

CHAPTER 4

THE LAW OF MARITIME DELIMITATION APPLICABLE IN THIS CASE

I. The Single Maritime Boundary

A. The Parties' Agreement That the Tribunal Will Establish a Single Maritime Boundary and Its Legal Implications

4.1. Guyana has requested that the Tribunal delimit “the single maritime boundary which divides the territorial seas and maritime jurisdictions of Guyana and Suriname . . . for a distance of 200 nautical miles.”¹⁶⁹ Assuming that the Tribunal were to reject Suriname’s Preliminary Objections, Suriname does not object to Guyana’s request but wishes to point out that there is no reference to the single maritime boundary in the 1982 Law of the Sea Convention. The International Court of Justice has made clear:

the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice.¹⁷⁰

Accordingly, Guyana’s request is not rooted in the 1982 Convention but in customary international law.

4.2. The boundary line that Guyana seeks will therefore not be the result of the direct application of Articles 15, 74 (1) and 83 (1) of the 1982 Law of the Sea Convention. Although there is no doubt that those provisions reflect customary international law, there is also no doubt that the jurisprudence of the International Court of Justice, arbitral tribunals and state practice has given specific legal content to the single maritime boundary in customary international law. This is not a semantic or theoretical distinction. The single maritime boundary is a boundary different from a territorial sea boundary established by sole reference to Article 15, a continental shelf boundary established by sole reference to Article 83(1) or an exclusive economic zone boundary established by sole reference to Article 74(1). Without doubt the single maritime boundary divides these three zones of jurisdiction, but its legal content is greater because it must harmonize the circumstances associated with various maritime zones of jurisdiction and its legal effect is greater because it applies for all purposes in international law now and in the future. The single maritime boundary is a boundary that is characteristic of the international maritime boundary practice that post-dates the negotiation of the 1982 Convention.

4.3. Suriname does not contest the power of the Tribunal to establish a single maritime boundary with the agreement of the Parties. That boundary line will be established based on the delimitation rules of customary international law applicable to the single maritime boundary. While Suriname differs with Guyana about the course of the single maritime boundary to be established by the Tribunal, it does not object to Guyana’s request that the

¹⁶⁹ MG, p. 135. Guyana Submission I.

¹⁷⁰ Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, para. 173.

Tribunal should establish the “single maritime boundary . . . for a distance of 200 nautical miles.”¹⁷¹

B. The History of the Single Maritime Boundary in the Judgments of the International Court of Justice and Arbitral Tribunals

4.4. Since the single maritime boundary is a feature of customary international law, it is important before proceeding further to review its development in the jurisprudence of the International Court of Justice and arbitral tribunals.

4.5. The first occasion on which the single maritime boundary was considered by an international tribunal was by the Chamber of the International Court of Justice in the Canada-United States *Gulf of Maine* case decided in 1984.¹⁷² The parties in that case, which was brought by Special Agreement, requested that the Chamber decide “the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States of America.”¹⁷³ The Chamber noted that “for the first time, the delimitation which the Chamber is asked to effect does not relate exclusively to the continental shelf, but to both the continental shelf and the exclusive fishing zone, the delimitation to be by a single boundary.”¹⁷⁴ Further, the Chamber noted that based on the agreement of the parties, “the single boundary line to be drawn should be applicable to all aspects of the jurisdiction of the coastal State, not only jurisdiction as defined by international law in its present state, but also as it will be defined in future.”¹⁷⁵

4.6. The Chamber considered the relationship between Article 6 of the 1958 Convention on the Continental Shelf (which was treaty law between the parties) and the single maritime boundary that the parties had requested:

It is doubtful whether a treaty obligation which is in terms confined to the delimitation of the continental shelf can be extended, in a manner that would manifestly go beyond the limits imposed by the strict criteria governing the interpretation of treaty instruments, to a field which is evidently much greater, unquestionably heterogeneous, and accordingly fundamentally different. . . . [S]uch an interpretation would, in the final analysis, make the maritime water mass overlying the continental shelf a mere accessory of that shelf. Such a result would be just as unacceptable as the converse¹⁷⁶

4.7. The Chamber in that case was confronted by a range of arguments presented by the parties concerning the legal relevance of conduct relating to fisheries and offshore oil and gas activities. After examining these facts and arguments, the Chamber concluded:

¹⁷¹ MG, p. 135. Guyana Submission I.

¹⁷² Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Merits, Judgment, I.C.J. Reports 1984, p. 246.

¹⁷³ *Id.* at 253, Article II, para. 1.

¹⁷⁴ *Id.* at p. 267, para. 26.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Id.* at p. 301, para. 119.

it is necessary, in a case like the present one, to rule out the application of any criterion found to be typically and exclusively bound up with the particular characteristics of one alone of the two natural realities that have to be delimited in conjunction.¹⁷⁷

This led the Chamber to the following conclusion:

In reality, a delimitation by a single line, such as that which has to be carried out in the present case, *i.e.*, a delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. In that regard, moreover, it can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation.

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it is, accordingly, towards an application to the present case of criteria more especially derived from geography that it feels bound to turn. What is here understood by geography is of course mainly the geography of coasts¹⁷⁸

That seminal finding, the importance of coastal geography, has been followed in all subsequent cases in which a single maritime boundary has been sought.

4.8. The next case that required a delimitation unrelated to a specific zone of maritime jurisdiction was the *Guinea/Guinea-Bissau* arbitration decided in early 1986.¹⁷⁹ There the boundary to be determined was defined by the arbitration agreement as “the maritime boundary between the two states.”¹⁸⁰ Aside from a short inshore segment that followed “Pilots Passage,” which had a basis in the 1886 Convention between the colonial powers, the boundary determined by that tribunal otherwise was based on geographic factors.¹⁸¹

4.9. In 1989, Canada and France established an arbitral tribunal to decide the single maritime boundary required by the presence of the French islands of St. Pierre and Miquelon

¹⁷⁷ *Id.* at p. 326, para. 193.

¹⁷⁸ *Id.* at p. 327, paras. 194-95.

¹⁷⁹ Dispute Concerning Delimitation of the Maritime Boundary (Guinea/Guinea-Bissau), 25 I.L.M. 251 (1986).

¹⁸⁰ *Id.* at 255.

¹⁸¹ *Id.* at 298, para. 111.

off the coast of Canada.¹⁸² In the arbitration agreement the parties required the tribunal to “establish a single delimitation which shall govern all rights and jurisdiction which the Parties may exercise under international law.”¹⁸³ On the basis solely of the relevant geographic circumstances, the tribunal established a maritime boundary that respected the geographical relationship between the relevant coasts of the parties.

4.10. Denmark submitted the *Jan Mayen* case to the Court in 1988,¹⁸⁴ but the case was not decided until 1993, after the judgment of the arbitration tribunal in the *Canada/France* case. Also, in the intervening years following the *Gulf of Maine* case, the Court decided in 1985 the continental shelf delimitation case between Libya and Malta.¹⁸⁵ In the *Libya/Malta* case, the Court adopted the practice, which it has since followed, of identifying first a provisional equidistance line and then considering whether that provisional equidistance line should be adjusted to create an equitable delimitation.¹⁸⁶ In the *Libya/Malta* case, the Court made such an adjustment to the provisional equidistance line so as to account for the relevant geographic circumstances.¹⁸⁷

4.11. In *Jan Mayen*, a case concerning the delimitation of the maritime area between Greenland and Jan Mayen Island, both Denmark and Norway agreed that there should be a single line of delimitation for both the continental shelf and the exclusive fishery zone. That agreement was reached even though the parties were bound to apply Article 6 of the 1958 Convention on the Continental Shelf for the continental shelf delimitation, while customary law applied to the delimitation of the fishery zone. In its analysis, the Court followed its practice adopted in the *Libya/Malta* case by referring first to a provisional median line, followed by an examination of the circumstances that might require an adjustment of that line. That examination led the Court to take into account the relevant geographic circumstances which led to the identification of the area of overlapping claims in the light of those relevant geographical circumstances.¹⁸⁸ The Court then constructed a geographic/geometric method to divide the area of overlapping claims. Finally, the Court made one adjustment in the southern sector of its delimitation based on economic considerations to ensure “equitable access” to the fishery resource in the area.¹⁸⁹

¹⁸² Case Concerning Delimitation of Maritime Areas (St. Pierre and Miquelon) (Canada/France), 31 I.L.M. 1145 (1992).

