ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

PEOPLE'S REPUBLIC OF BANGLADESH

V.

REPUBLIC OF INDIA

MEMORIAL OF BANGLADESH

VOLUME V
AWARDS AND DECISIONS OF AD HOC TRIBUNALS

31 MAY 2011

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DECISION

President: Mr. Erik CASTREN;

Members of the Court: Mr. Herbert BRIGGS, M. André GROS, Mr. Endre USTOR, Sir Humphrey WALDOCK;

Registrar: M. L. CAFLISCH,

Deputy-Registrar: M. G. MALINVERNI.

In the case concerning the delimitation of the continental shelf *between* the French Republic, represented by:

M. Guy Ladreit de Lacharrière, Minister Plenipotentiary, Director of Legal Affairs in the Ministry of Foreign Affairs, as Agent; M. Giles Chouraqui, Secretary in the Ministry of Foreign Affairs, Office of the Director of Legal Affairs of the Ministry of Foreign Affairs, as Deputy-Agent;[1] assisted by: M. René-Jean Dupuy, Professor of the Faculties of Law, Uni-

[1]Mr. Noël Museux, Legal Counsellor in the Ministry of Foreign Affairs, was appointed Deputy-Agent, commencing on 23 May 1977.

versity of Nice, M. Michel Virally, Professor of the Faculties of Law, University of Paris, M. Daniel Bardonnet, Professor of the Faculties of Law, University of Paris, as Counsel; M. André Guilcher, Professor of Geography in the University of Western Brittany, Brest, M. Félix Hinschberger, Professor of Geography in the University of Caen, M. Guy Pautot, Head of the Scientific Department of the Oceanological Centre of Brittany, Brest, M. Gabriel Turquet de Beauregard, Engineer-General of Mines, Ministry of Industry, M. Jean Hindermeyer, Engineer, Ministry of Industry, M. André Decae, Engineer-General and Geographer, *Institut Géographique National,* M. Jean Denègre, Chief Engineer and Geographer, *Institut Géographique National,* M. Henri Dufour, Chief Engineer and Geographer, *Institut Géographique National,* M. Philippe Houssay, Engineer and Geographer, *Institut Géographique National,* M. André Roubertou, Chief Engineer of Armaments, Hydrographic and Oceanographic Service of the Navy, Captain Guirec Doniol, Secretariat-General of National Defence, M. Marcel Mehl, Superintendent Engineer of the State Geographical and Cartographical Services, Ministry of Foreign Affairs, M. Michel Guyot, Engineer of the State Geographical and Cartographical Services, Ministry of Foreign Affairs, as Expert Advisers;

And the United Kingdom of Great Britain and Northern Ireland, represented by:

The Right Honourable Samuel Silkin, Q.C., M.P., Attorney-General of the United Kingdom, as Leader of the Delegation; Sir Ian Sinclair, K.C.M.G., Legal Adviser to the Foreign and Commonwealth Office, as Agent and Counsel; and Mr. F. D. Berman, Legal Counsellor to the Foreign and Commonwealth Office, as Assistant Agent; assisted by: Mr. C. K. Frossard, Deputy-Bailiff of Guernsey, Mr. V. A. Tomes, Attorney-General of Jersey, Mr. R. Y. Jennings, Q.C., Professor of International Law in the University of Cambridge, Mr. D. W. Bowett, President of Queen's College, Cambridge, as Counsel; Lord McCluskey, Q.C., Solicitor-General for Scotland; and by Sir Peter Kent, D. Sc., Ph.D., F.R.S., Chairman of the Natural Environment Research Council, Commander P. B. Beazley, Office of the Hydrographer, Ministry of Defence, Mr. M. G. de Winton, C.B.E., M.C., Under-Secretary, Law Officers' Department, Mr. Colin Rose, Department of Energy, as Experts and Advisers; and by Mr. E. J. M. Potter, Greffier of the States of Jersey;

THE COURT composed as above, *makes the following Award:*

After an exchange of correspondence and informal contacts which took place in 1964 and 1965, the Parties opened negotiations in October 1970 concerning the delimitation of their respective continental shelves. Since these negotiations, which continued until the beginning of 1974, were unsuccessful, the heads of the two Governments agreed in principle, during discussions held in Paris on 19 July 1974, to submit their dispute to an arbitral tribunal.

For this purpose, the Governments of the French Republic and of the United Kingdom, on 10 July 1975, signed in Paris an Arbitration Agreement in the following terms:

ARBITRATION AGREEMENT SIGNED AT PARIS, 10 JULY 1975

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic,

Considering that agreement in principle has been reached between the two Governments on the delimitation of the portion of the continental shelf in the English Channel eastward of 30 minutes west of the Greenwich Meridian appertaining to each of them;

Considering that differences have arisen between the two Governments concerning the delimitation of the portion of the continental shelf westward of 30 minutes west of that Meridian appertaining to each of them which could not be settled by negotiation;

Considering the urgency of settling these differences by a process of arbitration which should result in a speedy decision on the remaining issues in dispute;

Have agreed as follows:

Article 1

1. The Court of Arbitration (hereinafter called the Court) shall be composed of: Sir Humphrey Waldock, nominated by the United Kingdom Government; Messrs Paul Reuter, nominated by the French Government; Herbert Briggs; Erik Castren; Endre Ustor.

The President of the Court shall be: Mr. Erik Castren.

2. Should the President or any other Member of the Court be or become unable to act, the vacancy shall be filled by a new Member appointed by the Government which nominated the Member to be replaced in the case of the two Members nominated by the United Kingdom and French Governments, or by agreement between the two Governments in the case of the President or the remaining two Members.

Article 2

1. The Court is requested to decide, in accordance with the rules of international law applicable in the matter as between the Parties, the following question:

What is the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, westward of 30 minutes west of the Greenwich Meridian as far as the 1,000 metre isobath?

2. The choice of the 1,000 metre isobath is without prejudice to the position of either Government concerning the outer limit of the continental shelf.

Article 3

1. The Court shall, subject to the provisions of this Agreement, determine its own procedure and all questions affecting the conduct of the arbitration.

2. In the absence of unanimity, the decisions of the Court on all questions, whether of substance or procedure, shall be given by a majority vote of its Members, including all questions relating to the competence of the Court, the interpretation of this Agreement, and the decision on the question specified in Article 2 hereof.

Article 4

1. The Parties shall, within fourteen days of the signature of the present Agreement, each appoint an Agent for the purposes of the arbitration, and shall communicate the name and address of their respective Agents to each other and to the Court.

2. Each Agent so appointed shall be entitled to nominate an Assistant Agent to act for him as occasion may require. The name and address of an Assistant Agent so appointed shall be similarly communicated.

Article 5

The Court shall, after consultation with the two Agents, appoint a Registrar and es-

tablish its seat at a place fixed in agreement with the Parties. Until the seat has been determined the Court may meet at a place provisionally chosen by the President.

Article 6

1. The proceedings shall be written and oral.

2. Without prejudice to any question as to burden of proof, the Parties agree that the written proceedings should consist of:

(*a*) a Memorial to be submitted by each Party not later than six months after signature of the present Agreement;

(*b*) a Counter-Memorial to be submitted by each Party within a time-limit of six months after the exchange of Memorials;

(*c*) any further pleading found by the Court to be necessary.

The Court shall have power to extend the time-limits so fixed at the request of either Party.

3. The Registrar shall notify to the Parties an address for the filing of their written pleadings and other documents.

4. The oral hearing shall follow the written proceedings, and shall be held in private at such place and time as the Court, after consultation with the two Agents, may determine.

5. The Parties may be represented at the oral hearing by their Agents and by such Counsel and advisers as they may appoint.

Article 7

1. The pleadings, written and oral, shall be either in the English or in the French language; the decisions of the Court shall be in both languages.

2. The Court shall, as may be necessary, arrange for translations and interpretations and shall be entitled to engage secretarial and clerical staff, and to make arrangements in respect of accommodation and the purchase or hire of equipment.

Article 8

1. The remuneration of Members of the Court shall be borne equally by the two Governments.

2. The general expenses of the arbitration shall be borne equally by the two Governments, but each Government shall bear its own expenses incurred in or for the preparation and presentation of its case.

Article 9

1. When the proceedings before the Court have been completed, it shall transmit to the two Governments its decision on the question specified in Article 2 of the present Agreement. The decision shall include the drawing of the course of the boundary (or boundaries) on a chart. To this end, the Court shall be entitled to appoint a technical expert or experts to assist it in preparing the chart.

2. The decision shall be fully reasoned.

3. If the decision of the Court does not represent in whole or in part the unanimous opinion of the Members of the Court, any Member shall be entitled to deliver a separate opinion.

4. Any question of the subsequent publication of the proceedings shall be decided by agreement between the two Governments.

Article 10

1. The two Governments agree to accept as final and binding upon them the decision of the Court on the question specified in Article 2 of the present Agreement.

2. Either Party may, within three months of the rendering of the decision, refer to the Court any dispute between the Parties as to the meaning and scope of the decision.

Article 11

1. A Party wishing to carry out, at any time before the Court has rendered its decision on the question specified in Article 2, any activity in a portion of what it considers to be its continental shelf within the area submitted to arbitration shall, subject to the remaining provisions of this Article, obtain the prior consent of the other Party.

2. If such a request for consent is made by one Party the other Party may not withhold its consent for more than one month nor, if it consents within this period, subject its consent to conditions, except on the ground that the proposed activity relates to an area which it intends to claim or might claim as part of its own continental shelf at any stage in the course of the arbitration.

3. The Party withholding consent or subjecting its consent to conditions shall, when notifying the Party making the request, briefly state the grounds upon which it justifies its position.

4. The Party making the request may, if dissatisfied with the justification provided, refer the issue to the Court for a ruling.

5. Without prejudice to paragraph 4, either Party may refer any dispute as to the interpretation or application of this Article to the Court for a ruling.

6. The Court shall give, as soon as possible, a ruling on any issue referred to it pursuant to paragraph 4 or 5, and may order such provisional measures as it considers desirable to protect the interests of either Party.

Article 12

The present Agreement shall enter into force on the date of signature.

In accordance with Article 4 of the Arbitration Agreement, the French Government, on 18 July 1975, appointed M. Guy Ladreit de Lacharrière as its Agent for the case, and the United Kingdom, on 22 July 1975, appointed Sir Ian Sinclair as its Agent.

The Court of Arbitration met first at The Hague on 18 September and 17 November 1975 in the premises of the Permanent Court of Arbitration. Pursuant to an agreement negotiated between the Parties and the Swiss Confederation, the authorities of the Canton and of the City of Geneva having courteously offered their cooperation, the Court then decided that its seat should be in Geneva, in the Palais Eynard. At its meeting on 20 January 1976, it adopted its Rules of Procedure.

M. Paul Reuter having resigned for reasons of health, the French Government, on 6 April 1976, in accordance with Article 1(2) of the Arbitration Agreement, appointed M. André Gros to take his place.

After consulting the Parties, the Court appointed M. Lucius Caflisch as Registrar and M. Georges Malinverni as Deputy-Registrar.

According to Article 6(2) of the Arbitration Agreement, the time-limit for the filing of the Memorials of the Parties was fixed for 10 January 1976 and the time-limit for the filing of the Counter-Memorials for 10 July 1976. By an Order of 6 January 1976, the President of the Court, at the request of the Parties, extended the original time-limits for the filing of the Memorials and Counter-Memorials to 20 January and 20 July 1976, respectively.

A request for an extension of the time-limit for the filing of the United Kingdom's Counter-Memorial was received in the Registry from the Agent of the United Kingdom on 28 June 1976, and no opposition thereto having been expressed by the Agent of the French Republic, the President, by an Order of 5 July 1976, extended that time-limit to 20 August 1976 for both Parties.

On 14 September 1976, the Court made an Order that the Parties should file a Reply by 31 December 1976. It also fixed 26 January 1977 as the date for the opening of the oral proceedings.

The pleadings in the case having been filed within the time-limits thus prescribed, the case was ready for hearing on 31 December 1976.

The Court held twenty-one hearings, from 26 to 28 January, from 31 January to 4 February, from 7 to 10 February, from 16 to 18 February, from 21 to 23 February, and on 26 and 28 February 1977, during which it heard, in the order agreed between the Parties and approved by the Court, the following persons submit oral argument and give expert evidence: M. Ladreit de Lacharrière, Agent, MM. Virally, Bardonnet and Dupuy, Counsel, and MM. Hindermeyer and Mehl, Expert Advisers, on behalf of the Government of the French Republic; and the Right Honourable Samuel Silkin, Attorney-General, Sir Ian Sinclair, Agent and Counsel, MM. Bowett, Jennings and Frossard, Counsel, and Sir Peter Kent and Commander Beazley, Expert Advisers, on behalf of the Government of the United Kingdom.

The Court put certain questions to the Parties on 4, 11 and 23 February 1977. Further questions were addressed by the Court to the Parties after the completion of the oral proceedings on 28 February 1977. A difference of view between the Parties having then revealed itself after this date in regard to the status of Eddystone Rock and its effect on the delimitation of the boundary in the English Channel, the Court asked the Agents to pursue their examination of this question and to inform it as soon as possible whether they had reached any agreement. The Agents having apprised the Registrar of their inability to reach agreement, the Court requested the French Government to submit its observations on the question in writing before 7 April 1977, and the Government of the United Kingdom to submit in writing prior to 30 April 1977 its comments on the observations of the French Government. The observations thus requested by the Court were submitted within the prescribed time-limits, and the Court decided to convoke the Agents on 10 May 1977 to provide explanations on certain points raised by their above-mentioned written observations, communicating to them four questions for this purpose on 4 May 1977. At the sitting of 10 May 1977, the Court heard the Agents on these questions; and, in connexion with the third question, it also put to them a supplementary question the reply to which was received from the two Agents on 12 May 1977.

The Court appointed as Expert Mr. Hans ERMEL, former Director of Nautical Surveys and Charting, Deutsches Hydrographisches Institut, Hamburg. Mr. Ermel entered upon his duties on 4 March 1977.

In the course of the written proceedings, the following Submissions were made by the Parties:

On behalf of the Government of the French Republic, in its Reply:[2]

May it please the Court to adjudge and declare:

A. *Concerning the law applicable:*

1. That the objections raised by the United Kingdom to the reservations which France attached to its accession to the Convention of 29 April, 1958 on the Continental Shelf (hereinafter referred to as "the Convention") reflect a disagreement between the two States on various articles of the Convention;

That the French reservations are in conformity with the provisions of Article 12 of the Convention and consequently fully permissible; that the objections of the United Kingdom are equally valid;

That by reason of the disagreement established as existing between the two States concerning part of the Convention, the latter, in accordance with the international law in force in 1966, the date of the British objections, is not in force between the two States;

2. That France has not, at any time since 14 June 1965, the date of its act of accession, through its conduct or through the statements of its representatives, let it be understood that it has abandoned its reservations or shown, in clear and unequivocal fashion, that it admitted that the Convention was in force between itself and the United Kingdom in all its provisions, including those which had formed the subject of its reservations;

That the United Kingdom could not have been misled on this point; that the United Kingdom has not, moreover, changed its own position;

That the United Kingdom has maintained its objections and still maintains them today, considering that the French reservations are not opposable to it;

That, consequently, the legal obstacles to the entry into force of the Convention between the two States still persist in their entirety;

3. That the rules of international law applicable in this matter between the Parties are the rules of customary law, as stated in particular by the International Court of Justice in the *North Sea Continental Shelf* cases and confirmed by the subsequent practice of States and the work of the Third Conference on the Law of the Sea;

4. That those rules prescribe that the boundary (or boundaries) between the portions of the Continental Shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic respectively westward of 30 minutes west of the Greenwich Meridian and as far as the 1,000-metre isobath must be drawn in conformity with the principle of the natural prolongation of the territories of each of the two States and with the equitable principles towards the elucidation of which the Court contributed in the aforementioned cases;

5. That, in the alternative, if the Convention is in force between the two States, Article 6 thereof, concerning which they are in disagreement, is not applicable between them;

6. That, in the further alternative, if Article 6 of the Convention be applicable as between the two States, there are special circumstances in the Channel Islands sector and in the Atlantic sector that prohibit recourse to the equidistance method.

B. *Concerning the Delimitation*

(a) *In the Channel:*

7. That so far as concerns the Channel sector, where the coasts of the two States are opposite, the median line drawn in relation to the baselines from which the Parties measure the breadth of their territorial sea constitutes an equitable line, having regard to the fact that the two Parties have already agreed as to how that line is to be drawn in the western and eastern parts of the Channel which are submitted to arbitration and it being understood that in the Channel Islands sector this median is to be drawn between the baselines of the French land mass and the British land mass without the islands;

8. That the application of equitable principles to the Channel Islands, having regard to the very particular geographical circumstances in this area; leads to the drawing of a line, which delimits the continental shelf of these islands and the definition of which is as follows:

[2] This translation, and all those which follow, are made by the Registry.

—facing the French coast:

(i) as far as longitude 2°29′ west of the Greenwich Meridian, the median line drawn between, on the one hand, the low-water line and French straight baselines laid down in the Decree of 19 October 1967 and, on the other, the low-water line of the Islands of Alderney, Sark and Jersey, it being understood that no account is to be taken of either the Ecrehos and Minquiers or of the Chausey Islands;

(ii) from longitude 2°29′ west of the Greenwich Meridian towards the open sea, the median line drawn between the low-water line of the Roches Douvres and the low-water line of the islands of Jersey and Guernsey;

—facing the open seas:

(i) around Alderney, Burhou and the Casquets, segments of arcs of circles of six nautical miles in radius, drawn from the low-water lines of these islands or rocks, from the intersection of the arc of the circle of Alderney with the median line between the Cotentin Peninsula and the Channel Islands;

(ii) around Guernsey, segments of arcs of circles of six nautical miles in radius, drawn from the low-water lines of the island of Lihou and of the Hanois;

(iii) in the area situated between the Casquets and Guernsey, the tangent joining the arcs of circles of six nautical miles in radius, drawn from the Casquets and from the island of Lihou;

(iv) in the area situated to the south-west of Guernsey, a straight line drawn from the arc of a circle of six nautical miles in radius, as delimited from the Hanois, until its intersection with the median line, as previously defined, between the Roches Douvres and the Channel Islands;

(b) *In the Atlantic:*

9. That so far as concerns the Atlantic sector, where the coasts of the two States are no longer opposite each other, the natural prolongation of their territories, in the absence of relevant geological factors, must be determined by extending into the Atlantic lines expressing the general direction of their Channel coasts;

That the bisector of the angle formed by these two lines, prolonging the median line in the Channel, delimits in equitable fashion those parts of the continental shelf appertaining to the United Kingdom and the French Republic respectively:

10. That the general direction of the coasts of each State is equitably determined by lines representing such general direction through the elimination of salients and re-entrants and drawn from Dungeness to Guethensbras and from Berneval to Pointe Galaite respectively;

That the line of delimitation in the Atlantic is, in consequence, the bisector E of the angle formed by these two lines, prolonging the median line in the Channel as far as the 1,000 metre isobath.

On behalf of the Government of the United Kingdom of Great Britain and Northern Ireland, in its Counter-Memorial:

May it please the Court to adjudge and declare:

1.A. (*a*) That, neither at the time of the formulation of France's reservations on accession to the Geneva Convention of 1958 on the Continental Shelf nor at the time of the formulation of the United Kingdom's observations on those reservations (nor subsequently), did there exist any rule of international law establishing a presumption (still less an irrebuttable presumption) that, in relation to a treaty containing no provisions regarding reservations, an objection to a reservation precluded the entry into force of the treaty as between the "reserving" and the "objecting" States;

(*b*) that the rules of general international law on the subject of reservations to multilateral conventions (which in this respect have remained unchanged since the relevant time) require effect to be given in the first instance to the particular régime for reservations contained in the text of the treaty in question; that is to say, in the particular case of the 1958 Convention, Article 12 of the said Convention, which expressly permits reservations to be made to articles thereof other than Articles 1 to 3 inclusive;

(c) that, to the extent that the legal effect of the French Reservations to the 1958 Convention is not specifically provided for by the terms of the said Article 12, the legal effect of the said reservations and of the United Kingdom's observations thereon is determined on the basis of the intention underlying the United Kingdom's observations inferred from the terms thereof and from the surrounding circumstances;

(d) that the clear and unmistakable intention underlying the observations of the United Kingdom on the said French reservations was not to preclude the establishment, or deny the existence of, treaty relations with France on the basis of the 1958 Convention including Article 6 thereof;

(e) that France is, in any event, precluded by her subsequent conduct from denying the applicability of the 1958 Convention as a whole, including Article 6 thereof, as between the United Kingdom and France;

(f) that accordingly the 1958 Convention is in its entirety a treaty in force between the United Kingdom and France.

B. In the alternative, should the Court find, on the basis of Article 12 of the 1958 Convention, that the French reservations to Articles 4 *et seq.* of the said Convention were *ipso jure* effective from the date of France's accession to the 1958 Convention as against all other States parties to that Convention, including the United Kingdom:

(a) that the particular "reservations" to Article 6 of the said Convention, on which France relies in her Memorial submitted to the Court on 20 January 1976, are not true reservations in the sense in which that term is understood in international law, or, to the extent that they are true reservations, are not permissible reservations to the said Article 6;

(b) that the said "reservations" did not have as their object and purpose to exclude Article 6 of the Convention in general, or in its application to the area submitted to the present Arbitration in particular;

(c) that in any event to give effect to any or all of the said "reservations" in accordance with their express terms would have a minimal practical effect in the circumstances of the present Arbitration.

2. *(a)* The delimitations of the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, in the area comprised in the question submitted to the Court under Article 2 of the Arbitration Agreement is governed by the provisions of Article 1 and paragraph 1 of Article 6 of the said Convention, which constitute the rules of international law applicable between the Parties in the matter.

(b) The French "reservations" to Article 6 of the said Convention not being opposable to the United Kingdom, the said Article applies as between the Parties without any modification;

(c) in the alternative, should the Court find that the said "reservations", to the extent that they are true, permissible reservations to that Article, took effect *ipso jure* against the United Kingdom, the said "reservations", even on their most adverse interpretation, would not affect the course of the boundary (or boundaries) upon which the Court is required to decide in accordance with Article 2 of the Arbitration Agreement.

(d) The terms and the manifest intention of the said Article 6 render paragraph 1 thereof applicable to the entire area comprised in the question submitted to the Court under Article 2 of the Arbitration Agreement, since:

(i) the entire area is part of the same continental shelf and is adjacent to the coasts of the United Kingdom and the Channel Islands and France, respectively;

(ii) the coasts of the United Kingdom and France in that area and of the Channel Islands and France are indubitably opposite one another;

(iii) the said Article 6 was in any event intended to cover all questions of the delimitation of the continental shelf arising between immediately neighbouring States;

(iv) for the purposes of the present Arbitration, the entire area falls or must be deemed to fall within the terms of Article 1 of the 1958 Convention.

3. *(a)* Accordingly, the Parties having concluded that the delimitation westward of 30 minutes west of the Greenwich Meridian as far as the 1,000 metre isobath cannot be

effected by agreement between them, the applicable rule is that the boundary line in that entire area, as determined by the said paragraph 1 of Article 6, is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea is measured, unless another boundary line is justified by special circumstances.

(b) In so far as it is open to France to claim the existence of special circumstances justifying another boundary in that part of the area lying to the west of approximately 5 degrees 45 minutes west of the Greenwich Meridian, France has not discharged the *onus* of showing that the circumstances of the area constitute special circumstances within the meaning of the said Article 6, nor that they justify a boundary line other than the median line defined above.

(c) France has failed to show what meaning is to be attributed to the geographical expression "baie de Granville" as used in her "reservations" and, neither in relation to the area comprised in that expression (whatever it may be) nor in relation to the area of the Channel Islands as a whole, has France discharged the *onus* of showing that the circumstances constitute special circumstances within the meaning of the said Article 6, nor that they justify a boundary line other than the median line defined above.

(d) The boundary line in the entire area is accordingly the median line as defined above, which is to be measured—

(i) in relation to the United Kingdom, from the established baselines and bay-closing lines on the south coast of England, including the Scilly Isles and all other islands and relevant low-tide elevations, all such baselines being established in fact and in law as the baselines from which the territorial sea of the United Kingdom in the area is measured;

(ii) in relation to the Channel Islands, from the established baselines on all the islands, including the groups known as the Casquets, the Ecrehos and the Minquiers and all relevant low-tide elevations, all such baselines being established in fact and in law as the baselines from which the territorial sea of the Channel Islands is measured;

(iii) in relation to France, from the low water line along the north coast of France, including Ushant, the Iles Chausey and the group known as the Roches Douvres and all relevant low-tide elevations, and including lawful bay-closing lines, but excluding the baselines proclaimed by the Decree of 19 October 1967 and especially the line across the Anse de Vauville, which is not a bay in international law.

The line thus constructed is illustrated on Map 4 at Appendix C(5) to the United Kingdom Memorial.

4. In the alternative, should the Court find that the boundary line in the entire area or in any part of it is to be determined by customary or general international law, the rule is that the boundary line is to be drawn in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute the natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.

5. Accordingly:

(a) given the essential geological continuity of the continental shelf throughout the entire area, it can in principle be claimed by both Parties as constituting the natural prolongation of their land territories into and under the sea, and in the absence of agreement can therefore, in law, only be delimited by means of a median line;

(b) no rule of international law requires the displacement of the median line by another boundary line, since the median line, which faithfully reflects the geographical configuration of the coasts of the two States in relation to the sea, produces a result which accords with equitable principles and one which is in no way extraordinary, unnatural or unreasonable as leaving to either State areas of seabed which are uniquely part of the natural prolongation of the land territory of the other; in particular, there is no basis in law nor any objective validity for the drawing of any boundary in the South-Western Approaches

consisting of a modified "median line" constructed by means of an arbitrary revision of the baselines from which it is to be measured.

6. In the further alternative, should the Court decide that, in certain parts of the said area, there exists a major and persistent structural discontinuity of the seabed and subsoil of such a nature as to interrupt the essential geological continuity of the continental shelf and thereby to indicate the limits of those parts of the continental shelf that constitute a natural prolongation of the land territory of the United Kingdom and those parts of the continental shelf that constitute a natural prolongation of the land territory of France, the rule of international law is that the boundary line should be drawn along the axis of this structural discontinuity; this boundary line is more fully described in paragraphs 235 to 238 and 261 of the United Kingdom Memorial and is illustrated on Map 3 at Appendix C(4) hereto.

During the oral proceedings the following Submissions were made by the Parties:

On behalf of the Government of the French Republic, on 2 February 1977:

May it please the Court to adjudge and declare:

A. *Concerning the law applicable*

1. That the objections raised by the United Kingdom to the reservations which France attached to its accession to the Convention of 29 April 1958 on the Continental Shelf (hereinafter referred to as "the Convention") reflects a disagreement between the two States on several articles of the Convention;

That the French reservations are in conformity with the provisions of Article 12 of the Convention and consequently fully permissible; that the objections of the United Kingdom are equally valid;

That by reason of the disagreement established as existing between the two States concerning part of the Convention, the latter, in accordance with the international law in force in 1966, the date of the British objections, is not in force between the two States;

2. That France has not, at any time since 14 June 1965, the date of its act of accession, through its conduct or through the statements of its representatives, let it be understood that it has abandoned its reservations or shown, in clear and unequivocal fashion, that it admitted that the Convention was in force between itself and the United Kingdom in all its provisions, including those which had formed the subject of its reservations;

That the United Kingdom could not have been misled on this point; that the United Kingdom has not, moreover, changed its own position;

That the United Kingdom has maintained its objections and still maintains them today, considering that the French reservations are not opposable to it;

That, consequently, the legal obstacles to the entry into force of the Convention between the two States still persist in their entirety;

3. That the recent development of customary law, which was stimulated particularly by the work of the United Nations, the reactions on the part of Governments to this work, the discussions and negotiations at the Third Conference on the Law of the Sea, and the endorsement of this development in the practice of States with respect to economic zones and fishing zones of 200 miles, have rendered the 1958 Conventions obsolete;

4. That the situation of the continental shelf in the Atlantic sector in any event falls outside the scope of paragraphs 1 and 2 of Article 6 of the Convention;

5. That the rules of international law applicable in this matter between the Parties are the rules of customary law, as stated in particular by the International Court of Justice in the North Sea Continental Shelf cases and confirmed by the subsequent practice of States and the work of the Third Conference on the Law of the Sea;

6. That those rules prescribe that the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, westward of 30 minutes west of the Greenwich Meridian and as far as the 1,000 metre isobath must be drawn in conformity with the principle of

the natural prolongation of the territories of each of the two States and with the equitable principles to the elucidation of which the Court contributed in the aforementioned cases;

7. That, in the alternative if the Convention is in force between the two States, Article 6 thereof, concerning which they are in disagreement, is not applicable as between them;

8. That, in the further alternative, if Article 6 of the Convention be applicable as between the two States:

(*a*) there are special circumstances in the Channel Islands sector which justify a delimitation other than that which would result from application of the principle of equidistance;

(*b*) the Atlantic sector falls outside the scope of paragraphs 1 and 2 of Article 6;

(*c*) alternatively there are special circumstances in the Atlantic sector which justify a delimitation other than that which would result from application of the principle of equidistance.

B. *Concerning the Delimitation*

(a) *In the Channel:*

9. So far as concerns the Channel sector, where the coasts of the two States are opposite, the median line drawn by reference to the baselines from which the Parties measure the breadth of their territorial sea constitutes an equitable line having regard to the fact that the two Parties have already agreed as to how that line is to be drawn in the western and eastern parts of the Channel which are submitted to arbitration and it being understood that in the Channel Islands sector this median is to be drawn between the baselines of the French land mass and the British land mass without the islands.

10. That the application of equitable principles to the Channel Islands, having regard to the very particular geographical circumstances in this area, lead to the drawing of a line, which delimits the continental shelf of these islands and the definition of which is as follows:

—facing the French coast:

(i) as far as longitude 2°29′ west of the Greenwich Meridian, the median line drawn between, on the one hand, the low-water line and French baselines laid down in the Decree of 19 October 1967 and, on the other, the low-water mark of the Islands of Alderney, Sark and Jersey, it being understood that no account is to be taken of either the Ecrehos and Minquiers or of the Chausey Islands;

(ii) from longitude 2°29′ west of the Greenwich Meridian towards the open sea, the median line drawn between the low-water line of the Roches Douvres and the low-water line of the islands of Jersey and Guernsey;

—facing the open seas:

(i) around Alderney, Burhou and the Casquets, segments of arcs of circles of six nautical miles in radius, drawn from the low-water lines of these islands or rocks, from the intersection of the arc of the circle of Alderney with the median line between the Cotentin Peninsula and the Channel Islands;

(ii) around Guernsey, segments of arcs of circles of six nautical miles in radius, drawn from the low-water lines of the island of Lihou and of the Hanois;

(iii) in the area situated between the Casquets and Guernsey, the tangent joining the arcs of circles of six nautical miles in radius, drawn from the Casquets and from the island of Lihou;

(iv) in the area situated to the south-west of Guernsey, a straight line drawn from the arc of a circle of six nautical miles in radius, as it was drawn from the Hanois, until its intersection with the median line, as previously defined, between the Roches Douvres and the Channel Islands;

(b) *In the Atlantic:*

11. That so far as concerns the Atlantic sector, where the coasts of the two States are no longer opposite each other, the natural prolongation of their territories, in the absence of relevant geological factors, must be determined by prolonging into the Atlantic lines expressing the general direction of their Channel coasts;

That the bisector of the angle formed by these two lines, extending the median line in the Channel, delimits in equitable fashion those parts of the continental shelf appertaining to the United Kingdom and the French Republic, respectively;

12. That the general direction of the coasts of each State is equitably determined by lines representing such general direction through the elimination of salients and re-entrants drawn from Dungeness to Guethenbras and from Berneval to Pointe Galaite, respectively;

That the line of delimitation in the Atlantic is, in consequence, the bisector E of the angle formed by these two lines, prolonging the median line in the Channel as far as the 1,000 metre isobath.

On behalf of the Government of the United Kingdom of Great Britain and Northern Ireland, on 9 February 1977:

May it please the Court to adjudge and declare:

1.A. (*a*) That, neither at the time of the formulation of France's reservations on accession to the Geneva Convention of 1958 on the Continental Shelf nor at the time of the formulation of the United Kingdom's observations on those reservations (nor subsequently) did there exist any rule of international law establishing a presumption (still less an irrebuttable presumption) that, in relation to a treaty containing no provisions regarding observations, an objection to a reservation precluded the entry into force of the treaty as between the "reserving" and the "objecting" States;

(*b*) that the rules of general international law on the subject of reservations to multilateral conventions (which in this respect have remained unchanged since the relevant time) require effect to be given in the first instance to the particular régime for reservations contained in the text of the treaty in question; that is to say, in the particular case of the 1958 Convention, Article 12 of the said Convention, which expressly permits reservations to be made to articles thereof other than to Articles 1 to 3 inclusive;

(*c*) that, to the extent that the legal effect of the French reservations to the 1958 Convention is not specifically provided for by the terms of the said Article 12, the legal effect of the said reservations and of the United Kingdom's observations thereon is determined on the basis of the intention underlying the United Kingdom's observations inferred from the terms thereof and from the surrounding circumstances;

(*d*) that the clear and unmistakable intention underlying the observations of the United Kingdom on the said French reservations was not to preclude the establishment, or deny the existence of, treaty relations with France on the basis of the 1958 Convention including Article 6 thereof;

(*e*) that the course of conduct followed by France in her relations with the United Kingdom between 1966 and the date of signature of the Arbitration Agreement constitutes a continuing recognition and acknowledgement that the 1958 Convention, including Article 6, is a treaty in force between the two States; that this continuing recognition and acknowledgement was given in circumstances where France was in good faith bound to have denied that this was the case had that been her true position; and that, the French argument before the Court being fundamentally inconsistent with that course of conduct, the Court ought to hold France to the legal position reflected in her conduct and reject the inconsistent argument now adduced;

(*f*) that accordingly the 1958 Convention is in its entirety a treaty in force between the United Kingdom and France, and has not been abandoned by the Parties in their mutual relations nor rendered obsolete by subsequent developments in customary law.

B. In the alternative, should the Court find, on the basis of Article 12 of the 1958 Convention, that the French reservations to Articles 4 *et seq.* of the said Convention were *ipso jure* effective from the date of France's accession to the 1958 Convention as against all other States parties to that Convention, including the United Kingdom:

(*a*) that the particular "reservations" to Article 6 of the said Convention, on which France relies in her Memorial submitted to the Court on 20 January 1976, are not true reservations in the sense in which that term is understood in international law, or, to the extent that they are true reservations, are not permissible reservations to the said Article 6;

(*b*) that the said "reservations" did not have as their object and purpose to exclude

Article 6 of the Convention in general, or in its application to the area submitted to the present Arbitration in particular;

(*c*) that in any event to give effect to any or all of the said "reservations" in accordance with their express terms would have a minimal practical effect in the circumstances of the present Arbitration.

2. (*a*) The delimitation of the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, in the area comprised in the question submitted to the Court under Article 2 of the Arbitration Agreement is governed by the provisions of Article 1 and of paragraph 1 of Article 6 of the said Convention, which constitute the rules of international law applicable between the Parties in the matter.

(*b*) The French "reservations" to Article 6 of the said Convention not being opposable to the United Kingdom, the said Article applies as between the Parties without any modification;

(*c*) in the alternative, should the Court find that the said "reservations", to the extent that they are true, permissible reservations to that Article, took effect *ipso jure* against the United Kingdom, the said "reservations", even on their most adverse interpretation, would not affect the course of the boundary (or boundaries) upon which the Court is required to decide in accordance with Article 2 of the Arbitration Agreement.

(*d*) The terms and the manifest intention of the said Article 6 render paragraph 1 thereof applicable to the entire area comprised in the question submitted to the Court under Article 2 of the Arbitration Agreement, since:

(i) the entire area is part of the same continental shelf and is adjacent to the coasts of the United Kingdom and the Channel Islands and France, respectively;

(ii) the coasts of the United Kingdom and France in that area and of the Channel Islands and France are indubitably opposite one another;

(iii) the said Article 6 was in any event intended to cover all questions of the delimitation of the continental shelf arising between immediately neighbouring States;

(iv) for the purposes of the present Arbitration, the entire area falls or must be deemed to fall within the terms of Article 1 of the 1958 Convention.

3. (*a*) Accordingly, the Parties having concluded that the delimitation westward of 30 minutes west of the Greenwich Meridian as far as the 1000 metre isobath cannot be effected by agreement between them, the applicable rule is that the boundary line in that entire area, as determined by the said paragraph 1 of Article 6, is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea is measured, unless another boundary line is justified by special circumstances.

(*b*) In so far as it is open to France to claim the existence of special circumstances justifying another boundary in that part of the area lying to the west of approximately 5 degrees 45 minutes west of the Greenwich Meridian, France has not discharged the *onus* of showing that the circumstances of the area constitute special circumstances within the meaning of the said Article 6, nor that they justify a boundary line other than the median line defined above.

(*c*) France has failed to show what meaning is to be attributed to the geographical expression "baie de Granville" as used in her "reservations" and, neither in relation to the area comprised in that expression (whatever it may be) nor in relation to the area of the Channel Islands as a whole, has France discharged the *onus* of showing that the circumstances constitute special circumstances within the meaning of the said Article 6, nor that they justify a boundary line other than the median line defined above.

(*d*) The boundary line in the entire area is accordingly the median line as defined above, which is to be measured:

(i) in relation to the United Kingdom, from the established baselines and bay-closing lines on the south coast of England, including the Scilly Isles and all other islands and relevant low-tide elevations, all such baselines being established in fact and in law as the baselines from which the territorial sea of the United Kingdom in the area is measured.

(ii) in relation to the Channel Islands, from the established baselines on all the islands, including the groups known as the Casquets, the Ecrehos and the Minquiers and all relevant low-tide elevations, all such baselines being established in fact and in law as the baselines from which the territorial sea of the Channel Islands is measured;

(iii) in relation to France, from the low water line along the North coast of France, including Ushant, the Iles Chausey and the group known as the Roches Douvres and all relevant low-tide elevations, and including lawful bay-closing lines, but excluding the baselines proclaimed by the Decree of 19 October 1967 and especially the line across the Anse de Vauville, which is not a bay in international law.

The line thus constructed is illustrated on Map 4 at Appendix C(5) to the United Kingdom Memorial.

4. In the alternative, should the Court find that the boundary line in the entire area or in any part of it is to be determined by customary or general international law, the rule is that the boundary line is to be drawn in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute the natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.

5. Accordingly:

(*a*) given the essential geological continuity of the continental shelf throughout the entire area, it can in principle be claimed by both Parties as constituting the natural prolongation of their land territories into and under the sea, and in the absence of agreement can therefore, in law, only be delimited by means of a median line;

(*b*) no rule of international law requires the displacement of the median line by another boundary line, since the median line, which faithfully reflects the geographical configuration of the coasts of the two States in relation to the sea, produces a result which accords with equitable principles and one which is in no way extraordinary, unnatural or unreasonable as leaving to either State areas of seabed which are uniquely part of the natural prolongation of the land territory of the other; in particular, there is no basis in law nor any objective validity for the drawing of any boundary in the South-Western Approaches consisting of a modified "median line" constructed by means of an arbitrary revision of the baselines from which it is to be measured.

6. In the further alternative, should the Court decide that, in certain parts of the said area, there exists a major and persistent structural discontinuity of the seabed and subsoil of such a nature as to interrupt the essential geological continuity of the continental shelf and thereby to indicate the limits of those parts of the continential shelf that constitute a natural prolongation of the land territory of the United Kingdom and those parts of the continental shelf that constitute a natural prolongation of the land territory of France, the rule of international law is that the boundary line should be drawn along the axis of this structural discontinuity; this boundary line is more fully described in paragraphs 235 to 238 and 261 of the United Kingdom Memorial and is illustrated on Map 3 at Appendix C(4) thereto.

1. The Parties, by the Arbitration Agreement concluded by them on 10 July 1975, have submitted to this Court certain differences concerning the delimitation of the portions of the continental shelf appertaining to each of them westward of 30′ west of the Greenwich Meridian which could not be settled by negotiation. In order to settle these differences by arbitration, the Parties have requested the Court to decide, in accordance with the rules of international law applicable in the matter as between them, the following question:

What is the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, westward of 30 minutes west of the Greenwich Meridian as far as the 1,000 metre isobath?

They have further specified, by Article 9, paragraph 1, of the Arbitration Agreement, that the Court's decision is to include "the drawing of the course of the boundary (or boundaries) on a chart".

2. The area of continental shelf with which the Court is concerned in the present arbitration (hereafter for convenience termed the "arbitration area") forms part of the continental shelf of North-West Europe, which extends over the submarine areas of the North Sea and English Channel (La Manche)[3] and of all the waters lying westwards of France and the United Kingdom as far as the furthest limits of the continental shelf in the Atlantic ocean. The arbitration area itself comprises the continental shelf of the Channel westward of 30′ west of Greenwich, and the portions of the continental shelf appertaining to France and the United Kingdom in the Atlantic region immediately to the westward of the Channel as far as the 1,000-metre isobath. The continental shelf of this area, as the information before the Court clearly shows and both Parties have stressed in their pleadings, is characterized by the essential continuity of its geological structure.

3. The English Channel stretches westwards from the Straits of Dover (Pas de Calais) in a south-westerly and then in a west-south-westerly direction, separating the south coast of Great Britain from the north coast of France over a distance of some 300 nautical miles. The width of the Channel varies from about 18 nautical miles at the narrowest point of the Straits of Dover to some 100 nautical miles at its western entrances; its average depth similarly increases gradually from about 35 metres at its eastern entrance to about 100 metres where it begins to open into the Atlantic. On the United Kingdom side, the coastline follows a relatively regular west-south-westerly course, marked only by a number of more prominent headlands, notably Dungeness, Beachy Head, Selsey Bill, St. Catherine's Point on the Isle of Wight, Portland Bill, Start Point, the Lizard and Guethensbras at Land's End. It is also for most of its length free of islands, the only considerable ones being the Isle of Wight and the Isles of Scilly.

4. The Isle of Wight, lying at the entrance to the Port of Southampton, is divided from the mainland only by narrow passages and may be said to be comprised within the coastline of the mainland itself. The Scilly Isles, on the other hand, at their nearest point lie some 21 nautical miles westward of Land's End, the westerly extremity of the English mainland, while their furthest point is some 31 nautical miles distant. Channels of up to 60 and 70 metres depth separate the Scillies from the mainland, and between them and the mainland are to be found only the Seven Stones, a group of rocks which submerge at high tide, the Wolf Rock and the Longships. On the other hand, it is common ground between the Parties that, although some distance from the mainland, the Scilly Isles are geologically a natural prolongation of the Cornish peninsula and an integral part of the land mass of the United Kingdom. The Scillies group consists of 48 islands, six of which are inhabited with a total population of 2,428 in the census of 1971. The Eddystone

[3] In general, English terminology will be used for geographical features in the English text of the award, and French terminology in the French text.

Rocks, situated in the approaches to the Port of Plymouth, also require mention because of a difference between the Parties as to their significance for the delimitation of the median line in this part of the English Channel. These rocks, on one of which stands the 51.2 metres granite tower of Eddystone Lighthouse, lie eight nautical miles to the southward of Rame Head on the English coast.

5. On the French side of the English Channel the coastline follows a less regular course. From the Straits of Dover, it runs almost due south before turning in a south-westerly direction into the wide Baie de Seine. Thence it turns northwards again for some 30 nautical miles along the east side of the Cherbourg peninsula (le Cotentin) to Pointe de Barfleur from which it runs a similar distance due westwards to Cap de la Hague, the north-western extremity of that peninsula. From the Cap de la Hague the coastline reverses its course sharply to the south-south-east along the west side of the Cherbourg peninsula for a distance of some 60 nautical miles before turning once more westwards at a right-angle to form the gulf termed by the French Government in its pleadings the "Golfe breton-normand". Thereafter, it continues, with a slight west-south-westerly trend to the extremity of the Brest peninsula whence it turns due south to form the broken western coastline of that peninsula. Eastwards of the Cherbourg peninsula the coastline may, for all practical purposes, be described as free of islands. The west coast of the peninsula, however, and the whole coastline westwards to the Atlantic are heavily encrusted with islands, islets and rocks; and in two areas these require to be further described, namely, the Golfe breton-normand and the west coast of the Brest peninsula.

6. In the Golfe breton-normand, that is in the rectangular gulf formed by the coasts of Normandy and Brittany, lies the Channel Islands archipelago, a dependency of the Crown of the United Kingdom. The principal islands are Jersey, Guernsey, Alderney, Sark, Herm and Jethou and there is also a great number of rocks and islets some of which are inhabited. These islands, islets and rocks fall into four main groups:

(1) The northerly Alderney group, consisting of Alderney, Burhou, Ortac, the Casquets, and numerous other islets, lies due west and no more than eight nautical miles distant from Cap de la Hague on the Normandy coast.

(2) The westerly Guernsey group, which is situated furthest from the French coast, comprises Guernsey, Sark, Herm and Jethou together with a few islets.

(3) The Jersey group, consisting of Jersey itself, the Ecrehos and some other clusters of islets and rocks, lies to the south-east of the second group and is separated from the French mainland only by the narrow sea-passages known as La Déroute. The most easterly point of the Ecrehos, it may be added, is no more than 6.6 nautical miles distant from Cap de Carteret on the Normandy coast.

(4) The Minquiers group, composed of numerous islets and rocks, is situated some ten miles due south of Jersey and about 16 miles to the north

of Pointe de Meinga on the north coast of Brittany and only eight miles from the Iles Chausey.

7. The total land area of the four groups is approximately 195 square kilometres and their total population about 130,000. They are divided for governmental purposes into two Bailiwicks, the northerly and westerly groups constituting the Bailiwick of Guernsey, and the Jersey and Minquiers groups the Bailiwick of Jersey. Each Bailiwick has its own legislative Assembly, fiscal and legal systems, courts of law and systems of local administration; but responsibility for foreign relations and external defence is assumed by the United Kingdom. Alderney and the Casquets in the northerly group are distant about 49 miles from Portland Bill, the nearest point on the south coast of England.

8. In the sea-passages situated between the Channel Islands archipelago and the coasts of Normandy and Brittany there are also to be found numerous islets and rocks appertaining to France. This is the case particularly in the waters lying between the Jersey and Minquiers groups and the coast of Normandy from Cap de Carteret southwards to the Baie du Mont St. Michel and westwards from that bay along the coast of Brittany to Les Héaux de Bréhat. In these waters clusters of islets and rocks, such as the Plateau des Trois Grunes, the Chaussée des Boeufs, Iles Chausey, the Grand Léjon and the Roches Douvres, reach out from the French coast, narrowing the waters which separate the Channel Islands from France.

9. Geologically, the Channel Islands archipelago and the seabed and subsoil of the Golfe breton-normand form part of the same armorican structure as the land mass of Normandy and Brittany. This gulf is characterized by the same essential geological continuity as the rest of the English Channel, but the geomorphology of the Channel is here marked by a distinct fault, known as the Hurd Deep (Fosse Centrale). Situated a few nautical miles to the north and north-west of the Alderney and Guernsey groups, that fault or series of faults extends in a south-westerly direction for a distance of some 80 nautical miles, with a width of between one and three nautical miles and a depth of over 100 metres.

10. Off the west face of the Brest peninsula lies Ushant, about ten nautical miles from the mainland, while the Pointe de Pern, the most westerly point both of this island and of France, is situated some 14.1 nautical miles distant from the mainland. The island is fringed with rocks and shoals, and numerous clusters of islets, rocks and shoals stretch across the sea passages that separate it from the mainland. Ushant, which is inhabited with a population of some 2,500, is included in the Department of Finistère.

11. In the Atlantic region, as already indicated, the essential geological continuity of the continental shelf is maintained out to the limits of the arbitration area at the 1,000-metre isobath. The depth of the superjacent waters remains comparatively shallow until it reaches the 200-metre isobath when it descends steeply to 1,000 metres, the average distance between the 200- and 1,000-metre isobath being no more than about ten nautical miles. The contour of the 1,000-metre isobath, if its local meanderings are disregarded, runs from the Gulf of Gascony steadily in a north-westerly direction

until about 12° west of Greenwich where it turns due north to pass to seaward of the west coast of the Republic of Ireland. Its distance from Ushant, taken in a south-westerly direction from the island, is approximately 160 nautical miles, and its distance from the Scilly Isles, again taken in this general south-westerly direction, approximately 180 nautical miles.

12. The information before the Court indicates the presence in the Atlantic region of certain geological faults or groups of faults in the structure of the continental shelf to the west of the Ushant-Scillies line. A series of such faults, which follow the same general south-westerly trend as the English Channel, is to be found in the Atlantic region as far as 6°30′ west of Greenwich and others, with a more southerly trend, extend almost as far as the 1,000-metre isobath. The Parties are in accord as to the existence of the faults in the geological structure of this region, and as to their general south-westerly trend. They are also at one in considering that the faults do not detract from the essential geological continuity of the continental shelf. They are not, however, in agreement as to the sufficiency of the scientific information regarding the geological features in question or as to its correct interpretation; nor are they agreed as to the significance of the faults in relation to the geology and geomorphology of the shelf. The French Government considers the faults to constitute, at most, minor and disconnected rifts in the structure of the shelf and is unable to see in them any coherent or continuous fault zone. The United Kingdom Government, on the contrary, considers these geological features, which it denominates the Hurd Deep Fault Zone, to establish the existence of a major and persistent rift in the structure of the shelf constituting a prolongation of the Hurd Deep into the Atlantic region. These differences between the Parties relate to the alternative and subsidiary Submission put forward by the United Kingdom that if a continuous median line should not be adopted as the boundary throughout the arbitration area, the Hurd Deep and Hurd Deep Fault Zone provide the only appropriate dividing line between the natural prolongations of the continental shelves of each country. The Court, for reasons given later in this Decision, does not find it necessary to resolve the differences between the Parties concerning the character and the significance of the geological faults of the continental shelf. The Court, therefore, finds it unnecessary here to set out in detail the facts and evidence placed before it regarding these faults.

13. The task entrusted to the Court by Article 2(1) of the Arbitration Agreement is to decide "what is the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic" within the arbitration area. The preamble to the Agreement likewise speaks of differences "between the two Governments concerning the delimitation of the portion of the continental shelf . . . appertaining to each of them which could not be settled by negotiation". It is, therefore, clear that the competence conferred on the Court by Article 2(1) of the Agreement relates specifically to the delimitation in the arbitration area of the boundary of the continental shelf. Moreover, the term "continental shelf", as used in international law at the date of the conclusion of the Arbitration Agreement, was a legal term denoting only "the seabed and subsoil of the submarine

areas adjacent to the coast but outside the area of the territorial sea'' (Geneva Convention of 1958 on the Continental Shelf, Article 1). It follows, in the opinion of the Court, that the Arbitration Agreement does not confer upon it any competence to settle differences between the Parties regarding the boundary of their respective zones of territorial sea or of their respective fishery zones, and still less to pronounce upon the boundary of the Economic Zone declared by the French Republic in a law of 16 July 1976.

14. The Parties, in their written and oral pleadings, have addressed arguments to the Court regarding the delimitation of a ''continental shelf'' boundary between them in the sea passages situated between, on the one hand, the Channel Islands and, on the other, the coasts of Normandy and Brittany. However, the narrowness and rock-strewn character of these sea passages, which the Court has already described, brings into question its competence to make any such delimitation in the area in question. Although the United Kingdom at present claims only a three-mile territorial sea around the Channel Islands, the French Republic has established a 12-mile territorial sea off all its coasts, including those of Normandy and Brittany. Again, the United Kingdom claims, and has claimed before the Court, the right to extend its three-mile territorial sea to one of 12 miles; and it already has a 12-mile fishery limit around the Channel Islands, established in conformity with the European Fisheries Convention of 9 March 1964. To this has to be added the fact that many of the French and British islets and rocks scattered along the sea passages provide possible base-points for advancing seawards the limits established or claimed by each Party. As a result, the ''continental shelf'' boundary which the Parties invite the Court to delimit in the areas between the Channel Islands and the coasts of Normandy and Brittany must traverse over almost its whole length waters either claimed by France as part of its territorial sea or by the United Kingdom as part of its actual or potential territorial sea and of its existing fishery zone.

15. Moreover, although the Parties are agreed that the boundary should, in principle, be the median line in these areas where the coasts of the Channel Islands and those of Normandy and Brittany are opposite each other, the median line boundaries which they propose by no means coincide. On the contrary, the boundaries diverge in a number of places, and these divergencies reflect unresolved differences regarding the conformity with international law of the use of this or that base-point by one or other Party. The United Kingdom, for example, contests the French Republic's use of a straight baseline across the Anse de Vauville, while the French Republic challenges the United Kingdom's use of the Ecrehos and Minquiers groups as base-points for the median line. Again, if the Minquiers are not accepted as constituting a base-point, the United Kingdom challenges the legitimacy of the French Republic's use of the Roches Douvres; and if the Minquiers are used as a base-point, the French Republic asserts a right to the use of the Chausey group for delimiting the median line.

16. Consequently, it is clear that, in order to delimit any form of seabed and subsoil boundary between the Channel Islands archipelago and the coasts of Normandy and Brittany, the Court would have to decide a number

of questions in dispute between the Parties regarding the delimitation of the territorial sea of one or other country. This being so, at the hearing of 4 February 1977 the Court drew the attention of the Parties to the terms of Article 2(1) of the Arbitration Agreement and put to them the following question:

> What, if any, functions and powers are to be considered as having been conferred upon the Court by Article 2(1) with respect to the delimitation of the boundary in areas of seabed and subsoil which certainly form part of the territorial sea of one or other Party or in regard to which there is a difference between the Parties regarding their status as territorial sea or continental shelf?

17. Replying to this question at the hearing of 16 February 1977, the Agent for the French Republic stated:

> As regards the connexion between the Court's mandate and the delimitation of the territorial waters of the Parties in the area under consideration, the French Government holds the view that, as presently defined, the Court's mandate extends only to the delimitation of the continental shelf, and that shelf can begin only where the seabed and subsoil of the territorial sea end.
>
> The Court can thus delimit the continental shelf only if the boundary line is located beyond the limits of the bed of the territorial sea of one of the Parties or coincides with those limits.

After analysing the position of the Parties in the successive sectors of the boundary proposed by each Party, the French Agent concluded:

> It is consequently possible that the competence of the Court will be denied by one or the other Party, in at least an important portion of the area located between the Channel Islands, on the one hand, and the coasts of Normandy and Brittany on the other.

At the final hearing of the Court on 28 February 1977, and in response to a further question from the Court, the French Agent formally confirmed his previous statement; and he further indicated that, as the territorial sea forms part of French national territory, any extension of the Court's mandate with respect to the territorial sea would require reference to his Government.

18. The reply of the United Kingdom Agent, given at the hearing of 21 February 1977, and confirmed at the final hearing of the Court on 28 February 1977, was in the following terms:

> The view of the United Kingdom is that the Court is empowered, under Article 2(1) of the Arbitration Agreement, to determine the course of the continental shelf boundary throughout the entire arbitration area. In relation to that part of the area which is the subject of the Court's question:
>
> (i) By reason of the fact that at present the United Kingdom claims a territorial sea only three miles in breadth around the Channel Islands, the boundary claimed by the United Kingdom is throughout (with the exception of one small segment off the Ecrehos, . . .) the boundary of the continental shelf adjacent to the Channel Islands;
>
> (ii) Although this boundary, or parts of it, may be, from the point of view of France, the boundary of their territorial sea, the Court is, in our view, nevertheless competent to delimit it as a continental shelf boundary in accordance with Article 2(1) of the Arbitration Agreement, notwithstanding that it may be coincident with a territorial sea boundary from the point of the view of the other Party;
>
> (iii) By reason of the fact that under Article 6 of the 1958 Convention and under customary law, the median line is measured from the same baseline as that from which the territorial sea is measured, the Court is, in any event, in the view of the United Kingdom, competent to determine the relevant base-points for those measurements; and
>
> (iv) The United Kingdom claims, around the island groups of the Ecrehos and Minquiers, a territorial sea on exactly the same principles as around any other part of the Baili-

wick of Jersey and would not, therefore, regard it as legitimate for the Court to draw a boundary which failed to recognise the territorial sea around these island groups.

19. The Court necessarily derives its competence from the consent of both the Parties to the present arbitration. Accordingly, it does not suffice to establish the Court's competence that one Party may consider an area to be continental shelf when the other may not unreasonably maintain that any delimitation of a boundary in that area will inevitably involve a delimitation of its territorial sea. Nor can the difficulty be avoided by saying that, in any event, the Court is competent to determine the base-points relevant for delimiting the median line in the region in question. The Court does not possess any competence to determine base-points as such, but only for the purpose, and in the course, of discharging its task, under the Arbitration Agreement, of delimiting the boundary of the continental shelf as between the Parties within the arbitration area. If competence to delimit such a boundary in any given region is lacking, any competence that the Arbitration Agreement may implicitly be said to have conferred on the Court to determine base-points inescapably falls with it.

20. In these circumstances, the Court does not find itself empowered under the terms of Article 2(1) of the Arbitration Agreement to delimit the seabed and subsoil boundary between the Channel Islands archipelago and the coasts of Normandy and Brittany. Accordingly, it is not open to the Court in the present decision to decide the course of the boundary in this region without a clear and unqualified expression of their consent by both the Parties to these proceedings. As appears, however, from the replies of the French and United Kingdom Agents to the questions put by the Court, such a clear and unqualified expression of the consent of the Parties is lacking. The reply of the French Government is formal and precise as to the Court's present mandate being confined to the delimitation of the boundary of the continental shelf. The reply of the United Kingdom Government, while it accepts the competence of the Court, in general, to delimit the boundary in this region, appears to place a qualification on that competence in so far as concerns the Ecrehos and Minquiers areas; and these are the areas principally in dispute between the Parties.

21. In the light of the foregoing, and having regard to the geographical circumstances, the precise formulation of its competence in Article 2(1) of the Arbitration Agreement and the replies of the Parties to the Court's questions regarding the problem of its competence in the Channel Islands region, the Court considers that it is without competence to delimit any seabed and subsoil boundary in the narrow waters situated between the Channel Islands and the coasts of Normandy and Brittany. In the Channel Islands region, therefore, the Court's Decision must be confined to deciding the course of the boundary of the continental shelf in the areas to the north and the west of the Channel Islands in so far as this does not involve the delimitation of the territorial sea of either Party.

22. The Court, at the same time, recognises the importance to the Parties of settling their maritime boundary in the narrow waters which separate the Channel Islands from the coasts of Normandy and Brittany. It fur-

ther notes that the Parties are agreed that, in principle, their seabed and subsoil boundary in these waters should be the median line. In the light of the geographical evidence submitted to it, the Court feels justified in making the following observations. While the legal positions taken up by the Parties in response to the Court's questions regarding its competence under the Arbitration Agreement oblige the Court to leave the delimitation of the seabed and subsoil boundary in the Channel Islands region to the discretion of the Parties, it believes that certain practical considerations may also favour this course. In narrow waters such as these, strewn with islets and rocks, coastal States have a certain liberty in their choice of base-points; and the selection of base-points for arriving at a median line in such waters which is at once practical and equitable appears to be a matter peculiarly suitable for determination by direct negotiations between the Parties.

23. Diplomatic and other documents submitted to the Court relating to negotiations between the Parties for the delimitation of their continental shelf boundary show that in those negotiations references were made to possible pretensions on the part of the Republic of Ireland to areas of continental shelf in the vicinity of the 1,000-metre isobath and to a possible meeting of the boundary between the Parties with the boundary, not yet delimited, between the Irish Republic and the United Kingdom (e.g., the French Republic's Note of 7 August 1964, replying to the United Kingdom's Note of 18 February 1964). The Arbitration Agreement, on the other hand, makes no mention of the Irish Republic. Moreover, while Article 2(1) of the Agreement requests the Court to decide the course of the boundary only "between the portions of the continental shelf appertaining to the United Kingdom . . . and to the French Republic, respectively, westward of 30 minutes west of the Greenwich Meridian," it adds expressly "as far as the 1,000-metre isobath".

24. In the pleadings, reference was made in another context to a prospective delimitation of a continental shelf boundary between the United Kingdom and the Irish Republic in the Atlantic region. Invoking the Judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, the United Kingdom contended that, in assessing what would be an equitable delimitation as between itself and the French Republic, account should be taken of "the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region" (I.C.J. Reports 1969, paragraph 101, D(3)). France, the United Kingdom and the Republic of Ireland, it argued, are three States abutting upon the same continental shelf, as were the Netherlands, the Federal Republic of Germany and Denmark in the earlier case; and it asked the Court to draw an analogy between its situation as the middle State compressed between the French and Irish areas of continental shelf and that of the Federal Republic of Germany compressed between the Dutch and Danish areas. As to the French Republic, it contested the validity of the analogy, stressing that neither France and the United Kingdom nor the Republic of Ireland and the United Kingdom are States which have coasts adjacent to each other. It also objected to the idea that the United Kingdom should be allowed to find in the south, and to the detriment of France, compensation for what the United Kingdom might

regard as an insufficient continental shelf in the north resulting from the proximity of the Irish Coast.

25. The Court, during the course of the oral hearings put certain questions to the Parties regarding: (1) the possibility of the continental shelf boundary between France and the United Kingdom meeting the boundary between the United Kingdom and the Republic of Ireland at a tripoint to the east of the 1,000-metre isobath; (2) the power of the Court to delimit a boundary between France and the United Kingdom if the delimitation should appear to touch upon the interests or claims of a third State; and (3) the basis of their calculations of proportionality and equity in so far as concerned the northern limit of the area attributable to the United Kingdom. As to the first question, it suffices to say that the replies of the Parties do not appear to negate altogether the possibility that a boundary delimited between the United Kingdom and the Irish Republic might meet a boundary delimited between France and the United Kingdom at a point in the vicinity, and even a little to the east, of the 1,000-metre isobath.

26. As to the implications for the Court in the present proceedings of the existence of that possibility, the French Government took the position that, the United Kingdom-Irish Republic boundary being today still an unknown quantity, the Court cannot base its decision on what would be pure conjecture. It further observed that, as the Court's decision will be binding only upon the Parties to the present arbitration, the effect of the decision will only be to determine that the United Kingdom has no rights over the continental shelf to the south of the boundary delimited by the Court and the French Republic no rights to the north of that boundary. In its view, if any third State also claims an interest in areas of continental shelf on either side of that boundary, it will be for that third State to settle the matter with the United Kingdom or, as the case may be, with the French Republic. The United Kingdom, on the other hand, took the position that the Court's power to delimit a United Kingdom-French Republic continental shelf boundary would be in question to the westward of a notional meeting point with a United Kingdom-Irish Republic boundary; for at that point the boundary would, it says, cease to be a boundary of the parts of the continental shelf appertaining to France and the United Kingdom respectively. It also informed the Court, that, on 18 February 1977, it had addressed a Note to the Government of the Irish Republic accepting the latter's proposal of 2 April 1976 to refer the delimitation of the continental shelf as between their two countries to an independent settlement of disputes procedure through some form of third party settlement of a judicial nature. The United Kingdom further suggested that, should calculations of proportionality be thought relevant, the proper approach would be to try to identify a distinctive United Kingdom-French sector from a distinctive United Kingdom-Irish sector to the north, and from a distinctive Franco-Spanish sector to the south.

27. The Court, having regard to the views expressed by the Parties, emphasizes that the task entrusted to it in the Atlantic region by the Arbitration Agreement is the precise one of deciding the course of the boundary between the portions of the continental shelf appertaining to the United Kingdom and to the French Republic respectively "as far as the 1,000-metre

isobath". Furthermore, as will subsequently appear in paragraph 250 of the Decision, the Court does not consider that the course of the boundary between the United Kingdom and the French Republic in that region depends on any nice calculations of proportionality based on conjectures as to the course of a prospective boundary between the United Kingdom and the Republic of Ireland. Nor would it be open to the Court, on the basis of any such conjectures, to pronounce in these proceedings on the position of the tripoint, if any, at which the Irish Republic's boundary with the United Kingdom should be held to meet the latter's boundary with the French Republic. The Court's sole task in the present Decision is, in conformity with Article 2(1) of the Arbitration Agreement, to delimit the continental shelf boundary between the French Republic and the United Kingdom in accordance with the applicable rules of international law, and to delimit it "as far as the 1,000-metre isobath".

28. Even so, the Court thinks it appropriate at the same time formally to state that both its reasoning and its conclusions in this Decision are directed exclusively to the delimitation of the continental shelf boundary between the Parties to the present proceedings. It follows that no inferences may be drawn from this Decision as to views of the Court concerning the prospective course of the continental shelf boundary still to be delimited between the United Kingdom and the Republic of Ireland nor concerning the legal and factual considerations relevant to the delimitation of that boundary. The Court's Decision, it scarcely needs to be said, will be binding only as between the Parties to the present arbitration and will neither be binding upon nor create any rights or obligations for any third State, and in particular for the Republic of Ireland, for which the Decision will be *res inter alios acta*. In so far as there may be a possibility that the two successive delimitations of continental shelf zones in this region, where the three States are neighbours abutting on the same continental shelf, may result in some overlapping of the zones, it is manifestly outside the competence of this Court to decide in advance and hypothetically the legal problem which may then arise. That problem would normally find its appropriate solution by negotiations directly between the three States concerned, negotiations which may indeed be called for by the prolongation of their maritime zones beyond the 1,000-metre isobath to 200 nautical miles.

29. Under Article 2(1) of the Arbitration Agreement, the Court is requested to decide the course of the continental shelf boundary between the French Republic and the United Kingdom in the arbitration area "in accordance with the rules of international law applicable in the matter as between the Parties." Before the Court, however, the Parties have been in basic disagreement not merely as to the application of the rules of international law in the matter but as to the regime of legal rules in force between them governing the delimitation of the continental shelf. The Court has, therefore, first to determine what are the rules and principles of international law in force between the French Republic and the United Kingdom with respect to the delimitation of their continental shelf boundary (or boundaries) in the arbitration area.

30. The basic difference between the Parties as to the applicable law concerns the question whether the Convention on the Continental Shelf concluded at Geneva on 29 April 1958, and in particular Article 6 of that Convention, is in force between them and governs the present matter or whether it is the rules of customary law which apply. Although the French Republic and the United Kingdom are both parties to that Convention, the French Government contends that it has never entered into force between the French Republic and the United Kingdom by reason of the latter's refusal to accept certain reservations formulated by the French Republic when depositing its instrument of accession to the Convention. The question being one of the respective intentions of the French Republic and the United Kingdom in regard to their legal relations under the Convention, it is necessary first to set out the facts indicative of their intentions.

31. By a Note Verbale of 18 February 1964, before either State had ratified the Convention, the United Kingdom Government invited the French Government to enter into preliminary discussions "with a view to arriving at procedures for agreeing a line dividing that part of the Continental Shelf which lies between France and the United Kingdom". It proposed that this line should be calculated on median line principles and the measurements taken, in accordance with Article 6 of the Continental Shelf Convention, from baselines drawn in accordance with the provisions of the 1958 Convention on the Territorial Sea. At the same time, it informed the French Government that the necessary United Kingdom legislation for establishing straight baselines would shortly be submitted to Parliament and that, for reasons of uniformity, the United Kingdom considered it "desirable that the calculations for the median lines on the continental shelf should be made from baselines drawn in accordance with the 1958 Convention rather that from the low-water mark". On 11 May 1964, the United Kingdom ratified the Convention which, under Article 11, then entered into force on 10 June of that year.

32. The French Government, by a Note Verbale of 7 August 1964, accepted the United Kingdom's proposal for preliminary discussions. In doing so, it informed the latter of its intention to accede to the 1958 Convention subject to a number of reservations and an interpretative declaration of Article 1 designed to stress that the term "areas adjacent" in itself excludes an unlimited extension of the continental shelf. In addition, it specified that the French Government considered special circumstances within the meaning of Article 6, paragraph 1, of the Geneva Convention to exist in regard to the continental shelf adjacent to the coasts of France and the United Kingdom. And it further stated that in these circumstances, "an equidistance line determined unilaterally by France or by the United Kingdom, based on straight baselines, such as those referred to in the United Kingdom's Note of 18 February 1964, could not be admitted for the calculation of the dividing line without the agreement of the other Party" (Appendix A(7) to the United Kingdom Memorial).

33. On 14 June 1965 the French Republic deposited its instrument of

accession to the Convention to which was appended the following declaration:[4]

Article 1

In the view of the Government of the French Republic, the expression "adjacent" areas implies a notion of geophysical, geological and geographical dependence which *ipso facto* rules out an unlimited extension of the continental shelf.

Article 2 (paragraph 4)

The Government of the French Republic considers that the expression "living organisms belonging to the sedentary species" must be interpreted as excluding crustaceans, with the exception of the species of crab termed "barnacle"; and it makes the following reservations: . . .

Article 4

The Government of the French Republic accepts this article only on condition that the coastal State claiming that the measures it intends to take are 'reasonable' agrees that if their reasonableness is contested it shall be determined by arbitration.

Article 5 (paragraph 1)

The Government of the French Republic accepts the provisions of Article 5, paragraph 1, with the following reservations:

(a) An essential element which should serve as a basis for appreciating any 'interference' with the conservation of the living resources of the sea, resulting from the exploitation of the continental shelf, particularly in breeding areas for maintenance of stocks, shall be the technical report of the international scientific bodies responsible for the conservation of the living resources of the sea in the areas specified respectively in Article 1 of the Convention for the North-West Atlantic Fisheries of 8 February 1949 and Article 1 of the Convention for the North-East Atlantic Fisheries of 24 January 1959.

(b) Any restrictions placed on the exercise of acquired fishing rights in waters above the continental shelf shall give rise to a right to compensation.

(c) It must be possible to establish by means of arbitration, if the matter is contested, whether the exploration of the continental shelf and the exploitation of its natural resources result in an interference with the other activities protected by Article 5, paragraph 1, which is unjustifiable.

Article 6 (paragraphs 1 and 2)

In the absence of a specific agreement the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

—if such boundary is calculated from baselines established after 29 April 1958;

—if it extends beyond the 200-metre isobath;

—if it lies in areas where, in the Government's opinion, there are 'special circumstances' within the meaning of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.[5]

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[4] English text reproduced from *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions*. List of Signatures, Ratifications, Accessions, etc. as of 31 December 1976 (ST/LEG/SER.D/10), New York, 1977, p. 518.

[5] The reservations to this Article being pertinent in the present case, the original text is reproduced below:

"Article 6 (alinéas 1 et 2):

"Le Gouvernement de la République française n'acceptera pas que lui soit opposée,

34. Notification of France's instrument of accession and of its declaration was received by the United Kingdom from the Secretary-General on 30 July 1965, and on 14 January 1966, it addressed a communication to the Secretary-General as depositary of the Convention in the following terms:[6]

Article 1

The Government of the United Kingdom take note of the declaration made by the Government of the French Republic and reserve their position concerning it.

Article 2 (paragraph 4)

This declaration does not call for any observations on the part of the Government of the United Kingdom.

Article 4

The Government of the United Kingdom and The Government of the French Republic are both parties to the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes done at Geneva on the 29th April 1958. The Government of the United Kingdom assume that the declaration made by the Government of the French Republic is not intended to derogate from the rights and obligations of the parties to the Optional Protocol.

Article 5 (paragraph 1)

Reservation *(a)* does not call for any observation on the part of the Government of the United Kingdom;

The Government of the United Kingdom are unable to accept reservation *(b)*;

The Government of the United Kingdom are prepared to accept reservation *(c)* on the understanding that it is not intended to derogate from the rights and obligations of parties to the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

Article 6 (paragraphs 1 and 2)

The Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic.

35. The above communication does not appear to have been the subject of any observations on the part of the French Government prior to the delivery of its Memorial in the present proceedings. Materials submitted to the Court show that during the negotiations between 1970 and 1974 for an agreed delimitation of the continental shelf boundary both the French and the United Kingdom delegations made frequent reference to the Continental Shelf Convention of 1958 and, in particular, to the provisions of Article 6.

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sans un accord exprès, une délimitation entre des plateaux continentaux appliquant le principe de l'équidistance:

"Si celle-ci est calculée à partir de lignes de base instituées postérieurement au 29 avril 1958:

"Si elle est prolongée au-delà de l'isobathe de 200 mètres de profondeur;

"Si elle se situe dans des zones où il considère qu'il existe des "circonstances spéciales", au sens des alinéas 1 et 2 de l'article 6, à savoir : le golfe de Gascogne, la baie de Granville et les espaces maritimes du pas de Calais et de la mer du Nord au large des côtes françaises" (French Memorial, vol. II, Annexe III, p. 39).

[6] *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions, op cit.*, p. 520.

This Article was invoked by the United Kingdom delegation as pointing to a median line boundary, and by the French delegation as, on the contrary, calling first and foremost for a negotiated solution and allowing recourse to the median line only in the absence both of an agreed solution and of "special circumstances". The French delegation also placed emphasis on the distinction drawn in the two paragraphs of Article 6 between the cases of "opposite" and of "adjacent" States; and, in doing so, put forward the contention that the Atlantic region does not fall within either of these two cases. Mention was made by both Parties of the French Republic's reservation to Article 6, claiming the existence of "special circumstances" in certain areas, and more especially of its reservation regarding "Granville Bay" under which rubric they discussed the delimitation of the boundary in the Channel Islands region. On the other hand, the materials before the Court contain no indication of any reference having been made by either Party to the United Kingdom's communication to the Secretary-General of 14 January 1966 expressing its inability to accept some of the French reservations. Nor is there any indication in those materials that either Party spoke of the Continental Shelf Convention as inapplicable between them, whereas they do show that objection was taken by the French delegation to the United Kingdom's invocation of the Convention on the Territorial Sea and Contiguous Zone on the ground that this Convention had not been ratified by the French Republic.[7]

36. In its Memorial the French Republic contended that the result of the United Kingdom's refusal to accept its reservations to the Continental Shelf Convention of 1958 was that the Convention never became applicable as between them; and it further contends that, even if the Convention itself should be considered as having come into force between the two countries, the United Kingdom's refusal to accept the French reservations to Article 6 operated to prevent this Article from becoming applicable as between them. These contentions gave rise in the subsequent pleadings to extensive arguments concerning the effect on the legal position of the Parties under the Convention of the French Republic's reservations and the United Kingdom's reaction to them in its communication to the Secretary-General of 14 January 1966.

37. The Parties are in accord in considering that this effect has to be determined by reference to the law governing reservations to multilateral treaties in force in the years 1965-1966 when the French Republic formulated its reservations and the United Kingdom transmitted its observations upon them to the Secretary-General. They are also in accord that the law governing reservations to multilateral treaties was then undergoing a major evolution set in train in 1951 by the advisory opinion of the International Court of Justice concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (I.C.J. Reports 1951, p. 15); and they both accept, in general, the account of that evolution given in the Report of the International Law Commission adopted at its 18th Session in

[7] United Kingdom Memorial, Appendices A(9), A(10), A(14), A(15), A(19), A(20), A(25), A(26).

1966 (Yearbook of the International Law Commission, 1966, vol. II, pp. 203-207). The Parties disagreed, however, not only as to the precise state of the law governing reservations to multilateral treaties in the years in question but also as to the practice followed by each of the Parties themselves in regard to the need for unanimous consent to reservations.

38. The Court shares the opinion of the Parties that the effect of the French reservations and the United Kingdom's refusal to accept them has to be appreciated in the light of the law in force at the time when those acts occurred. Like the Parties, it also recognizes that the law governing reservations to multilateral treaties was then undergoing an evolution which crystallized only in 1969 in Articles 19 to 23 of the Vienna Convention on the Law of Treaties. The Court does not, however, think that any importance attaches in the present case to the precise state which that evolution may have reached in the years 1965-1966. The evolution of the law then in progress related primarily to cases where a treaty does not itself lay down the conditions for the formulation of reservations. But the 1958 Convention does prescribe its own rules for the making of reservations. Article 12 provides that "at the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than Articles 1 to 3 inclusive". Thus the unanimous consent of the Parties to the formulation of reservations to articles other than Articles 1, 2, or 3 is expressed in advance in the treaty itself. Accordingly, the evolution of the law of reservations between 1951 and 1966 has only a marginal interest in the present connexion. The question for the Court is rather one of the interpretation and application of Article 12 of the 1958 Convention; or, more particularly, it is a question of the effect to be given to the French Republic's reservations and the United Kingdom's response to them in the context of Article 12 of the Convention.

39. Article 12, by its clear terms, authorised any contracting State, including the French Republic, to make its consent to be bound by the Convention subject to reservations to articles other than Articles 1 to 3 inclusive. It follows that the United Kingdom, when it ratified the Convention in 1964, gave its express consent to the French Republic's becoming a party to the Convention subject to such reservations as the latter might make to any article other than Article 1, 2, or 3. Under Article 12, in short, the United Kingdom bound itself not to contest the right of the French Republic to be a party to the Convention on the basis of reservations the making of which is authorised by that Article. The responses made by the United Kingdom to the reservations of the French Republic have thus to be appreciated in the light of its previous agreement to the formulation of those reservations. On the other hand, the Court considers the view expressed by both Parties that Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 to be clearly correct. Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12, which authorises the making of reservations to articles other

than Article 1 to 3 in quite general terms. Article 12, as the practice of a number of States recorded in *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* confirms, leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation. Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.

40. The French Government points to the language used by the United Kingdom in its observation on the French Republic's reservations to Article 5(1): "The Government of the United Kingdom are unable to accept reservation *(b)*", and to the similar language of its observation on the French Republic's three reservations to Article 6. It maintains that the phrase "are unable to accept" amounted to an "objection" to these French reservations, and that the United Kingdom must be considered to have intended by those objections to prevent the Convention from coming into force as between it and the French Republic. In this connexion, it refers to the fact that the United States, which had made objection in similar terms to reservations made by various States to Conventions on the Law of the Sea, addressed a communication to the Secretary-General on 27 October 1967 specifying that it considered the Convention in force between itself and the States in question. It stresses that the United Kingdom made no such declaration; and it asks the Court to draw from the contrast between the behaviour of the two States the inference that the United Kingdom did not intend the Continental Shelf Convention to be in force vis-à-vis States to whose reservations the United Kingdom had objected. The French Government also explains its references to the Convention during its negotiations with the United Kingdom between 1970 and 1974 on the basis that at the opening meeting its delegation emphasised that the negotiations were taking place in "an open juridical framework"; and it says that the French delegation invoked the 1958 Convention only in its character as a codifying instrument generally expressive of the position in customary law, not as a treaty binding as between the French Republic and the United Kingdom.

41. The United Kingdom denies that the observations which, in its communication to the Secretary-General of 14 January 1966, it made on the French Republic's reservations to Article 5(1) and Article 6 manifested an intention to exclude the application of the Convention as between the two States. It points, first, to United Kingdom letters of 5 November 1959 and 10 August 1960 to the Secretary-General on the subject of reservations to the four Geneva Conventions on the Law of the Sea. And it asks the Court to note that in those letters the United Kingdom drew a clear distinction between the Continental Shelf and Fishing and Conservation Conventions, on the one hand, and the Territorial Sea and High Seas Conventions, on the other, on the very ground that the two first-mentioned Conventions permit reservations to certain articles, whereas the other two Conventions do not. It emphasises that, even in the case of the two Conventions which do not contain provisions expressly permitting reservations, the position taken by the

United Kingdom in those letters was that, while a reservation to which it had made formal objection would not be valid in relation to the United Kingdom, the reserving State would still be a party to the Convention vis-à-vis the United Kingdom. As to the United Kingdom's communication of 14 January 1966 regarding the French Republic's accession to the Continental Shelf Convention, it claims that this communication was, "on its face, framed in terms which are fundamentally incompatible with the notion that it was intended to deny treaty relations between the two countries".

42. The United Kingdom urges that its statements that it was "unable to accept" the French reservations to Article 5(1) and Article 6 have to be read not in isolation but in the context of its communication of 14 January 1966 as a whole; and that then these statements are clearly seen not to have been intended as formal objections negating application of the Convention as between itself and the French Republic. This is shown, it argues, by its consent, whether express or implied, to certain of the reservations. But it calls particular attention to the observations made by the United Kingdom in that communication concerning the French reservation to Article 4 and reservation *(c)* to Article 5(1) as unmistakable evidence that it regarded the Convention as applying between itself and the French Republic. By these reservations the French Republic had made its acceptance of each of those provisions conditional upon a right, in case of dispute, to submit the matter to arbitration; and the United Kingdom's observation in each case had stated its "assumption" or "understanding" that the reservation was "not intended to derogate from the rights and obligations of the parties to the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes" of 29 April 1958. The United Kingdom underlines that its observation on the French reservation to Article 4 opens with the statement that the United Kingdom and the French Republic "are both parties to the Optional Protocol of Signature"; and it adds that under the terms of the Protocol the two States could be parties thereto in relation to each other only if they were parties to the same Geneva Convention on the Law of the Sea. Pointing out that the Continental Shelf Convention was the only one to which France was a party, the United Kingdom maintains that its observations regarding the Optional Protocol contained in its communication of 14 January 1966 are consistent only with the inference that, notwithstanding its reaction to certain of the French reservations, it considered itself as in treaty relations with the French Republic under that Convention.

