

CHAPTER IV THE CHOICE OF A METHOD

I. Introduction

164. This Chapter is divided into two parts. The first is an assessment of a provisional equidistant line, an analysis that will both demonstrate that an equitable solution cannot be achieved through the use of that method and help to identify some of the key issues that arise out of the unique physical and political geography of the region. The second part will present the claim of Newfoundland and Labrador and explain why that claim would result in an equitable delimitation.
165. The Nova Scotia position has, to date, been based on the line set out in its legislation, whose status was considered in Phase One of this arbitration. At this stage, Newfoundland and Labrador is not in a position to know whether Nova Scotia will continue to assert that line as the basis of its claim or whether it will propose a new position. Accordingly, this Memorial will not address the existing Nova Scotia line in any detail. The Newfoundland and Labrador response to the Nova Scotia claim, whatever form it takes, will be reserved to the subsequent pleadings of this Phase.
166. What must be said, however, is that the line so far claimed by Nova Scotia is unsustainable as a matter of international law. It is not based on any discernable principle. It is simply an indefinite extension of the last segment of the line outside Cabot Strait, projected blindly into the outer area over vast distances to the edge of the continental shelf. It is disproportionate; it disregards the shift from opposite to adjacent coasts as the line proceeds seaward; and it is constructed as if the entire coast of Newfoundland outside the inner concavity did not exist. While there may be no single method that is legally correct under international law, there are methods that are plainly wrong. The present Nova Scotia line, it is submitted, is plainly wrong.
167. While there is no legal presumption in favour of equidistance, the use of a provisional equidistant line as a first step in the analysis is an approach that has frequently been followed

by international courts and tribunals, and that will be adopted for present purposes by Newfoundland and Labrador.

168. In assessing a provisional equidistant line in concrete situations, the analysis typically applied by international courts and tribunals can be summed up in a series of questions. First, does equidistance produce an equitable result? Second, if it produces a broadly equitable result, does it nevertheless require an adjustment to reflect the presence of geographical features that distort the course of an equidistant line? Third, where it does not produce an equitable result, what other method will do so?
169. Following this general approach, the present Chapter will begin with a consideration of a provisional equidistant line in order to determine if it produces an equitable result in this case. In the submission of Newfoundland and Labrador, it does not do so, for reasons that will be explained at length and which include the following considerations:
- a) The prevalence of incidental features, in particular St. Paul Island and Sable Island, which are not aligned with the general direction of the Nova Scotia coast;
 - b) The adjacent-coast relationship in the outer area;
 - c) A marked disparity in coastal lengths, both within the inner concavity and in the outer area where the south coast of Newfoundland dominates the configuration to the virtual exclusion of all other coasts; and
 - d) Within the inner concavity, a potential “cut-off” effect caused by the protruding coasts of Cape Breton Island and St. Pierre-et-Miquelon combined with the recessed Newfoundland coast at the back of the concavity—a coast that is more than twice the length of that of Nova Scotia in this sector.
170. The deficiencies of equidistance are fundamental in this situation and cannot be overcome by a mere adjustment to the strict equidistance method. Newfoundland and Labrador will

therefore propose, in the second part of this Chapter, a different method. Since this delimitation, like those in *Gulf of Maine* and *Canada v. France*, involves both an inner concavity and an outer area, a sector-by-sector approach is required.

171. Newfoundland and Labrador submits that within the inner concavity a delimitation based on coastal fronts, as suggested in the *North Sea Cases*, is required in order to avoid the distortions created by incidental features and the irregular configuration. Following the approach in *Gulf of Maine*, the location of the boundary in the area where it emerges from the inner concavity should be shifted toward Nova Scotia in order to reflect the disparity in the extent of the respective coastlines of the two parties. In the outer area, a line running perpendicular to the closing line of the inner concavity would be consistent with a considerable body of practice and would ensure that the boundary continues to respect the seaward extensions of the relevant coasts by avoiding any shift in either direction, as it continues to the outer limit of the continental margin to complete the delimitation.
172. The delimitation in this case involves a large area outside the Gulf of St. Lawrence as well as a short segment in the eastern portion of the Gulf of St. Lawrence. The area outside the Gulf is by far the most extensive and constitutes the principal focus of this dispute. The sector within the Gulf should therefore conform to, rather than influence, both the principles and the methods to be applied to the more seaward areas. For these reasons, this Chapter will deal first, and primarily, with the areas east of the Cabot Strait closing line. Having completed the analysis of this area, Newfoundland and Labrador will propose a delimitation within the Gulf sector based on a consistent approach: specifically, a perpendicular to the Cabot Strait closing line beginning on that line at the mid-point between Cape Breton Island and Newfoundland.
173. It will be shown that such a method reflects the particular characteristics of the coastal geography, including the political geography, throughout the relevant area, and that it gives proportionate and appropriate effects to that geography. In short, it produces the equitable result required by international law.

II. Equidistance is Not Appropriate in this Case

174. The following sections of this Chapter will consider the characteristics of a provisional equidistant line in this geographical situation. Newfoundland and Labrador contends that such a line is fundamentally flawed and cannot produce an equitable result in the light of the relevant circumstances.
175. The construction of a provisional equidistant line is a straightforward mathematical exercise: this is what makes it possible to construct such a line on a purely provisional basis, without prejudging the issues in any way. An equidistant line is one on which every point is at an equal distance from the nearest points on the baselines on the coast of each party from which the breadth of the territorial sea, and of the 200 nautical mile limit and other relevant zones of jurisdiction, are measured. The provisional line considered below has been constructed on the basis of this definition.