¹⁸³ *Id.* at 1152, Article II, para. 1.

¹⁸⁴ Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 41, para 1.

¹⁸⁵ Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13.

¹⁸⁶ *Id.* at p. 47, para. 62. The Court noted that this was the first time it had been asked to delimit between opposite coasts. For that reason it made it clear that: “in these circumstances, the tracing of a medium line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.”

¹⁸⁷ *Id.* at p. 49, para. 66, p. 51, para 71. In that case it was the marked disparity in the length of the relevant coasts that was the geographic circumstance that the Court deemed of relevance.

¹⁸⁸ *Denmark v. Norway*, I.C.J. Reports 1993, p. 64, para. 59.

¹⁸⁹ *Id.* at p. 79, para. 92. Guyana incorrectly suggests at MG para. 7.34, p. 88 that this adjustment reflected the conduct of the parties as a relevant circumstance. That is not what the Court said. The Court’s reasoning in this regard was entirely focused upon equitable access for both parties to the capelin stock. *See id.* at p. 67, para. 65; pp. 71-72, paras. 75-76.

4.12. In 1996, Eritrea and Yemen began an arbitration process that resulted in a second stage award in 1999 concerning the maritime boundary between the parties.¹⁹⁰ In *Eritrea/Yemen*, the tribunal was required to render an award “delimiting maritime boundaries.”¹⁹¹ The tribunal decided “that the international boundary shall be a single all-purpose boundary.”¹⁹² The tribunal established the boundary solely by reference to geographic features. It found no reason to adjust its geographical approach based upon the arguments of the parties concerning fisheries,¹⁹³ nor did it adjust its boundary line because of oil concession practice in which the parties had engaged.¹⁹⁴

4.13. The most recent two cases concerning the single maritime boundary have been decided by the Court. The first of these was the *Qatar-Bahrain* case decided in 2001.¹⁹⁵ The case came before the Court by way of Qatar’s Application based upon the “Bahraini formula.”¹⁹⁶ Therein the parties had requested the establishment of “a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters.”¹⁹⁷ At the time, only Bahrain was party to the 1982 Law of the Sea Convention. The parties agreed that Article 15 of the 1982 Convention reflected customary international law and the Court applied the equidistance/special circumstances rule on that basis insofar as it pertained to delimitation of the territorial sea.¹⁹⁸ Adjustments to the provisional equidistance line in the territorial sea were based on the relevant geographical circumstances.¹⁹⁹

4.14. As for the single delimitation of the economic zone/continental shelf between Qatar and Bahrain, the Court considered and set aside two arguments for adjustment of the provisional equidistance line in that sector. Bahrain argued that certain pearl fishing banks were a reason to adjust the provisional equidistance line, but the Court found otherwise for several reasons, not the least of which was that the pearl fisheries had been held in common even though they had been exploited primarily by people from Bahrain.²⁰⁰ Qatar, on the other hand, argued that a 1947 line — one used by the British to divide Bahrain and Qatar’s oil concessions — was a special circumstance.²⁰¹ The Court disagreed. It said:

The delimitation to be effected by the Court . . . is partly a delimitation of the territorial sea and partly a combined delimitation of the continental

¹⁹⁰ Permanent Court Arbitration: *Eritrea-Yemen Arbitration (Second Stage Maritime Delimitation) (Eritrea/Yemen)*, 40 I.L.M. 983 (2001).

¹⁹¹ *Id.* at 985, para. 6 (quoting Arbitration Agreement Between Government of the State of Eritrea and the Government of the Republic of Yemen of 3 October 1996, Article 2.3).

¹⁹² *Id.* at 1005, para. 132.

¹⁹³ *Id.* at 996, para. 73.

¹⁹⁴ *Id.* at 998-99, paras. 83-86.

¹⁹⁵ Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (*Qatar v. Bahrain*), Merits, Judgment, I.C.J. Reports 2001.

¹⁹⁶ *Id.* at para. 67.

¹⁹⁷ *Id.* at para. 168.

¹⁹⁸ *Id.* at paras. 175-223.

¹⁹⁹ *Id.* at paras. 217-23.

²⁰⁰ *Id.* at paras. 235-36.

²⁰¹ *Id.* at para. 237.

shelf and the exclusive economic zone. The 1947 line cannot therefore be considered to have direct relevance for the present delimitation process.²⁰²

Thus, the Court disregarded a continental shelf line that was well-founded in the practice of the parties and about which there was no question of fact. The Court disregarded the common line on the continental shelf because of the character of the delimitation process in which it was engaged. The Court, accordingly, made no adjustment to the provisional equidistance line because of the conduct of the parties, whether that conduct related to fisheries or to a line used to divide oil concessions. The only adjustment made by the Court to the provisional equidistance line was to eliminate the effect of the geographical feature of Fasht al Jarim, which the Court found should not have any affect on the boundary; for that reason alone, the provisional equidistance line on the continental shelf/exclusive economic zone was adjusted.²⁰³ The Court quoted with approval the language from the *Gulf of Maine* Judgment quoted above at paragraph 4.7.²⁰⁴

4.15. The most recent case to consider the single maritime boundary is *Cameroon-Nigeria*, brought by Cameroon's Application.²⁰⁵ Cameroon requested that the Court establish "the maritime boundary." Both Nigeria and Cameroon were party to the 1982 Law of the Sea Convention; therefore, the applicable law in the case was, in the first instance, the delimitation articles of the Convention pertaining to the exclusive economic zone and the continental shelf. The parties, however, agreed that the Court should effect the delimitation by a single line. Thus, the Court did not address the application of the delimitation articles of the Convention but turned to the application of customary international law in the circumstances. After quoting with approval from paragraph 194 of the Chamber's Judgment in the *Gulf of Maine* case,²⁰⁶ the Court said:

The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an "equitable result".²⁰⁷

²⁰² *Id.* at para. 240.

²⁰³ *Id.* at paras. 247-49. Fasht al Jarim is an extensive low-water feature in Bahrain's territorial sea north of Bahrain's main islands, which would have a substantial influence on the course of the equidistance line if used as a basepoint. The Court referred to it as "a remote projection of Bahrain's coastline". *Id.* at para. 247.

²⁰⁴ *Id.* at para. 225.

²⁰⁵ Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Merits, Judgment, I.C.J. Reports 2002.

²⁰⁶ *Id.* at para. 287.

²⁰⁷ *Id.* at para. 288.

Those criteria are geographical, and the Court in *Cameroon-Nigeria* found no reason to adjust the provisional equidistance line for geographical or other reasons.²⁰⁸

4.16. Of note was the Court's response to Nigeria's argument that oil concession practice should be taken into account. After a lengthy review of oil concession arguments made in prior cases, the Court rejected Nigeria's argument:

Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions *may indicate* a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties *may* they be taken into account. In the present case there is no agreement between the Parties regarding oil concessions.²⁰⁹

4.17. As discussed further in Chapter 4, Section II, Part B, below, the jurisprudence of the International Court of Justice and arbitral tribunals concerning the single maritime boundary indicates that a single maritime boundary is to be based on the geographical circumstances of a case. Circumstances that are not geographical are not likely to be of legal relevance unless they rise to the level of an express or tacit agreement between the parties, in which case they may have an effect on the choice and application of a delimitation method. In recent cases, as a matter of procedure the Court and arbitral tribunals have examined the provisional equidistance line as a starting point in the analysis but they have continued to make clear that equidistance is a delimitation method that is subject to adjustment or abandonment if it does not lead to an equitable solution in the circumstances of the case.