43. As to the actual statements that the United Kingdom was "unable to accept" the reservations in question, it insists that these were not formal "objections" but merely declarations of the United Kingdom's inability to accept them. The French reservations, it explains, posed a number of complex problems for the contracting parties, and there was uncertainty as to their admissibility and as to their meaning. Silence, it says, would have been tantamount to implied acceptance, and it was precisely to counteract any such presumption of acceptance that the United Kingdom was obliged to formulate a carefully worded response to the reservations. The United Kingdom also invokes in this connexion the fact that, although Canada formulated similar responses to the French reservations to Article 5(1) and Article

6, and Spain formulated a similar response to the French reservation to Article 6(2), the Convention has in each case been treated as in force between the French Republic and the States concerned. Even if these cases, as the French Government stresses, concern other States having their own particular interests and are thus *res inter alios acta* in regard to the United Kingdom, the latter considers that they support its contention regarding the meaning and effect of its response to the French reservations. The United Kingdom further invokes the conduct of the French Republic in the period between 1966 and the conclusion of the Arbitration Agreement, and more especially during the negotiations for the delimitation of the boundary, as constituting a continuing recognition and acknowledgement that the 1958 Convention, including Article 6, is a treaty in force between these two States.

44. The intention and the effect of the United Kingdom's communication of 14 January 1966, as the Court has already pointed out, have to be appreciated in the light of the express authorisation given by Article 12 of the Convention to contracting States, including the French Republic, to make reservations to articles other than Articles 1 to 3. Having regard to Article 12, the Court considers that the terms of the communication of 14 January 1966, and more especially its references to the Optional Protocol of Signature, indicate that it was not the intention of the United Kingdom to prevent by that communication the entry into force of the Convention as between the two countries. The practice of States in regard to reservations made under Article 12, including that of the French Republic, also appears to confirm, and certainly not to contradict, this view of the meaning and effect of the United Kingdom's communication. This appears to be no less true of the United States' communication to the Secretary-General of 27 October 1967 which is invoked by France as giving rise to a contrary inference. In previous years the United States had made declarations that it did not find acceptable a number of reservations by various States to Law of the Sea Conventions, including those of the French Republic to Articles 4, 5 and 6 of the Continental Shelf Convention. In its communication of 27 October 1967 the United States explained that, in response to an inquiry it wished "to state that *it has considered* and will continue to consider all the Geneva Law of the Sea Conventions of 1958 as being in force between it and all other States that have ratified or acceded thereto . . . with reservations unacceptable to the United States" (emphasis added).[8] This communication, therefore, serves rather to show that, when declaring the French reservations unacceptable to it, the United States also had assumed that the Conventions would nevertheless be in force as between it and the reserving State.

45. The French Republic, however, further contends that even if the 1958 Convention entered into force between it and the United Kingdom, all the Geneva Conventions on the Law of the Sea, including the Continental Shelf Convention, have been rendered obsolete by the recent evolution of

[8] *Multilateral Conventions in respect of which the Secretary-General Performs Depositary Functions, op.cit.*, pp. 504-505, n.6.

customary law stimulated by the work of the Third United Nations Conference on the Law of the Sea. In brief, its argument is that a consensus has been arrived at within the framework of the Conference regarding the right of a coastal State to a 200-mile economic zone comprising rights with respect both to the continental shelf and to fisheries, which is now incorporated in the Revised Single Negotiating Text drawn up by the Chairman of the Second Committee of the Conference.[9] Furthermore, a certain number of States, of which the French Republic is one, have already declared 200-mile economic zones; and considerably more States, including the French Republic, the United Kingdom and other States of the European Economic Community, have declared 200-mile fishery zones. These 200-mile zones, the French Government maintains, have all been promulgated on the basis of the consensus achieved at the Conference; and, in its view, these developments are clearly not compatible with the continuance in force of the Geneva Conventions on the Law of the Sea of 1958.

46. The United Kingdom, while agreeing that a certain consensus has emerged at the Third Conference on the Law of the Sea in favour of the recognition of 200-mile economic zones, denies that this emerging consensus has yet become law; and it objects that there still remain substantial unresolved problems. The consensus does not, it says, extend to the content of the jurisdiction to be exercised by coastal States within the zone or to the question of the relationship between the economic zone and the high seas; nor does it extend to the rules governing the delimitation of the 200-mile economic zones, which, according to the United Kingdom, is generally recognised to remain a controversial issue. In addition, the United Kingdom draws attention to statements of the President of the Conference emphasising the negotiating and tentative nature of the proposals contained in the Revised Single Negotiating Text,[10] and it asks the Court to conclude that they cannot be taken as an expression of existing positive law. It further states that the recent 200-mile fishery zones have been based on considerations of fisheries conservation rather than on the concept of the economic zone. It also refers to a dictum of the International Court of Justice in the *Fisheries Jurisdiction* cases that "the Court, as a court of law, cannot render judgement *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down" (I.C.J. Reports 1974, paragraph 53). Finally, it points to a number of examples of recent State practice, including the Franco-Spanish Treaty of 1974 and a statement of the French Minister of Foreign Affairs made in the National Assembly on 28 October 1975 concerning negotiations with Canada over the continental shelf of St. Pierre et Miquelon as positive indications of the continued validity of the 1958 Convention.

47. The Court is directed by Article 2 of the Arbitration Agreement to decide the course of the boundary "in accordance with the rules of international law applicable in the matter as between the Parties"; and, as the Parties agree, the rules of international law to be applied by the Court under this

[9] Third United Nations Conference on the Law of the Sea, Official Records, vol. V, p. 151 (Document A/CONF. 62/WP.8/Rev.1/PART II).

[10] *Ibid.*, p. 125.

rubric are unquestionably the rules in force today. At the same time, the Court recognises both the importance of the evolution of the law of the sea which is now in progress and the possibility that a development in customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations. But the Continental Shelf Convention of 1958 entered into force as between the Parties little more than a decade ago. Moreover, the information before the Court contains references by the French Republic and the United Kingdom, as well as by other States, to the Convention as an existing treaty in force which are of quite recent date. Consequently, only the most conclusive indications of the intention of the parties to the 1958 Convention to regard it as terminated could warrant this Court in treating it as obsolete and inapplicable as between the French Republic and the United Kingdom in the present matter. In the opinion of the Court, however, neither the records of the Third United Nations Conference on the Law of the Sea nor the practice of States outside the Conference provide any such conclusive indication that the Continental Shelf Convention of 1958 is today considered by its parties to be already obsolete and no longer applicable as a treaty in force.

48. The Court accordingly finds that the Geneva Convention of 1958 on the Continental Shelf is a treaty in force, the provisions of which are applicable as between the Parties to the present proceedings under Article 2 of the Arbitration Agreement. This finding, the Court wishes at the same time to emphasise, does not mean that it regards itself as debarred from taking any account in these proceedings of recent developments in customary law. On the contrary, the Court has no doubt that it should take due account of the evolution of the law of the sea in so far as this may be relevant in the context of the present case.

49. The Court's finding that the 1958 Convention is applicable as between the French Republic and the United Kingdom as a treaty in force does not, in any case, dispose of the question of the effect of the French reservations upon the terms of the Convention applicable between the two countries. Before turning to this question, however, the Court must first examine certain contentions advanced by the United Kingdom that the French Republic's reservations to Article 6 should be left out of consideration altogether as being either inadmissible or not true reservations.

50. In the first reservation to Article 6, it is stated that "in the absence of a specific agreement the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it if such boundary is calculated from baselines established after 29 April 1958". Although this reservation is thus formally expressed to attach to Article 6, the United Kingdom maintains that it is in reality a reservation either to Articles 3 and 4 of the Territorial Sea Convention or to the rules of customary law regarding the use of straight baselines which those Articles embody. Article 6, it says, merely refers to "the baselines from which the breadth of the territorial sea of each State is measured" but does not define them; and it is

Articles 3 and 4 of the Territorial Sea Convention or, in the case of the French Republic, which is not a party to that Convention, the relevant rules of customary law which govern the use of straight baselines. This being so, the United Kingdom contends that, if the reservation is intended to protect France, in a delimitation of the continental shelf, against the use of any straight baselines established after 29 April 1958, whether lawful or unlawful, the reservation is a reservation not to Article 6 but to the rules of customary international law and is inadmissible as a reservation to Article 6. If, on the other hand, it is intended as a protection only against the use of unlawful straight baselines, then it is said by the United Kingdom to be otiose and a mere interpretative declaration, not a true reservation. As to the French Government, it retorts that the first reservation to Article 6 has nothing to do with the legality of straight baselines established after 29 April 1958 but solely with their use in the delimitation of the continental shelf by the equidistance principle under Article 6. In its view, the "reservation" clearly involves a derogation from obligations contained in Article 6 and is, therefore, a true reservation to that Article.

51. The first reservation, construed according to the natural meaning of its terms, appears to the Court to constitute a general reservation designed to protect the French Republic, in the absence of a specific agreement, against a continental shelf boundary delimited by application of the equidistance principle and by reference to straight baselines established after 29 April 1958. It is to the method of delimiting the continental shelf and to the boundary resulting from the method that the French reservation is expressed to relate; and, in the view of the Court, the "reservation" is both a true reservation and a reservation to Article 6 itself, not to the general rules of international law regarding straight baselines. The reservation does not seek to protect the French Republic against the use of straight baselines by other States in any context other than the delimitation of the continental shelf; and, when entering into a new obligation, under an entirely new convention, with respect to the use of the equidistance method in the delimitation of the continental shelf, no rule of international law precluded the French Republic from formulating a reservation regarding the rôle of straight baselines in the application of that method as a condition of its acceptance of that new obligation. The Court is, therefore, unable to see any ground upon which it should hold the first French reservation to Article 6 to be inadmissible.

52. The second reservation to Article 6 similarly states that in the absence of a specific agreement, the French Republic will not accept that any continental shelf boundary determined on the equidistance principle shall be invoked against it "if it extends beyond the 200-metre isobath". According to the United Kingdom, this reservation has to be read in close conjunction with the interpretative declaration attached by the French Republic to Article 1, stating that "the expression 'adjacent areas' implies a notion of geophysical, geological and geographical dependence which *ipso facto* rules out an unlimited extension of the continental shelf". The United Kingdom recalls that both in 1958 and subsequently the French Republic had consistently opposed the inclusion of the exploitability criterion as part of the definition of the continental shelf in Article 1 of the Convention. It then maintains that,

being aware in 1965 that reservations to Article 1 itself are prohibited, the French Government voiced its continuing opposition to the exploitability criterion in two ways when acceding to the Convention: first, it attached its interpretative declaration to Article 1 and, secondly, it attached the second reservation to Article 6 with the intention of discouraging its neighbours from putting forward continental shelf claims beyond the 200-metre isobath. On this basis the United Kingdom contends that, although attached to Article 6, the second reservation is, in substance, a reservation to Article 1 and, therefore, inadmissible under the terms of Article 12. The French Government, on the other hand, insists that the interpretative declaration attached to Article 1 and the reservation to Article 6 are quite distinct; and that it is only necessary to read the reservation to see that it is not concerned with the rights of States to the continental shelf but exclusively with the question of delimitation by application of the principle of equidistance. The second reservation, it claims, is therefore incontestably admissible under Article 12.

53. The second reservation, like the first, has to be construed in accordance with the natural meaning of its terms. Whether or not any link is thought to exist between the considerations motivating the reservation and those motivating the interpretative declaration attached to Article 1, the reservation and the interpretative declaration are expressed as distinct acts having different objects. The reservation, whatever the motive which inspired it, relates in substance as well as in form to the regime of delimitation prescribed in Article 6; for it is so expressed as to have its effect only in the context of a delimitation by application of the principle of equidistance under Article 6. In these circumstances there does not appear to the Court to be any ground for considering the reservation incompatible with Article 12 of the Convention.

54. The third reservation is not impugned by the United Kingdom as inadmissible; it is rather said not to be a true reservation but an interpretative declaration—a mere advance notice by the French Republic of the areas in which it considers special circumstances to exist. By this reservation, in the absence of specific agreement, the French Republic declines to accept any boundary determined by application of the principle of equidistance "if it lies in areas where, in the Government's opinion, there are 'special circumstances' within the meaning of Article 6, paragraphs 1 and 2"; and it then names "the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast" as such areas. The United Kingdom argues that this is not a true reservation because the object of the "reservation" is already covered by the very terms of Article 6. The rule in Article 6, it insists, "is a combined equidistance-special circumstances rule", and the third reservation, even in relation to the named areas, does not have the effect of excluding the operation of Article 6. According to the United Kingdom, the reservation is in reality an invocation of Article 6, and even in the named areas is no more than "a positive affirmation of the applicability of Article 6" in those areas. The third reservation, it contends, is therefore simply an interpretative declaration. This view of the third reservation is, however, rejected by the French Government as inconsistent with the clear terms of the text, which do not seek to give any further

definition to the meaning of the expression "special circumstances". The French Republic, it says, by its own unilateral act simply excluded the application of the equidistance principle in the series of areas which it specified, and the effect was not to interpret Article 6 but to modify the scope of its application. The reservation, it argues, took the form of a restriction on the application of the equidistance method in cases not specifically provided for by Article 6, which only contains a general principle and does not enumerate a series of individual and particular cases. The French Government adds that the reservation also had the effect of extending and rendering absolute in the named areas the rule in Article 6 calling for agreement in the determination of the boundary of the continental shelf.

55. The Court thinks it sufficient to say that, although the third reservation doubtless has within it elements of interpretation, it also appears to constitute a specific condition imposed by the French Republic on its acceptance of the delimitation régime provided for in Article 6. This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that régime dependent on acceptance by the other State of the French Republic's designation of the named areas as involving "special circumstances" regardless of the validity or otherwise of that designation under Article 6. Article 2(1)(*d*) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a "reservation", provides that it means "a unilateral statement, however phrased or named, made by a State . . . whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State". This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".

56. The Court will now proceed to examine the effect of the French Republic's reservations on the terms of the Convention applicable as between it and the United Kingdom, and will do so on the basis that the three reservations to Article 6 are true reservations and admissible. Both the Parties have addressed themselves to the question of the effect of the French reservations, should the Court decide, as it has done, that the 1958 Convention is a treaty in force as between them and part of the law to be applied under Article 2(1) of the Arbitration Agreement. They are, however, in complete disagreement as to the effect of the reservations upon the conditions under which the terms of the Convention, particularly those of Article 6, would be applicable as between the Parties to the present proceedings.

57. The French Republic maintains that it is the combined effect of its reservations and their rejection by the United Kingdom which determines the question. In its view, the governing principle is that of the mutuality of consent in the conclusion of treaties. The French Republic's reservations to Article 6, it says, being valid reservations permitted by Article 12, imposed

conditions on its consent to be bound by Article 6, and the United Kingdom's rejection of the reservations means that there is no agreement between the Parties as to the terms of this Article. It follows, according to the French Republic, that Article 6 as a whole cannot be in force as between it and the United Kingdom and is thus inapplicable in the present proceedings.

58. The United Kingdom, on the other hand, takes the position that the effect of its rejection of the French reservations is rather to render them wholly unopposable to the United Kingdom, with the result that Article 6 applies as between the two countries unaffected by the reservations. Its rejection of those reservations, it also says, did not and could not go beyond the reservations themselves and therefore cannot be regarded as a rejection of Article 6 as a whole. It further argues that the French reservations do not even purport to exclude or modify the terms of Article 6 itself but only to guard against certain interpretations and applications of the Article. This being so, it contends that the three reservations, even if considered opposable to the United Kingdom, can at most operate as a partial exclusion or modification of Article 6. It refers in this connexion to Article 19, paragraph 3, of the draft article on the law of treaties adopted by the International Law Commission in 1966, which is now reflected in Article 21, paragraph 3, of the Vienna Convention on the Law of Treaties, and which reads:

> When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Stressing the final phrase "to the extent of the reservation", the United Kingdom maintains that the French reservations cannot render Article 6 inapplicable *in toto*, but at the most "to the extent of the reservations".

59. The Court considers that the answer to the question of the legal effect of the French reservations lies partly in the contentions of the French Republic and partly in those of the United Kingdom. Clearly, the French Republic is correct in stating that the establishment of treaty relations between itself and the United Kingdom under the Convention depended on the consent of each State to be mutually bound by its provisions; and that when it formulated its reservations to Article 6 it made its consent to be bound by the provisions of that Article subject to the conditions embodied in the reservations. There is, on the other hand, much force in the United Kingdom's observation that its rejection was directed to the reservations alone and not to Article 6 as a whole. In short, the disagreement between the two countries was not one regarding the recognition of Article 6 as applicable in their mutual relations but one regarding the matters reserved by the French Republic from the application of Article 6. The effect of the United Kingdom's rejection of the reservations is thus limited to the reservations themselves.

60. To state that conclusion does not, however, suffice to answer the question of the legal effect of the disagreement between the Parties regarding the introduction of the reservations into the application of the Article. The French Government's thesis that the effect is to render Article 6 as a whole inapplicable has to be excluded because, as already indicated, it attributes to the rejection a scope wider than its terms justify. The United

Kingdom's thesis, that the reservations are not opposable to it and that Article 6 applies without any modification, has equally to be excluded because it would allow the rejection unilaterally to set aside express conditions placed by the French Republic on its consent to be bound by the Article. attribute such an effect to the rejection of the reservations is not easy to reconcile with the principle of mutuality of consent in the conclusion of treaties. The Court also notes that in the negotiations which took place between the Parties during the years 1970-1974 references were made to the th reservation claiming "special circumstances" in named areas without any indication being given of its not being open to the French Republic to invoke the reservation against the United Kingdom.

61. In a more limited sense, however, the effect of the rejection may properly, in the view of the Court, be said to render the reservations not opposable to the United Kingdom. Just as the effect of the French reservation is to prevent the United Kingdom from invoking the provisions of Article except on the basis of the conditions stated in the reservations, so the effect of their rejection is to prevent the French Republic from imposing the reservations on the United Kingdom for the purpose of invoking against it binding a delimitation made on the basis of the conditions contained in the reservations. Thus, the combined effect of the French reservations and the rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto* as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, the reservations; and this is precisely the effect envisaged in such cases Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.

62. The fact that Article 6 is not applicable as between the Parties the extent that it is excluded by the French reservations does not mean that there are no legal rules to govern the delimitation of the boundary in area where the reservation operates. On the contrary, as the International Court of Justice observed in the *North Sea Continental Shelf* cases, "there are still rules and principles of law to be applied" (I.C.J. Reports 1969, paragraph 83); and these are the rules and principles governing delimitation of the continental shelf in general international law.

63. The United Kingdom submits that, "in any event, to give effect to any or all of the (French) 'reservations' in accordance with their express terms would have a minimal practical effect in the circumstances of the present Arbitration" (Final Submission 1 B(*c*)). Any practical effect that the French reservations may have for the purposes of the present proceedings is a matter to be considered later in deciding the course of the boundary. The Court finds it necessary, however, to notice here a general argument advanced by the United Kingdom and designed to show that all the French reservations to Article 6 are completely without object, now that the delimitation of the boundary is to be effected not by the Parties but by the Court under the Arbitration Agreement. Although this argument is considered by the Court to be without substance, it touches a point of principle on which the Court desires to leave no doubt as to its view. The United Kingdo

stresses that the three reservations to Article 6 are prefaced by the statement that, in the absence of a specific agreement, France will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it. The argument then proceeds (United Kingdom Counter-Memorial, paragraph 32 (1)):

> It will be seen therefore that the French "reservations" to Article 6 do *not* purport to exclude the application of the principle of equidistance even if any one of the three conditions is fulfilled. They seek merely to render a *unilateral* determination of the boundary by another State, based upon the principle of equidistance, "non-opposable" to France. But that is not the position here. The agreement of the two Governments to refer to arbitration the decision as to the course of the boundary in the area specified in Article 2 of the Arbitration Agreement necessarily pre-supposes that there can be no *unilateral* delimitation of the boundary by the United Kingdom, since it is for the Court (and the Court alone) to draw the line. Accordingly, the fact that two Governments have agreed to submit the dispute to arbitration is sufficient in itself to deprive the French "reservations" to Article 6 of their object in the present case. (Emphasis in the original.)

This argument appears to the Court to be open to more than one objection.

64. In the pleadings, the French Republic explained the purpose of the three reservations to be to prevent a unilateral delimitation, which applies the equidistance principle in a manner inconsistent with any of the three conditions, from being opposed to the French Republic. Such is the evident intent of the reservations; and it would be somewhat surprising if a reservation were directed to preventing an *agreed* delimitation from being opposable to the reserving State. Consequently, the emphasis which the United Kingdom places on the French Republic's object being to prevent a *unilateral* delimitation from being opposable to it appears to the Court to be mis-conceived. Indeed, the French reservations themselves nowhere refer to a "unilateral" delimitation. Furthermore, the structure and wording of the reservations make it plain that the words "in the absence of a specific agreement" (sans un accord expres) relate not to the unilateral character of the delimitation which applies the equidistance principle but to the opposing of the delimitation to the French Republic. In short, what the reservations are directed to prevent is that an equidistance delimitation, which runs counter to one of the three conditions, should be invoked against the French Republic without its specific agreement. The Court is therefore unable to see on what basis the reservations can be considered to have lost their object upon the submission of the delimitation to arbitration, the very time at which they would be expected to have their maximum relevance for the reserving State. Indeed, the Court considers that a fundamental question of principle is here involved; for it is hard to imagine a more serious impediment to recourse to arbitration and judicial settlement than if it were to be supposed that, by the very act of accepting arbitration or judicial settlement, a State might lose the benefit of a reservation which it had specifically formulated for its legal protection in regard to the matter in issue in the proceedings. In the view of the Court, there is nothing in the terms either of the French reservations or of the Arbitration Agreement which could warrant it in arriving at such a novel conclusion in the present case.

65. The Court itself, on the other hand, considers that for a quite different reason the practical significance of the French reservations to Article

6 in the present proceedings is very small. This is because, as stated in paragraph 61, the combined effect of the reservations and of the United Kingdom's rejection of them is to render the rules of customary law applicable where application of the equidistance principle under Article 6 is excluded by one of the French reservations and because, in the circumstances of the present case, the rules of customary law lead to much the same result as the provisions of Article 6. In deference to the very full arguments of the Parties addressed to it concerning the applicability of the 1958 Convention in the present proceedings, the Court has examined in detail each aspect of that question. However, as will now be explained, the effect of applying or of not applying the provisions of the Convention, and in particular of Article 6, will make not much practical difference, if any, to the actual course of the boundary in the arbitration area.

66. Article 6, paragraphs 1 and 2, provides:

> 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
>
> 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

The case with which the Court is here concerned is one where, after negotiations for the determination of the boundary by agreement, the States concerned failed to reach agreement, and it is therefore the provisions of these paragraphs applicable in the absence of agreement which come under consideration in the present proceedings. The arguments addressed to the Court by the Parties concerning the applicability or non-applicability of these provisions are directed, on the one side, to accent and, on the other, to minimise the rôle of the equidistance method as a legal criterion for the delimitation of continental shelf boundaries.

67. Thus, in invoking the application of Article 6, paragraph 1, the United Kingdom claims that this paragraph places an onus of proof upon the French Republic to show the existence of any "special circumstances" on which it relies and to show that these circumstances justify a boundary other than the median line as defined by the paragraph. The French Republic, on the other hand, in contesting the applicability of Article 6 and invoking the rules of customary law, claims the governing principle to be that the delimitation must be equitable and the equidistance principle to be merely one of numerous "methods" which may in certain circumstances be used to produce an equitable delimitation. Neither of these views of the equidistance "principle" or "method", however, appears to the Court to place it in its true perspective.

68. Article 6, as both the United Kingdom and the French Republic stress in the pleadings, does not formulate the equidistance principle and

"special circumstances" as two separate rules. The rule there stated in each of the two cases is a single one, a combined equidistance-special circumstances rule. This being so, it may be doubted whether, strictly speaking, there is any legal burden of proof in regard to the existence of special circumstances. The fact that the rule is a single rule means that the question whether "another boundary is justified by special circumstances" is an integral part of the rule providing for application of the equidistance principle. As such, although involving matters of fact, that question is always one of law of which, in case of submission to arbitration, the tribunal must itself, *proprio motu,* take cognisance when applying Article 6.

69. It also follows that the relevance of "special circumstances" in the application of Article 6 does not depend on a claim to invoke special circumstances having been advanced by the interested State when ratifying or acceding to the Convention. That this is the legal position under Article 6 is fully recognised by the United Kingdom, which concedes that the French Republic may put forward a claim to "special circumstances" in these proceedings, whether or not in 1965 it made a reservation with regard to those special circumstances. Clearly, this feature of Article 6 further underlines the full liberty of the Court in appreciating the geographical and other circumstances relevant to the determination of the continental shelf boundary, and at the same time reduces the possibility of any difference in the appreciation of these circumstances under Article 6 and customary law.

70. The Court does not overlook that under Article 6 the equidistance principle ultimately possesses an obligatory force which it does not have in the same measure under the rules of customary law; for Article 6 makes the application of the equidistance principle a matter of treaty obligation for Parties to the Convention. But the combined character of the equidistance-special circumstances rule means that the obligation to apply the equidistance principle is always one qualified by the condition "unless another boundary line is justified by special circumstances". Moreover, the *travaux préparatoires* of Article 6, in the International Law Commission and at the Geneva Conference of 1958, show that this condition was introduced into paragraphs 1 and 2 of the Article because it was recognised that, owing to particular geographical features or configurations, application of the equidistance principle might not infrequently result in an unreasonable or inequitable delimitation of the continental shelf. In short, the rôle of the "special circumstances" condition in Article 6 is to ensure an equitable delimitation; and the combined "equidistance-special circumstances rule", in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles. In addition, Article 6 neither defines "special circumstances" nor lays down the criterion by which it is to be assessed whether any given circumstances justify a boundary line other than the equidistance line. Consequently, even under Article 6 the question whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances. In other words, even under Article 6 it is the geographical and other circumstances of any given

case which indicate and justify the use of the equidistance method as the means of achieving an equitable solution rather than the inherent quality of the method as a legal norm of delimitation.

71. In the present instance, account has in any event to be taken of the French reservations to Article 6 and of the United Kingdom's rejection of them which results in the provisions of Article 6 being displaced by those of customary law "to the extent of the reservations". The first reservation regarding an equidistant line delimited from straight baselines established after 29 April 1958 can, in the view of the Court, be left out of account. Straight baselines are nowhere invoked by the United Kingdom for the purpose of delimiting the median line boundary which it proposes as the boundary throughout the arbitration area. The only question regarding the use of straight baselines which has, indeed, arisen in the present proceedings concerns an objection raised by the United Kingdom to the French Republic's claim to use a straight baseline across the Anse de Vauville situated on the coast of Normandy. This straight baseline, however, is relevant only to the delimitation of a seabed and subsoil boundary in an area of the Channel Islands region where, for the reasons previously given in paragraphs 19-21, delimitation of the boundary falls outside the Court's competence. The Court need not, therefore, concern itself further with the first reservation.

72. The second reservation against a boundary determined by application of the equidistance principle "if it extends beyond the 200-metre isobath" is the subject of differing interpretations by the Parties. The United Kingdom considers that it must be understood as connected with the French Republic's opposition in 1965 to the extension of the concept of the continental shelf beyond the 200-metre isobath through the exploitability criterion, and thus as confined to the sections of an equidistant line actually extending beyond the 200-metre isobath. According to the French Government, on the other hand, there is no basis in the text of the reservation for distinguishing between two delimitations, one up to and the other beyond the 200-metre isobath; and the reservation, on this view, covers any delimitation by equidistance extending beyond the 200-metre isobath.

73. The Court notes that the reservation is a general one not limited to the Atlantic region or to the French Republic's continental shelf boundary with the United Kingdom; and that, if the delimitation extends beyond the 200-metre isobath, the reservation is expressed to apply, regardless of the distance of this isobath from the coast. The reservation, therefore, certainly appears to be connected with the French Republic's original opposition to the extension of continental shelf claims beyond the 200-metre isobath. The Court does not, however, find it necessary to decide which of the meanings given to the reservation by the Parties should be adopted as the correct one. In the negotiations between the Parties that took place in the years 1970-1974, it was the French Republic itself which proposed that the delimitation of its boundary with the United Kingdom should be prolonged beyond the 200-metre to the 1,000-metre isobath. According to the information before the Court, no suggestion was ever made during those negotiations that the extension of the delimitation beyond the 200-metre isobath sufficed to ex-

clude altogether the application of Article 6. In these circumstances, the Court can only interpret the extension of the delimitation to the 1,000-metre isobath as disposing both of the French reservation and of the United Kingdom's objection to it in so far as concerns the Atlantic region. The Court, as will later appear, considers that the course of the boundary in that region will be the same whether the delimitation is made on the basis of Article 6 or of the rules of customary law. The considerations which it has just mentioned lead it to conclude, however, that, notwithstanding the prolongation by the Arbitration Agreement of the delimitation "as far as the 1,000-metre isobath", Article 6 is, in principle, applicable in relation to the Atlantic region.

74. More significance clearly attaches to the third reservation designating areas in which the French Republic considers there are "special circumstances" within the meaning of Article 6 by reason of the inclusion of the "Bay of Granville" amongst those areas. In the pleadings the United Kingdom has contested the French Government's interpretation of the expression "Bay of Granville" as covering the whole Channel Islands region. Tracing the development of the various uses of this expression, the United Kingdom claims that previous uses of the expression have related only to sea areas to the east and south of Jersey; and it maintains that the French Republic has, accordingly, not established that, as used in the reservation, the expression extends to the Channel Islands region as a whole. No doubt, the expression "Baie de Granville" may have normally been used in the past with a more restricted sense. During the negotiations in the years 1970-1974, however, as the Court has already noted in paragraph 35, mention was made by both Parties of the French reservation regarding "Granville Bay", and in the documents before the Court relating to those negotiations they are recorded as having discussed the delimitation of the boundary in the whole Channel Islands region under the rubric "Granville Bay". Nor is there any indication in those documents of the French reservations having been given a more restricted interpretation. As, moreover, it hardly seems probable that the French Government intended to restrict its reservation to the "Baie de Granville" in one of the narrower senses of this expression, the Court considers that this reservation must be viewed as relating to the Channel Islands region as a whole. The reservation having been rejected by the United Kingdom, the delimitation of the continental shelf boundary in the Channel Islands region must accordingly be determined by reference to the rules of customary law.

75. It follows from the foregoing paragraphs that, if the Channel Islands region is excluded as falling under the French reservation, the Court considers that Article 6 is applicable, in principle, to the delimitation of the continental shelf as between the Parties under the Arbitration Agreement. This does not, however, mean that the Court considers the rules of customary law discussed in the judgement in the *North Sea Continental Shelf* cases to be inapplicable in the present case. As already pointed out, the provisions of Article 6 do not define the condition for the application of the equidistance-special circumstances rule; moreover, the equidistance-special circumstances rule and the rules of customary law have the same object—the de-

limitation of the boundary in accordance with equitable principles. In the view of this Court, therefore, the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6. Indeed, the Court observes that in the present case, whether discussing the application of Article 6 or the position under customary law, both parties have had free recourse to pronouncements of the International Court of Justice regarding the rules of customary law applicable in the matter. At the same time, the Court also observes that they have tended to lay stress on different elements in the judgement in the *North Sea Continental Shelf* cases; and it is therefore now necessary to refer to some of those pronouncements.

76. The *North Sea Continental Shelf* cases comprised two separate cases brought before the International Court of Justice together, the one between the Federal Republic of Germany and the Netherlands and the other between the Federal Republic and Denmark. They concerned the delimitation of the continental shelf situated off the North Sea coasts of the three countries; and it was owing to the concave character of the coastline formed by the three coasts that the two separate cases were considered by the International Court of Justice to involve a single situation and dealt with as a single problem of delimitation. The Federal Republic not being bound by the 1958 Convention, the Court held Article 6 not to be applicable to the situation; and it further held that the provisions of the Article could not be regarded as expressing rules of customary law and binding on the Federal Republic for that reason. These were the general circumstances under which the Court was led to make its pronouncements concerning the rules of customary law governing delimitation of the continental shelf; and in appreciating the implications of some of those pronouncements it may be necessary to bear in mind that they may have been made in the particular context of the concave geographical configuration in that case involving the coasts of three adjoining States.

77. Many of the Court's pronouncements were, however, evidently of a general character and applicable to a delimitation under Article 6 no less than under customary law. Thus, the Court described the principle that a coastal State has inherent rights in the continental shelf which constitutes the natural prolongation of its land territory as "the most fundamental of all the rules of law relating to the continental shelf" and as "enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it". Under this rule, it explained (I.C.J. Reports 1969, paragraph 19):

> the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.

From this fundamental rule the Court drew two conclusions concerning the delimitation of the continental shelf which the Parties to the present proceedings are clearly correct in regarding as equally being of general application.

78. The first of these conclusions was that delimitation of the continental shelf is not a question of apportionment, that is of awarding "just and

equitable'' shares to each State in a common, as yet undelimited, area of shelf. On the contrary, delimitation is essentially a process of ''drawing a boundary line between areas which already appertain to one or other of the States affected'' (I.C.J. Reports 1969, paragraph 20). Accordingly, although the delimitation in the present case must be equitable, it cannot have as its object simply the awarding of an equitable ''share'' in the continental shelf to each Party. The delimitation, when made, will in practice divide the continental shelf in the arbitration area between the French Republic and the United Kingdom in what may then be said to be shares; but this will be only the incidental result of fixing their boundary in the marginal areas where their respective continental shelves converge.

79. The second conclusion was ''that the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State'' (*ibid.*, paragraph 85(*c*)). This conclusion follows directly from the fundamental rule itself and is, indeed, merely an application of that rule to the context of a single area of continental shelf upon which the territories of two or more States abut. So far as delimitation is concerned, however, this conclusion states the problem rather than solves it. The problem of delimitation arises precisely because in situations where the territories of two or more States abut on a single continuous area of continental shelf, it may be said geographically to constitute a natural prolongation of the territory of each of the States concerned. Consequently, it is rather in the rules of customary law discussed in the *North Sea Continental Shelf* cases and which are specifically directed to delimitation that guidance may be sought regarding the principles to be applied in determining the boundary of the continental shelf in such situations.

80. In close relation with the principle of the natural prolongation of the land, the Court examined the rôle of ''proximity'' in determining the appurtenance of an area of continental shelf to one State rather than to another. Having observed that there is ''no necessary, and certainly no complete, identity between the notions of 'adjacency' and 'proximity' '', it said that ''the question of which parts of the continental shelf 'adjacent to' a coastline bordering more than one State fall within the appurtenance of which of them remains to this extent an open one, not to be determined on a basis exclusively of proximity''. It then continued (I.C.J. Reports 1969, paragraph 42):

> Even if proximity may afford one of the tests to be applied and an important one in the right conditions, it may not necessarily be the only, nor in all circumstances the most appropriate one. Hence it would seem that the notion of adjacency, so constantly employed in continental shelf doctrine from the start, only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast of another State.

The Parties to the present proceedings both appear to accept that these observations were intended to relate generally to the delimitation of the continental shelf, whether under customary law or under the 1958 Convention. The significance which they give to the observations differs, however, in some respects. The French Government lays stress on them as involving a finding by the International Court that ''proximity'' does not confer any title to

rights over the continental shelf. What, in its view, the International Court's observations imply is that it is the principle of the continuity of the coastal State's territory, not of "proximity", which is decisive in giving title to the continental shelf. The United Kingdom, on the other hand, while not questioning the International Court's rejection of proximity as by itself a ground of title to the shelf, insists that the Court "did not thereby reject proximity as a method employable in solving the problem of delimitation". What the Court rejected, the United Kingdom maintains, was "absolute proximity", not proximity as a method of delimitation.

81. The observations of the International Court of Justice appear to speak for themselves. Clearly, the Court did decline to regard proximity as by itself a ground of title to areas of continental shelf. Clearly, however, it did also expressly recognise that proximity "may afford one of the tests to be applied and an important one in the right conditions". This would seem to state explicitly that under certain conditions proximity may be the appropriate test or method for delimiting the boundary of the continental shelf; but that in any given case the value to be attached to proximity as a method of delimitation depends on the individual circumstances of that case. That such was indeed the view taken by the International Court of Justice of the rôle of proximity in the delimitation of the continental shelf is borne out by its further observations regarding the rôle in the delimitation of the shelf of the equidistance principle, which itself is founded upon the criterion of proximity. In any event, this Court of Arbitration sees no reason to adopt a different view of the rôle of "proximity" in the circumstances of the present case. It will, therefore, at once turn to the observations of the International Court of Justice on the rôle of the equidistance principle, since these touch questions that are central to the determination of the course of the continental shelf boundary in the English Channel and the Atlantic region.

82. The International Court of Justice, as already indicated in paragraph 76, held that the equidistance rule laid down in Article 6 of the Convention is not the expression of a rule which is also applicable in customary law. In so holding, the Court took the view that the equidistance principle itself is not inherent in the doctrine of the continental shelf nor a logical necessity of that doctrine derived from any fundamental principle of proximity or adjacency; and it also emphasised the doubts voiced in the International Law Commission as to the possibility that, in certain cases, the geographical configuration of the coast would render a boundary drawn on the basis of equidistance inequitable. So it was that the Court was led to conclude that in customary law the basic principle of delimitation is that, failing agreement, the boundary must be determined in accordance with equitable principles. So it was also that, for the purpose of applying equitable principles, the Court held that "the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved" (I.C.J. Reports 1969, paragraph 85(*b*)). It said, indeed, that "there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures" (*ibid.*, paragraph 93).

83. These observations are given prominence by the French Republic, which seeks to deduce from them a specific principle of customary law which it terms "plurality of methods, unity of aim". Moreover, it presents this principle as conferring on the States concerned an almost unlimited freedom of choice as to methods of delimitation, provided that they result in an equitable delimitation. The United Kingdom does not dispute the International Court's endorsement of the use of various methods of solving the problem of delimitation or its pronouncement that no particular method is *per se* obligatory, where the situation is between States not parties to the 1958 Convention. But it lays stress on the fact that the cases before the International Court were cases where there were continuing negotiations between the parties for an agreed delimitation; and it claims that the Court's observations were directed only to negotiated agreements. As to the Court's statement that "there is no legal limit on the considerations which States may take account of for the purpose of making sure that they apply equitable procedures", the United Kingdom insists that this has nothing to do with "special circumstances" in the sense of Article 6 of the 1958 Convention.

84. Neither of these interpretations of the judgement in the *North Sea Continental Shelf* cases appears, however, to place in its proper perspective the rôle of the equidistance principle, as explained by the International Court in those cases. The Court there made certain observations, which were of an entirely general character, regarding the differing validity of the equidistance principle as a means of achieving an equitable delimitation in different geographical situations. These observations, to which the present Court of Arbitration in general subscribes, indicate that the validity of the equidistance method, or of any other method, as a means of achieving an equitable delimitation of the continental shelf is always relative to the particular geographical situation. In short, whether under customary law or Article 6, it is never a question either of complete or of no freedom of choice as to method; for the appropriateness—the equitable character—of the method is always a function of the particular geographical situation.

85. As to the Court's observations on the rôle of the equidistance principle, it was far from discounting the value of the equidistance method of delimitation, while declining to regard it as obligatory under customary law. "It has never been doubted", the Court commented, "that the equidistance method is a very convenient one, the use of which is indicated in a considerable number of cases (I.C.J. Reports 1969, paragraph 22); and again it commented "it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application" (*ibid.*, paragraph 23). The truth of these observations is certainly borne out by State practice, which shows that up to date a large proportion of the delimitations of the continental shelf have been effected by the application either of the equidistance method or, not infrequently, of some variant of that method. But the Court also drew a clear, and even sharp, distinction between the geographical situations where the coasts of States abutting on the same continental shelf are opposite and where they are adjacent to each other (*ibid.*, paragraph 57):

> Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that

> of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved. . . . This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem—a conclusion which also finds some confirmation in the difference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention[11] . . . as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.

Further explaining its reason for making this distinction, the Court said (I.C.J. Reports 1969, paragraph 58):

> 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.

86. The International Court of Justice also singled out an aspect of lateral boundary situations which tends to increase the likelihood that strict application of the equidistance method may be productive of inequitable results in delimitations between States having adjoining coasts. Although its observations on this aspect of "adjacent States" situations were directed to the particular context of a concave coastline formed by the adjoining territories of three States, they reflect an evident geometrical truth and clearly have a more general validity. It pointed out that in the case of lateral boundaries the effect of any irregularity in the coastline on the areas of continental shelf allocated to each State by the equidistance method is automatically magnified, the greater the distance the boundary extends from the shore. Speaking of the case of a concave or convex coastline, it said (I.C.J. Reports 1969, paragraph 89 (*a*); and *cf.* paragraphs 8 and 59):

> if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

Clearly, this characteristic of the equidistance method marks a material difference between a geographical situation of "opposite States" and one of "adjacent States" in the delimitation of continental shelf boundaries.

87. In the present proceedings, both the Parties have recognised the significance of the distinction drawn by the International Court of Justice between "opposite States" and "adjacent States" situations in relation to the use of the equidistance method, whether under Article 6 or under customary law. They are agreed that throughout the English Channel where the coasts of the French Republic and the United Kingdom are opposite each other the boundary should, in principle, be the median line. They are in radical disagreement as to the appropriate method of delimitation in the Channel Is-

[11] The text of the two paragraphs appears in paragraph 66 above.

lands region. Even in that region, as already mentioned in paragraph 15, they are agreed that in the areas where the coasts of the Channel Islands and the coasts of Normandy and Brittany are opposite each other, the seabed and subsoil boundary should in principle be the median line. In short, leaving aside the special problem resulting from the position of the Channel Islands off the French coast, they are agreed that the geographical and legal frame of reference for the delimitation of the boundary is that of an "opposite States" situation; and that, in consequence, the appropriate method is, in principle, equidistance. In so agreeing, the French Republic bases itself on the rules of customary law, the United Kingdom on the provisions of Article 6 of the Convention; but the result is the same, which seems to confirm that, under either head, it is the geographical situation which indicates the applicable method of delimitation. In any event, this Court of Arbitration sees no reason to differ from the conclusion of the Parties that, in principle, the method applicable in the English Channel is to draw a median line equidistant from their respective coasts, a conclusion which is in accordance both with Article 6 of the Convention and with the appreciation by the International Court of Justice of the position in customary law.

88. In the Atlantic region, on the other hand, the Parties are in radical disagreement as to the correct characterisation of the geographical situation for the purpose of delimiting the continental shelf. As a consequence, they are also in disagreement regarding the principle and method of delimitation to be applied in the region.

89. The French Republic, independently of its general contention that the 1958 Convention, and in particular Article 6, is wholly inapplicable to the present case, submits that the Atlantic region in any event falls outside both paragraph 1 and paragraph 2 of Article 6. Stressing the phrase "la délimitation du plateau continental *entre* ces Etats" (emphasis added) in the French text of paragraph 1, it asks the Court to treat that paragraph as confined to cases where not only are the coasts of the two States opposite each other but the continental shelf to be delimited is situated "between" those coasts. A mere glance at the map, it argues, shows that this is not the position in the Atlantic region; and it recalls that the United Kingdom in its Memorial (paragraph 239) described the situation in this region as one where "the areas of shelf lie off, rather than between, their two coasts". As to its own view of the situation, the French Government explained, on 2 February 1977:

> Moving west at least as far as the Land's End-Porsal line, and even up to the Scillies-Ushant line, one finds coasts which are opposite each other and from which a median line can be drawn. West of the Scillies, however, there are no coasts; this is a fact, and there is no point in denying a geographical fact.

Thus, according to its view of the geographical facts, the two countries cease to have coasts facing each other certainly to the west of the Scillies-Ushant line and perhaps even before that at the Land's End-Porsal line. This being so, the French Government argues that in the region westwards of one or other of those lines there are no coasts *between* which the continental shelf is situated and the case cannot be one of "opposite" States for the purpose either of paragraph 1 of Article 6 or of the rules of customary law.

90. The French Republic went on to observe that, as its territory and that of the United Kingdom do not adjoin each other and do not have a common land frontier, the case cannot be one of a lateral delimitation between "adjacent" States falling under paragraph 2 of Article 6. True, at the same hearing, it recognised that the situation may be said to present some analogy with the case of adjacent States:

> Undoubtedly, the shelf to be delimited . . . extends out to sea off the coasts of the two States, so that an analogy can be drawn with a lateral delimitation. This is because the delimitation will be made seawards out to the point fixed by the Parties for defining the extent of the continental shelf to be delimited, that is, out to the 1,000-metre isobath. Hence, the problems to be resolved are more akin to those arising in a lateral delimitation than to those arising in a delimitation between opposite States, where the supposition is that the shelf to be delimited is situated between the two States.

It does not, however, suggest that the Atlantic region should be treated as a case of lateral delimitation between "adjacent" States. On the contrary, the French Republic contends that the situation in this region is neither one of "opposite" States under paragraph 1 of Article 6 nor one of "adjacent" States under paragraph 2 of the Article, but is *sui generis*. The draftsmen of Article 6, it says, failed to appreciate that there may be situations other than those provided for in the two paragraphs of the Article; and on this point it cites the view of the International Court in the *North Sea Continental Shelf* cases that the relation between the Netherlands and Denmark is not that of "adjacent" nor of "opposite" States (I.C.J. Reports 1969, paragraph 36).

91. The position taken by the United Kingdom in its final Submissions is that the coasts of the two countries are "indubitably opposite one another" in the entire arbitration area; and that "the terms and manifest intention of Article 6 render paragraph 1 of the Article applicable throughout the arbitration area, including the Atlantic region". It maintains that Article 6 was intended to deal exhaustively with the law governing delimitation of the boundary between States abutting on the same area of continental shelf; that the wording of the Convention contains no indication that other cases exist which fall outside paragraphs 1 and 2 of the Article; that the *travaux préparatoires* do not disclose any evidence of an intention to allow a third category of cases outside those paragraphs; and that, on the contrary, all the substantive provisions of the Convention were designed to be of general application. State practice, it adds, confirms that the two categories in Article 6 are regarded as exhaustive; moreover, Article 62 and Article 71 of the Revised Single Negotiating Text also adopt the two categories of "opposite" and "adjacent" States, apparently treating them as covering all the delimitations that may arise between neighbouring States.

92. As to the statement of the International Court of Justice that the relation between the Netherlands and Denmark is neither one of "adjacent" nor of "opposite" States, the United Kingdom argues that, when read in its context, it does not support France's contention as to the existence of cases not covered by either paragraph of Article 6. The Court's statement, according to the United Kingdom, was in its very essence based upon the fact that the Netherlands and Denmark are not immediately neighbouring States; for in these circumstances it was not self-evident that they should have a com-

mon boundary on the continental shelf. The statement, the United Kingdom affirms, was merely referring to the point that it cannot be open to States, by ignoring the existence of the continental shelf claims of an intermediate third State, to divide up areas appertaining to the third State.

93. The United Kingdom bases its characterisation of the Atlantic region as a case of "opposite" States on two main propositions. First, the natural meaning of the term "two adjacent States" in paragraph 2 of Article 6 is "two States whose territories are alongside one another and who have a common land frontier at the sea coast"; as France and the United Kingdom are separated in the Atlantic region by the broad area of sea constituted by the south-western approaches to the English Channel, they are scarcely to be regarded as "adjacent". Secondly, throughout the arbitration area and eastwards to the Straits of Dover, the coasts of the United Kingdom and the French Republic are, in its view, a textbook example of coasts which are "opposite each other" within the meaning of paragraph 1 of Article 6. Although, argues the United Kingdom, the areas of shelf in the Atlantic region "lie off", rather than between, their two coasts, "there is no reason for changing the relationship of 'opposite' States which exists for the whole length of the Channel". It considers the French contention to be based on the fallacy that the south-western approaches constitute a separate sector which requires different legal rules from the rest of the Channel. In its view, the entire seabed area is one continuous shelf and the relationship between the coasts of the two countries for the purposes of the entire seabed area is patently one of opposite States.

94. The general character of the provisions of Article 6, and the absence of any contrary indications in the *travaux préparatoires* of the Article or in State practice, appear to the Court to support the view that the Article is to be understood as dealing comprehensively with the delimitation of the continental shelf, and that all situations, in principle, fall under either paragraph 1 or paragraph 2 of the Article. Nor does this view appear to be incompatible with that of the International Court of Justice regarding the effect of the intervention of the coast and continental shelf of the Federal Republic of Germany in preventing the Netherlands and Denmark from being in a relation of "opposite" States. Moreover, in its general discussion of the advantages and disadvantages of the equidistance method of delimitation, to which reference has been made in paragraphs 85-86, the Court itself dwelt on the distinction between the cases of "opposite" and "adjacent" coasts without apparently envisaging any third category of geographical situation as having the same significance in the delimitation of the continental shelf. On the other hand, while stressing the distinction between "situations" where the coasts are "opposite" and where they are "adjacent", the Court observed that this distinction may not always be uniform and clear-cut along the whole length of the boundary (I.C.J. Reports 1969, paragraph 6):

> An equidistance line may consist either of a "median" line between "opposite" States or of a "lateral" line between "adjacent" States. In certain geographical configurations of which the Parties furnished examples, a given equidistance line may partake in varying degree of the nature both of a median and of a lateral line.

Referring to this statement in the present proceedings, the United Kingdom

likewise remarked that there are many situations where "along the same boundary, the relationship changes from 'adjacent' to 'opposite' States". What this means, in the view of the present Court of Arbitration, is that in determining whether two States are to be considered as "opposite" or "adjacent", for the purpose of delimiting a continental shelf on which each of them abuts, the Court must have regard to their actual geographical relation to each other and to the continental shelf at any given place along the boundary.

95. The observations of the International Court of Justice regarding the difference between the application of the equidistance method in "median line" and "lateral line" boundary situations were, as already stressed, framed in general terms applicable alike to delimitation under the provisions of Article 6 or under the rules of general international law. The reason is clear: the relationship of "opposite" or "adjacent" States is nothing but a reflection of the geographical facts, and the transfer of the legal plane from the Convention to customary law does not modify the geographical facts. It is also clear that the distinction drawn by the Court between the two geographical situations is one derived not from any legal theory but from the very substance of the difference between the two situations. Whereas in the case of "opposite" States a median line will normally effect a broadly equitable delimitation, a lateral equidistance line extending outwards from the coasts of adjacent States for long distances may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographical features. In short, it is the combined effect of the side-by-side relationship of the two States and the prolongation of the lateral boundary for great distances to seawards which may be productive of inequity and is the essence of the distinction between "adjacent" and "opposite" coasts situations.

96. In the pleadings mention has been made of Article 62 and 71 of the Revised Single Negotiating Text still under negotiation at the Third United Nations Conference on the Law of the Sea. These Articles make provision for the delimitation, in the one case, of the 200-mile exclusive economic zone and, in the other, of the extended area of continental shelf which it is proposed at the Conference to allow to coastal States; and their texts, which have not yet been adopted by the Conference, are still a matter of discussion. Even so, this Court has examined their provisions and it finds no reason to suppose that, if they were applicable, they would make any difference to the determination of the course of the boundary in the present case. Those texts speak of delimitation between "adjacent" or "opposite" States in accordance with equitable principles as distinct cases; and they envisage that, where appropriate, the equidistance of median line[12] shall be employed, taking account of all the relevant circumstances. Since it is the geographical circumstances which primarily determine the appropriateness

[12] The texts reverse the order of the words "median" and "equidistant"; but it is the "equidistant" line which is appropriate to "adjacent" States and the "median" line to "opposite States". See Third United Nations Conference on the Law of the Sea, Official Records, vol. V (Document A/CONF. 62/WP. 8/Rev.1/Part II).

of the equidistance or any other method of delimitation in any given case, the Revised Single Negotiating Text would not appear to visualise the solution of cases like the present one on principles materially different from those applicable under the 1958 Convention or under general international law. What the Court thinks evident, however, is that the extension seawards of the maritime zones of States, for which the Revised Single Negotiating Text provides, cannot fail to increase the significance of the effects of individual geographical features in deflecting the course of a lateral equidistance boundary between "adjacent" States.

97. In short, this Court considers that the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or methods of delimitation in any given case, whether under the 1958 Convention or customary law, has therefore to be determined in the light of those circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles. Furthermore, in appreciating the appropriateness of the equidistance method as a means of achieving an equitable solution, regard must be had to the difference between a "lateral" boundary between "adjacent" States and a "median" boundary between "opposite" States.

98. The French Republic, in its account of the principles and rules applicable in the delimitation of the continental shelf, also invoked two further principles as specific rules of customary law, namely, "proportionality" and the "reasonable evaluation of the effects of natural features". These concepts are clearly inherent in the notion of a delimitation in accordance with equitable principles, and thus form an element in the appreciation of the appropriateness of the equidistance or any other method of delimitation. They hardly seem, however, to have the character of specific principles or rules of delimitation assigned to them by the French Republic.

99. In particular, this Court does not consider that the adoption in the *North Sea Continental Shelf* cases of the criterion of a reasonable degree of proportionality between the areas of continental shelf and the lengths of the coastlines means that this criterion is one for application in all cases. On the contrary, it was the particular geographical situation of three adjoining States situated on a concave coast which gave relevance to that criterion in those cases. In the present case, the rôle of proportionality in the delimitation of the continental shelf is, in the view of this Court, a broader one, not linked to any specific geographical feature. It is rather a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation, and in particular of a delimitation by application of the equidistance method.

100. A State's continental shelf, being the natural prolongation under the sea of its territory, must in large measure reflect the configuration of its coasts. Similarly, when two "opposite" or "adjacent" States abut on the same continental shelf, their continental shelf boundary must in large measure reflect the respective configurations of their two coasts. But particular

configurations of the coast or individual geographical features may, under certain conditions, distort the course of the boundary, and thus affect the attribution of continental shelf to each State, which would otherwise be indicated by the general configuration of their coasts. The concept of "proportionality" merely expresses the criterion or factor by which it may be determined whether such a distortion results in an inequitable delimitation of the continental shelf as between the coastal States concerned. The factor of proportionality may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines, as in the *North Sea Continental Shelf* cases. But it may also appear, and more usually does, as a factor for determining the reasonable or unreasonable—the equitable or inequitable—effects of particular geographical features or configurations upon the course of an equidistance-line boundary.

101. In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. The equitable delimitation of the continental shelf is not, as this Court has already emphasized in paragraph 78, a question of apportioning—sharing out—the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines; for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares. Furthermore, the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory places definite limits on recourse to the factor of proportionality. As was emphasized in the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, paragraph 91), there can never be a question of completely refashioning nature, such as by rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts. Proportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf.

102. In the light of the foregoing examination of the rules of international law applicable in the matter as between the Parties, the Court will now consider their concrete application in the delimitation of the continental shelf boundary or boundaries in the present case.

103. In the English Channel, leaving aside the particular situation resulting from the Channel Islands being located off the French coast, the geographical and the legal frame of reference for determining the course of the boundary of the continental shelf is patently that of a delimitation between "opposite" States. As stated in paragraph 87, the Parties themselves are in accord on this point; and, the Channel Islands region apart, they are also agreed that within the English Channel the boundary should, in principle, be the median line. The Court has already indicated that this is also its own

opinion. The effects of irregularities in the coastline of each State are, broadly, offset by the effects of irregularities in the coastline of the other, and a median line boundary will thus result in a generally equitable delimitation as between the Parties. The Court, therefore, considers that its first step should be to determine the course of the median line within the Channel to the east and to the west of the points where the presence of the Channel Islands has to be taken into consideration.

104. Before doing so, however, the Court must refer to paragraph 6 of the United Kingdom's final Submissions in which, in a certain eventuality, it proposes a boundary along the axis of the Hurd Deep and Hurd Deep Fault Zone as an alternative to the median line, and also to an express reservation in that regard made by the United Kingdom during the oral proceedings. The United Kingdom, as previously noted in paragraph 93, insists upon the geological continuity of the continental shelf throughout the arbitration area. It further maintains that the geographical and legal relation between the French Republic and the United Kingdom throughout the arbitration area, including the Atlantic region, is that of States whose coasts are opposite each other; and that, in consequence, the appropriate boundary both under Article 6 of the Convention and under customary law is a median line along the whole length of the boundary. The general features of the Hurd Deep-Hurd Deep Fault Zone, which the United Kingdom proposes in paragraph 6 of its Submissions as an alternative to the median line, have already been described by the Court in paragraph 12. The axis of these geological faults neither follows nor approximates to the course of the median line, but runs somewhat to its south both in the Channel and in the Atlantic region. The court is, however, asked by the United Kingdom to envisage the axis of the Hurd Deep-Hurd Deep Fault Zone as a possible alternative to the median line in the event that the Court should decide that in parts of the arbitration area there exists "a major and persistent structural discontinuity of the seabed and subsoil" of such a kind as to "interrupt the essential geological continuity of the continental shelf".

105. During the oral proceedings, in circumstances to be explained in paragraph 111, the Court requested the Parties to confirm their apparent acceptance in the written pleadings of a median line boundary to the east and to the west of the Channel Islands region. In confirming on 21 February 1977 its acceptance of a median line in the western segment of the Channel, the United Kingdom did so subject to the following reservation:

> If, however, the median line were not to be regarded as the proper boundary under customary international law, this could, in the submission of the United Kingdom, only be on the basis that the Hurd Deep and Hurd Deep Fault Zone are regarded as marking the limits of the respective natural prolongations of the two States. In these circumstances, the United Kingdom could not regard the segment of the median line west of the Channel Islands as an agreed boundary, since the proper boundary in law would then lie, in their submission, throughout the entire arbitration area west of the Channel Islands, along the axis formed by the Hurd Deep and the Hurd Deep Fault Zone and its prolongation out to the 1,000-metre isobath.

Consequently, it appears that the United Kingdom makes its endorsement of a median line boundary in the Channel to the west of the Channel Islands in some measure conditional upon the median line's being regarded by the

Court as also the appropriate boundary in the Atlantic region outside the Channel.

106. The Court notes that the United Kingdom's reservation regarding its acceptance of the median line in the western segment of the Channel is formulated in terms a little different from those used in the sixth Submission concerning the axis of the Hurd Deep-Hurd Deep Fault Zone as a possible alternative boundary. In the sixth Submission, the Hurd Deep-Hurd Deep Fault Zone boundary is proposed as an alternative to the median line if the Court should decide that those geological faults are such as to "interrupt the essential geological continuity of the continental shelf". In the reservation, on the other hand, the United Kingdom seems to make its endorsement of the median line in the western segment of the Channel conditional upon the median line's being regarded by the Court as the appropriate boundary throughout the arbitration area westwards of the Channel Islands, including the Atlantic region. The reservation is thus not limited to the case of a rejection by the Court of a median line boundary in the Atlantic region on the basis of a breach in the geological continuity of the shelf; it appears to envisage any setting aside of the median line westwards of the Channel Islands on whatever ground.

107. Whichever way the matter is put, the Court does not consider that the Hurd Deep-Hurd Deep Fault Zone is a geographical feature capable of exercising a material influence on the determination of the boundary either in the Atlantic region or in the English Channel. The Court shares the view repeatedly expressed by both Parties that the continental shelf throughout the arbitration area is characterised by its essential geological continuity. The geological faults which constitute the Hurd Deep and the so-called Hurd Deep Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuities in the seabed and subsoil which do not disrupt the essential unity of the continental shelf either in the Channel or the Atlantic region. Indeed, in comparison with the deep Norwegian Trough in the North Sea, they can only be regarded as minor faults in the geological structure of the shelf; and yet the United Kingdom agreed that the trough should not constitute an obstacle to the extension of Norway's continental shelf boundary beyond that major fault zone. Moreover, to attach critical significance to a physical feature like the Hurd Deep-Hurd Deep Fault Zone in delimiting the continental shelf boundary in the present case would run counter to the whole tendency of State practice on the continental shelf in recent years.

108. In any event, having regard to the essential continuity of the continental shelf in the Channel and the Atlantic region, there does not seem to be any legal ground for discarding the equidistance or any other method of delimiting the boundary in favour simply of such a feature as the Hurd Deep-Hurd Deep Fault Zone. Should the equidistance line not appear to the Court to constitute the appropriate boundary in any area, it will be because some geographical feature amounts to a "special circumstance" justifying another boundary under Article 6 or, by rendering the equidistance line inequitable, calls under customary law for the use of some other method. It fol-

lows that any alternative boundary would have either to be one justified by the "special circumstances" or one apt to correct the inequity caused by the particular geographical feature. But the axis of the Hurd Deep-Hurd Deep Fault Zone is placed where it is simply as a fact of nature, and there is no intrinsic reason why a boundary along that axis should be the boundary which is justified by the special circumstance under Article 6 or which, under customary law, is needed to remedy the particular inequity.

109. The Court is not, therefore, persuaded of the pertinence of the Hurd Deep-Hurd Deep Fault Zone as a significant factor in determining the method of delimitation either in the English Channel or in the Atlantic region. Still less is it persuaded of the existence of any necessary link between the method of delimitation adopted in the Atlantic region and the acceptability of the median line method in the western segment of the English Channel. In the Channel, as is recognised by the United Kingdom itself in company with the French Republic and by the Court, the geographical and legal frame of reference is that of a delimitation between opposite States; and the method of delimitation indicated by Article 6 of the Convention and by customary law alike is the median line. Whether or not the same method is considered appropriate westwards of the Channel, the median line will remain the method indicated by the applicable rules of law in the western segment of the Channel itself. The essential geological continuity of a continental shelf cannot, in the view of the Court, be said automatically to entail the continuous use of the same method of delimitation along the whole length of the shelf; for the mere reference to "special circumstances" in Article 6 rules out any such conclusion.

110. Consequently, while noting the qualification attached by the United Kingdom to its endorsement of the median line in the western segment of the Channel, the Court must now proceed to determine the course of the median line in the Channel both to the east and west of the Channel Islands. When so determined, the median line will, in the opinion of the Court, constitute the continental shelf boundary as between the Parties in these two segments of the English Channel.

111. In the written pleadings the French Republic and the United Kingdom both referred to the fact that during the negotiations in the years 1970-1974 agreement had in fact been reached between their two delegations regarding the tracing and the precise coordinates of the median line, and also of a "simplified"[13] median line in the English Channel. The natural inference, therefore, was that these coordinates included those relevant to the delimitation of the median line in the areas where the Parties are agreed in thinking that the boundary should in principle, be a median line. Accordingly, at the hearing on 16 February 1977, the Court requested the Agents of the Parties:

(1) formally to confirm that the Court is to treat those segments of the boundary line

[13]A "simplified" median line is one in which, in order to make the line less complicated, the number of its turning points is reduced by using straight lines between the principal points. When this is done, an advantage to one State in one area is usually compensated by a roughly equivalent advantage to the other State in another area.

in the Channel (to the east and to the west of the Channel Islands region) as agreed (between them);

(2) to identify precisely the respective terminal points of each of the agreed segments and to give the relevant coordinates of the median line in those segments of the boundary . . . ; and

(3) to trace these segments of the line on an appropriate chart or charts.

Each Agent confirmed in general terms that the two segments of the boundary to the east and to the west of the Channel Islands region should be treated by the Court as agreed between the Parties to be the median line. Both of them, however, did so subject to reservations or qualifications in regard to the detailed delimitation of the median line.

112. At the hearing of 16 February 1977 the Agent of the French Republic underlined that his confirmation of his Government's acceptance of the delimitations in the two segments was subject to an identical confirmation of those delimitations being given by the United Kingdom. At the same time, he specified that the French Republic's confirmation of the delimitation in the western segment extended westwards only as far as the coordinates of the point which is situated on the line Land's End-Pointe du Raz. He indicated that some differences existed between the precise lines proposed by either Party which, however, he considered that it should be possible to resolve by agreement between their experts. He also expressed his readiness to collaborate with the United Kingdom Agent in the identification of the extreme points of each of the agreed segments, in the determination of the relevant coordinates, and in the tracing of these segments on charts.

113. The Agent of the United Kingdom, on 21 February 1977, dealt first with the eastern segment, confirming its agreement that to the east of the tripoint in the Channel delimited from Cap de la Hague, Alderney and Portland Bill the boundary should in principle be the median line. He added that during the bilateral negotiations an agreement had been reached between the two delegations on precise coordinates defining a simplified line. But that this simplified line does not correspond in every particular with the lines proposed by the two Parties on their respective large-scale maps which, in turn, are not themselves identical. The reasons for these discrepancies, he explained, were:

(*a*) The 1971 simplified line was based upon the situation obtaining at the time of the original United Kingdom proposal of 1964, that is to say, before the promulgation of the French straight baseline system or the establishment of a French 12-mile territorial sea in 1971;

(*b*) Computer techniques developed in recent years now permit the location of the true median line with considerably greater accuracy than was possible with the techniques employed at the time; and

(*c*) It is possible now to refer all positions and base points to a common geodetic datum known as "European datum".

Since the discrepancies between the various lines were, in general, small, the United Kingdom was prepared either to confirm its acceptance of the 1971 simplified line and permit the technical experts of the two Parties to agree upon its tracing or, alternatively, to authorise its expert to reach agreement with the French experts on a fresh set of coordinates defining with the

necessary accuracy this segment of the boundary line and on the tracing of the line on charts.

114. The United Kingdom Agent stated that his reservations regarding the location of the 1971 "simplified" line and the lines drawn on the large-scale maps of the Parties are equally relevant to the segment of the median line to the west of the Channel Islands region. The discrepancies between the various lines were, however, greater than in the eastern segment in consequence chiefly of the different treatment now given by the Parties to the French straight baselines and to Eddystone Rock. The United Kingdom would, even so, be prepared to confirm its acceptance of the 1971 "simplified" line and leave it to the technical experts to agree on the details of its tracing to a suitable point of termination at the western end of the Channel. Alternatively, if the French Republic wished to insist on the use of its straight baselines promulgated in 1967, the United Kingdom would be prepared to accept the use of those baselines on the clear understanding that the same would apply to the Eddystone Rock. In this case, it would also be prepared to authorise its technical experts to reach agreement with those of the French Government regarding the coordinates necessary to define this segment of line and regarding the tracing of the line on charts.

115. The United Kingdom, it is true, also made the more general reservation, relating to the Hurd Deep-Hurd Deep Fault Zone as a possible alternative to the median line in the western segment of the Channel, which has been dealt with by the Court in paragraphs 104-110. The Court has, however, already found that reservation not to be pertinent in connexion with the delimitation of the continental shelf in the western segment of the Channel, and has also found that the appropriate method of delimitation in the western, as in the eastern segment of the Channel is a median line. The reservation does not, moreover, affect the actual tracing of the median line; and the United Kingdom, together with the French Republic, has given the Court every assistance in establishing the precise course of the median line in the Channel to the west, as well as to the east, of the Channel Islands.

116. In response to the Court's request to the Parties to identify precisely the respective terminal points of each of the agreed segments in the Channel and to give the relevant coordinates of the median line in those segments, meetings were held between their respective experts with a view to "agreeing on the course of segments of a continental shelf boundary to the east and to the west of the Channel Islands." The outcome of these meetings, communicated to the Court in identical reports submitted by the Parties on 28 February 1977, is that there is agreement between them on a "simplified" median line in the Channel both to the east of the Channel Islands and to the west, with the exception of one portion of the line in the western segment. Having regard to the disagreement concerning the portion of the line to the west of the Channel Islands, the Court will deal with the two segments separately.

117. East of the Channel Islands, that is to the east of the point in mid-Channel where the presence of the Channel Islands calls for consideration, the Parties are agreed on a "simplified" line based on the median

line. Beginning at longitude 0°30′ west, the eastern limit of the arbitration area, this agreed "simplified" line joins the following points:

A: 50°07′29″N 00°30′00″W

B: 50°08′27″N 01°00′00″W

C: 50°09′15″N 01°30′00″W

D: 50°09′14″N 02°03′26″W

These points, and the tracing of the line between them are, for purposes of illustration, shown on Map 1, which appears on page 196.[14] As the Parties themselves explain, Point D represents the equidistant tripoint between the appropriate base-points at Cap de la Hague (on the Cherbourg peninsula), Alderney (in the Channel Islands) and Portland Bill (on the coast of England). In other words, it represents the first point on the median line, travelling westwards, at which the presence of the Channel Islands calls for consideration.

118. West of the Channel Islands, that is to say west of the point in mid-Channel where, travelling westwards, the presence of the Channel Islands ceases to call for consideration, the Parties are agreed on two portions of a "simplified" median line. The first of these portions joins the following two points.

E: 49°32′42″N 03°42′44″W

F: 49°32′08″N 03°55′47″W (see Map 1 on page 196)[14]

Point E, as the Parties explain, represents the equidistant tripoint between the appropriate base-points at Les Hanois (off the west coast of Guernsey), Les Sept Iles (off the coast of Brittany) and Prawle Point (on the coast of England). Westwards of Point F there is a gap in the "simplified" line agreed by the Parties owing to a difference of view between them about "the legal status of Eddystone Rock and its consequent effect on the course of the boundary line." Further to the west—at Point G—the Parties were again able to reach agreement, the second portion of the agreed "simplified" boundary being a line joining the following points:

G: 49°27′23″N 04°21′46″W

H: 49°23′14″N 04°32′39″W

I: 49°14′28″N 05°11′00″W

J: 49°13′22″N 05°18′00″W (see Map 1)

Point J thus marks the westerly terminal of the "simplified" median line which has been agreed between the Parties. According to the list of base-

[14] The Court of Arbitration included two maps, on pages 117a and 136a of the Decision it handed down. One map containing all the relevant information is reproduced on page 338 below.

points subsequently transmitted to the Court by the Parties, Point J represents the point equidistant from Basse Vincent (Porsal off the north coast of Finistère) and the Stags (off The Lizard in Cornwall). It follows that the agreement between the Parties regarding the median line in the western segment of the Channel does not extend to the use of Ushant or the Scilly Isles as base-points for delimiting a median line boundary.

119. The Parties also submitted to the Court, in response to its request, a chart on which their respective experts had traced the eastern segment and the two portions of the western segment of the agreed "simplified" line. In a further request, as already indicated in paragraph 116, the Court asked the Parties to supply it with a list of the base-points used by them in determining the agreed portions of the median line to the east and to the west of the Channel Islands. Subsequently, by letters to the Registrar respectively of 1 and 6 April 1977, the United Kingdom and the French Republic each furnished the Court with a complete list of these base-points together with their coordinates, which were stated by the United Kingdom to have been agreed between the Parties' experts.

120. Points A-D, E-F, and G-J are thus points in the English Channel, equidistant from the coasts of the French Republic and the United Kingdom, which are agreed by the Parties to be the appropriate points for constructing a median line in these separate segments of the Channel. The Court, through its own expert, has confirmed the appropriateness of these salient points used by the Parties, and has verified the coordinates given by the Parties for each of the points. Through its own expert, it has also checked the base-points on the respective coasts of the two countries which determine the location of the median line at Points A-D, E-F and G-J, and has at the same time verified the coordinates given by the Parties for each of the base-points. The Court has likewise, through its own expert, verified the course of the median line between Points A-D, E-F and G-J traced by the Parties on charts submitted to the Court. In these circumstances, and since a median delimitation is indicated by the applicable law, the Court considers it appropriate, under Article 2(1) of the Arbitration Agreement, to adopt as the continental shelf boundary in three segments of the English Channel the simplified median line traced between the agreed Points A-D, E-F and G-J. These Points and the lines traced between them are reproduced on the Boundary-Line Chart included with this Decision, the letters used on the Boundary-Line Chart being the same as those given above for the Points of the agreed segments.

121. Two gaps in the continental shelf boundary within the English Channel still remain to be filled: namely, in the Channel Islands region between Points D and E; and to the south of Plymouth, on the coast of Devon, between Points F and G. The course of the boundary in the Channel Islands region raises a major question as to whether it should be a median line joining Point D directly westwards to Point E in mid-Channel or whether it should deviate southwards in a large loop as a median line between the Channel Islands and the coasts of Normandy and Brittany. Between Points F and G, on the other hand, the Parties are agreed that, as in the rest of the

western segment of the Channel, the applicable law indicates that the boundary should be the median line in mid-Channel; and the difference between them is only as to the relevance of the Eddystone Rock for determining its course. The Court will, therefore, first address itself to completing the boundary between Points F and G, that is to the problem of the use of the Eddystone Rock as a base-point for delimiting this segment of the median line.

122. During the first round of the oral arguments, Counsel for the United Kingdom referred to the status of Eddystone Rocks at the hearing on 10 February 1977, while apparently then believing that they were "not directly involved in this case". He underlined that "in the view of the United Kingdom, the Eddystone Rocks do constitute an island, not because of the lighthouse, but because, according to the *Channel Pilot* (1971 ed., p. 108) they 'only cover entirely at high water equinoctial springs' ". This, he said, "by definition, means that they are uncovered at mean high water springs, which is the required definition of an island in the United Kingdom Territorial Waters Order in Council of 1964, and is surely also in accord with international practice". He added that the facts regarding the Eddystone Rocks are shown on the British Admiralty Chart of 1964 and subsequent charts without having provoked any objection from the French authorities.

123. The status of the Eddystone Rock as a base-point did not become a matter of debate in the oral arguments. However, in the identical reports submitted to the Court by the Parties on 28 February 1977, to which the Court has already adverted in paragraph 116, a difference of view existing on this question was explained to be the reason why the Parties were unable to agree upon the course of the simplified median line between Points F and G:

> It was not possible to define an agreed line between points F and G . . . , by reason of a difference of view about the legal status of Eddystone Rock, and its consequent effect on the course of the boundary line. The French side took note of information provided by the United Kingdom on this subject. The French side wishes to reserve its position for the time being on this question and will make its definite view known within a reasonably brief time. The United Kingdom is willing to accept a line joining points F and G but must, in the circumstances, reserve the right to place written documentation before the Court as to the effect to be attributed to the Eddystone Rock, against the eventuality that the French side should be unable to agree to the United Kingdom view.

After the completion of the oral arguments on 28 February 1977, the Court requested the Parties to proceed with their examination of the status of Eddystone Rock and to inform the Court as soon as possible whether they were able to reach agreement upon the question of its use as a base-point for delimiting the median line in the English Channel. The Parties having advised the Registrar that agreement on this question seemed unlikely to be forthcoming, the Court later fixed certain time limits for the French Government to submit its reasons in writing for objecting to Eddystone Rock's being used as a base-point and for the United Kingdom Government to submit its written comments upon the French objections.

124. In order to expedite matters, the United Kingdom Agent was asked by the Court to communicate at once to the French Agent any relevant data regarding the Eddystone Rocks which might be immediately available.

A document containing geographical data telegraphed by the Hydrographic Department of the British Admiralty was therefore transmitted by the United Kingdom Agent to the French Agent, a copy being later supplied to the Court. The information furnished by the document was as follows. A survey of the rocks carried out in 1858 by Captain Williams R.N. recorded a drying height of 19 feet for the natural rock underneath the old lighthouse, while the height of mean high-water spring tides at Plymouth breakwater is 15.7 feet. The latest survey in 1960 did not record the drying height at the highest point of the rocks because that was occupied by the stump of the old lighthouse; only the height of a *lower* rock, on which the present lighthouse stands, was observed and that was recorded as 17 feet. The present Admiralty Chart No. 1613 shows a drying height of 5.5 metres for the lower rock, exactly the same height as that of mean high-water spring tides above the lowest astronomical tide. The highest rock appears on the Chart under the old lighthouse stump and would otherwise be shown as an islet.

125. The French Government's explanations of its objections to the use of Eddystone Rock as a base-point were submitted to the Court in a Note which reached the Registry on 7 April 1977, and was subsequently transmitted to the Agent of the United Kingdom. The French Government said that the information provided by the United Kingdom did not enable it to conclude that Eddystone Rock is today an island. In its view, Eddystone Rock belongs rather to the category of "low-tide elevations" (hauts-fonds découvrants) as understood in customary law. No difference is made in customary law, it maintained, between types of tide as the criterion for distinguishing between an island and a low-tide elevation. On the contrary, as soon as a reef does not remain uncovered continuously throughout the year, the French Government claimed that it has to be ranked as a low-tide elevation, not as an island. It also invoked an incident in 1905 when two French lobster boats were arrested for fishing within three miles of Eddystone Rock but subsequently released on the instructions of the British Board of Trade. Citing references to this incident in Fulton's *The Sovereignty of the Sea* (p. 642) and in Gidel's *Le droit international public de la mer* (vol. III, p. 696, note 1), it maintained that the incident shows the British Board of Trade in 1905 to have regarded Eddystone Rock as not having any territorial sea. That Eddystone Rock has not hitherto been treated as an island in British practice is, according to the French Government, also shown by the fact that, in establishing its straight baselines by an Order in Council in 1964, the United Kingdom did not connect Eddystone Rock to the British coast. On those grounds, the French Government declined to accept Eddystone Rock as a base-point for delimiting the median line, unless the United Kingdom were to adduce formal proof that it is an island, rather than a low-tide elevation, as for example by producing the plans of the lighthouse of Eddystone Rock.

126. The United Kingdom's comments on the French Republic's objections to the use of Eddystone Rock as a base-point were sent to the Registrar on 28 April 1977 in the form of a Note accompanied by a number of appendices. In the first part of the Note the United Kingdom set out, historically, factual data regarding the Eddystone Rocks and the four light-

houses which have been built on them. The principal facts emerging from this part of the Note appear to be as follows. The Eddystone group consists of drying reefs and, the United Kingdom claimed, of one natural above-water feature known as House Rock. Early French charts *(Le Neptune François,* 1693) and *La Manche ou le Canal entre la France et l'Angleterre à l'usage de M. le Duc de Bourgogne* (1695) show Eddystone as an island. Likewise, Greenville-Collins' *Coasting Pilot,* published in 1753, states that its north-west part "is above water (at a high spring-tide) about 6 or 7 feet". The first three Eddystone lighthouses were all erected on House Rock, the third of these being Smeaton's Lighthouse. Smeaton published in 1792 a *Narrative of the Building and a Description of the Construction of Eddystone Lighthouse,* and it appears from certain plates in this book that, when preparing the foundations, he may have cut off as much as 4.3 feet from the top of House Rock. At the same time, a statement in his *Narrative* appears to confirm that, before he began the third Lighthouse, House Rock was permanently above high water. Surveys carried out by a Mr. Murdock Mackenzie in the years 1777-1779 recorded that "the westmost rock is always above water, and at high-water even with springs, may be about 6 feet above the level of the sea". The later survey of Captain Williams, R.N., in 1858, the United Kingdom recalled, recorded that the height of the natural rock beneath the base of Smeaton's Lighthouse was 19 feet above mean low-water spring tides. Furthermore, the range of difference between mean high-water spring tides has been constant since that date at 15.5 feet.

127. In connexion with this factual information, the United Kingdom added certain explanations of its views regarding "mean high-water spring tides" as the criterion for determining whether a geographical feature has the legal status of an island or low-tide elevation. It took the position that, whether under customary law or under Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone, the relevant high-water line is the line of mean high-water spring tides; and it affirmed that this is also the practice of many other States. It further said that the high-water line shown on all British Admiralty charts is the line of mean high-water spring tides; and it pointed out that under Article 3 of the Territorial Sea and Contiguous Zone Convention it is the line marked on the large-scale charts officially recognized by the coastal State which, in the case of the low-water line, determines the location of that line. Although conceding that other interpretations of the expression "high tide" are possible, it maintained that "mean high-water spring tides" is the only precise one. Today, it said, the height of the natural rock at the base of the stump of the old Smeaton lighthouse is about 2 feet above mean high-water spring tides and 0.2 feet above the highest astronomical tide. In these circumstances the United Kingdom considered that the Eddystone Rocks are not to be ranked as low-tide elevations; and that it need not, therefore, "pursue further the significance of the fact that the Eddystone Rocks would be well within a 12-mile territorial sea measured from the low-water line on the main English coast".

128. In the second part of its Note, the United Kingdom challenged the French contention that the Eddystone Rocks have not hitherto in British

sels in 1905 cannot, it says, be taken as evidence that the United Kingdom did not then, or does not now, regard the Eddystone Rock as constituting an "island"; for "the release could have been motivated by other considerations, such as a desire not to provoke a diplomatic incident". In any event, according to the United Kingdom, "there is clear evidence that *contemporary* British practice treats the Eddystone Rocks as an island for all purposes, including the use of the low-water line around this island for the measurement of maritime zones". It further claimed that this evidence shows the French Republic to have acquiesced in the use of the Eddystone Rock as a base-point for the measurement of United Kingdom territorial waters and fishery zones.

129. The United Kingdom referred to negotiations between the two countries which took place in 1964 and 1965 regarding the preservation of French traditional fisheries in the outer six miles of the British 12-mile fishery zone in conformity with the European Fisheries Convention of 1964. It stated that one of the subjects discussed was French traditional fishing for lobsters, crawfish, escallops and demersal fish off the south coast of England; and that agreement was reached between the two Governments that the eastern limit for this French fishing area within the outer 6-mile belt of the United Kingdom's fishery zone should be a line drawn due south from Eddystone Rock. This line, it explained, was given legislative effect in Schedule 2 to the Fishing Boats (France) Designation Order 1965, the text of which had been agreed between the competent British and French authorities; and it supplied the Court with a copy of the British Admiralty chart illustrating "Foreign Fishing Rights and Concessions within British Fishery limits" on which the line appears. It maintained that the agreement of 1965 regarding these French traditional rights is explicable only on the basis of an agreement between the two countries that the Eddystone Rocks could be used as a base-point for the measurement of British fishery limits; and it said that this had never since been questioned by the French Republic. It further remarked that the British map, which showed a territorial sea surrounding the Eddystone Rocks as well as 6- and 12-mile fishery belts, had been circulated to all interested States without evoking any objection from any of them. This evidence, according to the United Kingdom, "serves as clear proof that contemporary United Kingdom practice did claim the Eddystone Rocks as an island before the commencement of the negotiations on the delimitation of the continental shelf, and that this was accepted by France".