(a) The Prevalence of Distorting Incidental Features in the Delimitation Area

176. One of the pervasive characteristics of the geography in this case is the presence of incidental features that depart from the general direction of the coasts. These features would distort the course of an equidistant line to such an extent that the use of equidistance may be considered inappropriate on this ground alone.
177. There are two significant features that fall within this category—St. Paul Island and, above all, Sable Island—and neither forms part of Newfoundland and Labrador territory. In contrast to many delimitations, therefore, there is no balance in the distribution of such distorting offshore features so that off-lying rocks or islands belonging to one party might be offset or compensated by similar features belonging to the other party.
178. Either one of these features would provide an unwarranted advantage to Nova Scotia if equidistance were the method of delimitation. Together their inequitable effect would be

compounded, all the more so when combined with the eastward thrust of Cape Breton Island. St. Paul Island gives an unwarranted boost to Nova Scotia at the very beginning of the line. The protruding Nova Scotia coasts of Cape Breton Island then drive the equidistant line eastward, until, in the outer reaches of the delimitation area, Sable Island pushes it ever further to the east.

- 179 St. Paul Island and Sable Island share more than one characteristic, but two of these should be mentioned at the outset. First, their main historical significance is that they were, and remain, notorious hazards to navigation on major North Atlantic sea-lanes. Second, neither one has been used in the construction of the Canadian system of straight baselines, which in itself is conclusive evidence that they are not—in the view of the Canadian authorities and experts—features that correspond to the general direction of the coast.¹⁷⁵
180. Sable Island is the more significant of these two features in terms of its effect on a provisional equidistant line, and St. Paul Island can therefore be dealt with briefly. St. Paul lies close to the Cabot Strait closing line about 14 nautical miles from the Nova Scotia coast, and—perhaps more significantly—over a quarter the way across the Strait. It is a barren wilderness only a few miles long. Under the equidistance system, however, it would have the effect of shifting the Nova Scotia landmass one quarter the way to Newfoundland. The inequity of such a disproportionate effect needs no elaboration. This is a case where the equidistance method would effectively “refashion geography” if it were applied.
181. The essential geographical data concerning Sable Island have been set out in Chapter II: situated 88 nautical miles off the mainland of Nova Scotia, it amounts to little more than an

¹⁷⁵ While the straight baseline system does not cover the area inside the Gulf of St. Lawrence, there would have been no reason, in view of the position of St. Paul Island at the entrance of Cabot Strait, why it would not have been included as part of the system applied to Nova Scotia's Atlantic coast if in fact it could plausibly have been associated with the “general direction of the coast” or “closely linked to the land domain” for the purposes of Article 7, paragraph 3 of the 1982 *Convention* (see Statutory Instruments # 9):

The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

exposed reef and sustains only federally-authorized personnel. Its effect on an equidistant line, however, would be dramatic.¹⁷⁶ **Figure 14** shows the course of two hypothetical equidistant lines, one with and one without effect to Sable Island. It is apparent that Sable Island would attract a broad swath of maritime territory, gradually widening as the line moves seaward in accordance with the normal properties of equidistance.

182. The weakness of equidistance, in certain configurations, is that it treats incidental features as if they were part of the mainland coast. This weakness becomes critical when an incidental feature is situated far from the mainland, as it is in this case. **Figure 14** shows this effect, which amounts to what the cases have referred to as a “refashioning” of geography. The effect of utilizing the equidistance method is exactly the same as an exponential expansion of the Nova Scotia landmass, and a shift of its mainland coast a full 88 nautical miles out to sea. It is self-evident that such a result is disproportionate, inequitable and illogical. The equidistant line in this case is a textbook case of the aberrations of that method because of the inflated effect it would give to Sable Island.
183. So far, the position and the scale of Sable Island have been considered. But the orientation of the island’s coasts—the elongated and attenuated shape of the island, and its east-west layout—are of equal importance. The coasts of Sable Island face north and south, not east. Only a narrow point of land at its eastern end actually faces towards the delimitation area in this case.
184. There is, as well, another relevant circumstance pertaining to Sable Island. Under the *Constitution*, as an exception to the normal rules on Crown land, the Government of Canada

¹⁷⁶ Sable Island—because of its very position, far from the mainland coast—does exert a considerable influence on the Canadian 200-mile zone. It does not follow that it should exert an influence on the delimitation in this case. The identification of basepoints for purposes of measuring the territorial sea and the 200 nautical mile limit is a purely mechanical exercise, a matter of applying the definitions in the conventions (as expressions of customary law) and reaching affirmative or negative conclusions about the eligibility of any particular feature. That exercise leaves no room for equitable principles or relevant circumstances, or for considerations of disproportion or distortion.

has been assigned both ownership and jurisdiction in relation to the island.¹⁷⁷ Because international law governs this arbitration, the unusual constitutional status of Sable Island must be assessed in terms of international law analogies and principles. Under international law, continental shelf rights are an adjunct of sovereignty—in other words, of a plenitude of state power over a given territory. The purely nominal interest Nova Scotia holds over Sable Island—having regard to the jurisdiction, power and beneficial interest of the federal government—would fall well short of sovereignty if Nova Scotia were in reality a sovereign state. On that ground alone it is clear that Sable Island should not be used as a source of Nova Scotia entitlements to continental shelf areas at the expense of Newfoundland and Labrador.

185. Modified or adjusted equidistance sometimes provides a remedy to the distortions caused by incidental features. Newfoundland and Labrador submits that no such partial remedies would be appropriate in this case. This is because: (a) the location of the incidental features, in particular Sable Island, is not a minor deviation but is so radically out of alignment with the general direction of the coast that a mere adjustment would be inadequate; (b) the distorting incidental features lie exclusively on the Nova Scotia side, eliminating any element of balance or reciprocity in their overall impact; and (c) the effect of these incidental features on the choice of a method should be considered in conjunction with all the other objections to equidistance as set out below.
186. When equidistance is so deeply flawed, it seems preferable to follow the suggestion of the Court in the *North Sea Cases*, using simplified geometrical methods such as those described in the concluding section of this chapter.