II. The Legal Regime of the Single Maritime Boundary and the Entitlement of Adjacent Coastal States to the Maritime Areas in Front of Their Respective Coasts

4.18. In *Cameroon-Nigeria*, the Court expressed the objective and method of delimitation of a single line as follows:

The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an "equitable result."²¹⁰

²⁰⁸ *Id.* at para. 306.

²⁰⁹ *Id.* at para. 304 (emphasis added).

²¹⁰ *Id.* at para. 288.

The Court's reference to the equidistance line expresses what is now a common procedure: first to examine the equidistance line and then to determine whether it should be adjusted or whether another method should be employed to achieve an equitable result. This procedural methodology, however, does not cast doubt upon but rather supports the legal role of the geography of the coast as the predominant relevant circumstance in delimitation of a single maritime boundary.

A. The Entitlement of Adjacent Coastal States to the Maritime Area That Lies in Front of Their Respective Coasts

I. Coastal Geography as the Essential Factor

4.19. The relevant circumstances applicable in any delimitation of a single maritime boundary are dominated by the coastal geography. Indeed, Suriname submits that the present dispute can and should be resolved exclusively on the basis of the coastal geography of the delimitation area. In *Canada v. France*, which pertained specifically to the single maritime boundary, the tribunal said:

Geographical features are at the heart of the delimitation process. The Chamber of the International Court of Justice in the Delimitation of the Maritime Boundary in the Gulf of Maine Area case said that the equitable criteria to be applied “are essentially to be determined in relation to what may be properly called the geographical features of the area.”²¹¹

4.20. The fundamental importance of coastal geography is best explained by reference to some of the early continental shelf cases that stand for the proposition that sovereignty over the coast is the basis of title to maritime areas. That is the meaning of the principle of the *North Sea Continental Shelf* cases that “the land dominates the sea.”²¹² Any delimitation of maritime areas must ultimately depend on considerations of the source of title to the maritime area concerned – namely the coast. In a critical passage, the International Court of Justice declared:

That the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.²¹³

4.21. While sovereignty over the land is the ultimate source of maritime rights, it is the coast— often referred to as the coastal front—that generates title. As the Court declared in *Libya/Malta*:

²¹¹ Case Concerning Delimitation of Maritime Areas (St. Pierre and Miquelon) (Canada/France), 31 I.L.M. 1145, 1160, para. 24 (1992).

²¹² North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Merits, Judgment, I.C.J. Reports 1969, p. 51, para. 96.

²¹³ Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 30, para. 27.

The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect.²¹⁴

Therefore, the fundamental proposition that follows from the fact that the coast is the geographical basis of title to maritime areas is that states are entitled to the areas situated in front of their coasts. In other words, it is its sovereignty over the coastline facing the delimitation area that gives rise to and validates a state's claim of title to maritime areas off that coast. In this case it is Suriname's sovereignty over its coast, including its sovereignty over the entire Corantijn River, that establishes Suriname's entitlement to the maritime area off of or in front of that coast and river mouth.

4.22. This principle is at the heart of the delimitation process, whether related to the establishment of a single maritime boundary or a continental shelf delimitation alone. When the law refers to "relevant circumstances," what is meant first and foremost is the coastal geography and its relationship to the maritime delimitation area – the "geographic correlation between coast and submerged areas off the coast" as it was expressed in *Tunisia/Libya*.²¹⁵ The coastal geography is overwhelmingly the most important relevant circumstance, and most often it is the only relevant circumstance, as it is in this case.

2. *The Natural Prolongation of the Coast*

4.23. Under modern international law, states automatically enjoy continental shelf rights out to a distance of 200 nautical miles from the coast regardless of the physical features of the seabed, and regardless of whether the physical continental shelf extends out to that limit. While the prolongation of the land mass into and under the sea forming the physical phenomenon of the continental shelf was identified in the *North Sea Continental Shelf* cases as the basis of title to the continental shelf, the subsequent jurisprudence has made it clear that "natural prolongation" must now be seen in purely geographical terms, at least as far as the 200-nautical-mile limit. Thus, "natural prolongation" is now identified with the so-called "distance principle" within 200 nautical miles of the coast.

4.24. The "distance principle" reflects the fact that, under the law of the sea as formulated by the 1982 Convention on the Law of the Sea and by the parallel evolution of customary law, states are entitled to rights not only with respect to the seabed and subsoil but also with respect to the water column to a distance of 200 nautical miles, regardless of the physical structure of the seabed.²¹⁶ The "distance principle," accordingly, refers to the altered basis of entitlement

²¹⁴ *Id.* at p. 41, para. 49.

²¹⁵ Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Merits, Judgment, I.C.J. Reports 1982, p. 61, para. 73.

²¹⁶ This was articulated by the Court in *Libya/Malta* as follows:

"The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned,

to the maritime area off of the coast and to the implication that spatial factors — in other words geography — are the principal considerations.

4.25. It is important to note, however, that even in *North Sea Continental Shelf* natural prolongation was never a purely geological concept. The Court articulated the concept of natural prolongation in the context of a delimitation problem relating to a smooth and regular North Sea continental shelf with no relevant physical breaks. The reasoning of the Court, in fact, was entirely concerned with the coastal relationship among the three parties — the Netherlands, the Federal Republic of Germany and Denmark — and the inequities that the equidistance method would have produced in that coastal configuration. Thus, natural prolongation in a geographical sense corresponds to the Court's holding that the line of delimitation must respect the principle of non-encroachment by avoiding a cut-off of the area in front of either state's coast — the area of its "most natural" prolongation.²¹⁷ It is clear, therefore, that from the Court's earliest treatment "natural prolongation" had a profound geographical basis.

4.26. The legal importance of coastal geography and natural prolongation leads logically to the first step in any analysis of a maritime boundary problem, particularly between adjacent states, which is to identify the relevant coasts and the seaward extensions of those coasts. Only by doing so may one determine a delimitation line that will leave as much as possible to each party all the maritime area that constitutes a natural prolongation of the land territory without encroachment on the natural prolongation of the land territory of the other.²¹⁸ The "natural prolongation" of a state's coast is the area directly in front of that coast. The frontal projection of coasts is a pervasive theme, implicit or explicit, throughout the jurisprudence in adjacent state situations. It was the central factor in *North Sea Continental Shelf*, as the discussion of the cut-off effect below will explain. It controlled the selection of the relevant coasts in both *Gulf of Maine* and *Tunisia/Libya*.²¹⁹ It is reflected in the macro-geographical approach in *Guinea/Guinea-Bissau*.²²⁰ It was the basis of the analysis of the coastal relationship and of the actual delimitation in *Canada v. France*, where the Court of Arbitration referred with approval to "the tendency, remarked by Canada, for coasts to project frontally, in the direction in which they face."²²¹

since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial." *Libya/Malta*, I.C.J. Reports 1985, p. 35, para. 39.

²¹⁷ *North Sea Continental Shelf*, I.C.J. Reports 1969, p. 31, para. 43. The Court said: "whenever a given submarine area does not constitute a natural — or the most natural — extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;—or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it."

²¹⁸ *See id.*, *dispositif*, at p. 54, para. 101(C)(1).

²¹⁹ Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Merits, Judgment, I.C.J. Reports 1984, p. 327; *Tunisia/Libya*, I.C.J. Reports 1982, pp.61-62, paras. 73-75.

²²⁰ Dispute Concerning Delimitation of the Maritime Boundary (Guinea/Guinea-Bissau), 25 I.L.M. 251 (1986).

²²¹ Case Concerning Delimitation of Maritime Areas (St. Pierre and Miquelon) (Canada/France), 31 I.L.M. 1145, 1171, para. 24 (1992).

B. The Requirement to Divide Any Area of Overlapping Coastal Front Entitlements Equitably

4.27. The geography of the relevant coasts and the projection seaward of those coasts leads normally in adjacent state configurations to a situation where some part of the frontal projections of the neighboring coasts converge and overlap. Thus, the maritime entitlement of adjacent neighboring countries represented by their coastal front projections creates an area of overlapping maritime entitlements. This area of overlapping projections is the area in which the delimitation takes place.