130. The United Kingdom also referred to an exchange of diplomatic Notes between the two Governments in 1966-1967 in which the question of Eddystone Rock's entitlement to a territorial sea had been specifically raised by the French Government. In 1964, contemporaneously with its negotiations in regard to the European Fisheries Convention, the United Kingdom had established certain straight baselines off its coasts in the Territorial Waters Jurisdiction Order in Council of that year, and had circulated to interested States charts illustrating the new baselines. In a Note of the Ministry of Foreign Affairs of 18 January 1965, a copy of which the United Kingdom attached to its Note on the Eddystone Rocks, the French Government commented that it had no observation to make on those charts, but went on to

query the reservation of a territorial sea to Eddystone Rock as marked on a British chart shown to the French delegation during the fishery negotiations. The French Government stated that the Eddystone Rocks were described in French Sailing Directions as "ne couvrant complètement qu'aux pleines mers d'équinoxe"; and that, being therefore low-tide elevations which were outside the territorial sea of the United Kingdom, they did not appear entitled to a territorial sea. In conclusion, the French Government inquired whether the attribution of a territorial sea around the Eddystone Rocks on the chart in question might not be a cartographical error. The United Kingdom's reply, which has also been supplied to the Court and is dated 20 November 1967, stated that there was no cartographical error, and that it considered Eddystone Rock to be an island as defined in Article 10 of the Territorial Sea and Contiguous Zone Convention. Recalling that under that Article an island is a "naturally formed area of land, surrounded by water, which is above water at high-tide", it said that "in accordance with general international practice" the United Kingdom took the high-water line to be the line of mean high-water springs. It added that it did not accept the use of equinoctial high-tide as sufficiently precise in this context.

131. The United Kingdom, in its Note on the Eddystone Rocks, observed that there was no record of its arguments having been contested by the French Republic. In its view, therefore, the latter had acquiesced in the use of the Rocks as a base-point.

132. The United Kingdom also asked the Court to find further evidence to the same effect in the agreement reached during the negotiations on the continental shelf in the years 1970-1974 between the experts of the two Governments on the course both of the true median line in the Channel and of a "simplified" line. It recalled that, as agreed between the two delegations, the precise coordinates had been established by the United Kingdom expert and communicated to the French Government, which had never questioned or challenged them. It further claimed that the discussions between the two delegations had been based on the assumption that the Eddystone Rocks were to be treated as an island, and it said that this is reflected in the coordinates.

133. The United Kingdom concluded its Note on the Eddystone Rocks with the submission that, "in all the circumstances, they must be regarded as an island under customary law and the Territorial Sea and Contiguous Zone Convention, and should accordingly be permitted to have a full effect in determining the course of a median line boundary in the Channel west of the Channel Islands".

134. Since certain matters raised in the United Kingdom's Note on the Eddystone Rocks had not been previously discussed before the Court nor fully explored in the French Note on this subject, the Court requested the Parties to submit orally to the Court on 10 May 1977 their explanations on specific questions notified to them by the Court. The object of these questions was to elicit whether the French Government should be considered as having acquiesced in the United Kingdom's view of Eddystone Rock as an island or in its use of the Rock as a base-point either for delimiting its fish-

ery limits or for delimiting a median line in the Channel. One question was raised by the Court itself which had noted that the Parties had both included Eddystone in their lists of the base-points determining the agreed segments of the median line. The Parties, however, were at one in saying that Eddystone had been included not as a "base-point" in the proper sense of the term but merely for the purpose of indicating at what points the median line would begin to be affected by Eddystone. This matter may, therefore, be left aside.

135. The explanations presented by the French Government may be summarized as follows. It concedes that during the negotiations in 1964 and 1965 the French Government did accept the fishery limit to the south of Eddystone Rock that was established by a legislative act, the relevant schedule to which had been agreed between the competent French and British authorities. In accepting that limit, however, the French authorities approved a text where a clear distinction is made between "islands", which figure in Schedule 1, and "demarcation lines, land marks and directions", which figure in Schedule 2, and where Eddystone appears under the latter, not amongst the "islands". The latter explanation, the Court would observe, hardly seems pertinent since certain islands are also to be found in Schedule 2; and it does not, in any event, affect the French Government's acknowledgement of its acceptance of Eddystone Rock as a base-point for determining the United Kingdom's fishery limits in the area concerned.

136. The French Government underlines, however, that in agreeing to the fishery arrangements it was committing itself only in the matter of fisheries; and it states that it has never recognized Eddystone Rock as an island possessing its own territorial sea. In this connexion, it points to its diplomatic Note of 18 January 1966 contesting the right of Eddystone Rock to its own territorial sea. As to the United Kingdom's Note of 20 November 1967 replying to the French contention that Eddystone is merely a low-tide elevation, the French Government acknowledges that it did not then pursue the point of the status of Eddystone Rock. But it maintains that its silence on the point cannot be interpreted as signifying that it abandoned the position which it had previously taken as to Eddystone Rock's being merely a low-tide elevation not entitled to its own territorial sea.

137. The French Government further states that it neither contested nor accepted "officiellement" in March 1971, or afterwards, the precise coordinates prepared by the British expert and communicated to the French Government in March 1971 "in so far as concerns the use of Eddystone Rock for delimiting a median line as a simplified line in the Channel". It maintains that the fact that it did not contest the coordinates in no way implies that it accepted them. It points to the records of the negotiations between 1970-1974 and in particular to the following paragraph in those of the meeting in Paris of 25 and 26 January 1971 [U.K. Memorial, Appendix A(10), paragraph 16]:

> The Hydrographers of both delegations then reported that they had reached agreement on both the actual median line and the administrative (i.e. "simplified") line in the Channel proper. It was decided that they should proceed by correspondence to agree the geographical coordinates of the turning points of the administrative line.

This paragraph shows, it says, that the coordinates of the British expert, after being communicated to the French authorities, still remained to be approved by the latter; and it insists that, although never contested, the coordinates have equally never been approved by the French Republic.

138. In addition, the French Government elaborated at some length its reasons for considering that Eddystone Rock is a low-tide elevation, not an island. In brief, it contends that an island is a natural piece of land that stays permanently above high-water; that current British cartography does not by any device indicate that any fragment of Eddystone Rock is an island; that the British concept of "high-water" is very questionable and a large number of States, including France, take it as meaning the limit of the highest tides; and that the information given by the United Kingdom itself indicates that the highest part of the Rocks is only very slightly above the highest full-tides and may be covered by them. It also invoked the fact that the United Kingdom had not made use of Eddystone Rocks in delimiting its straight baselines. These contentions, on which the Court did not invite the United Kingdom Agent to comment, are here referred to only in brief because, for reasons now to be stated, the Court considers that the decision whether the Eddystone Rocks should or should not be used as a base-point for delimiting the course of the median line rests upon other elements in the case.

139. The Court emphasizes that it is not concerned in these proceedings to decide the general question of the legal status of the Eddystone Rocks as an island or of its entitlement to a territorial sea of its own. Indeed, as the Court has pointed out in paragraphs 13-21, the Arbitration Agreement does not invest it with competence to resolve differences between the Parties regarding the delimitation of the territorial sea of either of them. In the present proceedings the Court is concerned with the Eddystone Rocks only as an element in the delimitation of the continental shelf boundary in the English Channel. Thus, what the Court is called upon to decide is not the general question of their legal status as an island but their relevance in the delimitation of the median line in the Channel as between the United Kingdom and the French Republic. No doubt, having regard to the role normally played by the baseline of the territorial sea in the delimitation of a median line, there is a certain connexion between the two questions. But it still remains true that the Court is here concerned with the Eddystone Rocks only in the particular context of the delimitation of the continental shelf by a median line in the Channel as between the Parties now before the Court.

140. The French Government, while acknowledging its acceptance in 1964-1965 of Eddystone Rock as a base-point for the delimitation of the United Kingdom's fishery limits under the European Fisheries Convention of 1964, comments that this does not commit it to accepting the Rock as an island entitled to its own territorial sea. However justified in general this comment may be, the Court cannot fail to note that the six and 12-mile fishery zones provided for by Articles 2 and 3 of that Convention are expressly stated to be zones "measured from the baseline of the territorial sea". In other words, it was in the context of a baseline of the territorial sea, as well

as in the context of fisheries, that the French Republic in 1964-1965 acknowledged the relevance of the Eddystone Rock as a base-point.

141. More directly to the point, clearly, is the evidence relating to the agreement reached between the experts of the Parties in 1971 regarding the tracing of the true median line and a "simplified" line in the English Channel. The record of the meeting of 25 and 26 January 1971, which the French Government itself invokes and the text of which has been given in paragraph 137, states that "the hydrographers of both delegations then reported that they had reached agreement on both the actual median line and the administrative [i.e. 'simplified'] line in the Channel proper". The Court can only understand this unchallenged statement as meaning that the hydrographers had reached agreement on the designation of the relevant starting and turning points of the two lines and the tracing of the lines themselves between the several points. Accordingly, when the record of that meeting further reports the decision of the two delegations that the hydrographers "should proceed by correspondence to agree the geographical coordinates of the turning points of the administrative line", the Court can only interpret this decision as referring simply to the technical operation of the precise definition of points on an already agreed line. That this interpretation of the record is correct is confirmed by the text of the letter of 24 February 1971 [U.K. Memorial, Appendix A(11)] in which the British expert set out his list of the coordinates of the points on the "administrative" line. This letter introduces the list of coordinates with the statement: "It was agreed at the talks with the French in Paris that the positions of the turning points of the agreed 'administrative' line east of the line Scillies-Ushant should be listed and exchanged for checking. I find the positions to be as follows." This statement clearly envisages nothing more than the purely technical operation of defining by exact coordinates positions on a line already agreed between the experts.

142. That the listing of the coordinates was a purely technical operation to define an agreed line seems also to be confirmed by paragraph 147 of the French Memorial:

> During the negotiations with the Government of the United Kingdom, the breaking off of which gave rise to the present dispute, the two delegations thus arrived without difficulty at an agreement on the determination of the boundary of the continental shelf, in the western and eastern areas of the Channel, apart from the Channel Islands sector. That agreement concerned the drawing of a median line all the points of which were equi-distant from the baselines from which the two States measure the breadth of their territorial sea; they even agreed on the drawing of a simplified median line which might possibly serve as a more convenient boundary. . . . The British delegation had even handed the French delegation a document stating the exact coordinates of this median line as well as the two British maritime charts No. 2649 and No. 2675 (HW 514/64, 16 June 1964) on which the Hydrographic Department of the Ministry of Defence had traced the "Anglo-French Seabed Boundary", outside the Channel Islands sector.

No reservation is expressed in this paragraph or elsewhere in the French pleadings as to the precise accuracy of the coordinates given by the United Kingdom expert. In any event, even if a doubt existed as to their accuracy, the fact would remain that all the turning points and the tracing of both the true and the "simplified" median lines were agreed between the two delegations in 1971.

143. The Eddystone Rock, as is confirmed by the Court's own expert, was treated as relevant to the delimitation of the median line in the Channel in 1971. Consequently, the French Government's statement, that it has never accepted "officiellement" the coordinates communicated to it so far as concerns the use of Eddystone Rock, does not seem to the Court sufficient to counterbalance the evidence of its use in 1971 by both Parties. This evidence is, moreover, reinforced by the French Government's earlier acceptance of the relevance of the Eddystone Rock in the delimitation of the United Kingdom's fishery limits. In these circumstances, the Court need not examine the further question, indicated by the United Kingdom, of the possible relevance of the right which it claims to establish a 12-mile territorial sea that would bring Eddystone within the territorial sea of England.

144. In the light of all the foregoing considerations and without taking any position on the difference between the Parties as to the precise legal status of Eddystone Rock, the Court concludes that it should treat the Rock as a relevant base-point for delimiting the continental shelf boundary in the Channel. It follows that between Points F and G the boundary determined by the Court will be a median line which takes account of Eddystone Rock. As a result, from point F the boundary will run westwards in a straight line to a Point, which the Court will designate F1 and the coordinates of which are:

F1: 49°27′40″N 04°17′54″W

This Point is a point equidistant from, on the United Kingdom side, Eddystone Rock and, on the French side, two base-points off the coast of Brittany, namely, La Fourchie (Plateau des Triagoz) and Le Raoumeur (Ile de Batz). From F1 the boundary will continue westwards in a straight line to the agreed Point G. The position of Point F1 and the tracing of a line from Point F to F1 and thence to Point G are shown, for purposes of illustration, in red on Map 2 which appears on page 208[15]. They are reproduced in black on the Boundary-Line Chart included with this Decision, the letter F1 also being used on the Boundary Chart to indicate the Point delimited from Eddystone Rock.

145. The next task of the Court is to determine the boundary (or boundaries) in the Channel Islands region, that is in the region lying between and to the south of Points D and E of the agreed segments of the median line in the Channel. The Court, for the reasons already given in paragraphs 19-22, has decided that it is not empowered by the Arbitration Agreement to delimit the seabed and subsoil boundary in the narrow waters situated between the Channel Islands and the coasts of Normandy and Brittany; and that it must confine itself in this region to delimiting the course of the boundary in the areas to the north and to the west of the Channel Islands, where this does not involve determining the territorial sea limits of either Party. Nevertheless, in deciding the continental shelf boundary to the north and to the west of the Channel Islands, the Court must clearly have regard to the region as a whole and to its relation with the rest of the arbitration area.

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[15]See map on page 338 and foot-note 14.

146. In this region the Parties remain agreed that the geographical and legal framework for determining the boundary is one of States the coast of which are opposite each other; and that, in consequence, the boundary should, in principle, be the median line. They are, however, in sharp disagreement as to the role which should be allowed to the coasts of the Channel Islands as coasts of the United Kingdom "opposite" to those of France. The French Republic maintains that in this part of the Channel, the relevant "opposite" coasts are those of the mainlands of France and the United Kingdom; and that the Channel Islands should be treated as a separate territory located within the continental shelf of the French mainland. The United Kingdom, on the other hand, insists that in this part of the English Channel the Channel Islands themselves constitute the relevant "opposite" coast of the United Kingdom for the purpose of delimiting the median line. As a result, the boundaries advocated by the Parties in this region bear almost no relation to each other, except in the narrow waters to the east and south of the Channel Islands where the delimitation of the boundary falls outside the Court's competence.

147. Before turning to the Submissions and arguments of the Parties regarding this region, the Court thinks it well to recall the conclusion which it reached in paragraph 74 concerning the French Republic's reservation to Article 6 of the 1958 Convention claiming "Granville Bay" to be an area where there is a "special circumstance" within the meaning of the Article. While considering that the reservation must be understood as relating to the Channel Islands region as a whole, the Court found that the United Kingdom's objection to the reservation prevents it from being invoked against the latter by the French Republic in the context of Article 6. The combined effect of the reservation and objection is to render Article 6 inapplicable as between the Parties "to the extent of the reservation"; and, as a result, the boundary in this region has to be determined by reference to the rules of customary law.

148. In the pleadings, treating Article 6 as inapplicable *in toto*, the French Republic formulates the principal statement of its case in terms of a delimitation in accordance with equitable principles under customary law; but it also contends in the alternative that, if Article 6 is considered to be applicable, the Channel Islands constitute a "special circumstance" justifying a boundary other than the median line. The United Kingdom, on the other hand, treating Article 6 as applicable, formulates the principal statement of its case in terms of the equidistance-special circumstances rule under the 1958 Convention; but it likewise puts its case in the alternative, maintaining that its Submissions regarding this region hold good equally under customary law. The double basis on which both Parties put their case regarding the Channel Islands confirms the Court's conclusion that the different ways in which the requirements of "equitable principles" or the effects of "special circumstances" are put reflect differences of approach and terminology rather than of substance. In the present instance the substantial point at issue is whether the presence of the British archipelago of the Channel Islands close to the French coast is a "special circumstance" or a circumstance creative of inequity that calls for a departure from or variation of the equidis-

tance method of delimitation which the Parties agree to be in principle the applicable method.

149. The final Submissions of the French Republic call for two distinct delimitations in this region (Submissions 9 and 10). One would be a median-line boundary in mid-Channel running westwards from Point D of the eastern agreed segment to Point E of the western agreed segment. This mid-Channel median line is formulated by the French Republic simply as a component part of its more general Submission that, in the Channel where the coasts of the two countries face each other, the continental shelf boundary should be the median line. However, the mid-Channel median line which it proposes in this region is one to be delimited on a different principle from the one used in the remainder of the Channel. To the east and west of the Channel Islands region it envisages a delimitation of the median line by reference to "the baselines from which the breadth of the territorial sea is measured", and thus from any relevant islands; but in the Channel Islands region it proposes that the median line should be "delimited *between the mainlands of France and the United Kingdom from baselines taking no account of islands*" (emphasis added). The practical effects of this Submission would be simply to join Points D and E by a median line which disregards the existence of the Channel Islands, the latter being made the subject of another, and separate, delimitation.

150. The French Republic's other Submission regarding this region is in two parts, the first of which deals with the tracing of a median line between the Channel Islands themselves and the coasts of Normandy and Brittany. This part of the Submission, as it concerns matters outside the Court's competence, must be left aside. The second part, however, concerns the area to the north and to the west of the Channel Islands where they face the open sea and where it is incumbent on the Court under the Arbitration Agreement to delimit a continental shelf boundary (or boundaries) between the Parties. In this part of the Submission the French Government contends that, having regard to the very particular geographical circumstances of the region, the application of equitable principles calls for the continental shelf boundary of the Channel Islands, where they face towards the open sea, to be delimited as follows (Submission 10):

> (i) around Alderney, Burhou and the Casquets, segments of arcs of circles of six nautical miles in radius, drawn from the low-water lines of these islands or rocks, from the intersection of the arc of the circle of Alderney with the median line between the Cotentin Peninsula and the Channel Islands;
>
> (ii) around Guernsey, segments of arcs of circles of six nautical miles in radius, drawn from the low-water lines of the island of Lihou and of the Hanois;
>
> (iii) in the area situated between the Casquets and Guernsey, the tangent joining the arcs of circles of six nautical miles in radius, drawn from the Casquets and from the island of Lihou;
>
> (iv) in the area situated to the south-west of Guernsey, a straight line drawn from the arc of a circle of six nautical miles in radius, as it was drawn from the Hanois, until its intersection with the median line, as previously defined, between the Roches Douvres and the Channel Islands.

The effect of this Submission would be to allow to each of the groups of the Channel Islands which it mentions a three-mile zone of continental shelf in

addition to its territorial sea and then to join the resulting six-mile zones by tangents so as to form a continuous boundary and create a coherent continental shelf enclave around the Channel Islands.

151. The French Republic, although basing the proposals on an application of equitable principles under customary law, also maintains in an alternative Submission that, if Article 6 is held to be applicable, they are no less valid under the equidistance-special circumstances rule. Special circumstances exist, it submits, in the Channel Islands region which justify a delimitation otherwise than by application of the equidistance method.

152. The United Kingdom's final Submissions treat the Channel Islands region as covered by its general contention that throughout the arbitration area the situation is one where the coasts of the two countries are "opposite" each other, and that the appropriate boundary is accordingly a median line delimited from their respective coasts. Its principal Submission is formulated in terms of Article 6 which the Court has found not to be applicable in the Channel Islands region. It therefore suffices to mention that, with regard to the equidistance-special circumstances rule, the United Kingdom considers the French Republic not to have shown that the circumstances in this region constitute "special circumstances" or that they justify a boundary other than the median line.

153. The United Kingdom's alternative Submission asks the Court to hold that the same median line boundary, delimited from the respective coasts of the two countries, is also called for by the rules of customary law. The rule which it invokes is that (Submission 4):

> the boundary line is to be drawn in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute the natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.

The United Kingdom then maintains that accordingly (Submission 5):

> (i) given the essential geological continuity of the continental shelf throughout the entire area, it can in principle be claimed by both Parties as constituting the natural prolongation of their land territories into and under the sea, and in the absence of agreement can therefore, in law, only be delimited by means of a median line;
>
> (ii) no rule of international law requires the displacement of the median line by another boundary line, since the median line, which faithfully reflects the geographical configuration of the coasts of the two States in relation to the sea, produces a result which accords with equitable principles and one which is in no way extraordinary, unnatural or unreasonable as leaving to either State areas of seabed which are uniquely part of the natural prolongation of the land territory of the other . . . .

While subparagraph (ii) of this Submission continues with a particular reference to the Atlantic region, it makes no specific mention of the Channel Islands region, which is therefore presumably to be taken as covered by the general contention in subparagraphs (i) and (ii).

154. In any event, the clear intention of the alternative Submission is that under customary law, as well as under the 1958 Convention, the Court should adopt the median-line boundary proposed by the United Kingdom in its principal Submission. This boundary, as illustrated on Map 4 at Appendix C(5) to the United Kingdom Memorial, would run from Point A of the Eastern segment to Point D of that segment and then turn almost directly

southwards as a median line between the Channel Islands and the coast of Normandy, thereafter returning northwards between the Channel Islands and the Coast of Brittany to rejoin the mid-Channel median line at approximately Point E of the western segment; and from Point E it would follow the median line of the Channel westwards. Thus, the boundary proposed by the United Kingdom, if a "median" line from end to end of the arbitration area, would treat the Channel Islands as the coast of the United Kingdom opposite to France in that part of the Channel and would form a deep loop around them close to the French coast. It follows that, under this proposal, the French Republic would have an eastern and western segment of continental shelf in the Channel, but between these would intervene a tongue of United Kingdom continental shelf reaching out in this region from its mainland continental shelf to the Channel Islands.

155. The principal considerations and arguments advanced by the Parties in support of their Submissions regarding the Channel Islands region, which were developed at some length in the pleadings, must now be examined. In doing so, however, the Court will pass over those which relate exclusively to the areas between the Channel Islands and the coasts of Normandy and Brittany that the Court considers to be outside its competence. Nor need it again refer to their contentions regarding the meaning and effect of the French Republic's reservation to Article 6 concerning Granville Bay which it has already dealt with in paragraph 74.

156. The principal considerations and arguments advanced by the French Republic in support of a mid-Channel median line, with an "enclave" around the Channel Islands, can be summarized under three main heads: (i) the specific character of the Channel Islands region, geographically, geologically and legally; (ii) the merits or defects of the equidistance method of delimitation when applied in this and analogous situations; and (iii) the State practice and the legal and equitable principles claimed by the French Republic to justify its proposals. But it is what the French Republic terms "la spécificité du problème des Iles Anglo-Normandes" that is the essential foundation of its case regarding this region.

157. Geographically, the specific character of the problem is represented by the French Republic as arising from the mere fact of the British archipelago of the Channel Islands being situated within a rectangular bay of the French coast and only a few nautical miles distant from it. In consequence, it says, the Channel Islands and the sea areas between them and the French coast are intrinsically linked with the continental land mass of France. Geologically, it says, the relevant scientific information shows conclusively that the Channel Islands form part of the physical mass of Brittany and Normandy. While recognizing the fundamental unity of the geological structure of the continental shelf of the Channel, the French Republic insists that according to the scientific evidence:

> the Channel Islands are, without any possible ambiguity, an integral part of the armorican area and are included, without any possible gap, in the French hercynien shelf.

It also cites in this connection a dictum in the Judgment in the *North Sea Continental Shelf* cases referring to geological considerations as potentially

relevant in determining the appurtenance of continental shelf to a territory (I.C.J. Reports 1969, paragraph 95).

158. Legally, the specific character of the Channel Islands is claimed by the French Republic to result from a number of factors. In advancing this claim, it begins by addressing itself to the concept of "islands" in Article 1(*b*) of the Continental Shelf Convention, which provides that the term "continental shelf", as used in the Convention, refers not only to the seabed and subsoil of submarine areas "adjacent to the coast" but also to those "adjacent to the coasts of islands". It concedes that this provision, when read in combination with Article 10(1) of the Territorial Sea and Contiguous Zone Convention, may appear to contemplate a single concept of "islands". In its view, however, there cannot be any single concept of islands in the law of the continental shelf owing to the almost infinite variation in their geographical circumstances. The French Republic further observes that the legal classification of islands may also have to take account of variable political circumstances; and it insists that here the Court is concerned only with islands or groups of islands not themselves directly responsible for their foreign relations, as distinct from island or archipelago States.

159. The specific character, legally, of the Channel Islands is said by the French Republic to lie first in their close contiguity to the mainland of France, a fact which it considers as distinguishing their status from that of ocean islands resting on their own continental shelf. Their second characteristic is said to be their detachment from the land mass of the United Kingdom which, according to the French Republic, distinguishes their legal status from that of coastal islands belonging to the State to the coast of which they are adjacent. They are, the French Government emphasizes, islands which, in the words of S. W. Boggs, a former geographer of the Department of State, are "on the wrong side of the median line". Again, the fact that in this region the mainland coasts of France and the United Kingdom are opposite each other, in its view, distinguishes the case of the Channel Islands from such a case as that of the islands of St. Pierre et Miquelon, where there is no French coast opposite Newfoundland and where, in consequence, the continental shelf remains largely open both to the south and east. In any event, the French Republic insists that in the present proceedings the Court is not concerned with the effect of islands, in general, on the delimitation of the continental shelf but only with the effect of foreign islands near the coast on a delimitation of the continental shelf between two opposite States.

160. Turning to the merits and defects of the equidistance method, the French Republic observes that, while the United Kingdom asks for its strict application in the Channel Islands region, the latter's practice has been more flexible in other parts of the world, such as the Persian gulf. It cites statements of British lawyers, including one by a member of the International Law Commission to the effect that "special circumstances" are likely to be the rule rather than the exception in the application of the equidistance method. That statement, it says, expresses the view also held by the French Government in regard to the equidistance method. While the advantages of

the equidistance method, especially in narrow waters, are not underrated by the French Government, it considers that the application of the method should never be automatic, but always subordinated to an appreciation of the equitable nature of its results. It accepts that the application of this method may, in principle, give an equitable result in the narrow waters where the Channel Islands face the French coast, but denies that this will be so where they face the open sea.

161. The French Republic objects to the application of the equidistance method proposed by the United Kingdom for the Channel Islands region as inequitable in two important respects. First, it would involve a deep amputation of the French Republic's continental shelf in the Channel, which would result in a reduction of the area appertaining to the Republic and a corresponding gain to the United Kingdom wholly disproportionate to the size of the Channel Islands and the length of their coasts. Secondly, it would involve severing the continental shelf of France in the Channel into two separate zones. In consequence, although the allocation of the intervening area of continental shelf of the United Kingdom would not theoretically affect the legal status of its superjacent waters and airspace, the vital interests of the French Republic in the security and defence of its territory could not fail to be put in doubt. The whole Hurd Deep (Fosse Centrale) would be made subject to the exclusive sovereign rights of the United Kingdom, so that the French maritime authorities would have no right to control activities in that zone; and this would involve serious inconveniences and risks for French submarines stationed at Cherbourg as well as affecting the French Republic's military supervision of the approaches to its territory. These detriments to French security are viewed by the French Government as all the more substantial in that the new law of the sea relating to the exclusive economic zone may include provisions debarring other States from placing any military or other installation on the continental shelf without the consent of the coastal State.

162. The French Government further stresses that the sea areas in question constitute a maritime route which is not only militarily but economically of vital interest to the French Republic, since they serve important commercial ports such as Dunkerque, Le Havre, Antifer and La Basse Seine. It stresses at the same time that a suggestion made by the United Kingdom, that passage through French territorial waters between the coasts of Normandy and Brittany and the Channel Islands might provide an alternative route, is completely untenable owing to the narrow and dangerous character of the passages through the channels of La Déroute.

163. The French Republic cites on this point the opinion expressed at the first Geneva Conference on the Law of the Sea by Commander Kennedy, R.N., on 9 April 1958 that a "special circumstance" may consist in "the presence of a navigable channel". It also adduces as evidence of its vital and superior interests in defence and navigation in this region certain arrangements made between the authorities of the two countries regarding defence, sea rescue, control of navigation, responsibility for lights and buoys, civil air navigation zones and measures against pollution. These various ar-

rangements, which include naval defence plans going back to the eve of the first world war, are stated by the French Republic to have all treated the Channel Islands as falling within the zone of responsibility assigned to the French authorities. This fact alone, it contends, makes the British thesis, that security considerations call for the Channel Islands' continental shelf to be continuous with that of the United Kingdom, difficult of acceptance.

164. The above considerations, in the French Republic's opinion, lead to the conclusion that the automatic application of the equidistance method in the Channel Islands region proposed by the United Kingdom would "produce results that appear on the face of them to be extraordinary, unnatural or unreasonable" (I.C.J. Reports 1969, paragraph 24). This conclusion it claims to be confirmed by a number of precedents of departures from the equidistance method in various complex situations involving islands. At the same time, it maintains that its own proposal for an enclave around the Channel Islands is supported by a number of precedents involving islands situated either "on the wrong side of the median line" or towards the middle of a continental shelf between two "opposite" States. These precedents are said by it to show that, with one exception, no account has been taken of the islands in the delimitation of the continental shelf other than to allow them either their own territorial sea or their own contiguous zone. The one exception, it explains, is the Italo-Tunisian Agreement of 20 August 1971 in which a symbolic extra one mile of continental shelf has been allowed to three Italian islands in addition to their existing 12-mile zones of territorial sea.

165. Further support for its enclave solution is claimed by the French Republic to be found in the principles discussed in the Judgment in the *North Sea Continental Shelf* cases and, in the first place, in the principle of the natural prolongation of the coastal State's land territory. In regard to this principle, the French Republic contends that the geographical and geological considerations which it has invoked establish the existence of natural links between the continental land mass of France and the whole Channel Islands region, including the submarine areas of these islands. Asked by the Court, on what legal basis the principle of "natural prolongation" may admit of the submarine territory of France's mainland being interrupted at least by the dry land of the Channel Islands and by the seabed and subsoil of their territorial sea and then re-emerging beyond them, Counsel for the French Republic stated, *inter alia,* at the hearing of 18 February 1977:

> For it is quite true that the prolongation of French territory, which constitutes a whole in the Channel on the French side of the grand median line delimited from the two mainlands, turns in some manner around the Channel Islands.
>
> The legal position of the French Government is justified above all by the basic factors underlying the notion of natural prolongation, that is, purely geographical circumstances.
>
> France, it must not be forgotten, is a State which abuts on the Channel throughout the entire length of its coasts. The importance of its points of contact with this area of sea is as great as those of the United Kingdom, which also abuts on the Channel throughout the length of its coasts. It is therefore proper, in seeking to achieve an equitable delimitation, to take account of the equality of States.
>
> If the continental shelf of the Channel Islands were attached, as is the British view, to the continental shelf of the United Kingdom, if, in other words, the natural prolongation of

> France in the Channel were interrupted, it would be literally cut off—as this chart well shows—from all the central part of the Channel. So, Mr. President, access to the central part of the Channel is a consequence at once of the principle of the equality of States abutting on the Channel and of the principle of natural prolongation. To admit that the entire central part of the Channel belongs exclusively to the United Kingdom is inequitable, for France and the United Kingdom have equal rights in the continental shelf of the Channel as a whole.

Thus, it is not the principle of natural prolongation in isolation which the French Republic invokes but that principle in combination with the principle of the equality of States.

166. Secondly, the French Republic calls in aid the principle of proportionality, which it takes from the Judgment in the *North Sea Continental Shelf* cases and which it says has the advantage of providing an objective basis for the application of equity. This supposed general principle, the true scope of which this Court has already discussed in paragraphs 100-101, the French Republic invokes as requiring in the Channel Islands region a reasonable relation between the extent of continental shelf allowed to each Party and the length of their coasts measured in accordance with their general direction. It suggests four alternative methods of calculating the proportionality, two being "micro-geographical" and limited to the Channel Islands region, and two "macro-geographical" which cover the whole English Channel. The "micro-geographical" and "macro-geographical" calculations are each made twice, once on the basis of the actual length of the coasts and the second time on the basis of the maritime facades. According to the French Republic, under none of these methods of calculation would the area accruing to France from the delimitation advocated by the United Kingdom represent a reasonable and equitable result in terms of the principle of proportionality.

167. In general, the French Republic argues that the Channel Islands constitute a natural geographical feature of a sharply defined character which is productive of unreasonable results in the context of a strict application of the median line as proposed by the United Kingdom. In these circumstances, it contends that the consequences of that geographical feature, in the words used in the Judgment in the *North Sea Continental Shelf* cases, "must be remedied or compensated for as far as possible, being of itself creative of inequity" (I.C.J. Reports 1969, paragraph 89(*a*)). The United Kingdom's rigid application of the equidistance method, the French Republic maintains, is not acceptable because it is not based on a reasonable evaluation of the natural features and gives disproportionate effects to a minor geographical accident.

168. The United Kingdom, in seeking to justify its proposal for a median line forming a loop around the Channel Islands close to Normandy and Brittany, starts from the proposition that, in principle, every island is entitled to its own continental shelf. This proposition it founds on Article 1 of the 1958 Convention, which it emphasizes was recognized in the *North Sea Continental Shelf* cases "as reflecting, or as crystallizing, received or at least emergent rules of customary law" (I.C.J. Reports 1969, paragraph 63). Pointing out that Article 1 provides for the continental shelf not only of

mainlands but also of islands, it adds that under Article 2(3) the shelf attaches as a natural appurtenance of their land territory. The principle of the inherent nature of the rights over the continental shelf embodied in Article 2(3) was likewise recognized in the *North Sea Continental Shelf* cases "as reflecting, or as crystallizing, received or at least emergent rules of customary international law." In its view, therefore, the proposition that both mainland and islands have continental shelves as a natural appurtenance to the land territory is based both on the Convention and on customary international law and cannot be affected by any reservations which parties to the 1958 Convention may have made.

169. The United Kingdom, in short, puts its case regarding the Channel Islands region, not on the basis of an extension of the continental shelf of its mainland in consequence of the effect of offshore islands, but on the basis of islands that have their own continental shelf which, in fact, joins with that of its mainland. Replying to a question from the Court on this point, the Agent of the United Kingdom stated at the hearing on 21 February 1977:

> the United Kingdom considers that there is a portion of continental shelf appertaining to the south coast of England and a portion of continental shelf appertaining to the Channel Islands. These separate portions merge together in mid-Channel.

170. While thus resting its case regarding the Channel Islands on the right of islands to their own continental shelf, the United Kingdom does not contest that in the application of the equidistance-special circumstances rule there may be some difference in the treatment given to islands in consequence of their differing geographical situations and importance. On the contrary, it specifically invokes a statement made by Commander Kennedy, R.N., as a United Kingdom delegate to the Geneva Conference in which he said that: "for the purposes of drawing a boundary, islands should be treated on their merits, very small islands or sand cays on a continuous continental shelf and outside the belts of territorial sea being neglected as base-points for measurement and having only their own territorial sea" (Committee IV, Thirty-second Meeting, on 9 April 1958). The United Kingdom is concerned rather to show that, in the context of the equidistance-special circumstances rule, it is only very small islands which, in certain circumstances may not be given full effect. As support for this concept of islands as "special circumstances", it invokes various other statements in the *travaux préparatoires* of Article 6, reviews extensively the existing State practice in regard to delimitations involving islands, and refers to the opinions of a number of writers who have discussed this question. This evidence, it maintains, justifies the conclusion: that all true islands generate their own continental shelf, irrespective of their location; and that for boundary purposes there is no difference between islands and mainland and, therefore, the median line is the proper boundary with any opposite State in the absence of agreement or special circumstances. In regard to "special circumstances", the evidence is said by the United Kingdom also to lead to the following conclusions (U.K. Memorial, paragraph 143(IV)):

> the *travaux préparatoires* disclose that islands would constitute "special circumstances" only where very small islands produce an excessively complicated median line

> which might be straightened out in the interests of simplicity, but compensating a loss of shelf in one area with a gain in another. State practice has rarely recognized that such a situation has arisen . . . . To the extent that some juristic writings tend towards a wider view of the exception of "special circumstance", these writings are concerned to make distinctions *de lege fenda*, not embodied in the 1958 Convention, or based upon the practice of States not parties to the 1958 Convention.

It also emphasizes that in the Judgment in the *North Sea Continental Shelf* cases, it is only "islets, rocks and minor coastal projections" which are spoken of as having a "disproportionately distorting effect" on the course of median line.

171. The United Kingdom, accordingly, seeks to convince the Court that the Channel Islands cannot be characterised as very small islands for the purpose of considering their effect on the delimitation of a median line between "opposite" States; and it invokes in this regard certain facts concerning the legal and economic circumstances of the Channel Islands. The total area of the islands, it states, is approximately 75 square miles, their total population about 130,000; the volume of their sea and air traffic and their commerce is substantial; and they are today highly developed, busy territories which provide financial facilities of international repute. Legally, it adds, they are part neither of the United Kingdom nor of the Colonies but have for several hundred years been direct dependencies of the Crown; they have their own legislative assemblies, fiscal and legal systems, Courts of law and systems of local administration, as well as their own coinage and postal service. The United Kingdom, indeed, claims that, although it assumes responsibility for the foreign relations of the Channel Islands, they are in effect "island States enjoying an important degree of political, legislative, administrative and economic independence of ancient foundation". It follows, according to the United Kingdom, that in this region "it is not just a question of the continental shelf boundary between the United Kingdom and France, but also, as the very terms of the Arbitration Agreement make clear, it is a question of the Channel Islands boundary with France.".

172. In response to a question from the Court, additional information was provided by the Agent of the United Kingdom at the hearing on 21 February 1977 concerning the legal position of the Channel Islands in regard to maritime jurisdiction:

> Under the relevant laws and constitutional usage of the United Kingdom and the Channel Islands, the Channel Islands exercise jurisdiction in and over the territorial sea adjacent to the Islands. This jurisdiction is exercised by the Channel Islands authorities pursuant to legislation enacted by the Parliaments of the Islands, that is to say, the States of Jersey and the States of Guernsey. Moreover, by virtue of United Kingdom laws, which apply to, or have been extended to, the Channel Islands, the Island authorities exercise jurisdiction over fisheries within a 12-mile limit. No specific arrangements have been made in regard to the exploration and exploitation of the continental shelf adjacent to the Channel Islands, but the United Kingdom Continental Shelf Act, 1964, pursuant to which jurisdiction is exercised by the authorities of the United Kingdom, extends to such areas.

This information appears to indicate that, although the Channel Islands may enjoy some measure of autonomous maritime jurisdiction, this autonomy is incomplete and does not extend to jurisdiction over the continental shelf for the purpose of exploring it and exploiting its natural resources.

173. As to the fact that the Channel Islands are islands "on the wrong

side of the median line", the United Kingdom accepts that this may in some cases be material to the delimitation of a boundary between "opposite" States. "Doubtless it may be possible", it concedes, "to plead as special circumstances justifying a boundary other than the median line the presence of islets or small islands belonging to one country but nearer the coast of an opposite country, when those islets or islands are not of sufficient importance as to warrant the influence they bear upon the course of the median line merely by their presence in a particular location." In its view, however, the matter is quite different when the islands in question are of such political and economic importance as clearly to warrant the influence they have upon the course of the boundary. This, the United Kingdom maintains, is precisely the case of the Channel Islands, having regard to the historical, political and economic position of these island communities.

174. The United Kingdom contests the French Government's thesis that the whole Channel Islands region forms part of the natural prolongation of the land mass of France. That thesis, according to the United Kingdom, confuses the geological with the juridical concept of the continental shelf. It refers to a statement in the Judgment in the *North Sea Continental Shelf* cases (paragraph 95) in which, after observing that the institution of the continental shelf "has arisen out of the recognition of a physical fact", the Court continued: "and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime". This means, the United Kingdom says, that the principle of natural prolongation is not of a prolongation under the sea of a continent or geographical land mass but of the land territory of a particular State. The limits of that territory, it adds, are not a product of natural but of political history. Again, when the Judgment in those cases states that there can be no question of totally refashioning nature, the United Kingdom maintains that what it means is that there can be no refashioning of a particular State's geographical situation within its particular boundaries. In short, argues the United Kingdom, "the continental shelf of a State in the juridical sense is—and can only be—that which constitutes a natural prolongation of its land territory such as it has been fashioned by its history".

175. As to the security, defence and navigational considerations invoked by the French Republic, the United Kingdom objects that these considerations may equally be urged in favour of a continuous continental shelf between its mainland and the Channel Islands for the defence of which the United Kingdom is responsible. The French Republic's reference to defence arrangements made between the competent French and British authorities, delimiting their respective zones of responsibility in the Channel, it considers to be without any pertinence. Zonal defence arrangements, it insists, have little or nothing to do with national frontiers, and much less with continental shelf boundaries. Similarly, it insists that dividing lines of responsibility in the Channel adopted in a recent plan for pollution control and in other arrangements for air traffic control and sea rescue are purely for administrative convenience and are irrelevant to the matter before the Court.

176. The United Kingdom maintains that for a number of reasons the

French Republic's preoccupations regarding its security, defence and navigational interests are, in any event, not entitled to be given weight. It states that, *inter alia,* they do not take account of the legal protection given to those interests by the régime of the continental shelf itself, in particular by Articles 3-5 of the Convention; and that they also take no account of the fact that the areas in question to the north and north-west of the Channel Islands constitute an international channel of navigation of major importance—indeed the busiest shipping lane in the world. The traffic on this route, it observes, is not exclusively or even predominantly British or French, being used as an essential shipping lane by the navies and merchant marines of the countries of the North Sea and Baltic; and no delimitation of the continental shelf between the United Kingdom and the French Republic will change this situation. Nor does it accept that any British installations which might conceivably be constructed in the Hurd Deep could constitute a serious hindrance to the exercises of French submarines stationed at Cherbourg; moreover, even if that should prove to be the case there are other suitable waters, it says, in the Celtic Sea and the Bay of Biscay which are already used for submarine exercises by the French and British navies. As far as the movement of warships is concerned, the United Kingdom adds, there is a broad expanse of sea between Brest and Cherbourg providing suitable passage both above and below water; and there is, accordingly, no question of the route's being confined to narrow channels where awkwardly placed installations might create a serious obstacle.

177. The precedents for enclave solutions invoked by the French Republic are stated by the United Kingdom almost all to be in fact precedents for semi-enclaves, joining the continental shelf of the island directly to that of its coastal State; and this, it observes, is the very result produced by the United Kingdom's proposal for a median line boundary looping southwards between the Channel Islands and the French coast. The few exceptions, it says, have special explanations, such as the fact that the delimitation involved the continental shelf of islands the sovereignty of which was in dispute between the States concerned. The United Kingdom accepts that the case of the islands of St. Pierre et Miquelon presents some analogy with that of the Channel Islands. But it points out that at the outset of the French Republic's negotiations with Canada the French Republic claimed for those islands a continental shelf boundary delimited by full and strict application of the equidistance principle. This claim, the United Kingdom recognizes, has now been renounced by the French Republic in a provisional agreement reached with Canada on 26 May 1972, in the form of a *Relevé des Conclusions* which limits the continental shelf of St. Pierre et Miquelon to an enclave. It maintains, however, that in the Relevé des Conclusions the French Republic has obtained for these islands special rights of a very substantial character in return for renouncing their claim to the strict application of the equidistance principle. As a result, says the United Kingdom, the solution provisionally agreed for St. Pierre et Miquelon appears very advantageous to the French Republic when compared with the solution which it advocates for the Channel Islands.

178. In general, the United Kingdom claims that the specific features

of the Channel Islands region actually militate against an enclave solution and in favour of attributing a substantial continental shelf to these islands. The very fact that the French coast embraces and contains the Channel Islands, it argues, means that in the narrow waters to their east and south they cannot have "anything more than the very minimum of continental shelf"; it is only to the west and north, where they face the more open waters of the English Channel, that there can be any substantial area of continental shelf for the Channel Islands. In the view of the United Kingdom, "a division of this still quite modest area by a median line between the Channel Islands and France cannot on any reasonable assessment be regarded as inequitable in regard to France"; nor can there, it maintains, be any question of "disproportion or exaggeration".

179. The United Kingdom finally contends that, if there were to be considered any justification for an enclave around the Channel Islands, there could in any event be no justification for an enclaved zone of six miles. International law, it observes, has now clearly accepted the 12-mile territorial sea as a right of coastal States, and any determination of the continental shelf around the Channel Islands should at least allow for that possibility; moreover, the Channel Islands already possess an existing fishery zone of 12 miles delimited from the baselines of their coasts.

180. In the view of the Court, it is manifest from a mere glance at the map that, with respect to the delimitation of the continental shelf as between the French Republic and the United Kingdom, the Channel Islands region presents particular features and problems. The Parties themselves both recognize that this region has particular features. But they disagree as to which of its features are to be considered particular and as to how far any of them may constitute a "special circumstance" justifying a boundary other than the median line or a circumstance creative of inequity. The Parties likewise base opposing considerations of law and equity upon the features which one or other of them alleges to be particular. The Court, accordingly, finds it necessary first to identify the features and considerations which, in its view, may in varying degrees require to be evaluated in deciding upon the course of the boundary (or boundaries) in the Channel Islands region.

181. The Court will begin with the facts which determine the geographical and legal framework for its decision regarding the delimitation of this part of the boundary. The region forms an integral part of the English Channel the general features of which the Court has described in paragraphs 3-9; and for the purpose of delimiting its continental shelf the region has clearly, in the opinion of the Court, to be viewed in its context as part of that whole maritime area. From its eastern end at the Straits of Dover, the English Channel stretches in a generally west-south-westerly direction for a distance of about 300 nautical miles, its width gradually widening from about 18 nautical miles at the Straits of Dover to some 100 nautical miles at its western end. Along with the whole 300 miles of the south coast of the Channel runs the mainland coast of the French Republic; along the whole 300 miles of the north coast of the Channel runs the mainland coast of the United Kingdom. Each country has some promontories on its coast and the

general result is that the coastlines of their mainlands face each other across the Channel in a relation of approximate equality.

182. Between opposite States, as this Court has stated in paragraph 95, a median line boundary will in normal circumstances leave broadly equal areas of continental shelf to each State and constitute a delimitation in accordance with equitable principles. It follows that where the coastlines of two opposite States are themselves approximately equal in their relation to the continental shelf not only should the boundary in normal circumstances be the median line but the areas of shelf left to each Party on either side of the median line should be broadly equal or at least broadly comparable. Clearly, if the Channel Islands did not exist, this is precisely how the delimitation of the boundary of the continental shelf in the English Channel would present itself.

183. The Channel Islands, however, do exist and are situated not only on the French side of a median line drawn between the two mainlands but practically within the arms of a gulf on the French coast. Inevitably, the presence of these islands in the English Channel in that particular situation disturbs the balance of the geographical circumstances which would otherwise exist between the Parties in this region as a result of the broad equality of the coastlines of their mainlands. The question then is whether and, if so, in what manner this affects the legal framework within which the boundary has to be delimited in the Channel Islands region. Before this question can be answered, however, a number of other facts concerning the islands themselves have to be taken into account, and in particular their political relation to the United Kingdom.

184. The case of the Channel Islands must, in the view of the Court, be differentiated from that of the rocks or small islands which figure in some of the precedents canvassed by the Parties in their pleadings. Possessing a considerable population and a substantial agricultural and commercial economy, they are clearly territorial and political units which have their own separate existence, and which are of a certain importance in their own right separately from the United Kingdom. According to the information before the Court, the two Bailiwicks of Jersey and Guernsey which compose the Channel Islands are not, constitutionally, part of the United Kingdom itself but direct dependencies of the British Crown, and have been so for several hundred years. According to this information they undoubtedly enjoy a very large measure of political, legislative, administrative and economic autonomy; so much so that the United Kingdom asks the Court to regard them as, in effect, distinct island States for the purpose of determining the continental shelf appurtenant to them.

185. Under Article 2(1) of the Arbitration Agreement, the Court is requested to decide "the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic respectively". The Court does not understand these words as foreclosing one way or the other the question whether the Channel Islands are to be considered as political units distinct from the United Kingdom and separately entitled under international law to

portions of continental shelf vis-à-vis France. These words appear designed rather to name comprehensively the territories the continental shelf boundaries of which the Court is requested to decide, and to leave open the question whether this would entail the delimitation of one or more boundaries. The political status of the Channel Islands vis-à-vis France for the purpose of the delimitation of the continental shelf is, therefore, a matter to be appraised by this Court itself.

186. Responsibility for the foreign relations of the Channel Islands indisputably rests with the United Kingdom; and the Court notes that the Continental Shelf Convention of 1958 was ratified by the United Kingdom simply in its own name and on its own behalf, without separate mention of the Channel Islands. It also seems from the diplomatic correspondence and from the record of the meetings in the years 1970-1974 that the abortive negotiations between the two countries for an agreed delimitation of their continental shelf boundary were conducted by the United Kingdom without the participation of the Channel Islands authorities in its delegation. Similarly, the Court notes that the Arbitration Agreement itself was concluded by the Government of the United Kingdom in its own name alone without mention of the Channel Islands otherwise than in the definition in Article 2 of the question submitted to the Court. Furthermore, as the Court has pointed out in paragraph 172, the specific information given to the Court concerning the legal position of the Channel Islands in regard to maritime jursidiction appears to confirm that, in matters relating to the continental shelf, it is the United Kingdom Government which is the responsible authority, both internally and externally. If follows that, as between the United Kingdom and the French Republic, the Court must treat the Channel Islands only as islands of the United Kingdom, not as semi-independent States entitled in their own right to their own continental shelf vis-à-vis the French Republic.

187. The legal framework within which the Court must decide the course of the boundary (or boundaries) in the Channel Islands region is, therefore, that of two opposite States one of which possesses island territories close to the coast of the other State. To state this conclusion is not, however, to deny all relevance to the size and importance of the Channel Islands which, on the contrary, may properly be taken into account in balancing the equities in this region. Part also of this legal framework are the limits of the territorial seas and coastal fisheries of the French Republic and the United Kingdom in the Channel Islands region. The French Republic established a 12-mile zone of coastal fisheries off the coasts of France in 1964 in pursuance of the European Fisheries Convention of that year, and in 1971 also extended its zone of territorial seas to 12 miles. In 1964 the United Kingdom likewise established 12-mile fishery zones off the coasts both of the mainland and of the Channel Islands in conformity with the European Fisheries Convention; but it still retains a territorial sea of three miles. On the other hand, the United Kingdom took the position before the Court that coastal States today have a right under international law to extend their territorial sea to 12 miles, and repeatedly referred in the pleadings to the possibility of its doing so. Consequently, the Court has to take account of the fact that, apart from their three-mile zone of territorial sea the Channel Islands

have an existing fishery zone of 12 miles, expressly recognized by the French Republic, and the potentiality of an extension of their territorial sea from three to 12 miles.

188. Other elements in the framework are the various equitable considerations invoked by the Parties regarding their respective navigational defence and security interests in the region. These considerations may be, and have been, urged by both Parties as supporting the solutions which they advocate: by the French Republic in favour of a continuous link between the eastern and western parts of its continental shelf in the Channel; and by the United Kingdom in favour of a continuous link between the continental shelf of the Channel Islands and that of the mainland. Moreover, the weight of such considerations in this region is, in any event, somewhat diminished by the very particular character of the English Channel as a major route of international maritime navigation serving ports outside the territories of either of the Parties. Consequently, they cannot be regarded by the Court as exercising a decisive influence on the delimitation of the boundary in the present case. They may support and strengthen, but they cannot negative, any conclusions that are already indicated by the geographical, political and legal circumstances of the region which the Court has identified. As to the conclusion to be drawn from those considerations in connexion with the delimitation of the continental shelf, the Court thinks it sufficient to say that, in its view, they tend to evidence the predominant interest of the French Republic in the southern areas of the English Channel, a predominance which is also strongly indicated by its position as a riparian State along the whole of the Channel's south coast.

189. The Court will now turn to the basic question, which it posed in paragraph 183; whether, and if so in what manner, the presence of the British Channel Islands close to the coasts of Normandy and Brittany affects the legal framework of a median line delimitation in mid-Channel which would otherwise be indicated by the opposite and equal coastlines of the mainlands of the two countries. In setting out to answer this question the Court has first to determine whether the Channel Islands should be considered to be a projection, as it were, from the United Kingdom's mainland which constitutes its "opposite" coast vis-à-vis France in this region. If this interpretation of the geographical situation were to be accepted by the Court as correct, there would be little more to be discussed; the mid-Channel median line would automatically deviate southwards in a long loop around the Channel Islands in the manner proposed by the United Kingdom.

190. In the opinion of the Court, however, such an interpretation of the situation in the Channel Islands region would be as extravagant legally as it manifestly is geographically; nor does the United Kingdom, in fact, ask the Court to view the situation in that way. As recalled in paragraph 169, it specifically puts its case on the basis that "there is a portion of continental shelf appertaining to the south coast of England and a portion of continental shelf appertaining to the Channel Islands". These two separate portions, it claims, "merge together in mid-Channel". Thus, in the view of the United Kingdom itself, the question raised by the presence of the Channel Islands

close to the coasts of Normandy and Brittany is not, strictly speaking, the question of their effect in this region on the delimitation of the median line between *England* and France. It is rather the question of the extent of their own entitlement to continental shelf as islands separate from the United Kingdom. This view of the matter appears to the Court to be correct, subject to its previous finding that, as between the United Kingdom and the French Republic and for present purposes, the Channel Islands are separate islands of the United Kingdom, not separate States.

191. The continental shelf of the Channel Islands and of the mainlands of France and of the United Kingdom, in law, appertains to each of them as being the natural prolongation of its land territory under the sea. The physical continuity of the continental shelf of the English Channel means that geographically it may be said to be a natural prolongation of each one of the territories which abut upon it. The question for the Court to decide, however, is what areas of continental shelf are to be considered as *legally* the natural prolongation of the Channel Islands rather than of the mainland of France. In international law, as the United Kingdom emphasized in the pleadings, the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea not of a continent of geographical land mass but of the land territory of each State. And the very fact that in international law the continental shelf is a juridical concept means that its scope and the conditions for its application are not determined exclusively by the physical facts of geography but also by legal rules. Moreover, it is clear both from the insertion of the "special circumstances" provision in Article 6 and from the emphasis on "equitable principles" in customary law that the force of the cardinal principle of "natural prolongation of territory" is not absolute, but may be subject to qualification in particular situations.

192. Accordingly, in the opinion of the Court, the principle of natural prolongation of territory cannot be said to require that the continental shelf to the north and north-west of the Channel Islands should be considered as automatically and necessarily appurtenant to them rather than to the French Republic. The United Kingdom itself, as the Court has noted in paragraph 173, does not contest that in the application of the equidistance-special circumstances rule there may be some difference in the treatment of islands by reason of their geographical situations, size and importance. Nor, in particular, does it contest the possibility of pleading special circumstances justifying a boundary other than the median line where islets or small islands belonging to one country are nearer to the coast of an opposite country. Yet, if the force of the principle of natural prolongation of territory were absolute, a small island would block the natural prolongation of the territory of the nearby mainland in the same way, if not always to the same extent, as a larger island. The question of the appurtenance to the Channel Islands of the areas of continental shelf extending to their north and north-west is not therefore resolved merely by referring to the principle of natural prolongation of territory.

193. At the same time, the theory advanced by Counsel for the

French Republic to reconcile its claim to those areas with the principle of natural prolongation of territory is altogether unconvincing. This explanation, the text of which is set out in paragraph 165, that the natural prolongation of France's mainland in some way turns around the Channel Islands, simply states the result which would follow from the Court's acceptance of the French Republic's claim; it does nothing to reconcile that claim with the right of the Channel Islands also to the application of the principle of the natural prolongation of their territories under the sea. Similarly, the general geological argument advanced by the French Republic that the Channel Islands region, including the Channel Islands themselves, form part of the armorican structure of the French mainland does nothing to resolve the problem. It, in effect, begs the question by simply passing over the fact that the Channel Islands themselves have their own individual existence and are under the sovereignty of the United Kingdom, not the French Republic.

194. The true position, in the opinion of the Court, is that the principle of natural prolongation of territory is neither to be set aside nor treated as absolute in a case where islands belonging to one State are situated on continental shelf which would otherwise constitute a natural prolongation of the territory of another State. The application of that principle in such a case, as in other cases concerning the delimitation of the continental shelf, has to be appreciated in the light of all the relevant geographical and other circumstances. When the question is whether areas of continental shelf, which geologically may be considered a natural prolongation of the territories of two States, appertain to one State rather than to the other, the legal rules constituting the juridical concept of the continental shelf take over and determine the question. Consequently, in these cases the effect to be given to the principle of natural prolongation of the coastal State's land territory is always dependent not only on the particular geographical and other circumstances but also on any relevant considerations of law and equity.

195. The legal rules to be applied in the Channel Islands region, the Court has held, are those of customary international law, rather than of Article 6 of the Convention. Under customary law, the method adopted for delimiting the boundary must, while applying the principle of natural prolongation of territory, also ensure that the resulting delimitation of the boundary accords with equitable principles. In other words, the question is whether the Channel Islands should be given the full benefit of the application of the principle of natural prolongation in the areas to their north and north-west or whether their situation close to the mainland of France requires, on equitable grounds, some modification of the application of the principle in those areas. In the opinion of the Court, the doctrine of the equality of States which, *inter alia,* the French Republic invokes as justifying a curtailment of the continental shelf attributable to the Channel Islands, cannot be considered as constituting such an equitable ground. The doctrine of the equality of States, applied generally to the delimitation of the continental shelf, would have vast implications for the division of the continental shelf among the States of the world, implications which have been rejected by a majority of States and which would involve, on a huge scale, that refashioning of geography repudiated in the *North Sea Continental Shelf* cases. Any ground of

equity, the Court considers, is rather to be looked for in the particular circumstances of the present case and in the particular equality of the two States in their geographical relation to the continental shelf of the Channel.

196. In paragraph 181, the Court has already drawn attention to the approximate equality of the mainland coastlines of the Parties on either side of the English Channel, and to the resulting equality of their geographical relation to the continental shelf of the Channel, if the Channel Islands themselves are left out of account. The presence of these British islands close to the French coast, if they are given full effect in delimiting the continental shelf, will manifestly result in a substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic. This fact by itself appears to the Court to be, *prima facie,* a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses the inequity. If this conclusion is tested by applying the equidistance-special circumstances rule of Article 6, instead of the rules of customary law, it appears to the Court that the presence of the Channel Islands close to the French coast must be considered, *prima facie,* as constituting a "special circumstance" justifying a delimitation other than the median line proposed by the United Kingdom.

197. The Court refers to the presence of the Channel Islands close to the French coast as constituting a circumstance creative of inequity, and a "special circumstance" within the meaning of Article 6, merely *prima facie,* because a delimitation, to be "equitable" or "justified", must be so in relation to both Parties and in the light of all the relevant circumstances. The United Kingdom, moreover, maintains that the specific features of the Channel Islands region militate positively in favour of the delimitation it proposes. It invokes the particular character of the Channel Islands as not rocks or islets but populous islands of a certain political and economic importance; it emphasizes the close ties between the islands and the United Kingdom and the latter's responsibility for their defence and security; and it invokes these as calling for the continental shelf of the islands to be linked to that of the United Kingdom. Above all, it stresses that at best it is only in the open waters of the English Channel to their west and north that they have any possibility of an appreciable area of continental shelf. In the light of all these considerations, it submits that to divide this area to the west and north of the islands between the Channel Islands and the French Republic by the median line which it proposes does not involve any "disproportion or exaggeration".

198. The Court accepts the equitable considerations invoked by the United Kingdom as carrying a certain weight; and, in its view, they invalidate the proposal of the French Republic restricting the Channel Islands to a six-mile enclave around the islands, consisting of a three-mile zone of continental shelf added to their three-mile zone of territorial sea. They do not, however, appear to the Court sufficient to justify the disproportion or remove the imbalance in the delimitation of the continental shelf as between the United Kingdom and the French Republic which adoption of the United Kingdom's proposal would involve. The Court therefore concludes that the

specific features of the Channel Islands region call for an intermediate solution that effects a more appropriate and a more equitable balance between the respective claims and interests of the Parties.

199. The Court considers that the primary element in the present problem is the fact that the Channel Islands region forms part of the English Channel, throughout the whole length of which the Parties face each other as opposite States having almost equal coastlines. The problem of the Channel Islands apart, the continental shelf boundary in the Channel indicated by both customary law and Article 6, as the Court has previously stated, is a median line running from end to end of the Channel. The existence of the Channel Islands close to the French coast, if permitted to divert the course of that mid-Channel median line, effects a radical distortion of the boundary creative of inequity. The case is quite different from that of small islands on the right side of or close to the median line, and it is also quite different from the case where numerous islands stretch out one after another long distances from the mainland. The precedents of semi-enclaves, arising out of such cases, which are invoked by the United Kingdom, do not, therefore, seem to the Court to be in point. The Channel Islands are not only "on the wrong side" of the mid-Channel median line but wholly detached geographically from the United Kingdom.

200. The case of St. Pierre et Miquelon, although it clearly presents some analogies with the present case, also differs from it in important respects. First, that case is not one of islands situated in a channel between the coasts of opposite States, so that no question arises there of a delimitation between States, whose coastlines are in an approximately equal relation to the continental shelf to be delimited. Secondly, there being nothing to the east of St. Pierre et Miquelon except the open waters of the Atlantic Ocean, there is more scope for redressing inequities than in the narrow waters of the English Channel. Even so, it appears from the *Relevé des Conclusions* that a delimitation according no more than a 12-mile zone of territorial sea to St. Pierre et Miquelon has been agreed between the French Republic and Canada. True, it also appears that this agreement includes a reservation of certain special privleges for St. Pierre et Miquelon; but for these special privileges there is a counterpart in the considerable extent of continental shelf left to Canada in the Atlantic to seawards of the islands.

201. In the actual circumstances of the Channel Islands region, where the extent of the continental shelf is comparatively modest and the scope for adjusting the equities correspondingly small, the Court considers that the situation demands a twofold solution. First, in order to maintain the appropriate balance between the two States in relation to the continental shelf as riparian States of the Channel with approximately equal coastlines, the Court decides that the primary boundary between them shall be a median line, linking Point D of the agreed eastern segment to Point E of the western agreed segment. In the light of the Court's previous decisions regarding the course of the boundary in the English Channnel, this means that throughout the whole length of the Channel comprised within the arbitration area the primary boundary of the continental shelf will be a mid-Channel median

line. In delimiting its course in the Channel Islands region, that is between Points D and E, the Channel Islands themselves are to be disregarded, since their continental shelf must be the subject of a second and separate delimitation.

202. The second part of the solution is to delimit a second boundary establishing, vis-à-vis the Channel Islands, the southern limit of the continental shelf held by the Court to be appurtenant to the French Republic in this region to the south of the mid-Channel median line. This second boundary must not, in the opinion of the Court, be so drawn as to allow the continental shelf of the French Republic to encroach upon the established 12-mile fishery zone of the Channel Islands, The Court therefore further decides that this boundary shall be drawn at a distance of 12 nautical miles from the established baselines of the territorial sea of the Channel Islands. The effect will be to accord to the French Republic a substantial band of continental shelf in mid-Channel which is continuous with its continental shelf to the east and west of the Channel Islands region; and at the same time to leave to the Channel Islands, to their north and to their west, a zone of seabed and subsoil extending 12 nautical miles from the baselines of the two Bailiwicks. The result, so far as the Channel Islands are concerned, is to enclose them in an enclave formed, to their north and west, by the boundary of the 12-mile zone just described by the Court and, to their east, south and south-west by the boundary between them and the coasts of Normandy and Brittany, the exact course of which it is outside the competence of the Court to specify.

203. The decision of the Court concerning the delimitation of the continental shelf in the Channel Islands region thus requires it to define the course of two boundaries, one in mid-Channel and the other to the north and west of the Channel Islands. The mid-Channel boundary is formed by a line drawn westwards from the agreed Point D to the agreed Point E through four Points which are equidistant from the coasts of France and the United Kingdom, disregarding the Channel Islands. The coordinates of these Points, which the Court will designate Points D1, D2, D3 and D4 are as follows:

D1: 49°57′50″N 02°48′24″W
D2: 49°46′30″N 02°56′30″W
D3: 49°38′30″N 03°21′00″W
D4: 49°33′12″N 03°34′50″W

Point D1 is delimited from, on the French side, La Hague and, on the United Kingdom side, Start Point and Portland Bill; Point D2 from, on the French side, La Hague and Roches Douvres and, on the United Kingdom side, Start Point; Point D3 from, on the French side, Roches Douvres and, on the United Kingdom side, Start Point and Prawle Point; and Point D4 from, on the French side, Roches Douvres and Les Sept Iles and, on the United Kingdom side, Prawle Point. The boundary to the north and west of the Channel Islands is formed by a line which follows segments of arcs of circles of 12-mile radius delimited from the relevant base-points, at low-water, in the Bailiwick of Guernsey. The eastern terminal of this boundary is therefore the point of intersection of the arcs of circles of a 12-mile radius delimited from Quénard Point on Alderney and from Cap La Hague on the Cherbourg pe-

ninsula; and its western terminal is likewise the point of intersection of circles of a 12-mile radius delimited from Les Hanois (off the west coast of Guernsey) and from Roches Douvres off the coast of Brittany. These eastern and western terminals of the boundary will be designated by the Court respectively Point X and Point Y. The segments of the arcs of circles of a 12-mile radius along which the boundary is drawn westwards from Point X to Point Y are formed by the intersection of such arcs delimited from Quénard Point on Alderney, the island of Burhou (west of Alderney), the Casquets, the island of Lihou (north of Guernsey) and Les Hanois (off the west coast of Guernsey). The four Points where the arcs of circles of a 12-mile radius intersect will be designated by the Court respectively X1 (Quénard Point and Burhou), X2 (Burhou and the Casquets), X3 (the Casquets and Lihou) and X4 (Lihou and Les Hanois). The coordinates of the six points which thus constitute the salient points of the boundary to the north and west of the Channel Islands are as follows:

X:	49°55′05″N	02°03′26″W
X1:	49°55′40″N	02°08′45″W
X2:	49°55′15″N	02°22′00″W
X3:	49°39′40″N	02°40′30″W
X4:	49°34′30″N	02°55′30″W
Y:	49°18′22″N	02°56′10″W

The two boundaries described above and the letters which mark their respective salient Points are, for purposes of illustration, shown in red on Map 2 which appears on page 208.[16] These boundaries are reproduced in black on the Boundary-Line Chart included with this Decision, the letters used to mark their salient Points being the same as those given above.

204. The remaining task of the Court is to determine the course of the boundary to the west of Point J, the most westerly point of the mid-Channel median line which the Court has decided shall be the primary continental shelf boundary between the Parties in the arbitration area from that point eastwards. Point J is situated on longitude 05°18′00″ West, and purely for convenience the Court will hereafter refer to the whole of the arbitration area westwards of this line of longitude as "the Atlantic region". Its use of this expression does not, however, imply any assumption as to what, geographically, is the true dividing line between the English Channel and the Atlantic Ocean, or as to where, geographically or legally, the coasts of France and the United Kingdom are to be considered as ceasing to be "opposite" coasts. During the negotiations in the years 1970 to 1974, the Parties treated their difference of opinion regarding the boundary westwards of the English Channel as relating to the region lying to the west of approximately the Scillies-Ushant line. Before the Court, however, the difference between the Parties has manifested itself in regard to all the region westwards of longitude 05°18′00″ West, that is of Point J. In the whole of that region the Parties are in deep disagreement both as to whether the situation is, legally, to be con-

[16] See map on page 338 and foot-note 14.

sidered one of "opposite" States and as to what may be the proper method of delimiting the boundary. But whether or not some small part of this region should be regarded as geographically within the English Channel, it is convenient for the purposes of this Decision to refer to the whole region westwards of Point J under the general title of the Atlantic region. In the pleadings, it is true, the Parties engaged in some debate regarding the correct nomenclature to be applied to the various maritime areas of which this region is composed. In the view of the Court, however, the precise system of toponomy adopted for these various areas is without any legal relevance in the present proceedings; it is the physical facts of geography, not nomenclature, with which this Court is concerned.

205. Before examining the substantive Submissions of the Parties concerning the boundary in the Atlantic region, the Court must recall its previous conclusions, stated in paragraphs 48 and 61, concerning the rules of international law applicable in the present case, in so far as these conclusions have a bearing upon the determination of the boundary in this region. In those paragraphs the Court has decided, *inter alia*, that the Continental Shelf Convention of 1958 is a convention in force as between the French Republic and the United Kingdom; and that its provisions, including those of Article 6, are consequently applicable in the present case except to the extent of the reservations made to certain of these provisions by the French Republic in its instrument of accession. In paragraph 73, the Court has also decided that the French reservation regarding the application of the equidistance principle if the boundary extends beyond the 200-metre isobath is inapplicable. Accordingly, as no other reservation was made by the French Republic with respect to the application of Article 6 in the Atlantic region, it follows that, in principle, the provisions of that Article are applicable to the delimitation of the boundary in this region.

206. The Court must likewise, and in particular, recall its previous discussion, in paragraphs 89-94, of an argument advanced by the French Republic that the Atlantic region is neither a case of "opposite" nor of "adjacent" States but a *casus omissus* which falls completely outside Article 6. The Court has there held that the provisions of Article 6 are to be understood as dealing comprehensively with the delimitation of the continental shelf; and that all situations, in principle, fall under either paragraph 1 covering that of "opposite" States or paragraph 2 covering that of "adjacent" States. In so holding, however, the Court has underlined that the distinction between the two situations is not always uniform and clear-cut along the whole length of a boundary. In certain geographical configurations the relationship between the States may change from one situation to the other with the result that, as was observed in the Judgment in the *North Sea Continental Shelf* cases (paragraph 6), "a given equidistance line may partake in varying degree of the nature both of a median and of a lateral line". What that means, this Court of Arbitration has held, is that, in determining whether the French Republic and the United Kingdom are to be considered as "opposite" or "adjacent" States for the purpose of delimiting their continental shelf, the Court must have regard to their actual geographical relation to each other and to the continental shelf at each position along the boundary.

207. The French Republic in its final Submissions [paragraphs 4, 8(*b*) and 8(*c*)] asks the Court to discard the equidistance method of delimitation altogether in the Atlantic region, either on the ground that the region falls outside both paragraph 1 and paragraph 2 of Article 6 or on the ground that "special circumstances" exist which justify a method of delimitation other than that of equidistance. On the supposition that both paragraphs of Article 6 are totally inapplicable to the Atlantic region, the French Republic contends that the boundary has to be determined by reference to the rules of customary law; and that under the latter the Court is free to select any method of determining the boundary which it considers will result in an equitable delimitation. As the Court has already recalled, the supposition on which this contention is based is not one that the Court can accept. However, precisely the same position is claimed by the French Republic to result from application of the "equidistance-special circumstances" provisions of Article 6. In other words, should the Court be satisfied that special circumstances exist in the Atlantic region justifying a boundary other than one determined by equidistance, the French Republic contends that the Court is free to select any method which it considers will produce an equitable boundary.

208. Thus, whether under customary international law or Article 6, the French Republic submits that the Atlantic region calls for a method of delimitation other than that of equidistance from the nearest points of the baselines from which the territorial sea of each State is measured. Starting from that basis, it formulates its substantive submissions regarding the method to be adopted for delimiting the boundary in the Atlantic region as follows (final Submissions, paragraphs 11 and 12):

> 11. That so far as concerns the Atlantic sector, where the coasts of the two States are no longer opposite each other, the natural prolongation of their territories, in the absence of relevant geological factors, must be determined by prolonging into the Atlantic lines expressing the general direction of their Channel coasts.
>
> That the bisector of the angle formed by these two lines, extending the median line in the Channel, delimits in equitable fashion those parts of the continental shelf appertaining to the United Kingdom and the French Republic, respectively;
>
> 12. That the general direction of the coasts of each State is equitably determined by lines representing such general direction through the elimination of salients and re-entrants drawn from Dungeness to Guethensbras and from Berneval to Pointe Galaite, respectively;
>
> That the line of delimitation in the Atlantic is, in consequence, the bisector E of the angle formed by those two lines, prolonging the median line in the Channel as far as the 1,000-metre isobath.

209. In essence, the method of delimitation proposed in these Submissions is a median line prolonging the Channel median line out to the 1,000-metre isobath but no longer drawn from the baselines of the territorial sea. Instead, it is drawn midway between the two straight lines, which are said to represent the general direction respectively of the French and British coasts on either side of the English Channel. The line on the French side, marked D.G.F. (direction générale française) on maps and charts submitted by the French Republic, commences at Berneval, slightly to the east of Dieppe, passes across the Baie de Seine, the Cherbourg peninsula, the island of Jersey and the Golfe breton-normand and then finishes at Pointe Galaite

on the north coast of the mainland of Finistère. The line on the British side of the Channel, marked D.G.B. on the French Republic's maps and charts, commences at the headland of Dungeness some miles to the west of Dover, passes across the promontory of Beachy Head, the open waters of Poole and Lyme bays, the promontory inland of Start Point, the expanse of Plymouth Bay and the promontory of the Lizard, and then finishes at the southernmost point of Land's End. Neither the island of Ushant on the French side nor the Scilly Islands on the British side are taken into account in delimiting these straight lines, the lengths of which are given in the pleadings as approximately 455 kilometres for D.G.F. on the French side and approximately 480 kilometres for D.G.B. on the British side. The boundary which the French Republic proposes and which is marked "E" on French charts and maps is a median line that, starting from Point J, bisects the area situated between the prolongations of the lines D.G.F. and D.G.B. westwards to the 1,000-metre isobath.

210. The United Kingdom, on the other hand, in its final Submission starts from the basis that the rules applicable to the delimitation of the continental shelf in the Atlantic region are those contained in Article 6. On this basis, it submits that the entire arbitration area, including the Atlantic region, is part of the same continental shelf; that in this entire area the coasts of the United Kingdom and France "are indubitably opposite one another"; and that Article 6 was "in any event intended to cover all questions of the delimitation of the continental shelf arising between immediately neighbouring States". It asks the Court to conclude that, in consequence, "the terms and manifest intention" of Article 6 render paragraph 1 of the Article applicable to the entire area, including the Atlantic region (Submission 2). It follows, according to the United Kingdom, that, in the absence of an agreement, the boundary in the Atlantic region is "the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea is measured, unless another boundary line is justified by special circumstances" (Submission 3(*a*)). As for "special circumstances", the United Kingdom submits (Submission 3(*b*)):

> In so far as it is open to France to claim the existence of special circumstances justifying another boundary in that part of the area lying to the west of approximately 5 degrees 45 minutes west of the Greenwich Meridian, France has not discharged the onus of showing that the circumstances of the area constitute special circumstances within the meaning of the said Article 6, nor that they justify a boundary line other than the median line defined above.

211. The United Kingdom, like the French Republic, puts its case on a double basis by resting it on customary law as well as on Article 6. In an alternative Submission (Submission 4) it maintains that, if the boundary is to be determined by customary law, "the rule is that the boundary line is to be drawn in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute the natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other". It then submits (Submission 5) that from this rule the Court should draw the following conclusions:

> (*a*) given the essential geological continuity of the continental shelf throughout the entire area, it can in principle be claimed by both Parties as constituting the natural prolon-

gation of their land territories into and under the sea, and in the absence of agreement can therefore, in law, only be delimited by means of a median line;

(*b*) no rule of international law requires the displacement of the median line by another boundary line; since the median line, which faithfully reflects the geographical configuration of the coasts of the two States in relation to the sea, produces a result which accords with equitable principles and one which is in no way extraordinary, unnatural or unreasonable as leaving to either State areas of seabed which are uniquely part of the natural prolongation of the land territory of the other; in particular, there is no basis in law nor any objective validity for the drawing of any boundary in the South-Western Approaches, consisting of a modified "median line" constructed by means of an arbitrary version of the baselines from which it is to be measured.

212. Specifying the method by which the median line boundary which it proposes should be delimited, whether under Article 6 or customary law, the United Kingdom submits that, so far as concerns the Atlantic region, this median line should be measured (Submission 3(*d*)(i) and (iii):

(i) in relation to the United Kingdom, from the established baselines and bay-closing lines on the south coast of England, *including the Scilly Isles* and all other islands and low-tide elevations, all such baselines being established in fact and in law as the baselines from which the territorial sea of the United Kingdom in the area is measured;

(iii) in relation to France, from the low-water line along the North coast of France, *including Ushant*, the Iles Chausey and the group known as the Roches Douvres and all relevant low-tide elevations, and including lawful bay-closing lines . . . (emphasis added).

In short, the method of delimitation proposed by the United Kingdom in its Submissions is the one prescribed by paragraph 1 of Article 6 in the absence of special circumstances, namely a median line equidistant from the baselines of each country; and it emphasizes that, in its view, Ushant and the Scilly Isles should each be taken into account as part respectively of the baselines of France and of the baselines of the United Kingdom.

213. The principal considerations and arguments invoked by the Parties in support of their Submissions regarding the Atlantic region must now be examined. In doing so, however, the Court will not revert to those parts of their arguments which relate specifically to the question whether it is under the regime of Article 6 or of customary law that the boundary has to be delimited in this region; for the Court has already dealt with that question and decided that it is Article 6 which applies. Those arguments will, accordingly, be referred to here only in so far as they may throw light on the substantive question which still remains for decision, namely, the appropriate method to be employed in this region for delimiting the continental shelf as between the French Republic and the United Kingdom.

214. The considerations and arguments invoked by the French Republic are, in part, of a negative character designed to establish the inappropriateness of the equidistance method in the Atlantic region and, in part, of a positive character designed to justify the method of delimitation which it proposes. Its main negative argument is that special circumstances exist in this region which call for a method of delimitation other than that of equidistance. In 1965, in formulating its reservations to Article 6, the French Republic did not mention the Atlantic region among the "areas where, in its opinion, there are 'special circumstances' within the meaning of Article 6,

paragraphs 1 and 2". As soon as the negotiations concerning the boundary began in 1970, however, the French delegation raised the question of the existence of special circumstances in this region (U.K. Memorial, Appendix A(9), pp. 3-4). In fact, during the course of the negotiations it put its claim to regard the Atlantic region as a case of special circumstances on more than one ground. First, it seems to have considered this to be a corollary of its general thesis that the situation westwards of the Scillies-Ushant line is neither one of "opposite" nor one of "adjacent" States. Secondly, it seems then to have considered the existence in the Atlantic of an ill-defined area, thought to hold out favourable prospects of exploitation and to which it gave the name Bassin d'Iroise,[17] as a "special circumstance". At a meeting in 1971, however, it referred more specifically to "the effect of the small islands in the Scillies and Ushant on the general direction of the English and French coasts" as constituting special circumstances; and it added that "the disproportionate effect at the western end of the line of the Scillies and Ushant was another indication that the delimitation agreement should take account of these islands as a particular feature" (U.K. Memorial, Appendix A(15), pp. 3-4).

215. Subsequently, and before the Court, the French Government has placed the emphasis on the particular geographical relation of the coasts of the two countries in the Atlantic region and the allegedly distorting effect of the respective positions of the Scilly Isles and the island of Ushant, if the equidistance method is employed to delimit the boundary. Thus, in a letter of 12 April 1972 the chief French delegate wrote to the Chief United Kingdom delegate as follows (U.K. Memorial, Appendix A(16), pp. 1-2):

> If the drawing of an equidistance line appears to be the most natural solution in the area where the coasts of France and of the United Kingdom are opposite each other—and here our two delegations are in full agreement—the same cannot be said for the Iroise area, where the absence of adjacent coasts makes a median-line delimitation completely arbitrary, deflected by the slightest geographical feature, in particular islands and projections of the coast. *In the Iroise area, the problem is in fact a problem of delimitation similar to that which arises between adjacent States. It is a case akin to that which in* 1969 *the International Court of Justice gave its judgment* and enumerated the geographical, geological or economic reasons of a kind to justify a boundary other than the equidistance line (emphasis added).

In a further letter of 20 November 1972, after repeating the French contention that the Atlantic region falls outside both paragraphs of Article 6, the chief French delegate expressly invoked the observation in the Judgment in the *North Sea Continental Shelf* cases as to the distorting effect of certain geographical features in the case of a lateral delimitation between adjacent States on the basis of equidistance. He then continued (U.K. Memorial, Appendix A(19), p. 2):

> This observation, which refers to the case of adjacent States is still more pertinent in the present case, where the distances out from the coasts are considerable. *This "geographical feature" resulting from the respective positions of the Scilly Islands and Ushant*

[17] This expression was a neologism, the existing designation "Mer d'Iroise" referring to a different sea area to the south and south-east of Ushant.

involves a deviation of the dividing line which becomes all the more important and unjustified as one moves seawards (emphasis added).