¹⁷⁷ See Chapter II, para. 51. See Statutory Instruments # 1 and # 7.

(b) A Substantial Disparity in Coastal Lengths

- 187 The preceding Chapter has explained that a marked disparity in coastal lengths may be, and often is, a relevant circumstance influencing the choice of a method of delimitation—a consideration that is quite distinct from the test of proportionality applied after the fact in assessing the equity of the result. The examples are abundant: the *North Sea Cases*, *Gulf of Maine*, *Canada v. France*, *Jan Mayen* and *Libya v. Malta* are all instances where comparative coastal lengths were a factor, sometimes the principal factor, controlling the ultimate result.
188. Equidistance is a method that in principle is aimed at an equal division through its rigorous adoption of the mid-way point as the basis of delimitation. Setting aside potential distortions of the kind identified in the *North Sea Cases*, this tends to bring about an appropriate result when coastal lengths are broadly equal. Where, on the other hand, there is a marked disparity of coastal lengths, the use of the mid-way point becomes suspect for the very reason that it aims at an equal division that does not correspond to the geographical fundamentals.
189. As Chapter III pointed out, the geometrical properties of the equidistance method will drive the boundary inexorably toward the middle of the closing line of the concavity, however great the disparity in the coastal relationship inside or beyond the concavity. Such a result is wrong, not only because it fails to reflect the geographical relationship in the area of the closing line, but—sometimes even more significantly—because it determines the trajectory of the line through the outer area on a basis that is inequitable and unsound.
190. It is self-evident that the most extensive coasts fronting on the delimitation area—within the concavity and beyond—are those of the south coast of Newfoundland from Cape Ray to Cape Race. That coastline spans the entire region from west to east, while the coasts of Cape Breton Island occupy a more restricted area toward the western end of the configuration. Thus, the south coast of Newfoundland remains a constant presence as the eye moves seaward and the coast of Nova Scotia recedes into the background.

191. The predominance of the Newfoundland coasts throughout the area is implicit in the analysis of the Court of Arbitration in *Canada v. France*, which was focused almost exclusively on the southern projections of this Newfoundland coastal front. Within the inner concavity, as the Tribunal will recall, the relevant coasts of Newfoundland extend from Cape Ray to the Burin Peninsula, while those of Nova Scotia are composed of the coastal front on Cape Breton Island from Money Point to Scatarie Island. The ratio is 2.42 to 1 in favour of Newfoundland and Labrador—a “marked disparity”¹⁷⁸ exceeding that considered decisive in *Gulf of Maine*.¹⁷⁹ Outside the inner concavity, the Newfoundland coasts occupy an even more commanding position, for reasons that are at the heart of *Canada v. France* and that will be discussed below.
192. This imbalance—this “marked disparity”—is a relevant circumstance that must be taken into account. It rules out, in the most unequivocal terms, a method that is based on a halfway line between two coastal fronts that are not of similar orders of magnitude.

(c) An Inequitable Cut-off of the Coasts of Southwestern Newfoundland

193. The provisional equidistant line is constructed by reference to basepoints within a coastal concavity formed by the coasts of the parties of substantially different lengths, a situation where it is well known that the equidistance method does not produce an equitable result.
194. Apart from the position of St Paul Island, there is nothing objectionable about the general course of an equidistant line in the vicinity of Cabot Strait. As it reaches the central portions of the inner concavity, however, it swings back toward the coast of Newfoundland, simultaneously pushed and pulled toward the Newfoundland coast—pushed outward by the protruding coasts of Cape Breton and Scatarie Island and pulled in toward Newfoundland by the controlling basepoints along its recessed coast in the deepest portion of the concavity.

¹⁷⁸ *Canada v. France* at p. 1162, para. 33. See Authorities # 10.

¹⁷⁹ In the *Gulf of Maine* case, the coastal ratio was 1.38 to 1: *Gulf of Maine* at p.336, para. 222. See Authorities # 7.

195. The problem at the heart of the *North Sea Cases* was the cut-off produced by equidistance in a situation where one state is caught at the back of a concavity between the protruding coasts of two other states, with the result that its zone would be restricted to a relatively small triangle, as illustrated by the sketches included in the decision.¹⁸⁰ The combined effect of the French and Nova Scotian zones of jurisdiction under an equidistance scenario would lead to precisely the same phenomenon, and on a similar scale, compressing or “squeezing” the maritime entitlements of Newfoundland and Labrador into a relatively small triangle off this portion of its coast. See **Figure 15**.
196. The cut-off of the Newfoundland coast by the maritime area of St. Pierre-et-Miquelon has been mitigated—but not eliminated—by the decision of the Court of Arbitration in *Canada v. France* to limit the French zone to a narrow corridor beyond the area within 24 nautical miles of the western and southern coasts of St. Pierre-et-Miquelon. But that solves only a part of the problem arising from the presence of three jurisdictions. The Court of Arbitration was obviously powerless to address the other half of the problem. This is the cut-off created from the other side of the configuration by the coasts of Cape Breton Island, causing the equidistant line to swing directly across the coastal front of southwestern Newfoundland. It is as if the *North Sea Cases* had dealt with the cut-off created by either Denmark or the Netherlands, but had been unable to deal with the combined effect of all three coasts. In that hypothesis, it would have been the central task of any subsequent proceeding to deal with the other half of the problem on the basis of similar principles.
197. The presence of Cape Breton Island means that the seaward projections of southwestern Newfoundland will necessarily be restricted to a degree. But the equidistance method in this situation aggravates the problem, rather than contributing to a solution. Cape Breton Island is distinctly convex. Its protruding, right-angled shape forms a salient that thrusts the Nova Scotia coasts out toward the centre of the inner concavity. The shape of the Newfoundland

¹⁸⁰ A similar concern was noted by the tribunal in *Guinea v. Guinea-Bissau* at p. 187, paras. 103-104. See Authorities #9.

coast is almost exactly the opposite, receding as it approaches the deep indentation of Fortune Bay.