4.28. In *Gulf of Maine*, the Chamber of the Court said:

in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap.²²²

It is important to stress, however, that the basic criteria of an equal division of areas in which the maritime projections overlap may need to be adjusted in certain geographical circumstances. The Chamber noted:

Nevertheless, it is not always the case that the choice of this basic criterion appears truly equitable when it, and it alone, is exclusively applied to a particular situation. The multiplicity and diversity of geographical situations frequently call for this criterion to be adjusted or flexibly applied to make it genuinely equitable²²³

For this reason the Chamber took further note of, and gave effect to, the relevant geographic circumstances.²²⁴

4.29. The question of the division of an area of overlapping coastal front projections is closely associated with the choice of delimitation method, the cut-off effect and the principle of non-encroachment. Non-encroachment takes its name from the *dispositif* of the *North Sea Continental Shelf* cases, which stated that the delimitation should accord to each party its own natural prolongation, “without encroachment on the natural prolongation of the land territory of the other.”²²⁵ In practical terms this means that a boundary dividing an area of overlapping coastal front entitlements must not unduly “cut-off” the seaward projection of the coast of either neighboring state.

4.30. No clearer illustration of the “cut-off” effect can be found than that provided by the *North Sea Continental Shelf* cases themselves, where equidistance lines on either side of the Federal Republic of Germany would have swung across the concave German coast, confining

²²² *Gulf of Maine*, I.C.J. Reports 1984, p 327, para. 195.

²²³ *Id.* at pp. 327-328, para. 196.

²²⁴ *Id.* at pp. 333-39, paras. 216-29.

²²⁵ *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Merits, Judgment, I.C.J. Reports 1969, p. 53, para. 101.

the German shelf to a small triangle. The Court criticized the equidistance method by reference to the cut-off effect when it said equidistance:

would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's coastal front, *cutting it off from areas situated directly before that front.*²²⁶

The application of the equidistance method in that case, therefore, did not respect — it cut off — the projection of the coastal front of Germany. Judge Jiménez de Aréchaga, in his separate opinion in *Tunisia/Libya*, referred to this statement by the Court in his explanation of the real meaning of “natural prolongation.” He said:

This statement makes it quite clear that for the Court ‘natural prolongation’ is a concept divorced from any geomorphological or geological requirement and that it merely expresses the continuation or extension seawards of each State’s coastal front. It means that the continuation of the territory into and under the sea has to be based on the actual coastline, as defined by the land frontiers of the States in question, since it is from the actual coastline of each State that the land territory continues into and under the sea. Consequently, the basic corollary of ‘natural prolongation’ is the need to avoid the ‘cutting-off’ of areas ‘situated directly before that front.’²²⁷

As discussed below, because the equidistance method responds to incidental coastal features, it often gives rise to the cut-off effect in adjacent state situations, requiring some adjustment to, or abandonment of, equidistance as the appropriate delimitation method in the circumstances.

4.31. Delimitation methods that ignore coastal irregularities and make use of lines representing coastal fronts, such as methods based on angle bisectors and perpendiculars, are often more likely to give effect to the principle of non-encroachment and avoid the cut-off effect in adjacent state situations. Coastal front lines are based on the general direction of the coast. They ignore incidental features and irregularities in the coastal configuration. Their purpose is to eliminate the effect of distorting features that would otherwise constitute sources of inequity of the kind that the equidistance method often produces. Therefore, coastal fronts facilitate the use of simplified geometrical methods of delimitation, in particular bisectors and perpendiculars, which may be more respectful of the broad geographical relationship between two neighboring adjacent states.

4.32. For example, angle bisectors are appropriate when the neighboring coastal fronts form an angle, as often occurs in the case of adjacent states where the land boundary meets the sea in a coastal indentation or concavity. The best example is the first segment of the single maritime boundary prescribed in *Gulf of Maine*. In that situation, the adjacent neighboring coasts form an approximate right angle with an apex at the land boundary. The Chamber

²²⁶ *Id.* at pp. 31-32, para. 44 (emphasis added).

²²⁷ Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Merits, Judgment, I.C.J. Reports 1982, p. 116, para. 58 (Separate Opinion of Judge Jiménez de Aréchaga).

established coastal fronts drawn from Cape Elizabeth to the land boundary terminus, representing the general direction of the Maine coast and from the land boundary terminus to Cape Sable, representing the general direction of the portion of the Canadian coast facing the Gulf of Maine. The angle bisector between these two coastal front lines runs from the initial point of the maritime boundary established by the Chamber toward the central part of the Gulf.²²⁸ The use of an angle bisector in that type of configuration achieves the objective of an approximately equal division of the offshore area, coupled with what the Chamber termed “the advantages of simplicity and clarity.”²²⁹

4.33. In different situations, perpendiculars to the common general direction of the coast serve the same ends. A perpendicular line, by its very nature, does not veer or swing in either direction but heads straight out to sea on a constant course. It is thus ideally suited to the avoidance of any effect of cut-off. The result — where the method is appropriate — is that the boundary heads out to sea without swinging in front of the coast of either party.

4.34. The leading cases involving adjacent state relationships illustrate the utility of delimitation methods adopted to give effect to the relationship between neighboring coastal fronts and thus take into account the principle of non-encroachment to avoid the cut-off effect. *Tunisia/Libya, Gulf of Maine* and *Canada v. France* all made use of simplified representations of relevant coasts. In *Tunisia/Libya*, the Court viewed the coast in the vicinity of the land boundary as a straight line, so that the boundary in that sector could be established as a perpendicular to the general direction of the coast.²³⁰ In *Gulf of Maine* the Chamber used coastal fronts to represent the United States and Canadian coasts and developed its three segment maritime boundary with reference to bisectors and perpendiculars associated with those coastal fronts.²³¹ In *Canada v. France*, the tribunal’s respect for the coastal front projections of the French islands and the coast of Newfoundland is the hallmark of the case.²³²

4.35. Such geometrical methods bear an affinity to equidistance but without the distortions that are inherent in the equidistance method. At the same time, they offer a degree of flexibility in creating an equitable solution by dividing an area of overlapping coastal front projections while respecting the principle of non-encroachment and avoiding the cut-off effect.

²²⁸ Because, however, the adjudicated line began at “Point A” some miles off the coast, a point that had been established not by the Chamber but by the agreement of the parties, the geometrical construction of the bisector involved the use of perpendiculars drawn from the two coastal fronts to that point and the bisection of the angle created on the seaward side of those two perpendiculars. The result, however, is essentially the same as a bisector of the angle created by the two coastal fronts. See *Gulf of Maine*, I.C.J. Reports 1984, p. 333, paras. 213-14.

²²⁹ *Id.* at p. 333, para. 213.

²³⁰ *Tunisia/Libya*, I.C.J. Reports 1982, p. 93, para. 133(B)(4). In its description of the geographical circumstances the Court said: “If one follows the coast of Libya towards Tunisia, for some distance before and after the frontier point, the general line of the coast is somewhat north of west”. *Id.* at pp. 34-35, para. 19.

²³¹ *Gulf of Maine*, I.C.J. Reports 1984, pp. 348-51. The first segment of the boundary was established with reference to the coastal front of the United States extending from Cape Elizabeth to the international boundary terminus and the Canadian coastal front extending from the international boundary terminus to Cape Sable. *Id.* at p. 333, para. 213. The second segment was established with reference to the coastal front of the United States extending from Cape Ann to the elbow of Cape Cod and the Canadian coastal front extending from Brier Island to Cape Sable. *Id.* at p. 334, para. 216.

²³² Case Concerning Delimitation of Maritime Areas (St. Pierre and Miquelon) (Canada/France), 31 I.L.M. 1145, 1162, paras. 34-35 (1992).