216. Before the Court, while invoking the existence of special circumstances in the Atlantic region only as an entirely subsidiary argument, the French Republic has furnished further explanations as to what it regards as those special circumstances (French Reply, paragraphs 238-244). It argues that the existence respectively of the Scilly Isles and the Island of Ushant and their effect on the course of the equidistance line constitute a typical case of a special circumstance. To apply the equidistance principle by delimiting the line from two points situated respectively on a far rock in the Scilly Isles and on the island of Ushant produces, in its opinion, a considerable deviation of the line, quite disproportionate to the importance of these geographical features in comparison with an equidistance line calculated from the land masses of England and France. It stresses that at the Geneva Conference of 1958 the United Kingdom itself insisted upon the problem raised by small islands. Nor does it accept the United Kingdom's thesis of the symmetry in the present instance of the respective positions of the Scilly Isles and the island of Ushant. The Scilly Isles, it says, are situated at a distance from the mainland of England twice as great as that which separates Ushant from the French coast; and the distance between Bishop Rock and the Scillies and the mainland (31 nautical miles) is, in fact, rather more than twice that between Pointe de Pern on Ushant and the French coast (14 nautical miles). This difference in the positions of the two points, according to the French Republic, results in a distortion of the boundary which requires to be corrected by application of equitable principles.

217. The mere fact that, as the French Republic maintains, the situation in the Atlantic region is neither one where the two coasts are opposite each other nor one where they are adjacent to each other is further said by it to constitute a quite extraordinary "special circumstance". But it also claims to find in the Atlantic region another feature negativing the use of the equidistance method. Alleging that the line proposed by the United Kingdom is constructed by reference to only two base-points, Bishop Rock in the Scillies and Pointe de Pern on Ushant, it contends that this is not an equidistance line as commonly understood either in customary international law or in the 1958 Convention, and is certainly not a "median" line. In its view, since both paragraphs of Article 6 speak of equidistance from the nearest points of the baselines, an equidistance line, if it is not to be an arbitrary line, must be drawn from sufficient portions of the two coasts and not from single points on those coasts. An equidistance line which does not satisfy this condition does not conform, it maintains, to the method of delimitation prescribed in Article 6. Commenting upon certain precedents invoked by the United Kingdom as showing median lines prolonged beyond the point where the coasts of the States concerned are no longer "opposite" each other, the French Republic accepts the existence of such cases. But it argues that a boundary prolonged beyond the position where the coasts face each other can be considered a delimitation between "opposite" States only where it is delimited from a plurality of points on the opposing coasts. The French Republic also explains that, if it does not designate the absence of a plurality of

base-points in the Atlantic region as a "special circumstance", this is only because it considers that the rules laid down in Article 6 cannot have any application in that region.

218. The affirmative arguments advanced by the French Republic in support of its line E, delimited by reference to the general directions of the two coasts, draw largely upon principles and analogies derived from the Judgment in the *North Sea Continental Shelf* cases. Article 6 being, in its view, inapplicable to the Atlantic region, it maintains that the Court is free to adopt any method or methods for determining the boundary provided that the resulting delimitation accords with the principle of the natural prolongation of the land territory and with equitable principles. It takes the position that, although the Atlantic region may be said to be "adjacent" to the coasts of the United Kingdom, as also of the French Republic, the United Kingdom possesses no maritime facade on the Atlantic; and that even its own maritime facade is small. From this absence of relevant maritime facades it asks the Court to conclude that some other basis for determining the application of the principle of natural prolongation of the land territory in the Atlantic region must be looked for than the coasts of the two countries abutting on that region. Such a basis, it contends, can be found only in the coasts of the two countries in the Channel. It emphasizes that its proposal does not envisage the use of the actual coasts in the Channel as a means of effecting a delimitation in the Atlantic region; for they have already been used once in delimiting the boundary in the Channel. What it envisages is that they should be used to determine the natural prolongation of the land territory of the two countries into the Atlantic.

219. The French Republic also asks the Court to have regard to other elements in the Judgment in the *North Sea Continental Shelf* cases. It refers to the emphasis placed in that case on the factor of distance in appreciating the inequitable effects of a minor geographical feature and on the particular significance of this factor in lateral delimitations between "adjacent" States. Moreover, while denying that the French Republic and the United Kingdom can be regarded as "adjacent" States in the Atlantic region, it suggests that the situation has some analogies with that of a lateral delimitation between "adjacent" States. In particular, the French Republic invokes the use in the *North Sea Continental Shelf* cases, and previously in the *Fisheries* case (I.C.J. Reports 1951) of straight lines following the general direction of the coast, and it maintains that those cases establish the concept of "the general direction of the coast" as a criterion of general validity in the delimitation of maritime areas. In putting forward the lines D.G.F. and D.G.B. as constituting the general directions of the French and British coasts in the Channel, it provides detailed explanations of the methods which it has used in arriving at the construction of those lines. For reasons which appear in paragraphs 246-247, however, the Court does not find it necessary to enter into those aspects of the French argument regarding the general directions of the two coasts.

220. The French Republic does not propose that the concept of the general direction of the coast should be applied simply as such; it proposes

rather that the concept should be applied in combination with, and in the context of, "proportionality", which it puts forward as a general principle. This principle it likewise derives from the Judgment in the *North Sea Continental Shelf* cases, where "proportionality" figures in the Judgment as a criterion applied in conjunction with the use of straight lines for constructing the maritime facades of the three States concerned, that is their coastal frontages abutting on the continental shelf of the North Sea. The French Republic also cites a recent Convention concluded between it and Spain for the delimitation of their continental shelf boundary in the Gulf of Gascony as a case where these two concepts had been applied in a similar manner. Applying the two concepts to the situation in the Channel and Atlantic region, the French Republic contends that at the least "proportionality" requires that France which has some maritime facade in the Atlantic region should not be given worse treatment than the United Kingdom which, in its view, has none. It also contends that in determining the lengths of the two coasts in the Channel to be taken into account for the purpose of delimiting the boundary in the Atlantic region, proportionality requires that they should be comparable to the lengths of the prolongation of their general directions into the Atlantic.

221. The considerations and arguments advanced by the United Kingdom in support of the median-line boundary which it proposes are less complex than those invoked by the French Republic and can be stated more briefly. Both in the negotiations in the period 1970-1974 and before the Court, the United Kingdom has taken the position that in the Atlantic region the legal situation is that of a delimitation between two "opposite" States. It has likewise taken the position in the negotiations and before the Court that the location of the Scilly Islands some miles to the west of the Cornish peninsula does not constitute a "special circumstance" within the meaning of Article 6 or justify a boundary other than the median line.

222. The United Kingdom, as previously mentioned in paragraph 93, bases its characterisation of the Atlantic region as a case of "opposite" States on two main propositions, one negative and one positive. First, it says that the natural meaning of the expression "two adjacent States" in paragraph 2 of Article 6 is "two States whose territories are alongside one another and who have a common land frontier"; and that, as France and the United Kingdom are separated by a wide area of sea, they cannot be considered as having "adjacent" coasts. Secondly, it says that throughout the entire arbitration area, and indeed further eastwards to the Straits of Dover, the coasts of the United Kingdom and France constitute a "textbook example" of coasts which "are opposite each other" within the meaning of paragraph 1 of Article 6; and that although in the Atlantic region the areas of shelf "lie off, rather than between, their two coasts, there is no reason for changing the relationship of 'opposite' States which exists for the whole length of the Channel". In support of this proposition, it stresses the essential continuity of the continental shelf of the Channel and the Atlantic region, as well as the absence of any exceptional geographical configurations which might warrant the latter being treated as a separate sector. It cites, in this regard, a statement in the French Republic's Reply: "The French and British coasts are

neither very irregular nor differ very much from each other even if the French coast is more broken." Endorsing that statement, it contends that "precisely for that reason the median line in consequence follows the line of thrust of the two land masses, in a south-westerly direction, out into the Atlantic".

223. At the same time, the United Kingdom rejects the French Republic's thesis that the United Kingdom has no maritime facade in the Atlantic region and projects into it only at Bishop Rock in the Scilly Isles. It maintains that, on the contrary (U.K. Counter-Memorial, paragraph 270):

> the thrust of the United Kingdom into the South-Western Approaches, far from being simply that of Bishop Rock, is constituted by the whole of south-west England (including the Scilly Isles) and part of Wales. In reality, however, what actually projects under the sea in the South-Western Approaches is part of the same continental shelf which underlies the English Channel (and the Irish and Celtic Seas). The concept of the continental shelf is that, whatever be the points of measurement, the continental shelf attaches to, and as a matter of apportionment reflects, the adjacent land mass. The fallacy in the French argument is the assumption that what has to be reflected is Bishop Rock. Bishop Rock is not the land mass of the United Kingdom adjacent to the continental shelf, it is simply a point of measurement, the most extreme westerly point on the United Kingdom baseline . . . .

As a matter of actual fact, the United Kingdom observes, the westerly extremity of the baseline of the United Kingdom is not Bishop Rock but another rock in the Scilly Isles called the Crebinicks.

224. The United Kingdom likewise rejects the French Republic's contention that an equidistance line prolonged on by reference to one base-point does not conform to the concept of an equidistance line as envisaged in Article 6. In the first place, it dissents from the French Republic's interpretation of the expression "the nearest points" in paragraph 1 of the Article (U.K. Counter-Memorial, paragraph 273):

> Neither the English nor the French language text of that paragraph leaves any room for doubt that what the negotiating States had in mind was the truism that *each point* on the median line is determined by the fact that it is equidistant from the *nearest points* on the baselines of the two States; that is to say, equidistant from the nearest *point* on one baseline and the nearest *point* on the other; hence the use of the plural. In its very essence, therefore, the paragraph is based upon the idea of only two points, one on each baseline, determining a third point or series of points on the median line. Practical experience shows that, for the construction of any delimitation by way of a median line as between opposite States, only a relatively small number of coastal points come into play and these points, between themselves, determine the entire course of the boundary which may stretch over several hundred miles. Even then, however, these points constitute a series of points all along each coast, just as there is such a series of points along each coast in the present case. A whole series of points all along the South coast of England has been used to determine the median line, of which Bishop Rock [the Crebinicks] is the last (just as, on the French side, the Pointe de Pern on Ushant is the last). Logically, there must be a last point, a most extreme point. But it does not make it the only point, nor does it make it "arbitrairement choisi"; the choice is the product of geographical fact and not in the least arbitrary" (emphasis in the original).

Describing the operation of this technical process in the Atlantic region in greater detail during the oral proceedings, the United Kingdom stated (Hearing of 8 February 1977):

> The British base-points move from Lizard Head to a point on the south coast of the Scillies and thence gradually some eight kilometres further to the western end of the Scilly Isles to a rock there . . . whilst a single point on the north coast of Ushant controls the same 45-mile stretch of the equidistance line. It controls the whole of that length. The

> Ushant base-point then moves in stages some five kilometres to the westernmost rocks, and the westernmost points of Ushant and the Scillies do not fully determine the equidistance line until a position over 60 miles, or 111 kilometres, beyond the line joining them, and after that the Ushant point still moves slightly further south . . . .

The United Kingdom concedes that in this instance the movements of the base-points do not result in any significant change in the course of the equidistance line out to the 1,000-metre isobath. But it claims that they demonstrate that the French Republic's contention is an oversimplification which is misleading.

225. The United Kingdom asks the Court, in the light of the above considerations, to conclude that there is no substance in the French thesis that an equidistance line loses its logical foundation if it is not based on a series of points on each of the two coasts in question. It also refers the Court to a number of examples in State practice of equidistance line boundaries determined for part of their length by a single or by very few base-points. Amongst these it mentions in particular the continental shelf boundaries in the North Sea between Norway and the United Kingdom and between Norway and Denmark.

226. As for the French Republic's contention that the respective situations of the Scilly Isles and the island of Ushant amount to a "special circumstance", the United Kingdom concedes that nothing prevents the French Republic from arguing that some geographical feature constitutes a special circumstance in the Atlantic region, even though it made no reservation with regard to that circumstance in acceding to the Convention (U.K. Counter-Memorial, paragraph 94). On the other hand, it asks the Court to take a strict view of the conditions under which a case of special circumstances justifying a boundary other than the median line may be established. *Inter alia,* it contends that (Hearing of 7 February 1977):

> Special circumstances can only mean an exceptional geographical configuration in the sense of a geographical feature which is highly unusual;
>
> Such a feature may justify another boundary on ground of convenience, practicality, or equity;
>
> Where an "equitable" justification is advanced, it must be shown that the exceptional geographical feature distorts the boundary in a manner totally disproportionate to its importance;
>
> By definition, therefore, such a distortion can only arise from very minor features.

In applying these criteria to the Atlantic region, the United Kingdom invokes a passage in the Judgment in the *North Sea Continental Shelf* cases which it claims to fit the situation in the region exactly. In this passage, the full text of which has already been set out in paragraph 85, the International Court of Justice spoke of each State, in a case of "opposite" States, being able to claim the continental shelf as a natural prolongation of its territory and then continued:

> These prolongations meet and overlap, and can therefore only be delimited by means of a median line; *and ignoring the presence of islets, rocks and minor coastal projections, the disproportionately distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved* (emphasis added).

This passage is invoked by the United Kingdom as indicating what the International Court of Justice understood by "special or unusual features".

Both Ushant and the Scilly Isles, it maintains, "are islands of considerable size", and under no circumstances could either be classed as an islet or rock and on that basis ignored.

227. In regard to the Scilly Isles, the United Kingdom stresses the facts that, geologically, they form an integral part of the land mass of the United Kingdom; that they consist of a group of some 48 islands of which six are inhabited; that they have a sizeable population, and have for centuries been regarded as an integral part of the United Kingdom. In these circumstances, it says, the Scilly Isles clearly constitute "islands" for the purpose of Article 1(*b*) of the 1958 Convention and, as such, "generate their own shelf". Stressing also that at their furthest point they lie no more than 31 nautical miles and at their nearest point only 21 miles from the Cornish coast, it claims that they are indisputably offshore islands of the United Kingdom. As for the continental shelf "generated" by the islands, the United Kingdom says that "on the landward side, facing the Cornish coast, there is no purpose in attempting to distinguish between the continental shelf of the United Kingdom and that of the Isles of Scilly in view of the geological unity between the islands and the Cornish peninsula and the fact that the islands are an integral part of the United Kingdom". On the seaward side, it says that the Scilly Isles represent a continuation of the Cornish peninsula, thrust out into the Atlantic region and continuing the same south-westerly trend or direction as the peninsula; and that in its view "there is no possible basis for denying to the islands their full effect for purposes of drawing the median line between the United Kingdom and France".

228. Similarly, the United Kingdom observes that Ushant is geologically an integral part of the French land mass, and is manifestly an offshore island which forms part of the coast of France. Pointing out that Ushant is included within the straight baselines promulgated by the French Republic in 1967 for the delimitation of its territorial sea, it states that this could only have been because the French Republic quite properly regarded Ushant as essentially part of its coast. Adding that the legality of using Ushant as a base-point for delimiting the continental shelf is beyond doubt, the United Kingdom suggests that the French Republic chooses not to do so and to treat Ushant as a "special or unusual feature" only because the logic of the situation would otherwise compel it to concede similar treatment for the Scilly Isles.

229. In general, the United Kingdom maintains that the median line which it proposes in the Atlantic region, measured from points both on the Scilly Isles and on Ushant, does not have the effect of attributing to the United Kingdom any areas of continental shelf which can be said to be *uniquely* a natural prolongation of the continental shelf of France. On the contrary, it says, the situation is one of overlap and the appropriate boundary is the median line. It invokes at the same time a statement in the Judgment in the *North Sea Continental Shelf* cases regarding the function of equity (paragraph 91):

> Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question

> of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy.

The fact that the Cornish peninsula and the Scilly Isles reach further into the Atlantic than the Breton peninsula and Ushant is, it insists, simply a fact of nature and to ignore the Scillies would be to refashion nature.

230. The United Kingdom addresses a number of criticisms to the French Republic's proposal of a median line delimited by reference to the prolongations of the general directions of the coasts of the two countries. *Inter alia*, it contests the analogies drawn by the French Republic from the Judgment in the *North Sea Continental Shelf* cases. It maintains that the geographical situation in those cases, where there was a conclave coastline formed by the coasts of three States, differed fundamentally from the situation in the Atlantic region; and that the International Court's application of the concepts of maritime facades and of proportionality of areas of shelf in relation to the lengths of the facades is explained by the special facts of the North Sea cases. In addition, it contests both the scientific basis and the relevance of the particular "lignes de lissage", that is of the particular straight lines along the two coasts chosen by the French Republic as representing their general directions. The construction of these lines it alleges is purely arbitrary and other, equally valid, methods can be suggested that give quite different results. Amongst other objections to the relevance of the French "lignes de lissage", the United Kingdom considers that (U.K. Counter-Memorial, paragraph 329):

> there is no consistency in a position which accepts that the boundary line is determined by the actual features as they lie off the two coastlines, *including the Scilly Islands and Ushant*, for the areas to the East of these islands, but formally denies to these features the same relevance further west *while nevertheless claiming to substitute for them in this latter region artificial lines which are said to be based upon the self-same features* (emphasis in the original).

231. As for "proportionality", in addition to contesting the relevance in the present case of combining it with the length of the maritime facades, the United Kingdom challenges the bases on which the French Republic makes its calculations of proportionality. Indeed, it claims that, if other bases which it regards as more appropriate are used, the calculations of "proportionality" serve only to support the equitable character of the median line boundary proposed by the United Kingdom. In any event, as the Court has already pointed out in paragraph 24, the United Kingdom claims that any assessment of what would be an equitable delimitation as between itself and the French Republic must, in the words of the International Court of Justice, take account of "the effects, actual or prospective, of any other continental shelf delimitation between adjacent States in the same region". In the Atlantic region, it maintains, the French Republic, the United Kingdom and the Republic of Ireland are three States abutting upon the same continental shelf, as were the Netherlands, the Federal Republic of Germany and Denmark in the *North Sea Continental Shelf* cases. It asks this Court, in consequence, to see an analogy between its position as the middle State compressed between the French and Irish areas of continental shelf and that of the Federal Republic. If the Scilly Isles were to be disregarded in the de-

limitation of its boundaries both with French and Irish Republics, the resulting compression of the United Kingdom's continental shelf by those of its two neighbours would, in its view, constitute a serious injustice to the United Kingdom.

232. The Court, as in the Channel Islands region, will begin by identifying the geographical and other features which establish the legal framework for its decision regarding the course of the continental shelf boundary in the Atlantic region. The essential continuity of the continental shelf of the English Channel and Atlantic region has already been emphasized repeatedly in the present Decision. It is also common ground between the Parties that, geologically, the slight south-westerly trend of the continental shelf of the Channel extends westwards into the Atlantic region along the line of the faults referred to in the pleadings as the Hurd Deep Fault Zone. They are likewise agreed that, geologically, the island of Ushant forms an integral part of the land mass of France, and the Scilly Isles part of the land mass of the United Kingdom; and in the western region of the Channel the coast of France, including the island of Ushant, and the coast of the United Kingdom, including the Scilly Isles, have the same south-westerly trend as the continental shelf of the Channel and the Atlantic region. In these various respects, therefore, the United Kingdom's insistence that the Atlantic region may not be considered a separate sector of the arbitration area has a certain justification. Nevertheless, in the view of the Court, this region has characteristics which distinguish it geographically and legally from the region within the English Channel.

233. The chief of these distinguishing characteristics consists in the fact that the continental shelf of the Atlantic region is not one confined within the arms of a comparatively narrow channel but one extending seawards from the coasts of the two countries into the open spaces of the Atlantic Ocean. In consequence, the areas of continental shelf to be delimited, in the phrase used by the United Kingdom, lie off, rather than between, the coasts of the two countries. A further consequence is that the continental shelf across which the Court has to decide the course of the boundary extends to seawards of the coasts of the two countries for great distances. In fact, as already noted in paragraph 11 of this Decision, the distance from Ushant to the limit of the arbitration area at the 1,000-metre isobath, taken in a south-westerly direction, is of the order of 160 nautical miles; and the distance from the Scilly Isles, taken in the same general direction, is of the order of 180 nautical miles. Other distinguishing characteristics are that the actual coastlines of the two countries abutting on the continental shelf to be delimited are comparatively short; and that, although separated by some 100 miles of sea, their geographical relation to each other vis-à-vis the continental shelf to be delimited is one of lateral rather than opposite coasts.

234. Whether these differences in the geographical situation in the Atlantic region alter the legal framework for the delimitation of the continental shelf in this part of the arbitration area will shortly be examined by the Court. The Court considers it convenient, however, first to identify any other features which may form part of the geographical and legal framework

of the delimitation. First, although the coasts of the two countries abutting on the continental shelf to be delimited are of somewhat different shapes, they exhibit certain similarities. Both are peninsulas which constitute the ultimate reach of their respective territories into the Atlantic region; both have offshore islands which project their respective territories still further into the region; nor can the court accept the thesis of the French Government that, while France has a small maritime frontage facing the region, the United Kingdom has none. To deny that the latter possesses a maritime frontage upon the region is to mistake form for substance. Although more complex in form and less easy perhaps to define, the United Kingdom possesses a frontage upon the region which is comparable broadly in its extent with that of the French Republic, as well as having the same relation to the continental shelf to be delimited.

235. The pertinent dissimilarity between the two coasts, for the purpose of delimiting the boundary of their continental shelf, is rather the one invoked by the French Republic as a "special circumstance" calling for a boundary other than the equidistance line. This is the circumstance, not that the United Kingdom has no coastal frontage upon the Atlantic region, but that its coastal frontage projects further into the Atlantic than that of the French Republic. The greater projection of the United Kingdom coast into the Atlantic region is due in part to the fact that the most westerly point of its mainland is situated almost one degree further to westward than that of the French mainland. But it is also due to the greater extension westwards of the Scilly Isles beyond the United Kingdom mainland than that of Ushant beyond the French mainland. Thus, at its nearest point, Ushant is only about 10 miles and at its most westerly point no more than 14.1 nautical miles from the coast of Finistère; the nearest point of the Scilly Isles, on the other hand, is some 21 nautical miles and their most westerly point some 31 miles distant from Land's End. As a result, even when account is taken of the slight south-westerly trend of the English Channel, the further extension south-westwards of the United Kingdom's coast has a tendency to make it obtrude upon the continental shelf situated to seawards of the more westerly facing coast of the French Republic in that region.

236. An additional feature of the Atlantic region, already referred to in paragraphs 23-28 of this Decision, also needs to be recalled, namely the fact that the French Republic and the United Kingdom are not the only States which abut upon the continental shelf in the Atlantic westwards of France and the United Kingdom. The existence of the Spanish coast far to the south-west is not material in the present arbitration. But the possible impact of the claims of the Irish Republic in the north upon the areas of continental shelf accruing to the United Kingdom in the Atlantic region has been invoked by the latter and discussed by the French Government in the pleadings. Accordingly, the Court has necessarily taken cognizance of this feature of the Atlantic region although, as indicated in paragraphs 23-28, it does not itself consider that the abutting of the Irish Republic on the same continental shelf in the north affects its decision regarding the boundary between the United Kingdom and the French Republic in these proceedings.

237. What then is the legal framework for the delimitation of the

boundary in the Atlantic region, having regard to the various features of the situation in the region to which the Court has drawn attention? The Court has already held both that Article 6 governs the delimitation in the Atlantic region and that there is no question of any *casus omissus* which does not fall within the scope of either paragraph 1 or paragraph 2 of the Article. The question, therefore, is whether it is paragraph 1, dealing with "opposite" States, or paragraph 2, dealing with "adjacent" States, which is applicable. In the pleadings both Parties have taken it for granted that, owing to the wide expanse of sea separating the two coasts at the entrance to the Channel, the situation cannot be considered one of "adjacent" States within the meaning of paragraph 2 of Article 6. The controversy between them has been as to whether the "opposite" States relationship, which certainly exists within the entrances to the Channel, should be considered as continuing into the Atlantic region or whether, owing to the cessation of the "opposing" coasts of the entrances to the Channel, the situation should be considered to fall outside paragraph 1, as well as paragraph 2, of Article 6. The United Kingdom assumes that, if the situation is legally one of "opposite" States governed by paragraph 1, the pronouncement in the *North Sea Continental Shelf* cases that the shelf can then only be delimited by means of a median line automatically applies; and that "ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved" (I.C.J. Reports 1969, paragraph 57). The French Republic assumes that, in the absence of coasts beyond Ushant and the Scilly Isles, the method of delimitation by equidistance from the baselines of the coasts of the two countries loses all its validity. Both these assumptions appear to the Court to oversimplify the legal situation.

238. The rules of delimitation laid down in the two paragraphs of Article 6 are essentially the same. In the absence of agreement, and unless another boundary is justified by special circumstances, the boundary is to be the line which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. In paragraph 1 the line is designated "the *median* line every point of which is equidistant from the nearest points of the baselines" etc.; in paragraph 2 it is simply referred to as the boundary "determined by application of the principle of equidistance from the nearest points of the baselines" etc. But both the legal rule and the method of delimitation prescribed in the two paragraphs are precisely the same. Consequently, there is nothing in the language of Article 6 to imply that in situations falling under paragraph 1 the virtues of the equidistance principle as a method of effecting an equitable delimitation are in any way superior to those which it possesses in situations falling under paragraph 2. The emphasis placed in the *North Sea Continental Shelf* cases on the difference between the situations of "opposite" and "adjacent" States reflects not a difference in the *legal* régime applicable to the two situations but a difference in the *geographical* conditions in which the applicable legal régime operates.

239. As this Court of Arbitration has already pointed out in paragraphs 81-94, the appropriateness of the equidistance or any other method

for the purpose of effecting an equitable delimitation in any given case is always a function or reflection of the geographical and other relevant circumstances of the particular case. In a situation where the coasts of the two States are opposite each other, the median line will normally effect a broadly equal and equitable delimitation. But this is simply because of the geometrical effects of applying the equidistance principle to an area of continental shelf which, in fact, lies between coasts that, in fact, face each other across that continental shelf. In short, the equitable character of the delimitation results not from the *legal* designation of the situation as one of "opposite" States *but from its actual geographical character as such*. Similarly, in the case of "adjacent" States it is the lateral geographical relation of the two coasts, when combined with a large extension of the continental shelf seawards from those coasts, which makes individual geographical features on either coast more prone to render the geometrical effects of applying the equidistance principle inequitable than in the case of "opposite" States. The greater risk in these cases that the equidistance method may produce an inequitable delimitation thus also results not from the *legal* designation of the situation as one of "adjacent" States but *from its actual geographical character as one involving laterally related coasts*.

240. What is, moreover, evident is that the relevance of the distinction between opposite and adjacent coasts is in regard to the operation of the "special circumstances" element in the "equidistance-special circumstances" rule laid down in Article 6 for both situations. What is also evident in the view of the Court, is that the answer to the question whether the effect of individual geographical features is to render an equidistance delimitation "unjustified" or "inequitable" cannot depend on whether the case is *legally* to be considered a delimitation between "opposite" or between "adjacent" States. The appreciation of the effect of individual geographical features on the course of an equidistance line has necessarily to be made by reference to the actual geographical conditions of the particular area of continental shelf to be delimited and to the actual relation of the two coasts to that particular area.

241. Clearly, there is considerable force in the contention, put forward by both Parties, that, owing to the separation of the two coasts by a wide expanse of sea, the situation in the Atlantic region cannot be categorized as, legally, a case of "adjacent" States governed by paragraph 2 of Article 6. If that view is accepted, it follows that the situation is to be considered as, legally, a case of "opposite" States and therefore one governed by paragraph 1 of that Article. It is, on the other hand, certain that in the Atlantic region the situation *geographically* is one of two laterally related coasts, abutting on the same continental shelf which extends from them a great distance seawards into the Atlantic Ocean. Indeed, the Court notes that so evident is this lateral relation of the two coasts, *geographically*, that both Parties in their pleadings saw some analogy between the situation in the Atlantic region and the situation of "adjacent" States. Accordingly, whether the Atlantic region is considered, legally, to be a case of "opposite" States governed by paragraph 1 or a case of "adjacent" States governed by paragraph 2 of Article 6, appreciation of the effects of any special geographical

features on the equidistance line has to take account of those two geographical facts: the lateral relation of the two coasts and the great distance which the continental shelf extends seawards from those coasts.

242. In so far as the point may be thought to have importance, the Court is inclined to the opinion that the Atlantic region falls within the terms of paragraph 1 rather than paragraph 2 of Article 6. As the United Kingdom emphasizes, there are a number of precedents in which equidistance boundaries between "opposite" States are prolonged seawards beyond the point where their coasts are geographically "opposite" each other; and the assumption seems to be that these are prolongations of median lines. Another view of the matter might be that, beyond the point where the coasts are geographically opposite each other, the legal situation changes to one analogous to that of adjacent States. In certain geographical configurations, as was stated in the *North Sea Continental Shelf* cases in an observation recalled by the United Kingdom itself, " a given equidistance line may partake in varying degree of the nature both of a median and of a lateral line" (paragraph 6). But to fix the precise legal classification of the Atlantic region appears to this Court to be of little importance. The rules of delimitation prescribed in paragraph 1 and paragraph 2 are the same, and it is the actual geographical relation of the coasts of the two States which determine their application. What is important is that, in appreciating the appropriateness of the equidistance method as a means of effecting a "just" or "equitable" delimitation in the Atlantic region, the Court must have regard both to the lateral relation of the two coasts as they abut upon the continental shelf of the region and to the great distance seawards that this shelf extends from those coasts.

243. The essential point, therefore, is to determine whether, in the actual geographical circumstances of the Atlantic region, the prolongation of the Scilly Isles some distance further westwards than the island of Ushant renders "unjust" or "inequitable" an equidistance boundary delimited from the baselines of the French and United Kingdom coasts. The effect of the presence of the Scilly Isles west-south-west of Cornwall is to deflect the equidistance line on a considerably more south-westerly course than would be the case if it were to be delimited from the baseline of the English mainland. The difference in the angle is 16°36′14″; and the extent of the additional area of shelf accruing to the United Kingdom, and correspondingly not accruing to the French Republic, in the Atlantic region eastwards of the 1,000 metre isobath is approximately 4,000 square miles. The mere fact, however, that the presence of the Scilly Isles in the position in which they lie has that effect does not in itself suffice to justify a boundary other than an equidistance line delimited by reference to the Scillies. The question is whether, in the light of all the pertinent geographical circumstances, that fact amounts to an inequitable distortion of the equidistance line producing disproportionate effects on the areas of shelf accruing to the two States.

244. The projection of the Cornish peninsula and the Isles of Scilly, further seawards into the Atlantic than the Brittany peninsula and the island of Ushant, is a geographical fact, a fact of nature; and, as was observed in the *North Sea Continental Shelf* cases, there is no question of equity "com-

pletely refashioning nature'' or ''totally refashioning geography'' (Judgment, paragraph 91). It may also be urged that the very fact of the projection of the United Kingdom land mass further into the Atlantic region has the natural consequences of rendering greater areas of continental shelf appurtenant to it. Nevertheless, when account is taken of the fact that in other respects the two States abut on the same continental shelf with coasts not markedly different in extent and broadly similar in their relation to that shelf, a question arises as to whether giving full effect to the Scilly Isles in delimiting an equidistance boundary out to the 1,000-metre isobath may not distort the boundary and have disproportionate effects as between the two States. In the view of the Court, the further projection westwards of the Scilly Isles, when superadded to the greater projection of the Cornish mainland westwards beyond Finistère, is of much the same nature for present purposes, and has much the same tendency to distortion of the equidistance line, as the projection of an exceptionally long promontory, which is generally recognized to be one of the potential forms of ''special circumstance''. In the present instance, the Court considers that the additional projection of the Scilly Isles into the Atlantic region does constitute an element of distortion which is material enough to justify the delimitation of a boundary other than the strict median line envisaged in Article 6, paragraph 1, of the Convention.

245. The Court thus recognizes that the position of the Scilly Isles west-south-west of the Cornish peninsula constitutes a ''special circumstance'' justifying a boundary other than the strict median line. It does not, however, consider that the existence of this ''special circumstance'' in the Atlantic region gives it carte blanche to employ any method that it chooses in order to effect an equitable delimitation of the continental shelf. The French Republic, it is true, has impressed upon this Court certain observations in the Judgment in the *North Sea Continental Shelf* cases to the effect that, in order to achieve an equitable solution, ''it is necessary to seek, not one method of delimitation but one goal'' (Paragraph 92), and that ''there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures'' (paragraph 93). But in these cases the Parties had retained the actual delimitation of the boundary in their own hands for further negotiation in the light of the principles and rules to be stated by the International Court of Justice; and in any event the observations invoked by the French Republic have to be read in the light of certain other observations of the International Court in the same Judgment. In these other observations, it was stressed that any recourse to equitable considerations must be to considerations ''lying not outside but within the rules'' of law, and that there is no question of any decision *ex aequo et bono* (paragraph 88); and, as already noted, it was also stressed that ''there can never be any question of completely refashioning nature'' (paragraph 91). Furthermore, at the outset of the Judgment it was underlined that delimitation of the continental shelf is not a process of dividing it up into equitable ''shares'' but of delimiting a boundary in areas which, in principle, are already appurtenant to one or the other State; and that the notion of ''the just and equitable share'' is wholly at variance with the funda-

mental principle that the continental shelf appertains to the coastal State as the natural prolongation of its land territory (paragraphs 18-20).

246. The "equitable" method of delimitation which is advocated by the French Republic, and which invokes a median line delimited by reference to prolongation of the general directions of the Channel coasts of the two countries, does not appear to the Court to be one that is compatible with the legal régime of the continental shelf. It detaches the delimitation almost completely from the coasts which actually abut on the continental shelf of the Atlantic region, and is thus not easily reconciled with the fundamental principle that the continental shelf constitutes the natural prolongation of a State's territory under the sea. In so far as that method may have relation to the respective land masses of the Parties, it is not apparent why the general directions of their Channel coasts alone should be considered to represent either the totality or any particular part of their land masses. In addition, there appears to be a radical inconsistency in the French Republic's recourse to the general directions of the two Channel coasts as the criterion for delimiting the continental shelf of the Atlantic region. In the pleadings, the French Republic has insisted that the coasts of the two countries within the Channel are irrelevant for the purpose of determining whether the situation in the Atlantic region is one of "opposite" States, for which a median line delimitation is indicated both by Article 6, paragraph 1 of the Convention and by customary law unless another boundary is justified by special circumstances. It is not, therefore, obvious how or why the coasts within the Channel should, on the contrary, acquire an absolute relevance in determining the course of the boundary itself in the Atlantic region. Nor is this inconsistency removed by invoking an alleged principle of proportionality by reference to length of coastlines; for the use of the Channel, rather than the Atlantic, coastlines is still left unexplained. Moreover, as the Court has already stated in paragraphs 98-101, "proportionality" is not in itself a source of title to the continental shelf, but is rather a criterion for evaluating the equities of certain geographical situations.

247. The Court, for the above reasons, finds itself unable to accept the prolongations of the general directions of the Channel coasts of the two countries as a relevant basis for determining the course of the boundary in the Atlantic region. It need not, therefore, explore the further difficulties which the application of that method would involve in determining the precise lines that should be considered as the appropriate representation of the general directions of the two coasts.

248. The Court considers that the method of delimitation which it adopts for the Atlantic region must be one that has relation to the coasts of the Parties actually abutting on the continental shelf of that region. Essentially, these are the coasts of Finistère and Ushant on the French side and the coasts of Cornwall and the Scilly Isles on the United Kingdom side. The island of Ushant not only forms part, geologically, of the land mass of France but lies no more than ten nautical miles from the French coast within the territorial sea of the French mainland. Indeed, the island forms one of the links in the system of straight baselines along the French coast established by the

French Republic in 1964. The Scilly Isles likewise form part of the land mass of the United Kingdom and, although some 21 miles distant from the mainland, they are unquestionably islands offshore of the United Kingdom which, both geographically and politically, form part of its territory. In fact, the existing 12-mile fishery zones of the mainland and of the Scilly Isles merge into one and, if the United Kingdom exercises the right which it claims to establish a 12-mile territorial sea, the same will be the case with their territorial sea. Both Ushant and the Scilly Isles are, moreover, islands of a certain size and populated; and, in the view of the Court, they both constitute natural geographical facts of the Atlantic region which cannot be disregarded in delimiting the continental shelf boundary without "refashioning geography". The problem therefore is, without disregarding Ushant and the Scillies, to find a method of remedying in an appropriate measure the distorting effect on the course of the boundary of the more westerly position of the Scillies and the disproportion which it produces in the areas of continental shelf accruing to the French Republic and the United Kingdom.

249. The Court notes that in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection. In the present instance, the problem also arises precisely from the distorting effect of a geographical feature in circumstances in which the line equidistant from the coasts of the two States would otherwise constitute the appropriate boundary. Consequently, it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation. The appropriate method, in the opinion of the Court, is to take account of the Scilly Isles as part of the coastline of the United Kingdom but to give them less than their full effect in applying the equidistance method. Just as it is not the function of equity in the delimitation of the continental shelf completely to refashion geography, so it is also not the function of equity to create a situation of complete equity where nature and geography have established an inequity. Equity does not, therefore, call for coasts, the relation of which to the continental shelf is not equal, to be treated as having completely equal effects. What equity calls for is an appropriate abatement of the disproportionate effects of a considerable projection on to the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom.

250. The abatement of these disproportionate effects, as previously indicated in paragraph 27, does not entail any nice calculations of proportionality in regard to the total areas of continental shelf accruing to the Parties in the Atlantic region. This is because, as pointed out in paragraphs 99-101, the element of "proportionality" in the delimitation of the continental shelf does not relate to the total partition of the area of shelf among the coastal States concerned, its rôle being rather that of a criterion to assess the distorting effects of particular geographical features and the extent of the resulting inequity. In the present instance, "proportionality" comes into ac-

count only in appreciating whether the Scilly Isles are to be considered a "special circumstance" having distorting effects on the equidistance boundary as between the French Republic and the United Kingdom and, if so, the extent of the adjustment appropriate to abate the inequity. These questions do not therefore require nice calculations of the areas of continental shelf appertaining to the United Kingdom in the north under a prospective delimitation of its continental shelf boundary with the Irish Republic. The point here at issue is simply whether the geographical situation of the Scilly Isles in relation to the French coast has a distorting effect and is a cause of inequity as between the United Kingdom and the French Republic.

251. A number of examples are to be found in State practice of delimitations in which only partial effect has been given to offshore islands situated outside the territorial sea of the mainland. The method adopted has varied in response to the varying geographical and other circumstances of the particular cases; but in one instance, at least, the method employed was to give half, instead of full, effect to the offshore island in delimiting the equidistance line. The method of giving half effect consists in delimiting the line equidistant between the two coasts, first, without the use of the offshore island as a base-point and, secondly, with its use as a base-point; a boundary giving half-effect to the island is then the line drawn mid-way between those two equidistance lines. This method appears to the Court to be an appropriate and practical method of abating the disproportion and inequity which otherwise result from giving full effect to the Scilly Isles as a base-point for determining the course of the boundary. The distance that the Scilly Isles extend the coastline of the mainland of the United Kingdom westwards onto the Atlantic continental shelf is slightly more than twice the distance that Ushant extends westwards the coastline of the French mainland. The Court, without attributing any special force as a criterion to this ratio of the difference in the distances of the Scillies and Ushant from their respective mainlands, finds in it an indication of the suitability of the half-effect method as a means of arriving at an equitable delimitation in the present case. The function of equity, as previously stated, is not to produce absolute equality of treatment, but an appropriate abatement of the inequitable effects of the distorting geographical feature. In the particular circumstances of the present case the half-effect method will serve to achieve such an abatement of the inequity. At the same time, the Court notes that the boundary resulting from the use of this method will follow the slight south-westerly trend of the coastlines of the Parties and of the continental shelf in the region.

252. The Court is now in a position to decide the actual course of the boundary in the Atlantic region, that is, to the west of Point J. This point is the most westerly position at which the Parties are in agreement that the situation is one of "opposite" States and that the equitable boundary is therefore the median line. In the view of the Court, however, this situation obtains also for a short distance to westwards of Point J where the coasts of the two Parties are still to be considered as in an "opposite" rather than lateral relation to the continental shelf. It accordingly decides that the course of the boundary immediately to the westwards of Point J shall be the median line joining:

Point J: 49°13'22"N 05°18'00"W
Point K: 49°13'00"N 05°20'40"W
Point L: 49°12'10"N 05°40'30"W (see Map 2 on page 208).

The base-points on the two coasts from which point J is delimited have already been specified in paragraph 118. Those from which Point K is delimited are, on the French side, Basse Vincent (Roches de Porsal) and Le Crom (Ushant) and, on the United Kingdom side, the Stags (The Lizard); and those from which Point L is delimited are, on the French side, Le Crom (Ushant) and, on the United Kingdom side, The Stags (The Lizard) and Wingletang (Scilly Isles). Point L is the median point which is equidistant from the points on Ushant (Le Crom) and the Scilly Isles (Wingletang) that are nearest each other.

253. Westwards of Point L, a point equidistant from Ushant and from the Scilly Isles, the Court considers that the relation between the respective coasts of the Parties and the continental shelf which is to be delimited begins to be one where the coasts face the continental shelf side by side, rather than face it opposite each other. From Point L westwards, therefore, account has to be taken of the distorting influence exercised by the Scilly Isles on the course of the boundary in the Atlantic region if those islands are given full effect in applying the equidistance method. In principle, as the Court has decided, the boundary in the remainder of the Atlantic region is to be determined by the equidistance method but giving only half-effect to the Scillies. Accordingly, the line running from Point K to Point L, at which latter point the Scilly Isles exercise their full effect, is prolonged for no more than a brief distance westwards until at Point M it meets the equidistance line which allows only half-effect to the Scilly Isles. The precise coordinates of Point M, where the prolongation of the line K-L intersects the equidistance line giving half-effect to the Scilly Isles, are:

M:49°12'00"N 05°41'30"W.

254. From Point M, as indicated in paragraph 251, the boundary follows the line which bisects the area formed by, on its south side, the equidistance line delimited from Ushant and the Scilly Isles and, on its north side, the equidistance line delimited from Ushant and Land's End, that is, without the Scilly Isles. The direction westwards followed by the bisector line, which thus constitutes the boundary westwards of Point M, is at the angle of 247°09'37"; and it meets the 1,000-metre isobath approximately at Point N, the coordinates of which may be stated as:

N:48°06'00"N 09°36'30"W.

The position of Point N, the terminal point of the boundary in the arbitration area, is given by the Court only approximately, because the meanderings of the contour of the 1,000-metre isobath make it difficult to fix the point of intersection between the boundary and the isobath with absolute precision. The distance that the line drawn from Point M to Point N extends the boundary seawards to the 1,000-metre isobath is approximately 170 nautical miles.

255. The positions of Points K, L, M and N and the lines joining Points J, K, L, M and N are shown in red on Map 2. These segments of the

boundary are reproduced in black on the Boundary-Line Chart included with this Decision, the letters used to mark the Points in question being the same as those given above.

For these reasons,

THE COURT, unanimously, decides, in accordance with the rules of international law applicable in the matter as between the Parties, that:

(1) Except as provided in paragraph (2) below, the course of the boundary between the portions of the continental shelf appertaining to the United Kingdom and to the French Republic respectively, westward of 30 minutes west of the Greenwich Meridian as far as the 1,000-metre isobath shall be the line traced in black on the Boundary-Line Chart included with this Decision between Points A, B, C, D, D1, D2, D3, D4, E, F, F1, G, H, I, J, K, L, M and N, the coordinates of which Points are as follows:

Point A:	50°07′29″N	00°30′00″W
Point B:	50°08′27″N	01°00′00″W
Point C:	50°09′15″N	01°30′00″W
Point D:	50°09′14″N	02°03′26″W
Point D1:	49°57′50″N	02°48′24″W
Point D2:	49°46′30″N	02°56′30″W
Point D3:	49°38′30″N	03°21′00″W
Point D4:	49°33′12″N	03°34′50″W
Point E:	49°32′42″N	03°42′44″W
Point F:	49°32′08″N	03°55′47″W
Point F1:	49°27′40″N	04°17′54″W
Point G:	49°27′23″N	04°21′46″W
Point H:	49°23′14″N	04°32′39″W
Point I:	49°14′28″N	05°11′00″W
Point J:	49°13′22″N	05°18′00″W
Point K:	49°13′00″N	05°20′40″W
Point L:	49°12′10″N	05°40′30″W
Point M:	49°12′00″N	05°41′30″W
Point N:	48°06′00″N	09°36′30″W

(2) To the north and west of the Channel Islands, the boundary between the portions of the continental shelf appertaining to the United Kingdom (Channel Islands) and to the French Republic respectively shall be the line composed of segments of arcs of circles of a 12-mile radius drawn from the baselines of the Bailiwick of Guernsey and traced in black on the Boundary-Line Chart included with this Decision between Points X, X1, X2, X3, X4, and Y, the coordinates of which Points are as follows:

Point X:	49°55′05″N	02°03′26″W
Point X1:	49°55′40″N	02°08′45″W
Point X2:	49°55′15″N	02°22′00″W
Point X3:	49°39′40″N	02°40′30″W
Point X4:	49°34′30″N	02°55′30″W
Point Y:	49°18′22″N	02°56′10″W

DONE in English and in French at the Palais Eynard, Geneva, this 30th

day of June 1977, both texts being equally authoritative, in three copies, of which one will be placed in the archives of the Court and the others transmitted to the Government of the French Republic and to the Government of the United Kingdom of Great Britain and Northern Ireland, respectively.

Mr. Herbert W. BRIGGS makes the following declaration:

With the course of the boundaries delimited by the Court I am in complete agreement; the decision is thus unanimous.

However, for reasons set forth below, I must regretfully differ from my distinguished colleagues in their evaluation of the French reservations to Article 6 of the 1958 Geneva Convention on the Continental Shelf. These reservations have called for comment because final French Conclusions A.1 and A.7 are to the effect that, even if that Convention is in force between France and the United Kingdom, Article 6 thereof cannot provide the applicable law in this Arbitration because there is no agreement between the Parties to this Arbitration as to its text, the United Kingdom not having accepted the French reservations.

The specific conditions by which France, in acceding to the Geneva Convention on 14 June 1965, sought to limit the application of Article 6 were expressed in the form of three reservations, as follows (French Memorial, 1976, Annex III):

> En déposant cet instrument d'adhésion le Gouvernement de la République française déclare: . . .
>
> *Article 6 (alinéas 1 et 2)*
>
> Le Gouvernement de la République française n'acceptera pas que lui soit opposée, sans un accord exprès, une délimitation entre des plateaux continentaux appliquant le principe de l'équidistance;
>
> Si celle-ci est calculée à partir de lignes de base instituées postérieurement au 29 avril 1958;
>
> Si elle est prolongée au-delà de l'isobathe de 200 mètres de profondeur;
>
> Si elle se situe dans des zones où il considère qu'il existe des "circonstances spéciales", au sens des alinéas 1 et 2 de l'article 6, à savoir : le golfe de Gascogne, la baie de Granville et les espaces maritimes du pas de Calais et de la mer du Nord au large des côtes françaises.[18]

Each of these three reservations to Article 6 is based upon the same premise, namely that the Government of the French Republic will not accept that there be invoked against it, in the absence of an express agreement, any delimitation between continental shelves which applies the principle of equidistance. The phrase "entre des plateaux continentaux" can only refer, in the context, to a delimitation made between the continental shelves of France and a neighbouring State; and the words "sans un accord exprès" clearly indicate that the purpose of the three reservations was to prevent a

[18] For an English translation, see the Court's Decision, paragraph 33. In that translation, the word "exprès" is translated as "specific"; and the phrase "une délimitation entre des plateaux continentaux" is mistranslated as "any boundary of the continental shelf". I can find no evidence that either Party to this Arbitration relied on the English translation set forth by the Court; both Parties quoted the French text in the original. In this Declaration, all quotations are in the original.

neighbouring State from unilaterally establishing or claiming against France a delimitation based upon equidistance.

This intent to prevent unilateral delimitations by States based upon equidistance was foreshadowed even before French accession to the Geneva Convention, and prior to the formulation of the French reservations, in the French Note of 7 August 1964 to the United Kingdom Government in which the French Government, after expressing its intention to accede to the Geneva Convention on the Continental Shelf with a number of reservations, observed in part [United Kingdom Memorial, 1976, Appendix A(7)]:

> une ligne d'équidistance déterminée unilatéralement par la France ou le Royaume-Uni, en se fondant sur les lignes de base droites, telles que celles auxquelles se réfère la note du Royaume-Uni du 18 février 1964, ne saurait dans ces conditions être retenue pour le calcul de la ligne de partage sans l'accord de l'autre Partie.

After France acceded to the Geneva Convention in 1965 with the reservations, *inter alia*, quoted above, it has been the consistent and unvarying interpretation of the French Government that the intended purpose of the reservations to Article 6 was to prevent unilateral delimitations of continental shelves in relation to France by another State, if based upon equidistance.

Thus, referring to the first French reservation to Article 6, the French Counter-Memorial, paragraph 28, observes:

> Les raisons qui ont pu motiver une telle réserve se laissent deviner assez facilement. La France n'a pas voulu que puisse lui être imposée une délimitation qui résulterait d'un double acte unilatéral d'un autre Etat : la fixation de nouvelles lignes de base, d'abord, suivant des critères définis par cet Etat, la détermination d'une ligne d'équidistance ensuite, calculée à partir de ces lignes de base;

and the same paragraph 28 concludes that France "a voulu, en formulant une réserve, se prémunir contre une mauvaise surprise".

In paragraph 30, the French Counter-Memorial complains that the interpretation given to the first French reservation in the United Kingdom Memorial:

> omet la phrase qui introduit l'ensemble des réserves françaises à l'article 6 : "Le Gouvernement français n'acceptera pas que lui soit opposée, sans un accord exprès, une délimitation entre des plateaux continentaux appliquant le principe de l'équidistance."

and continues:

> Cette phrase définit exactement et, de ce fait même, limite la portée de la réserve. Il s'agit seulement du refus d'une délimitation opérée unilatéralement d'après la méthode de l'équidistance dans les hypothèses énumérées plus loin, ici dans l'hypothèse d'une délimitation "calculée à partir de lignes de base instituées postérieurement au 29 avril 1958"

With regard to the second French reservation to Article 6, the French Counter-Memorial, in paragraph 34, again complains that it appears that "le Mémoire britannique ait négligé la phrase qui introduit l'ensemble des réserves françaises à l'article 6;" and in paragraph 39, rejecting the United Kingdom interpretations of this second reservation, it states, in part:

> On voit mal comment l'une ou l'autre de ces délimitations opérées par acte unilatéral pourrait être opposée au Gouvernement français, alors que celui-ci déclare qu'il "n'acceptera pas que lui soit opposée, sans un accord exprès, une délimitation . . . appliquant le principe de l'équidistance si elle est prolongée au-delà de l'isobathe de 200 mètres de profondeur".

Referring to the third French reservation to Article 6, the French

Counter-Memorial, in paragraph 49, notes a third time that the United Kingdom Memorial appeared to have forgotten "la phrase introductive de la réserve" and adds that in its third reservation, the French Government:

> se borne à indiquer un certain nombre de zones où ses intérêts lui semblent assez clairement déterminés, en fonction de la situation particulière des régions considérées, pour qu'il estime ne pouvoir accepter qu'on lui oppose unilatéralement une ligne d'équidistance et où, en conséquence, il considère qu'il existe des "circonstances spéciales" justifiant une autre délimitation. Il indique qu'il ne ratifie la Convention qu'à la condition que cette manière de voir soit acceptée par les autres parties.

Denying, in paragraph 56, that the purpose of the French reservation was to *interpret* the expression "special circumstances", the French Counter-Memorial asserts that the purpose of the third reservation was to *apply* Article 6:

> C'est *d'appliquer* cette expression, avec toutes les conséquences de droit qu'en tire l'article 6, à un certain nombre de situations concrètes et identifiées, et de faire de cette application *la condition* de l'acceptation de la Convention par le Gouvernement français. (Emphasis in the original.)

Thus, each of the three French reservations to Article 6 is intended, according to explicit statements in the French Counter-Memorial, to prevent *unilateral* delimitations based on the principle of equidistance, *by other States,* of the continental shelf boundaries between them and France. It is not straight baselines as such, nor boundaries extended beyond the 200 metre isobath, nor special circumstances, nor even equidistance lines as such against which the French reservations are directed; according to repeated official French statements, the reservations were directed against *unilateral* action by another State to establish or claim against France any delimitation based upon equidistance.

This conclusion is reinforced by the words of Professor Virally, when, as counsel for France, speaking at the oral hearing of 27 January 1977 before this Court on the first French reservation to Article 6, he said:

> Dans cette réserve lue sans préjugé, il apparaît que la France refuse seulement de se voir imposer unilatéralement une ligne d'équidistance, établie d'après les lignes de base définies après la signature de la Convention de 1958.

Of the third French reservation, Professor Virally observed at the same oral hearing:

> Simplement, la France exclut l'application de la méthode de l'équidistance par acte unilatéral donc telle que prescrite dans l'article 6, dans une série de zones qu'elle définit et, par là-même, elle modifie la portée d'application de l'article 6 et non pas en interprète le sens.

The consistent French statements equating "sans un accord exprès" with "unilatéralement" cannot be attributed to error or to careless drafting: they must be taken as expressive of the very purpose of the French reservations to Article 6.

The United Kingdom Counter-Memorial draws the correct conclusion in paragraph 32(1):

> The French reservations to Article 6 are prefaced by the statement that, in the absence of a specific agreement, France will not accept that any boundary of the continental shelf determined by application of the principle of equidistance "shall be invoked against it" if certain conditions are fulfilled. It will be seen therefore that the French "reservations" to Article 6 do *not* purport to exclude the application of the principle of equidistance even if

any one of the three conditions is fulfilled. They seek merely to render a *unilateral* determination of the boundary by another State, based upon the principle of equidistance, "non-opposable" to France. But that is not the position here. The agreement of the two Governments to refer to arbitration the decision as to the course of the boundary in the area specified in Article 2 of the Arbitration Agreement necessarily presupposes that there can be no *unilateral* determination of the boundary by the United Kingdom, since it is for the Court (and the Court alone) to draw the line. Accordingly, the fact that the two Governments have agreed to submit the dispute to arbitration is sufficient in itself to deprive the French "reservations" to Article 6 of their object in the present case.[19] (Emphasis in the original.)

The explicit and consistent interpretation, set forth above, by counsel for France that the reservations to Article 6 were intended to prevent unilateral delimitations based on equidistance by other States to the detriment of France, and the agreement of the Parties, which effectively prevents unilateral delimitation by submitting to this Court the determination of the boundary in accordance with the applicable rules of international law, have thus deprived the French reservations to Article 6 of the Geneva Convention of any relevance before this Court: there can be no unilateral aspect in the Court's decision.

In any event, the first French reservation would be irrelevant in this Arbitration because, as the United Kingdom Agent observed at the oral hearing of 7 February 1977, "there do not exist in any part of the arbitration area United Kingdom baselines established after 29 April 1958 from which the median line has been measured or is sought to be measured." Moreover, the French Government has itself established straight baselines after 29 April 1958. The second reservation lacks any relevance in this Arbitration, if only because the 1,000 metre isobath limit was first proposed by France during the negotiations of 1970-1974, and agreed to by her in the Arbitration Agreement. As for the third reservation, claiming the application of special circumstances with all the legal consequences derived from Article 6[20] is not a reservation at all: it neither excludes nor modifies the legal effect of any provisions of Article 6. The gloss later placed by counsel for France on the words of the third reservation is that other States, parties to the Convention, must accept the unilateral designations by France of the areas where she considers special circumstances to exist so as to prevent any unilateral delimitations by those other States of continental shelf by equidistance lines in the areas specified. However, before this Court, no situation arises in which the United Kingdom is making any unilateral claim to an equidistance line: the boundaries throughout the entire area covered by the Arbitration are submitted to the decision of the Court.

Consequently, there is a certain sterility in discussing whether reservations which are not relevant were really reservations or admissible as reservations. Even if, following the method of the Court, I were to examine the legal nature of the French reservations to Article 6, I would have to find the first and second reservations invalid as reservations to Article 6 because,

[19] See also United Kingdom Reply, 1977, paragraphs 23 and 28, and United Kingdom Memorial, 1976, paragraph 181.

[20] See above for quotation from paragraph 56 of the French Counter-Memorial.

whatever modifying effect they purport to have on delimitations based upon equidistance, they attempt to exclude or modify rights not dependent upon Article 6, but upon Articles 1 and 2 of the Geneva Convention on the Continental Shelf, to which no such reservations are permitted, or upon rules of customary international law, the rights deriving from which cannot, in my opinion, be excluded collaterally by another State through incidental reservations to a treaty which merely refers to such established rules of international law.

The third reservation I have found to be no reservation at all. If, however—disregarding for the moment the explicit statements of counsel for France set forth above that it was intended to prevent unilateral delimitations based upon equidistance—the third reservation is treated as really a reservation because, after invoking the "special circumstances" provision of Article 6 with all its legal consequences, it additionally makes a peremptory determination that Granville Bay is a special circumstance (whether or not it can be justified as such under Article 6)—even on that assumption, this Court would not, in my opinion, be barred by the alleged reservation from deciding for itself whether or not the Channel Islands constitute a "special circumstance" within the terms of Article 6, justifying another line than an equidistance line.

I reach this conclusion for two reasons—one of fact and one of law. As for the facts: the French Counter-Memorial, starting from the premise (paragraph 170) that as a geographical concept the "Bay of Granville does not exist", proceeds (paragraphs 170 to 238) to analyze half a dozen meanings of the term, each covering for differing purposes a different territorial area, but none of which, prior to the present controversy over the continental shelf, embraced the entire area of the Channel Islands, in particular, any areas to the north or northwest of those islands. Since the Court has found that it lacks competence to delimit a boundary in any area historically or traditionally covered by the concept "Granville Bay", it stretches credulity to retain the Granville Bay reservation "to the extent of the reservation" as a disabling reservation to prevent the application of Article 6 in areas north and northwest of the Channel Islands, even if the negotiators of 1970-1974 sometimes discussed the Channel Islands under the rubric of "Granville Bay".

On the point of law, I submit the following observations. The Court appears to be holding that the applicable law which the Parties have agreed should govern its delimitation cannot include Article 6 of the Geneva Convention on the Continental Shelf to the extent of the third French reservation because that reservation was not accepted by the United Kingdom. This suggests the importance of re-examining the formulation of the third reservation and its legal consequences.

In formulating its third reservation, France availed itself of the right to invoke special circumstances under Article 6, explicitly referring thereto, and counsel for France have declared this to be an application of Article 6. The United Kingdom has in this case consistently recognized the right of

France to invoke special circumstances under Article 6, with or without a reservation.

In invoking special circumstances under the terms of Article 6, however, the French Government additionally stipulated, according to counsel for France (French Counter-Memorial, paragraphs 49, 56 and 57), that other parties to the Convention must accept the French application of "special circumstances" to specified areas as a condition of French accession to the Convention, whether or not such designations are justified under the terms of Article 6. This additional claim the United Kingdom has not accepted, since it regards the third reservation as being merely an interpretative declaration which, in case of dispute, is a matter for the Court to decide (United Kingdom Memorial, paragraph 99; United Kingdom Counter-Memorial, paragraph 87; United Kingdom Reply, paragraphs 33ff).

The fact that the United Kingdom has not fully accepted the ambiguous interpretation placed by counsel for France on the third reservation cannot, in my opinion, operate automatically to exclude Article 6 as "international law applicable in the matter as between the Parties" in the Channel Islands area, by reasoning that the United Kingdom rejected a condition set by France to her accession to the Continental Shelf Convention. The matter is more complex. It is difficult to regard the third French reservation as intended to eliminate application of the Article whose benefits it invoked specifically in an area now claimed by counsel for France to include the entire Channel Island area. This Court has rightly rejected French contentions that because the United Kingdom did not accept some of the French reservations to Article 6, therefore that Article in its entirety must be excluded as part of the applicable law in this Arbitration. Nor could a peremptory determination by France that other States must accept its designation of areas constituting special circumstances within the terms of Article 6 be conclusive on this Court.

Even following the Court in examining the validity of the French reservations to Article 6, I must therefore conclude that all three reservations are invalid as reservations to Article 6.

Careful study of the French reservations to Article 6 suggests that perhaps all of them were intended to prevent a possible interpretation of Article 6 as permitting an automatic delimitation by another State on equidistance principles in the absence of agreement, i.e., unilaterally. Thus, one inevitably comes back to the conclusion that in the particular circumstances of this Arbitration, the French reservations have no object or relevance.

The conclusion, therefore, is that "the rules of international law applicable in the matter as between the Parties" are to be found in the 1958 Geneva Convention on the Continental Shelf, including Article 6, supplemented, where required, by customary international law.

The view that Article 6 is expressive of customary international law—a view already held by some Judges of the International Court of Justice in 1969 in the *North Sea Continental Shelf* cases—has been substantially strengthened by the subsequent practice of States, which has been elaborately analyzed by counsel in this Arbitration. The fact that both Parties

have, with qualifications, placed reliance alternatively on principles derived from customary international law and on those set forth in Article 6 leads me to agree with the Court that little practical effect on the delimitation which the Court is required to make would result from applying one or the other in the circumstances of this case.

My principal concern in this respect is that the Court's interpretation of Article 6 seems, in effect, to shift "the burden of proof" of "special circumstances" from the State which invokes them to the Court itself, and constitutes some threat that the rule of positive law expressed in Article 6 will be eroded by its identification with subjective equitable principles, permitting attempts by the Court to redress the inequities of geography.

With these qualifications, and others which it would serve no helpful purpose to elaborate, I am in accord with much, perhaps most, of the reasoning of the Court.

ANNEX

THE BOUNDARY-LINE CHART AND THE TRACING OF THE BOUNDARY LINE

Technical Report to the Court by Mr. H. R. Ermel

(1) The principal Charts consulted are those specified in the explanatory note which appears on the Boundary Line Chart included with the Court's Decision. The following large-scale charts were also consulted:

French Marine Chart: No. 5567 "De l'île de Molène à l'île D'Ouessant, Passage de Fromveur".

scale 1:20,000
Published 1950

British Admiralty Chart: No. 34 "Isles of Scilly"

scale 1:25,000
Published 1972

(2) French charts have been accepted as authoritative in regard to the existence or nature of features that lie on the south side of the English Channel and British charts as authoritative in regard to features that lie on the north side.

(3) The method used for the construction of the median line, which the Court has decided shall be the boundary in parts of the arbitration area, is the one in general use today in delimiting maritime boundaries by application of the principle of equidistance. The actual course of this boundary is determined by construction lines of equal length drawn from opposing points on the two coasts. It is, in principle, a median line, but is one adjusted in certain respects, relatively unimportant, so as to form a more convenient, simplified, boundary based on the true median line.

(4) Construction lines are shown as pecked green lines. They indicate in every case the precise points on the respective baselines which determine the equidistance line. These lines are shown, in general, wherever the equidistance line changes direction, and so indicate the features which control any section of the line.

(5) The following are the Points, together with their coordinates, by reference to which the simplified median line in mid-Channel laid down by the Court is traced on the Boundary-Line Chart:

1.	*East of the Channel Islands*		
	A: 50°07′29″N 00°30′00″W		
	equidistant from		
	(i) Jetee (Antifer)	49°40′16″N	00°07′30″E
	(ii) The Mixon (Selsey Bill)	50°42′23″N	00° 46′13″W
	B: 50°08′27″N 01°00′00″W		
	equidistant from		
	(i) Les Equets (Barfleur)	49°42′56″N	01°18′18″W
	(ii) Woody Point (Ventnor)	50°35′01″N	01°14′23″W
	C: 50°09′15″N 01°30′00″W		
	equidistant from		
	(i) Le Renier (Barfleur)	49°43′25″N	01°21′43″W
	(ii) Jeremy Rock (St. Catherine Point)	50°34′31″N	01°18′10″W
	D: 50°09′14″N 02°03′26″W		
	Tripoint equidistant from		
	(i) Grois Rocks (Alderney)	49°44′14″N	02°10′26″W
	(ii) St. Albans	50°34′38″N	02°03′13″W
	(iii) La Hague	49°44′15″N	01°56′27″W
2.	*Channel Islands Region*		
	D 1: 49°57′50″N 02°48′24″W		
	Tripoint equidistant from		
	(i) Start Point	50°13′02″N	03°38′15″W
	(ii) La Hague	49°44′15″N	01°56′17″W
	(iii) Portland Bill	50°30′40″N	02°27′18″W
	D 2: 49°46′30″N 02°56′30″W		
	Tripoint equidistant from		
	(i) La Hague	49°44′15″N	01°56′17″W
	(ii) Start Point	50°13′02″N	03°38′15″W
	(iii) Roches Douvres	49°07′16″N	02°49′00″W
	D 3: 49°38′30″N 03°21′00″W		
	Tripoint equidistant from		
	(i) Start Point	50°13′02″N	03°38′15″W
	(ii) Roches Douvres	49°07′16″N	02°49′00″W
	(iii) Prawle Point	50° 12′08″N	03°43′18″W
	D 4: 49°33′12″N 03°34′50″W		
	Tripoint equidistant from		
	(i) Roches Douvres	49°07′16″N	02°49′00″W
	(ii) Prawle Point	50°12′08″N	03°43′18″W
	(iii) Les Cochons (Les Sept Iles)	48°54′28″N	03°27′57″W
3.	*West of the Channel Islands*		
	E: 49°32′42″N 03°42′44″W		
	Tripoint equidistant from		
	(i) Les Hanois (Guernsey)	49°26°31″N	02°42′46″W
	(ii) Prawle Point	50°12′08″N	03°43′18″W
	(iii) Les Cochons (Les Sept Iles)	48°54′28″N	03°27′57W
	F: 49°32′08″N 03°55′47″W		
	Tripoint equidistant from		
	(i) Prawle Point	50°12′08″N	03°43′18″W
	(ii) La Fourchie (Triagoz)	48°52′53″N	03°38′49″W
	(iii) Eddystone Rock	50°10′50″N	04°15′52″W
	F 1: 49°27′40″N 04°17′54″W		
	Tripoint equidistant from		
	(i) Eddystone Rock	50°10′50″N	04°15′52″W
	(ii) La Fourchie (Triagoz)	48°52′53″N	03°38′49″W
	(iii) Le Raoumeur (Ile de Bas)	48°45′48″N	04°01′52″W
	G: 49°27′23″N 04°21′46″W		
	Tripoint equidistant from		
	(i) Eddystone Rock	50°10′50″N	04°15′52″W

	(ii) Black Head (The Lizard)	50°00′14″N	05°06′02″W
	(iii) Le Raoumeur (Ile de Bas)	48°45′48″N	04°01′52″W
H:	49°23′14″N 04°32′39″W		
	Tripoint equidistant from		
	(i) The Stags (The Lizard)	49°57′11″N	05°12′10″W
	(ii) Le Raoumeur (Ile de Bas)	48° 45′48″N	04°01′52″W
	(iii) Carrec Ar Ploum (Pontusval)	48°41′20″N	04°21′37″W
I:	49°14′28″N 05°11′00″W		
	Tripoint equidistant from		
	(i) The Stags (The Lizard)	49°57′11″N	05°12′10″W
	(ii) Le Libenter	48°37′50″N	04°37′19″W
	(iii) Basse Vincent (Porsal)	48°35′32″N	04°43′57″W
J:	49°13′22″N 05°18′00″W		
	equidistant from		
	(i) The Stags (The Lizard)	49°57′11″N	05°12′10″W
	(ii) Basse Vincent (Porsal)	48°35′32″N	04°43′57″W
K:	49°13′00″N 05°20′40″W		
	Tripoint equidistant from		
	(i) The Stags (The Lizard)	49°57′11″N	05°12′10″W
	(ii) Basse Vincent (Porsal)	48°35′32″N	04°43′57″W
	(iii) Le Crom (Ushant)	48°29′14″N	05°04′20″W
L:	49°12′10″N 05°40′30″W		
	Tripoint equidistant from		
	(i) The Stags (The Lizard)	49°57′11″N	05°12′10″W
	(ii) LeCrom (Ushant)	48°29′14″N	05°04′20″W
	(iii) Wingletang (Scilly Isles)	49°52′56″N	06°20′15″W

(6) To the west of Point L, as decided by the Court, the boundary ceases to be a median line giving full effect to the Scilly Isles and continues westwards to the 1,000 metre isobath as a line which, though determined by application of the method of equidistance, gives only half effect to the Scilly Isles. This part of the boundary line is therefore constructed by prolonging almost directly westwards the median line K-L for a brief distance (00°01′00″ of longitude) until Point M, at which point it meets the equidistance line giving half-effect to the Scilly Isles, Point M is thus the point of intersection of the prolongation of the line K-L almost due west with the equidistance line giving half-effect to the Scilly Isles, the precise coordinates of Point M being:

M: 49°12′00″N 05°41′30″W

(7) The line drawn westwards of Point M to the 1,000-metre isobath, giving half-effect to the Scilly Isles, is the bisector of the area formed by:

(a) on the south side, the equidistance line delimited from
  (i) Le Crom (Ushant)
  (ii) Wingletang (Scilly Isles)

(b) on the north side, the line delimited as equidistant from
  (i) Runnelstone (south of Land's End)
  (ii) Le Crom (Ushant).

The direction westwards of the course followed by equidistance line (*a*) is
  238°51′30″.

The direction westwards of the course followed by equidistance line (*b*) is
  255°27′44″.

The total area comprised within the two equidistance lines, taken as far as the 1,000-metre isobath, is approximately 4,000 square miles.

(8) The angle formed at Point M by the two equidistance lines delimited respectively with and without the use of the Scilly Isles as a base-point is therefore the difference between 255°27′44″ and 238°51′30″, that is
  16°36′14″.

The half angle which determines the course of the bisector is thus:
  8°18′07″.

(9) The direction followed by the bisector which the Court has decided shall be the boundary westwards of Point M is consequently: 238°51'30" plus 8°18'07", that is 247°09'37".

(10) This bisector intersects the 1,000-metre isobath approximately at Point N, the coordinates of which are

48°06'00"N 09°36'30"W.

The length of the line M-N is approximately 170 nautical miles.

(11) The line joining X, X1, X2, X3, X4, Y, decided by the Court as the boundary separating the continental shelf of the French Republic from that of the Channel Islands to the north and west of these Islands is formed by the segments of arcs of circles of a 12-mile radius delimited from the following base-points:

La Hague	49°44'15"N	01°56'17"W
Quénard Point (Alderney)	49°43'45"N	02°09'30"W
Island of Burhou	49°44'00"N	02°14'50"W
The Casquets	49°43'20"N	02°22'45"W
Island of Lihou (north of Guernsey)	49°27'45"N	02°40'00"W
Les Hanois (west of Guernsey)	49°26'31"N	02°42'46"W
Roches Douvres (off Brittany)	49°07'16"N	02°49'00"W

The coordinates of the points where the arcs of circles of a 12-mile radius intersect, that is of Points X, X1, X2, X3, X4, and Y, are:

X: 49°55'05"N 02°03'26"W
X1: 49°55'40"N 02°08'45"W
X2: 49°55'15"N 02°22'00"W
X3: 49°39'40"N 02°40'30"W
X4: 49°34'30"N 02°55'30"W
Y: 49°18'22"N 02°56'10"W.

Delimitation of Maritime Boundary between Guinea and Guinea-Bissau, Award, 14 February 1985, reprinted in 25 ILM 252.

ARBITRATION TRIBUNAL

FOR THE

DELIMITATION OF THE MARITIME BOUNDARY

BETWEEN GUINEA AND GUINEA-BISSAU

AWARD OF 14 FEBRUARY 1985

Dispute submitted to an Arbitration Tribunal - Absence of a maritime boundary in the Franco-Portuguese Convention of 1886 - Ordinary meaning of the words within their context and in the light of the object and purpose of the Convention - Subsequent conduct of the Parties - Preparatory work and circumstances of the conclusion of the Convention.

Delimitation of the maritime territories of the two States - Nature of their coastlines - Methods of delimitation - Equidistance - Parallels of latitude - General configuration of the West African coast - Unity of the continental shelf - Proportionality of the surfaces to be attributed to the lengths of the coasts - Other circumstances.

Mr. Manfred LACHS, President,
Mr. Keba MBAYE,
Mr. Mohammed BEDJAOUI, Members;
Mr. Alain PILLEPICH, Registrar.

In the case concerning the delimitation of the maritime boundary,

between

The Republic of Guinea,

represented by

Mr. Mamadi Diawara, Procureur Général of the Republic of Guinea,

As Agent,

assisted by

His Excellency Mr. Daouda Kourouma, Ambassador of Guinea to Belgium, Luxembourg, the Netherlands and the European Communities,
Mr. Robert F. Pietrowski, Jr., Member of the Bar of the Supreme Court of the United States,
Mr. Myres S. McDougal, Sterling Professor Emeritus at the Law Faculty of Yale University,

Mr. Philippe Cahier, Professor at the Graduate Institute of International Studies in Geneva,
Mr. W. Michael Reisman, Hohfeld Professor of Jurisprudence at the Law Faculty of Yale University,
Mr. Jean-Pierre Queneudec, Professor at the University of Paris I
Mr. Jean-Pierre Colin, Professor at the University of Reims,
Mr. Albert Bourgi, Lecturer at the University of Paris VII,

as Counsel,

Mr. Stanislas Aquarone, former Registrar of the International Court of Justice,

as Advisor,

Mr. Lewis Alexander, Professor of Geography and Marine Affairs at the University of Rhode Island,
Mr. Sekou Camara Menton, Engineer, Director of the National Institute of Geography of Guinea,
Mr. Thierno Keita, Advisor of the Ministry of Mines and Geology,
Mr. Joseph Wiedel, Professor of Geography of the University of Maryland,
Captain Soumah Moussa,

as Experts,

Mr. Daniel Lopis, Director of Legal Affairs at the Ministry of Foreign Affairs,
Mr. Pierre Weiss, Lecturer at the University of Paris XII,

as Legal Advisors,

and

The Republic of Guinea-Bissau,

represented by

His Excellency Mr. Fidelis Cabral de Almada, Minister of Education, Culture and Sports, President of the Boundary Commission and Law of the Sea,

as Agent,

assisted by

His Excellency Mr. Pio Gomes Correia, Secretary of State of Natural Resources, Geologist,
His Excellency Mr. Boubacar Toure, Ambassador of Guinea-Bissau to Belgium and to the European Communities,
Mr. Antoine Lawrence, personal advisor of the President of the Council of State,

Mr. Lamine Haidara, Director of the Ministry of Foreign Affairs,
Mr. Joao Aurigemma Cruz Pinto, civil servant, former Agent for Guinea-Bissau,
Navy Lieutenant Feliciano Gomes, member of the General Staff of the Navy, naval pilot,
Mr. Mario Lopes, Judge, Civil Section of the Tribunal of Bissau,
Mr. Carlos Mendes Pereira, Director, Central Department of Immigration and Emigration,
Mr. Carlos Moussa Balde, legal assessor for the Presidency of the Council of State,

as Experts,

Mrs. Monique Chemillier-Gendreau, Professor of International Law at the University of Paris VII,
Mr. Miguel Galvao Teles, lawyer, Member of the Council of State of Portugal,

as Counsel,

Mr. Andre De Cae, geographer,
Mr. Maurice Baussart, geophysicist,
Mr. Armindo Ribeiro Mendes, lawyer.

THE TRIBUNAL,

composed as above,

makes the following Award:

1. The Governments of Guinea and of Guinea-Bissau signed in Bissau on 18 February 1983 a Special Agreement which provided as follows:

> "The Government of the Republic of Guinea-Bissau and the Government of the People's Revolutionary Republic of Guinea,
>
> Considering the bond of friendly brotherhood and solidarity existing between the two States and their Governments,
>
> Recalling the Solemn Declaration of the meeting of the Heads of States and Governments of the Organization of African Unity held in Cairo from 17 to 21 of July 1964, during which the member States agreed under oath to honor the boundaries existing at the time of their independence,
>
> Anxious to resolve promptly and in a friendly manner the question of the delimitation of the maritime boundary between the Republic of Guinea-Bissau and the People's Revolutionary Republic of Guinea,
>
> Considering that this question of maritime delimitation between the two States was studied by an ad hoc commission which met at Bissau on 29 December 1982,

Considering that following the discussions of the aforesaid ad hoc commission, the two Parties have agreed:

a) to consider the Convention of 12 May 1886 as the basic document to pursue the discussions on the maritime boundary delimitation between the two States;

b) to consider that this Convention defines precisely the onshore boundary;

c) as to the maritime boundary, in view of the differences of opinion and interpretation concerning the Convention of 1886, to submit to an appropriate Arbitration Tribunal, acceptable to both Parties, the interpretation of the Convention and the delimitation of the maritime boundary between the two States.

Considering that the proces-verbal adopted during this meeting mentions that 'the delegation of Guinea-Conakry has specified that in its understanding of the Treaty of 12 May 1886, the annexes and protocols signed by the Plenipotentiaries' shall be taken into account.

Have agreed as follows:

ARTICLE 1

1. The Arbitration Tribunal (hereinafter the 'Tribunal') will be composed of nationals of third States, which shall be appointed within 30 days after the signature of this Special Agreement, and shall consist of three (3) Members, hereinafter named:

M.....appointed by the Republic of Guinea-Bissau;
M.....appointed by the People's Revolutionary Republic of Guinea; the third Arbitrator, who will serve as the President of the Tribunal, will be appointed by mutual agreement of the two Parties; in case they cannot reach agreement, the third Arbitrator shall be appointed by the two Arbitrators acting jointly after consultation with the two Parties.

2. In case the President or another Member of the Tribunal should be unable to serve, the vacancy will be filled by a new Member appointed by the Government that had previously named the Member to be replaced in the case of the two Arbitrators appointed respectively by the two Governments, or by mutual agreement of the two Governments in the case of the President.

ARTICLE 2

It is requested of the Tribunal that it decide according to the relevant rules of international law the following questions:

Did the Convention of 12 May 1886 between France and Portugal establish the maritime boundary between the respective possessions of those two States in West Africa?

What judicial effect can be attributed to the protocols and documents annexed to the Convention of 1886 for the interpretation of the aforesaid Convention?

According to the answers given to the two above-mentioned questions, what is the course of the boundary between the maritime territories appertaining respectively to the Republic of Guinea-Bissau and the People's Revolutionary Republic of Guinea?

ARTICLE 3

The seat of the Tribunal shall be Geneva (Switzerland).

ARTICLE 4

1. The Tribunal shall not rule unless all Members are present.

2. In absence of unanimity, the decisions of the Tribunal regarding all substantive or procedural questions, including all questions concerning the competence of the Tribunal and the interpretation of the Special Agreement, shall be by a majority of its Members.

ARTICLE 5

1. Within 30 days after signature of this Special Agreement, the Parties will each appoint, for purposes of the arbitration, an Agent, and will submit to the Tribunal and the other Party the name and address of said Agent.

2. After the Tribunal has been constituted, and after the two Agents have been consulted, the Tribunal will appoint a Registrar.

ARTICLE 6

1. The proceedings before the Tribunal will be adversary in nature. Without prejudice to any question relating to the burden of proof, the proceedings shall consist of two phases: written pleadings and oral argument.

2. The written pleadings shall consist of:

a) A Memorial which will be submitted by each of the Parties within a period not exceeding three (3) months after the constitution of the Tribunal.

b) A Counter-Memorial which will be submitted by each of the Parties within a period not exceeding two (2) months after the exchange of the Memorials.

c) Any other pleadings that the Tribunal deems necessary.

3. The Tribunal shall have the power to extend to a maximum of one (1) month the time-limits so fixed, at the request of one of the Parties, or according to its own judgment. The Registrar shall notify the Parties of a mailing address for the filing of their written pleadings and all other documents. Documents presented to the Tribunal shall not be transmitted to the other Party until the Tribunal has received the corresponding pleading from the other Party.

4. The oral argument will follow the written pleadings, and will be held in a place and at a date determined by the Tribunal after consultation with the two Agents. The Parties can be represented at the oral arguments by their Agents and by any and all advisors and experts they wish to appoint.

ARTICLE 7

1. The written pleadings and the oral arguments will be in French and/or in Portuguese; the decisions of the Tribunal will be in these two languages.

2. The Tribunal, as necessary, will provide for translation and interpretation, will hire the secretarial staff, and will take all measures as to the premises and the purchase or rental of equipment.

ARTICLE 8

The general expenditures of the arbitration staff as well as the salary of the Members of the Tribunal will be equally shared by both Governments, but each Government will sustain the costs of the preparation and the presentation of its own case.

ARTICLE 9

1. After the proceedings before the Tribunal have ended, the Tribunal will inform the two Governments of its decision regarding the questions stated in Article 2 of this Special Agreement.

2. This decision must include the drawing of the boundary line on a map. In this regard, the Tribunal will designate one or more technical experts to assist in the preparation of the map.

3. The decision of the Tribunal will be fully reasoned.

4. Any question regarding the subsequent publication of the proceedings will be resolved by agreement between the two Governments.

ARTICLE 10

The arbitration award rendered by the Tribunal will be definitive and both Parties shall take all the measures necessary for its execution. Each Party can, within three (3) months following the award, submit to the Tribunal any dispute between the Parties concerning the interpretation and the implementation of the award.

ARTICLE 11

1. Revision of the award can be requested by either of the two Parties if any new element has been discovered which could have decisively influenced the award, provided that before the delivery of the award this new element was unknown to the Tribunal and to the Party which requests the revision, and there is no fault on the part of this Party.

2. The request for revision must be made within a period of six (6) months after the discovery of the new element, and in any case, within five years following the date of the award.