198. This is a classic situation in which the combined effects of convexity and concavity rule out the use of equidistance. Two of the coasts abutting on this area form the headlands of the inner concavity, providing the most advantageous basepoints in the application of the equidistance method. The third coast—that of southwestern Newfoundland—is distinctly concave and is “sandwiched” between the other two coasts. The equidistant line would cut the longer coast of Newfoundland off from its extension seaward to areas outside the concavity. One need look no further than the *North Sea Cases* for an authoritative demonstration that equidistance is not the appropriate method, *prima facie* or otherwise, in this type of geographical setting.
199. There is, however, one significant difference with the situation considered in the *North Sea Cases*. In that situation, the International Court of Justice was dealing with coasts that were roughly similar in their extent. In the present case, there is no such equality: Newfoundland presents by far the longer coastal front. This consideration, which has already been discussed, makes the cut-off of the Newfoundland coasts all the more unacceptable.
200. Such a result is not only unacceptable on general principles of maritime delimitation: it contradicts the whole thrust of the decision in *Canada v. France*. As explained elsewhere, the rationale of that decision was (a) the imperative need to respect the seaward projections toward the south of the Newfoundland coasts, and accordingly to minimize a cut-off of those projections, and (b) the coastal opening of the islands toward the south “unobstructed by any opposite or laterally aligned Canadian coast.”¹⁸¹ These two factors led to the configuration of the narrow corridor toward the south. It would be a strange twist of fate if the cut-off of the Newfoundland coasts, which the Court of Arbitration so assiduously sought to avoid, were

¹⁸¹ *Canada v. France* at p. 1170, para. 70 (see Authorities # 10): “... such a seaward projection [of France] must not be allowed to encroach upon or cut off a parallel frontal projection of the adjacent segments of the Newfoundland southern coast.”

to be reintroduced by way of an inappropriate application of equidistance in the present delimitation.

(d) Encroachment on the Seaward Projections of Southeastern Newfoundland

201. The objections to equidistance outside the inner concavity are equally decisive—in a sense, even more so. Within the concavity, the coastal relationship is unequal. Outside the concavity, to the east of the French corridor, it is hardly meaningful to speak of a coastal relationship at all. This area is within the natural prolongation of the Newfoundland coasts from the Burin Peninsula to Cape Race, to the exclusion of any competing projection from Nova Scotia. This conclusion follows inexorably from the reasoning of the Court of Arbitration in *Canada v. France*, and it follows as well that an equidistant line would create an effect of encroachment on the natural prolongation of this portion of the coasts of Newfoundland and Labrador.
202. The immediacy of the coastal relationship between the southeastern coasts of Newfoundland and this outer area is readily apparent to the eye. The area lies directly in front of those coasts. It does not lie directly in front of coasts of Nova Scotia far to the west.
203. That was the basis of a crucial finding in *Canada v. France*, which will be discussed in the last part of this Chapter. The essential point is that the Court of Arbitration found that the seaward projection of the islands of St. Pierre-et-Miquelon toward the south is unobstructed by any eastward projection from the coasts of Nova Scotia. If the French islands have an unobstructed projection toward the south, so too must those of Newfoundland lying even farther to the east. This is not an area where the natural prolongations of two jurisdictions can be said to meet and overlap. An equidistant line would not therefore effect an equitable division of an area of overlapping projections, which is the rationale that justifies its use. It would, on the contrary, violate the principle of non-encroachment, identified in the *dispositif* of the *North Sea Cases* as one of the cardinal principles of the law of continental shelf delimitation.

204. Even if this consideration were not conclusive in itself, an equidistant line outside the inner concavity would disregard the transition from an opposite-coast situation to one of adjacent coasts. As pointed out above, the behaviour of an equidistant line in this situation provides a vivid illustration of why equidistance often produces untoward results where the relevant coasts are laterally aligned.

(e) The Unique Political Geography

205. There are, finally, considerations arising out of the complex political geography of the region that militate against the use of equidistance. On the one hand, the line must take account of the existence of the French corridor cutting through the outer area. On the other, it must begin in the Gulf of St. Lawrence at an undetermined tripoint with the Province of Québec.
206. A continuous equidistant line is patently an impossibility. Such a line would have to jump the hurdle of the French corridor. There is no maritime boundary in the world of the sort that an equidistant line would create in this situation. A “leap-frogging” equidistant line transecting this corridor would be more than anomalous. It would not be countenanced by international law or practice.
207. The inequity of an equidistant line in the light of the geographical relationship between the coasts of Newfoundland and Labrador and Nova Scotia has been amply demonstrated. That inequity would strike especially hard in the circumstances of this case. The burden of the zone allotted to St. Pierre-et-Miquelon is to be borne exclusively by Newfoundland and Labrador. This is not something that can be changed; but it can certainly be taken into account in the balancing up of all the relevant circumstances in order to bring about an equitable delimitation. It would be doubly inequitable to apply equidistance to Newfoundland and Labrador, when it has already paid the price—as Nova Scotia has not—of the delimitation resulting from the presence of these islands off the Canadian coast.