4.36. Accordingly, in a delimitation between neighboring adjacent coastal states “one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap,”²³³ in other words a division of “the areas of convergence and overlapping of maritime projections.”²³⁴ The governing concept, therefore, is that of “maritime projections.” This reflects the underlying notion, ultimately derived from the *North Sea Continental Shelf* cases, of a frontal projection of neighboring adjacent coasts and of a maritime area that lies in front of more than one coast, reflecting an area of overlap and convergence of the neighboring coastal front projections.²³⁵ These principles are fundamentally associated with coastal geography and as such are applicable in the delimitation of a single maritime boundary between adjacent states.

C. The Limited Legal Relevance of the Conduct of the Parties

4.37. The conduct of the parties to a maritime boundary dispute, and in particular one that concerns a single maritime boundary, is generally not relevant to the maritime delimitation. Only if that conduct meets a very high legal standard may it be taken into account. The alleged conduct must be consistent and sustained and it must display clearly an intention by both parties to accept a specific line as an equitable basis of delimitation. The adopted line therefore must be the result of an express or tacit agreement. Conduct that does not meet that legal standard is simply irrelevant. Guyana has seriously misstated the law in this respect. Guyana has elevated the ephemeral conduct of the parties to a level of controlling legal importance, which plainly is not correct.

4.38. The conduct of sovereign states, of course, can be relevant under the principles of general international law relating to estoppel. For example, certain minor elements of the delimitation in the *U.K.-French Continental Shelf* case were based on prior French acceptance.²³⁶ In other delimitation cases, however, estoppel arguments were considered and rejected. In *North Sea Continental Shelf*, estoppel was unsuccessfully invoked as a basis on which the Federal Republic of Germany was said to be bound by the rule in Article 6 of the 1958 Convention.²³⁷ In *Gulf of Maine* it was unsuccessfully invoked, along with acquiescence, as a basis on which the United States was said to have accepted an equidistance line.²³⁸ The Court in *North Sea Continental Shelf* sought and did not find “clearly and consistently evinced acceptance”;²³⁹ nor did it find a real intention to manifest acceptance or recognition; nor did it find the requirement of detrimental reliance.²⁴⁰ In *Gulf of Maine*, the Chamber did not find

²³³ *Gulf of Maine*, I.C.J. Reports 1984, p. 327, para. 195.

²³⁴ *Id.* at p. 328, para. 197.

²³⁵ See *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/ Netherlands), Merits, Judgment, I.C.J. Reports 1969, *dispositif*, p. 53, para. 101(C).

²³⁶ Notably the use in the *U.K.-French Continental Shelf* case of Eddystone Rock as a basepoint, and the use of a 12-nautical-mile limit in the Channel Islands area. 54 I.L.R. 5, 75-76, paras. 143-44; 95-96, para. 202 (1979).

²³⁷ *North Sea Continental Shelf*, I.C.J. Reports 1969, p. 26, paras. 29-30.

²³⁸ *Gulf of Maine*, I.C.J. Reports 1984, p. 310, para. 148.

²³⁹ *North Sea Continental Shelf*, I.C.J. Reports 1969, p. 26, para. 30.

²⁴⁰ *Ibid.*

“clear and consistent acceptance”²⁴¹ in relation to estoppel; nor did it find conduct that was “sufficiently clear, sustained and consistent to constitute acquiescence.”²⁴²

4.39. In *Tunisia/Libya*, on the other hand, which is the case upon which Guyana relies to support its argument that the conduct of the parties may have an influential role in a maritime delimitation, the conduct noted by the Court was taken into account not under the rubric of acquiescence or estoppel but merely as a corroborating indication of the equity of the chosen line. That line, a 26° bearing line in the first segment of the continental shelf boundary extending from the coast, corresponded to the perpendicular to the general direction of the coast (*i.e.*, a line respecting the projection seaward of adjacent neighboring coasts along a common coastal front) and it had served for 60 years to divide the area in which Italy and France applied fishing regulations.²⁴³ That same basic line had also been acted upon — not unilaterally, but intentionally by both parties for eight years — as a common limit to separate the Tunisian and Libyan petroleum concessions.²⁴⁴ Thus, the 26° line, adopted by the Court as the first part of the first segment of the continental shelf boundary in *Tunisia/Libya*, reflected several important considerations other than oil concession conduct. Accordingly, even in *Tunisia/Libya*, the oil concession conduct was not a controlling factor in the choice of delimitation method. Given Guyana’s focus on that case, Suriname addresses it thoroughly in Chapter 5. However, as confirmed by recent cases, the *Tunisia/Libya* precedent is only significant in the present circumstances if the alleged conduct amounts to an express or tacit agreement between Suriname and Guyana.

4.40. For instance, in subsequent cases, namely *Qatar-Bahrain* and *Cameroon-Nigeria*, as noted above, conduct-based arguments did not prevail.²⁴⁵ In the most recent statement by the Court in the *Cameroon-Nigeria* case, the Court made clear that conduct, at a minimum, must rise to an express or tacit agreement between the parties if it is to have any relevance in a maritime delimitation case.²⁴⁶ The jurisprudence has therefore established a very stringent test, whether under the heading of estoppel, acquiescence or indications of a *modus vivendi*. The conduct of the parties is relevant only if it is mutual, sustained, consistent and unequivocal in indicating the intention of both parties to accept a particular line for a particular purpose. Otherwise the conduct of the parties must be disregarded.

4.41. The conduct of the parties must also be disregarded if the conduct alleged relates to diplomatic efforts to find solutions that have failed. In this regard, Guyana finds it meaningful that:

this appears to be the first case before an international court or tribunal in which the parties have themselves sought over an extended period of time – in excess of forty years – to identify and then agree upon an

²⁴¹ *Gulf of Maine*, I.C.J. Reports 1984, p. 309, para. 145.

²⁴² *Id.* at p. 309, para. 146. Arguments by Canada relating to French practice and attitudes were wholly disregarded in *Canada v. France*, 31 I.L.M. 1145, 1166, paras. 53-55.

²⁴³ Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Merits, Judgment, I.C.J. Reports 1982, p. 84, para. 119.

²⁴⁴ *Id.* at p. 66, para. 86.

²⁴⁵ See *supra* Chapter 4, Section I, Part B.

²⁴⁶ Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Merits, Judgment, I.C.J. Reports 2002, para. 304.

equidistance line. It is a central part of Guyana's case that those efforts and related conduct should be taken into account in achieving an equitable solution.²⁴⁷

As a matter of fact, as demonstrated in Chapter 3, Guyana is wrong when it says that there has been a 40-year effort to identify and agree on an equidistance line. More to the point here, Guyana has no basis for saying that failed negotiations and positions taken therein are an indicator of legally relevant conduct. In *Gulf of Maine*, which came before the Chamber because of the failure of the United States to ratify a signed agreement accommodating the fishing interests of the parties in the area concerned, the Chamber took no account of Canada's arguments based on the signed instrument. In the international law of maritime delimitation, the conduct of the parties has a very limited and well-defined role. As is discussed further in Chapter 5, there is no conduct of the Parties in this case that arises to the level of a relevant circumstance insofar as the law of maritime delimitation is concerned.

D. The Procedural Role of the Equidistance Method

4.42. Identification of a provisional equidistance line as a first step in the process of delimitation between the coasts of neighboring states is now standard practice in maritime boundary analysis by the International Court of Justice and arbitral tribunals. Equidistance, however, is just a delimitation method. In both conventional and customary international law any delimitation method, whether equidistance or otherwise, is subordinate to the objective of reaching an equitable solution. A delimitation based on the median or equidistance line is never mandatory. The law remains what was stated in *Tunisia/Libya*: "equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed."²⁴⁸ Indeed, since all the cases beginning with *Libya/Malta*, where this methodology was first employed, only the *Cameroon-Nigeria* case resulted in a maritime boundary that constitutes an equidistance line that was not adjusted.