3. During the review procedures, the Tribunal will first determine the existence of the new element, and will judge the admissibility of the request. If the Tribunal judges the request admissible, it will render judgment on the merits.

4. The request for revision is brought before a Tribunal composed in the same manner as the one that rendered the award. If for any reason this is impossible, the Parties will mutually agree on another solution.

5. The request for revision shall not suspend the binding nature of the award.

ARTICLE 12

1. No activity of the Parties during the course of the arbitral proceedings will be considered to prejudice their sovereignty in the area which is the object of the Special Agreement.

2. The Tribunal shall have the power to prescribe any interim measures to safeguard the rights of the Parties, at the request of one of the Parties and if the circumstances require it.

ARTICLE 13

This Special Agreement shall enter in force on the date of its signature."

2. By virtue of Article I of this Special Agreement, Mr. Keba MBAYE was appointed a Member of the Tribunal by Guinea, and Mr. Mohammed BEDJAOUI by Guinea-Bissau.

3. The two Governments signed another agreement in Bissau on 30 June 1983 providing that:

"The Government of the People's Revolutionary Republic of Guinea and the Government of the Republic of Guinea-Bissau, noting that since the designation of the two Members of the Arbitral Tribunal they have not been able to agree on the appointment of a third Arbitrator to fill the role of President of this same Tribunal:

Article 1

In accordance with the provisions of Article I, paragraph 1, of the Special Agreement signed in Bissau on 18 February 1983, the two Governments agree that this selection shall be made by common accord of the two appointed Arbitrators, after they have been consulted by their respective Governments.

Article 2

The Arbitrators concerned must perform this mission within a month of the date of signature of this Agreement.

Article 3

The deadline set out in the Special Agreement of 18 February 1983 will thus be extended by whatever amount of time will be required for the appointment of the President of the Tribunal by the two Parties; this applies in particular to the next phase of the procedure agreed to: the filing of the Memorial and Counter-Memorial by each of the Parties (Article 6, paragraphs 2 and 3).

Article 4

The present Agreement will enter into force on the date of its signature."

4. In accordance with this Agreement, Mr. MBAYE and Mr. BEDJAOUI appointed Mr. Manfred LACHS as third Arbitrator and President of the Tribunal. The Tribunal was established on 14 October 1983.

5. The Governments of Guinea and Guinea-Bissau signed a complementary Agreement in Bissau on 18 October 1983:

"Since the appointment of the two Arbitrators by the two Parties and that of the third Arbitrator called upon to be President was not questioned, the Arbitral Tribunal is legally constituted.

Since the Members constituting the Arbitral Tribunal all reside in The Hague (Netherlands), and due to the numerous appreciable advantages of establishing the aforementioned jurisdiction in that locality, the Parties agree to the following:

Article 1

Article 3 of the Special Agreement between the Government of the Republic of Guinea-Bissau and the Government of the People's Revolutionary Republic of Guinea is modified as follows:

Instead of 'the seat of the Tribunal shall be Geneva (Switzerland)' read 'the seat of the Tribunal shall be The Hague (Netherlands).'

Article 2

The present Agreement shall enter in force on the date of its signature."

6. In application of Article 5, paragraph 2, of the Special Agreement, Mr. Alain PILLEPICH was appointed Registrar of the Tribunal.

7. In application of Article 5, paragraph 1, of the Special Agreement, the Government of Guinea appointed as Agent His Excellency Mr. Sikhe Camara, then Mr. Mamadi Diawara; and the Government of Guinea-Bissau for its part appointed His Excellency Mr. Joao Aurigemma Cruz Pinto, then His Excellency Mr. Fidelis Cabral de Almada.

8. The Memorials of the Parties were filed simultaneously on 20 January 1984, within the time limits specified in the provisions of Article 6, paragraph 2(a), of the Special Agreement dated 18 February 1983, and of Article 3 of the Agreement dated 30 June 1983.

9. During the session held on that occasion, which was the first session of the Tribunal, it was agreed that the Tribunal would follow the same rules of procedure as the International Court of Justice, and more specifically that Articles 30-31, 49-50, 52, 54, 56-58, 60-68, 71-72, 94-95 and 98 of the Rules of the Court would be applicable mutatis mutandis.

10. The date for filing the Counter-Memorials was set, in accordance with Article 6, paragraph 2(b), of the Special Agreement, at 20 March 1984. This date was extended to 20 April at the request of the Agent of Guinea-Bissau, then to 21 May and 8 June, at the request of Guinea's Agent. The Counter-Memorials were filed simultaneously within the extended time limits thus established.

11. Since no other written pleading was deemed necessary, the case was ready for oral argument. After consultation with the two Agents in accordance with Article 6, paragraph 4, of the Special Agreement, the oral argument was scheduled by the Tribunal to begin on 21 August 1984. It was agreed that the delegates of Guinea-Bissau would speak first.

12. During 11 private sittings held at the Peace Palace on 21, 22, 23, 25, 27 and 28 August and 10, 11, 12, 14, and 15 September 1984, the Tribunal heard Their Excellencies Mr. Cabral de Almada and Mr. Gomes Correia, Mr. Cruz Pinto, Navy Lieutenant Gomes, Mrs. Chemillier-Gendreau, Mr. Galvao Teles, Mr. de Cae and Mr. Baussart, on behalf of Guinea-Bissau; Mr. Diawara, Mr. Pietrowski, Mr. McDougal, Mr. Cahier, Mr. Reisman, Mr. Queneudec, Mr. Colin and Mr. Bourgi, on behalf of Guinea.

13. The Agent for Guinea-Bissau summoned Mr. Grandin as an expert, and Mr. Rodeia and Vice-Admiral Bustorff Guerra as witnesses. The Agent for Guinea summoned Mr. Alexander as an expert and Captain Sanoussi as a witness.

14. On 30 August 1984, the Tribunal submitted written questions to the Parties and subsequently obtained written answers thereto.

15. Pursuant to Article 9, paragraph 2 of the Special Agreement, the Tribunal appointed Commander Peter Bryan Beazley as technical expert to assist in the preparation of the map indicating the course of the boundary line.

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16. In the written pleadings, the following submissions were presented by the Parties:

On behalf of Guinea-Bissau, in the Memorial and in the Counter-Memorial:

"May the Tribunal decide that:

- The Convention of 12 May 1886 between France and Portugal did not establish a maritime boundary between the respective possessions of those two States in West Africa, the line laid down in Article I, paragraph 4, of the aforementioned Convention having had no other purpose than to designate the islands belonging to Portugal.

- The protocols and documents annexed to the aforementioned Convention have no other value than that of preparatory work and can be used to help in the interpretation of the treaty only when:

the meaning of the treaty is obscure or ambiguous,

and they give evidence of the parties' common intent.

Since neither of these conditions is met, the preparatory work cannot be of any use to interpret the Convention which after all is perfectly clear.

- The course of the maritime boundary between the two States, with a view to an equitable solution, will be the equidistance line drawn from the low-water marks of the coasts of the two States, along the entire length of the maritime boundary."

On behalf of Guinea, in the Memorial and in the Counter-Memorial:

"As to the first question:

The Convention of 12 May 1886 between France and Portugal did establish the general maritime boundary between the respective possessions of those two States in West Africa seaward to the Cape Roxo meridian.

As to the second question:

The protocols and documents annexed to the Convention of 1886 confirm that the Convention did establish a general maritime boundary between the respective possessions of France and Portugal in West Africa seaward to the Cape Roxo meridian.

As to the third question:

The course of the boundary between the maritime territories appertaining respectively to the Republic of Guinea-Bissau and the People's Revolutionary Republic of Guinea is as follows: from the terminus of the land frontier, the boundary follows the thalweg of the Cajet River and then goes in a southwesterly direction across the Pilots' Pass to the parallel of 10° 40' north latitude, with which it conforms to the seaward extent of the Parties' maritime jurisdictions."

17. In the oral argument, the following submissions were presented by the Parties:

On behalf of Guinea-Bissau, at the hearing of 12 September 1984:

"May the Tribunal decide that:

1) The Convention of 12 May 1886 between France and Portugal did not establish a maritime boundary between the respective possessions of those two States in West Africa, the line laid down in Article I, final paragraph, of the aforementioned Convention having had no other purpose than to designate the islands belonging to Portugal.

2) The protocols and documents annexed to the aforementioned Convention, with the exception of the two maps, have no other significance than that appertaining to preparatory work and:

a) they confirm the meaning of the text of the Convention mentioned in conclusion number 1 above, which after all is perfectly clear;

b) the preparatory work can in no way be used to invalidate the meaning of this text, which is not ambiguous and does not lead to an unreasonable result.

3) The course of the maritime boundary between the two States, with a view to an equitable solution, after a study of all the relevant circumstances, will be the equidistance line drawn from the low-water marks of the coasts of the two States, along the entire length of the maritime boundary, as represented on the map added to these submissions. However, to the north of this line, the Republic of Guinea will be able to exercise its rights over Alcatraz Rock and in an enclave of 2 nautical miles calculated from the low-water mark of Alcatraz."

On behalf of Guinea, at the hearing of 15 September 1984:

"As to the first question:

The Convention of 12 May 1886 between France and Portugal did establish the general maritime boundary between the respective possessions of those two States in West Africa seaward to the Cape Roxo meridian.

As to the second question:

The protocols and documents annexed to the Convention of 1886 confirm that the Convention did establish a general maritime boundary between the respective possessions of France and Portugal in West Africa seaward to the Cape Roxo meridian.

As to the third question:

The course of the boundary between the maritime territories appertaining respectively to the Republic of Guinea-Bissau and the Republic of Guinea is as follows: from the terminus of the land frontier, the boundary follows the thalweg of the Cajet River and then goes in a southwesterly direction across the Pilots' Pass to the parallel of 10° 40' north latitude, with which it conforms to the seaward extent of the Parties' maritime territories."

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18. The Tribunal will begin by recalling the geographical and historical framework of the dispute submitted to it. The two adjacent countries which have entrusted the Tribunal with delimiting their maritime territories in the Atlantic Ocean are situated in the western portion of Africa, between Senegal and Mali on the one hand, and Sierra Leone, Liberia and the Ivory Coast on the other hand. Guinea, which has been independent since 2 October 1958, had

been occupied by France in the 19th century, first as a region called "Rivières du sud du Sénégal," and then, from the 1890's, as a separate colony. Guinea-Bissau, which proclaimed its independence on 24 September 1973, had until then been under the domination of Portugal, which had discovered it in the 15th century and made it into a separate colony in 1879. The land boundary between the two Parties in the present case, established at the time of the colonial period, is not in dispute.

19. Nor do the Parties dispute the homogeneity of their coastline or, despite successive marine transgressions and regressions, the unity of the continental shelf which naturally extends their land areas. From Cape Roxo to the vicinity of Sallatouk Point, i.e., a distance in latitude of slightly over 3°, the coastline generally follows a north-west/south-east direction. It borders on an alluvial plain formed by rivers which generally originate in the mountains of Guinea and are rarely deeper than 10 meters. This plain, constituted of sand, sandstone or clay, with lateritic outcrops, is swampy and covered with mangrove forests. Offshore, the sea-bed slopes down under the ocean at a rate of 1 to 4 meters per kilometer, and numerous islands emerge. Since the mean tidal range can exceed 5 meters, coastal waters are often brackish, and some islands join with one another or join with the continent at low tide, and Guinea-Bissau can lose as much as 8000 sqare kilometers of its area at high tide. The continental shelf is covered with fine sand and bears traces of successive coast lines. The outer ridge of the continental margin is quite far from the coast, especially in the case of Guinea-Bissau, and the fracture zones of the Atlantic are considerably further than 200 nautical miles off the two States.

20. In describing this coastline and continental shelf in more detail, it is necessary first of all to note that the land boundary between Senegal and Guinea-Bissau, as established by the 12 May 1886 Convention between France and Portugal, reaches its terminal point on the ocean at Cape Roxo, situated at 12° 20' north latitude and 16° 43' west longitude. Just south of that point, the coastline starts out quite uniform. The Cacheu River (or San Domingo de Cacheu), which flows entirely in Guinea-Bissau, opens on an estuary 10 kilometers wide at its mouth. The continental shelf in that area reveals no unusual features.

21. Further to the south, the rivers have more branches which encompass the islands of Jeta, Pecixe, Bissau (where the capital of the same name is to be found), and Bolama. The Geba River, rising in Senegal, and the Corubal, flowing down from the Futa Jallon in Guinea, have a common estuary which in its final section is called the Geba Channel, and which can reach a width of more than 30 kilometers. Proceeding seaward, the Bijagos (or Bissagos) Archipelago belongs to Guinea-Bissau and comprises several groups of islands most of which are inhabited. The main ones are Caravela, Carache, Formosa, Uracane, Uno, Unhocomo, Galinhas, Bubaque, Roxa and Orango. These islands, which trading vessels must circumnavigate to the north, west or

south, are 2 to 37 nautical miles away from the nearest coast, and are separated from each other by never more than 5 miles of shallow waters interspersed with reefs. Approximately 20 miles towards the open sea, these islands are fronted by a line of reefs and breakers situated between 10° 30' and 11° 40' north latitude: there lies the limit of the old delta, partially submerged today, which in fact coincides with the present accretion zone of the Bijagos.

22. From the Rio Grande de Buba, the estuary of which is continued by the channels of Bolola, Canhabaque and Orango, the coastline becomes less indented, and the continental shelf takes on the characteristics of an erosion zone. In Guinea-Bissau, the Tombali and Cacine (or Cassini) Rivers encompass several islands the most southerly of which is Cataque (or Catack). In Guinea, the Komponi (or Compony or Cogon), Nunez (or Nuno) and Kapatchez Rivers delimit the islands of Tristao, Kouffin, etc. The land boundary between the two countries, established by the aforementioned Convention of 12 May 1886 as lying halfway between the Cacine and Komponi Rivers, ends up following the thalweg of the Cajet (or Casset) River until its estuary, situated between the islands of Cataque and Tristao; then begins, at sea, the Pilots' Pass. In the shallow waters offshore are found, amid numerous reefs, the islands of the Jamber group (Guinea-Bissau) and small uninhabited islands such as Poilao, Samba or Sene, belonging to Guinea-Bissau and Alcatraz, (10° 38' N and 15° 22' W) belonging to Guinea. The neighboring Naufrage Island, which belonged to France at the end of the 19th century, has almost entirely disappeared. Like Alcatraz, it was a lateritic formation dating back to a previous condition of the continental shelf. Further from the coast, a series of underwater troughs, oriented in a north-east/south-west direction, 3 to 10 kilometers wide but never more than a few meters deeper than the shelf, drain sediments coming from the continent. The troughs, said to be those of the Rio Grande and Rio Cacine, lead to a structure of terrigenous sediments called the Orango Delta, on the edge of the continental shelf. The Rio Nunez trough ends in a similar submerged formation called the Nunez Delta.

23. Further south toward Sallatouk Point, the Guinean coast is marked by rivers such as the Rio Pongo, and Konkoure, Soumbouya and Mebkhoure (or Mellacoree), and by coastal islands, namely Quito, Konebomby, Kakos, Kabak and Tannah. Two rocky outcrops can also be noted, Cape Verga and the Kaloum peninsula. The land boundary between Guinea and Sierra Leone, delimited by an arrangement of 21 January 1895 between France and Great Britain, terminates between Sallatouk Point and Kiragba village, at approximately 9° 03' north latitude and 13° 19' west longitude. Opposite the Kaloum peninsula are Tumbo Island, the site of Conakry, and the Guinean islands of Los (Tamara, Kassa, Roume), ceded to France by Great Britain in a treaty of 8 April 1904. South of these islands, the underwater troughs of Konkoure and Soumbouya are more pronounced than those previously mentioned, and have no delta.

24. The Tribunal will now recall the origins and evolution of the dispute as presented in the documents submitted by the Parties. The establishment of their boundary dates back to the period which followed the signature on 26 February 1885 of the General Act of the Berlin Conference, which contained among other things a declaration concerning the essential conditions to be met for any new occupation of the African coast to be considered effective. Negotiations between France and Portugal which began in Paris on 22 October 1885 led to the conclusion of a Convention on the delimitation of the two countries' respective possessions in West Africa. This Convention was signed in Paris on 12 May 1886 and ratified in Lisbon on 31 August 1887. The text of the Convention is set forth in paragraph 45 below. A joint commission demarcated the land boundary of the two Guineas on the ground, and its conclusions were accepted in letters exchanged by the two ministries of foreign affairs on 6 and 12 July 1906.

25. The final paragraph of Article I of the 1886 Convention states that the islands situated between the coast, the Cape Roxo meridian and a "southern limit" formed primarily by the parallel of 10° 40' north latitude shall belong to Portugal. Up to 1958, the implementation of this provision caused no difficulty. Portugal finished securing control over the islands allotted to it, installed beacons the most southerly of which was that of Poilao (10° 52' N) and carried out customs surveillance to within 10 nautical miles of the coast (decree dated 17 September 1913). Later, this was reduced to 6 miles (administrative order of 10 February 1920). At the end of 1887, and with no protests issuing from Portugal, France took possession of the island of Alcatraz situated 2.25 nautical miles south of parallel of 10° 40' north latitude, installed beacons and buoys, but never further north than the Gonzales Rocks (10° 24' N), and followed its routine practices regarding customs surveillance, the laying of cables, navigation and movements of foreign war vessels, including tactical exercises and actual war operations.

26. In 1958, the year of the Geneva Conference on the Law of the Sea and of the proclamation of the independence of Guinea, Portugal awarded a concession for oil exploration off Guinea's shores to a foreign company. This concession, authorized on 26 February 1958, renewed in decrees published on 19 February 1966 and 13 January 1973, and finally denounced by Guinea-Bissau in January of 1975, extended to the south beyond the parallel of 10° 40' north latitude; but it seems that actual exploration never took place south of 10° 58' north latitude. France did not protest in the name of Guinea, and when Guinea became independent, it did not protest either. In order to avoid the risk of overlapping concessions, the French Government, which was then responsible for Senegal's foreign affairs, proposed to negotiate a delimitation of the territorial sea and continental shelf between Portuguese Guinea and Senegal. Following discussions in Lisbon which took place between 8 and 10 September 1959, the Portuguese Prime Minister and the French

Ambassador in Lisbon agreed in letters exchanged on 26 April 1960 that the boundary of the territorial sea and delimitation of the contiguous zone would follow an azimuth of 240° drawn from the lighthouse at Cape Roxo.

27. The minutes of the discussions of 1959 stated:

> "The Portuguese delegation has expressed to the delegation of the French Republic and of the Community its wish, by reference to the Franco-Portuguese Convention signed in Paris on 12 May 1886, to consider as part of Portugal's internal waters those waters situated in the perimeter defined in Article I in fine of the said Convention. It has been agreed that the delegation of the French Republic and of the Community would recommend to the governments in Paris and Dakar not to contest any such decision."

However, nothing further came out of these proposals.

28. In a decree published on 3 June 1964, Guinea established the lateral limits of its territorial sea along parallels of 10° 56' 42" north latitude with Portuguese Guinea, and 9° 03' 18" with Sierra Leone; it established the outer limit of its territorial sea at 130 nautical miles from a straight baseline extending from the southwest corner of the island of Sene to the island of Tamara, and prohibited fishing by any foreign vessels in the area thus defined. In a decree published on 31 December 1965, the limit of Guinea's territorial sea was extended to 200 miles. These two decrees were made public by the United Nations, the first decree in 1970, the second in 1977. From the written and oral statements presented to the Tribunal by Guinea, it appears that from 1965 onwards its national navy patrolled the coasts in order to enforce the 10° 56' 42" north latitude limit to the north, and, except in 1970 when a situation arose which will be described below, Guinea never detected any vessel belonging to Portugal or to Guinea-Bissau. The Guinean Government did authorize specific fishing companies to operate between the parallels of 10° 56' 42" and 9° 03' 18" north latitude, and stopped some foreign fishing vessels which had not received authorization to fish, between the parallels of 10° 56' 42" and 10° 40' north latitude.

29. It follows from confidential instructions to the Portuguese naval military forces in 1971-1972, submitted by Guinea-Bissau in the present case, that the Portuguese Government considered Guinea's unilateral delimitation of the territorial sea as illegal: finding inspiration in Article 12, paragraph 1, of the Geneva Convention on the Territorial Sea and the Contiguous Zone, which it had ratified on 8 January 1963, Guinea-Bissau took the view that the lateral limit ought to follow an equidistance line; it advised its naval commanders from September 1964 onwards to defend national sovereignty while trying to avoid any incident. It equally follows from testimony by Guinea-Bissau that a hydrographic vessel of the Portuguese navy collected data between 1963 and 1974, and was not stopped by

any unit of the Guinean navy while in the areas of the Rio Grande and Rio Cacine troughs. Moreover, the Portuguese Government, which had maintained its territorial sea at 6 nautical miles, its contiguous zone at 12 nautical miles, and had claimed exclusive jurisdiction over fishing in those two areas (law of 22 August 1966), established in its province of Guinea a straight baseline system which encompassed the Bijagos Archipelago, and which in several areas extended beyond the parallel of 10° 56' 42" north latitude (law-decree of 27 June 1967). These decisions, published in the Official Journal, never gave rise to any protests.

30. In the early part of 1963, the people of Guinea-Bissau embarked upon a war of national liberation in which, in the course of a few years, and with the help of countries such as Guinea, they recovered the main part of their territory. After an unsuccessful attack by Portuguese armed forces on Conakry (22 November 1970), Guinea-Bissau was able to proclaim its independence (24 September 1973), to conclude a treaty of recognition by Portugal (Algiers, 26 August 1974), and to obtain admission to the United Nations (17 September 1974). After having decided on the very day of its independence to maintain those Portuguese laws which were not incompatible with its own principles, Guinea-Bissau, in a decision by the Council of State published in the Official Journal on 31 December 1974, established the width of its territorial sea at 150 nautical miles, measured from straight baselines in the vicinity of those of 1967. Fishing was prohibited to all foreign vessels unless specially authorized. In 1975-1976, a seismic research operation was conducted by Guinea-Bissau between the parallels of 10° 39' 4" and 8° 30' 16" north latitude.

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31. At that time, upon Guinea-Bissau's initiative, negotiations concerning the delimitation of the maritime boundary between the two countries were initiated. In the first meeting, held in Conakry from 13 to 19 April 1977, Guinea-Bissau proposed to negotiate a delimitation, but it became clear that Guinea, while offering to integrate the territories and maritime resources of the two countries with a view to joint development, was not prepared to accept any other limit than the parallel of 10° 56' 42" north latitude. Quite evidently, the dispute had not crystalized and the path to negotiation remained open.

32. At a second meeting held in Bissau on 24-25 January 1978, Guinea, while continuing to make proposals towards joint development, offered to adopt as a lateral maritime limit the thalweg of the River Cajet, the Pilots' Pass and the parallel of 10° 40' north latitude, which would have corresponded to the line described in the final paragraph of Article I of the 1886 Convention. Guinea-Bissau, however, did not accept this offer. According to the information made available to it, the Tribunal considers

that, from then on, the two Parties had entered into a legal dispute, the object of which would not change. Having recognized at the hearing that they could not, in their arguments before the Tribunal, rely upon any acts accomplished by them after this critical date, the two Parties accepted that this was a correct conclusion to be reached on the basis of the record before the Tribunal.

33. After Guinea-Bissau enacted legislation on 19 May 1978 reducing the territorial sea limit to 12 nautical miles, establishing a 200 mile exclusive economic zone, and claiming as a baseline the entire limit outlined in the final paragraph of Article I of the 1886 Convention, a third meeting took place in Conakry in August 1978. Guinea re-affirmed its conviction that no boundary should exist between the two countries and Guinea-Bissau concluded that negotiations had reached a dead end. The period following that meeting was characterized by new oil concessions, oil exploration and fishing activities, which occasionally gave rise, on either side, to protests and the arrest of fishing vessels. This situation further confirmed the existence of the dispute.

34. In 1980, Guinea, which in a decree dated 24 March had reaffirmed the lateral limit of its territorial waters along the parallel of 10° 56' 42" north latitude, in a decree published on 9 June, fixed its maritime boundary along the line mentioned in the final paragraph of Article I of the 1886 Convention. In a fourth meeting held in Bissau on 14 July, the two delegations declared that they would accept the Convention as a basic legal document; but they were in disagreement as to how to interpret it. Guinea-Bissau, refusing to recognize the Line described in the Convention as representing a general maritime boundary, proposed an azimuth of 225° drawn from the Pilots' Pass. Thus a first definition of the extent of the area of the contested zone began to emerge. On 30 July, in a new decree, Guinea confirmed its new maritime boundary, reduced its territorial waters to 12 nautical miles, established a 200 mile exclusive economic zone and restored the low-water mark as the baseline. The situation was summarized by Guinea-Bissau in a confidential memorandum, supported by quotations, dated 13 August. This was followed by a press conference organized by the Guinean Head of State on 22 August and a Guinean White Book dated 28 September.

35. In 1981, Guinea sent Guinea-Bissau a draft of a delimitation treaty for the maritime boundary between the two States which would have finalized the lateral boundary claimed by Guinea from June 1980 onwards. At the end of 1981, Guinea-Bissau responded with a counter-draft based on the equidistance line drawn from the baselines of the two coasts. This represented a change in the position it had held in June 1980, and a consequent increase in the contested area.

36. On 28 and 29 December 1982, a few days after the signature at Montego Bay of the new Convention of the Law of

the Sea, a bipartite commission met in Bissau with a view to examining the question of the maritime boundary. It agreed to "consider the Convention of 12 May 1886 as the basic document to pursue the discussions" and to present recommendations to the two Governments so that action could be taken as quickly as possible with a view to "submitting to an appropriate Arbitration Tribunal, accepted by both Parties, the interpretation of the Convention and the delimitation of the maritime boundary between the two States." Thus, on 18 February 1983, the Special Agreement to arbitrate which appears in paragraph 1 above was signed in Bissau. The preamble of the Special Agreement reproduces, among other things, the actual proces-verbal of the December 1982 meeting.

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37. The Special Agreement under which the present Tribunal was constituted defines in its preamble the object of the dispute, namely, the delimitation of the maritime boundary between Guinea and Guinea-Bissau. It goes on to establish the competence of the Tribunal as well as certain matters of procedure. In particular, Article 4 and Article 9, paragraph 3, state that the Tribunal shall be able to decide questions concerning its own competence and the interpretation of the Special Agreement, that its decisions shall be made with all its Members present, and that the answers to the questions raised in the Special Agreement shall be fully reasoned.

38. Pursuant to Article 2 of the Special Agreement, the Parties have requested the Tribunal to decide three questions "according to the relevant rules of international law." The first two questions revolve around whether the 1886 Convention between France and Portugal establishes the maritime boundary between the respective possessions of those two States in West Africa. The aim of the third question is to obtain the precise course of the boundary between the maritime territories appertaining respectively to each of the two Parties in the present case. Their correct interpretation will be given below. As to identifying the relevant rules, it is necessary to consider the sources of international law enumerated in paragraph 1 of Article 38 of the Statute of the International Court of Justice. Certain other specific texts will also be indicated below.

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39. Although the Parties, in the beginning of the written proceedings, had disagreed on the precise meaning to be attributed to the first two questions, at the end of the oral argument they no longer contested that the first question dealt with the general interpretation of the 1886 Convention, and that the second question dealt more specifically with the interpretation of the Convention on the

basis of the preparatory work, which included, in the record submitted to the Tribunal, the protocols containing the summaries or proces-verbal of the negotiating sessions which led to the signing of the Convention and, in the form of annexes, the texts in their entirety of statements made, as well as various other documents including a few diplomatic or parliamentary texts. Nor has it been disputed, as one can see from the wording of the submissions, that the Tribunal's task was to explore first of all the meaning of the relevant parts of the Convention, within the context of the time of its signature and ratification.

40. The Parties, which had agreed in accordance with the preamble to the Special Agreement to consider the 1886 Convention as a precise definition of the land boundary and as a basic document for their discussions concerning their maritime boundary, have not contested the validity of this Convention as regards the relevant rules of international law. It remained in force between France and Portugal until the end of the colonial period, and became binding between the successor States by virtue of the principle of uti possidetis. This principle, recalled in the preamble to the Special Agreement, was solemnly proclaimed in Cairo on 21 July 1964, when the Heads of State and Heads of Government of the Organization of African Unity (OAU) declared that all Member States pledged to "respect the boundaries existing at the time they reached their independence." This conforms not only with paragraph 3, Article III, of the OAU Charter dated 25 May 1963 concerning the principle of "respect of the sovereignty and territorial integrity of each State and its inalienable right to an independent existence," but also with the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties. The relevant provisions of this latter convention, which is not yet in force, and which in fact neither Guinea nor Guinea-Bissau has adhered to, are nonetheless held to reflect customary rules of international law. The Tribunal concludes that the provisions of the 1886 Convention concerning what it calls "Guinea" are generally, subject to their correct interpretation, applicable to Guinea and Guinea-Bissau. Whether the principle of uti possidetis applies more specifically to maritime boundaries was debated by the Parties, but this point will arise only if a positive answer is given to the first question submitted to the Tribunal.

41. The two States concerned do not dispute, though neither is a party to the Vienna Convention of 29 May 1969 on the Law of Treaties, in force since 27 January 1980, that Articles 31 and 32 of this Convention constitute the relevant rules of international law governing the interpretation of the 1886 Convention. Due to the Parties' agreement on this point and the practice of international tribunals concerning the applicability of the provisions of the Convention on the Law of Treaties by virtue of an international custom recognized by States (see in particular the Legal Consequences for States of the Continued Presence of South Africa in Namibia case, I.C.J. Reports 1971, p. 47,

paragraph 94; Fisheries Jurisdiction case, I.C.J. Reports 1973, p. 18 and 63, paragraph 36), the Tribunal can only base itself on the aforementioned Articles 31 and 32. The Tribunal observes that Article 32 provides the first element of an answer to the second question submitted to it by the Parties, in that it defines, and generally circumscribes, by setting forth conditions, the legal value to be attributed to the preparatory work of a Convention as "supplementary means of interpretation." The answer to the first question and the definitive and precise answer to the second question will thus depend on the interpretation of the 1886 Convention to which the Tribunal must apply itself.

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42. The third question submitted to the Tribunal is, as shown by the terms used, dependent upon the other two. It is not disputed by the Parties that the maritime territories concerned are the territorial sea, exclusive economic zone and continental shelf; that these territories must be delimited by a single line; and that in the event of a negative answer to the first question, the Tribunal must determine the entire course of this line. The Parties disagree on the present function of the line provided for in the last paragraph of Article I of the Convention, in the event that this line should be determined to have established a maritime boundary right from the start; but, as previously indicated, this problem will only arise if a positive answer is given to the first question.

43. As to the third question, both Parties have invoked, as relevant rules of international law, custom, judicial and arbitral decisions and, above all, conventions concluded under U.N. auspices. They invoke the relevant provisions of the Conventions of 29 April 1958, particularly those concerning the territorial sea and continental shelf, though neither State adhered to any of these conventions upon the achievement of their independence. As to the new Convention on the Law of the Sea signed at Montego Bay on 10 December 1982 by 119 States including Guinea-Bissau, but not yet in force, both Parties mentioned several of its provisions which they considered to be consistent with the evolution of international custom concerning the contemporary trends of the law of the sea. The Tribunal must consider these factors, which the International Court of Justice took into account in the Fisheries Jurisdiction case, the Tunisia/Libyan case and the Gulf of Maine case, (I.C.J. Reports 1974, pp. 23, paragraph 53, and 192, paragraph 45; 1982, pp. 37-38, paragraph 23-24; 1984, p. 294, paragraph 94).

I

44. The Tribunal will first of all examine, on the basis of the arguments presented by the Parties, the first and second questions submitted to it. The first is worded thus:

"Did the Convention of 12 May 1886 between France and Portugal establish the maritime boundary between the respective possessions of those two States in West Africa?"

45. The Franco-Portuguese Convention of 12 May 1886 was written in French and Portuguese. The ratified text of 31 August 1887 is as follows:

"Convention on the delimitation of French and Portuguese possessions in West Africa

His Majesty the King of Portugal and of the Algarves and the President of the French Republic, acting in an effort to strengthen, by means of relations of good neighborliness and perfect harmony, the bond of friendship existing between the two countries, have decided to sign, for this purpose, a special Convention to prepare the delimitation of their respective possessions in West Africa, and have appointed their respective plenipotentiaries . . .

Who, having exchanged their full powers, found to be in proper form, have agreed on the following Articles:

Article I

In Guinea, the boundary separating the Portuguese possessions from the French possessions will follow, in accordance with the course indicated on Map number 1 attached to the present Convention:

To the north, a line which, starting from Cape Roxo, will remain as much as possible, according to the lay of the land at equal distance from the Cazamance (Casamansa) and San Domingo de Cacheu (Sao Domingos de Cacheu) rivers, up to the intersection of the meridian of 17° 30' longitude west of Paris with parallel of 12° 40' north latitude. Between this point and the meridian of 16° longitude west of Paris, the boundary will conform to parallel of 12° 40' north latitude.

To the east, the boundary will follow the meridian of 16° west, from parallel 12° 40' of north latitude to the parallel of 11° 40' north latitude.

To the south, the boundary will follow a line starting from the estuary of the Cajet River, located between Catack Island (which will belong to Portugal) and Tristao Island (which will belong to France), and following the lay of the land, it will remain, as much as possible, at equal distance from the Rio Componi (Tabati) and the Rio Cassini, then from the northern branch of the Rio Componi (Tabati) and the southern branch of the Rio Cassini (Marigot de Kakondo) first and the Rio Grande afterwards. It will end at the intersection of the meridian of 16° west longitude and the parallel of 11° 40' north latitude.

Shall belong to Portugal all islands located between the Cape Roxo meridian, the coast and the southern limit represented by a line which will follow the thalweg of the Cajet River, and go in a southwesterly direction through the Pilots' Pass to reach 10° 40' north latitude, which it will follow up to the Cape Roxo meridian.

Article II

His Majesty the King of Portugal and of the Algarves recognizes the French protectorate over the territories of Futa-Jallon, as established by treaties signed in 1881 between the Government of the French Republic and the Almamys of Futa-Jallon.

On its part, the Government of the French Republic pledges to refrain from exerting its influence within the limits allocated to Portuguese Guinea in Article I of this Convention. Moreover, it pledges not to alter the treatment granted until now to Portuguese subjects by the Almamys of Futa-Jallon.

Article III

In the Congo region, the boundary between Portuguese possessions and French possessions will follow, in accordance with the course outlined in Map number 2 attached to the present Convention, a line which will start from Chamba Point situated at the confluence of the Loema or Louisa-Loango with the Lubinda, and will remain as far as possible and in accordance with the lay of the land, at equal distance from these two rivers; it will then, from the northernmost source of the Luali River, follow the watershed separating the basin of the Loema or Louisa-Loango from that of the Chiloango, to reach 10° 30' of longitude east of Paris, which it will follow until it meets the Chiloango, which in this area serves as the boundary between Portuguese possessions and the free State of Congo.

Each of the High Contracting Parties pledges to refrain from erecting any structure at Chamba Point which is likely to impede navigation.

In the estuary situated between Chamba Point and the Sea, the thalweg will serve as a political line of demarcation between the possessions of the High Contracting Parties.

Article IV

The Government of the French Republic recognizes His Most Faithful Majesty's right to exert His sovereign and civilizing influence on the territories separating the Portuguese possessions of Angola and Mozambique, subject to the rights acquired earlier by other Powers, and pledges on its part to refrain from any occupation of that region.

Article V

Portuguese subjects in French possessions on the west coast of Africa, and French citizens in Portuguese possessions on the same coast will, as far as protection of persons and property is concerned, be treated on a footing of equality with the citizens and subjects of the other Contracting Power.

Each of the High Contracting Parties will, in the aforementioned possessions, benefit from most favored nation status for the purposes of navigation and trade.

Article VI

Public property belonging to the High Contracting Parties, situated in the territory mutually ceded, will be exchanged and compensated.

Article VII

A Commission will be entrusted with determining, on the spot, the definitive position of the lines of demarcation provided for in Articles I and II of the present Convention. Its members will be appointed in the following manner:

His Most Faithful Majesty and the President of the French Republic will each appoint two commissioners.

These commissioners will meet at a place to be determined later, by joint agreement of the High Contracting Parties, as soon as possible after the exchange of documents ratifying this Convention.

If a disagreement arises, the aforementioned commissioners will refer back to the governments of the High Contracting Parties.

Article VIII

The present Convention will be ratified, and the ratification documents exchanged in Lisbon as soon as possible."

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46. The text of the Convention to be interpreted is the final paragraph of Article I underlined above. The two Parties unconditionally accept the rule set out in Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties, which is consistent with the practice of international tribunals, by virtue of which the paragraph concerned must be interpreted in good faith, with each word being given its ordinary meaning within the context and in the light of the object and purpose of the Convention. However, the interpretations presented in the Memorials and debated in the oral argument with sufficient reasons for an international Tribunal not to judge them to be anything but an expression of their complete good faith, resulted in

diverging final conclusions. Guinea has asked the Tribunal to hold that the Convention has established a general maritime boundary between the respective possessions of France and Portugal in West Africa, which extended seaward to the Cape Roxo meridian. For its part, Guinea-Bissau has submitted that the Convention did not establish a maritime boundary between those possessions, since the only purpose of the line defined in the contested paragraph was to designate the islands belonging to Portugal.

47. It is not contested by the Parties that the provision, when examined, achieves what the text indicates with great clarity: its purpose is to designate which islands off Guinea's coasts "shall belong" in full sovereignty to Portugal. For this purpose it defines a perimeter within which all the islands are declared to be Portuguese. But the Parties disagree as to whether the perimeter thus defined has another function, that of separating the Portuguese islands and waters from those of France, thereby establishing a general maritime boundary.

48. The two States agree that the segment corresponding to the Cape Roxo meridian cannot constitute a maritime boundary, since it extends straight to the south without any regard for the extent of territorial waters already recognized by international law at that time to appertain to any State or coastal territory. Guinea-Bissau concludes that it would be illogical to consider the other segments as constituting a maritime boundary. Guinea contends that the definition of these other segments is introduced by the words "the southern limit formed by" and that these words, like all those which appear in the text of a treaty, must be there for a reason and have a meaning.

49. The disagreement stems first of all from the meaning to be given to the word limit:* Guinea holds that it is synonymous with boundary and remarks that it is generally used in this sense in maritime affairs, whereas Guinea-Bissau gives it a less precise meaning in this case. The Tribunal observes that the two expressions must be taken here in their spatial sense, with due regard to their legal connotations. In French as in Portuguese, and according to the definitions provided by linguistic or legal dictionaries, mentioned or not mentioned by the Parties, they are slightly ambiguous. First of all, they can mean either a zone, especially if in the plural, or a line, which is of course the case here. Secondly, the word limit can have two meanings, a general one and a more specific one. This appears in particular in a French dictionary contemporaneous with the signature of the 1886 Convention, the Dictionnaire général de la langue française du commencement du XVIIe siècle jusqu'à nos jours (The General Dictionary of the French language from the beginning of the 17th century to today), by Hatzfeld and Darmesteter, which defines limit as the "extreme part where a territory, a domain ends," and boundary as the "limit which separates the territory of a

* Translator's note: "limite" in the French and Portuguese texts.

State from that of a neighboring State." One can thus see that the territory enclosed by a limit is not necessarily that of a State, and a limit is not necessarily a boundary. Generally, a limit indicates the extent of a domain, whereas the role of a boundary is to separate two States.

50. Nonetheless, the Tribunal is aware of the fact that practice has not always accurately reflected such a distinction, and that the word limit may have been used to mean a boundary between States. This is why the Tribunal prefers to assume that the paragraph in question in the Franco-Portuguese Convention of 1886 does contain some uncertainty.

51. The disagreement between the Parties then relates to the general structure of Articles I and II of the Convention which deal more specifically with the Guinean region. Article I is composed of 5 paragraphs, neither numbered nor lettered. The first, which ends with a colon, is an introductory paragraph ("In Guinea, the boundary . . . will follow . . .:). The three following paragraphs, directly linked to the first by their form, ("To the north, a line which . . . To the east, the boundary will follow . . . To the south, the boundary will follow . . ."), enclose the territory recognized as belonging to Portugal in a boundary defined by meridians, parallels and other lines. The final paragraph, equally covered by the first, differs however from the middle three because of its different grammatical structure and legal meaning (it begins with "Shall belong . . ."), and because its object is not the continental domain but the islands. Moreover, it defines the latter by surrounding them with a meridian, a parallel and another line. The Parties to this case recognize that the meridian in no way constitutes a boundary; as to the parallel and the line, they are described in the text itself as a "limit." However, Article II, which deals with certain obligations of the Parties in the Guinean region, mentions the "limits attributed to Portuguese Guinea in Article I of the present Convention."

52. Basing itself both on the terminology and structure described above, Guinea gives the final paragraph of Article I less autonomy in relationship to the others than Guinea-Bissau does. However, neither of the two Parties disputes that, in matters pertaining to treaties, the use of different legal terms must be justified by more than the purely literary concern of avoiding repetition. The use of "limit" in the final paragraph of Article I, instead of "boundary" as in the preceding three paragraphs, is considered as proof by Guinea that what is involved here is a maritime boundary; for Guinea-Bissau, it is the exact opposite. The two Parties justify the use of "limits" in Article II which designates the group of lines defined in the descriptive paragraphs of Article I, by invoking its more authentic meaning in one case, its more general meaning in the other. But what remains in both cases is to account for the presence of the word "boundary" in the middle of the introductory paragraph of Article I, to characterize equally the

whole group. The Tribunal notes that a mere reading of Articles I and II does not enable it to solve this obvious contradiction, nor establish the specific role of the final paragraph of Article I.

53. Another difficulty was pointed out by Guinea at the hearing. If the Parties accept that the Cape Roxo meridian, which defines the western part of the perimeter within which all the islands are Portuguese, does not have the function of delimiting a maritime boundary, it so happens that the Cajet, or eastern extremity of this very perimeter, has demonstrably a dual function. Indeed, the "southern limit" of the final paragraph of Article I is formed "by a line following the thalweg of the Cajet River," whereas the boundary described in the 4th paragraph follows a line "starting from the estuary of the Cajet River, located between Catack Island . . . and Tristao Island." The "southern limit" is thus also a boundary as long as it follows the thalweg of the Cajet. As a result, according to whether one considers the rest of the aforementioned limit as a boundary or not, this will be in contradiction either with the Cape Roxo meridian or the thalweg of the Cajet. The Tribunal observes that if the contradiction concerned the Cajet, it would then apply to a shorter line and would be explained by the text of the Convention itself, as well as by nature; the Cajet appears both in the last and penultimate paragraphs of Article I, for the simple reason that Cataque and Tristao islands are both insular by nature and continental because of their proximity to the coast.

54. With regard to this matter, Guinea stressed that Map number 1, referred to in the first paragraph of Article I and annexed to the Convention, indicates not only the boundary defined in the three middle paragraphs but also the entire perimeter described in the final paragraph. For the Tribunal, this confirms the introductory character of the first paragraph of Article I in relation to the last, but it cannot accept either of the contradictory conclusions reached by the Parties. Indeed, the lines drawn on the map lose any probative value when one observes that on land they are drawn with dashes, whereas on the sea or on the Cajet they are dotted lines. As a result, the "southern limit" is indicated in a different manner for the land boundary, but in the same fashion for the Cape Roxo meridian which is not a boundary, and for the thalweg of the Cajet, which is a boundary. In these circumstances, the presentation of the map cannot be considered as conclusive.

55. Moving on to the other parts of the text of the Convention, one notes that this instrument bears the title: "Convention on the delimitation of French possessions and Portuguese possessions in West Africa" and that, according to its preamble, the two Heads of State,

> "acting in an effort to strengthen, by means of relations of good neighborliness and perfect harmony, the bond of friendship existing between the two countries, have decided to sign, for this purpose, a special Convention to prepare the delimitation of their respective possessions in West Africa."

For Guinea, the object and purpose of the Convention was to delimit the African possessions of the two European States, with a view to eliminating sources of friction between them; the limit provided for by the final paragraph of Article I thus separated their maritime possessions in the region of Guinea. Guinea-Bissau makes a distinction between the object and the purpose of the Convention. In its view, the delimitation, or rather its preparation, was only the purpose of the Convention; the object of the Convention was the possessions of the two States; but only the land possessions were concerned, since no explicit mention of waters ever appears in any of the articles, and particularly not in Article III relative to the Congo region with its annexed map which indicates no maritime line. Guinea answers that nowhere in the Convention is it stated that the possessions concerned are only land possessions; that Article III has nothing to do with the present case and that when Article V mentions rules of navigation, this is unquestionably a reference to maritime navigation as well as river navigation.

56. The Tribunal considers that the frequent use of the terms possessions and territory in the text of the Convention proves that the colonial possessions of France and Portugal in West Africa were its object; but the complete absence of the words waters, sea, maritime or territorial sea is a clear sign that essentially land possessions were involved here. In another respect, it seems to the Tribunal that the main purpose of the Convention was the distribution, cession (Art. VI), exchange or eventual occupation (Art. IV) of territories, and that delimitation was but one aspect or one means of distribution of territories which were never mentioned as possibly being maritime. Here, it would seem, lies the true object not only of Article I, but of the entire Convention. The Convention merely "prepared the delimitation" (preamble) for territories confirmed or ceded, the "demarcation" (Art. VII) of which still had to be accomplished on the spot; naturally this was unnecessary in other territories where the Convention limited itself to a promise of well-disposed neutrality (Art. IV).

57. These last remarks, which help better to circumscribe the ultimate goal of the Convention, provide interesting presumptive evidence as to its meaning. However, they do not suffice to clear up the uncertainties noted earlier. Hence they do not dispense with the need to resort to other elements of interpretation.

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58. Paragraphs 2 and 3 of Article 31 of the Vienna Convention on the Law of Treaties, which refer to the context for the purpose of interpreting a treaty, include as part of this context certain contemporaneous agreements,

plus "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." To the Tribunal's knowledge, no agreement exists which could be considered in the interpretation of the "southern limit" defined in the final paragraph of Article I of the 1886 Convention. An interpretative agreement dated 23 January 1901 between France and Portugal appears not to be relevant in this case, since it only concerns Article III of the Convention pertaining to the Congo region. Moreover, the documents of the Demarcation Commission and the exchange of letters marking the end of its activities do not mention the maritime zones. Thus, due to its very nature, as argued by Guinea, or due to its nonexistence as a boundary, as alleged by Guinea-Bissau, the "southern limit" has not been held to be a "demarcation line," for the purposes of Article VII of the Convention.

59. As for the negotiations of 1959-1960 between France and Portugal, a passage of the report concerning the definition of Guinea-Bissau's internal waters has been reproduced in paragraph 27 above. While refusing to accept this text, which dealt principally with the boundary between Senegal and Guinea-Bissau, the Tribunal notes that the two parties negotiating in 1959-1960, the very same parties which concluded the 1886 Convention, provided in the final paragraph of Article I for an interesting interpretation as regards the present case. Portugal apparently was not seeking to extend its territorial waters beyond the limits it had itself established. If it had considered that Article I in fine delimited a maritime boundary, it would surely not, in 1959, have sought to have waters situated within the perimeter defined in 1886 recognized as internal waters.

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60. According to Article 31, paragraph 3(b), of the Vienna Convention, it is also appropriate to take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." The relevant facts here having been recalled in the historical account in the beginning of this Award (paragraphs 2-30), the Tribunal will hereafter limit itself to stating the necessary legal conclusions.

61. First of all, none of the documents presented by the Parties has proven to the Tribunal that in the course of the colonial period France and Portugal considered the "southern limit" referred to in the final paragraph of Article I of the 1886 Convention as a general maritime boundary between their possessions. To be sure, an internal note of the French Ministry of Foreign Affairs dated 12 June 1887, concerning discussion of the ratification of the Convention by Parliament, stated that:

> "The islands situated along the coast between the extension of the northern and southern limits of the Portuguese possessions will be part of these possessions, just as those

> placed in the waters of the French possessions will be incorporated into these possessions."

It would seem that this only alluded to the coastal islands, indubitably situated in territorial waters. In any case, the French Government, which shortly thereafter took possession of the Island of Alcatraz and the neighboring reefs situated south of the limit, did not indicate this action to be a direct and necessary consequence of the 1886 Convention. Indeed, the letter dated 29 September 1887 in which the Under-Secretary of State of the Ministry for the Navy and Colonies gave instructions to the Governor of Senegal to take possession of Alcatraz, did not mention this Convention and merely stated:

> "It is important in taking possession to precede Germany which, according to recent information, may have the intention of occupying this archipelago."

62. For the ensuing part of the colonial period, with the exception of one reference and summary sketch by a geologist with no official responsibility who visited Alcatraz in 1938, none of the few documents, Pilots or maps presented to the Tribunal mentions any water boundary other than the thalweg of the Cajet. If it is indisputable that the Governments of France and Portugal exercised their jurisdictions offshore the two Guineas to frontal limits which were occasionally specified, none of the exact points where their activities have been recorded are particularly close to the "southern limit" referred to in the final paragraph of Article I of the Convention. There was thus a wide area of indetermination, where in fact no incident was reported. Even if the "southern limit" was not in fact transgressed, as underlined by Guinea, the conclusion cannot be reached that it was held to be a maritime boundary by law.

63. The truth is that for a long time no problem arose. It only arose in 1958, with the granting of the concession by Portugal, and the answer then was quite clear. The Portuguese Government, by agreeing to a concession which went beyond the parallel of 10° 40' north latitude towards the south, and the French Government, by not protesting in the name of Guinea when it was still open to it to do so, expressed their conviction that the Convention had not established a maritime boundary between the two Guineas.

64. As to the period of decolonization, the Tribunal notes that from the legislative or administrative provisions brought to its attention, neither Portugal, whenever present, nor the two successor States, Guinea and Guinea-Bissau, accepted the line referred to in the final paragraph of Article I of the 1886 Convention as the lateral limit of their waters; on the contrary, they purported to unilaterally exercise jurisdiction beyond that line, and acted in consequence. In particular, the straight baselines established by Portugal in 1967 and by Guinea-Bissau in 1974 resulted, in the absence of any specific contrary indica-

tion, in the frontal limit out at sea of the contiguous zone or territorial sea going beyond the Line described in the Convention.

65. This same line was also transgressed by Guinea when it unilaterally established a lateral limit in 1964, to the extent that the allocation of the islands of Poilao, Samba and Sene was in doubt. In its pleadings and in its oral argument, this State has consistently affirmed its ignorance of the existence of the 1886 Convention, and of the oil concession granted by Portugal from 1958 onwards. As the opposing Party did, the Tribunal wishes also to pay tribute to the exemplary courage with which, under extremely difficult conditions, the Guinean Administration had to fulfill its duties after independence. However, if it is conceivable under certain circumstances that a recent foreign concession escape notice and that this be without consequence, it does not seem possible, in the present state of international law and international relations, to invoke against third States ignorance, over so many years, of a widely publicized boundary treaty, the effects of which can be observed on the ground.

66. Though in the strict sense the question goes beyond the present phase of interpretation, where what must be established is only the subsequent point of view of the Parties as to the meaning of certain provisions of the 1886 Convention, the Tribunal will note that the conflicting nature of the Parties' claims and of their measures of application is enough to exclude any notion of implicit agreement on any lateral delimitation of the maritime zones. This being so, the Tribunal considers that for the time being, it need not take cognizance of any other related points argued by the Parties, such as the reasons inherent in the general political situation which might explain certain actions or certain silences, the fact that the decisions of a waning colonial power may not be invoked against third States, the legal validity of a unilateral delimitation between maritime zones of different States or the situation of estoppel which may arise from a change of legislation.

67. The Tribunal feels justified in concluding, despite the relative scarcity of documents submitted to it, that until 1978 the States signatories to the 1886 Convention and their successor States interpreted the text of the final paragraph of Article I of this instrument as not having established a maritime boundary.

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68. Faced with such a conclusion, and having sought to discover the Parties' thinking subsequent to the conclusion of the Convention, it now becomes important to study their prior intentions. Article 32 of the Vienna Convention on the Law of Treaties gives the option of turning to the

supplementary means of interpretation - often considered by international tribunals - consisting of the preparatory work and circumstances of the conclusion of the treaty, with a view either to confirm the interpretation obtained, or to clarify whatever may remain ambiguous, obscure, absurd or unreasonable in the text. In this case, the option becomes a necessity, because of the second question submitted by the Parties to the Tribunal:

> "What legal effect can be attributed to the protocols and documents annexed to the 1886 Convention for the interpretation of the aforementioned Convention?"

The Tribunal will thus deal with this second question before finally disposing of the first.

69. In its final submissions, Guinea asked the Tribunal to answer the question as follows:

> "The protocols and documents annexed to the Convention of 1886 confirm that the Convention established a general maritime boundary between the respective possessions of France and Portugal in West Africa seaward to the Cape Roxo meridian."

As to Guinea-Bissau, it has submitted that:

> "The protocols and documents annexed to the aforementioned Convention, apart from the two maps, have no other significance than that of preparatory work and:
>
> a) they confirm the meaning of the text of the Convention mentioned in conclusion number 1 above, which after all is perfectly clear;
>
> b) the preparatory work can in no way be used to invalidate the meaning of this text, which is not ambiguous and does not lead to an unreasonable result."

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70. As indicated in paragraph 39 above, the preparatory work of the 1886 Convention consists essentially of protocols numbered 1 to 12, with an assortment of various annexes which contain the proces-verbal of the Franco-Portuguese meetings held in Paris from 22 October 1885 to 12 May 1886. It is useful to add the notes and diplomatic dispatches annexed by the Parties to their Memorials; and, though this is not stricto sensu a part of the preparatory work, the documents provided the following year to the French and Portuguese Parliaments in preparation for the ratification of the Convention, which have been supplied by the Parties to the Tribunal at its request. The two maps mentioned in Guinea-Bissau's conclusions are annexes to the Convention, not to the preparatory work; the Tribunal has already disposed of these as belonging to the very context of the Convention, in keeping with the views of the Parties them-

selves, and Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties.

71. A general terminological study of the texts in question confirms the presumptions which the Tribunal has made from studying the specific object and purpose of the Convention. While, as discussed below, specific mention of waters appears only once, the words possessions, and especially territory, appear very frequently. Moreover, while the protocols talk of "reciprocal cooperation" and "mutual support" (22 October 1885), of "sphere of action" (28 November 1885), and of "territorial exchange" (12 and 21 December 1885; 2 February and 30 March 1886), of "concessions" and "compensation" (12 and 21 December 1885; 17 February 1886), the word demarcation is hardly used at all. As concerns the two key words of the present interpretation, limit is used more often than boundary; it is most often used in the same sense, and only on one occasion out of five is it used in the more general meaning of the word. Thus, it is not by pure chance that, in the reverse situation, boundary appears more frequently than limit in the text of the Convention.

72. The Tribunal considers the fact that the drafters were at pains to avoid the word limit in the text of Article III pertaining to the Congo region, which is not concerned with islands, to be significant. Though this Article is not in question in the present case, it can help to better understand the ideas of the drafters of the Convention in terms of legal vocabulary. One notes that at the session of 6 April 1886, they added to the text of the draft: "which serves as a limit between the Portuguese possessions and those of the free State of Congo," but that the word "boundary" appears in the definitive text. Similarly, on 10 April, it was agreed that they would add: "In the estuary situated between Chamba Point and the sea, the thalweg will serve as a political boundary between the possessions of the High Contracting Parties," but the word "boundary" was ultimately changed to "line of demarcation" rather than to "limit." This shows an obvious intent which must be explained.

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73. For this purpose it is necessary to reconstitute, on the basis of the protocols, the process whereby the text of Article I of the Convention was established and, in particular, its final paragraph. The first concrete proposition was put forward by the Portuguese delegation on 12 December 1885, and suggested attributing to Portugal, in Guinea, a territory limited in the north by a line ending at a certain parallel, in the east by a certain meridian and:

> ". . . in the south, by the course of the Nuno River from longitude 16° 30' west of Paris to its mouth; in the west, all the islands located between the parallel of Cape Roxo and that of the mouth of the Nuno River will belong to Portugal." (Emphasis added.) (Annex to Protocol No. 4.)

During the discussions which followed, the proposed line was modified and on 11 January 1886 the French delegate, referring to the related map to be prepared, made no further mention of the islands and declared:

> "The line in question will start from the mouth of the Cajet River, will leave to Portugal the island of Catack and to France the island of Tristao at the mouth of the Compony River, and will continue, remaining as near as possible at equal distance from the Cassini River and Compony River at first, then from the latter and the Rio Grande." (Emphasis added.) (Protocol No. 7.)

74. On 6 April 1886, the French delegation submitted a first complete draft of the Convention. Article I included two unnumbered paragraphs. The first concerned the land domain and stated (omitting that part of the line which is unrelated to the present matter):

> "The boundary separating Portuguese and French possessions in Guinea will, in accordance with the line drawn on map No. 1 annexed to the present treaty, follow a line which will start from Cape Roxo, will follow . . . and, taking a southwesterly direction, will as far as possible and following the landmarks, remain at equal distance from the Rio Grande and the southern branch of the Cassini River (Marigot de Cakondc) to the north, and the northern branch of the Compony River to the south, as far as the Cajet River located between the island of Catack, which will belong to Portugal, and the island of Tristao, which will belong to France." (Emphasis added.)

The second paragraph concerned the sea:

> "The limits of the territorial waters will be formed, in the north, by a line extending from Cape Roxo three miles out to sea in a southwesterly direction; in the south, by a line which will follow the thalweg of the Cajet River and will then go in a southwesterly direction across the Pilots' Pass to reach 10° 40' north latitude, which it will follow up to 19° of longitude west of Paris." (Emphasis added) (Appendix to Protocol No. 12.)

75. During the official discussions, a French delegate suggested that the first paragraph should be divided into: "(1) north (2) east and (3) south." As for the paragraph relating to the limit of territorial waters, the Portuguese delegate proposed "replacing the initial text by the following":

> "Shall belong to Portugal, all islands located between the Cape Roxo meridian, the coast and the southern limit represented by a line which will follow the thalweg of the Cajet River and will then go in a southwesterly direction across the Pilots' Pass to reach 10° 40' north latitude which it will follow up to the Cape Roxo meridian." (Emphasis added.)

Both propositions were accepted without any reason or discussion being recorded in the proces-verbal, which

contained no explanation of how the final text was arrived at. (Protocol No. 12.)

76. The new text of the Article was adopted at the following session on 10 April 1886 (Protocol No. 13) and annexed, after a few minor amendments and with no other comments, to the signature protocol of 12 May 1886 (Protocol No. 16). It conforms with the ratified text reproduced in paragraph 45 above. In particular, the first paragraph is divided into four unnumbered sub-paragraphs in the French handwritten copy preserved at the Ministry of Foreign Affairs in France, the second and third sub-paragraphs ending with semi-colons, and there is again a semi-colon at the end of the third sub-paragraph in a printed text of the draft law submitted to the French parliament. On the other hand, in the bilingual version printed for the Portuguese parliament, there are no longer any semi-colons and we thus have the punctuation of the text which was eventually ratified.

77. This brief summary explains the origin of the difficulties encountered in the interpretation of the whole of Article I of the Convention. In the first French draft, it is clear that the first twenty-five or so words concerned only the first paragraph. "The boundary," "the possessions" and "map No. 1" therefore concerned only the continental domain. For the "territorial waters" of the second paragraph, "limits" were referred to. Since, in the same draft, Article II began: "Within the limits, thus defined, of Portuguese Guinea . . . ," it is clear that, at this stage, it was limit and not boundary which was considered by the negotiators as covering both the idea of boundary and of limit. All this was coherent. In the amended text, the beginning of the first paragraph became an introduction to the whole article, resulting in "boundary" and "possessions" being related to the last paragraph and in the map which included a line drawn at sea. Such a departure from the original intentions was a source of ambiguities.

78. In the same way, whereas the French proposition of 11 January 1886 mentioned only the land boundary and took it to start at the mouth of the Cajet River, the first draft, which made a distinction between land boundary and maritime limit, placed the thalweg of the Cajet River in the latter, it being made to run between two coastal islands which are obviously located in the territorial sea. No mention of territorial seas was made in the amended text and the mouth of the Cajet River was once again mentioned in relation to the land boundary, but the thalweg was not omitted from the limit drawn at sea as it also has a role to play for the reasons mentioned in paragraph 53 above. This explains the duplication already mentioned.

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79. What is even more important is that the 1886 negotiators almost immediately rejected the proposal to include territorial waters in their Convention, and this

with so little discussion that it was judged not necessary for it to be included in the proces-verbal (Protocol No. 12). The fact is that there was no question of territorial waters, either in the other negotiation protocols or in the official dispatches, notes or documents immediately prior to or following these negotiations, with the single exception of the internal note of the French Ministry of Foreign Affairs mentioned in paragraph 61 above. Thus, an essential condition required to determine a maritime boundary did not exist. In the absence of any textual evidence, there is every reason to presume that the negotiators never envisaged anything but the land boundaries. Such a presumption, already justified by analysis of the object and purpose of the Convention, becomes a certainty when this instrument is re-situated in the circumstances prevailing at its signature. As recalled at the beginning of the present Award, discussions were started immediately following the Congress of Berlin in 1884-1885, where the Colonial Powers had sought to avert conflict by defining the conditions of occupation of their coastal possessions in Africa, but without concerning themselves with territorial waters in this respect.

80. The notion of territorial seas, as opposed to that of the high seas, was recognized in the 19th century, even though the limit varied between the most generally-accepted 3 nautical miles and 6 nautical miles - with a few notable exceptions such as the short-lived Russian claim to a 100-mile limit in the Behring Sea (1821-1825). In 1886, France was in favor of the first limit and Portugal of the second. Given that, to judge by contemporary boundary treaties produced by the Parties, there had still not been any lateral delimitation of territorial waters in Africa, the French draft text was somewhat unusual for the time and place. The lateral limit off Cape Roxo, going to only 3 nautical miles, would have raised objections by Portugal, while the southern limit, continued to about 100 miles from the coast and passing the nearest island, Poilao, at a distance of more than 12 miles, would have extended the notion of territorial sea far beyond the concepts of the time.

81. Portugal, on the other hand, by reintroducing its first proposition (Protocol No. 4) to define the islands by lines, was inspired by contemporary practice. Among the islands whose sovereignty has been determined by treaty, the Parties either directly or indirectly mentioned those off the Atlantic coast of the United States of America (Peace Treaty with Great Britain, 1783), off Alaska (Treaty between the United States and Russia, 1867), off Sierra Leone (the non-ratified Anglo-French Treaty of 1882) and the Philippine Archipelago (Spanish-American Peace Treaty of 1898). To the knowledge of the Tribunal, it was never considered at the time that any of these treaties granted maritime sovereignty to any of the signatories over anything except the commonly recognized territorial waters. Another case, occurring after 1886 and not mentioned by the Parties, is that of Hong Kong. This territory and its islands were

defined by a line drawn on a map appended to the Sino-British Treaty of 1898; two bays were included in the territory, under certain conditions, and no other maritime area was mentioned.

82. These are objective facts which, more than any speculation about the ulterior motives of the two governments, lead the Tribunal to an imperative conclusion. Under the circumstances just described, a proposition which was presented as quickly as it was withdrawn and which attempted to mention territorial waters in the Convention - and what is more in a way which was hardly compatible with the law of the sea at that time - could hardly constitute proof of the actual intentions of the parties. On the contrary, everything indicates that these two States had no intention of establishing a general maritime boundary between their possessions in Guinea. In a complex and still little known geographical area, they simply indicated which islands would belong to Portugal. In other words, in the last paragraph of the final text of Article I of this Convention, the word "limit" does not have the precise legal meaning of boundary, but a wider meaning.

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83. Thus, what the reading of the 1886 Convention text leaves ambiguous or obscure has been elucidated and confirmed by the subsequent practice of the signatory States and their successor States. As neither of the two interpretations between which the Tribunal is being asked to decide is manifestly absurd or unreasonable, the supplementary means of interpretation provided for by Article 32 of the Vienna Convention on the Law of Treaties and imposed by the second question submitted to the Tribunal is thus concluded.

84. The Tribunal is therefore in a position to reply, in reverse order, to the first two questions submitted by the Parties:

a) The protocols and documents annexed to the Franco-Portuguese Convention of 12 May 1886 have an important role to play in the legal interpretation of Article I of this Convention.

b) This Convention did not determine the maritime boundary between the respective possessions of France and Portugal in West Africa.

85. Once having arrived at this conclusion, the Tribunal has no need to concern itself with the other points discussed between the Parties. The Tribunal is not required to examine how the 1886 Convention, which remains in force, would have continued to determine or would still determine a maritime boundary. Neither is it required to investigate whether the principle of uti possidetis applies or does not apply to maritime boundaries.

II

86. The third question submitted to the Tribunal is as follows:

> "According to the answers given to the two above-mentioned questions, what is the course of the boundary between the maritime territories appertaining respectively to the Republic of Guinea-Bissau and the People's Revolutionary Republic of Guinea?"

The Tribunal having reached the conclusion that the Convention of 12 May 1886 between France and Portugal did not determine the maritime boundary between the respective possessions of these two Powers in West Africa, it follows that there is no boundary delimiting the territorial waters, the exclusive economic zone or the continental shelf belonging respectively to Guinea and Guinea-Bissau. It is therefore now necessary for the Tribunal to draw the line delimiting the maritime territories of these two States. As indicated in paragraph 42 above, one line only will be drawn to delimit the maritime territories containing the territorial sea, the exclusive economic zone and the continental shelf.

87. The Parties have requested the Tribunal "to decide according to the relevant rules of international law." It is therefore the rules relating to the law of the sea, as recalled in paragraph 43, that the Tribunal will apply in order to determine where the requested line of delimitation will be drawn.

88. It should nevertheless be specified, as was done by the Chamber of the International Court of Justice in its judgment of 12 October 1984 in the Gulf of Maine case, that international customary law can provide, in a matter like that of the present Award, "only a few basic legal principles, which lay down guidelines to be followed with a view to reaching an essential objective." (ICJ Reports 1984, p. 290, paragraph 81.) For the Tribunal, the essential objective consists of finding an equitable solution with reference to the provisions of Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention of 10 December 1982 on the Law of the Sea. This is a rule of international law which is recognized by the Parties and which compels recognition by the Tribunal. However, in each particular case, its application requires recourse to factors and the application of methods which the Tribunal is empowered to select. This nevertheless does not mean that the Tribunal is endowed with discretionary powers or is authorized to decide ex aequo et bono. Its findings must be based on considerations of law.

89. The factors and methods referred to result from legal rules, although they evolve from physical, mathematical, historical, political, economic or other facts. However, they are not restricted in number and none of them is obligatory for the Tribunal, since each case of delimita-

tion is a unicum, as has been emphasized by the International Court of Justice (ibid). The Tribunal will come back to the question of methods. Where factors are concerned, the Tribunal must list them and assess them. They result from the circumstances of each particular case and, in particular, from characteristics peculiar to the region. These circumstances will be taken into consideration only when the Tribunal considers them relevant to the case in point. These circumstances are varied and are not restricted to physical facts whether geographical, geological or geomorphological.

90. The Tribunal will now review these circumstances. Beforehand, however, it will emphasize not only that the decision to be taken must reflect the deep-seated convictions of the Arbitrators and their sense of justice, but that the decision must also be justifiable by a reasoning process based on law. It must be taken along straightforward lines, well adapted to the accuracy of the maps available to the Tribunal and to the technical facilities of the users.

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91. An initial circumstance, on which Guinea has insisted, is that the two States are adjacent to, and not opposite, each other. Guinea-Bissau argued that, to a certain extent, the coasts of the two States are opposite each other. The Tribunal considered that there is no reason why two States should not have coasts which are partially adjacent and partially opposite each other. However, it is not necessary to linger over this circumstance. On the other hand, it is important to note that the maritime zones in question are the prolongations of the land territories of the two States out to sea, that they are extensive and do overlap, but they do not contain any unusual characteristics. The delimitation now required does not present any exceptional difficulties. It needs only to be based on equitable and objective principles.

92. In order for any delimitation to be made on an equitable and objective basis, it is necessary to ensure that, as far as possible, each State controls the maritime territories opposite its coasts and in their vicinity. First of all, therefore, it is necessary to define the coastline concerned with a view to delimitation. In this particular case, the coastline is continuous, although fairly irregular, from Cape Roxo in the north to the region of Sallatouk Point in the south. The Parties have based their arguments on a coastline extending over this distance and have submitted no proof to the Tribunal of the necessity to take into account, for the purposes of the delimitation, a shorter stretch of coast. It is therefore the continuous coastline of Guinea-Bissau in the north and Guinea in the south that the Tribunal is called upon to consider, although this does not prevent it from taking into account, if necessary, the coastlines of one or more neighboring countries.

93. Although the coastline concerned is easy to define, the same is not true of the zone to be considered, that is, the whole maritime area which will be affected by the delimitation ruling of the Tribunal. A delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or still to be made in the region. Guinea-Bissau is bordered by Senegal in the north and Guinea is bordered by Sierra Leone in the south. Where maritime boundaries are concerned, the Tribunal has been informed that Guinea-Bissau is currently in dispute with Senegal. Guinea-Bissau is said to be claiming the parallel of latitude as the maritime boundary, while Senegal is claiming the azimuth of 240°. The question here would be to determine in what measure the 1959-1960 agreement between France and Portugal, referred to in paragraph 26 above, is applicable. The two States are thought to be in the process of searching for a solution to this dispute.

94. In the south, as mentioned in paragraph 28 above, Guinea unilaterally fixed a line of delimitation along the parallel of latitude by a decree of 3 June 1964. Sierra Leone has apparently not recognized this delimitation. There is nothing to say whether, in the event of a formal agreement finally being achieved, the line adopted would follow the same direction or a direction more or less favorable to Guinea. However, in its assessment, the Tribunal could not take into consideration a delimitation which did not result from negotiations or an equivalent act in accordance with international law. In that particular case, however, the claimed delimitation was made through a legal act by Guinea alone and, like that made by the same Guinea in the north at the same time, is likely to be the object of unilateral modifications. It necessarily follows that the Tribunal can have only an approximate idea of the zone to be considered, based on an approximate evaluation.

95. The coastline to be considered, as described in paragraph 19 to 23 above, is marked by the presence of numerous islands. In order to determine the extent to which these should be taken into account for delimitation purposes, it is necessary to distinguish three types of islands:

a) The coastal islands, which are separated from the continent by narrow sea channels or narrow watercourses and are often joined to it at low tide, must be considered as forming an integral part of the continent.

b) The Bijagos Islands, the nearest of which is two nautical miles from the continent and the furthest 37 miles, and no two of which are further apart than 5 miles, can be considered, if the 12-mile rule accepted by the Parties is applied, as being in the same territorial waters as each other and as being linked to those of the continent.

c) There are also the more southerly islands scattered over shallow areas (Poilao, Samba, Sene, Alcatraz), some of which may be taken into account

for the establishment of baselines and be included in the territorial waters.

Although it cannot be denied that, somehow or other, the delimitation must leave to each State the islands over which it has sovereignty, it nevertheless remains that, in the search for the general criteria to be applied, it is above all the islands in categories (a) and (b) that are considered as relevant.

96. The problem of the baselines necessary to establish the 200-mile limit recognized by the Parties as the extent of their exclusive economic zones is not of direct concern to the Tribunal, as these lines depend on the unilateral decision of the States concerned and do not form part of the present dispute. During the oral proceedings, the Parties set aside their latest baselines, established after the critical date on which the dispute arose: the Guinea decree of 30 July 1980 and the Guinea-Bissau law of 19 May 1978. This leads to the consideration of the previous lines (Guinea decree of 3 June 1964 and Guinea-Bissau decision of 31 December 1974). However, none of this is of any practical consequence where the present lateral delimitation is concerned. It is also worth noting that, in accordance with Article 76 of the Convention of 10 December 1982 on the Law of the Sea, the continental shelf may be extended beyond the 200-mile limit if "the outer edge of the continental margin" is further out. In this respect, the Tribunal has received contradictory information from the Parties. Here again, however, this can have no effect on the reasoning of the Tribunal.

97. In reply to questions asked by the Tribunal concerning the length of the coastline, conflicting figures were provided by the Parties because they were not in agreement either on the method of defining the coastline for this purpose or on the method of accounting for the numerous islands and estuaries. In fact, what counts for the delimitation to be made is "the length of the coastline following its general direction," as stated by the International Court of Justice in the North Sea Continental Shelf cases and the Tunisia/Libya case, (ICJ Reports 1969, p. 54, paragraph 101; 1982, p. 93, paragraph 133). In the present case, the Tribunal considers that account should be taken of the coastal islands and the Bijagos Archipelago, as they are defined in paragraphs 95 (a) and (b) above, but not of the scattered islands referred to in paragraph 95 (c). Furthermore, the relevant islands must not be taken into account in the form of the total obtained by adding together the perimeters of each of them, but as elements determining the general direction of the entire coastline of the country considered. For Guinea-Bissau, this gives a broken line which, starting from Cape Roxo, would be at a tangent to the islands of Unhocomo and Orango and would end at the thalweg of the Cajet River. For Guinea, there would be a straight line from the mouth of the Cajet River to Sallatouk Point. Using this method of evaluation, each country's coastline is about 154 miles long. If the Bijagos Islands were not taken

into account, the coastline of Guinea-Bissau would be only 128 miles long. This State's coastline is therefore affected by a coefficient of 20%, which equitably brings out the importance of the islands in this case. The Parties must therefore be considered by the Tribunal as having, in its opinion, coastlines of the same length.

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98. In order to ensure that each Party has control over the maritime territory opposite and in the vicinity of its coast, an important factor is the coastal configuration and orientation. This configuration must include the relevant islands, i.e., the coastal islands and the Bijagos Archipelago. The problems which arise nevertheless vary according to whether the coastline in question is concave or convex, whether it is considered from nearby or from afar, and whether a limited or more extensive area is considered. Not having given the same weight to these circumstances, the two States have claimed very different lines of delimitation. Guinea-Bissau advocates an equidistance line, whereas Guinea argues in favor of a line principally based on a parallel of latitude.

99. Guinea-Bissau is in favor of the equidistance method because it considers, above all, that no attempt should be made to change nature (see, in particular, the North Sea Continental Shelf cases, ICJ Reports 1969, p. 49-50, paragraph 91); and because the equidistance method has the merit of taking into account the factor of coastal proximity and of avoiding one of the two Parties losing zones located nearer its coast than that of the other Party. It does not contest that, in order to obtain an equitable result, it may prove opportune to modify the equidistance line in accordance with criteria judged to be relevant. It proposes, whatever the present position of the Parties in the matter of baselines, that the equidistance line be calculated in relation to the low-water marks of both countries, including islands (see sketch appended to the present Award). However, it has suggested that further modification could still be made, for example, by changing certain points of reference. [sketch at I.L.M. p. 251]

100. Guinea rejects the equidistance method on the grounds that its application to the Atlantic seaboard of Africa would result in exaggerated divergencies or convergencies and that for some States, including Guinea itself, this would lead to a cut-off effect or even enclavement (see, in particular, the North Sea Continental Shelf cases, ICJ Reports 1969, p. 17, paragraph 8 and p. 49, paragraph 89). Guinea considers that, on the other hand, a system of parallels of latitude would not produce these drawbacks, if only because parallels of latitude never meet. In this way, any cut-off effect would be compensated for further out to sea and there would be no enclavement. Guinea underlines the fact that this system corresponds with its own method of fixing the line of delimitation with Sierra Leone and that it has already been applied between

Gambia and Senegal and, to some extent, between Kenya and Tanzania. On this basis and whatever the reply to the first question submitted to the Tribunal, Guinea proposes that the line of delimitation separating its maritime territories from those of Guinea-Bissau be the "southern limit" referred to in the final paragraph of Article I of the 1886 Convention, extended in the same direction beyond the Cape Roxo meridian, as far as the 200-mile limit (see sketch).[at I.L.M. p. 251]

101. In its argument against the equidistance line claimed by Guinea-Bissau, Guinea points out that, if what it considers impossible should occur and this method be adopted, the islands of Bijagos should in no circumstances be taken account of, which would result in another equidistance line located further west (see sketch). On its side, Guinea-Bissau points out that it is the very configuration of the coastline that gives it the right to a widely divergent maritime zone and that the system of parallels of latitude, which would in any case be inapplicable from Liberia onwards because of the change in direction of the African coast, would not take this natural feature into account.

102. The Tribunal takes note that the Parties are agreed on certain points. They both recognize that there is no question of changing nature and that as far as possible any cut-off effect or enclavement should be avoided, although Guinea-Bissau was more particularly insistent on the first point and Guinea on the second. On the other hand, they are divided on the question of method. They have extensively debated whether a start should be made by considering a line of equidistance, even if this entails modifying it later depending on circumstances, as was done by the Arbitration Court in the case of France and the United Kingdom (award of 30 June 1977, paragraph 249), or whether no priority should be given to any particular method, as was decided by the International Court of Justice in the Tunisia/Libya case (ICJ Reports 1982, p. 79, paragraph 110). Generally speaking, Guinea-Bissau argued for the first solution and Guinea for the second. The Tribunal itself considers that the equidistance method is just one among many and that there is no obligation to use it or give it priority, even though it is recognized as having a certain intrinsic value because of its scientific character and the relative ease with which it can be applied. The method of delimitation to be used can have no other purpose than to divide maritime areas into territories appertaining to different States, while doing everything possible to apply objective factors offering the possibility of arriving at an equitable result. Such an approach excludes any recourse to a method chosen beforehand. On the contrary, it requires objective legal reasoning and the method to be used can come only as a result of this. Nevertheless, in accordance with correct legal procedures, the Tribunal must examine the lines proposed by the Parties and discussed by them.

103. If the coasts of each country are examined separately, it can be seen that the Guinea-Bissau coastline is

convex, when the Bijagos are taken into account, and that that of Guinea is concave. However, if they are considered together, it can be seen that the coastline of both countries is concave and this characteristic is accentuated if we consider the presence of Sierra Leone further south. What are the effects of such a circumstance? Between two adjacent countries, whatever method of delimitation is chosen, the likelihood is that both will lose certain maritime areas which are unquestionably situated opposite and in the vicinity of their coasts. This is the cut-off effect. Where equidistance is concerned, the Tribunal, which as we have seen is confronted here with two lines of equidistance, is forced to accept that both would have serious drawbacks in the present case. In the vicinity of the coast, they would give exaggerated importance to certain insignificant features of the coastline, producing a cut-off effect which would satisfy no equitable principle and which the Tribunal could not approve. In one case, this would be to the detriment of Guinea-Bissau and, in the other, to the detriment of Guinea, with the island of Alcatraz being "on the wrong side." In the latter case, Guinea-Bissau has put forward several propositions to correct this situation and finally, in its conclusions, offers to leave this island with a 2-mile enclave measured from the low-water mark.

104. When in fact - as is the case here, if Sierra Leone is taken into consideration - there are three adjacent States along a concave coastline, the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits. In the present case, this is what would happen to Guinea, which is situated between Guinea-Bissau and Sierra Leone. Both the equidistance lines envisaged arrive too soon at the parallel of latitude drawn from the land boundary between Guinea and Sierra Leone which Guinea has unilaterally taken as its maritime boundary.

105. This being said, the Tribunal must now consider whether the "southern limit" referred to in the final paragraph of Article I of the 1886 Convention, and claimed by Guinea as a line of delimitation, is of a more equitable character than a line of equidistance. The Tribunal first of all takes note that, until 1958, this limit was not breached by either France or Portugal during activities concerned with the installation and maintenance of beacons and buoys, the laying of certain submarine cables, the control of navigation in peace and war, customs patrols, etc. (see paragraphs 25 and 62 above).

106. In the vicinity of the coast, the "southern limit" runs from the end of the land boundary which, as already mentioned, is a point on the thalweg of the Cajet River, located at the mouth thereof, between the islands of Cataque and Tristao. This circumstance is in itself relevant because, as the International Court of Justice emphasized in the Tunisia/Libya case:

> ". . . there is also the position of the land frontier, or more precisely the position of its intersection with the coastline, to be taken into account." (ICJ Reports 1982, p. 64, paragraph 81.)

This is all the more true in the present case in that, beyond this "position," the "southern limit" coincides, as the Tribunal has noted in paragraphs 53 and 54 above, with a short segment of the land boundary, i.e., that which passes between the coastal islands; that from this point, it runs for about twenty miles along the Pilots' Pass, which is the geographical prolongation of the land boundary and more or less follows the same direction, being roughly perpendicular to the coast at this point. These observations explain why, even though this was not accepted by Portugal, the "southern limit" was able to be put forward originally by the French negotiators in 1886 as a possible delimitation of the territorial waters. The said limit then follows the parallel of 10° 40' north latitude and passes 2.25 nautical miles north of the island of Alcatraz, which is the most western possession of Guinea. Although it is not possible for the Tribunal to affirm that it was in application of the final paragraph of Article I of the 1886 Convention that France occupied Alcatraz in 1887, there is nothing to prevent the assumption that this occupation was an indirect consequence of the allocation of territories with which that Convention was concerned, the allusion to rival intentions attributed to Germany (see paragraph 61 above) being explained by the principle of the relative effect of the treaties. Guinea-Bissau, after first having contested Guinea's sovereignty over Alcatraz before the Tribunal, then recognized it and, while proposing a radically different delimitation, based its criticism of the "southern limit" on arguments which the Tribunal considers to apply, above all, to that part of this line located beyond Alcatraz. For all these reasons, the Tribunal believes itself justified in considering the "southern limit," until it draws abreast of Alcatraz, as a factor it should take into account with a view to a delimitation tending to achieve an equitable result.