208. Finally, an equidistant line between Newfoundland and Labrador and Nova Scotia assumes an equidistant tripoint with Québec within the Gulf of St. Lawrence, with the implication that equidistance is the appropriate method in the Gulf of St. Lawrence and that the western starting point of this delimitation is an equidistant tripoint with Québec. Such an approach is not appropriate. Québec has not entered into an Accord with the federal government with respect to a defined “offshore area.” Another method should therefore be found to describe the Newfoundland and Labrador-Nova Scotia boundary in the Gulf of St. Lawrence that does not by implication impinge upon the interests of third parties.

III. An Equitable Delimitation

A. Introduction

209. To a considerable extent, the basis for the line developed by Newfoundland and Labrador is implicit in the critique of the provisional equidistant line. Accordingly, an equitable line should exhibit the following properties:
- a) it should be constructed on the basis of the broad patterns of the geography;
 - b) it should therefore employ coastal fronts rather than selected and isolated basepoints;
 - c) the line should not be pushed out by the protruding incidental features that distort the direction of the Nova Scotia coast, or drawn in toward Newfoundland by the concavity in the central portion of the Newfoundland coast;
 - d) it should reflect the overall disparity in the coastal lengths of the parties, so that as it approaches the outer area it should be shifted to the west of the mid-point between the two coasts; and
 - e) it should not veer toward the coast of either party as it proceeds toward the outer limit of the continental shelf.

210. The settled pattern of the jurisprudence is to divide a delimitation into a series of distinct segments in cases where the area is composed of different sectors with varying geographical characteristics. This is invariably the approach taken where a delimitation begins within a coastal concavity and moves seaward into an area of open sea. The adoption of a sector-by-sector approach allows the delimitation to reflect the shift from an enclosed geographical configuration to one that is not enclosed, as well as the transition—gradual or otherwise—from a situation of opposite coasts to one of laterally aligned or adjacent coasts.
211. For the reasons given in Chapter II, the delimitation area in the present case is one that lends itself to a sector-by-sector approach. The area is composed of a coastal concavity and a broad area of open oceanic space outside that concavity. While the Canadian Memorial in *Canada v. France* referred to both the “Gulf Approaches” and to the more distinct inner concavity “of semi-circular shape” west of St. Pierre-et-Miquelon, it was the latter concavity that the Court of Arbitration identified as the “marked concavity”¹⁸² on which its methodology was based. It is therefore appropriate to begin with the delimitation within this marked concavity.

B. The First Segment: A Bisector in the Area of Cabot Strait

212. The first issue is the starting point of the line in the area of Cabot Strait. The only logical and equitable starting point is on the closing line of the strait mid-way between Money Point on Cape Breton Island and Cape Ray on Newfoundland. Here the two coasts are nearer to one another than at any other point in the delimitation, and face each other in a classic opposite-coast relationship. It therefore makes sense to begin the delimitation at the halfway point on this closing line between the “mainlands” of the parties.
213. St. Paul Island should be disregarded for the purpose of establishing the mid-point on this closing line. The starting point of the delimitation should be based on the mainland coasts of

¹⁸² *Canada v. France* at p. 1160, para. 22. See Authorities # 10.

the parties, not on incidental features such as rocks and islands that distort the geographical relationship between the coasts of the parties.

214. Proceeding eastward from this starting point, the first segment of the proposed line is a bisector of the angle formed by the two coastal fronts that face this part of the inner concavity. The use of such a simplified geometrical method is the obvious, and perhaps the only, way in which the distortions of incidental features and coastal irregularities can be overcome, while still adhering to the geography as the basis of the delimitation methodology. This approach attracted the express approval of the International Court of Justice in the concluding paragraphs of the *North Sea Cases*, where it was referred to as the “principle of the coastal front.”¹⁸³
215. In the immediate vicinity of Cabot Strait, where the coasts face each other in a classically opposite relationship, there could be no serious objection to the equidistant line, provided that St. Paul Island is not used as a basepoint and that the method is changed before the line swings back toward the Newfoundland coast. Given the fundamental defects of equidistance throughout most of the delimitation area, however, a consistent approach based on some other method is preferable. In this geographical setting, moreover, the use of a bisector eliminates the shift in the direction of the equidistant line caused by the shallow indentation in the coast of Cape Breton Island southeast of Money Point. This is to the advantage of Nova Scotia, and is entirely appropriate, provided that a consistent approach is taken in the more seaward areas, where—as set out in the preceding section—the properties of equidistance would work a far greater inequity upon the interests of Newfoundland and Labrador.
216. There is a further advantage to the use of a simplified geometrical method based on coastal fronts. A series of coastal fronts has already been determined and approved in *Canada v. France*, based apparently on the lines proposed by Canada for the purpose of measuring the lengths of the relevant coasts. See **Figure 16**. For present purposes, those coastal fronts

¹⁸³ *North Sea Cases* at p. 52, para 98. See Authorities # 4.

should be applied with one variation, to which Nova Scotia could hardly object, and which reflects the fact that the coastal fronts are to be used to construct a line and not to measure the coasts. The coastal front of Cape Breton Island facing the inner concavity should be simplified, eliminating the bends in the line toward St. Anns Bay, so that it extends in a single straight line from Money Point to Scatarie Island.