4.43. The criticisms of the equidistance method remain valid. First, equidistance was criticized in the *North Sea Continental Shelf* cases on both theoretical and practical grounds. The Netherlands and Denmark argued that equidistance has an *a priori* character of necessity or inherency leading to delimitations where relative proximity between coast and maritime areas was the objective.²⁴⁹ The International Court of Justice rejected the notion of absolute proximity, holding that natural prolongation is more fundamental, and it concluded that "the notion of equidistance as being logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine, is incorrect."²⁵⁰

4.44. Second, equidistance has different attributes in opposite and adjacent coast situations. The distinction between opposite and adjacent coasts recognizes that the suitability of the equidistance method will vary in these two geographical situations. Where the coasts are opposite, a median line — adjusted as necessary to deal with the effect of incidental features — produces an equitable result with a fair degree of predictability. It is less reliable where the

²⁴⁷ MG, para. 9.5, p. 108.

²⁴⁸ *Tunisia/Libya*, I.C.J. Reports 1982, p. 79, para. 109.

²⁴⁹ *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Merits, Judgment, I.C.J. Reports 1969, pp. 28-29, para. 37.

²⁵⁰ *Id.* at p. 32, para. 46.

coasts are adjacent because of the characteristics of the results produced, including the concerns related to non-encroachment and the cut-off effect, discussed earlier, which may often lead to inequitable results.²⁵¹

4.45. There are both conceptual and geometrical reasons for the distinction between opposite and adjacent coasts and the suitability of the equidistance method for each. The conceptual basis of the distinction was first noted in the *North Sea Continental Shelf* cases.²⁵² The seaward extensions of opposite coasts will “meet and overlap.” In this type of configuration a median line, adjusted if necessary for the “disproportionally distorting effect” of incidental coastal features, will effect an equitable division. The maritime projections of adjacent (*i.e.*, laterally aligned) coasts do not, as observed in the *North Sea Continental Shelf* cases, converge and overlap in this same manner.²⁵³

4.46. Those practical considerations are compelling. Between opposite coasts, a series of constantly shifting basepoints causes the median line to respond continuously and accurately to the changing contours of the two facing coasts. In the case of adjacent coasts, however — as the sketches and maps produced in the decision in the *North Sea Continental Shelf* cases make clear²⁵⁴ — the partially self-correcting property of a median line is lost. An equidistance line extending into the open sea off two adjacent coasts is often controlled by a limited number of basepoints, sometimes causing the line to veer inequitably towards or in front of the coast of one of the two parties.

4.47. Third, the equidistance line may have different effects in coastal and offshore areas because of the influence of specific selected basepoints along various sections of neighboring coasts. An equidistance line will only be an equitable delimitation method in an adjacent state situation where there is a relative balance between the corresponding basepoints that control the equidistance line on the neighboring coasts. The *North Sea Continental Shelf* cases pointed out the problems inherent in the equidistance method where a coastal irregularity close to the land boundary terminus has a disproportionate effect throughout the entire delimitation.²⁵⁵ In that circumstance, the equidistance method can have a significant disproportionate effect in the context of a delimitation to the 200-nautical-mile limit.

4.48. This was vividly demonstrated by the sketches and maps referred to in the *North Sea Continental Shelf* cases.²⁵⁶ Where a geographical irregularity — whether convexity, concavity, or the presence of islands — close to the land boundary terminus controls the equidistance line throughout its length, it will cause the line to swing out at an angle across the

²⁵¹ In comparing opposite and adjacent state situations, the Court said:

whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other.

Id. at p. 38, para. 58.

²⁵² *Id.* at pp. 36-37, para. 57.

²⁵³ *Id.* at pp. 36-37, paras. 57-58.

²⁵⁴ *Id.* at pp. 15-16.

²⁵⁵ *Id.* at pp. 17-18, para. 8; p. 49, para. 89.

²⁵⁶ *Id.* at pp. 15-16.

coastal front of one of the parties. That effect is magnified as the line moves further out to sea. This is the cut-off problem. As the International Court of Justice said, the “slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf.”²⁵⁷ More generally, the Court pointed out that “the distorting effects of lateral equidistance lines . . . produce their maximum effect in the localities where the main continental shelf areas lie further out.”²⁵⁸

4.49. The converse may also be true. While a coastal irregularity close to the land boundary terminus may have undue influence on the equidistance line in near-shore areas, other basepoints located further from the land boundary terminus may take over control of the equidistance line at a later stage. Depending on the relative geographical relationship of those basepoints, they may turn the line so that it more equitably represents a division of the relationship between the relevant coasts or, in other cases, they may exacerbate the problem by turning the line more to the disadvantage of one state.

4.50. Fourth, equidistance is *par excellence* the method that reflects micro-geography rather than macro-geography. It focuses on basepoints, not coasts; on incidental features as opposed to broad patterns. Nowhere is this more clearly expressed than in *Gulf of Maine*, where the Chamber indicated that if equidistance were used in the first segment of that boundary “the likely end-result would be the adoption of a line all of whose basepoints would be located on a handful of isolated rocks, some very distant from the coast, or on a few low-tide elevations . . .”²⁵⁹ Referring to such features, as well as tiny islands, the Chamber noted the anomaly of making the controlling elements of the delimitation single isolated features:

If any of these geographical features possess some degree of importance, there is nothing to prevent their subsequently being assigned whatever limited corrective effect may equitably be ascribed to them, but that is an altogether different operation from making a series of such minor features the very basis for the determination of the dividing line, or from transforming them into a succession of basepoints for the geometrical construction of the entire line.²⁶⁰

The equidistance method is blind to scale and proportion. A basepoint is a basepoint, as far as equidistance is concerned. It is a constant refrain of the jurisprudence that “refashioning geography” in the name of equity is inadmissible. However, the equidistance method itself — its failure to differentiate between basepoints on the basis of the scale, character and position of the coasts they represent — often creates a line that in effect refashions geography, by not respecting the broader geographic patterns represented by the coastal fronts of neighboring states.

²⁵⁷ *Id.* at p. 49, para. 89. The Court also noted:

It will suffice to mention here that, for instance, a deviation from a line drawn perpendicular to the general direction of the coast, of only 5 kilometres, at a distance of about 5 kilometres from the coast, will grow into one of over 30 at a distance of over 100 kilometres.

Id. at p. 18, para. 8.

²⁵⁸ *Id.* at p. 37, para. 59.

²⁵⁹ Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Merits, Judgment, I.C.J. Reports 1984 p. 332, para. 210.

²⁶⁰ *Id.* at p. 330, para. 201.

4.51. Fifth, the equidistance line is based not on the dominant features of the geography but simply on the most protruding features. The point was noted by the Court in *Libya/Malta*:

since an equidistance line is based on a principle of proximity and is therefore controlled only by salient coastal points, it may yield a disproportionate result where a coast is markedly irregular or markedly concave or convex. In such cases, the raw equidistance method may leave out of the calculation appreciable lengths of coast, whilst at the same time giving undue influence to others merely because of the shape of coastal relationships.²⁶¹

These and the other criticisms of equidistance remain valid and are cause to adjust or abandon the provisional equidistance line if necessary to produce an equitable delimitation.

4.52. While the practice of the International Court of Justice and of arbitral tribunals is to draw a provisional equidistance line and then to consider whether it should be adjusted,²⁶² the Court has stressed that it does not accord any presumptive role to equidistance, recalling and quoting the following passage from its earlier decision in *Libya/Malta*:

“the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question.”²⁶³

Thus the examination of a provisional equidistance line is a matter of procedure rather than substance. The procedure is designed to facilitate a systematic methodology and not to dictate the final result. It is a procedure rooted in geography, not conduct.²⁶⁴ The criticisms of the equidistance method are valid, and, if corresponding geographical circumstances are present, they require adjustment of the provisional equidistance line or the use of a different delimitation method altogether. In adjacent state situations, a delimitation method that is based on coastal fronts rather than coastal basepoints will often be more appropriate.