107. Beyond Alcatraz, on the other hand, there would be a danger of the parallel of 10° 40' north latitude producing a cut-off effect, this time to the detriment of Guinea-Bissau, and if the waters of that State were separated from those of Senegal by a maritime boundary inclined towards the south, a certain enclavement effect. It is for this reason that Guinea, aware of the danger for both Guinea-Bissau and for itself, suggested in extremis that, from the meridian of Cape Roxo, the limit between the two Guineas, instead of being extended along the parallel of 10° 40' north latitude, could be directed towards the south, if necessary, until it coincides with the azimuth of 240°. However, it gave no further details, leaving it up to the Tribunal to decide. The Tribunal therefore has to decide whether, while adopting the "southern limit" in the vicinity of the coast, it is possible, further out to sea, to find a method which does not have the drawbacks of the line of equidistance or of the line referred to in Article I of the Convention.

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108. In the Tribunal's view, a valid method consists of looking at the whole of West Africa and of seeking a solution which would take overall account of the shape of its coastline. This would mean no longer restricting considerations to a short coastline but to a long coastline. However, while the continuous coastline of the two Guineas - or of the three countries when Sierra Leone is included - is generally concave, that of West Africa in general is undoubtedly convex. With this in mind, the Tribunal considers that the delimitation of maritime territories to be attributed to coastal States could be made following one cf the directions which takes this circumstance into account. These directions would be approximately divergent. This idea, which in the present case would seem to offer an equitable result, automatically condemns the system of parallels of latitude defended by Guinea and of which the limit represented by the parallel of 10° 40' north latitude would have been just one example. However, it also condemns the equidistance method as seen by Guinea-Bissau. It leads towards a delimitation which is integrated into the present or future delimitations of the region as a whole.

109. In order for the delimitation between the two Guineas to be suitable for equitable integration into the existing delimitations of the West African region, as well as into future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions, it is necessary to consider how all these delimitations fit in with the general configuration of the West African coastline, and what deductions should be drawn from this in relation to the precise area concerned in the present delimitation. To this end, the configuration of the coastline should be interpreted in a simple manner. In practice, two systems are presented and from them the Tribunal must find a solution likely to provide an equitable result. A first system would be based on the outer perimeter of the coasts and their islands. Without going so far as to select an arc of a circle passing through Almadies Point (Senegal), Cape Roxo and the southern extremity of Liberia, this being too distant from the coast, the Tribunal could envisage a polygon with protruding angles which would include every part of the coast. This polygon would join the following points: Almadies Point - Cape Roxo - Unhocomo Island - Tortue Island (Sierra Leone). A variation of this system would consist of using a polygon with re-entering angles. This would have the advantage of enabling the selection of line segments which do not touch any third State, e.g., Orango Island - Sallatouk Point or Orango Island - Cape Verga. However, this would restrict the coastline to limits which would be too narrow, given the views of the Parties expressed in paragraph 92 above.

110. A second system would consist of using the maritime facade and, for this purpose, selecting a straight line joining two coastal points on the continent. This would have the advantage of giving more weight to the general

direction of the coastline, at the risk of starting from a line crossing through islands and even encroaching on the continent. There would be two possible facades: one would be a line joining Cape Roxo and Sallatouk Point and would concern only the two Guineas; the other would be a line joining Almadies Point (Senegal) and Cape Shilling (Sierra Leone) and would thus involve two third States. The second system is better suited to the circumstance chosen by the Tribunal, i.e., the overall configuration of the West African coastline, and the Almadies Point - Cape Shilling line reflects this circumstance more faithfully.

111. This opens the possibility of an equitable delimitation which would consist of:

a) First following the "southern limit" of the 1886 Convention, i.e., the Pilots' Pass from the mouth of the Cajet River and the parallel of 10° 40' north latitude, as far as the island of Alcatraz. Because, in this way, the island in question would have only 2.25 nautical miles of territorial waters to the north - and there is even less reason to grant more in this direction in that the "southern limit" marked the maximum claim by Guinea in its conclusions - the Tribunal would consider it equitable to grant it, at least towards the west, the 12 nautical miles provided for in the 1982 Law of the Sea Convention, without however taking into account any reefs. The "southern limit" could therefore be adopted as far as 12 miles west of Alcatraz.

b) The line would then go in a southwesterly direction, being grosso modo perpendicular to the line joining Almadies Point and Cape Shilling. This would give just one straight line bearing 236°. The Tribunal considers that such a line would reduce the risk of enclavement to a minimum and, in this respect, would be more satisfactory than any line drawn perpendicular to the other lines envisaged in paragraphs 109 and 110 above.

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112. The Parties have invoked several other circumstances, while according them unequal importance. By referring to circumstances which it considers relevant in the present case, the Tribunal considers that it has already determined a line offering an equitable delimitation. It is now necessary, by considering other circumstances, to establish whether the chosen line effectively leads to an equitable result.

113. The first of these other circumstances is the structure and nature of the continental shelf. The Parties

have asked the Tribunal to draw the same line for the territorial waters, the exclusive economic zone and the continental shelf. Guinea has claimed that the criterion of natural prolongation is irrelevant because, apart from the fact that it is also necessary to delimit an economic zone, there is no longer any identity of meaning between geographical and legal notions of the continental shelf. It has emphasized that, in any event, Guinea-Bissau, unlike Guinea, will have a continental shelf exceeding a distance of 200 miles out to sea and that morphological differentiations of the shelf common to both Guineas are neither well enough known nor well enough marked to constitute natural limits. Guinea-Bissau, on the other hand, has mentioned distinctive features of this shelf as described in paragraphs 19-23 above, with a view to defending a delimitation which takes account of their existence and to orienting the Tribunal towards the choice of the equidistance line it proposes. It has underlined the fact that this line would lie within the erosion zone south of the Bijagos, that it would be roughly parallel to the trenches in this zone and that it would pass between the flood deltas of the Orango and Nunez, one of which, according to Guinea-Bissau, constitutes the prolongation of its territory, while the other constitutes the prolongation of Guinea's territory.

114. Bearing in mind its final objective of achieving an equitable result, the Tribunal can under no circumstances ignore the continental shelf, if only because of the potential wealth it would normally be expected to contain and which is essential for developing countries such as Guinea and Guinea-Bissau.

115. Article 76 of the Convention on the Law of the Sea of 10 December 1982 defines the continental shelf and specifies, in paragraph 1, that:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin . . ."

Other provisions in the same Article refer to the rule of natural prolongation of the land territory. The International Court of Justice had already emphasized, in its 1969 ruling in the North Sea Continental Shelf cases, that a delimitation made in accordance with equitable principles must, wherever possible, attribute to each Party "all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea." (ICJ Reports 1969, p. 53, paragraph 101.) However, the rule of natural prolongation is not the only one to be taken into account with regard to the 1982 Convention of the Law of the Sea because, under the terms of paragraph 1 of the same Article 76 of that Convention, "where the outer edge of the continental margin does not extend up to" 200 nautical miles, "the continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend

beyond its territorial sea" as far as that distance. This second rule for determining the continental shelf by reference to distance, without derogating from the rule of natural prolongation, reduces its scope by substituting it in certain circumstances specified in the above-mentioned paragraph of Article 76 of the 1982 Convention, and through the other provisions of that Article.

116. There are therefore two rules between which there is neither priority nor precedence. In any event, however, the rule of natural prolongation can be effectively invoked for purposes of delimitation only where there is a separation of continental shelves. In the present case, both Parties have been obliged to recognize that the continental shelf formed by the prolongation of their respective coasts is one and the same (see paragraph 19 above). This is the same shelf, with the same geological history and, generally speaking, with the same physical characteristics. It is an extension of all the territories of both States. It matters little how the structure was formed. What does matter is its present state and unity. None of the physical characteristics invoked by Guinea-Bissau, and which Guinea-Bissau itself has described as "secondary," appear to the Tribunal to be sufficiently important to be taken as constituting a separation of the natural prolongations of the two States concerned. The Court can merely repeat what was said by the Arbitration Court appointed to delimit the continental shelf between France and the United Kingdom, namely:

> ". . . the very fact that in international law the continental shelf is a juridical concept means that its scope and the conditions for its application are not determined exclusively by the physical facts of geography but also by legal rules." (Award of 30 June 1977, paragraph 191.)

117. In any event, the variations in the relief of the continental shelf in the present case and the variations in the nature of its terrain are not well enough known and above all not sufficiently characterized, to constitute valid separative factors, given the present state of research. The continental shelf opposite the two Guineas is one and the same. It must therefore be delimited as such. The characteristics of a continental shelf may serve to demonstrate the existence of a break in the continuity of the shelf or in the prolongation of territories of the States which are parties to a delimitation. However, if the continental shelf is assumed to be continuous, in the present state of international law no characteristic could validly be invoked to support an argument based on the rule of natural prolongation and designed to justify a delimitation establishing a natural separation.

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118. The proportionality between the surface areas of maritime zones to be attributed is another circumstance which the Tribunal has to examine. The Parties have argued this question from two aspects: proportionality in relation

to the land mass of each State and proportionality in relation to the length of their coastlines. As far as the Tribunal is concerned, proportionality must be considered in the assessment of factors which enter into the equation leading to an equitable result. Combined with all the other factors, it enables the States concerned to be dealt with on an equal footing. However, this does not concern mathematical equality, but rather legal equality.

119. As for proportionality with relation to the land mass of each State, the Tribunal considers that this does not constitute a relevant factor in this case. The rights which a State may claim to have over the sea are not related to the extent of the territory behind its coasts, but to the coasts themselves and to the manner in which they border this territory. A State with a fairly small land area may well be justified in claiming a much more extensive maritime territory than a larger country. Everything depends on their respective maritime facades and their formations.

120. The only relevant proportionality is that between the length of the coastline and the surface area of the zone to be attributed to each State. However, this circumstance must not be exaggerated. The delimitation, which the International Court of Justice said in the North Sea Continental Shelf cases (ICJ Reports 1969, p. 22, paragraph 20) must not be a mere apportionment, cannot be effected by simply dividing the maritime zones equally between the two States in proportion to the lengths of their coastlines. A delimitation is a legal operation. In order to effect a delimitation, it is certainly necessary to refer to circumstances which may have physical characteristics, but these circumstances must nevertheless be based on considerations of law. Furthermore, the rule of proportionality is not a mechanical rule based only on figures reflecting the length of the coastline. It must be used in a reasonable way, with due account being given to other circumstances in the case (see, in particular, North Sea Continental Shelf cases, ICJ Reports 1969, p. 54, paragraph 101; Tunisia/Libya case, ICJ Reports 1982, p. 93, paragraph 133). More precisely, in the present case, the fact of taking the islands into account results in the coastlines of the two States being considered by the Tribunal as having the same length. Where proportionality is concerned, therefore, neither of the two Parties can claim any additional advantage.

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121. The Parties have invoked economic circumstances, have qualified them in various ways and have based their respective arguments on examples relating for the most part to their economy, their lack of resources and their development plans. They have put forward arguments relating to maritime transport, fishing, petroleum resources, etc., and Guinea-Bissau has mentioned its particular interest in having future free access to the port of Buba by the Orango channel and the Rio Grande estuary.

122. The Tribunal has taken note that both Guinea and Guinea-Bissau are developing countries, both being confronted with considerable economic and financial difficulties which increased resources from the sea could help to attenuate. Both of them justly aspire to obtaining fair profits from this present or potential wealth for the benefit of their peoples. However, this Tribunal has not, any more than the International Court of Justice in the Tunisia/Libya case (ICJ Reports 1982, p. 77-78, paragraph 107), acquired the conviction that economic problems constitute permanent circumstances to be taken into account for purposes of delimitation. As the Tribunal can be concerned only with a contemporary evaluation, it would be neither just nor equitable to base a delimitation on the evaluation of data which changes in relation to factors that are sometimes uncertain.

123. Some States may have been treated by nature in a way that favors their boundaries or their economic development; others may be disadvantaged. The boundaries fixed by man must not be designed to increase the difficulties of States or to complicate their economic life. The fact is that the Tribunal does not have the power to compensate for the economic inequalities of the States concerned by modifying a delimitation which it considers is called for by objective and certain considerations. Neither can it take into consideration the fact that economic circumstances may lead to one of the Parties being favored to the detriment of the other where this delimitation is concerned. The Tribunal can nevertheless not completely lose sight of the legitimate claims by virtue of which economic circumstances are invoked, nor contest the right of the peoples concerned to a level of economic and social development which fully preserves their dignity. The Tribunal is of the opinion that the economic preoccupations so legitimately put forward by the Parties should quite naturally encourage them to consider mutually advantageous cooperation with a view to achieving their objective, which is the development of their countries.

124. To the economic circumstances, the Parties linked a circumstance concerned with security. This is not without interest, but it must be emphasized that neither the exclusive economic zone nor the continental shelf are zones of sovereignty. However, the implications that this circumstance might have had were avoided by the fact that, in its proposed solution, the Tribunal has taken care to ensure that each State controls the maritime territories situated opposite its coasts and in their vicinity. The Tribunal has constantly been guided by its concern to find an equitable solution. Its prime objective has been to avoid that either Party, for one reason or another, should see rights exercised opposite its coast or in the immediate vicinity thereof, which could prevent the exercise of its own right to development or compromise its security.

125. The examination which the Tribunal has just carried out has led it to conclude that none of the addi-

tional circumstances invoked by the Parties is such as to affect its decision concerning the delimitation line to be drawn between the maritime territories of the two States. Consequently, as no other circumstance appears to be relevant in the present case, the Tribunal upholds the line of delimitation set forth in paragraph 111 above.

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126. Under the provisions of Article 9, paragraph 2, of the Special Agreement of 18 February 1983 between Guinea and Guinea-Bissau, the present ruling "must include the drawing of the boundary line on a map." During the hearing, the Tribunal was informed that, in presenting their arguments, the Parties were unable to agree on a common map but had agreed to adopt the world geodesic ellipsoid WGS72 and the Mercator projection tangent to the equator, and to define any line by the relevant points expressed in geographical coordinates, the junction between these points being made by geodesic arcs. The Parties were later also unable to agree on what marine map to recommend to the Tribunal with a view to suitably indicating the requested line.

127. The Tribunal considered that this map should comprise the coastline of West Africa at least from Cape Roxo to Sallatouk Point and that it should extend sufficiently to the West to indicate the greater part of the maritime territory of the two States in the vicinity of the line of delimitation. The Tribunal noted that such considerations implied the choice of a fairly small-scale map and that it was desirable, in addition, that the drawing of the coastal area near the end of the land boundary should as far as possible take maximum account of the latest surveys. It was for this reason that it was decided to use chart No. 5979 of the French Navy's hydrographic service, this appearing to best satisfy the above-mentioned criteria. A copy bearing the line drawn by the Tribunal will be appended to each of the three originals of the present judgment and each printed copy will be accompanied by a scaled-down version.

128. Where drawing of the line on this chart is concerned, the Tribunal has chosen the loxodromic system inasmuch as a small part of the line concerned is a segment of parallel, and therefore a loxodromic curve, while the major parts concern a line perpendicular to a general direction which is defined by its orientation on a Mercator projection and is itself loxodromic. It will therefore be more logical to use loxodromic curves which, in regions close to the equator, show very little difference from geodesic arcs. Furthermore, the coordinates will be indicated using the world geodesic ellipsoid WGS72.

129. As the thalweg of the Cajet River may, in practice, be subject to movement over the years, the Tribunal has started the line of delimitation of the maritime territories from the intersection of this thalweg with an appro-

priate meridian, without indicating a more precise latitude. For this purpose, it has chosen the meridian of 15° 06' 30" west longitude. No final line has been drawn on the chart to define that part of the delimitation between the end of the land boundary and the point A defined in paragraph 130 (3) (b) below, but a fine line was drawn to indicate a potential line designed to illustrate the continuity of the line of delimitation at any time, without necessarily corresponding to the actual line over a given period.

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130. For these reasons,

THE TRIBUNAL

has unanimously

decided that:

1) the Convention of 12 May 1886 between France and Portugal did not determine a maritime boundary between the respective possessions of those two States in West Africa;

2) the protocols and documents annexed to the 1886 Convention have an important role to play in the legal interpretation of the said Convention;

3) the line delimiting the respective maritime territories of the Republic of Guinea-Bissau and the Republic of Guinea:

   a) starts from the intersection of the thalweg of the Cajet River and the meridian of 15° 06' 30" west longitude;

   b) joins by loxodromic segments the following points:

	LATITUDE NORTH	LONGITUDE WEST
A	10° 50' 00"	15° 09' 00"
B	10° 40' 00"	15° 20' 30"
C	10° 40' 00"	15° 34' 15"

   c) follows a loxodromic line on an azimuth of 236° from point C above to the outer limit of the maritime territories of each States as recognized under general international law.

DONE in French and Portuguese, with the French text being the only one valid in law, at the Peace Palace in the Hague on the fourteenth day of February in the year one thousand nine hundred and eight-five, in three original copies, one of which will be filed in the archives of the Tribunal, the others being transmitted to the Government of the Republic of Guinea and the Government of the Republic of Guinea-Bissau respectively .

(Signed) M. LACHS
President

(Signed) K. MBAYE
Member

(Signed) M. BEDJAOUI
Member

(Signed) PILLEPICH
Registrar

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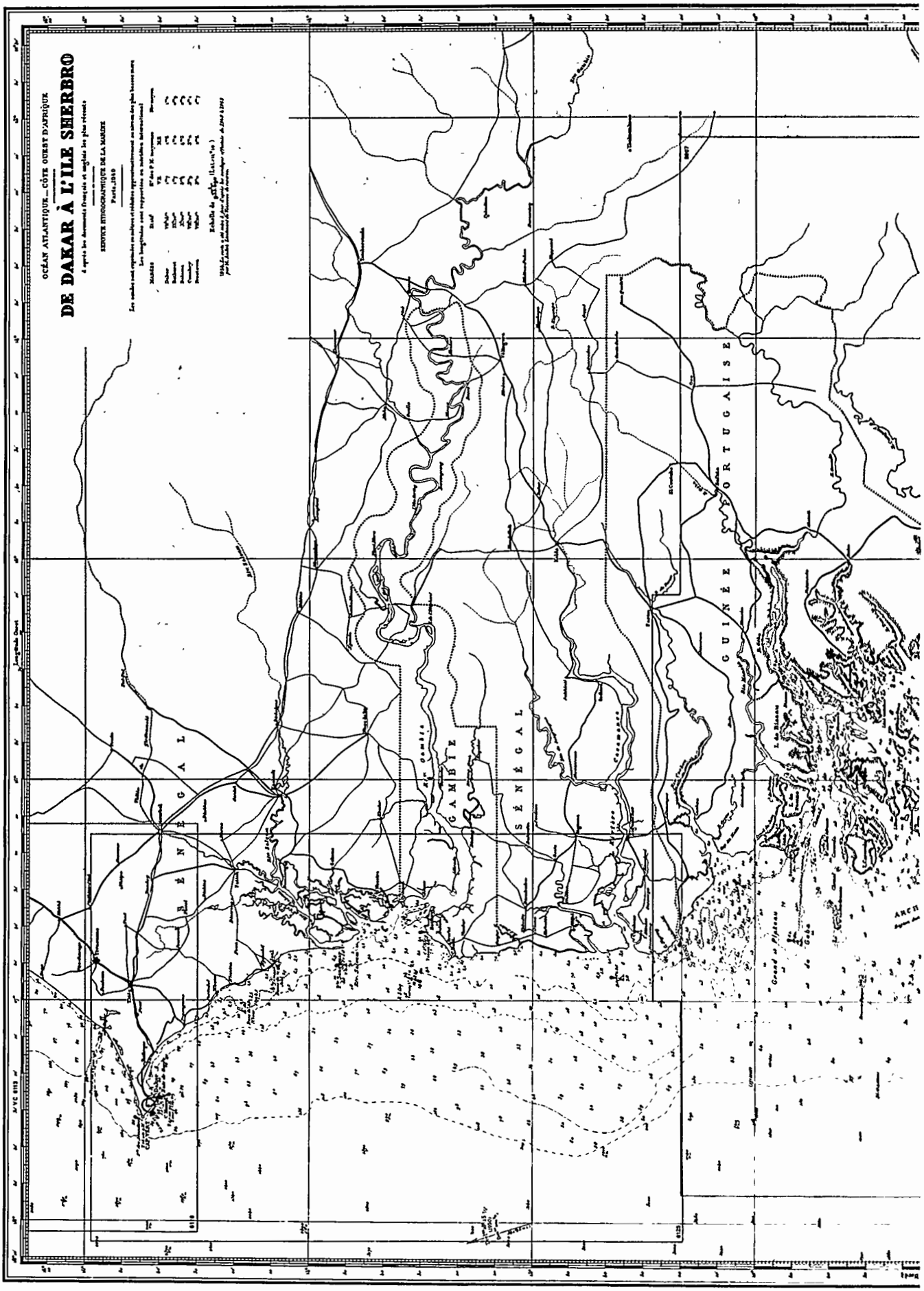
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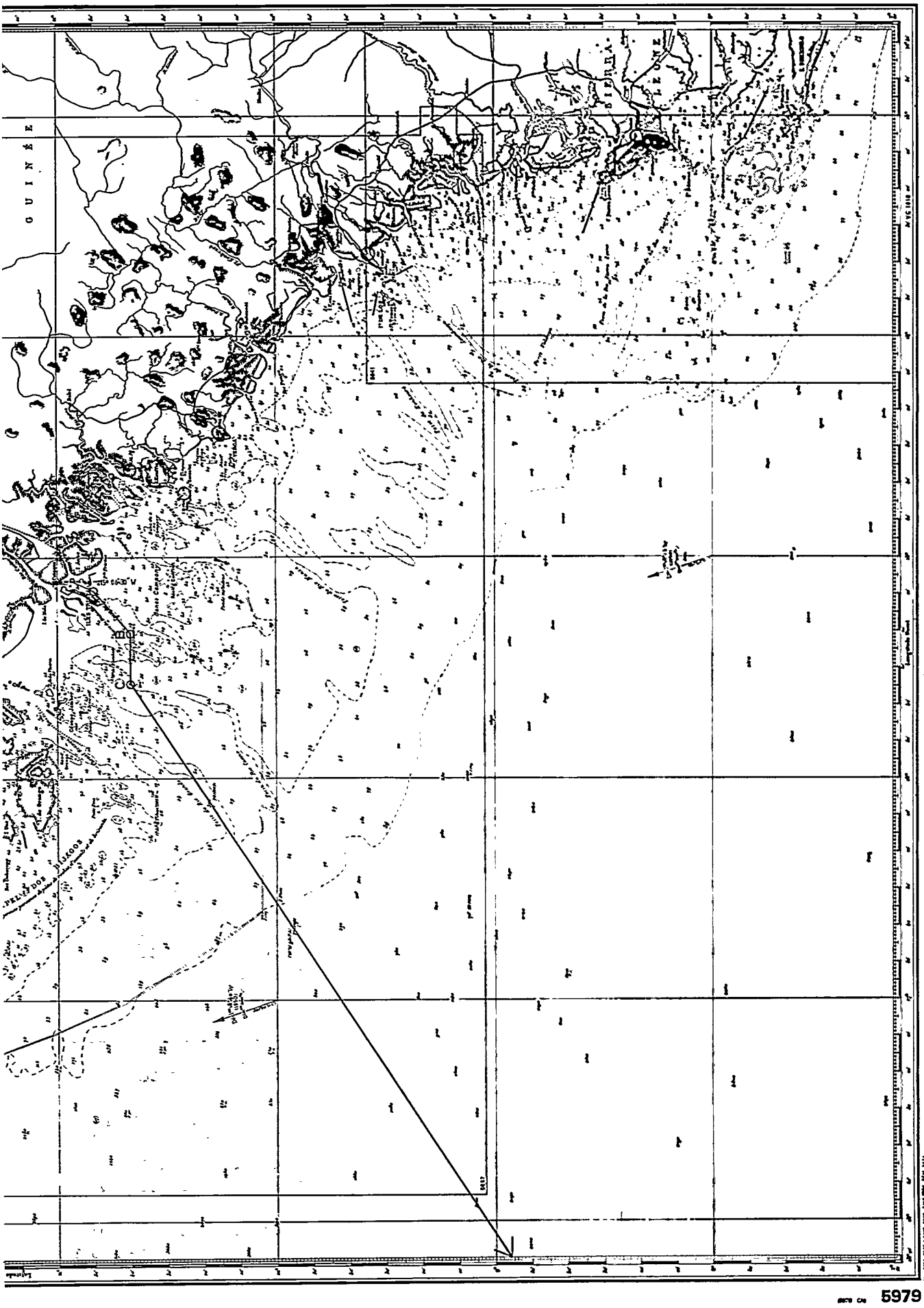
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Case Concerning Delimitation of Maritime Areas between Canada and France (St Pierre et Miquelon), Decision, 10 June 1992, reprinted in 31 ILM 1149.

COURT OF ARBITRATION
FOR THE DELIMITATION
OF MARITIME AREAS
BETWEEN CANADA AND FRANCE

CASE CONCERNING DE DELIMITATION OF MARITIME AREAS BETWEEN CANADA AND THE FRENCH REPUBLIC

D E C I S I O N

President: Mr. Eduardo Jiménez de Aréchaga;

Members of the Court: Mr. Oscar Schachter, Mr. Gaetano Arangio-Ruiz, Mr. Prosper Weil, Mr. Allan E. Gotlieb;

Registrar: Mr. Felipe H. Paolillo;

Expert: Cdr. P.B. Beazley.

In the case concerning the delimitation of maritime areas between

Canada

represented by

The Honourable Kim Campbell, P.C., Q.C., M.P., Minister of Justice and Attorney-General of Canada,

Ambassador François A. Mathys, Department of External Affairs and International Trade,
as Agent and Counsel;

Mr. Howard Strauss, Department of External Affairs and International Trade,
as Deputy Agent and Counsel;

Mr. L. Allan Willis, Q.C., Department of Justice,
as Senior Counsel and Legal Advisor;

Mr. Ian Binnie, Q.C., Member of the Ontario Bar; McCarthy Tétrault, Toronto,
Professor Derek W. Bowett, Q.C., Whewell Professor of International Law, Queen's College, Cambridge,
Professor Luigi Condorelli, Director, Public International Law, Faculty of Law, University of Geneva,
Mr. L. Yves Fortier, O.C., Q.C., Ambassador and Permanent Representative of Canada to the United Nations,
Mr. Ross Hornby, Department of Justice,
Ms. Valerie Hughes, Department of Justice,
Professor Gunther Jaenicke, Professor, University of Frankfurt am Main,

Mr. Leonard Legault, O.C., Q.C., Senior Assistant Deputy Minister, Department of External Affairs and International Trade,
Mr. Donald McRae, Dean of Common Law, University of Ottawa,
Mr. Malcolm Rowe, Member of Ontario and Newfoundland Bars; Gowling, Strathy & Henderson, Ottawa
Ms. Jan Schneider, Member of the New York and of District of Columbia Bars; Perley, Robertson, Panet, Hill & McDougall, Washington and Ottawa

as Counsel;

Mr. Denis Bilodeau, Department of Justice,
Mr. Charles V. Cole, Member of the Ontario and New Brunswick Bars,

as Legal Advisors;

Mr. John Cooper, Consultant in Maritime Boundary Delimitation, Ottawa;
Mr. Ron Gélinas, Department of Environment;
Mr. David Gray, Survey Engineer, Canadian Hydrographic Service, Department of Fisheries and Oceans;

as Experts;

Mrs. Louise Côté, Department of Fisheries and Oceans,
Dr. Michael Shepard, Fisheries Consultant, Victoria,
Mr. Edward J. Sandeman, Fisheries Consultant, St. John's

as Scientific and Technical Advisors;

Ms. Anne Brennan, Department of External Affairs and International Trade;

as Administrative Officer;

Ms. Barbara Knight, Assistant Secretary to Cabinet for Intergovernmental Affairs, Government of Newfoundland and Labrador;
Mr. Les Dean, Assistant Deputy Minister, Department of Fisheries, Government of Newfoundland and Labrador,
Mr. François Mondo, Economist, Department of Fisheries and Agriculture, Government of New Brunswick;
Mr. Arthur Longard, Director of Marine Resources, Department of Fisheries, Government of Nova Scotia;
Mr. Pierre Vagneaux, Counsellor, Department of Agriculture, Fisheries and Food, Government of Quebec;

as Advisors;

and

the French Republic

represented by

M. Henri Nallet, Minister of Justice,
M. Alain Vivien, Secrétaire d'Etat to the Minister of Foreign Affairs,

M. Jean-Pierre Puissochet, Conseiller d'Etat, Director of Legal Affairs, Ministry of Foreign Affairs,

as Agent and Counsel,

M. Marc Plantagenest, President of the conseil général of Saint-Pierre and Miquelon,
M. Kamel Khrissate, Prefet of Saint-Pierre and Miquelon,
as Special Advisors;

M. Vincent Coussirat-Coustere, Professor of International Law at the University René Descartes, Paris V,
M. Pierre-Michel Eisemann, Professor of International Law at the University of Paris XIII,
M. Laurent Lucchini, Professor of International Law at the University of Paris I,
M. Jean-Pierre Queneudec, Professor of international law at the University of Paris I,
M. Tullio Treves, Professor of international law at the University of Milan,
as Counsel and Lawyers;

M. François Alabrune, Secretary, Department of Legal Affairs, Ministry of Foreign Affairs,
Mrs, Jutta Bertram-Nothnagel, Research assistant, New York University School of Law,
M. Bernard Dejean de la Bâtie, Diplomatic advisor of the Government, Ministry of Foreign Affairs,
M. Guirec Doniol, Admiral, (F.N.) Defence Adviser of the Government, Ministry of Defence.
M. Terry Olson, Lieutenant-Commander (F.N.), Department of Legal Affairs, Ministry of Foreign Affairs,
M. André Roubertou, Vice-Admiral (F.N.) (Ret), Hydrographic engineer,
M. Eric Van Lauwe, Geographical Engineer, Geographical Division, Ministry of Foreign Affairs.
M. François Vervel, Administrateur civil, Ministry of Overseas Departments and Territories,
as Advisers and Experts;

Mlle Isabelle Besson,
Mme Christine Durand,
Mlle Christelle Goujat,
as Assistants;

the Court, composed as above, makes the following decision:

1. On 30 March 1989, following a series of contacts and negotiations, the Government of Canada and the Government of France signed an agreement (hereinafter called "the 1989 Agreement") by which a Court of Arbitration was establish to carry out the delimitation as between the two countries of the maritime areas appertaining to France and of those appertaining to Canada. The text of the Agreement reads as follows:

"AGREEMENT ESTABLISHING A COURT OF ARBITRATION FOR THE PURPOSE OF CARRYING OUT THE DELIMITATION OF MARITIME AREAS BETWEEN FRANCE AND CANADA

The Government of Canada and the Government of the Republic of France (hereinafter "The Parties");
Considering that by an Agreement signed in Ottawa on March 27, 1972 the Parties partially delimited the maritime areas

appertaining respectively to Canada and France;
Considering that, in view of the differences between them, the Parties have been unable to complete the delimitation;
Considering that the Parties have expressed a common desire to resolve the dispute arising from these differences by submitting it to third-party binding arbitration;
Have agreed as follows:
Article 1
1. A court of Arbitration (hereinafter "the Court"), is hereby established, consisting of five members, namely:
Mr. Prosper WEIL, appointed by the French Government,
Mr. Allan E. GOTLIEB, appointed by the Canadian Government,
Mr. Gaetano ARANGIO-RUIZ
Mr. Eduardo JIMENEZ DE ARECHAGA,
Mr. Oscar SCHACHTER.
The President of the Court shall be Mr. Eduardo JIMENEZ DE ARECHAGA.
2. If a member of the Court appointed by one of the Parties is unable to act, that Party shall name a replacement within a period of one month from the date on which the Court declares the existence of the vacancy.
3. (a) If another member of the Court is unable to act, the Parties shall agree on a replacement within a period of two months from the date on which the Court declares the existence of the vacancy.
(b) In the absence of an agreement within the period mentioned in paragraph (a) the Parties shall have recourse to the good offices of the President of the Court or, if the office of the President is vacant, the Secretary General of the United Nations.
Article 2
1. Ruling in accordance with the principles and rules of international law applicable in the matter, the Court is requested to carry out the delimitation as between the Parties of the maritime areas appertaining to France and of those appertaining to Canada. This delimitation shall be effected from point 1 and from point 9 of the delimitation referred to in Article 8 of the Agreement of March 27, 1972 and described in the Annex thereto. The Court shall establish a single delimitation which shall govern all rights and jurisdiction which the Parties may exercise under international law in these maritime areas.
2. The Court shall describe the course of this delimitation in a technically precise manner. To this end, the geometric nature of all the elements of the delimitation shall be indicated and the position of all the points mentioned shall be given by reference to their geographical coordinates in the North America Datum 1927 (NAD 27) geodesic system.
The Court shall also indicate for illustrative purposes only the course of delimitation on an appropriate chart.
3. After consultation with the Parties, the Court shall designate a technical expert to assist it in carrying out the duties specified in paragraph 2 above.
Article 3
1. The Court may perform its functions only when all members are present.
2. All members of the Court shall be deemed to be present notwithstanding the existence of a vacancy in the following cases: a) where the only matter for consideration is the

declaration of a vacancy for the purposes of Article 1, or b) where either Party has neglected to fill a vacancy as provided by paragraph 2 of Article 1.
3. Subject to paragraph 4 of this Article, the decisions of the Court shall be made by a majority of its members.
4. In the case of an even division of the votes in the circumstances referred to in paragraph 2 of this Article, the vote of the President shall be decisive.
5. Subject to the provisions of this Agreement, the Court shall decide on its procedures and on all questions respecting the conduct of the arbitration.
Article 4
1. Each Party shall designate an Agent for the purposes of the arbitration within thirty days of the signature of this Agreement and shall communicate the name and address of its Agent to the other Party and to the Court.
2. Each Agent so designated shall be entitled to name a Deputy to act for him where necessary. The name and the address of the Deputy so named shall be communicated to the other Party and to the Court.
Article 5
1. The Court shall sit in New York City.
2. After it has been constituted and after consultation with the Agents, the Court shall appoint a Registrar.
3. The Court may hire staff and procure whatever services and equipment it deems necessary.
Article 6
1. The proceeding shall include a written phase and an oral phase.
2. The written pleadings shall consist of:
(a) a memorial to be submitted by each Party to the Court and to the other Party not later than June 1, 1990;
(b) a counter-memorial to be submitted by each Party to the Court and to the other Party not later than eight months after the submission of memorials;
(c) any further pleading that the Court deems necessary.
The Court shall be empowered to extend the time periods so established at the request of either Party.
3. The Registrar shall provide the Parties with an address for the filing of their written pleadings and of any other documents.
4. The oral phase shall follow the written phase and shall be held in New York City, at the place and on the dates determined by the Court after consultation with the two Agents.
5. Each Party shall be represented in the oral phase of the proceedings by its Agents or, where appropriate, its Deputy Agent, and by such counsel, advisers and experts as it may designate.
Article 7
1. The written and oral pleadings before the Court shall be in French or in English. Decisions of the Court shall be in both these languages. Verbatim records of the hearings shall be produced daily in the language used in each statement.
2. The Court shall provide translations and interpretation services and shall keep a verbatim record of all the hearings in French and in English.

3. The written pleadings may not be made public until the oral proceedings have commenced. Each Party shall communicate to the public only its own written pleadings.
4. Members of the public shall be admitted to the oral proceedings on invitation by either Party.
5. Each Party may make public the verbatim records of its oral pleadings.
6. Each Party shall inform the other Party prior to introducing into evidence or argument any diplomatic or other confidential correspondence between Canada and France. Unless the Parties agree, neither Party shall invoke in support of its own position or to the detriment of the position of the other Party:
(a) the interim arrangements concerning fishing to be applied pending the award of the Court;
(b) proposals or counter-proposals made with a view to concluding this Agreement or the interim arrangements described in sup-paragraph (a).
7. Unless the Parties agree, neither Party shall introduce into evidence or argument, or publicly disclose in any manner, the nature or content of proposals directed to a settlement of the delimitation issue referred to in Article 2 or responses thereto,in the course of negotiations or discussions between the Parties undertaken since January, 1979.

Article 8

1. The remuneration of the members of the Court and of the Registrar shall be shared equally by the Parties.
2. The general arbitration expenses shall be shared equally by the Parties. The Registrar shall record these expenses in detail and render a final account of them.
3. Each Party shall pay all the expenses incurred by it in the preparation and conduct of its case.

Article 9

1. The Court's decision shall be fully reasoned. Each member shall be entitled to attach an individual or dissenting opinion.
2. The Court shall inform the Parties of its decision as soon as practicable.
3. Each Party may make public the text of the award or of any individual or dissenting opinion.

Article 10

1. The decision of the Court shall be final and binding.
2. Each Party may refer to the Court any dispute with the other Party as to the meaning and scope of the decision within three months of its notification.
3. The Court is empowered to correct any material error relating to its decision at the request of either Party, within three months of notification.

Article 11

This agreement shall come into force on the date of its signature.

IN WITNESS WHEREOF, the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

DONE :

At Toronto, on the thirtieth day of March 1989

AND

At Paris, on the thirtieth day of March 1989
In duplicate, in the English and French languages, both texts being equally authentic."

2. In accordance with article 4 of the 1989 Agreement, the Government of Canada appointed Mr. François A. Mathys as its Agent, and the Government of the French Republic appointed Mr. Jean-Pierre Puissochet as its Agent.

3. The first meeting of the members of the Court with the Agents of the Parties took place on Santiago de Compostela on 7 September 1989. At this meeting, and in accordance with article 5, para 2 of the 1989 Agreement, the Court, in consultation with the Agents, appointed Mr. Felipe H. Paolillo as Registrar. The Court also decided to appoint Cdr. P. B. Beazley as Expert.

4. Article 6 of the 1989 Agreement stipulates that the proceedings shall include a written phase and an oral phase (para. 1) and that the written pleadings shall consist of a memorial to be submitted by each Party to the Court and to the other Party no later than June 1, 1990, and a counter-memorial to be submitted by each Party to the Court and to the other Party no later than eight months after the submission of memorials (para. 2). Accordingly, on June 1, 1990, both Parties deposited with the Registrar their respective memorials, and on February 1, 1990, they deposited their counter-memorials.

5. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Canada, in the Memorial and in the Counter-Memorial:

"In view of the facts and arguments set out in this Memorial, may it please the Court to declare and adjudge that:
The delimitation of the maritime areas referred to in the Arbitration Agreement concluded between Canada and the Republic of France on 30 March 1989, is defined in the following manner:
from point 1 of the delimitation referred to in Article 8 of the Agreement of 27 March 1972, and described in its Annex, the delimitation is made southward and westward by arcs of circles circumscribed about points located on the low-water line of the coasts of the islands of St-Pierre and Miquelon, so that each such arc has a radius of 12 nautical miles, and terminates at the intersection with an immediately adjoining arc to latitude 47°14'30" N, and longitude 56°37'53" W; from thence by a rhumb line to point 9 of the delimitation referred to in the Agreement of 1972."

On behalf of the French Republic, in the Memorial and in the Counter-Memorial:

"For all the reasons given in this statement, the Government of the French Republic has the honour of requesting the Court of Arbitration to state and judge:
The delimitation of the maritime areas appertaining to France and of those appertaining to Canada, under article

2 of the compromise of 30 March 1989, is effected as follows (illustrated by map no. 16):
1) Starting from point 9 of the delimitation referred to in article 9 of the agreement of 27 March 1972, the separating line shall be constituted, at the west and southwest of Saint Pierre and Miquelon, by the median line traced by taking as base points the following points:
* on the French coasts:
- on Grande Miquelon: Cape Nid'Aigle, Grand Bec, Nid aux Hirondelles, the Veaux Marins shallows, situated at about five nautical miles west of Miquelon;
- on Petite Miquelon (Langlade): Point Plate, Cape Bleu, Pointe de l'Ouest (Cap Coupé);
- on Saint Pierre Island: Pointe du Diamant;
*on the Canadian coasts:
- on the Newfoundland coast: Pass Island, Watch Rock (about 8 miles south of Cap la Hune), Lord Island (Penguin Islands), Colombier Island (Penguin Islands), Ramea Southeast Rocks, Ramea Island;
- on the Cape Breton coast: Scatarie Island;
- on Sable Island: eastern tip of the island;

2) Starting from point 1 of the delimitation referred to in article 8 of the agreement of 27 March 1972, the separating line shall be constituted, to the east and southeast of Saint Pierre and Miquelon, by an equidistant line determined, from the French coast, by three base points situated on the islet of Enfant Perdu (F1), Cap Noir (F2) and Pointe Blanche (F3) on Saint Pierre Island; and from the Canadian coast, by two base points situated on Lamaline Shag Rock (C3) and Point-aux-Gauls (C2) on the Burin Peninsula. This line shall go up to point C (-55°44'55"7, 46°16'44"1). Beyond this point the separating line will follow azimuth 164°16'15";
3) These lines shall be prolonged throughout the entire length of the maritime areas to which both parties may lay their claims."

6. The pleadings in the case having been filed within the time-limits prescribed in the Agreement, the case was ready for hearing. The hearings took place in New York, (article 6, para. 4 of the Agreement), at the headquarters of the Association of the Bar of the City of New York, from July 29 to August 23, 1991. During the hearings, the Court heard the counsel of the Parties in the order agreed between them, Canada being the first Party to plead. The following counsels and advisors submitted oral arguments and provided expert advice on behalf of the Parties: The Honourable Kim Campbell, Mr. François Mathys, Mr. Donald Mc Rae, Mr. Ian Binnie, Mr. Yves Fortier, Mr. Luigi Condorelli, Mr. Leonard Legault, Mr. L. Allan Willis, and Mr. Derek Bowett on behalf of the Government of Canada; Mr. Henri Nallet, Mr. Jean-Pierre Puissochet, Mr. Jean-Pierre Quenedeuc, Mr. Pierre-Michel Eisemann, Mr. Tullio Treves, and Mr. Laurent Lucchini, on behalf of the Government of the French Republic.

7. In the course of the oral proceedings, the Parties presented the final submissions which were identical with those set out in the Memorials and Counter-Memorials.

8. The history of the dispute can be traced back to 1966, when the two Governments exchanged notes verbales and aide-mémoires stating their positions with respect to the delimitation of the continental shelf off Canada and the French islands of St. Pierre and Miquelon. This exchange of views was prompted by the issuing of hydrocarbon exploration permits in the area by authorities of the two Parties. Since this early stage the Parties adopted opposite positions as to the criteria that should regulate the establishment of the demarcation line between off-shore areas of Canadian and French jurisdiction: While for France the delimitation of the continental shelf should be based on the principle of equidistance, Canada maintained that the "special circumstances" rule was applicable to the area. Both Parties had ratified the 1958 Convention on the Continental Shelf, but France made several reservations among which those made to article 6 on delimitation of the continental shelf were not accepted by Canada.

9. In January 1967 the Parties engaged in negotiations during which they reiterated their initial positions. In the course of those negotiations concrete compromise proposals were made by each of the Parties, neither of which were acceptable to the other. After a second meeting of the Parties in August 1967, negotiations were interrupted. Attempts to resume negotiations in 1970 failed. That same year Canada extended its territorial sea to 12 nautical miles. France did the same the following year.

10. Another round of negotiations was held in May 1972. From these negotiations a text emerged, the "Relevé de Conclusions", that the negotiators agreed to submit to their respective Governments for approval. The "Relevé de Conclusions" does not contain any concrete proposal for the delimitation of the continental shelf; it states instead the acceptance, by France, of the concept of a reduced continental shelf "propre aux îles Saint-Pierre-et-Miquelon" (paragraph I), and the concession, by Canada, of certain economic advantages related to the exploration and exploitation of hydrocarbons in the continental shelf of the region. The "Relevé de Conclusions" was never approved.

11. By that time, Canada and France had been more successful in negotiations relating to fisheries. The Parties have referred extensively in their written pleadings as well as in the course of the oral proceedings to the importance of the fisheries of the region for the population living on Canada's Atlantic coast, in particular those on the South coast of Newfoundland, and on the islands of St. Pierre and Miquelon. France had traditionally fished in Canadian waters in the Gulf of St. Lawrence and in designated areas along the Canadian coasts. On 27 March 1972 French rights to fisheries in the region were redefined when the parties signed the "Agreement between Canada and France on their Mutual Fishing Relations". This Agreement provides *inter alia* for access for French vessels to any extended area of Canadian jurisdiction, including the establishment of quotas, (article 2) and a 15-year phase-out of French metropolitan fishing vessels from the Gulf of St. Lawrence (article 3).

12. With respect to fishermen from Saint-Pierre and Miquelon, article 4 of this Agreement says:

> "In view of the special situation of Saint-Pierre and Miquelon and as an arrangement between neighbours:

(a) French coastal fishing boats registered in Saint-Pierre and Miquelon may continue to fish in the areas where they have traditionally fished along the coasts of Newfoundland, and Newfoundland coastal fishing boats shall enjoy the same right along the coasts of Saint-Pierre and Miquelon;
(b) A maximum of ten French trawlers registered in Saint-Pierre and Miquelon, of a maximum length of 50 metres, may continue to fish along the coasts of Newfoundland, of Nova Scotia (with the exception of the Bay of Fundy), and in the Canadian fishing zone within the Gulf of St. Lawrence, on an equal footing with Canadian trawlers; Canadian trawlers registered in the ports on the Atlantic coast of Canada may continue to fish along the coasts of Saint-Pierre and Miquelon on an equal footing with French trawlers."

13. Although the Agreement deals mainly with fisheries matters, it is particularly relevant to this dispute because article 8 determines the line that constitutes the limit "of the territorial waters of Canada and of the zones submitted to the fishery jurisdiction of France" in the area between Newfoundland and the islands of Saint Pierre and Miquelon. In accordance with article 2, paragraph 1 of the 1989 Agreement, the outer points of that line are the points from which this Court has to effect the delimitation between the maritime areas of the two Parties.

14. In 1977 Canada and France extended their maritime jurisdictions up to 200 nautical miles from their respective coasts. Canada declared the 200-mile zone extending along its coasts as an exclusive fishing zone on January of that year; the following month France declared the zone extending 188 miles beyond the territorial waters of Saint Pierre and Miquelon to be an economic zone under its jurisdiction. These developments accentuated the seriousness of the dispute over the maritime jurisdiction of the two States and made more urgent the need for its settlement.

15. New negotiations on the delimitation of the areas under national jurisdiction of the two countries took place during 1978 and 1979. Both Parties insisted on their original positions, adjusted in the light of the new situation resulting from developments taking place at the Third United Nations Conference on the Law of the Sea and from the extension by both States of their maritime jurisdictions: According to Canada, France was only entitled to a 12-mile territorial sea off the coasts of St. Pierre and Miquelon; France claimed the right to an exclusive economic zone up to 200 nautical miles, the outer limits of which should be determined on the basis of the equidistance rule. In 1979 negotiations were interrupted and resumed in 1981. Several meetings were held between the parties from 1981 to 1985 with no result.

16. The Governments of the two countries had signed on 3 October 1980 a document reflecting an agreement on the annual catch French ships were permitted to capture in Canadian waters during the period 1981-1986, in application of articles 3 and 4 of the Agreement of 27 March 1972. But in the mid-1980s differences relating to the application of fisheries agreements and regulations arose between the two parties. Canada accused France

of fishing in excess of the allowed quotas, thus threatening the viability of the fisheries resources of the area; France accused Canada of applying management practices the real purposes of which were to deprive it of its fisheries rights in the area.

17. In January 1987 the Parties agreed to negotiate an arbitration agreement for the establishment of a third-party settlement procedure to which the maritime boundary dispute would be submitted, as well as a fisheries agreement to be applied during the duration of the proceedings. The Parties also undertook to continue negotiations with a view to setting fishing quotas. But negotiations that would lead to the establishment of quotas for 1988 were broken off. It was not until 30 March 1989 that Canada and France, with the assistance of a mediator, Mr. Enrique Iglesias, signed an agreement establishing quotas for French fishermen in Canadian waters for the period 1989 to 1991; this period could be extended to 1992 in case the dispute on the maritime delimitation had not been solved by 1991. On the same date another agreement was signed by the Parties establishing this Court of Arbitration to proceed with the delimitation of the maritime areas between the two countries.

I. GEOGRAPHICAL DESCRIPTION OF THE AREA

18. The area within which the delimitation is to take place lies south of the Canadian island of Newfoundland, and east of the Canadian island of Cape Breton and the coast of mainland Nova Scotia. The coasts are indented by numerous bays and have many small islands and islets lying off them. To the east and south the area is open to the Atlantic Ocean.

19. The south coast of Newfoundland lies between Cape Race, at the eastern end, and Cape Ray about 260 nautical miles westward. From Cape Race the general direction of the coast is westerly for about 120 nautical miles to the southwestern end of the Burin Peninsula where the general direction turns abruptly north for nearly forty nautical miles, crossing the entrance to Fortune Bay, before turning west again towards Cape Ray. Placentia Bay, 48 nautical miles wide at its entrance and penetrating 60 nautical miles inland, has its eastern entrance 45 nautical miles west of Cape Race. Its western shore is the Burin Peninsula. Fortune Bay, north of the peninsula, is a further deep indentation about 30 nautical miles wide at its entrance and 60 nautical miles in length.

20. The north-eastern point of Cape Breton Island lies approximately 60 nautical miles southwest of Cape Ray, from which it is separated by Cabot Strait which gives access to the Gulf of St. Lawrence. The east coast of the island stretches in a direction slightly east of south for 67 nautical miles to Scatarie Island lying a mile offshore. There it turns to a southwesterly direction for a further 70 nautical miles, after which the east coast of mainland Nova Scotia continues in the same direction.

21. Sable Island is an isolated sandy island oriented in an east-west direction, 22 nautical miles long and less than a mile wide, situated 120 nautical miles south of Scatarie Island, and about 88 nautical miles from mainland Nova Scotia. It has an area of 33 square kilometres.

22. The coasts of Newfoundland and Cape Breton Island from the Burin Peninsula to Scatarie Island, together with the opening to the Gulf of St. Lawrence, form a marked concavity. The French territory of Saint Pierre and Miquelon lies within this concavity, opposite the mouth of Fortune Bay and west and southwest of the Burin Peninsula. It has an area of 237 square kilometres and consists of two main islands, Miquelon and Saint Pierre, several smaller islands and islets and many drying rocks. Miquelon, which has a north-south axis and an area of 210 square kilometres, is about 27 nautical miles south of the mainland of Newfoundland. It consists of two parts: Grande Miquelon to the north and Langlade to the south, the two being joined by a narrow above-water sand bank or tombolo. The whole island is 21.6 nautical miles in length from north to south, and is about 7 nautical miles east to west at its widest part (Langlade). The island of Saint Pierre is situated 3 nautical miles south-west of Langlade and almost 10 nautical miles southwest of the Burin Peninsula. It is oriented northeast-southwest and has an area of 27 square kilometres and a length of 4.4 nautical miles.

23. The continental shelf in the area is agreed to be a geological continuum. The 200 metre isobath is generally about 120 nautical miles off the coasts described, except where it borders the Laurentian Channel, a wide glacial valley about 50 nautical miles in width with an average depth of 400 metres, which runs in a southeast direction from Cabot Strait. This channel is a secondary feature which does not interrupt the continuity of the shelf. Further east and southeast of Newfoundland, the 200 metre isobath extends to a distance of nearly 250 nautical miles from the coast. East of the Laurentian Channel the continental shelf is marked by further secondary features in the form of a series of plateaux or banks collectively known as the Grand Banks of Newfoundland. The easternmost and largest of these is the Grand Bank. West of it lie the smaller Whale, Green, St. Pierre and Burgeo Banks. The continental slope begins at about the 200 metre depth. The continental margin off Newfoundland generally extends beyond 200 nautical miles from the coasts.

II. THE RELEVANCE OF GEOGRAPHICAL FACTORS

24. 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" (ICJ Reports, 1984 para. 59). In the Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (the Anglo-French Continental Shelf case), the Court declared that "it is the geographical circumstances which primarily determine the appropriateness of equidistance or any other method of delimitation in any given case" (UNRIAA, vol. XVIII, pages 56-57, para. 96). However, geographical facts do not, in themselves, determine the line to be drawn. Rules of international law, as well as equitable principles, must be applied to determine the relevance and weight of the geographical features.

25. The delimitation process begins, as a rule, by identifying what the International Court of Justice has called "the geographical context of the dispute before the Court, that is to say the general area in which" the "delimitation which is the subject of the proceedings, has to be effected" (Continental Shelf (Tunisia-Libya) Case, Judgment, 1982 para. 17).

26. In the present case both Parties have identified as the relevant area ("la région concernée") the geographical concavity formed by Newfoundland and Nova Scotia which Canada has termed the "Gulf Approaches" and France has described as "l'antichambre du Golfe". The French islands of Saint-Pierre-et-Miquelon are within a concavity framed exclusively by Canadian coasts.

27. The Parties differ, however, in their identification of the coasts that should be considered as fronting on the area of dispute. Canada submits that the relevant Canadian coasts extend from Cape Race to Cape Canso, thus including (1) the entire southern coast of Newfoundland from Cape Race to Cape Ray; (2) a closing line across the Cabot Strait and (3) the eastern coasts of Cape Breton Island from Money Point (close east of Cape North) to Scatarie Island and from there to Cape Canso at the north eastern end of the mainland of Nova Scotia.

28. France would exclude significant segments of the southern coast of Newfoundland, such as the coast between Ramea Island and Cape Ray and the eastern and southern facade of the Burin Peninsula across Placentia Bay. Moreover, it would not consider the closing line across Cabot Strait as "coast". It would also exclude segments of the coast of Nova Scotia between Cape North and Low Point in Cape Breton Island and part of the line between Scatarie Island and Cape Canso. In support of these exclusions France has adduced that only those coasts that are in relation to one another and that generate projections which meet and overlap should be considered.

29. But the coastlines that France wants to exclude form the concavity of the Gulf approaches and all of them face the area where the delimitation is required, generating projections that meet and overlap, either laterally or in opposition. The closing line across the Cabot Strait represents coastlines inside the Gulf which are in direct opposition to Saint Pierre and Miquelon and are less than 400 nautical miles away. For similar reasons, the indentation of Placentia Bay cannot be ignored either.

30. On the other hand, the French argument justifiably excludes the Canadian line across Fortune Bay and opposite the north and east coast of Miquelon and Saint Pierre as far as the longitude of Point 9 of the 1972 Agreement. The north and east coasts of Miquelon and Saint Pierre do not face on to the area in dispute, and thus were correctly left out of account in the estimate made in the Canadian Memorial of the total length of coasts of the French islands. However, a similar treatment should apply to the opposite Canadian coast lying behind the French islands. Although this segment of coast was taken into account in the 1972 agreement for an uninterrupted and continuous line of delimitation between the islands and the mainland, it should be omitted from the calculation of the length of coast fronting on the area of this dispute.

31. At the same time it is necessary to recognize that Saint Pierre and Miquelon face both westwards and southwards on to the area of dispute. This reality cannot be represented by a single north-south oriented line as proposed by Canada. Instead, it may be better represented by two segments: one from Cap du Nid à l'Aigle to Pointe du Ouest of 21.6 nautical miles, and the other from Pointe du Ouest to Cap Noir on Tête de Galantry of 8.25 nautical miles. The Court notes that although there is no difference between the distances, the method used to arrive at them differs from that described at footnote 28 of the Canadian Memorial.

32. France considered as a relevant Canadian coast a line from Scatarie Island to the tip of Sable Island, lying 211 nautical miles to the southeast. A glance at the map shows "ictu-oculi" that this island lies outside the geographical configuration that forms the Gulf Approaches. The French Memorial has recognized that Sable Island is "située en avance notable et isolée de toutes les autres côtes au sud-ouest de la région où doit se faire la délimitation" (French Memorial, para. 293).

33. Both Parties admit that there is a marked disparity in the length of the relevant coasts. Measured by segments, according to their lines of general direction, the respective coastlines defined above have the following lengths:

Canada 455.6 nautical miles
France 29.85 nautical miles

The ratio between the Canadian coastline and the French coastline is, then, 15.3 to 1 and not 21 to 1 as it is said in the Canadian Memorial (para. 44).

34. Another important geographical feature concerning the coasts of the Parties is the relationship of these coasts to each other. The Canadian position is that the close contiguity of the coasts of the French islands to the South coast of Newfoundland signifies that the relationship between them is one of adjacency. The French position is that towards the west, the islands are opposite to the Canadian coasts that lie on the other side of the Laurentian Channel and that, in particular, they are in a relation of oppositeness to the Cape Breton Island. Towards the south and the southeast, France accepts that the relationship with the Burin and Avalon Peninsula is "plutôt latérale".

35. It is the view of this Court that Saint Pierre and Miquelon are laterally aligned with the south coast of Newfoundland, so that the prevailing and overall relationship is one of adjacency. Historical evidence also confirms that the French islands have long been considered adjacent to Newfoundland. Article XIII of the 1713 Treaty of Utrecht implicitly included Saint Pierre and Miquelon in the clause assigning to Great Britain "the island called Newfoundland with the adjacent islands". The retrocession to France in the Treaty of Versailles of 1783 maintained Great Britain's rights with respect to the Island of Newfoundland and the adjacent islands, "excepting the islands of Saint Pierre and Miquelon". This explicit exception was required because otherwise the two French islands would have been included among the islands adjacent to Newfoundland.

III. THE APPLICABLE LAW

36. Article 2, para. 1 of the 1989 Agreement requires the Court to establish a single delimitation as between the Parties of the maritime areas appertaining to France and of those appertaining to Canada. The single delimitation is to govern all rights and jurisdiction which the parties may exercise under international law in these maritime areas.

37. The Parties have agreed to request an all purpose delimitation. As stated by the Chamber in the Case concerning the Delimitation of the Maritime Boundaries in the Gulf of Maine Area "there is certainly no rule of international law to the contrary, and, in the present case, there is no material impossibility in drawing a boundary of this kind". (para. 27). Similarly, in the present case there is no material obstacle to the Court's drawing a single delimitation line as required by the Agreement.

38. The Parties are in agreement with respect to the fundamental norm to be applied in this case, which requires the delimitation to be effected in accordance with equitable principles, or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result. The underlying premise of this fundamental norm is the emphasis on equity and the rejection of any obligatory method. However, the Parties disagree with respect to the principles or criteria that should govern the equitable decision of this dispute, placing their emphasis on different principles or criteria.

39. In its Memorial France referred to the 1958 Convention on the Continental Shelf, ratified by both Parties, and contended that its Article 6 has a role to play in the present case and that the potential line resulting from the application of Article 6, which refers to equidistance, is an element that must be taken into account in determining the equitable character of the line to be drawn.

40. However this Court will adhere to the established judicial opinion to the effect that in a single or all purpose delimitation operation, Article 6 of the Convention on the Continental Shelf has not "mandatory force even between States which are parties to the Convention". (I.C.J. Reports 1984 para. 124). The Chamber in the Gulf of Maine case ruled, rejecting a Canadian claim, that Article 6 was not applicable to a single delimitation of both the sea-bed and the water column, because "such an interpretation would, in the final analysis, make the maritime water mass overlying the continental shelf a mere accessory of the shelf" (I.C.J. Reports, 1984, para. 119).

41. Moreover, if the purpose of invoking Article 6 is to derive from it support for equidistance, it must be observed that Article 6 does not provide for equidistance "tout court" but equidistance when there are no special circumstances. The 1977 decision in the Anglo-French arbitration interpreted the reference in Article 6 to special circumstances as meaning "that the obligation to apply the equidistance principle is always one qualified by the condition 'unless another boundary line is justified by special circumstances'"(UNRIAA vol. XVIII para. 70). The Court added that a finding as to the existence of special circumstances "is very much a matter of appreciation in the light of the geographical and other circumstances" (Ibid).

42. In the course of these proceedings repeated reference was made by the Parties to the treatement given to the Channel Islands in the 1977 decision in the Anglo-French Arbitration. This Court does not consider that decision to provide a precedent for the present case. The situation of the Channel Islands is substantially different from the present one, because of the proximity of the English coast. The Channel Islands were seen by the Court as an incidental feature in a delimitation between two mainland, and approximately commensurate, coasts.

IV. THE PRINCIPLES OR CRITERIA INVOKED BY FRANCE

43. In order to oppose the Canadian submission, which awards to Saint Pierre and Miquelon only a belt of 12 nautical miles from the baselines in those areas that have not yet been delimited, France relies on two basic principles: the principle of sovereign equality of States and the principle of the equal capacity of islands and mainland countries to generate maritime areas. On these grounds France asserts that the Canadian proposal is not only inequitable but also divorces the legal title to maritime areas from the delimitation operation. The French Government notes that the Canadian proposal would deny to the French islands any exclusive economic zone and continental shelf. It contends that the two islands are thus assimilated to "rocks which cannot sustain human habitation or economic life" of their own, while in accordance with Article 121 (3) of the 1982 Convention on the Law of the Sea, it is only such rocks which "shall have no exclusive economic zone or continental shelf".

44. In answering the French contention that all coasts have an equal title, Canada introduced the notion of "relative reach", contending that all coasts do not necessarily have an equal title and that their seaward projection is relative to their length. Canada asserted that coasts of limited length must have a correspondingly diminished prolongation as against longer coasts.

45. Undoubtedly, the difference in length of all the relevant coasts of the Parties is an important factor to take into account for an equitable delimitation, in order to avoid disproportionate results and, subsequently, to test the equitableness of the solution finally adopted. However, the Court cannot accept the contention that particular segments of coast may have an increased or diminished projection depending on their length. The extent of the seaward projections will depend, in every case, on the geographical circumstances; for example, a particular coast, however short, may have a seaward projection as far as 200 miles, if there are no competing coasts that could require a curtailed reach.

46. Another Canadian argument that France answers by invoking the principle of equality of States is the contention that Saint Pierre and Miquelon generate no continental shelf of their own because, from a physical point of view, the islands are superimposed upon the Canadian continental shelf itself. But the continental shelf in this area is a continuum characterized by the unity and uniformity of the whole sea-bed, "from the Arctic to Florida", as admitted by Canada and recognized by the Chamber of the International Court of Justice in the Gulf of Maine case. In that case the Chamber concluded that "the continental shelf of the whole of this area is no more than an

undifferentiated part of the continental shelf of the eastern seaboard of North America" (para. 45). Since it is all one shelf it cannot be considered as exclusively Canadian. Each coastal segment has its share of shelf.

47. The Canadian invocation of the physical structure of the sea-bed does not adequately recognize that the continental shelf concept, as also the related concept of "natural prolongation", in spite of its physical origins has throughout its history become more and more a "complex and juridical concept". (Case concerning the Continental Shelf Libya/Malta, I.C.J. Reports, 1985, para.34). It should not be forgotten,either, that the physical structure of the sea-bed ceases to be important when the object, as in this case, is to establish a single, all purpose delimitatio both of the sea-bed and the superjacent waters.

48. By emphasizing the fact that the delimitation is to be carried out between two equally sovereign States, and that their sovereignty is indivisible, France seeks to refute a further argument invoked by Canada. The Canadian argument is to the effect that the status of political dependency of the French islands with respect to metropolitan France is a factor justifying less extensive maritime rights than if they constituted an independent island State.

49. In the view of this Court there are no grounds for contending that the extent of the maritime rights of an island depends on its political status. No distinction in this respect is made by Article 121 (para. 2) of the 1982 Convention on the Law of the Sea or by the corresponding provisions of the 1958 Conventions on the Territorial Sea and Contiguous Zone and on the Continental Shelf.

50. Canada has pointed out that in the Libya/Malta case the International Court of Justice recognized that Malta could hardly be given less weight as an independent State than as an offshore dependency, concluding that an independent island State could not be placed "in a worse position because of its independence" (ICJ Reports 1985, para. 72). However, this formulation suggests equality of treatment, rather than a diminished treatment for politically dependent islands.

51. Canada further observed that in the 1977 Anglo-French case the Court of arbitration underlined the importance of the distinction between dependent and independent islands, by attaching significance to the status of the Channel Islands as islands of the United Kingdom, and not as semi-independent States. This distinction is not relevant in the present case, since all the islands involved in the proceedings must be considered as islands of France or of Canada respectively, and none of them are independent or semi-independent States.

52. A relevant distinction was made by the Court of Arbitration in the 1977 Anglo-French case when it stated that "the case of the Channel Islands must, in the view of the Court, be differentiated from that of rocks or small islands" by reason of the presence of certain factors such as the "considerable population and a substantial agricultural and commercial economy" (para. 184). Some of these factors are equally present in the case of Saint Pierre and Miquelon. Without comparing and even

less equating the economic or political significance of the territories involved in this case, it must be concluded, from a strictly legal point of view, that Newfoundland, although much larger in size than Saint Pierre and Miquelon, is equally an island which does not enjoy the status of a politically independent or semi-independent State.

53. A further issue is raised by Canada's contention based on stipulations agreed upon in mutual declarations exchanged between the King of Great Britain and the King of France, when signing the 1783 Treaty of Versailles. Article IV of the 1783 Treaty of Versailles provided that the Islands of Saint Pierre and Miquelon "are ceded in full right, by the present Treaty to His Most Christian Majesty" i.e. the King of France. But the Declarations then exchanged provided that the King of Great Britain

> "in ceding the Islands of Saint Pierre and Miquelon to France, regards them as ceded for the purpose of serving as a real shelter to the French fishermen and in full confidence that those possessions will not become an object of jealousy between the two nations".

54. Differing views were taken by the Parties as to whether these provisions might be considered as being still in force and as restricting French rights to maritime areas beyond territorial waters. While Canada argues that these provisions are still in force and restrict France's rights to maritime areas beyond territorial waters, France strongly rejects this contention.

55. In the Court's view, even assuming that these stipulations are still in force, they cannot reasonably be construed as limiting the rights of France to maritime areas under the contemporary law of the sea. The reference to the islands as a "real shelter" for French fishermen has not been construed by Great Britain, or by Canada in later years, as limiting the right of Saint Pierre and Miquelon to be a base for fishing activities by its inhabitants. The stipulation that the islands will not become "an object of jealousy" between the Parties cannot plausibly be interpreted to mean that the legal rights of France under contemporary international law must be denied because of "jealousy".

V. THE PRINCIPLES OR CRITERIA INVOKED BY CANADA

56. In order to oppose the French claim for a delimitation based on equidistance, Canada invokes two principles or criteria developed by judicial opinion: the principle of non-encroachment and the equitable criterion defined as the need to take into account coastal lengths, so as to avoid disproportionate results.

57. The principle of non-encroachment was introduced by the judgment of the International Court of Justice in the North Sea Continental Shelf cases. In the operative part of that decision the Court stated that delimitation is to be effected "in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation

of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other" (ICJ Reports, 1969 para. 101, C,1). And in the 1985 Libya/Malta case the Court referred to

> "the principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances" (ICJ Reports 1985, para. 46).

58. As described by Canada, the principle of non-encroachment signifies that the delimitation must leave to a State the areas that constitute the natural prolongation or seaward extension of its coasts, so that the delimitation must avoid any cut-off effect of those prolongations or seaward extensions. This means that, for an all-purpose delimitation, the concept of natural prolongation refers to the seaward projection of the coasts, both in respect of the sea-bed and of the water column. Canada adduces that in this case, of two adjacent coasts, one of them concave, with the French islands constituting a sort of protuberance, the line of equidistance proposed by France would swing out laterally across the coastal front of the more concave coast, cutting Canada off from areas situated directly in front of its coasts. The use of equidistance in such situations, Canada contends, would, in the terms employed by the International Court of Justice in 1969, "cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another" (ICJ Reports 1969, para. 44). In that case the Court added that this is to be avoided because the delimitation "must not encroach upon what is the natural prolongation of the territory of another State" (Ibid. para. 85).

59. Canada adds that a look at the map shows ictu-oculi that the line of equidistance captures too large a portion of the space seaward of the southern coast of Newfoundland, as the line balloons creating an inequitable cut-off of the natural projection of segments of that coast in the maritime areas lying directly in front of the southern coast of Newfoundland. This coast is, according to Canada, the most important one in this delimitation, for coasts project frontally, in the direction in which they face, as has been recognized by the judicial opinion. Canada pointed out that the judgment of 1969 in the North Sea Continental Shelf cases was clearly based on a directional concept of natural prolongation; the Court spoke of natural prolongation in terms of the areas directly in front of a coast, and, in a practical sense, this was the operative principle of the whole decision. Canada added that in the Gulf of Maine case it argued in favour of a radial projection based on the distance criterion but its arguments were not accepted by the Chamber of the International Court of Justice.

60. The second equitable criterion invoked by Canada in order to reject equidistance is described as the need to avoid a disproportionate relationship between the length of the relevant coasts of the Parties and the maritime areas which are found to correspond to each coast. Canada asserts that the premise underlying the relevance of the proportionality factor is that

coasts constitute the legal bases of title and it is through their configuration and projection into the sea that the extent of a State's maritime jurisdiction is determined. Canada adduces that since delimitation is a juridical operation, it must reflect the legal basis of title to offshore rights, which acquire concrete expression through the coastal geography. It reiterates that it is by way of the coast, the point of contact between the land and the sea, that territorial sovereignty over the land generates offshore rights and recalls that in the Libya/Malta case the Court declared that sovereignty over the landmass brings rights into effect "by means of the maritime front of this landmass, in other words, by its coastal opening" (ICJ Reports, 1985, para. 49).

61. Canada pointed out that, according to established jurisprudence, there is a double role for the proportionality factor in a delimitation operation. On the one hand, it consists of a preliminary assessment of the relative extent of the abutting coasts in order to select the method of delimitation to be adopted; on the other hand, the ex-post comparison of the coastal length ratio would be a test of the equity of the delimitation.

62. Canada invokes proportionality both as a criterion and as one of the relevant circumstances to take into account in the process of deciding on the choice of the method of delimitation. It contends that the marked disparity in the total length of the relevant coasts leads to the rejection of equidistance as the method to apply in this case in order to reach an equitable result. Canada adduces that there can be no basis for the use of this methodology when the adjacency relationship is coupled with such a marked disparity in the length of the coasts that equidistance would inevitably lead to a disproportionate result. And Canada goes even further in opposing the use of a provisional equidistance line as a starting point, asserting that there is no point in beginning the process with a method that shows no prima facie likelihood of success in the geographical configuration to which it must be applied.

63. This Court considers that the proper use of proportionality as a test of equity was well described by the International Court of Justice in its 1985 judgement in the Libya/Malta case. At para. 66 the Court defined its proper role:

> "It is however one thing to employ proportionality calculations to check a result; it is another thing to take note, in the course of the delimitation process, of the existence of a very marked difference in coastal lengths, and to attribute the appropriate significance to that coastal relationship, without seeking to define it in quantitative terms which are only suited to the ex-post assessment of relationships of coast to area".

And in para. 58 the Court described the improper role of proportionality:

> "... to use the ratio of coastal lengths as of itself determinative of the seaward reach an area of continental shelf proper to each Party, is to go far

beyond the use of proportionality as a test of equity, and as a corrective of the unjustifiable difference of treatment resulting from some method of drawing the boundary line. If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration".

VI. EXAGGERATION IN THE CLAIMS OF BOTH PARTIES

64. Both Parties, in rebutting their opponent's claims, tend to contradict the very principles they have invoked in support of their respective positions. Thus, Canada invokes the principle of non-encroachment and avoidance of cut off of its coastal projections towards the south and west, in order to oppose the French line of equidistance, while at the same time Canada denies, with its enclave proposal, any projection beyond the territorial sea to the coastal openings of Saint Pierre and Miquelon towards the South and the West. Similarly, France does not pay due regard to the principle of equality of States and equal title of islands when it denies, with its line of equidistance, any seaward projection to important segments of the southern coast of Newfoundland.

65. This Court does not consider that either of the proposed solutions provides even a starting point for the delimitation. The Court's conclusion is similar to that drawn by the Chamber of the International Court of Justice in the Gulf of Maine case, namely "that it must undertake this final stage of the task entrusted to it and formulate its own solution independently of the proposals made by the Parties" (ICJ Reports, 1984, para. 190).

VII. THE SOLUTION

66. In order to reach an equitable result, it is necessary to examine separately two different sectors of the maritime area where the delimitation is to be effected. This distinction between two separate seaward projections of the coasts of the French islands was suggested in the French Memorial, which says: "la zone dans laquelle doit intervenir la délimitation comporte deux secteurs nettement distincts, l'un à l'ouest et au sud-ouest des îles, l'autre au sud et au sud-est de ces îles" (para. 307).

67. With respect to the first sector, which may be called the western seaward projection, it is unavoidable that any seaward extension of the French coasts beyond their territorial sea would cause some degree of encroachment and cut off to the seaward projection towards the south from points located in the southern shore of Newfoundland. Both Parties, however, recognize that "some degree of cut off may be inherent in any delimitation", and such effect is "inherent in the mere presence of the islands close to the Newfoundland shore" (C.M. para. 392; C.C.M. para.428); it has also been stated that any solution "amputera ... inéluctablement une partie de leurs droits. Tel est l'esprit de toute opération de délimitation." (CMF para. 370).

68. This Court has already concluded that the specific Canadian proposal of the enclave is not equitable because it denies the islands any maritime area beyond that already recognized as

territorial sea. A limited extension of the enclave beyond the territorial sea in this western sector would meet to some degree the reasonable expectations of France of title beyond the narrow belt of territorial sea, even if causing some encroachment to certain Canadian seaward projections.

69. A reasonable and equitable solution for the western sector would be to grant to Saint Pierre and Miquelon an additional twelve nautical miles from the limit of its territorial sea, for its exclusive economic zone. That area will have the extent of the contiguous zone referred to in Article 33 of the 1982 Convention on the Law of the Sea, which grants to the coastal State jurisdiction to prevent infringement of its customs, fiscal, immigration or sanitary regulations. Beginning at point 9 of the delimitation referred to in Article 8 of the Agreement of 27 March, 1972, the line of delimitation shall be a straight line in a southwesterly direction to the furthest point of intersection of arcs of circles of 12 nautical miles radius centred on the nearest points of the baselines described below. Thence it shall be an equidistant line between Canada and the French islands to a position 24 nautical miles from the nearest points on those baselines, from where it will follow a 24 nautical miles limit measured from the nearest points of the baseline of the French islands as far as the western limit of the second sector. In the case of Canada the baseline is to be that given in the Territorial Sea and Fishing Zones Geographical Co-ordinates Order (Canadian Memorial, Annex E-2), and in the case of the French islands the baseline is to be the low-water line of the islands, islets, above-water rocks or low-tide elevations.

70. In the second sector, towards the south and the southeast the geographical situation is completely different. The French islands have a coastal opening towards the south which is unobstructed by any opposite or laterally aligned Canadian coast. Having such a coastal opening, France is fully entitled to a frontal seaward projection towards the south until it reaches the outer limit of 200 nautical miles, as far as any other segment of the adjacent southern coast of Newfoundland. There is no foundation for claiming that Saint Pierre and Miquelon frontal projection in this area should end at the 12 mile limit of the territorial sea. On the other hand, such a seaward projection must not be allowed to encroach upon or cut off a parallel frontal projection of the adjacent segments of the Newfoundland southern coast.

71. In order to achieve this result the projection towards the south must be measured by the breadth of the coastal opening of the French islands towards the south. Thus, a balanced application of the principles and criteria invoked by the Parties leads to the solution of a second maritime area for Saint Pierre and Miquelon, in the southern sector extending to a distance of 188 nautical miles from a 12 nautical miles limit measured from the baselines already described, with its axis extending due south along the meridian half way between the two meridian described below, its eastern and western limits being formed by lines parallel to that axis and its width being determined by the distance between the meridians passing through the easternmost point of the island of St. Pierre and the westernmost point of Miquelon respectively and measured at the mean latitude of those

two points, or approximately 10.5 nautical miles. From the northeastern point of the limit thus described, as far as point 1 referred to in the 1972 Agreement, the delimitation shall be a twelve nautical miles limit measured from the nearest points on the baseline of the French islands.

72. Canada has contended that in determining the seaward projection towards the South of Saint Pierre and Miquelon, account must be taken of the projection towards the east from the coasts of Cape Breton Island, 140 nautical miles away, or from other more distant points in Nova Scotia. Both Parties considered in this connection the hypothetical situation that would arise if Nova Scotia would have been an independent country. Canada contended that it could not derive less maritime rights for the sole reason that Nova Scotia is a Canadian province.

73. The objections of Canada against the southern projection of the coast of Saint 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 Saint Pierre and 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 areas towards the south appertaining to Saint Pierre and Miquelon.

74. In the light of the geographical situation, the Court finds no incompatibility or inconsistency in admitting a limited westward projection of the west coast of Saint Pierre and Miquelon, as well as a full seaward projection to 200 miles of the unobstructed south coast of the French islands.

VIII. THE QUESTION OF THE BROAD SHELF

75. The French Government, in its Memorial (at para. 146) indicates that from the available information concerning the profiles of the sea-bed, in the area South of Saint Pierre and Miquelon, it appears ("il apparaît") that the continental margin in that area extends beyond 200 nautical miles. Invoking Article 76, para. 4 a) ii) of the 1982 Convention on the Law of the Sea, France claims rights over the continental shelf beyond 200 miles, asserting that its shelf in the area extends as far as the outer edge of the continental margin. For these reasons the French Government requests the Court of Arbitration to decide that the lines of delimitation it establishes should be prolonged in order to delimit also the continental shelf of the parties beyond 200 miles. The French Memorial adds that if the Court does not prolong the delimitation line at least as far as the Canadian 200 nautical miles line, then its decision would result in denying France right to a broad continental shelf extending as far as the outer edge of the continental margin (para. 321).

76. On its part Canada, in its Counter Memorial states that although the continental margin off Newfoundland generally extends beyond 200 nautical miles, the point at which France is

making its claim may, in fact, lie beyond the edge of that margin determined in accordance with Article 76 of the 1982 Convention on the Law of the Sea, so that there is no reasonable basis for the French claim. Canada adds that it does not accept the French assertion concerning the location of the outer edge of the continental margin and observes that France itself does not know the location of the outer edge of the margin, which is fundamental to its claim, as shown by the fact that it did not complete the lines of that claim in Map 16 of the French Memorial (C.M.C. para. 68 and footnote 61).

77. There is a previous issue concerning the competence of this Court to pronounce on the discrepancy between the Parties as to whether the continental shelf at the relevant area extends beyond 200 miles. Under the Arbitration Agreement the Court has been requested "to carry out the delimitation as between the Parties of the maritime areas appertaining to France and of those appertaining to Canada".

78. Any decision by this Court recognizing or rejecting any rights of the Parties over the continental shelf beyond 200 nautical miles, would constitute a pronouncement involving a delimitation, not "between the Parties" but between each one of them and the international community, represented by organs entrusted with the administration and protection of the international sea-bed Area (the sea-bed beyond national jurisdiction) that has been declared to be the common heritage of mankind.

79. This Court is not competent to carry out a delimitation which affects the rights of a Party which is not before it. In this connection the Court notes that in accordance with Article 76, para. 8 and Annex II of the 1982 Convention on the Law of the Sea, a Commission is to be set up, under the title of "Commission on the Limits of the Continental Shelf", to consider the claims and data submitted by coastal States and issue recommendations to them. In conformity with this provision, only "the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding".

80. Obviously, a denial of a pronouncement on the French claim, based on the absence of a competence of this Court cannot signify nor may be interpreted as prejudging, accepting or refusing the rights that may be claimed by France, or by Canada, to a continental shelf beyond 200 nautical miles.

81. The disagreement between the Parties concerning the factual situation, namely, whether at the relevant location the geological and geomorphological data make Article 76 (4) applicable or not, was not elucidated during the oral proceedings. This deficiency strengthens the Court's decision to abstain from pronouncing on the substance of the matter. It is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist. The French Memorial rightly states in a different context that "il est sûr que le Tribunal ne peut tabler sur des actes futurs au contenu et à la date inconnus de lui" (M.F. para. 47).

82. It follows from the above considerations that this Court is only competent to effect a delimitation reaching as far as the

200 nautical miles outer limit, which is the single delimitation applicable simultaneously both to the exclusive economic zone and to the normal continental shelf of the Parties, that is to say, the shelf which is not extended under Article 76 (4) of the 1982 Convention. In closing at the 200 nautical miles outer limit the two parallel lines conforming the seaward projection towards the south of the coastal opening of Saint Pierre and Miquelon, the Court is complying strictly with the 1989 Agreement, which enjoins it to "establish a single delimitation which shall govern all rights of jurisdiction which the Parties may exercise under international law in these maritime areas". This provision mandates a single boundary line that would apply both to the sea-bed and the superjacent waters in the area subject to the delimitation.