217. Having established the relevant coastal fronts and the starting point of the line, the final step in the construction of the first segment is free of difficulty. It should, quite simply, be a line bisecting the angle formed by the two coastal fronts. See **Figure 17**. The use of such a bisector is inherently equitable, provided that the coastal fronts accurately represent the geographical configuration and that proportionality and any special circumstances are taken into account. The merit of a bisector lies not so much in the fact that it bisects an angle (the angle produced by the extension of the lines formed by the coastal fronts to the point where they meet), but in the fact that it averages the general direction of the two coastal fronts. It also remains at a constant relative distance from each of them, avoiding any effect of cut-off or encroachment. To the extent that the coasts are opposite, moreover, it will effect an equal division of areas of “overlap and convergence” of seaward extensions, as required by *Gulf of Maine*.
218. The building blocks of the first portion of the line are therefore at hand. The relevant coastal front on the Newfoundland side is the long line across most of the back of the concavity, from Cape Ray to Connaigre Head. As noted above, a single coastal front is proposed for the Nova Scotia side of the concavity. The bisector of those two lines runs at an angle of 123.9 degrees, beginning at Point A, the mid-point between Cape Ray and Money Point.

C. The Second Segment: An Adjusted Bisector Intersecting the Closing Line of the Inner Concavity

219 The first segment, however straightforward, is suitable only for a very limited portion of the boundary. It is apparent that an equitable line must turn toward the south before it leaves the approaches to Cabot Strait.

220. This turn to the south is a necessary implication of the framework of coastal fronts adopted in *Canada v France*. On the Newfoundland side there is not one but two coastal fronts framing the concavity, and both must be given their effect at the appropriate points along the delimitation. The long coastal front from Cape Ray to Connaigre Head should control the first segment of the line, as explained in the preceding paragraphs. See Figure 18. At Connaigre Head, however, a new coastal front comes into play. The general direction of the Newfoundland coast turns sharply to the south in the area of Fortune Bay, crossing that Bay to meet the headland of the Burin Peninsula at Lamaline-Shag Rock, where the coastline resumes its broadly east-west orientation in its final segment ending at Cape Race.

221. It is this shorter coastal front running south from Connaigre Head that should control the delimitation of the area lying immediately between the Burin Peninsula and Fortune Bay and Cape Breton Island—in other words, the more seaward portion of the inner concavity. Just as the analysis in *Gulf of Maine* gave effect to the opposite coasts of southwest Nova Scotia and Massachusetts facing each other in the area near the closing line of the Gulf, the second segment of the line in this case should give effect to the coasts that form the “jaws” of the concavity. Since there is only one coastal front on the Nova Scotia side, this implies no change on that side of the configuration, but it does mandate a shift of focus on the Newfoundland side.

222. This suffices to establish the direction of the second segment. Consistent with the coastal-front bisector approach, this part of the line should run at a bearing that bisects the angle formed by the general directions of the relevant coastal fronts—Connaigre Head to

Lamaline-Shag Rock on the Newfoundland side, and the single coastal front of Cape Breton Island within the concavity. As noted above, such a bisector in fact represents the average of the general directions of the two coastal fronts. For this sector, the bisector runs at an angle of 163.15 degrees, causing the line to turn southward as the change in the direction of the Newfoundland coast would imply.

223. That, of course, answers only one of the questions about the course of the second segment. The other is *where* the segment will begin, and how its axis will accordingly be determined. The method used in *Gulf of Maine*, in a situation that presents an unmistakable analogy, provides the answer.
224. The relevant circumstance common to both cases is the marked disparity in the coastal lengths of the parties. And the analogy is to the manner in which—in the most distinctive and important part of its decision—the Chamber in *Gulf of Maine* adjusted the course of the line near the closing line of the Gulf of Maine in order to reflect such a disparity, thus projecting the line outward across the key area of Georges Bank on a course that took that disparity into account.
225. It was in the area between southwest Nova Scotia and Massachusetts, where the coasts were found to be opposite and nearly parallel, that the adjustment was made in order to reflect the fact that the coasts within the concavity were predominantly American—in a ratio found to be 1.38 to 1. After making a further adjustment to give half effect to Seal Island, the Chamber shifted the median line back from the mid-point toward the Nova Scotia coast in order to reflect this ratio. Although the segment of the line so adjusted was relatively short, the shift in the position of the median line had a direct, and highly significant, effect on the trajectory of the line across Georges Bank. This effect was central to the intentions of the Chamber, which observed that it had “borne constantly in mind the problem of determining

the final segment of the delimitation line when applying itself so meticulously to the task of establishing the previous segments.”¹⁸⁴

226. Although—as the Chamber observed—every case is unique, the parallels with the present case are significant. Here there is also a notable disparity of coastal lengths, considerably greater than that identified in *Gulf of Maine*. This is also a case that involves a large coastal concavity and an outer area. And here too the point at which the line emerges from the concavity is important not only in its own right, but in its decisive influence upon the division of the outer area.
227. There is, on the other hand, a significant difference. In *Gulf of Maine*, the only relevant coasts were those within the concavity, because outside the Gulf both coasts turned away sharply and ceased to face the delimitation area. In this case, the coasts of Newfoundland outside the concavity continue to face the delimitation area, and are therefore clearly relevant. The overall disparity in coastal lengths, moreover, is considerably greater.
228. The adjustment in the second segment of the line should, therefore, reflect the difference in coastal lengths within the concavity. This, as **Figure 18** demonstrates, is in the order of 2.42:1; in other words about 71% of the coastline belongs to Newfoundland and Labrador within the concavity. Following the approach in *Gulf of Maine*, such an adjustment requires a shift in the position of the second segment of the line so that it intersects the closing line at a point that corresponds to that ratio (point C on **Figure 18**). The intersection of the first and second segments (point B on **Figure 18**) is determined automatically by the position and azimuth of the second segment.

¹⁸⁴ *Gulf of Maine* at p. 338, para. 226. See Authorities # 7.