4.53. Chapter 6 of this Counter-Memorial applies the law to the facts. In support of its claim, Suriname, unlike Guyana, will therefore begin with an appraisal of the equidistance method as applied to the geographical circumstances of this case. Such appraisal will demonstrate that the equidistance method does not produce an equitable result, and that other methods must be employed.

²⁶¹ Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 44, para. 56.

²⁶² Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, para. 230.

²⁶³ *Id.* at para. 233 (quoting *Libya/Malta*, I.C.J. Reports 1985, p. 47, para. 63) (quotation marks omitted).

²⁶⁴ Perversely, Guyana believes “it is appropriate to take the historic equidistance line as a starting point” in application of this procedure. MG, para. 9.6, p. 109. As demonstrated in Chapter 3 above, Guyana’s “historic equidistance line” is neither historic nor equidistant. Because it has no legitimate basis, it would be inappropriate to give it any credence even as a starting point in any analytical framework.

E. Conclusion

4.54. The establishment of the single maritime boundary by this Tribunal is governed by the principles of customary international law relating to the delimitation of a single maritime boundary. Those principles conform to the underlying attributes of Articles 15, 74 and 83 of the 1982 Law of the Sea Convention. An equitable solution is required in the light of the relevant circumstances. These circumstances are constituted above all by the coastal geography as the basis of title. Specifically:

- a) A state is *prima facie* entitled to the areas in front of its coast, as the “natural prolongation” of its territory to which it has inherent rights.
- b) Any effect of encroachment on these areas by the application of a delimitation method, or cut-off, is to be avoided.
- c) Incidental coastal features or irregular coastal configurations should not be allowed to have a disproportionate effect.
- d) Areas of overlapping coastal front projection between neighboring states must be divided equitably in light of the relevant circumstances.

These are the fundamental principles recognized by the jurisprudence. Provided they are respected, there is no method of delimitation that is sacrosanct. Equidistance is frequently used as a point of departure in the process of delimitation but there is no legal presumption in its favor. The use of equidistance may not be appropriate because of the irregularities in the coastal configuration that would distort the course of the line. Other geometrical delimitation methods such as bisectors or perpendiculars applied in relation to the coastal fronts are often resorted to in order to avoid the disproportionate effects such incidental features might create. The essential requirement is a result that is equitable in terms of the particular geographical configuration of the relevant area.

4.55. The equitable solution required by international law has a precise meaning, though it allows room for judgment and prescribes no pre-determined method. It is an equitable solution as determined by relevant circumstances. Those relevant circumstances do not include the conduct of the parties unless that conduct constitutes an express or tacit agreement to apply a line for a particular jurisdictional purpose. Above all, those relevant circumstances pertain to the coastal geography because coastal geography constitutes the basis of title. Accordingly, the idea of a frontal projection of that coastal geography is fundamental. The “natural prolongation” or “seaward extension” of each party is the area directly in front of its coasts. Any area of overlap of these projections is to be divided equitably in light of the relevant circumstances of the case. The principle of non-encroachment — including the avoidance of any disproportionate effect caused by incidental coastal features or irregular configurations — is to be taken into account in the establishment of an equitable solution.

III. The Territorial Sea Boundary Has Been Established

4.56. Guyana does not contest that the 1936 Point and the 10° Line were established in combination.²⁶⁵ Chapter 3, Section I of this Counter-Memorial has discussed the facts in this regard. It is Suriname’s position, as set forth in its Preliminary Objections, that the historical record demonstrates that the 1936 Point and the 10° Line were identified in a combined

²⁶⁵ “At the time of the establishment of the land boundary terminus at Point 61, the Boundary Commissioners also developed a line delimiting the territorial waters adjacent to the two colonies.” MG, para. 3.15, p. 18.

operation and that this is uncontested as a matter of fact. It is also Suriname's position, as set forth in its Preliminary Objections, that neither the 1936 Point nor the 10° Line is legally established *per se* and binding on the Parties. Accordingly, Suriname has filed Preliminary Objections in this case.

4.57. Guyana, however, finds it useful to argue that the 1936 Point is legally established but that the 10° Line as the boundary in territorial waters is not. Guyana inherited such a position from the United Kingdom, which it set forth in 1965 in the final stages of negotiations with the Netherlands prior to Guyana's independence, all as referred to in Chapter 3, Section I of this Counter-Memorial.

4.58. The British sought to induce the Netherlands to abandon the 10° Line in order to create a favorable precedent for the Netherlands' European interests. Thus, the British Government believed itself free to disavow the 10° Line position. This would seem to lead to the conclusion that the British Government did not regard the 1936 Point/10° Line operation as a legally binding event – otherwise how could the British Government distinguish between a 1936 Point that it would regard as legally established while taking the position that the 10° Line was not?

4.59. The British position in 1965 was simply a reflection of one stage in a long running negotiation between the colonial powers. The United Kingdom favored the 1936 Point so it retained it as its position; it did not favor the 10° Line any longer so it disregarded it. Arthur Watts made clear in the exchange reported at paragraph 3.7 of Suriname's Preliminary Objections that "In the absence of a formal agreement it would be difficult to argue that the Netherlands Government was bound by their diplomatic correspondence."²⁶⁶ Thus, the British Government took what it liked from the diplomatic past and disregarded what it did not like. Guyana has embraced and followed that position here.

4.60. By the time the Parties engaged in the Marlborough House Talks in 1966, it was clear that there was no agreement between the colonial powers on anything other than that the west bank of the Corantijn River was the general territorial boundary; there was no agreement between Guyana and Suriname on any other specific boundary matter. It is for this basic reason that Suriname holds there is no agreement on the location of the land boundary terminus and that this Tribunal is therefore without jurisdiction to decide the maritime boundary.

4.61. However, if Suriname is wrong and the Tribunal decides that there is agreement on the 1936 Point, Suriname maintains that by a parity of reasoning the Tribunal must also find that the 10° Line was legally established and binds the Parties on the same basis as does the 1936 Point.

4.62. The facts, really, are quite simple. From 1936 to the early 1960s the colonial powers were engaged in negotiations in which they regarded the 1936 Point and the 10° Line as

²⁶⁶ SPO, para. 3.7, p. 15 (quoting Note from American Department of FO (Mr. S.W. Martin) to Assistant Legal Advisor (Mr. Watts) (12 April 1966), at SPO Annex 24). The subject description on the first page of the document containing the comment of Arthur Watts refers to "Details of past correspondence between H.M.G. and the Netherlands Govt. regarding the Kutari & New Rivers". *Ibid.* It would be wrong to conclude from this subject description on the document that the comment does not apply equally to the 1936 Point. The correspondence to which reference is made deals in the same way with the disputed area in the south and the terminus of the land boundary in the north.

boundary elements established in combination and promoted them as such in their various draft instruments and practice.²⁶⁷ In the early 1960s the negotiating process between the United Kingdom and the Netherlands broke down and new positions were put forth. For instance, earlier Dutch officials in connection with the equidistance line examination had suggested a land boundary terminus well north of the 1936 Point²⁶⁸ and in a formal proposal the Netherlands suggested that the maritime boundary should extend from the thalweg of the Corantijn River.²⁶⁹ The record is thus clear that the Netherlands Government did not believe it was bound by the 1936 Point; nonetheless, it maintained the 10° Line position. The British Government to the contrary abandoned the 10° Line position but retained the 1936 Point as the starting point for the equidistance line. Guyana and Suriname carried these varying points of view into the Marlborough House Talks and retain them to this day.

4.63. Accordingly, if there was a legally established agreement, it was an agreement that was carried forward by both the United Kingdom and the Netherlands, a combined 1936 Point/10° Line agreement, up to the time that both colonial powers disavowed that “agreement” in the early 1960s. They did so by presenting different negotiating proposals at odds with such an agreement. While those proposals were not accepted, neither were they met with protest that one side or the other was reneging on a legally established matter. Thus, if there was agreement, the colonial powers nullified whatever agreement there may have been.