IX. THE RELEVANCE OF FISHERIES

83. It is evident from the pleadings that access to and control of fisheries in the disputed area are central to the dispute over delimitation. Both Parties have emphasised the economic dependence of their respective nationals on fishing in the area and both consider delimitation a critical factor in safeguarding the legitimate interests of their fishing communities. On the other hand, the Parties are in essential agreement that the criteria governing delimitation are to be found primarily in the geographical facts. The Court, as already stated, shares this view. In particular, the Court recognizes that it has not been requested or authorized to apportion resources on the basis of need or other economic factors. Accordingly, economic dependence and needs were not taken into account in the process of delimitation, as described above.

84. However, the Court cannot close its eyes to the arguments and data presented by both parties concerning the impact of fishing rights and practices on the economic well-being of the people most affected by the delimitation. Having decided upon the delimitation in accordance with the geographical factors, the Court still has an obligation to assure itself that the solution reached is not "radically inequitable", the terms used by the Chamber of the International Court of Justice in the Gulf of Maine case. The Chamber defined "radically inequitable" as "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the parties concerned" (ICJ Reports, 1984 para. 237).

85. In the present case, the facts submitted to the Court indicate that the proposed demarcation will not have a radical impact on the existing pattern of fishing in the area. As both Parties have repeatedly stressed during the proceedings, the delimitation is without prejudice to their fishing rights, which will continue to be governed by the Agreement of 27 March, 1972. The main feature of that Agreement is that each Party is to give access to the nationals of the other in the fishing zones under its jurisdiction on the basis of full reciprocity. This principle is made subject to "possible measures for the conservation of resources, including the establishment of quotas".

86. The Arbitral Tribunal in the La Bretagne Case noted in its decision of 17 July, 1986 that the agreement of 27 March, 1972

"belongs to the category of reciprocity agreements, in that it involves an exchange of benefits of the same type between the two contracting States which grant each other fishing rights in the zones subject to their respective jurisdictions" (para. 29 of decision). While it is not the function of this Court to apply or interpret the Agreement of 27 March, 1972, it is pertinent to note that the existing rights of the Parties under that Agreement will apply to the fishing zones subject to the delimitation (1). A restrictive interpretation of the Agreement in that respect would not be warranted. As noted by the Tribunal in the La Bretagne case:

> "In a treaty of this type, there appears to be no warrant for treating the rights of one of the parties as a statement of principle and the rights of the other as a statement of an exception which, as such, would justify a restrictive interpretation" (para. 30).

87. Inasmuch as each of the Parties has valuable fishing resources in the areas under its jurisdiction, the Agreement for reciprocal rights has a true mutuality. The delimitation decided upon by the Court will not have the effect of depriving either Party of its existing Fishing rights under that 1972 Agreement. The fact that the Parties have had differences in the past relating to quotas and claims of over-fishing does not deprive the Agreement of its essential utility. Both States have recognized the value of reciprocity in regard to the fishing resources that they have shared for centuries. They agree that quotas are to be fixed solely to conserve fishing resources. It is in the declared interest of both to maintain their cooperation and reciprocity. This Court is confident that by abiding in good faith with the 1972 Agreement, the Parties will be able to manage and exploit satisfactorily the fishing resources of the area. In these circumstances, the solution adopted by the Court on the basis of the geographical facts, equitable criteria and the principles of law will surely not have catastrophic repercussions for either Party.

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(1) Articles 1 and 2 of the Agreement provide:
"Article 1. The Government of France renounces the privileges established to its advantage in fishery matters by the Convention signed at London, on April 8, 1904, between the United Kingdom and France. The present agreement supersedes all previous treaty provisions relating to fishing by French nationals off the Atlantic coast of Canada.
Article 2. In return, the Canadian Government undertakes in the event of a modification to the juridical regime relating to the waters situated beyond the present limits of the territorial sea and fishing zones of Canada on the Atlantic coast, to recognize the right of French nationals to fish in these waters subject to possible measures for the conservation of resources, including the establishment of quotas. The French Government undertakes for its part to grant reciprocity to Canadian nationals off the coast of Saint Pierre and Miquelon."

88. By reason of the geography of the relevant area, the delimitation lines established by the Court result in economic zones that at certain points cross or intercept each other. This fact, as the one examined in para. 87 above, will also have no adverse effects, concerning navigation and other rights and duties of the Parties. It is obvious, and is recognized by both Parties, that the navigational and other rights and duties within the 200 mile economic zone are governed by the relevant rules of international law. In the written and oral proceedings both Parties have underscored the importance they attach to the principle of freedom of navigation through the 200 mile zone guaranteed by Article 58 of the 1982 Convention, a provision that undoubtedly represents customary international law as much as the institution of the 200 mile zone itself. Even though this matter is not at issue in the present arbitration, the Court takes note of the concurrence of the Parties on this question.

XI. MINERAL RESOURCES

89. The Court was also informed by the Parties of their interest in potential hydrocarbon exploitation in areas of overlapping claims. Some permits had concurrently been issued for exploration by both governments but after reciprocal protests, no drilling was undertaken. In the present circumstances, the Court has no reason to consider the potential mineral resources as having a bearing on the delimitation.

90. The question of hydrocarbon resources was also brought to the Court's attention by reference to a document, called the Relevé de Conclusions, by which France would accept a reduced shelf area off Saint Pierre and Miquelon in return for Canadian concessions to French companies to exploit oil and gas in the Canadian shelf area. This document was adopted in 1972 by the negotiators, ad referendum, to be submitted to the two governments for approval, but such approval was not given. France subsequently brought the Relevé to the attention of the Court in the Anglo-French arbitration of 1977.

91. In the view of this Court, no conclusions may be derived from the Relevé for purposes of the present delimitation. It refers only to the shelf and is therefore not relevant to the "all purpose" delimitation required here. Moreover, it did not receive the necessary approval of the two governments and therefore has no standing as an agreement between them.

XII. CHECKING THE RESULTS

92. The International Court of Justice has stated in the Libya/Malta case that:

> "In the view of the Court, there is no reason of principle why the test of proportionality, more or less in the form in which it was used in the Tunisia-Libya case, namely the identification of "relevant coasts", the identification of "relevant areas" of continental shelf, the calculation of the mathematical ratios of the lengths of the coasts and the areas of shelf attributed, and finally the comparison of such ratios, should not be employed to verify the equity of a delimitation..." [Continental Shelf (Libya/Malta case) I.C.J. Reports, 1985 p. 53, para. 74].

Yet the Court found that there were in that case practical difficulties which rendered it inappropriate to apply the proportionality test in that form, in particular there were practical difficulties in identifying the relevant coasts and the relevant areas. This is not the case here. The relevant coasts have been identified and their ratio established in para. 33 supra.

93. It is true that with respect to the size of the relevant area the Parties have submitted different figures, some of them on a hypothetical basis. However, the geographical expert assisting this Court has calculated the size of the area relevant for the purpose of checking the results, as identified by the Court, to be close to 63,000 square nautical miles. The Court considers this calculation to be well founded because in comparing like with like it is necessary to take into account not only the projection to 200 miles awarded to France, but also the Canadian area resulting from an identical projection extending the relevant area eastwards along the Newfoundland 200 miles arc to a point due south of Cape Race, and so embracing the whole economic zone generated to the South by the south coast of Newfoundland. Thus, the southern limit of the relevant area consists of a line from Cape Canso to the intersection of the 200 mile limit from Cape Breton Island and the French islands, then the 200 mile limit from the French islands to the intersection with the 200 mile limit from Newfoundland, and then the latter as far as a point due south from Cape Race. On those basis, the actual areas appertaining to each of the Parties are: for Canada, 59,434 n.m2; for the French islands, 3,617 n.m2, making a total area of 63,051 n.m2. This would produce a ratio of approximately 16.4 to 1, thus confirming that there is certainly no disproportion in the areas appertaining to each of the Parties. Consequently, the requirements of the test of proportionality, as an aspect of equity, have been satisfied.

For these reasons:

THE COURT OF ARBITRATION, by three votes to two, being in favour President Jiménez de Aréchaga and Judges Schachter and Arangio-Ruiz, and against Judges Weil and Gotlieb, draws the following line of delimitation:

It shall be defined by geodetic lines which, beginning at point 9 of the delimitation referred to in Article 8 of the Agreement of 27 March, 1972, connect the points with the following coordinates:

	Latitude North			Longitude West		
	°	′	″	°	′	″
A	47	14	28.3	56	37	52.0
B	47	12	59.0	56	39	45.1
C	47	07	46.6	56	52	06.3
D	46	58	58.6	57	05	48.4

From point D it shall be defined by segments of arcs of circles of 24 nautical mile radius centred on the nearest points of the baselines of the French islands, which segments intersect at the points with the following coordinates:

E	46	47	54.5	56	59	12.3
F	46	36	35.1	56	53	55.3
G	46	33	14.9	56	50	16.5
H	46	27	28.4	56	41	17.3
I	46	23	52.6	56	30	24.0

and thence it shall continue along the next segment to:

J	46	22	03.8	56	24	15.6

From point J it shall be defined by geodetic lines connecting the points with the following coordinates:

K	45	23	04.0	56	24	07.6
L	44	24	04.0	56	24	00.1
M	43	25	04.5	56	23	52.9

From point M it shall be the segment of an arc of circle of 200 nautical miles radius centred on the nearest point of the baseline of the French islands to:

N	43	24	58.0	56	09	26.0

From point N it shall be defined by geodetic lines connecting the points with the following coordinates:

O	44	27	45.0	56	09	18.3
P	45	30	30.0	56	09	10.2
Q	46	33	17.2	56	09	01.6

From point Q it shall be defined by segments of arcs of circles of 12 nautical miles radius, centred on the nearest points of the baselines of the French islands, which intersect at the points with the following coordinates:

R	46	34	52.0	56	01	45.1
S	46	37	01.7	55	57	12.2

and thence it shall continue along the next segment to point 1 of the 1972 Agreement.

All coordinates are expressed in the North American Datum (1983) geodetic system.

Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia, Award, Second Phase, 26 March 2002

ARBITRATION BETWEEN
NEWFOUNDLAND AND LABRADOR
AND
NOVA SCOTIA
CONCERNING PORTIONS OF THE LIMITS OF THEIR OFFSHORE AREAS
AS DEFINED IN THE *CANADA-NOVA SCOTIA OFFSHORE PETROLEUM RESOURCES ACCORD IMPLEMENTATION ACT* AND THE *CANADA-NEWFOUNDLAND ATLANTIC ACCORD IMPLEMENTATION ACT*

AWARD OF THE TRIBUNAL
IN THE SECOND PHASE

Ottawa, March 26, 2002

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AWARD

In the case concerning the delimitation of portions of the offshore areas

between

The Province of Nova Scotia

and

The Province of Newfoundland and Labrador

THE TRIBUNAL

Hon. Gérard V. LA FOREST, Chairperson
Mr. Leonard H. LEGAULT, Member, and
Dr. James R. CRAWFORD, Member

Registrar:
Ms. Heather M. HOBART

Technical Expert:
Mr. David H. GRAY

For Nova Scotia

Government Representatives:

Mr. Walter J. Tucker, Chief Executive Officer, Petroleum Directorate
Mr. Bill Wilson, Q.C., Executive Director, Department of Justice
Mr. James G. Gogan, Solicitor
Mr. Paul Harvey, Senior Petroleum Geophysicist

Agent and Counsel:

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THE ARBITRATION TRIBUNAL
Composed as above,
Makes the following Award:

1. Introduction

(a) The Present Proceedings

1.1 This Tribunal was constituted on May 31, 2000 by the federal Minister of Natural Resources, pursuant to the dispute settlement provisions of the *Canada-Newfoundland Atlantic Accord Implementation Act*,[1] and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* [2] (hereafter the *Accord Acts*). These Acts, and their provincial counterparts,[3] gave effect to the Accords reached in 1985 between Canada and Newfoundland and Labrador and in 1986 between Canada and Nova Scotia (hereafter the Accords).[4] The Terms of Reference (set out in Appendix A in the Tribunal's First Phase Award of May 17,

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1 S.C. 1987, c. 3.
2 S.C. 1988, c. 28.
3 *Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act*, S.N. 1986, c. 37 (hereafter *Newfoundland Act*), *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3 (hereafter *Nova Scotia Act*)
4 "The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing". (February 11, 1985) (NL Annex of Documents 100, NS Annex 1); "Canada-Nova Scotia Offshore Petroleum Resources Accord" (August 26, 1986) (NL Annex of Documents 108, NS Annex 2).

2001) mandated the Tribunal to deal with the dispute in two phases. In the first phase it was required to consider "whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement".[5] If (as the Tribunal held) the answer to that question was no, the Tribunal was required in a second phase to "determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined".[6] Article 6 of the Terms of Reference laid down a pleading schedule for the second phase, requiring the deposit of Memorials within three months of the First Phase Award and of Counter-Memorials within a further two months; the Tribunal was then, within two months of the filing of the Counter-Memorials, to convene an oral hearing, with the eventual decision to be rendered within four months thereafter.

1.2 Following the First Phase Award, the Parties proceeded to an exchange of pleadings in respect of the question to be considered in the second phase, with simultaneous Memorials deposited on August 17, 2001 and Counter-Memorials deposited on October 17, 2001. The Tribunal heard oral argument in the second phase at the Wu Conference Centre, University of New Brunswick, Fredericton, New Brunswick on November 19, 20, 22, 23, 26 and 28, 2001. The following persons appeared on behalf of the Parties:

For Newfoundland:

Professor Donald M. McRae
Mr. L. Alan Willis, Q.C.
Mr. David A. Colson
Professor John H. Currie

For Nova Scotia:

Mr. L. Yves Fortier, C.C., Q.C.

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5 Terms of Reference, Article 3.2(i).

6 *Ibid.*, Article 3.2(ii).

Mr. Jean G. Bertrand
Professor Phillip M. Saunders
Professor Dawn Russell

Once again, the cases of the Parties were presented with great clarity and ability by their respective counsel.

1.3 The submissions of the Parties regarding the manner in which the offshore areas of Newfoundland and Labrador and Nova Scotia should be delimited were as follows:

For Newfoundland and Labrador:

> a) The line in the area outside the Gulf of St. Lawrence shall be constructed as follows:
>
> - From North 47° 19′ 25″ West 59° 50′ 46″ (Point A) the line shall proceed on an azimuth of 123.9 degrees until it reaches North 46° 50′ 30" West 58° 47′ 45″ (Point B).
>
> - From North 46° 50′ 30″ West 58° 47′ 45″ (Point B) the line shall proceed on an azimuth of 163.15 degrees until it reaches North 46° 16′ 13" West 58° 32′ 42″ (Point C).
>
> - From North 46° 16′ 13″ West 58° 32′ 42″ (Point C) the line shall proceed on an azimuth of 163.2 degrees until it intersects the outer limit of Canada's continental shelf jurisdiction.
>
> a. The line in the area inside the Gulf of St. Lawrence shall proceed from North 47° 19′ 25″ West 59° 50′ 46″ (Point A) on an azimuth of 321.5 degrees to the limit of the offshore area of Newfoundland and Labrador and Nova Scotia within the Gulf.[7]

For Nova Scotia:

> (1) THAT the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia is delimited as follows:

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[7] Newfoundland and Labrador Counter-Memorial, Phase Two, at p. 111 (para. 305).

- From a point at latitude 47° 45′ 40″ and longitude 60° 24′ 17″, being approximately the midpoint between Cape Anguille (Newfoundland) and Pointe de l'Est (Québec);

- Thence southeasterly in a straight line to a point at latitude 47° 25′ 28″ and longitude 59° 43′ 33″, being approximately the midpoint between St. Paul Island (Nova Scotia) and Cape Ray (Newfoundland);

- Thence southeasterly in a straight line to a point at latitude 46° 54′ 50″ and longitude 59° 00′ 30″, being approximately the midpoint between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland);

- Thence southeasterly in a straight line and on an azimuth of 135° 00′ 00″ to the outer edge of the continental margin;

(2) THAT the line defined in sub-paragraph (1) above is correctly set out in the *Canada-Nova Scotia Offshore Petroleum Resources Implementation Act* (S.C. 1988, c. 28), Schedule I, as it relates to the limits of the offshore area of Nova Scotia along the boundary with Newfoundland and Labrador.[8]

(b) History of the Dispute

1.4 As noted in the First Phase Award, a dispute exists between the two provinces concerning the limits of their respective offshore areas. Initially the Parties cooperated, along with the other East Coast Provinces, in making a joint claim to the ownership of offshore areas against the Government of Canada. Details of these early discussions were set out in the Tribunal's First Phase Award.[9] Initial preparations included the circulation by Nova Scotia on August 7, 1961 of a document entitled *Notes re: Boundaries of Mineral Rights as between Maritime*

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8 Nova Scotia Counter-Memorial, Phase Two, at p. V-7.

9 First Phase Award, at p. 32-44, 44-64, 64-75 (paras. 4.4-4.30, 5.1-5.27, 6.1-6.16).

Provincial Boundaries (hereafter *Notes re: Boundaries*).[10] This described the boundaries of the various provinces by metes and bounds and depicted these boundaries on an attached map which, as indicated below, was approved by the Atlantic Premiers in 1964 (hereafter the 1964 map).[11] The map, entitled "Atlantic Coast, Gulf and River St. Lawrence", showed what purported to be "proposed boundaries of Maritime Provinces, Newfoundland and Quebec with primary regard to Mineral Rights". The boundary between Nova Scotia and Newfoundland was a line connecting three points (subsequently numbered turning points 2015, 2016 and 2017): the method for establishing these turning points was already laid down in the *Notes re: Boundaries*. The 1964 map also showed a rather short (approximately 85 nautical miles) line extending out in a general "southeasterly" direction into the Atlantic as also envisaged in the *Notes re: Boundaries*. While the *Notes re: Boundaries* referred only to a southeasterly direction, this line ran on an azimuth of approximately 125°.

1.5 Following further discussions, the Atlantic Premiers on September 30, 1964 issued a Joint Statement asserting the entitlement of the provincial governments "to the ownership and control of submarine minerals underlying territorial waters including, subject to International Law, the areas in the Banks of Newfoundland and Nova Scotia, on legal, equitable and political grounds". The Premiers regarded it as "desirable that the marine boundaries as between the several Atlantic Coast Provinces should be agreed upon by the provincial authorities and the necessary steps taken to give effect to that agreement". The Joint Statement said that the boundaries described in the attached *Notes re: Boundaries* and on the appended map "be the marine boundaries of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland", and proposed action by

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10 "*Notes re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries*" (1961) (NL Annex of Documents 15, NS Annex 18).

11 The 1964 map is reproduced after p. 34 of the First Phase Award.

the Parliament of Canada "to define the boundaries"[12] pursuant to section 3 of the *British North America Act, 1871* 34-35 Vict., c. 28 (U.K.) (now the *Constitution Act, 1871*). It also envisaged an approach to Québec to obtain its agreement to a joint approach to the Federal Government; the Premier of Québec subsequently stated by telegram that his province was "in agreement with the Atlantic Provinces on the matter of submarine mineral right[s] and of the marine boundaries agreed upon by the Atlantic Provinces".[13]

1.6 Pursuant to this decision, the four Atlantic Provinces presented a "Submission on Submarine Mineral Rights" to the Federal-Provincial Conference of Prime Ministers held in Québec City on October 14-15, 1964.[14] In presenting the proposal, Premier Stanfield of Nova Scotia requested "the Federal authorities to give effect to the boundaries thus agreed upon by legislation, pursuant to Section 3 of the *British North America Act, 1871*".[15] However, the Federal Government did not agree to the provincial claims; its view was that ownership of submarine mineral rights beyond the land territory and internal waters of the provinces was vested in Canada and that accordingly no question of existing provincial boundaries arose. In 1967, the Supreme Court of Canada in *Reference re: Offshore Mineral Rights (British Columbia)* upheld the federal view.[16]

1.7 Following the decision of the Supreme Court in 1967, discussions continued between the Federal Government and the provinces over some cooperative scheme for offshore areas. The five Atlantic Provinces sought to take a common line on these matters. To this end they established a Joint Mineral Resources

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12 Joint Statement re: Atlantic Premiers Conference Halifax, Nova Scotia (September 30, 1964) (NL Annex of Documents 11, NS Annex 24).

13 Telegram from J. Lesage, Premier, Province of Québec to R. L. Stanfield, Premier, Province of Nova Scotia (October 7, 1964) (NL Annex of Documents 14, NS Annex 28).

14 "Submission on Submarine Mineral Rights by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland" The Federal/Provincial Conference (October, 1964) (NL Annex of Documents 15, NS Annex 31).

15 NL Annex of Documents 15 at p. 4, NS Annex 31 at p. 18.

16 [1967] S.C.R. 792.

Committee (JMRC) by a formal memorandum of agreement of July 16, 1968.[17] For its part the Federal Government proposed a scheme involving federal administration of most of the offshore with provincial revenue sharing, as well as provincial administration within "mineral resource administration lines" close to the provincial coasts.[18] Neither that proposal nor a subsequent proposal for the pooling of offshore revenues was acceptable to the East Coast Provinces. Meanwhile the JMRC through a Technical Committee on Delineation and Description of the Boundaries of the Participating Provinces in Submarine Areas prepared a more detailed description of the turning points described in the *Notes re: Boundaries*. These were referenced to the North American Datum 1927 (NAD 27) and were shown on a map (hereafter the 1972 map) which did not, however, show any extension southeasterly from point 2017.[19] In 1971, federal officials prepared a small-scale map for the purposes of discussion with the provinces which showed a dividing line between Nova Scotia and Newfoundland and Labrador extending seaward to the base of the continental slope in a straight line very close to an azimuth of 135°.[20]

1.8 The 1972 map and the accompanying delineation were agreed to at a meeting of the Atlantic Premiers and the Vice-Premier of Québec on June 18, 1972. The Communiqué of that meeting stated *inter alia*:

> 4. THE FIVE EASTERN PROVINCES ASSERT OWNERSHIP OF THE MINERAL RESOURCES IN THE SEABED OFF THE ATLANTIC COAST AND IN THE

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17 Memorandum of Agreement establishing Joint Mineral Resources Committee (July 16, 1968) (NL Annex of Documents 25, NS Annex 36 Schedule A).

18 See First Phase Award, at p. 50 (para. 5.10).

19 The 1972 map, entitled "Atlantic Provinces Showing Boundaries of Mineral Rights", is reproduced after p. 53 of the First Phase Award.

20 See First Phase Award, at p. 73 (para. 6.11).

GULF OF ST. LAWRENCE IN ACCORDANCE WITH THE AGREED BOUNDARIES.[21]

1.9 Prime Minister Trudeau was peremptory in his response. Responding to Premier Regan's request for a meeting to discuss the issues, he said, *inter alia*:

> ... I do not think that such a meeting could usefully be directed to the points concerning jurisdiction, ownership and administration as outlined in your telegram...
>
> Clearly ownership and the extent of provincial territory, as well as the location of provincial boundaries are matters of law. The only way they can properly be settled, if the provinces definitely wish to contest them, is in the Supreme Court... I see no purpose to be served by discussion of these legal matters...[22]

The Premiers, while maintaining the positions taken in the Communiqué, decided not to press the question. In particular they were not prepared to take the issue to the point of litigation.[23]

1.10 At about this time Newfoundland and Labrador undertook a review of its offshore policy. As part of that process it sought clarification of the "present demarcation" vis-à-vis Nova Scotia. In a letter of October 6, 1972 to the Premier of Nova Scotia's Principal Secretary, Minister C.W. Doody, the Newfoundland and Labrador Minister of Mines, Agriculture and Resources said, *inter alia*:

> ...the Government of Newfoundland is not questioning the general principles which form the basis of the present demarcation. However, we feel that the line should be established according to those scientific principles generally accepted in establishing marine boundaries. The boundary should be established as accurately as possible.

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21 "Communiqué issued following Meeting of the Premiers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and the Vice-Premier of Québec" (June 18, 1972) (NL Annex of Documents 48, NS Annex 54).

22 Letter from P. E. Trudeau, Prime Minister of Canada to G. Regan, Premier, Province of Nova Scotia (June 22, 1972) (NL Annex of Documents 51, NS Annex 117), cited in First Phase Award, at p. 58 (para. 5.19).

23 First Phase Award, at p. 58 (para. 5.19).

> Attached hereto is what we consider a more accurate reflection of the general principles of division to which we have agreed. I hasten to add that this version is meant for explanatory purposes only and is itself inaccurate because of the limitations of the maps used in its preparation. In essence, it merely follows the configuration of the coasts more precisely.[24]

Attached to the letter was a copy of the 1964 map, with an alternative dashed line drawn from turning point 2017 in a south-southeasterly direction on an approximate azimuth of 145° (as compared with 125° on the 1964 map) and extending approximately the same distance out to sea. Thus Nova Scotia was put on notice that there was no agreement between the two provinces on the location of the southeasterly line. As the Tribunal pointed out in its First Phase Award, in the context of interstate relations governed by international law and of an alleged agreement on a boundary, a letter such as that of October 6, 1972 would probably have been treated as the beginning of a dispute and would have called for some response. In response, Mr. Kirby agreed "that boundaries should be established as accurately as possible", expressed uncertainty as to "what principles were used in drawing the boundaries as shown on existing maps", and promised to inquire further. He was "confident that any difficulty with regard to the boundary line can be resolved amicably".[25] However, despite a further reminder from Newfoundland and Labrador,[26] nothing was done to clarify the matter.

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24 Letter from C. W. Doody, Minister of Mines, Agriculture & Resources, Province of Newfoundland and Labrador to M. J. Kirby, Principal Secretary to the Premier, Province of Nova Scotia (October 6, 1972) (NL Annex of Documents 57), cited in First Phase Award, at p. 60 (para. 5.22).

25 Letter from M. J. Kirby, Principal Assistant to the Premier, Province of Nova Scotia, to C. W. Doody, Minister of Mines, Agriculture and Resources, Province of Newfoundland and Labrador (October 17, 1972) (NL Annex of Documents 58).

26 Letter from C. Martin, Legal Advisor to the Minister of Mines, Agriculture and Resources, Province of Newfoundland and Labrador to M. J. Kirby, Principal Secretary to the Premier, Province of Nova Scotia (November 17, 1972) (NL Annex of Documents 59, NS Annex 61).

1.11 Thereafter, further disagreements developed between Newfoundland and Labrador and the other four provinces, which continued to advocate joint action.[27] In September 1973 Newfoundland and Labrador made a direct approach to the Federal Government with a detailed proposal for provincial administration and a 90:10 split of revenues in its favour,[28] which Prime Minister Trudeau rejected outright.[29] Québec subsequently also dissociated itself from the joint East Coast Provinces' position, while apparently continuing to maintain the provincial boundaries shown on the 1964 and 1972 maps.[30]

1.12 At this time, Canada was engaged in difficult negotiations over maritime boundaries and fisheries issues with the United States in respect of the area in and outside the Gulf of Maine, and with France in respect of St. Pierre and Miquelon and French fishing generally in the region. Eventually each of the two boundary disputes was submitted to third-party settlement, before a Chamber of the International Court of Justice in respect of the Gulf of Maine,[31] and a Court of Arbitration in respect of St. Pierre and Miquelon.[32] The pendency of those disputes affected internal discussions on federal-provincial issues. A federal

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27 See the "Memorandum to First Ministers" by J. Austin and M. Kirby Co-Chairmen (May 8, 1973) (NL Annex of Documents 60, NS Annex 60).

28 "Proposal of the Government of Newfoundland to resolve the current offshore minerals dispute between the Province of Newfoundland and the Federal Government" (September 27, 1973) (NL Annex of Documents 62).

29 Letter from P. E. Trudeau, Prime Minister of Canada to F. D. Moores, Premier, Province of Newfoundland and Labrador (January 25, 1974) (NL Annex of Documents 65). See also Letter from R. Hatfield, Chairman, Council of Maritime Premiers to F. D. Moores, Premier, Province of Newfoundland and Labrador (September 27, 1973) (NL Annex of Documents 63); Letter from G. A. Regan, Premier, Province of Nova Scotia to P. E. Trudeau, Prime Minister of Canada, (September 28, 1973) (NL Annex of Documents 64).

30 See the "frontière interprovinciale" shown on the map, "Le Québec et ses limites administratives" (Québec: Ministère des Ressources naturelles, 1998) (NS Annex 74). The same line is shown, together with certain exploration permits in the Gulf, on a 1999 map issued by the same Ministry "Permis de recherche de réservoir souterrain et de pétrole et de gaz naturel en Vigueur Gaspésie – Anticosti – Estuaire et Golfe du Saint-Laurent" (Québec: Ministère des Ressources naturelles, 1999) (NS Annex 75).

31 *Case Concerning, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, [1984] I.C.J. Rep. 246 (hereafter *Gulf of Maine*).

32 *Case Concerning, Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon)*, (1992), 95 I.L.R. 645 (hereafter *St. Pierre and Miquelon*).

moratorium on drilling activity in the vicinity of St. Pierre and Miquelon was introduced in 1967 and remained in effect until July 1992, when the decision of the Court of Arbitration was given effect by Canada and France.[33] This did not, however, affect areas south of 46°N or west of the Burin Peninsula, and both Parties issued permits in the disputed area during the 1960s and early 1970s. The potential relevance of this practice will be examined in Section 3 of this Award.

1.13 The subsequent history of federal-provincial negotiations for a settlement of the offshore question was outlined in the First Phase Award and need not be repeated.[34] It is clear from minutes of meetings and otherwise that Nova Scotia was aware that there were unresolved inter-provincial issues: for example in 1976, the Nova Scotia Legislative Counsel noted that as to inter-provincial boundaries "there would be only one area of controversy, that between Nova Scotia and Newfoundland".[35] A 1976 federal memorandum noted that Newfoundland did not accept "the so-called 'inter-provincial boundary lines'.... in their entirety".[36] In 1977 a Newfoundland White Paper respecting the Administration and Disposition of Petroleum included maps purporting to show the provincial offshore boundary;[37] although only approximately drawn, they clearly did not show the 135° line.

1.14 Unlike Nova Scotia or the other East Coast Provinces, Newfoundland and Labrador asserted a claim to offshore ownership through the Canadian courts, relying on the special history of Newfoundland and in particular on the

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33 The moratorium area is the area marked "Not available" on NS Annex 114, "Canada East Coast Offshore Federal Permit Map" (Calgary: Nickel Map Service Ltd., 1970).

34 See First Phase Award, at p. 66 (paras. 6.5-6.6).

35 "Minutes of Meeting of Federal and Provincial Officials to Discuss East Coast Offshore Mineral Resources" (May 12, 1976) at p. 13 (NL Annex of Documents 71). For reservations by other provinces, see First Phase Award, at p. 53 (paras. 5.13 – 5.14).

36 Memorandum to Cabinet, "Offshore Mineral Rights. Proposed Agreement with Maritime Provinces" (July 12, 1976) at p. 12-13 (NL Annex of Documents 72).

37 "A White Paper Respecting the Administration and Disposition of Petroleum belonging to Her Majesty in Right of the Province of Newfoundland", Government of Newfoundland and Labrador (May 1977) after p. 51 (NL Annex of Documents 75, NS Annex 129).

proposition that it already had a continental shelf when it joined Confederation in 1949. The Supreme Court of Canada dealt with the matter in the *Hibernia* reference in 1984, rejecting the claim by Newfoundland and Labrador.[38]

1.15 Meanwhile, negotiations were proceeding between Nova Scotia and Canada on offshore oil and gas resource management. An agreement was concluded on March 2, 1982 (hereafter the 1982 *Agreement*).[39] It was subsequently implemented by both Canadian and Nova Scotia legislation.[40] The 1982 *Agreement* allowed the Federal Government after consultation with all parties concerned to redraw the boundaries of the offshore region "if there is a dispute as to those boundaries with any neighbouring jurisdiction".[41] In the meantime the boundaries of the "offshore region" were defined in the 1982 *Agreement* in terms of the *Notes re: Boundaries*.[42] In 1984, however, the *Canada-Nova Scotia Oil and Gas Agreement Act* defined the boundary seaward of the mid-point between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland) as proceeding "southeasterly in a straight line and on an azimuth of 135° 00′ 00″ to the outer edge of the continental margin".[43] Newfoundland and Labrador argued[44] that this 135° line originated with the Surveyor General of Canada who, as part of his response to a request from the federal Department of Energy, Mines and

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38 *Reference re: the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86.

39 "Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing" (March 2, 1982) at Schedule 1 (NS Annex 68).

40 *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29; *Canada-Nova Scotia Oil and Gas Agreement (Nova Scotia) Act*, S.N.S., 1984, c.2.

41 "Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing" (March 2, 1982) at Schedule 1 (NS Annex 68).

42 See "Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing" (March 2, 1982), at Schedule 1 (NS Annex 68); *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29, s. 6.

43 S.C. 1984, c. 29, Schedule I.

44 Newfoundland and Labrador Counter-Memorial, Phase One, at p. 17 (para. 41).

Resources, "assumed" that the southeasterly line referred to in the *1964 Notes Re: Boundaries* was a line having an azimuth of 135°.[45]

1.16 In 1985, following the Supreme Court's decision in the *Hibernia* reference, Canada and Newfoundland and Labrador reached agreement on the offshore: the Atlantic Accord of February 11, 1985[46] was thereafter implemented by joint legislation (hereafter the *Newfoundland Accord Acts*).[47] The definition of the "offshore area" did not contain any specific description of boundaries. Instead it provided:

> "offshore area" means those submarine areas lying seaward of the low water mark of the province and extending, at any point, as far as
>
> (i) a prescribed line, or
>
> (ii) where no line is prescribed at that location, the outer edge of the continental margin or a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea of Canada is measured, whichever is the greater; ...[48]

No line was then or has since been prescribed. There was thus a potential discrepancy between the "offshore area" as defined in the *Newfoundland Accord Acts* and that defined in the *Canada-Nova Scotia Oil and Gas Agreement Act*.[49] As already noted, however, the *Newfoundland Accord Acts* made provision for settlement of inter-provincial disputes concerning the extent of offshore areas.

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45 Letter from W. V. Blackie, Surveyor General and Director, Legal Services Division, Energy, Mines and Resources Canada to Mr. G. Booth, Canada Oil and Gas Land Administration, Energy Mines and Resources Canada (November 24, 1983) (NL Annex of Documents 97).

46 "The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing" (February 11, 1985) (NL Annex of Documents 100, NS Annex 1).

47 *Newfoundland Act*, S.N. 1986, c. 37, *Canada-Newfoundland Act*, S.C. 1987, c. 3.

48 *Newfoundland Act*, S.N. 1986, c. 37, s. 2(o); See also *Canada-Newfoundland Act*, S.C. 1987, c. 3, s. 2. The definition of the area covered in the Atlantic Accord of February 11, 1985 referred to "the appropriate lines of demarcation between Newfoundland, the adjacent provinces, and the Northwest Territories", without further specification: see First Phase Award, at p. 75 (para. 6.16).

49 S.C. 1984, c. 29.

1.17 On August 26, 1986 a further accord was reached between Canada and Nova Scotia, implemented by Nova Scotia in 1987[50] and by Canada in 1988.[51] The legislation defined the "offshore area" in the same terms as the earlier Canada and Nova Scotia Acts had done (*i.e.*, using the 135° line), and it also contained a provision for dispute settlement in the same terms as the *Newfoundland Accord Acts*. The Tribunal has already considered, and rejected, Nova Scotia's argument that the inclusion of a precise definition of the "offshore area" in the federal legislation implementing the 1986 Accord[52] should be regarded as resolving the dispute in favour of Nova Scotia's claim.[53] The history does, however, show that Nova Scotia consistently maintained its position as to the appropriate boundary from 1964 onwards.

1.18 Earlier indications (*e.g.*, the maps attached to the 1977 White Paper) suggested that Newfoundland and Labrador proposed a boundary which ran broadly in a southeasterly direction from turning point 2017 to the outer edge of the continental margin. Unlike the line on the 1964 map, it did not run on a constant bearing. Although it was shown only on small-scale maps, it gives the impression of being an equidistance line to the west and south of Newfoundland itself from points drawn on opposite coasts and islands, including Sable Island.

1.19 The record does not disclose that there were any bilateral discussions between the Parties as to their boundary in the period between 1973 and 1992. In August 1992, shortly after the award of the Court of Arbitration in the *St. Pierre and Miquelon* case,[54] the Canadian Minister of Energy, Mines and Resources raised

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50 *Nova Scotia Act*, S.N.S. 1987, c. 3.

51 *Canada-Nova Scotia Act*, S.C. 1988, c. 28.

52 "Canada-Nova Scotia Offshore Petroleum Resources Accord" (August 26, 1986) (NL Annex of Documents 108, NS Annex 2).

53 First Phase Award, at p. 48 (paras. 5.6-5.7). Essentially the same considerations apply to the legislation implementing the 1982 *Agreement*, even though it did not contain provision for settlement of disputes by arbitration.

54 (1992) 95 I.L.R. 645.

with the provincial ministers the need "to address the issue of the determination of the offshore inter-provincial boundary".[55] In reply, the Nova Scotia Minister doubted "that the limited discussions to date between representatives of Nova Scotia and Newfoundland concerning the boundary have resulted in a 'dispute'", but accepted the need to resolve the boundary.[56] Evidently the Parties were not in agreement, although it does not seem that Newfoundland and Labrador had at this stage a clear position of its own. A version of the Newfoundland and Labrador claim line was communicated to the federal authorities in November 1997;[57] shortly thereafter the Canadian Minister registered the existence of a dispute which, if not resolved promptly by negotiations, would be referred to arbitration under the *Accord Acts*.[58] In July 1998 Newfoundland and Labrador provided to Nova Scotia, on a without prejudice basis, an indication of its claim line with "a short explanatory note indicating the basis on which the line was established".[59] Overall the positions of the parties remained relatively consistent during this period. Nova Scotia argued for the line set out in the Accord of 1986; Newfoundland and Labrador denied it had agreed to that line but was slow in developing an alternative.

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55 Letter from J. Epp, Minister of Energy, Mines and Resources, Government of Canada, to R. Gibbons, Minister of Mines and Energy, Government of Newfoundland and Labrador (August 6, 1992) (NL Annex of Documents 111). A letter in the same terms was sent to Nova Scotia.

56 Letter from J.G. Leefe, Minister of Natural Resources, Government of Nova Scotia, to J. Epp, Minister of Energy, Mines and Resources, Government of Canada (September 9, 1992) (NS Annex 3).

57 Letter from F.G. Way, Deputy Minister, Department of Mines and Energy, Government of Newfoundland and Labrador, to J.C. McCloskey, Deputy Minister, Natural Resources, Government of Canada (November 4, 1997) (NS Annex 5).

58 Letter from R. Goodale, Minister of Natural Resources, Government of Canada, to C.J. Furey, Minister of Mines and Energy, Government of Newfoundland and Labrador and K. MacAskill, Minister of Natural Resources, Government of Nova Scotia (January 7, 1998) (NS Annex 6).

59 Letter from A. Noseworthy, Deputy Minister, Intergovernmental Affairs Secretariat, Government of Newfoundland and Labrador, to P. Ripley, Deputy Minister, Nova Scotia Petroleum Directorate (July 22, 1998) (NS Annex 7).

(c) Findings of the Tribunal in the First Phase

1.20 In its First Phase Award, the Tribunal ruled that the negotiations and agreements of the East Coast Premiers in the period 1964-1972 did not amount to a binding agreement on the location of the boundary, with the result that the boundary has not been "resolved by agreement". It is not necessary to repeat here the reasons which led the Tribunal to that conclusion.[60] However, two points bear emphasis for present purposes.

1.21 First, as to the line southeast of turning point 2017, the Tribunal noted that:

> even if the 1964 *Joint Statement* or the *1972 Communiqué* had amounted to a binding agreement, this would not have resolved the question of that line. As to the 1964 *Joint Statement*, the reason is that neither the *Joint Statement* nor the *Notes re: Boundaries* provided any rationale for the direction or length of the line. The direction of the line on the map did not coincide with a strict southeast line, and there was nothing in the documents or in the *travaux* which could resolve the uncertainty. If anything, the indications were that the line would not follow a strict southeast direction, and this leaves to one side the question what form the line would take — *e.g.*, a constant azimuth (a rhumb line) or a geodesic. The JMRC for its part made no attempt to draw the southeasterly line, and for the reasons given above, the subsequent process by which it was described and drawn for the purposes of the *Canada-Nova Scotia Act* is not opposable to Newfoundland and Labrador. Thus, even if the interprovincial boundary up to Point 2017 had been established by agreement, the question of the boundary to the southeast would not have been resolved thereby and a process of delimitation would still have been required in that sector.[61]

1.22 The Tribunal also made it clear that it was concerned at the first stage

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60 They are summarized in the First Phase Award, at p. 76, 78-80 (paras. 7.2, 7.5-7.7).

61 First Phase Award, at p. 81 (para. 7.10).

> only to determine whether the interprovincial boundary has been resolved by agreement, *i.e.*, by a binding agreement from the perspective of international law, as required by the Terms of Reference. But the conduct of the Parties may be relevant to delimitation in a variety of ways, while stopping short of a dispositive agreement. Such conduct thus remains relevant for the process of delimitation in the second phase of this arbitration.[62]

(d) The Positions of the Parties in the Second Phase

1.23 The Tribunal turns now to the question presented by the Terms of Reference for the second phase. This is formulated as follows:

> 3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.
>
> ...
>
> (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.

1.24 As to the applicable law in the second phase, Newfoundland and Labrador argued that the starting point was the "fundamental norm" of customary international law, which the Chamber in the *Gulf of Maine* case stated in the following terms:

> ...delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result. [63]

Newfoundland and Labrador noted that the International Court of Justice in the *Tunisia/Libya* case added the qualification—reflected in Articles 74 and 83 of the

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62 First Phase Award, at p. 80 (para. 7.8). See also p. 71, 80 (paras. 6.8, 7.9).

63 [1984] I.C.J. Rep. 246 at p. 57 (para. 112).

United Nations Convention on the Law of the Sea (hereafter the 1982 *Law of the Sea Convention*)[64] — that it is the equity of the result that is of paramount importance.[65] In the view of Newfoundland and Labrador, the 1958 *Geneva Convention on the Continental Shelf* (hereafter the 1958 *Geneva Convention*)[66] was inapplicable and, in any event, it maintained, both the result and process of delimitation would be the same as under customary law and Article 6 of that convention as international tribunals have consistently affirmed the substantial similarity of the two sources of law.

1.25 Nova Scotia agreed that the applicable law in this case was the "fundamental norm" of customary international law. The fundamental norm, as formulated by Nova Scotia, required that delimitation was to be effected by the application of equitable principles, taking into account all the relevant circumstances, in order to achieve an equitable result. Like Newfoundland and Labrador, Nova Scotia considered Article 6 of the 1958 *Geneva Convention* inapplicable, but it also considered that this provision was reconcilable with customary international law.

1.26 Despite their agreement on the fundamental norm, the Parties took radically opposed positions both as to the legal framework for the resolution of this question, and as to the resulting answer. **Figure 1** shows the respective claim lines of the Parties, as well as a strict equidistance line between the two provinces.

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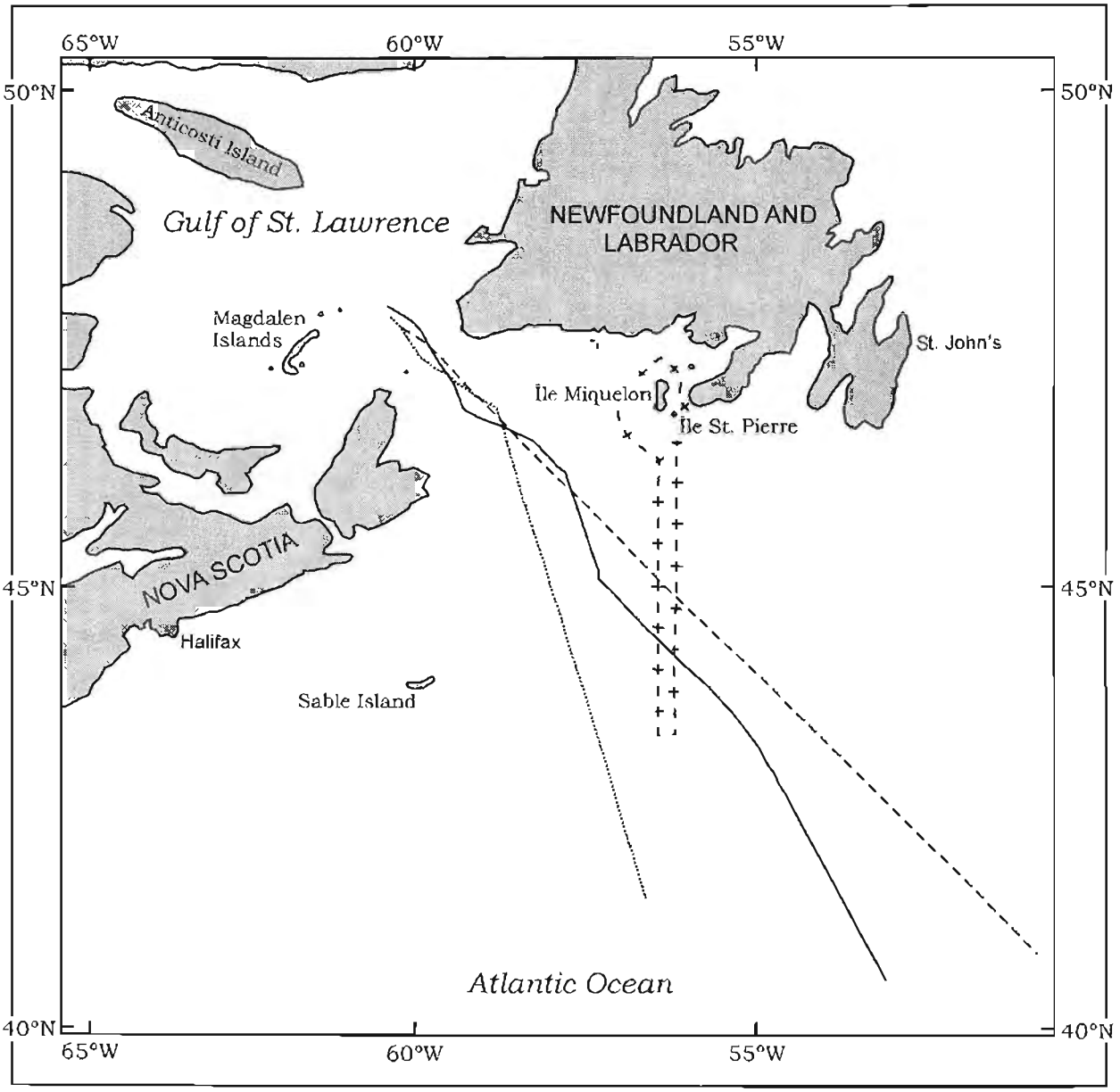
64 *United Nations Convention on the Law of the Sea*, December 10, 1982, 450 U.N.T.S. 11 (entered into force November 16, 1994).

65 *Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, [1982] I.C.J. Rep. 18 at p. 59 (para. 70) (hereafter *Tunisia/Libya*).

66 *Convention on the Continental Shelf*, April 29, 1958, 499 U.N.T.S. 312 (entered into force June 10, 1964).

Figure 1
The Claims of the Parties



Nova Scotia claim - - - - - - - - - - - - - - -
Newfoundland and Labrador claim .....
Strict equidistance (between Nova Scotia and Newfoundland and Labrador) ———————
French Maritime Area as established in 1992 - + - + - + - + - + - +

1.27 Newfoundland and Labrador argued that in the present case the conduct of the Parties was irrelevant to the location of the boundary, both in principle and as a matter of fact. In its view, in a continental shelf delimitation carried out in accordance with international law, conduct could only be taken into account if it embodied an agreement of the parties or if it provided unequivocal indications of a shared view as to the equitableness of a specific boundary. The Tribunal having held there was no agreement on the boundary, and the facts disclosing no such shared view, the question was to be resolved exclusively by reference to geographical considerations. Geographical factors were of fundamental importance because sovereignty over the coast was the basis of title. The first step was to identify, on the basis of the notion of frontal projection, the seaward extensions of the coasts, which were the areas directly in front of those coasts. The "principle of non-encroachment" required that the delimitation should accord to each Party its own "natural prolongation" or seaward extension of its coast and avoid any "cut-off" effect on the seaward extension of the other Party. An equitable delimitation would give proportionate effect to the coastal geography and avoid the potentially distorting effects of incidental features. Proportionality — the relationship between coastal lengths and maritime entitlements — was a critical factor both in the selection and application of the method of delimitation to be used and as an *ex post facto* means of testing, by reference to proportionality between coastal lengths and offshore areas, the equitable character of the delimitation.

1.28 In conformity with the conclusions as to coastal geography reached by the Court of Arbitration in *St. Pierre and Miquelon*, Newfoundland and Labrador considered that the area in dispute could be divided into two sectors: (a) an "inner concavity" bounded on the one hand by the closing line across Cabot Strait and on the other hand by an outer closing line joining Cormorandière Rocks, off Scatarie Island, Nova Scotia and Lamaline Shag Rock off Newfoundland, and (b) an outer

area to the southeast of the closing line, bounded by the coast of Nova Scotia down to Cape Canso, and by the south-facing coast of Newfoundland over to Cape Race. The configuration of the two areas, and the disparity of coastal lengths in favour of Newfoundland and Labrador dictated a solution modelled on that adopted by the Chamber in *Gulf of Maine*: namely, the adoption of bisectors to the general direction of the coasts within the "inner concavity", an adjustment to the midpoint on the closing line to take into account the ratio of coastal lengths within the inner indentation, and from that adjusted point a perpendicular to the closing line out to 200 nautical miles. This procedure divided the relevant area between the Parties in a ratio uncannily close to the ratio of coastal lengths, and was accordingly equitable. For Newfoundland and Labrador, it had the further advantage of ignoring or giving no effect both to St. Paul Island (in Cabot Strait) and Sable Island. These small, uninhabited islands, if taken into account in any way, would further affect the equity of a delimitation to the disadvantage of Newfoundland and Labrador, despite the significant disparity of coastal lengths in its favour.

1.29 The construction of the Newfoundland and Labrador line is shown on **Figure 2**, with insets showing the equivalent line constructed by the Chamber in *Gulf of Maine*.

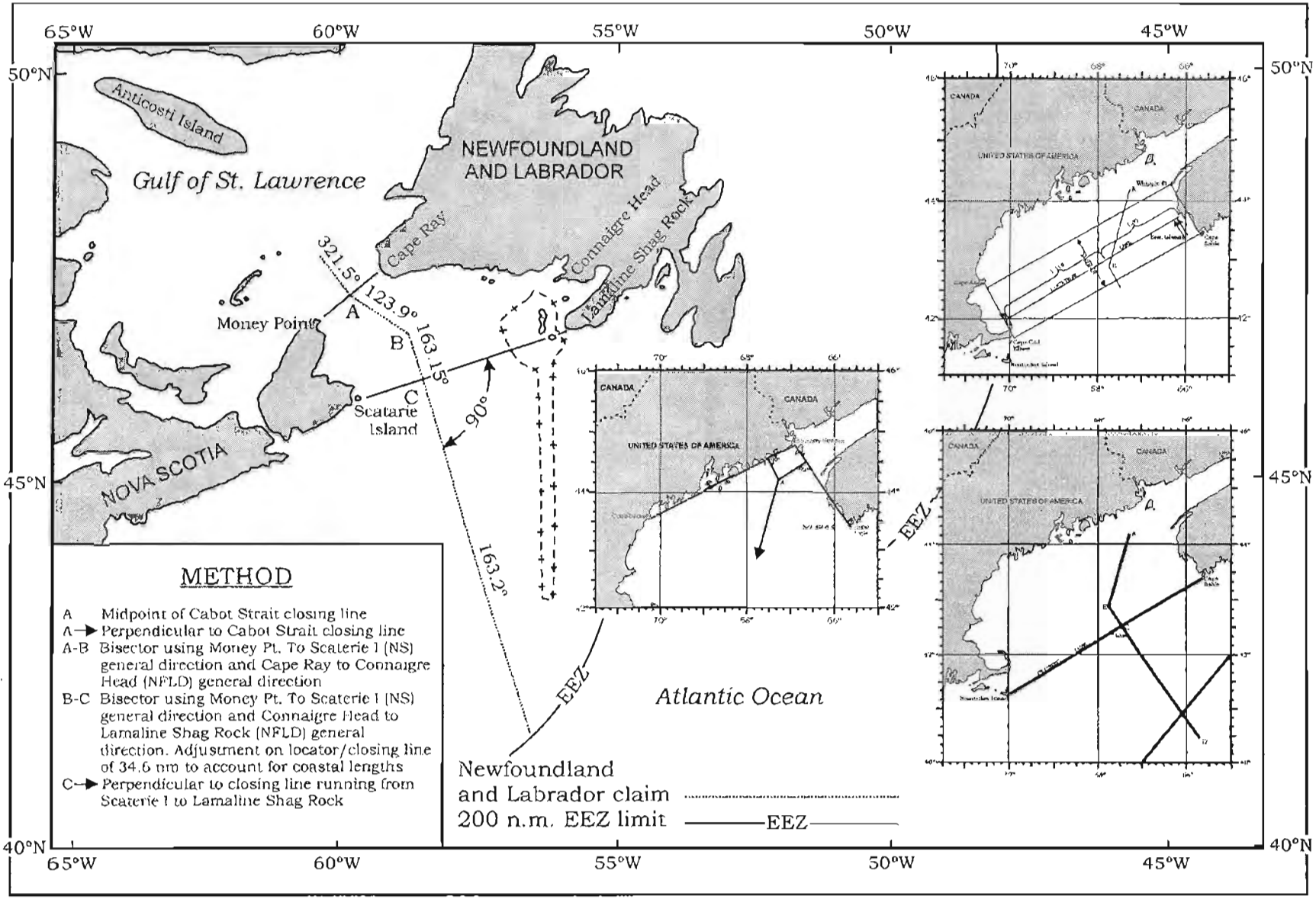


Figure 2: The Newfoundland and Labrador Line Compared with the Gulf of Maine Delimitation

1.30 Newfoundland and Labrador stressed not only the view of the coastal geography taken by the Court of Arbitration in *St. Pierre and Miquelon*, but also its general approach. It accepted that this Tribunal was not bound by the reasoning in that decision, as distinct from the result. But the area awarded to the French islands by the Court of Arbitration (the mushroom-like shape shown on **Figure 1**) was underpinned by a number of clear findings: the dominance in the relevant area of the southern coast of Newfoundland, the need to avoid cutting off any of the south-facing coasts (including those of the French islands), and the non-projection of the coast of Cape Breton Island to the east. In particular, the following passage from the *St. Pierre and Miquelon* award was stressed:

> 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 and 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 areas towards the south appertaining to St Pierre and Miquelon.[67]

Newfoundland and Labrador argued that the Tribunal could not award offshore areas to Nova Scotia to the east of the St. Pierre and Miquelon corridor without disregarding the clear reasoning of the Court of Arbitration. The method it proposed certainly avoided doing so, as can be seen from **Figure 2**. It also, according to Newfoundland and Labrador, avoided any cut-off effect on the southwest coast of Newfoundland as well as of any southeast-facing coasts of Nova Scotia.

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67 *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 672 (para. 73).

1.31 By contrast, Nova Scotia placed great emphasis on its view of the basis of the Parties' title to the offshore. This was to be found exclusively in the *Accord Acts*, which implement a Canadian negotiated settlement to provincial offshore claims. Nova Scotia stressed (as the Tribunal had already noted) that the *Accord Acts* do "not purport to attribute offshore areas to the provinces, still less to change provincial boundaries".[68] The legislation simply gives the provinces a share in the administration of and revenue from certain areas of an undivided Canadian continental shelf. Thus, the Parties' entitlements, deriving from a negotiated domestic arrangement, did not involve inherent title or any natural prolongation of coasts. That fundamental fact, in Nova Scotia's view, affected all aspects of the present phase of the arbitration. It determined the identification of relevant circumstances and it reduced the importance of geography. It displaced or made irrelevant the 1958 *Geneva Convention*, since the Tribunal is not to delimit two areas of continental shelf but rather offshore areas under and for the purposes of Canadian law. Even if the conduct of the Parties and the content of their (unperfected) negotiations might not be decisive, or even relevant, in continental shelf delimitation under international law, they were highly relevant in a case where the Tribunal has to delimit offshore areas arising from a negotiated Canadian settlement. In any event, Nova Scotia argued that the conduct of the Parties over the period from the early 1960s onwards, even if it did not give rise to an estoppel, was such as to demonstrate the equitable character of that boundary. In this context it pointed out that a boundary based on the conditional agreement of 1964 took account of resource location and access and corresponded reasonably well to a strict or full-effect equidistance line. Such a line also divided the area of overlapping offshore entitlements of the Parties proportionately to the ratio of relevant coasts — a result achieved by Nova Scotia's taking into account coastlines from Cape Forchu up to Cape Spear, and the vast offshore areas which

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68 First Phase Award, at p. 25 (para. 3.23).

those coastlines generated, radially and out to the outer edge of the continental margin.

1.32 Despite the major divergences in the construction of their claim lines and in their supporting argumentation, there were a number of apparent points of agreement between the Parties, beyond their agreement on the fundamental norm. In particular, as has already been noted, they agreed that the 1958 *Geneva Convention* is not applicable in the present case. They also agreed that the Tribunal was not required to begin its consideration of the delimitation by adopting, even provisionally, an equidistance line. The reasons for these agreements were, however, essentially accidental, and did not involve any real convergence of views. Before turning to a more detailed analysis of the geography of the area in question and to the process of delimitation, it is accordingly necessary to say something further on the applicable law.

2. The Applicable Law

(a) The Terms of Reference

2.1 The present dispute has been referred to the Tribunal pursuant to the dispute settlement provisions of the *Accord Acts*, implementing the Accords with Nova Scotia on one hand and Newfoundland and Labrador on the other. The relevant subsection, identical in both Acts, provides:

> (4) Where the procedure for the settlement of a dispute pursuant to this section involves arbitration, the arbitrator shall apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require.[69]

Pursuant to these provisions, Article 3.1 of the Terms of Reference requires the Tribunal to apply "the principles of international law governing maritime boundary delimitation with such modification as the circumstances require... as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times".

2.2 The Tribunal analysed these provisions in some detail in its First Phase Award.[70] Of particular significance is the phrase "as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times" in Article 3.1. That phrase is not contained in the *Accord Acts* themselves. But as the Tribunal has already noted, it does no more than spell out the necessary implications of the legislation, which in terms requires an arbitral tribunal to apply principles of international law in delimiting the offshore areas of two provinces.[71] Ordinarily the Tribunal would not have needed to take matters further.

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69 *Canada-Newfoundland Act*, S.C. 1987, c. 3, s. 6(4); *Canada-Nova Scotia Act*, S.C. 1988, c. 28, s. 48(4).

70 See First Phase Award, at p. 24-30 (paras. 3.21-3.30).

71 See First Phase Award, at p. 26 (para. 3.24).

2.3 However, by a curious transposition, Nova Scotia (which in the first phase argued for the application of international law to negotiations and agreements of the governments of Canadian provinces) argued in the present phase that the Tribunal's task was rather a domestic one, that of attributing offshore areas to the provinces for specific purposes under the *Accord Acts*. In contrast, Newfoundland and Labrador (which had earlier argued that international law could not be applied to inter-provincial agreements even by analogy) now argued for the direct application of international law to the delimitation of offshore areas, applying a panoply of international principles and techniques elaborated by international tribunals.[72]

2.4 It is accordingly necessary to return to the matter, in particular to consider two closely related questions. The first is whether (as Nova Scotia argued) the domestic law basis of title under the *Accord Acts* effectively replaced the international law basis of title for the purpose of applying the principles of international law under the Terms of Reference. The second is whether the reference to "the same rights and obligations as the Government of Canada" may not require the Tribunal to apply the 1958 *Geneva Convention* in the present case, given that Canada is a party to that Convention. Further questions then arise, as to the possible modification of the delimitation article of the Convention (Article 6) in practice, and as to its application to a broad continental shelf given the definition of "offshore areas" under the *Accord Acts*.

(b) The Basis of Title

2.5 As already noted, Nova Scotia argued strenuously that the "offshore areas" to be delimited by the Tribunal differ significantly from the continental shelf in legal terms, and particularly in terms of their basis of title, which for the offshore areas

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[72] See First Phase Award, at p. 12 (paras. 3.2, 3.3) for a summary of the Parties' positions in the first phase.

derives from a "negotiated entitlement" expressed in the legislation implementing the Canada-Newfoundland Accord and the Canada-Nova Scotia Accord. According to this argument, the legal regime of the continental shelf is inherently different from the regime of joint management and revenue sharing that is the object of this arbitration. Under the negotiated regime of the *Accord Acts*, the provinces acquire no jurisdiction or exclusive sovereign rights to explore and exploit seabed resources that are at the heart of the continental shelf regime. The limited, shared provincial entitlements that do exist in the offshore areas arise exclusively by virtue of the Accords and their implementing legislation. These provincial rights are fundamentally at odds, as regards both their nature and scope, with the exclusive sovereign rights of the continental shelf regime.

2.6 In distinguishing between the continental shelf and the areas to be delimited in this case, Nova Scotia also argued that the substantive scope of the interests in the two types of zones is different. The regime of the offshore areas, unlike the continental shelf regime, does not apply to sedentary species, or to mineral resources other than hydrocarbons, or to the regulation of certain other seabed activities such as pipelines. Moreover, Nova Scotia pointed out, the offshore areas do not correspond to the same areas of the seabed as the continental shelf, whether under the 1958 *Geneva Convention* or the 1982 *Law of the Sea Convention*, a point to which the Tribunal will return.

2.7 Under international law "[t]he geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title".[73] In contrast, Nova Scotia argued, provincial rights in the offshore areas do not derive from the seaward projection of sovereignty over the coasts, but rather from what the provinces were able to negotiate with the Federal Government. Thus, for Nova Scotia, the Tribunal is not concerned with a continental shelf delimitation; it

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73 *Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 61 (para. 73).

is concerned with the delimitation of a maritime zone that is *sui generis* to the *Accord Acts*.

2.8 Nova Scotia attached critical importance to the question of legal basis of title. It viewed legal title as a circumstance of special relevance; as affecting the choice of equitable criteria, and as critical to determining the relevant area for the delimitation and to proportionality. For Nova Scotia, the significance of the juridical nature of the zone was such as to affect *all* aspects of the delimitation.

2.9 Newfoundland and Labrador, for its part, did not disagree with the central importance of title. It did, however, disagree vigorously with Nova Scotia's view of where that basis is to be found. While accepting that provincial offshore entitlements could not literally be continental shelf rights from the perspective of international law, Newfoundland and Labrador maintained that this did not imply that negotiated or legislated provincial entitlements could not be treated as genuine continental shelf rights for the specific purpose of applying the international law of maritime boundary delimitation as incorporated into the relevant domestic instruments.

2.10 Newfoundland and Labrador asserted that the reference to the international law of maritime boundaries in this dispute between provinces could only be meaningful with the adoption of a legal fiction and a legal assumption. The legal fiction was that the parties to the dispute are sovereign states. The legal assumption was that the maritime zones at issue are either identical or substantially similar to those to which the international law of maritime delimitation applies — the territorial sea, the continental shelf or the exclusive economic zone as the case may be. Otherwise, according to Newfoundland and Labrador, the exercise would become a logical impossibility. For Newfoundland and Labrador, these assumptions or legal fictions must be implicit in the statutory adoption of international law as the governing law, since international law is not directly applicable to the provinces.

In the view of Newfoundland and Labrador, the Terms of Reference make explicit the assumption regarding the sovereign status of the provinces by providing that international law is to be applied "as if the parties were states" whose seabed entitlements beyond the territorial sea would be continental shelf entitlements. Thus, Newfoundland and Labrador considered that, read together, the *Accord Acts* and the Terms of Reference provided a complete answer to the Nova Scotia approach to the basis of title.

2.11 According to Newfoundland and Labrador, the Nova Scotia approach would lead to an impasse, even a *non liquet*, in these delimitation proceedings. Nova Scotia's proposition that the object of the delimitation was merely an *ad hoc* negotiated entitlement under Canadian law, "fundamentally at odds with the continental shelf", implied that the entitlement would not be within the scope of the international law of maritime delimitation, which does not apply in its own right to negotiated arrangements implemented in Canadian law. In the view of Newfoundland and Labrador, the result would be a total frustration of the statutory adoption of international law and of this arbitration.

2.12 This impasse, Newfoundland and Labrador claimed, was implicit in the Nova Scotia view (shared by Newfoundland and Labrador but for quite different reasons) that the 1958 *Geneva Convention* does not apply here because the continental shelf regime is inherently different from the regime of joint management and revenue sharing that is the object of the delimitation. This, Newfoundland and Labrador argued, would preclude the application of the customary law of continental shelf delimitation for exactly the same reasons. In that event there would be no law that could be applied, contrary both to the *Accord Acts* and the Terms of Reference.

2.13 According to Newfoundland and Labrador, the basis of title in the present delimitation was closely related to the continental shelf as understood in

international law. The statutory definition of "offshore area" in the *Accord Acts* was an unmistakable indication of the juridical nature of the zones that form the object of the *Accord Acts*. The delimitation provisions of the *Accord Acts* treat the two Parties as if they were sovereign states; for Newfoundland and Labrador this meant that the rights at issue are deemed to flow from the same source of title as the continental shelf entitlements of such states, namely, territorial sovereignty over adjacent coasts. It was only on this basis that it was possible to apply the international law of maritime delimitation without disregarding its very essence. The fact that the negotiated regime did not cover every element of the continental shelf regime did not raise any practical or conceptual impediment to the application of the law relating to the delimitation of the continental shelf.

2.14 For its part, the Tribunal is not persuaded by Nova Scotia's contention that the basis of title, for the purposes of this delimitation, is to be treated as entirely distinct from that of the continental shelf, or that the origin of the Parties' rights in the *Accord Acts* makes any relevant difference to the process of delimitation. Indeed, it hardly seems possible to speak of a domestic basis of title in this case when domestic law grants the Parties no title or ownership whatever over offshore areas or resources. It is true that the offshore areas of the Parties and the limited rights they have negotiated in those areas are different from the legal institution of the continental shelf. As Canadian provinces, the Parties enjoy no sovereignty over their coasts and no sovereign rights to explore and exploit the resources of the continental shelf adjacent to those coasts; this sovereignty and these rights are vested in Canada as a state in international law. The Tribunal, however, is bound by the Terms of Reference and the *Accord Acts*. These dictate the law the Tribunal is to apply to the facts of the case. Indeed, in the Tribunal's view, they do so unambiguously.

2.15 Article 3.1 of the Terms of Reference, already referred to, directs the Tribunal in the following terms:

> Applying the principles of international law governing maritime delimitation with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.

This provision is made up of four elements:

- First, the Tribunal is to determine the line dividing the respective offshore areas of the two provinces. These areas are and will remain areas encompassing not exclusive sovereign rights over seabed resources, but limited, shared, negotiated rights in respect of certain of those resources only.

- Second, for the purpose of making this determination, the Tribunal is to apply the principles of international law governing maritime boundary delimitation, with such modification as the circumstances require. The provinces, however, are not subjects of international law. The principles governing maritime delimitation apply to the territorial sea, the continental shelf and the economic zone, and not to a purely domestic arrangement between provinces and the Federal Government on joint management and revenue sharing relative to offshore hydrocarbon resources, a regime unknown to international law. Evidently something more is required for the Tribunal to carry out its mandate.

- Third, for this reason, the Tribunal is required to effect its determination as if the Parties were states, with all the attributes of states, including territorial sovereignty and exclusive sovereign rights in respect of the resources of the continental shelf adjacent to their coasts.

- Fourth, to add emphasis and even greater precision to the foregoing point, the Tribunal is also required to make its determination as if the provinces were subject to the same rights and obligations as the Government of

> Canada. Canada's rights in respect of the continental shelf arise not from domestic law but from its legal basis of title under international law. The offshore rights of Nova Scotia and Newfoundland and Labrador under the *Accord Acts* must therefore be treated for the purposes of delimitation of those areas as arising, like Canada's, from the same basis of title in international law.

This is the legal framework the Terms of Reference impose upon the Tribunal and the Parties. It puts no difficulty or obstacle of any kind in the way of the delimitation exercise. Rather, it is what makes the exercise possible.

2.16 The Tribunal would also note that while there are differences between the regime of "negotiated entitlements" and the regime of the continental shelf, there are a number of important similarities. In particular, both extend to the outer edge of the continental margin as defined in international law, and both concern — albeit in a different measure — the management and benefits from the exploitation of a vital natural resource, hydrocarbons. Moreover, none of the differences between the two regimes conflict with or impede the application of the Terms of Reference.

2.17 The negotiations regarding the Parties' entitlements make it clear that the Parties themselves always looked upon them as being governed by the same principles of delimitation as the continental shelf. Originally, indeed, they claimed ownership of the resources of the continental shelf adjacent to Canada and proceeded to delimit their respective areas according to a form of equidistance method based on their coastal frontages. This general approach never varied throughout the negotiations. The Federal Government offered to create a system of revenue pooling among the Atlantic Provinces, but they refused to depart from an individual delimitation anchored in geographic considerations.

2.18 In an eloquent plea by the Agent for Nova Scotia during the oral proceedings, it was said that the principles of international law are fully capable of application to the delimitation of offshore areas for which the basis of title was founded on domestic (*i.e.*, Canadian) law. Even if this is unprecedented, it was urged, the principles of international law governing maritime delimitation were sufficiently robust to assist in such a delimitation. The difficulty, however, does not lie in the lack of precedent nor the lack of flexibility in international law. As was pointed out by Nova Scotia, the International Court was able to apply the law to novel situations: to the delimitation of the continental shelf in the *North Sea Continental Shelf* Cases;[74] to the delimitation of a single maritime boundary in the *Gulf of Maine* case;[75] and to the delimitation of two separate but coincident boundaries of exclusive fishing zone and continental shelf in the *Jan Mayen* case.[76] But these cases involved the delimitation of zones whose basis of title flowed directly from international law, and the flexibility required to deal with them was found within, not outside, the realm of international law — flexibility *infra legem*, one might call it. What Nova Scotia contended for seemed to be something else entirely: the application of international law to zones whose basis of title was apparently divorced from any international extension or connotation, being founded exclusively on domestic (Canadian) law and a domestic (Canadian) negotiated settlement. Now the fact that Canada has sovereign rights over the continental shelf and its resources, and that vis-à-vis third states the extent of its continental shelf rights is determined by international law principles of delimitation, did not require Canada to use those principles in allocating interests in offshore areas to the provinces. The *Accord Acts* could have laid down some different basis of delimitation, as for example with the fisheries jurisdiction lines between England

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74 *North Sea Continental Shelf Cases*, (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*, [1969] I.C.J. Rep. 3 (hereafter *North Sea Continental Shelf Cases*).

75 [1984] I.C.J. Rep. 246.

76 *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] I.C.J. Rep. 38 (hereafter *Jan Mayen*).

and Scotland before 1999.[77] But when the *Accord Acts* expressly stipulated that, in the absence of agreement, disputed offshore areas of the two provinces were to be delimited according to the principles of international law, the Canadian Parliament was seeking to resolve a difficulty, not to create one. It was entirely appropriate to apply the international law principles of delimitation to this task (as they have been applied for analogous purposes in the United States).[78] The Parliament of Canada having done so, there is no reason to treat the legislative mandate and the Terms of Reference as saying anything else than their words provide. This is all the more so as the purposes for which the offshore areas are created are key purposes of the continental shelf — the administration of and benefit from exploitation of oil and gas resources.

(c) Applicability of the 1958 *Geneva Convention on the Continental Shelf*

2.19 The Tribunal turns to a second, closely related question concerning the applicable law: that is, whether the 1958 *Geneva Convention,* and particularly its Article 6 on delimitation between opposite or adjacent coasts, is applicable to the present delimitation. In its First Phase Award, the Tribunal noted that:

> Canada ratified the fourth Geneva *Convention of 1958 on the Continental Shelf*, (*GCCS*) with effect from February 6, 1970. It did so without any reservation. It has not yet ratified the *1982 United Nations Convention on the Law of the Sea (UNCLOS)*. Thus as a matter of international law, the governing provision, *prima facie* at least, is *GCCS* Article 6.[79]

As the qualifying phrase in the last sentence implies, the Tribunal in the first phase did not need to decide that the 1958 *Geneva Convention* is applicable to this delimitation. It was thus open to the Parties in the second phase to argue that it

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77 See now Scottish Adjacent Waters Boundary Order 1999 (SI 1999/1126).

78 See J. I. Charney, "The Delimitation of Lateral Seaward Boundaries between States in a Domestic Context" (1981) 75 *A.J.I.L.* 28.

79 First Phase Award, at p. 16 (para. 3.11) (footnotes omitted).

does not and both did so, albeit for quite different reasons. In the circumstances, the Tribunal considers that it must look beyond the surface agreement of the Parties and examine their underlying disagreement.

2.20 Nova Scotia argued that the 1958 *Geneva Convention* is of limited utility in this arbitration and that the delimitation provisions found in Article 6 are not directly applicable. It founded this argument on essentially the same grounds as its argument on the basis of title, and more specifically on the ground that the *Accord Acts* do not address the same rights, the same resources, the same uses, or the same areas of the seabed that are the subject matter of the 1958 *Geneva Convention*. The Tribunal has already addressed most of these points in dealing with the basis of title. What remains to be considered is Nova Scotia's argument that at least some of the areas concerned in this delimitation differ from the legal definition of the area of the continental shelf under the 1958 *Geneva Convention*.

2.21 The offshore areas dealt with in the Terms of Reference begin at the low-water mark of the coasts, whereas the 1958 *Geneva Convention* defines the continental shelf as encompassing "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea".[80] On the other hand, the line to be determined in this delimitation will not proceed through any area of the territorial sea adjacent to either province. Although the areas delimited extend to the coasts of the Parties, the line will at no point represent a territorial sea boundary.

2.22 Nova Scotia also argued that the seaward extent of the offshore areas involved here is defined by reference to the "continental margin". This is itself defined in the *Oceans Act*,[81] which prescribes the limits of Canadian jurisdiction in terms

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80 *Geneva Convention on the Continental Shelf*, April 29, 1958, 499 U.N.T.S. 312, (entered into force June 10, 1964) Article 1.

81 S.C. 1996, c. 31.

borrowed from Article 76 of the 1982 *Law of the Sea Convention* rather than the 1958 *Geneva Convention*. In the Tribunal's view, the contrast that Nova Scotia seeks to draw between the definitions of the continental shelf in the 1958 and the 1982 conventions is too stark. The 1958 *Geneva Convention* definition of the continental shelf as extending over submarine areas "to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas"[82] is essentially compatible with the definition given in the 1982 *Law of the Sea Convention*. Under the 1958 definition, some states, including Canada, claimed continental shelf rights to the outer edge of the continental margin well before 1982. To the Tribunal's knowledge, it has not been suggested in state practice that a delimitation out to 200 nautical miles requires adjustment in terms of its direction beyond that limit; certainly neither of the Parties suggested as much. The Tribunal accordingly is not persuaded that the 1958 *Geneva Convention* does not apply to this delimitation for the reasons advanced by Nova Scotia.

2.23 As to the reasons advanced by Newfoundland and Labrador, the Tribunal finds these equally unpersuasive. Newfoundland and Labrador argued that the expression "principles of international law" used in the Terms of Reference refers to generally applicable principles of law and not what it called the *lex specialis* created by particular treaties such as the 1958 *Geneva Convention*. According to Newfoundland and Labrador, that was "undoubtedly" the meaning the expression must be given in the *Accord Acts*, which do not authorize the federal Minister to alter the substantive law as prescribed by the legislation itself.

2.24 The Tribunal accepts that the Terms of Reference cannot change, and should not be interpreted as changing, the law applicable to this arbitration as laid down in the *Accord Acts*. But it does not accept that the term "principles of international

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82 *Geneva Convention on the Continental Shelf*, April 29, 1958, 499 U.N.T.S. 312, (entered into force June 10, 1964) Article 1.

law" should be narrowly construed so as to refer exclusively to customary international law principles. It was, in the Tribunal's view, appropriate for the Terms of Reference to apply to the present task the provisions of treaty law relating to delimitation of continental shelf which are binding on Canada. As a party to the 1958 *Geneva Convention* without any reservation, Canada is subject to the rights and obligations it incorporates, including those under Article 6. So too, under the Terms of Reference, are Nova Scotia and Newfoundland and Labrador. This in no way alters the substantive law prescribed by the legislation. It rather confirms and clarifies it.

2.25 The Tribunal notes that, although international courts have not applied the 1958 *Geneva Convention* to cases involving the determination of a single maritime boundary (*i.e.*, involving both the exclusive economic zone and the continental shelf out to 200 nautical miles),[83] the present case is confined to resources falling within the scope of the continental shelf and that it involves areas extending out to the outer margin of the continental shelf. The International Court has not suggested that states parties to the 1958 *Geneva Convention* have somehow ceased to be bound by its provisions as a result of subsequent developments in the law of the continental shelf or in the practice of maritime delimitation.[84]

(d) Subsequent Developments in the International Law of Maritime Delimitation

2.26 The Tribunal accordingly starts from the 1958 *Geneva Convention*, in particular Article 6, which provides as follows:

> 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be

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83 *Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 303 (para. 125); *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 663 (para. 40).

84 *Cf. Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 301 (para. 118); *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 57 (para. 44).

> determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
>
> 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
>
> 3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.

This compares with Article 83 of the 1982 *Law of the Sea Convention*, which refers to delimitation of the continental shelf "by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

2.27 The apparent contrast between these two articles has been attenuated by subsequent practice and caselaw. On the one hand, the "special circumstances" of Article 6 of the 1958 *Geneva Convention* have rather readily been found to exist, and to be not very different from the "relevant circumstances" of Article 83; moreover, the underlying aim of achieving an equitable result, the focus of Article 83 and customary international law, has also tended to suffuse the consideration of Article 6. On the other hand, in the application of Article 83 or of the customary international law principle of equitable delimitation since *Libya/Malta*, courts and tribunals, notably the International Court, have normally begun by considering an equidistance line and adjusting that line in accordance with relevant considerations in each case. As the Court said in the *Jan Mayen* case:

> If the equidistance-special circumstances rule of the 1958 Convention is... to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference — at any rate in regard to delimitation between opposite coasts — between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles.[85]

The equidistance line was also the starting point for the International Court in the *Qatar-Bahrain* case which, as the Court noted, involved areas where the coasts were opposite to each other and those which are "rather comparable to adjacent coasts",[86] albeit within a confined area. Again the Court in that case noted that

> the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.[87]

2.28 In the context of opposite coasts and latterly adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstances justify it.[88] The Tribunal will further consider the question of choice of methods in due

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85 [1993] I.C.J. Rep. 38, at p. 58 (para. 46) citing the Anglo-French Court of Arbitration in the *Channel Islands/Western Approaches* case, (1977), 18 R.I.A.A. 3 at p. 45 (para. 70), and its own judgment in the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, [1985] I.C.J. Rep. 13 at p. 33 (para. 33). See also *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 62 (para. 56).

86 *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, (2001), 40 I.L.M. 847, at p. 883 (para. 170) (hereafter *Qatar/Bahrain*). See also p. 892 (para. 230).

87 *Ibid.*, at p. 892 (para. 231).

88 *Eritrea-Yemen Arbitration (Second Stage: Maritime Delimitation)*, (2001), 40 I.L.M. 983 at p. 998 (para. 83) (hereafter *Eritrea-Yemen*) ("the Tribunal has taken as its starting point, as its fundamental point of departure, that, as between opposite coasts, a median line obtains."). In the *St. Pierre and Miquelon* case, there was at no stage explicit consideration of an equidistance line in either sector (*cf.* p. 671 (paras. 67-68)). Evidently the Court of Arbitration in that case treated St. Pierre and Miquelon as being, for its purposes, part of the general coastline of Newfoundland and as not being in an "opposite" situation to any coasts, there being no question of a delimitation on the east or north-facing coasts of the islands. The majority's reasoning, summary as it is, was dominated by arguments concerning non-encroachment and frontal projection.

course. For present purposes it is sufficient to note that the applicability of the 1958 *Geneva Convention* in the present proceedings reinforces the case for commencing with an equidistance line, but in any event that is now the starting point in most cases, whether the governing law is the 1958 *Geneva Convention*, the 1982 *Law of the Sea Convention* or customary international law.

(e) The Offshore Areas beyond 200 Nautical Miles

2.29 Finally, some reference should be made to the mandate of the Tribunal in terms of the outer limits of the "offshore areas" to be attributed to the Parties. As already noted, the *Accord Acts* define these areas as extending to the outer edge of the continental margin, a definition that incorporates the provisions of Article 76 of the 1982 *Law of the Sea Convention*. In the present case both Parties accepted that the line determined by the Tribunal should in principle extend out so far, and the Tribunal's jurisdiction clearly permits it to do so. It should, however, be noted that no international tribunal has yet had to delimit to the outer edge of the continental shelf as between adjacent states, and certain points arise as to the task of the Tribunal in this respect.