D. The Final Segment: A Perpendicular to the Closing Line of the Inner Concavity

229. The closing line of the inner concavity represents a geographical transition point. Here the delimitation area is no longer enclosed. The line gradually emerges into the open Atlantic. At the same time, there is a shift in the predominant coastal relationship from one of opposite coasts to one of adjacency. In contrast to *Gulf of Maine*, the transition is not abrupt. Clearly, however, the overall character of the area outside the inner concavity is open-ended, with the coasts laterally aligned in a relationship of adjacency.
230. In addition to the open geography and the adjacent coastal relationship, there are two considerations that are fundamental to an appropriate delimitation in the outer area. First—as in the concavity, but even more emphatically so—the delimitation should not depend on incidental features but should reflect the dominant characteristics of the geography. This consideration is far more critical in this sector than it is closer to the coast. The issue, of course, is the off lying position of Sable Island, and the drastic effect it would have on any delimitation—even one not based on equidistance *per se*—if it were to be used as a point of reference in determining the course of the line. The matter has been fully discussed in the preceding section of this Chapter, and need not be reviewed. It will suffice to say that any small island situated 88 nautical miles offshore would have a profoundly distorting effect; that there is no precedent for giving effect to a similarly positioned island at the expense of the mainland coasts; and that the distorting effect of the island is a function not only of its size, position and orientation but of the relationship of adjacency that characterizes the coastal relationship, as so clearly explained in the *North Sea Cases*.
231. One other consideration has also been alluded to, but discussed in less detail, in the previous section. This is the fact that most of the outer area lies directly in front of the Newfoundland coasts—specifically the coasts from the Burin Peninsula to Cape Race. The outer area has no similar relationship to the Nova Scotia coasts, which lie to the west and face in a generally southern direction. The area is therefore part of the natural prolongation or seaward

extension of the Newfoundland coasts, not of the Nova Scotia coasts, and this coastal relationship must be recognized in the delimitation.

232. This perception was central to the analysis in *Canada v. France*. The Court found that the French islands had an “unobstructed” seaward opening to the south, and that they should therefore be allowed a zone of jurisdiction extending a full 200 nautical miles in that direction, but severely constrained on either side to avoid a cut-off of the seaward projections of the south coast of Newfoundland. It was inherent in this finding, and expressly stated in the decision, that the seaward projections of the Nova Scotia coast failed to extend into this outer area, which was therefore subject to competing claims generated by the southern coastal fronts of Newfoundland and France, but not of Nova Scotia.
233. This finding was not an *obiter* observation, or a matter of secondary importance. On the contrary, it was central to the reasoning of the Court and to the very structure of the delimitation adopted in the decision.
234. The Canadian position was that the French islands should be limited to an enclave of 12 nautical miles, on the analogy of the treatment of the Channel Islands in the *Anglo-French Continental Shelf* case. The objection Canada had to meet was that the Channel Islands, unlike St. Pierre-et-Miquelon, were situated in a confined channel, with little room for “redressing inequities.”¹⁸⁵ Canada endeavoured to meet this objection by stressing that, in fact, any seaward projections from the French Islands were blocked by *converging seaward projections* from two separate Canadian coastal fronts on both sides of the configuration, namely those of Newfoundland and of Cape Breton Island. **See Figure 19**, which has been reproduced from the Canadian Memorial in *Canada v. France*.
235. This Canadian argument was unsuccessful. It was rejected because the Court of Arbitration denied the very existence of a seaward projection from Nova Scotia out to the area to the

¹⁸⁵ *Anglo-French Continental Shelf* case at p. 94, para. 200. See Authorities # 5

south of the French islands. The Court adopted this position because of the orientation of the coasts of Cape Breton Island, which face northeast within the inner concavity but in a generally southern direction outside that concavity.

236. The relevant findings in *Canada v. France* were:

The objections of Canada against the southern projection of the coast of St. Pierre and Miquelon, based on an eastern projection from Nova Scotia and Cape Breton Island are not compelling. Geographically, the coasts of Nova Scotia have open oceanic spaces for an unobstructed seaward projection towards the south in accordance with the tendency, remarked by Canada, for coasts to project frontally, in the direction in which they face. In the hypothesis of a delimitation exclusively between St. Pierre-et-Miquelon and Nova Scotia, as if the southern coast of Newfoundland did not exist, it is likely that corrected equidistance would be resorted to, the coasts being opposite. In that *event it is questionable whether the area hypothetically corresponding to Nova Scotia, would reach the maritime area towards the south appertaining to St. Pierre and Miquelon.*¹⁸⁶

237. The implications for the present delimitation cannot be ignored. If—as the Court of Arbitration determined in *Canada v. France*—St. Pierre-et-Miquelon has an unobstructed seaward projection toward the south, which does not converge with any competing projection from Nova Scotia, then *a fortiori* the coastal front of Newfoundland east of the French islands must also enjoy a similar unobstructed projection. It follows that, east of the corridor appertaining to St. Pierre-et-Miquelon, the entire area is situated within the unobstructed seaward projections of the south coast of Newfoundland—and not those of Nova Scotia. A maritime boundary extending the Nova Scotia continental shelf into that outer area would, as a matter of pure logic, constitute an encroachment on the natural prolongation of the Newfoundland and Labrador coast. The line must therefore follow a course that is sufficiently southerly in its bearing to avoid any such effect of encroachment.

¹⁸⁶ *Canada v. France* at p. 1171, para. 73. Emphasis added. See Authorities # 10.