4.64. If, however, the Tribunal finds that the colonial powers did not nullify that agreement by their inconsistent proposals, Guyana and Suriname inherited a 1936 Point/10° Line agreement from those colonial powers. On that basis, the principle of *uti possidetis juris* operates and both Guyana and Suriname must live with the combined 1936 Point/10° Line position.

4.65. There is no basis for saying that the combined 1936 Point/10° Line position can be sundered, retaining one part and disregarding the other. Even Guyana quotes in its Memorial at paragraph 9.6 a statement that Commander Kennedy made at the First United Nations Conference on the Law of the Sea concerning the presence of navigation channels as a special circumstance requiring modification to a median line.²⁷⁰ If there was a boundary agreement that was based in part on such circumstances, it cannot be nullified by the fact that those circumstances changed as Guyana argues. The abiding character of boundary agreements is a fundamental legal proposition that approaches *jus cogens*.

4.66. The principle of stability and finality embodied in all boundary agreements was clearly pronounced by the Court in the *Temple of Preah Vihear* case.²⁷¹ In the words of the Court:

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible

²⁶⁷ See SPO, para. 1.6 n. 7, p. 2.

²⁶⁸ See SPO, paras. 2.14-2.15, pp. 9-10.

²⁶⁹ See SPO, para. 3.6, p. 14; MG, Vol. III, Annex 91, at p. 2.

²⁷⁰ See Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, pp. 88-89 (Separate Opinion of Judge Schwebel) (quoting UNCLOS I, Fourth Committee, Continental Shelf, *Official Records*, Vol. VI, p. 93).

²⁷¹ Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962.

if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious.²⁷²

The principle is also set forth in the Vienna Convention on the Law of Treaties.²⁷³ Part V, Section 3 addresses the “Termination and Suspension of the Operation of Treaties.” Article 62 concerns “Fundamental Change of Circumstances.” Even if Guyana is correct on the facts about navigational considerations at the mouth of the Corantijn River, which Suriname does not concede, that Article, which is widely referred to and respected, makes clear that “A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary.”²⁷⁴ In the *Aegean Sea Continental Shelf* case, the Court drew attention to this principle when it said “[w]hether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances.”²⁷⁵

4.67. Thus, if there was a combined 1936 Point/10° Line agreement, it cannot be modified as to one part of that agreement because of the change of circumstance that Guyana argues. It should also be clear that if there was a combined 1936 Point/10° Line agreement, the agreement pertained to a delimitation of the territorial waters as such and was open-ended as to its extent. The 1939 British draft treaty simply referred to the “prolongation seawards of the line drawn on a bearing of 10° East of True North” as the boundary of the territorial waters.²⁷⁶ Today, the territorial sea extends to 12 nautical miles from the baseline.

4.68. The implications of an open-ended definition of the extent of a maritime boundary were considered by the Arbitral Tribunal in the Arbitration for the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal. The parties were in dispute as regards an agreement concluded by an exchange of letters on 26 April 1960 between France and Portugal, which defined the maritime boundary between the Republic of Senegal (at the time an autonomous state within the *Communauté* established by the French Constitution) and the Portuguese territory of Guinea, which proclaimed independence as Guinea-Bissau in 1973. One point of dispute before the arbitral tribunal was whether the 1960 exchange of letters had

²⁷² *Id.* at p. 34. See also Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, pp. 26-28, paras. 53-57.

²⁷³ Vienna Convention on the Law of Treaties, adopted 23 May 1969, 1155 U.N.T.S. 331.

²⁷⁴ As Judge Ajibola noted in his separate opinion in the *Libya/Chad* case, “[m]any multilateral conventions have provisions safeguarding and ensuring stability and finality with regard to boundary treaties. An example of such treaties is the 1978 Convention on the Succession of States in Respect of Treaties . . . especially Article 11 therein, which stipulates that a succession of States does not alter or affect a boundary established by a treaty, and neither does it affect the obligations and rights established by a treaty, and neither does it affect the obligations and rights established by such a treaty when it involves the issue of boundaries.” *Libya/Chad*, I.C.J. Reports 1994, pp. 64-65, para. 53.

²⁷⁵ *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, pp. 35-36, para. 85.

²⁷⁶ MG, Vol. III, Annex 89.

to be interpreted as also delimiting the exclusive economic zone as was argued by Senegal and rejected by Guinea-Bissau.

4.69. The exchange of letters between France and Portugal contained the following language with regard to the maritime boundary between Senegal and the Portuguese territory of Guinea:

As far as the outer limit of the territorial seas, the boundary shall consist of a straight line drawn at 240°, from the intersection of the prolongation of the land frontier and the low water mark, represented for that purpose by the Cape Roxo lighthouse.

As regards the contiguous zones and the continental shelf, the delimitation shall be constituted by the prolongation in a straight line in the same direction of the boundary of the territorial seas.²⁷⁷

Thus, the 1960 Agreement did not define a seaward terminus of the territorial sea, the contiguous zone or continental shelf.

4.70. The Tribunal rejected the position of Senegal that the 1960 Agreement also delimited the exclusive economic zone, a maritime space that did not exist in 1960.²⁷⁸ The Tribunal observed:

We are not concerned here with the evolution of the content, *or even the extent*, of a maritime space which existed in international law at the time of the conclusion of the 1960 Agreement, but with the actual non-existence in international law of a maritime space such as the “exclusive economic zone” at the date of the conclusion of the 1960 Agreement.²⁷⁹

4.71. Next, the Tribunal turned to the position of the territorial sea, the contiguous zone and the continental shelf. The Tribunal distinguished the situation in respect of these zones from that of the exclusive economic zone:

On the other hand, the position regarding the territorial sea, the contiguous zone and the continental shelf is quite different. These three concepts are expressly mentioned in the 1960 Agreement and they existed at the time of its conclusion. In fact, the Agreement itself specifies that its object is to define the maritime boundary “taking into account the Geneva Conventions of 29 April 1958” elaborated by the first United Nations Conference on the Law of the Sea, and these codification conventions define the notions of the “territorial sea”, “contiguous zone” and “continental shelf”.²⁸⁰

²⁷⁷ Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), *reprinted in* Annex to the Application Instituting Proceedings of the Government of the Republic of Guinea-Bissau (Translation), I.C.J. Pleadings, 1989, p. 64, para. 80 (quotation omitted).

²⁷⁸ *Id.* at p. 67, para. 85.

²⁷⁹ *Ibid.* (Emphasis added).

²⁸⁰ *Ibid.*

To leave no doubt about the relevance of these pronouncements of the Arbitral Tribunal in the Determination of the Maritime Boundary arbitration, the following should be noted. At the time the 1960 Agreement was concluded, France had a territorial sea of three nautical miles. The position of Portugal in this respect is less clear. However, in 1966 Portugal established a contiguous zone of 12 nautical miles, which suggests that Portugal had a territorial sea of less than 12 nautical miles at the time of the 1960 Agreement. At the time of the Arbitral Award both Senegal and Guinea-Bissau had a territorial sea of 12 nautical miles.²⁸¹ This makes the situation between Suriname and Guyana identical to that between Guinea-Bissau and Senegal. In both cases there is a territorial sea boundary that does not have a fixed seaward terminus. The ruling of the arbitral tribunal in the Determination of the Maritime Boundary arbitration indicates that in such a case an extension of the outer limit of the territorial sea results in an extension of the territorial sea boundary between the states concerned.

4.72. Guyana repeatedly argues that it is the modern law of the sea that should inform the Tribunal and this arbitration. Suriname agrees. On that basis, if the 1936 Point was agreed, the boundary of the territorial sea in modern international law was agreed and those waters today extend to the 12-nautical-mile limit.

²⁸¹ Guinea-Bissau established the outer limit of its territorial sea at 12 nautical miles in 1978 (Law No. 3/78 of 19 May 1978), and Senegal established a territorial sea with the same breadth in 1985 (Act No. 85-14 of 25 February 1985), delimiting the territorial sea, the contiguous zone and the continental shelf.