238. With this background in mind, the final course of the line can be addressed. The starting point of this segment is pre-determined: it is the point of intersection of the second segment with the closing line from Scatarie Island to the Burin Peninsula, at point C. Since the starting point is on the closing line of a concavity, practice and precedent immediately suggest a solution: a line running perpendicular to that closing line. This, of course, was the method applied in *Gulf of Maine* for the delimitation crossing Georges Bank, beyond the confines of the Gulf.
239. The reason why a perpendicular line is generally appropriate in this type of situation is that such a line, by definition, extends straight out to sea and therefore avoids any tendency to swing toward either coast. A single straight line is inherently suited to areas of open geography, where there are no changing points of reference along the coast that would cause the boundary to change direction as it moves outward. It is a macro-geographical method: provided that incidental features are not used as the headlands in establishing the closing line, it cannot be distorted by the presence of such features. Like a coastal-front bisector, moreover, it shares some of the geometrical properties of an equidistant line, which in this type of situation is a perpendicular to the closing line formed by the two final basepoints.
240. The outer segment of the line should therefore be a perpendicular to the closing line of the inner concavity, extended to the outer limit of the continental shelf, as depicted in Figure 20. That line follows an azimuth of 163.2 degrees. There is no need to determine the exact limit of the continental shelf for this purpose: that, in fact, would be inappropriate in view of the policies that Canada may wish to adopt in this connection in the event of the ratification of the 1982 *Convention*. It will suffice to indicate the azimuth of the final course of the line to the limit of national continental shelf jurisdiction, wherever that exact limit may eventually be established.
241. In this case—as in *Gulf of Maine*—the perpendicular line outside the concavity follows a bearing that is similar to that of the last segment of the line within the concavity. Here, in fact, the bearings are so close (163.15 degrees and 163.2 degrees for the perpendicular) that

there could be no objection to a simplified delimitation consisting of a single straight line extending seaward from the intersection of the first and second segments at Point B. Because the conceptual justifications for each sector are distinct, however, Newfoundland and Labrador has maintained the separate bearings of the two segments for the purposes of this Memorial.

242. In summary, this outer segment of the line—the longest in the entire delimitation—is justified on a number of grounds. It avoids the potential distortion that might be caused by the off lying position of Sable Island. It takes account of the dominant position of the Newfoundland coasts in the outer area, as recognized by the Court of Arbitration in *Canada v. France*. As the next chapter will demonstrate, it reflects the general direction of the relevant coasts; and by heading straight out to sea, avoiding any tendency to veer in one direction or another, it avoids any effect of encroachment on the seaward extensions of those coasts.

E. The Gulf of St. Lawrence

243. The consideration of the short sector within the Gulf has been deferred because, as noted in the introduction to this Chapter, it seemed appropriate to deal with the longer and more important sectors first.
244. This sector, in fact, is both short and straightforward. The coastal relationship moves from opposite to adjacent as the line moves west from Cabot Strait, but the geography is fairly simple. Apart from St. Paul Island—which is not an issue if the mainland-to-mainland mid-point on the closing line is used as suggested above—there are few if any complicating incidental features. It might be suggested that equidistance could be used in such a situation, but as already indicated, the Québec tripoint cannot be taken for granted, and it is appropriate, in any event, that the delimitation within the Gulf should be based on the same general approach as that used for the remainder of the boundary.

245. A bisector of the angle formed by two coastal fronts was proposed for the line running eastward from Cabot Strait. So far as the Gulf is concerned, however, the immediately adjacent coasts on the western sides of Money Point and Cape Ray may be too short to support such an approach. On the other hand, a perpendicular to the Cabot Strait closing line would reflect the general direction of the Newfoundland coast running northeast from Cape Ray and the coast of Cape Breton Island running southwest from Money Point. Such a perpendicular line would have all the inherent qualities outlined above with respect to the outermost segment of the line: in particular, in addition to reflecting the general direction of the coasts, it would avoid any tendency to swing toward the territory of either party as it extends into the Gulf. See Figure 21.
246. Accordingly, such a perpendicular line, beginning at the mid-point between Money Point and Cape Ray and proceeding on an azimuth of 321.5 degrees, is proposed as the basis of the delimitation within the Gulf. Following established international practice, taking account of the presence of potential third party interests in the Gulf, the exact terminal point of this line should not be prescribed. Instead, Newfoundland and Labrador suggests that the award should simply determine that this perpendicular line shall extend to the limit of the offshore areas of Newfoundland and Labrador, and Nova Scotia, respectively, within the Gulf of St. Lawrence.

IV. Conclusion

247. The use of a provisional equidistant line reflects the practice of tribunals, and serves to bring the dominant features of the geography into sharp relief. In this situation, an examination of such a line demonstrates that equidistance-based solutions will not lead to an equitable result. There are a number of reasons why this is so: the prevalence of incidental features that distort the general direction of the Nova Scotia coast, in particular Sable Island and St. Paul Island; the overall disparity in coastal lengths; the potential for a cut-off effect within the inner concavity and for encroachment on the continental shelf of Newfoundland in the outer area, having regard to the findings of the Court of Arbitration in *Canada v. France*; and

finally, the configuration of the French zone of jurisdiction as well as the fact that an equidistance tripoint in the Gulf cannot be assumed.

248. This analysis demonstrates, not only that equidistance is unsuitable, but also that an equitable solution must be based on simplified geometric methods that take account of the “macro-geography” and disregard the incidental features of the configuration. Bisectors of coastal fronts within the inner concavity, following the suggestion of the International Court of Justice in the *North Sea Cases*, will achieve this objective within the inner concavity, provided that an adjustment is made in order to reflect the overall disparity in coastal entitlements. This adjustment is required not only within the concavity but—above all—to ensure an equitable result as the line proceeds to the outer limit of the continental shelf. Having adjusted the position of the line for this purpose, a perpendicular to the closing line of the inner concavity, extended to the outer limit of the continental shelf, will serve to complete the delimitation of the offshore portion of the area. For the short segment within the Gulf of St. Lawrence, a perpendicular to the closing line of Cabot Strait is proposed as the most appropriate solution. See **Figure 22**.