2.30 Canada's claim to an extended continental shelf rests within its domestic law on the *Oceans Act*, which at subsection 17(1) states:

> The continental shelf of Canada is the seabed and subsoil of the submarine areas, including those of the exclusive economic zone of Canada, that extend beyond the territorial sea of Canada throughout the natural prolongation of the land territory of Canada
>
> (a) subject to paragraphs (b) and (c), to the outer edge of the continental margin, determined in the manner under international law that results in the maximum extent of the continental shelf of Canada, the outer edge of the continental margin being the submerged prolongation of the land mass of Canada consisting of the seabed and subsoil of the shelf, the slope and the rise, but not

> including the deep ocean floor with its oceanic ridges or its subsoil;
>
> (b) to a distance of 200 nautical miles from the baselines of the territorial sea of Canada where the outer edge of the continental margin does not extend up to that distance; or
>
> (c) in respect of a portion of the continental shelf of Canada for which the geographical coordinates of points have been prescribed pursuant to subparagraph 25(a)(iii), to lines determined from the geographical coordinates of points so prescribed.

Canada has not yet prescribed the required geographical co-ordinates of points. This Tribunal does not have the competence or the mandate to delimit the outer limit of the continental shelf, but simply notes that a continental shelf wider than 200 nautical miles from the territorial sea baselines probably exists through most, if not all, of the area seaward of these two provinces.

2.31 In the *St. Pierre and Miquelon* case, the Court of Arbitration held it had no jurisdiction to delimit the continental shelf beyond 200 nautical miles, on the ground that to do so would involve the legal position of a third party, the "international community" as represented by the Commission on the Limits of the Continental Shelf established under Annex II of the 1982 *Law of the Sea Convention.*[89] The present Tribunal is in a quite different position: first, in that it is a national and not an international tribunal, so that there is no question of any decision which might be opposable to any international processes for the determination of the outer edge of the Canadian continental shelf; and second, in that all it is called to do is to specify the offshore areas of the two Parties *inter se* for the purposes of the *Accord Acts*, which it can do by providing that the line

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89 *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 674 (paras. 78-79).

shall not extend beyond the point of intersection with the outer limit of the continental margin as determined in accordance with international law.[90]

2.32 Nova Scotia provided expert evidence of the outer limit of the continental shelf as defined by Article 76.[91] Newfoundland and Labrador did not dispute that Canada enjoyed an extended continental shelf throughout the region from east of the island of Newfoundland to the area off the Gulf of Maine, but it did not provide any evidence as to the location of the outer limit. The Tribunal's Technical Expert provided a version of Canada's possible claim to an extended continental shelf that was not significantly different from that shown by Nova Scotia.[92] That limit is shown on **Figure 3** for illustrative purposes only.

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90 In this respect there does not seem to be any difference in principle between the non-effect of a bilateral delimitation vis-à-vis a third state (*cf. Eritrea/Yemen*, (2001), 40 I.L.M. 983, at p. 1010 (para. 164)) and its non-effect vis-à-vis the "international community" or third states generally.

91 Nova Scotia Memorial, Phase Two, Appendix B.

92 See also R. MacNab, ed., "Canada and Article 76 of the Law of the Sea: Defining Limits of Canadian Jurisdiction Beyond 200 nautical miles in the Atlantic and Arctic Oceans" (Ottawa: Geological Survey of Canada, 1994) open File Report 3209.

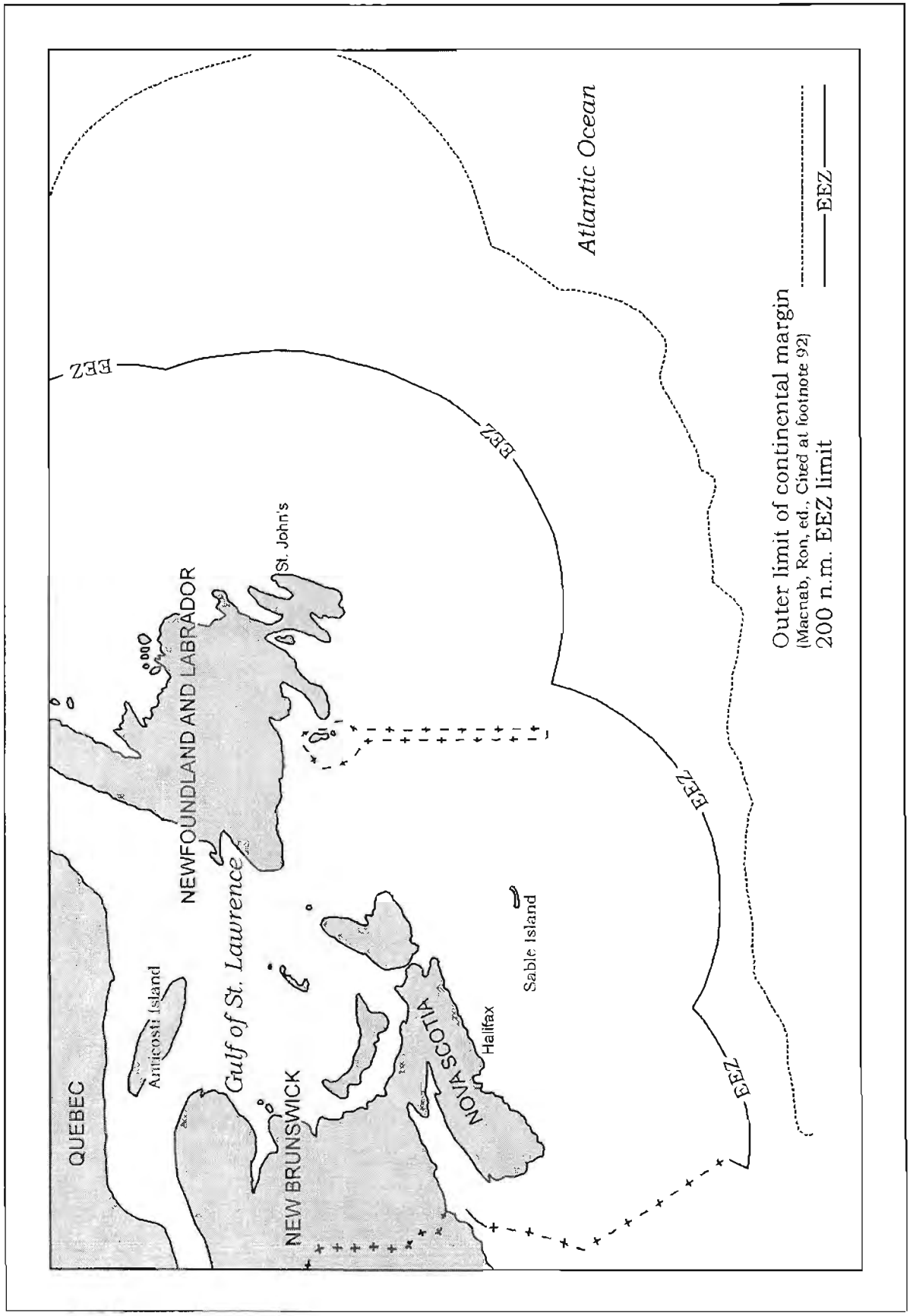

Figure 3: The Outer Edge of the Continental Margin off the East Coast: Projected Limits

2.33 Newfoundland and Labrador did, however, argue that, in determining the relevant area for the purposes of delimitation and in making any proportionality calculation, the Tribunal should ignore areas beyond 200 nautical miles. The essential reason was that under Article 76 the extent of such areas depends on geomorphological considerations, so that areas off the same stretch of coast may vary in ways that have nothing to do with coastal geography. Indeed, as can be seen from **Figure 3**, the outer continental shelf is considerably broader off the coast of Newfoundland than it is further south, off Nova Scotia. If exact measures of proportionality are to determine continental shelf delimitation, it was argued that differential breadths of outer continental shelf would be decisive. This, it was said, would be inequitable to "broad shelf" coasts such as Newfoundland's.

2.34 The Tribunal does not accept this argument for a number of reasons. One is that Article 6 in its inception applied to a continental shelf seen as a function of geomorphology, not distance; yet the drafters clearly considered that Article 6 could be applied to delimitations throughout the whole extent of a broad margin. In 1958 it would have been anachronistic to use a 200 nautical mile limit in the application of Article 6. Another reason is that the existence of a "disproportionately" narrow or broad outer continental shelf could presumably be a special or relevant circumstance in a delimitation. But the main point is simply that Newfoundland and Labrador's argument implies equating equitableness with a mathematical proportionality test — and indeed its construction of its claim line appeared to depend on high levels of mathematical concordance between ratios of coastal lengths and maritime areas. For reasons that will be explained below, the Tribunal does not accept that the criterion of general proportionality is to be applied in this rigid way, if it is applied at all.

(f) The Tribunal's Conclusions as to the Applicable Law

2.35 For these reasons, the Tribunal reaffirms its view that the principles of international law are applicable in the present phase;[93] for Canada, and therefore for the Parties, those principles include the provisions of Article 6 of the 1958 *Geneva Convention* and the developments under customary international law that have been associated with the interpretation and application of Article 6. Of course, the *Accord Acts* do not simply stipulate the application of principles of international law for the Tribunal's task; they add the qualifier "with such modifications as the circumstances require". In response to a question from the Tribunal in the first phase concerning the effect of this proviso, Nova Scotia replied that it is "not necessary to modify the principles of international law other than so as to ensure their applicability to the parties in this case"; this was, in its view, already achieved by the Terms of Reference.[94] For the reasons given above, the Tribunal agrees. Just as in the first phase the Terms of Reference called for the application of international law by analogy to the conduct of provincial governments within Canada claiming the benefit of a resource,[95] so in the second phase they clearly call for the application of the principles of international law governing maritime boundary delimitation by analogy, in order to determine the extent of the offshore areas of the two provinces. In both cases the application of international law is analogical. In both cases it is appropriate and required by the *Accord Acts* and the Terms of Reference. Furthermore, in the Tribunal's view, the international law governing maritime boundary delimitation (including the provisions of Article 6 of the 1958 *Geneva Convention*) is flexible enough to allow the delimitation process to be carried through without further modification.

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93 First Phase Award, at p. 25 (paras. 3.23-3.24).
94 *Ibid.*, at p. 28 (para. 3.27).
95 *Ibid.*, at p. 27 (para. 3.26).

3. The Process of Delimitation: Preliminary Issues

3.1 On this basis, the Tribunal turns to the actual process of delimitation of the Parties' offshore areas, and to the applicable criteria in terms of Article 6 of the 1958 *Geneva Convention*. For the most part, it is established, such criteria concern the configuration of the relevant coasts and their relationship with each other, *i.e*, the geography of the region. Nova Scotia, however, relied on certain additional criteria and these need to be dealt with. They were, first, the conduct of the Parties, and second, the question of access to the resources in dispute.

(a) The Conduct of the Parties

3.2 There was extensive argument in both phases of this arbitration as to the extent and implications of the Parties' conduct in terms of establishing or at least indicating the propriety of a particular line. The Tribunal has already ruled that the conduct relied on was insufficient to establish an agreement between the Parties resolving the boundary between them.[96] In its written pleadings Nova Scotia argued that Newfoundland and Labrador was nevertheless estopped from denying that a boundary existed, so that the effect of its conduct was tantamount to a formal agreement — in effect, an application of the doctrine of estoppel by convention in the common law. This argument was not pressed in the oral phase, and in the Tribunal's view rightly so. The conduct of the provincial Premiers in 1964 and 1972, not amounting to an agreement which disposed of the boundary, can hardly be converted into such an agreement by presenting it in terms of the doctrine of estoppel. The problem with that conduct is not that it was unilateral, requiring reliance by the other party to render it binding; the problem was (*inter alia*) that it was conditional. After 1972, Nova Scotia was on notice that

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[96] First Phase Award, at p. 64-71 (paras. 6.1-6.8).

Newfoundland and Labrador did not accept the 135° line.[97] It was also of course fully aware that the Federal Government refused to accept the provincial claim to title (with which the determination of "provincial boundaries" was intimately linked) and that this refusal had been upheld by the Supreme Court of Canada. There was no distinct statement or representation by Newfoundland and Labrador after 1972 that it accepted the boundary, and no statement, before or after 1972, that it accepted the boundary "for all purposes". When Québec Minister Allard pressed the other provinces to do so in 1969, Newfoundland and Labrador reserved its position.[98]

3.3 Thus, from the point of view of its formal acceptance of a boundary, the conduct of Newfoundland and Labrador at relevant times was, at best, analogous to that of the signatory of an unratified boundary agreement.[99] Such an agreement does not establish a boundary.[100]

3.4 This does not, however, dispose of the matter, as the Tribunal has already noted.[101] Courts and tribunals dealing with maritime delimitation have frequently been faced with arguments based upon conduct, ranging from acquiescence in the use of a particular feature as a basepoint to the establishment through a pattern of conduct of a *de facto* line which is entitled to respect. For example, in the *Tunisia/Libya* case the International Court treated as "a circumstance of great relevance for the delimitation" the existence of a "line of adjoining concessions, which was tacitly respected for a number of years, and which approximately corresponds... to the line perpendicular to the coast at the frontier point which had

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97 The Parties disagreed as to whether and when Newfoundland and Labrador saw the line on the map prepared by federal officials in 1971. It is however, clear from Minister Doody's letter of October 6, 1972 that the line was unacceptable.

98 First Phase Award, at p. 53 (para. 5.13).

99 *Ibid.*, at p. 29 (para. 3.29).

100 See, *e.g.*, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6 at p. 24 (para. 50) p. 27 (para. 57) and *cf.* the treatment of the Relevé des Conclusions in *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 656, 677 (paras. 10, 91).

101 See paragraph 1.21 above.

in the past been observed as a *de facto* maritime limit".[102] The Court referred to "the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference, or (until 1976) protests, by the other".[103] That line was "neither arbitrary nor without precedent in the relations between the two States".[104] It was incorporated in the line awarded by the Court on the ground that it was one of the "indicia... of the line or lines which the Parties themselves may have considered equitable or acted upon as such".[105] This may be contrasted with the finding of the Chamber in the *Gulf of Maine* case, where there had been a period of apparent United States acquiescence in Canadian activity up to the equidistance line. But, the Chamber held, the period in question (from about 1965 to 1972) was "too brief to have produced a legal effect of this kind, even supposing that the facts are as claimed".[106] In the Chamber's view, for conduct (falling short of an actual agreement) to be relevant, it would have to be "sufficiently clear, sustained and consistent".[107] Mere coincidence of permits, even when combined with some measure of acquiescence or silence at an administrative level, was insufficient to meet this standard, in its view.

3.5 In maritime boundary cases it has often been argued that the parties have by conduct established a particular line or consolidated some aspect of a maritime boundary.[108] Such arguments have always been treated as admissible and have been carefully considered. But it must be said that more often than not they have

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102 [1982] I.C.J. Rep. 18 at p. 71 (para. 96).
103 *Ibid.*, at p. 84 (para. 117).
104 *Ibid.* (para. 119).
105 *Ibid.* (para. 118).
106 [1984] I.C.J. Rep. 246 at p. 311 (para. 151).
107 *Ibid.*, at p. 309 (para. 146).
108 See *North Sea Continental Shelf Cases* [1969] I.C.J. Rep. 3 at p. 25-27 (paras. 27-33); *Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 66-71 (paras. 87-96); *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 28 (paras. 24-25); *Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 303-311 (paras. 126-54); *Guinea – Guinea-Bissau Maritime Delimitation*, (1985), 77 I.L.R. 636 at p. 666-668, 682 (paras. 61-66, 105); *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 677 (paras. 89-92); *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 53-56, 75-76 (paras. 33-39, 82-86); *Eritrea/Yemen*, (2001), 40 I.L.M. 983 at p. 997-998 (paras. 76-82).

been rejected, either because the conduct did not relate to the area in question,[109] or was merely unilateral,[110] or was performed vis-à-vis a third party,[111] or was an exercise in self-restraint to avoid aggravating the dispute,[112] or was equivocal.[113] There is little point in considering these cases in detail since each depended on its own facts. In the Tribunal's view, in order to establish that a boundary (not settled or determined by agreement) has been established through conduct, it is necessary to show an unequivocal pattern of conduct as between the two parties concerned, relating to the area and supporting the boundary, or the aspect of the boundary, which is in dispute. In the words of the International Court in the *Libya/Malta* case, the question is whether there is "any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court".[114] It may be observed that (as was clearly demonstrated in argument before the Tribunal) the relevant line in *Tunisia/Libya* closely followed the line of actual exploration and exploitation based on oil concessions granted by one party and not protested by the other over a significant period of time.[115] In effect, each of the parties had established a consolidated and relatively concordant set of vested rights without protest from the other. This was not just a question of the appearance on the map of a line established by paper acts such as permits, but the consolidation of the line in practice by conduct referable to it, including the discovery of exploitable fields.

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109 *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 52 (para. 32).

110 *Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 68 (paras. 90, 92).

111 *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 55 (paras. 37, 86).

112 *Ibid.*, at p. 54 (para. 36).

113 *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 29 (para. 25); *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 52 (paras. 34, 35).

114 *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 29 (para. 25).

115 The Tribunal was referred to maps in the pleadings in *Tunisia/Libya*, [1982] I.C.J. Rep. 18, to demonstrate the extent of convergence between wells drilled and the line eventually awarded.

3.6 In line with its argument on the basis of title, already considered above, Nova Scotia argued that more weight should be given to conduct in the domestic context. The offshore areas were the result of a Canadian negotiated settlement of claims: in the context of such a negotiation, lasting from the early 1960s, considerations of good faith and equity demanded that substantial weight be accorded to the conduct of the Parties. In that regard, Nova Scotia stressed the consistency of its own conduct since 1964 and the purported acquiescence of Newfoundland even after 1972.

3.7 The Tribunal has already explained why it cannot accept Nova Scotia's general argument in relation to the basis of title, having regard to the *Accord Acts* and the Terms of Reference. But even if the Tribunal were delimiting "offshore areas" with a basis of title distinct from the institution of the continental shelf under international law, it fails to see how conduct which was equivocal or uncertain could be considered decisive in relation to what is, on any view, a significant legal entitlement of both provinces. It accordingly sees no reason to depart from the standard laid down by the International Court in *Libya/Malta*, namely, whether there is "any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable..." [116]

3.8 In seeking to establish its position, Nova Scotia relied essentially on two kinds of conduct: first, general assent, maintained over time, to a procedure of delimitation, to the use of particular basepoints and to the general direction of a delimitation line, and second, the oil permit practice of the Parties, especially in the outer area.

3.9 As to the inner area, the position may be summarised as follows:

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[116] *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 29 (para. 25).

(a) Both Nova Scotia and Newfoundland accepted a particular procedure for the determination of a maritime boundary in the inner area, including specific agreement on particular basepoints. This agreement was, however, as the Tribunal has already held, made in support of a claim to an existing provincial maritime zone, which claim was rejected by the Federal Government and by the Supreme Court of Canada. Unlike Nova Scotia, Newfoundland and Labrador never expressly accepted the 1964 boundary in the inner area as an "all purpose" line.

(b) When, in 1972, the relevant Newfoundland and Labrador Minister queried the 1964 boundary, he said that he was "not questioning the general principles which form the basis of the present demarcation". However, he made it clear that the line eastward of turning point 2017 was, in Newfoundland and Labrador's view, not "established according to those scientific principles generally accepted in establishing marine boundaries", and he suggested a different line as a basis for negotiations.[117]

(c) Newfoundland and Labrador made no objection at this stage to the turning points themselves, or to the configuration of the line in the vicinity of Cabot Strait. Indeed it did not expressly query the use of those turning points, as a basis for a delimitation based on an adjusted equidistance line, until the pleadings in the present case.

(d) Newfoundland and Labrador only formulated a detailed proposal in the period 1997-1998. This was based on the use of bisectors to the general direction of the coast in the inner area. It was not identical to the present claim line but clearly enough came from the same quiver. It did not envisage the use of an equidistance line.

(e) Although there was some issuing of oil permits and some seismic exploration and other activity in the inner area, this was limited. No wells

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[117] Letter from C. W. Doody, Minister of Mines, Agriculture & Resources, Government of Newfoundland and Labrador to M. J. Kirby, Principal Secretary to the Premier, Government of Nova Scotia (October 6, 1972) (NL Annex of Documents 57), cited above, at paragraph 1.9.

were drilled beyond territorial waters, and Newfoundland and Labrador's seismic permits, though they did not respect the 1964 line, contained a caveat for provincial boundaries. In any event, there was no reason for Nova Scotia to be aware of these permits or to protest them. In the Tribunal's view, it is difficult to accept that seismic activity, of itself, could give rise to a situation analogous to that in *Tunisia/Libya*, and anyway there is no evidence that there was seismic activity in the critical areas close to the equidistance line, or that Nova Scotia should have been aware of such activity, if indeed it occurred.

3.10 The Tribunal notes the Chamber's criticism of United States conduct, including failure to protest Canadian claims and actions, in *Gulf of Maine*.[118] Similar criticisms can be directed at Newfoundland and Labrador in the present case. It is true that in the period between 1972 and 1992 there were a number of factors — the moratorium on drilling around St. Pierre and Miquelon, the *Hibernia* reference, the continuing negotiations of both Parties with the Federal Government before and after 1984 — which may explain and to a certain extent justify that silence. But after 1992, with the Accords in place, the boundaries with France delimited and the moratorium lifted, the position was different. Oil activity pursuant to the Atlantic Accord in the 1990s, had it conformed to the 1964 line, could very well have led to the conclusion that the boundary was now settled. No such activity has, however, been drawn to the Tribunal's attention, and it may be inferred that there was none. In the circumstances, the Tribunal concludes that there was no "sufficiently clear, sustained and consistent" conduct on the part of Newfoundland and Labrador to justify holding that it accepted the line in the inner sector. On the other hand, its failure to protest the methodology in the inner sector, and in particular the use of St. Paul Island as a basepoint, is in the Tribunal's view relevant. There was no indication that Newfoundland and

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[118] *Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 307-308 (paras. 138, 140, 141).

Labrador disputed that use (which it had expressly accepted in 1972), or that it found it inequitable. These are factors to be taken into account, along with others, in the determination of an eventual line in the inner area.

3.11 As to the outer area, it is necessary to stress on the one hand that, from 1972, Nova Scotia was on notice that there was no agreement on the precise location of the line, and on the other hand that the "oil practice" was more substantial than it was in the inner area. In particular, based on the evidence adduced by the Parties and the explanations given, the position may be summarised as follows:

(a) The Petroleum Grid Map of Nova Scotia of approximately 1972[119] explicitly refers to the boundary line shown thereon as the "Mineral Rights Boundary Line", in conformity with the *Notes Re: Boundaries*. Permits utilizing the boundary were first issued in 1965.

(b) Mobil had taken out a provincial permit on the Nova Scotia side of the 135° line and, apparently, wished to take out a Newfoundland permit for that area of its federally issued permit that was on the Newfoundland side of the same line. This permit was issued by Newfoundland in September 1967 and renewed in 1972 as a Class A permit.

(c) In the written and oral pleadings of the first phase and the second phase, both Parties devoted significant time and effort to the location of the Katy Permit with respect to the 135° line from point 2017. The information provided indicated that the permit had been issued in May 1971. Since the permit was given only by reference to a medium-scale map on what was alleged to be a conic projection, the information was rather equivocal. The Tribunal asked the Parties and its Technical Expert to compute the distance from the southwest and northwest corners of the permit areas to

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[119] Map of Nova Scotia showing Reservation Grid System for Petroleum Licenses, Map 1 of 2 (Nova Scotia Department of Mines, 1972 approximately) (NL Supplementary Documents 16, NS Annex 77).

the 135° line. The distances provided were computed along the appropriate parallels of latitude and were:

By Nova Scotia	By Newfoundland & Labrador	By the Technical Expert
NW corner 1.7 n.m.	10.1 n.m.	6.1 n.m.
SW corner 12 n.m.	39 n.m.	40.7 n.m.

Distances relate to the permit corners west of the 135° line. Two things are worthy of note. First, there were major differences between the two Parties in interpreting the same information. Second, the distances west of the 135° line were significant according to the computations by Newfoundland and Labrador and the Technical Expert.

3.12 In the Tribunal's view, the conduct of the Parties in the outer sector has to be analysed in relation to the period before and after 1972, when Newfoundland and Labrador indicated its disagreement with the 135° line, just prior to its departure from the East Coast alliance on the offshore.

3.13 As to the period before October 1972, there was, it is true, a degree of concordant practice associated with the line, including on the part of Newfoundland and Labrador. For the reasons given above, however, this conformity was neither complete nor, in its context, did it reflect a clear consensus of the Parties as to where any boundary should be drawn.

3.14 The basic considerations in the Tribunal's view are as follows. First, as both Parties accepted, no drilling activity took place throughout the entire area now in dispute except under cover of federal permits. It is true that there was no complete concordance of federal and provincial permit areas, but it is apparent that no oil company was prepared to engage in costly exploration, still less

exploitation, of the area without a federal permit; and this for the good reason that the provincial claims to the area were unfounded in law. Indeed, the provincial permits, at least beyond a certain limited distance from the shore, were evidently *ultra vires* and the companies for the most part paid for them under protest. There is no evidence whatever of reliance on provincial permits as the legal basis for actual expenditure in the disputed area, which was an important factor, *mutatis mutandis*, in *Tunisia/Libya*. The provincial permit trail was accordingly little more than a paper trail. Second, the period in question (approximately 1965-1972) was not, without more, sufficient to establish a boundary by practice, any more than it was in *Gulf of Maine*. It is relevant in particular here that no wells were drilled under federal or provincial permits close to the 135° line. If there was activity along the line, it seems to have been rather ephemeral at this stage, partly perhaps because of the moratorium. Third, the period was characterised by a continuing common effort (in which Newfoundland and Labrador participated) to persuade the Federal Government to accept provincial claims. The definitive federal rejection of a proprietary claim to the eastern offshore, in the Tribunal's view, came in June 1972. Up to that point, Newfoundland and Labrador was acting in the context of the common front. That front having failed in its purpose, the Tribunal does not think that the limited conduct of Newfoundland and Labrador up to that point — even if it were to be considered unequivocal — can be converted into the all purposes acceptance of a boundary.

3.15 Turning to the period after 1972, the position is, in the Tribunal's view, even clearer. Once a state has given notice that it does not accept a particular situation or claim, strong evidence is needed that it has thereafter abandoned its position. After 1972 there was no equivalent from Newfoundland and Labrador of an Ihlen Declaration.[120] Indeed there was no indication from any Newfoundland and Labrador source that the 135° line was considered equitable.

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[120] *Legal Status of Eastern Greenland Case*, (1933) P.C.I.J. (Ser.A/B) No. 53 at p. 71.

3.16 Moreover, in the Tribunal's view, that line was not equitable. It was drawn on the Newfoundland side of the strict or full-effect equidistance line, in circumstances where Newfoundland had the longer coastline and where its own maritime areas were potentially seriously affected by French claims around St. Pierre and Miquelon. In such circumstances, it cannot seriously be argued that a full-effect equidistance line required further adjustment at the expense of Newfoundland and Labrador. The lack of any articulated justification for the 135° line has already been noted. That factor must, in the Tribunal's view, affect its appreciation of the situation.

3.17 However that may be, there is no sufficient indication of adherence to the 135° line on the part of Newfoundland and Labrador after 1972. Few or no new permits seem to have been issued (quite apart from the difficulties with relying on the provincial permit practice already discussed). The indications are that all parties were aware of the existence of a disagreement about the line in the period after 1972. In these circumstances, Newfoundland and Labrador could not be regarded as having somehow acquiesced in Nova Scotia's position without the clearest evidence. There is no such evidence.

3.18 For all these reasons, the Tribunal holds that Newfoundland and Labrador's practice in relation to the supposed 135° boundary southeast of turning point 2017 does not sustain a claim of acquiescence, or support the view that the Parties regarded that line as equitable.

(b) The Issue of Access to Resources

3.19 The *Accord Acts* allow for provincial participation in administration of the area and for revenue sharing in respect of exploration and exploitation of hydrocarbons. They have no reference to living marine resources, including sedentary species. In practice all the decisions on continental shelf delimitation have likewise been concerned, actually or potentially, with control over hydrocarbon resources.[121] This raises the question whether the Tribunal can properly take account of the likely existence and location of hydrocarbon resources in its decision.

3.20 On this issue, again the Parties disagreed. For Newfoundland and Labrador, reference to the incidence of resources here was inappropriate. Maritime delimitation is not "an operation of distributive justice",[122] nor does it involve the sharing out of an undivided whole on grounds of need or otherwise. To the extent that access to resources is a relevant factor in marginal cases, this is only where the resource in question was, in the words of the Court in the *North Sea Cases*, "known or readily ascertainable".[123] According to Newfoundland and Labrador, that may have been the case with the fisheries resources in *Jan Mayen*[124] but it was not the case here. On the contrary, the existence of hydrocarbon resources in the disputed area was still essentially speculative and the precise location of any resources was unknown. In contrast, Nova Scotia saw the question of access to hydrocarbon resources as central to the offshore entitlements of the Parties under the *Accord Acts*. It noted that in public statements, officials of both provinces had referred to the present arbitration as one concerning the potential hydrocarbon

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121 In *Qatar-Bahrain*, (2001), 40 I.L.M. 847, at p. 893 (paras. 235-236) the Court considered but dismissed the relevance of pearl fishing activities, which had ceased many years earlier.

122 As the Court stressed in *Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 60 (para. 71).

123 I.C.J. Rep. [1969] 3 at p. 54 (para. 101 (D) (2)), cited with approval by the Court in *Libya/Malta*, I.C.J. Rep. [1985] 13 at p. 41 (para. 50).

124 I.C.J. Rep. [1993] 38 at p. 70 (paras. 72-73), p. 71-72 (paras. 75-76). See however the separate opinion of Judge Schwebel at p. 172.

resources of the Laurentian sub-basin, an area described as highly prospective. According to information provided,[125] this is a triangular area between latitudes 44°N and 45°N and between longitudes 54°W and 58°W. Even if the precise location of resources within that sub-basin is as yet uncertain, this Tribunal — according to Nova Scotia — would be closing its eyes to reality in failing to take potential resources into account. Whether or not other courts and tribunals had done so expressly, they had certainly done so in fact.

3.21 It is now well settled that a court engaged in maritime delimitation may not take account of the relative wealth or natural resources of the states concerned or their peoples; these are wholly extraneous matters.[126] Nor, in the end, did either Party suggest otherwise. As to access to the specific resources of the zone in question, the Tribunal does not think that this factor is irrelevant. Indeed, in accordance with earlier jurisprudence it seems that access to resources in the zone to be delimited may be relevant in two different ways. One concerns the hypothesis that a particular delimitation may entail "catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned";[127] but this can clearly be excluded in the present case. More relevant is the possibility, already recognized in the *North Sea Continental Shelf Cases*, of having regard in any delimitation to the natural resources of the area in question "so far as known or readily ascertainable". This was decisive in *Jan Mayen* in producing an eventual adjusted equidistance line.[128] True, to have regard to the location of potential resources stands in some tension with the often-repeated statement that a court engaged in maritime delimitation is not sharing out an undivided whole.[129] For the reasons explained already, this Tribunal is in no different position in delimiting the undivided continental shelf of Canada as

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125 Nova Scotia Counter-Memorial, Phase Two, at p. III–77, Figure 76.

126 See *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 41 (para. 50), cited with approval by the Court in *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 74 (para. 80).

127 *Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 342 (para. 237).

128 *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 72 (para. 76).

129 *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 3 at p. 21 (para. 18).

between the two Parties for the purposes of the *Accord Acts*. Thus it is not the Tribunal's function to share out equitably any offshore resource, actual or hypothetical, irrespective of its location. On the other hand, the effect of any proposed line on the allocation of resources is, in the Tribunal's view, a matter it can properly take into account among other factors.

3.22 As will be seen from **Figure 4**, each Party's claim line allocated to it the greater part of the Laurentian sub-basin. (The St. Pierre and Miquelon corridor also cuts through this sub-basin, although no mention is made of this fact in the Award of the Court of Arbitration, which rather emphasised fisheries resources.)[130] In a situation where officials of both sides have referred to an area of potential resources as being at stake, the Tribunal does not believe that the *North Sea* formula ("known or readily ascertainable") should be restrictively applied. Accordingly, the impact of any delimitation on access to that resource is a potentially relevant factor in the present case.

3.23 In a case where the claim lines of each Party allocate to it all or most of a resource and where neither claim line can (for different reasons) be upheld, it is virtually inevitable that the line eventually awarded will end up dividing the resource in some way, and that is the case here. The Tribunal has no information as to which areas within the sub-basin may be more prospective than others, and any more precise calculation of the impact of a line on access to resources (as undertaken by the Court in *Jan Mayen*) is not possible here, even if it were desirable in principle. Thus, the incidence of the line on potential resources is only one factor to be taken into account, among others, in assessing the overall equitableness of the delimitation. The Tribunal notes that no information is available to it which would suggest that the line it will award is inequitable to either Party on this ground — and certainly not to the extent of justifying any further adjustment.

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130 *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 692, 677 (paras. 73, 89).

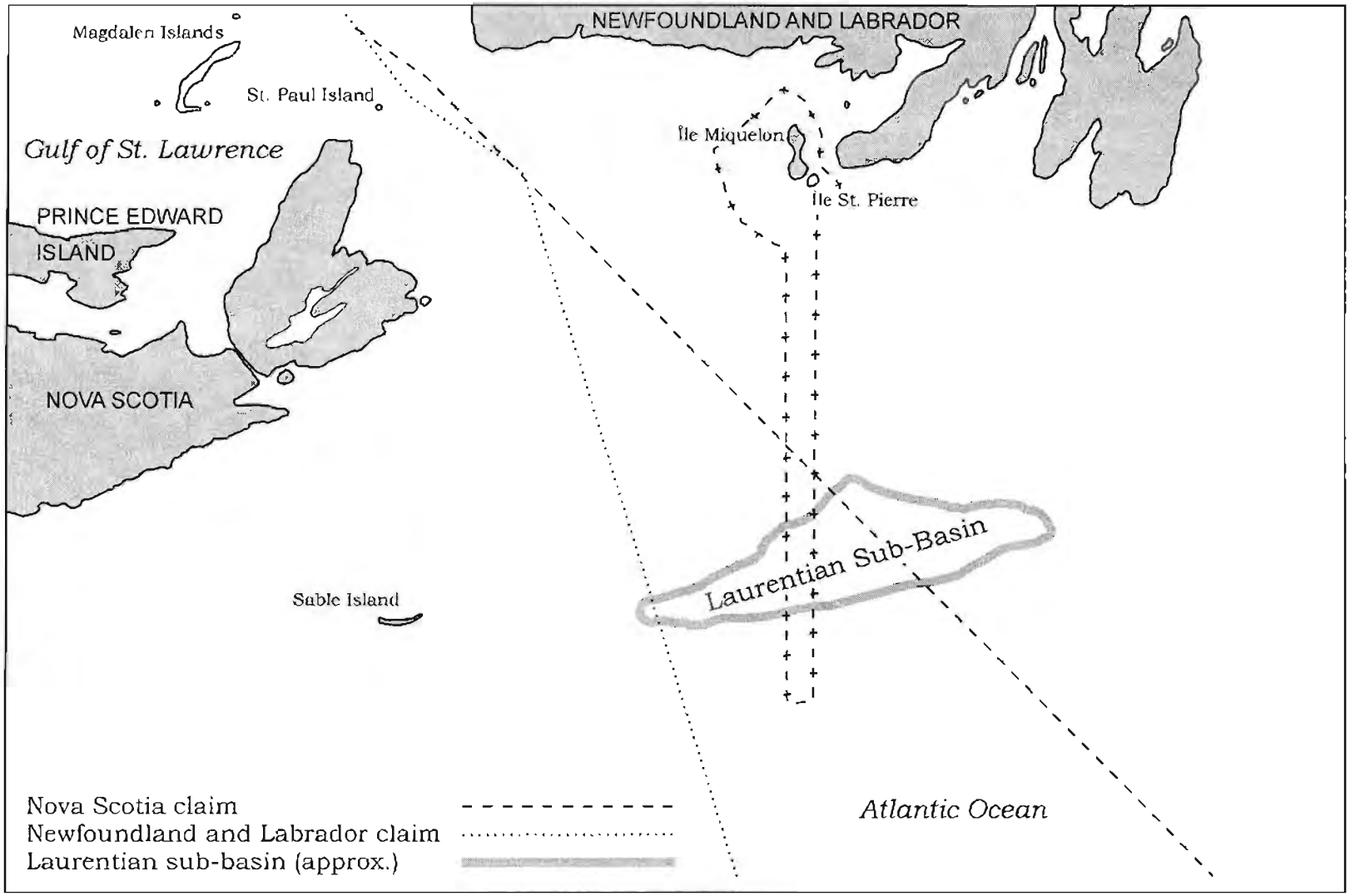

Figure 4: The Parties' Claims in Relation to the Location of the Laurentian Sub-Basin

4. The Geographical Context for the Delimitation: Coasts, Areas and Islands

(a) General Description

4.1 The area within which the delimitation is to take place is shown on **Figure 5**. It lies principally south of the island of Newfoundland, east and south of Cape Breton Island and, eventually, southeast of the mainland of Nova Scotia. It includes the maritime space between Cape Breton Island and Newfoundland, with at its narrowest, Cabot Strait. The delimitation also involves a small portion of the Gulf of St. Lawrence in the direction of a tripoint with areas of the Gulf associated with the Magdalen Islands (Québec). The coasts of the island of Newfoundland, Cape Breton Island and mainland Nova Scotia are indented by numerous bays and have many small islands and islets lying off them. To the east and south of Cape Breton Island, southeast of mainland Nova Scotia and to the south of the island of Newfoundland, the area is open to the Atlantic Ocean.

(b) Identifying the Relevant Coasts and Area

4.2 To the west of both Cape Breton Island and the island of Newfoundland is the Gulf of St. Lawrence. In this delimitation, since the two Parties are to be treated as independent states, the Gulf may be considered to be an enclosed sea. The Provinces of Québec, New Brunswick, Nova Scotia and Newfoundland border the Gulf. The Province of Prince Edward Island is a large island in the southern part of the Gulf. Anticosti Island and the Magdalen Islands, situated in the northwestern and central parts of the Gulf, respectively, are part of the Province of Québec. The west coast of Cape Breton Island and the island of Newfoundland are almost in a straight line forming the eastern side of the Gulf.

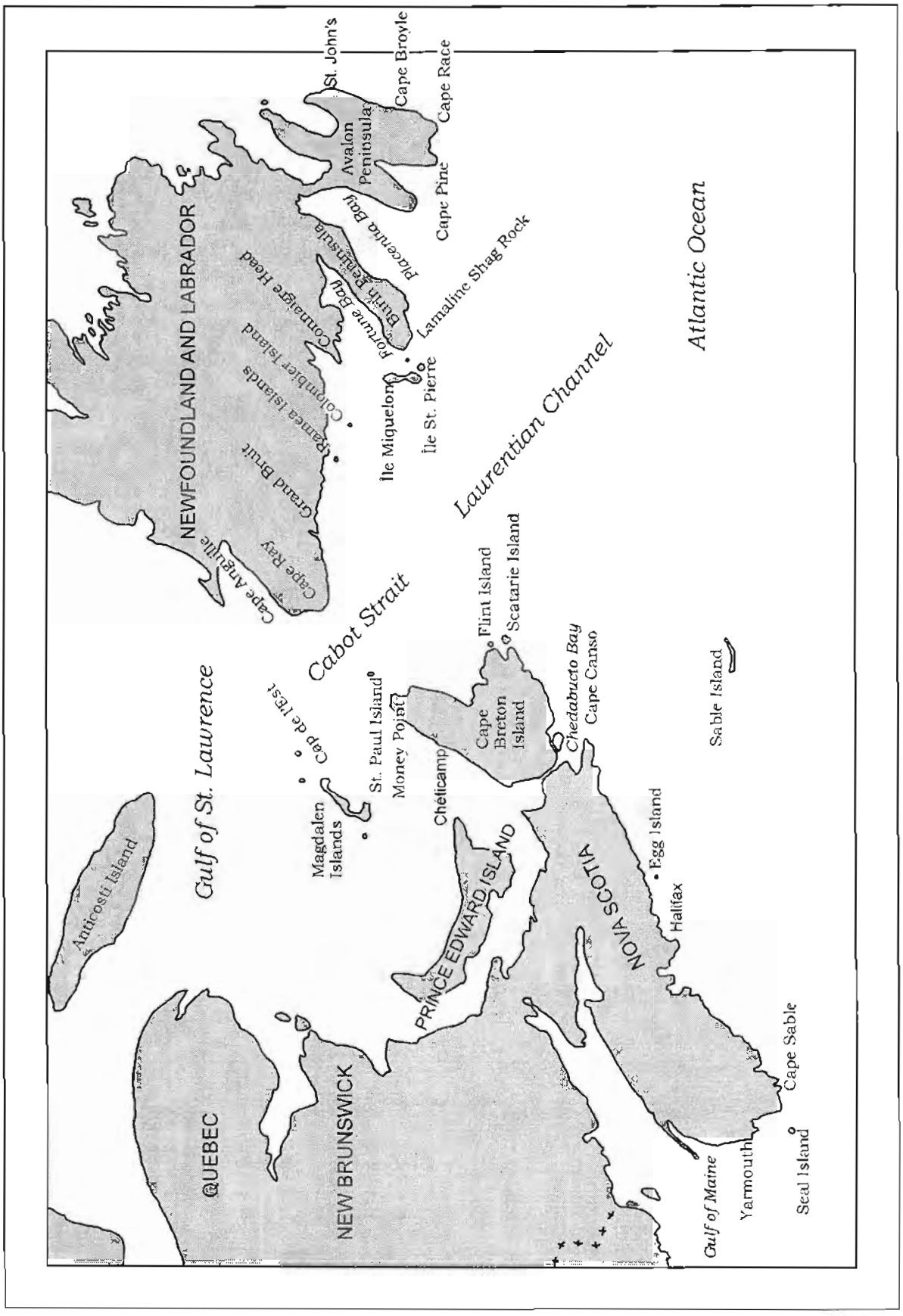

Figure 5: The Geographical Context

4.3 The south coast of the island of Newfoundland is almost straight easterly from Cape Ray to Fortune Bay. It is deeply indented by fjord-like bays and has a few offlying islands. Fortune Bay is a 60-nautical mile deep bay, with a mouth about 30 nautical miles across.[131] The south side of the bay is the Burin Peninsula. The entrance point on the north side of the bay may be identified with Connaigre Head, 137 nautical miles east of Cape Ray. Lamaline Shag Rock, on the southwest end of the Burin Peninsula, is 36 nautical miles south of Connaigre Head.

4.4 The northeastern point of Cape Breton Island lies approximately 60 nautical miles southwest of Cape Ray, from which it is separated by Cabot Strait which gives access to the Gulf of St. Lawrence. The east coast of Cape Breton Island stretches in a direction slightly east of south for 67 nautical miles to Scatarie Island, lying about one nautical mile offshore.[132]

4.5 Scatarie Island marks the western end of the closing line of what Newfoundland and Labrador referred to as the "inner concavity" and the Tribunal will refer to as the "inner area". It is to be contrasted with the area lying south and southeast of the closing line drawn between appropriate points off the coasts of the two parties, namely, Cormorandière Rocks, 0.6 nautical miles off the northeast extremity of Scatarie Island and Lamaline Shag Rock and out to the outer edge of the continental margin, which may be referred to as the "outer area". In relation to the distinction between the two areas, three initial points may be made:

(a) First, although the Court of Arbitration in the *St. Pierre and Miquelon* case treated the inner area as forming "a marked concavity",[133] that is not the situation facing the Tribunal as between the Parties to the present case.

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131 *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 659 (para. 19).
132 *Ibid.* (para. 20).
133 *Ibid.* (para. 22).

The Court of Arbitration, in this respect following the Canadian argument, took into account the length of the Cabot Strait closing line as representing "coastlines inside the Gulf which are in direct opposition to St. Pierre and Miquelon and are less than 400 nautical miles away".[134] While entirely reasonable in the context of that case, this is essentially irrelevant here. In maritime delimitation, geographical features have to be considered in relation to the actual coasts of the parties in dispute and not in an abstract sense.[135] Considered in relation to each other, the coasts of Newfoundland and Cape Breton Island are essentially opposite, albeit receding, coasts, and neither province is represented in terms of the closing line across Cabot Strait, which lies slightly to the west of St. Paul Island.

(b) Second, the islands of St. Pierre and Miquelon lie within the closing line of the inner area, although the south-facing maritime zone attributed to those islands by the Court of Arbitration lies entirely in the outer area. The Tribunal will return to this matter at the appropriate stage.

(c) Third, the closing line to the inner area here does not entirely coincide with the line of the general direction of the coasts of Nova Scotia and Newfoundland, if indeed such a line can be said to exist. On one view, the southeast coast of Nova Scotia can be seen as essentially a straight line conforming with the southeast facing coast of the Burin Peninsula, with the Avalon Peninsula jutting out by way of an initially narrow projection from the coast. Relative to that notional line, the closing line of the inner area faces approximately 7° more southerly. Even a comparatively minor difference of this kind can take on major significance in the case where a delimitation line is drawn as a perpendicular from the closing line, as Newfoundland and Labrador has proposed. In particular, the effect of any divergence of a closing line from the general direction of the coast is

134 *St. Pierre and Miquelon,* (1992), 95 I.L.R. 645 at p. 661 (para. 29).
135 *Cf. Jan Mayen,* [1993] I.C.J. Rep. 38 at p. 76 (para. 86).

magnified the longer the line is extended, as it is here since it proceeds to the outer edge of the continental shelf.

In the Tribunal's view, all three factors tend to distinguish the situation in the present case from that dealt with by the Chamber in *Gulf of Maine*. Taken together they speak against any automatic adoption of the methodology of that decision in the present case.

4.6 To summarize, in the Tribunal's view the distinction between the inner and outer areas is not only a matter of descriptive geography: it corresponds to the transition between the area where the Parties' coasts are essentially opposite, and those (in the outer area) where they are, "rather comparable to adjacent coasts", to use the language of the Court in *Qatar-Bahrain*.[136]

4.7 Turning to the outer area, the Newfoundland coast of this area is formed by the south coasts of the Burin and Avalon Peninsulas. Placentia Bay, about 48 nautical miles across at its mouth and about 60 nautical miles deep is a prominent feature on this coast.[137] The eastern extremity of the south coast of Newfoundland is Cape Race, 114 nautical miles east of Lamaline Shag Rock.

4.8 The general direction of the coast of Cape Breton Island turns at Scatarie Island to a southwesterly direction for 73 nautical miles to Cape Canso,[138] after which the east coast of mainland Nova Scotia continues in essentially the same direction to Cape Sable, a distance of 300 nautical miles from Scatarie Island. Cape Canso, on the mainland, forms the southerly entrance to Chedabucto Bay, separating Cape Breton Island from the mainland.

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136 *Qatar-Bahrain*, (2001), 40 I.L.M. 847 at p. 883 (para. 170).
137 See *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 659 (para. 20).
138 *Ibid.*

4.9 The continental shelf in the area is agreed to be a continuum. The 200-metre isobath is generally about 120 nautical miles off the coasts described, except where it borders the Laurentian Channel, a wide glacial valley about 50 nautical miles in width with an average depth of 400 metres, which runs in a southeast direction from Cabot Strait. This channel is a secondary feature which does not interrupt the continuity of the shelf. Further east and southeast of the island of Newfoundland, the 200-metre isobath extends to a distance of nearly 250 nautical miles from the coast.[139]

4.10 The Tribunal has already dealt with the question of locating the outer edge of the continental margin, which is defined in the legislation as the seaward limit of the offshore area. The approximate location of this limit is shown in **Figure 3**, above, for illustrative purposes only.

4.11 For the purpose of confirming the equitableness of their respective claim lines, both Parties provided proportionality models in which relevant areas and relevant coasts were defined. **Figure 6** shows the relevant areas proposed by the Parties.

4.12 As to its proposed relevant area, Newfoundland and Labrador noted that this only needed to be identified for the purposes of applying a proportionality test, *i.e.*, comparing the length of the relevant coasts with the respective offshore areas awarded to each of the Parties. Against that eventuality Newfoundland and Labrador defined the relevant area in the same terms as those adopted by the Court of Arbitration in the *St. Pierre and Miquelon* case. Newfoundland and Labrador did not, however, follow the Court in excluding the Newfoundland coasts north and east of St. Pierre and Miquelon, coasts which had already been used as the basis of a 1972 territorial sea delimitation between Canada and

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139 *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 660 (para. 23).

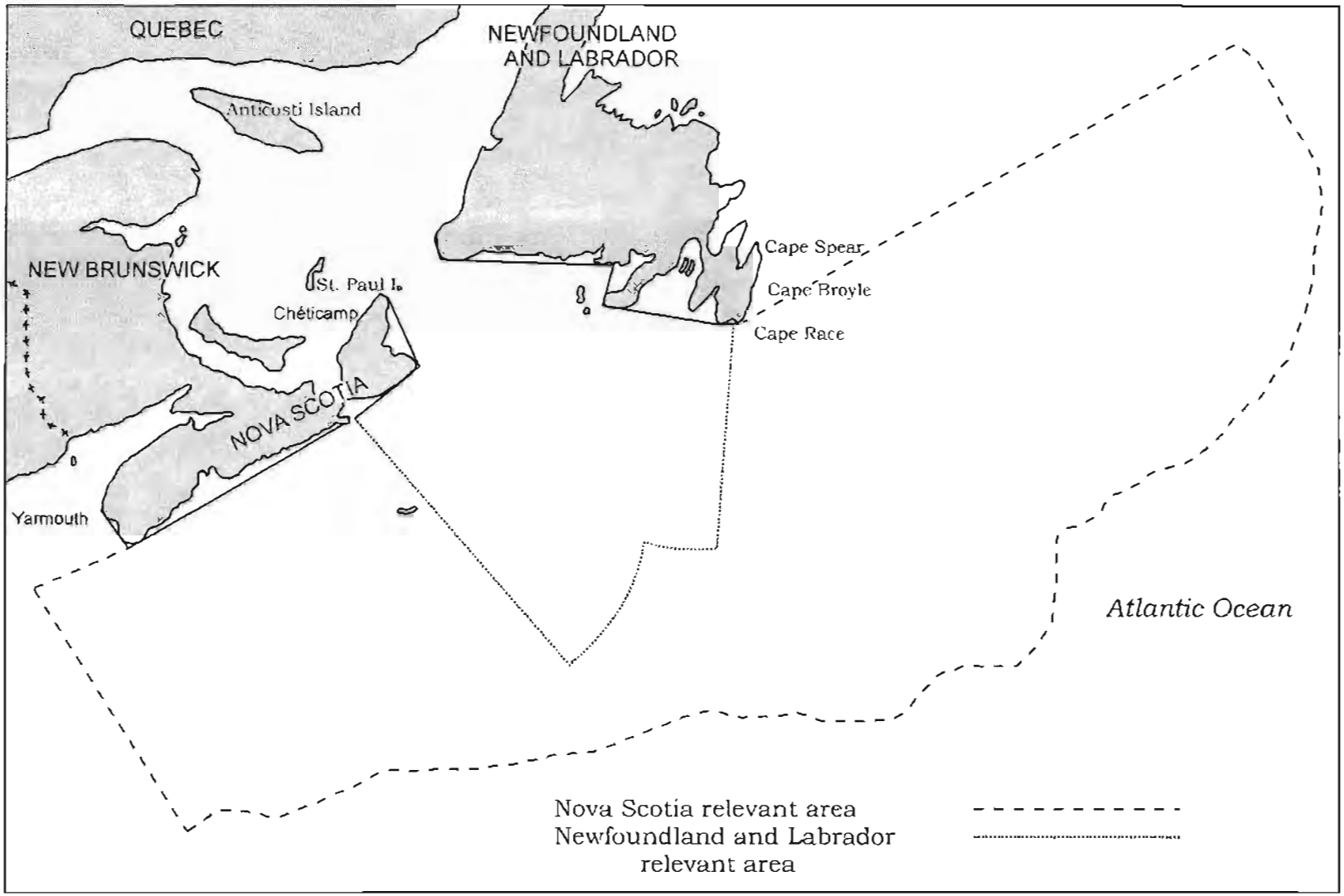

Figure 6: The Relevant Areas Proposed by the Parties

France.[140] The relevant coasts of Newfoundland, measured along their general direction, extended from Cape Ray in the west to Cape Race in the east, a distance according to Newfoundland and Labrador of 319 nautical miles. Nova Scotia's relevant coasts, again measured along their general direction, extended from Money Point in the north to Cape Canso in the south over a distance of 141 nautical miles. Thus, Newfoundland and Labrador put the ratio of coastal lengths as more than 2:1 in its favour. These various coasts were considered relevant by Newfoundland and Labrador because they faced toward the delimitation area, creating a zone of "overlap and convergence".

4.13 Newfoundland and Labrador further adjusted the Court of Arbitration's relevant area by extending lines perpendicular to the general direction of the coast from Cape Race and Cape Canso to the 200 nautical mile limit of Canada's exclusive economic zone (see **Figure 6**). This approach did not encompass the shelf areas extending beyond 200 nautical miles to the outer edge of the continental margin, for reasons already discussed. In any event, Newfoundland and Labrador maintained, there was no reason to believe that the addition of those areas would significantly alter the proportions of offshore areas accruing to either Party.

4.14 Nova Scotia rejected Newfoundland and Labrador's approach in all respects. Its objections can be briefly summarized. Whereas Newfoundland and Labrador argued that only coasts facing directly onto the area of delimitation were relevant, Nova Scotia suggested that all coasts contributing to the generation of the Parties' respective potential entitlements were relevant. The findings of the Court of Arbitration in the *St. Pierre and Miquelon* case on this matter were not applicable in the present case, in Nova Scotia's view, because the area involved was not substantially the same. For example, in that case the relevant area extended seaward to 200 nautical mile arcs about points on Newfoundland and St. Pierre,

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140 *St Pierre and Miquelon* (1992), 95 I.L.R. 645, at p. 661 (para 30).

whereas in the present case it extends to the outer edge of the continental margin. Moreover, Nova Scotia said, the Court of Arbitration did not use perpendiculars to define the lateral limits of the relevant area; rather it drew the eastern lateral limit as a line due south of Cape Race, and the western limit as a line drawn from Cape Canso to the intersection of the 200 nautical mile arcs from Cape Canso and St. Pierre. According to Nova Scotia, what Newfoundland and Labrador had done was to alter the equation between the respective coasts and areas of the Parties by maximizing the length of the relevant coast of Newfoundland while minimizing its maritime area, and at the same time minimizing Nova Scotia's coastal length while maximizing that province's maritime area, all to the advantage of Newfoundland and Labrador.

4.15 Nova Scotia defined its own relevant coast as starting at Chebogue Point in the Gulf of Maine (near Yarmouth) and going anti-clockwise around the province to Enragée Point in the Gulf of St. Lawrence (near Chéticamp). It defined the relevant coast of Newfoundland and Labrador as starting at Cape Broyle, on the east side of the Avalon Peninsula (south of St. John's, Nfld.) and going clockwise around the island to Cape Anguille in the Gulf of St. Lawrence. This produced relevant coastal lengths of 403.2 nautical miles for Nova Scotia and 378.5 nautical miles for Newfoundland and Labrador, a ratio of 1:0.94 in favour of Nova Scotia.

4.16 As to the relevant area, Nova Scotia argued again that the legal basis of title was critical to the issue of definition. Citing the *North Sea* and *Tunisia/Libya* cases, Nova Scotia defined the relevant area as the area "where one claim encroaches on the other". This concept, according to Nova Scotia, was further refined in the *Jan Mayen* case, in which the notion of a "claim" was explained as including "...areas which each State would have been able to claim had it not been for the presence of the other State". Thus, in addition to an area of overlapping claims, "there is an area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the

other".[141] This "area of overlapping entitlements", Nova Scotia concluded, provided the basis for the critical definition of the area relevant to the delimitation.

4.17 In the present case, the Nova Scotia argument continued, it was not necessary to examine factors such as relevant coasts and coastal projections to determine the area of overlapping entitlements. Rather, this was to be decided by reference to the *Accord Acts*, which provide that the respective entitlements of the two provinces extend to the outer edge of the continental margin. The *Canada-Newfoundland Accord Act* prescribed no dividing line between the Newfoundland and Nova Scotia entitlements; the *Canada-Nova Scotia Accord Act*, on the other hand, did prescribe such a dividing line but that line was irrelevant given that Newfoundland denied its applicability in the delimitation.

4.18 In short, Nova Scotia defined the Parties' entitlements in accordance with Article 76 of the 1982 *Convention on the Law of the Sea* (incorporated in Canada's *Oceans Act*) and applied those entitlements according to a system of radial projection and on the basis of "line of sight", extending to every point within the Article 76 limits, from the Canada-U.S. maritime boundary in the Gulf of Maine area to 465 nautical miles to the northeast of Cape Race. This procedure had the coasts of Nova Scotia reaching parts which calculations of relevant areas in earlier cases had not reached. Nova Scotia defended its unusual procedure on the basis that any more restrictive view of the area privileged certain coasts over others and was question begging.

4.19 In reply, Newfoundland and Labrador vigorously rejected Nova Scotia's concept of the areas of overlapping entitlements. It argued that the *Accord Acts* must be interpreted in accordance with the rule of reason and subject to implied constraints based on the notions of geographical adjacency and frontal projections of the

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[141] See *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 64 (para. 59).

coasts. Under international law, according to Newfoundland and Labrador, no state could consider itself entitled to areas 700 nautical miles away, lying directly in front of the territory of neighbouring states. The idea of an area which each state would have been able to claim had it not been for the other made sense in the *Jan Mayen* case, given the precisely defined overlapping 200 nautical mile arcs of the parties. But it made no sense, according to Newfoundland and Labrador, in the present case.

4.20 What the Tribunal for its part seeks in the definition of the relevant coasts is guidance as to those coasts which may affect the actual delimitation, *i.e.*, that contribute to the delimitation in some general sense. In this respect it treats as relevant any coast of either party which affects or might potentially affect the delimitation.[142] This involves a practical judgement, not a merely geometrical concept; it needs to have regard to the zone to be delimited and the respective claim lines of the parties. On that basis, the Tribunal can no more accept Newfoundland and Labrador's restricted vision of the relevant coasts and relevant area than it can accept Nova Scotia's greatly extended one. There is about both these versions an unmistakable odour of the pre-cooked.

4.21 In particular, Newfoundland and Labrador's approach ignores a portion of the Nova Scotia coast southwest of Cape Canso which the Tribunal considers relevant, and it excludes from the relevant area those areas of the continental shelf beyond 200 nautical miles. Newfoundland and Labrador asserted that an equidistance line between the coasts of the Parties, ignoring Sable Island, would only be governed on the Nova Scotia side by coasts down to Cape Canso and no further. But the fact remains, in the first place, that Sable Island cannot be assumed *a priori* to be irrelevant to the delimitation (especially given the possibility that it may contribute to the area of Canadian continental shelf to be delimited), and in the second place,

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142 *Cf. Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 61 (para. 75); *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 49 (para. 67); *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 68 (para. 67).

that Nova Scotia's coast further to the southwest does contribute to the area of potential convergence and overlap. In the Tribunal's estimation, a more appropriate view of Nova Scotia's relevant coast from this perspective would include the area west of Cape Canso to Egg Island, just east of Halifax. This would add 88 nautical miles to Nova Scotia's relevant coast. Since Newfoundland and Labrador's definition of its relevant coast would remain unchanged, this would give a total of 231 nautical miles to Nova Scotia as compared with 319 nautical miles to Newfoundland, a ratio of 1:1.38 in favour of Newfoundland and Labrador.[143]

4.22 As to Nova Scotia's relevant area, the Tribunal's greatest difficulty is that it provides the Tribunal no assistance whatever in carrying out its task. It tells the Tribunal no more than that the delimitation is not to be carried out between, say, the coast of Maine and the coast of Labrador. The definition of relevant coasts and the relevant area is, generally, intended to help judicial bodies determine which coasts may actually affect the course of a dividing line, to narrow the geographical focus to the area where the delimitation is to take place, and to fix the bounds within which a proportionality test, if appropriate in the circumstances of a particular case, is to be applied. In some cases a coast or area which is relevant — that is to say, useful — for one of these purposes may not be so for another, and this is often reflected in the use courts actually make of relevant coasts and relevant areas.

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[143] The Parties disagreed as to whether the west-facing coast of Newfoundland "behind" the islands of St. Pierre and Miquelon could be counted for this purpose, and on the interpretation to be given to the position of the Anglo-French Court of Arbitration in relation to the analogous case of the *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and French Republic*: see (1977), 18 U.N.R.I.A.A. 3 at p. 92 (para. 193), p. 94-96 (paras. 201-203). Given that any second stage proportionality exercise in cases such as the present must be approximate, and that it is not the function of the Tribunal "to share out an area of overlap on the basis of comparative figures for the length of the coastal fronts and the areas generated by them" (*Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 67 (para. 64)), the Tribunal does not deem it necessary to resolve the point. For this purpose it has included all Newfoundland coasts facing on to the area of the delimitation, including the west-facing coast in question.

4.23 The Nova Scotia concept of the area of potential overlapping entitlements has been applied only once, in the *Jan Mayen* case. However, the circumstances of the *Jan Mayen* case were very different from the present case, involving as it did opposite coasts, precisely overlapping 200-nautical mile arcs,[144] and a situation where one party asserted the maximum claim of 200 nautical miles and the other party did not. The Court did not apply a proportionality test to assess the equity of the result; the disparity of coastal lengths was a factor, along with access to resources, in generating an adjustment in the provisional equidistance line but it was not, so to speak, used twice to generate a further adjustment on the basis of mathematical proportionality.

4.24 In the Tribunal's view, the particular circumstances of this case are such that it is sufficient, for the purposes of the delimitation, to identify the relevant coasts without proceeding to define a relevant area. This is so for the following reasons. First, as will be explained later, the Tribunal does not consider it appropriate to apply a proportionality test of coastal lengths and maritime areas in the present delimitation, and it is therefore unnecessary to define a relevant area or proportionality area for this purpose. Second, there are no circumstances present here, such as other existing or potential delimitations, that would require the Tribunal to define western or eastern lateral limits within which the Tribunal must confine the delimitation. Third, as the Tribunal proposes to begin the delimitation with a provisional equidistance line, the area where the delimitation takes place will be self-evident and requires no further definition. That delimitation area clearly lies within an area of convergence and overlap generated by the relevant coasts as defined by the Tribunal.

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144 *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 68 (para. 67).

(c) Situation of Offshore Islands

4.25 Within the area where the delimitation will take place, there are a number of islands which raise questions pertaining to a possible delimitation. Newfoundland and Labrador denied that several of these — notably Sable Island in the Atlantic off Nova Scotia and St. Paul Island in Cabot Strait — should be given any effect in the event that the Tribunal chose to draw a provisional equidistance line. Some discussion of the relevant features is called for.

(i) St. Pierre and Miquelon

4.26 The French islands of St. Pierre and Miquelon lie within the inner area, off the mouth of Fortune Bay and west and southwest of the Burin Peninsula. The islands have an area of 237 square kilometres. Besides the two main islands, there are several smaller islands and islets and many drying rocks. Miquelon, which has an hour-glass shape with a north-south axis and an area of 210 square kilometres, is about 27 nautical miles south of the island of Newfoundland. The island is 21.6 nautical miles long from north to south and is about 7 nautical miles wide. The island of St. Pierre is situated 3 nautical miles southeast of Miquelon and almost 10 nautical miles southwest of the Burin Peninsula. It is oriented northeast-southwest and has an area of 27 square kilometres and a length of 4.4 nautical miles.[145] The area of maritime jurisdiction appertaining to France was definitively determined in 1972 in an agreement with Canada for the territorial sea delimitation between the French islands and the Burin Peninsula[146] and in 1992 by the decision of the Court of Arbitration. It consists of belts of water surrounding the islands (up to 24 nautical miles in breadth on the west side and 12 nautical miles on the southeast), as well as the long corridor about 10.5 nautical miles wide extending due south to the French 200 nautical mile limit.

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145 *St. Pierre and Miquelon*, (1992), I.L.R. 645 at p. 659 (para. 22).

146 *Fisheries Agreement between Canada and France (with supplementary Exchanges of Letters)*, March 27, 1972, Can. T.S. 1979 No. 37 (entered into force 27 March 1972).

4.27 The Court of Arbitration declined to rule on whether France had any continental shelf area beyond the 200 nautical mile limit from St. Pierre, on the ground that the area was beyond its mandate.[147] This Tribunal will proceed on the basis that the maritime areas pertaining to France are those within the limits defined by the Court of Arbitration.[148]

4.28 Neither Party argued that the islands of St. Pierre and Miquelon were relevant considerations in the present arbitration, although Newfoundland and Labrador argued that if some other initial delimitation method were to be adopted than its system of bisectors and perpendiculars, they might possibly have to be taken into account. As to the maritime area pertaining to the islands, however, both Parties contended that it did represent a relevant consideration. Nova Scotia argued that any area gained by France in any seaward extension of its zone beyond 200 nautical miles would be at the expense of Nova Scotia on the basis of Nova Scotia's claim line. In the same vein but from a different perspective, Newfoundland and Labrador argued that all of the area already allocated to France was "carved out" of the area that would otherwise belong to Newfoundland and Labrador, and this unequal impact had to be taken into account in the balancing of all relevant circumstances. The Tribunal, however, is aware of no principle whereby Newfoundland and Labrador, or Nova Scotia, should be "compensated" in this delimitation for what it "lost", or might hypothetically lose, in another. As to Newfoundland and Labrador's assertion that the maritime areas of St. Pierre and Miquelon and Nova Scotia together create a cut-off effect in respect of the Newfoundland coast in the inner area, the Tribunal will deal with this matter in the course of effecting the delimitation of that area.

4.29 The Tribunal notes that in a few cases in state practice, islands belonging to third states have been used as basepoints. Indeed, since St. Pierre and Miquelon lie

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147 *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 673-674 (paras. 75-82).

148 *Cf. Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 33 (para. 34).

within the closing line of the inner area, it considered whether a methodology which divided that closing line in ratios reflecting the coasts behind it might not be appropriate.[149] However, the inner area (unlike the Gulf of Fonseca) is not an area subject to joint sovereignty, nor is it subject to a regime analogous to that of internal waters vis-à-vis third states. It is an area of territorial sea, continental shelf and exclusive economic zone of Canada and France. In any event, the Tribunal does not believe that any further account needs to be taken of the French islands in order to produce an equitable solution as between the Parties to the present case.

(ii) St. Paul Island

4.30 St. Paul Island is situated about 13 nautical miles north of Money Point, Cape Breton Island and 41.5 nautical miles distant from Cape Ray, Newfoundland, and almost on the direct line between the two points. The island was the site of many shipwrecks and for many years two life-saving stations were operated from the island. Since 1839 there have been lighthouses at both the north and south ends of the island.[150] Only recently have they been automated. The island has never supported human habitation without sustenance from outside. The island is rocky, bold and rises to 148 metres.[151] It measures about 2.8 nautical miles long (north-

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149 *Cf.* the remarks of the Chamber on the Gulf of Fonseca closing line in the *Land, Island and Maritime Boundary* case, [1992] I.C.J. Rep. 351 at p. 607-609 (paras. 418-420).

150 The provinces have not always been enthusiastic as to the ownership or appurtenances of St. Paul Island. Of the 1820s it has been noted that:

> Since St. Paul Island at this time lay outside the jurisdiction of all the Atlantic colonies, the initiative at the outset lay with the home government. Lord Dalhousie, governor of Lower Canada, put the matter before the imperial authority in a despatch of 24 March 1826... The imperial treasury concurred in June 1829 in sharing the cost of the project [building lighthouses] with the colonies concerned, but ruled that Newfoundland be excluded a contribution.

Canadian Historic Sites, Occasional Papers in Archaeology and History No. 9, (Ottawa: Indian and Northern Affairs, 1974) at p. 40.

151 Sailing Directions, Nova Scotia (Atlantic Coast) and Bay of Fundy, 1990, at p. 68

south) and about one nautical mile wide, and has an area of less than 5 square kilometres.[152]

4.31 Newfoundland and Labrador argued that St. Paul Island should have no effect on the construction of the line, on the ground that an uninhabited island situated in enclosed waters more than 12 nautical miles from the coast was almost bound to have a disproportionate effect in the delimitation. On the other hand, in the context of a provisional equidistance line drawn from opposite coasts, it is unusual for no effect to be given to an island (not merely a rock or other minor feature), even where other delimitation methods are used.[153] For its own part, the Tribunal would have been inclined to give half effect to St. Paul Island. In earlier inter-provincial discussions, however, Newfoundland expressly accepted St. Paul Island as a basepoint for the purposes of delimitation, and it did not object to this at the time (1972) when it made it clear it did not accept any line eastwards of turning point 2017, or for that matter at any subsequent time before 1997. It is true that the East Coast Provinces did not — as the present Tribunal has already held — reach any definitive or binding agreement on an actual line, even northwestward of point 2017. But the question is a different one: it is whether, starting with an equidistance line in this area, St. Paul Island ought to be given half effect, and Newfoundland's conduct is relevant in answering that question, just as French conduct in accepting that Eddystone Rock was a basepoint was treated as relevant, if not decisive, in the *Anglo-French Channel Islands* arbitration.[154] In these circumstances there is no sufficient case for giving less than full effect to St. Paul Island.

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152 St. Paul Island, Map (Ottawa: Canadian Hydrographic Service, 1997) Chart 4450. See also http://www.geocities.com/Heartland/Estates/6001/St_Paul_Island.htm (NS Annex 214).

153 *Cf.* the treatment of Seal Island in the *Gulf of Maine* case, [1984] I.C.J. Rep. 246 at p. 336-7 (para. 222). This may be contrasted with the Court's treatment of Filfla, a small uninhabited inshore island, in *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 48 (para. 64).

154 *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and French Republic*, (1977), 18 R.I.A.A. 3 at p. 72-73 (paras. 140-141).

(iii) Sable Island

4.32 Sable Island is an isolated, sandy, crescent-shaped island oriented in an east-west direction, 22 nautical miles long and less than one nautical mile wide, situated 120 nautical miles south of Scatarie Island and about 88 nautical miles from the mainland of Nova Scotia. It has an area of 33 square kilometres.[155] For a time there was an attempt to inhabit the island; there were life-saving station personnel and lighthouse keepers as well, but now the only occupants are federally-authorized personnel. Its reputation as a graveyard of ships no doubt played a role in the exclusive federal ownership and jurisdiction over the island established by the *Constitution Act, 1867*, a departure from the general rule of provincial ownership and jurisdiction of Crown lands in Canada.

4.33 Despite its special constitutional status, there is no doubt that Sable Island remains part of Nova Scotia and its coasts are to be considered as Nova Scotia coasts for the purposes of this arbitration. Specific mention is made of it in both the 1982 and 1986 Nova Scotia Accord. Moreover, it has been used as a basepoint by Canada for the purposes of claiming the exclusive economic zone and could be used for the purpose of delimiting the outer continental shelf area.[156]

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155 *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 659 (para. 21).

156 The exclusive fishing zone of Canada established by Order in Council in 1977 defined the centres of arcs of circles of 200 nautical miles radius. Four of these points were on Sable Island. Canada declared its exclusive economic zone with the proclamation of the *Oceans Act*, 1996 as being 200 nautical miles from the territorial sea baselines. Since the territorial sea baseline is defined, *inter alia*, as the low water mark on Sable Island, any point along its shore and charted drying areas within 12 nautical miles of the island can be used as a centre of an arc of 200 nautical miles radius. The definition of the outer bound of the continental shelf under Article 76 provides for the greater of (1) arcs of 350 nautical miles from the territorial sea baseline, or (2) 100 nautical miles from the 2500-metre isobath. The best estimate of the actual continental shelf (60 nautical miles from the foot of the slope, or where the sedimentary rock thickness is 1% of the distance to the foot of the slope) is beyond 350 nautical miles from mainland Nova Scotia and beyond 100 nautical miles from the 2500-metre isobath, but not as far seaward as 350 nautical miles from the low water mark of Sable Island. Nova Scotia in its definition of the potential entitlements noted the effect caused by Sable Island being part of Nova Scotia, but not being part of Newfoundland.

4.34 Newfoundland and Labrador argued that to utilize Sable Island in the construction of a provisional equidistance line would be tantamount to refashioning geography and would have the same effect as an exponential expansion of the Nova Scotia landmass and a shift of its mainland coast a full 88 nautical miles out to sea. In the view of Newfoundland and Labrador, this situation could not be remedied by the use of modified or adjusted equidistance but required the choice of other methods altogether.

4.35 Unlike St. Paul Island, Sable Island was not referred to in the *Notes re: Boundaries*, the 1964 *Joint Statement* or the 1972 *Declaration*. It does not fall within the description of an island "lying between Provinces" for the purposes of the *Notes re: Boundaries*, and there is no unequivocal indication that Newfoundland and Labrador ever accepted its use as a basepoint for the purposes of maritime delimitation with Nova Scotia. Moreover, in the context of a delimitation between adjacent coasts and a line proceeding out to the open sea, a relatively minor feature such as Sable Island is capable of having major effects. This can be seen from **Figure 7**, which shows the strict or full-effect equidistance line, a line giving half effect to Sable Island, and a line giving no effect to Sable Island. In the *Qatar/Bahrain* case, the International Court made a similar observation with regard to Fasht al Jarim, which it described as "a maritime feature located well out to sea and of which at most a minute part is above water at high tide", and to which it gave no effect in the delimitation.[157]

4.36 Sable Island is considerably more substantial than Fasht al Jarim. But in the context of the present delimitation, it is clearly a "special" or "relevant" circumstance which needs to be taken into account. The Tribunal will return to the question in the context of its overall approach.

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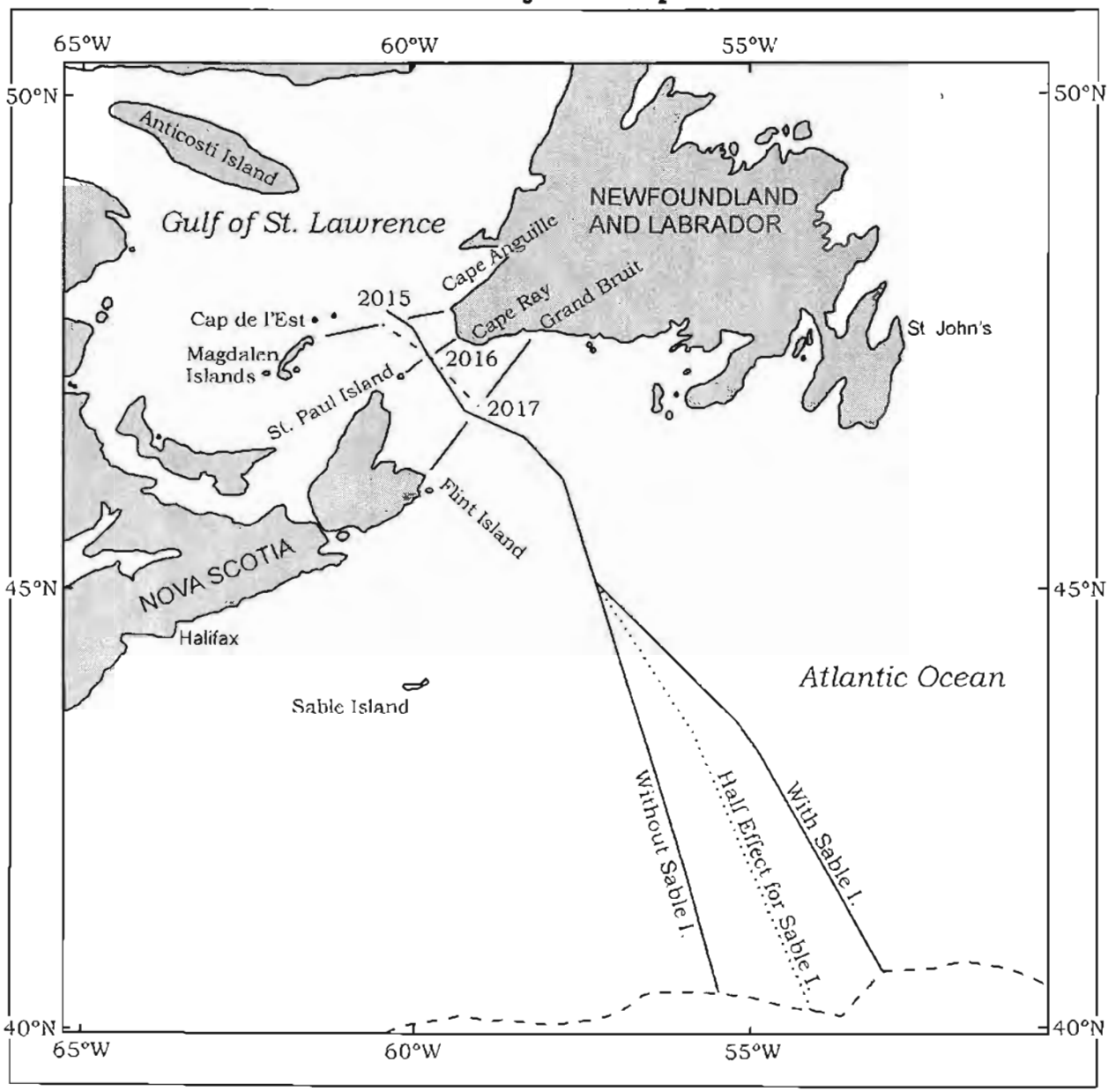
157 *Qatar/Bahrain*, (2001), 40 I.L.M. 847 at p. 894 (para. 248).

Figure 7
The Strict and Adjusted Equidistance Lines



Lines joining 2015, 2016 and 2017 - - - - - - - - - - - - - - - - - -
Strict equidistance (with Sable Island) ————————————
Adjusted equidistance (without Sable Island) ————————————
Adjusted equidistance (half effect for Sable Island) .....

(iv) Other islands forming potential basepoints

4.37 A number of other islands form potential basepoints in the inner area off the coasts of both parties. Leaving aside St. Paul Island, no difficulty was raised by either of the Parties as to the use of any of these basepoints in the drawing of an equidistance line. The Tribunal sees no reason why any of them should not be used in constructing a provisional equidistance line.

5. Delimiting the Parties' Offshore Areas

5.1 The Tribunal accordingly turns to the actual delimitation. The positions of the Parties, and the reasons justifying their respective claim lines, have already been set out and discussed in detail. Not for the first time in maritime delimitation, the Tribunal finds that neither approach can be accepted as such.[158] The use by Newfoundland and Labrador of the *Gulf of Maine* analogy has already been criticized and the geographical situation here distinguished. As to Nova Scotia's position, the Tribunal has already held that the line southeastward of turning point 2017 was never established by agreement, nor for the reasons given above can it be treated as a *de facto* line consolidated through oil practice, in the manner of the inner line in the *Tunisia/Libya* case.

(a) The Initial Choice of Method

5.2 The Tribunal will first address the question of the choice of a practical method that will assure an equitable result in the particular circumstances of this case. That choice is not difficult to determine. Since the Parties are to be treated as being bound by Article 6 of the 1958 *Geneva Convention*, it is appropriate for the Tribunal to begin with the construction of a provisional equidistance line and to determine whether it requires adjustment in the light of special circumstances. The Tribunal would note, however, that its approach would have been precisely the same in applying customary international law or Article 83 of the *1982 Law of the Sea Convention*. As the Court said in *Jan Mayen*:

> there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only

158 *Cf. Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 325 (para. 190); *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 670 (para. 65).

> because they both are intended to enable the achievement of an equitable result.[159]

The law governing maritime delimitation has thus attained a basic unity, while retaining the necessary flexibility to respond to the specific facts and features of each case. For its part, the Tribunal is convinced that this method, subject to the modifications to be indicated, will lead in the circumstances of the present case to the equitable result that is the overarching objective of all maritime delimitations, whether under customary or conventional international law.

5.3 The Tribunal proposes to construct its provisional equidistance line and effect the delimitation in three stages: first, within the inner area bounded by the Scatarie Island-Lamaline Shag Rock closing line; second, in the outer area extending from that closing line out to the outer edge of the continental margin; and third, in the area from Cabot Strait northwestward in the Gulf of St. Lawrence. The adoption of this three-stage approach will allow the Tribunal to take account of the relevant circumstances in each area, including the shift from a semi-enclosed geographical situation, where the coastal relationship is one of oppositeness, to an open-ended situation in which the essential relationship is that of adjacency.

(b) The Inner Area

5.4 The Tribunal begins its provisional equidistance line at the closing line at the entrance to the Gulf of St. Lawrence, using basepoints on St. Paul Island and Newfoundland's Cape Ray. This starting point substantially coincides with turning point 2016 as defined by the JMRC in 1969 and approved by the Premiers in 1972.[160] From there, proceeding east from turning point 2016, the line swings

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159 *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 62 (para. 56).

160 The Tribunal notes that the values for turning points 2015, 2016 and 2017 as computed by the JMRC in 1969 and confirmed by the Premiers in 1972 were based on North American Datum 1927. Article 7.1 of the Terms of Reference requires that all geodetic data be computed in terms of North American Datum 1983. The three turning points have been recomputed by the Technical

gradually to the south until it reaches the central portion of the inner area, from where it turns gradually eastward before more or less straightening out until it intersects with the Scatarie Island-Lamaline Shag Rock closing line, 11.8 nautical miles west of the mid-point of that line. From its starting point, this line is directed by basepoints on Flint Island and Scatarie Island (actually Cormorandière Rocks off the island) off the Nova Scotia coast, and Halibut Rocks, Duck Island, Yankee Rock, Ship Rock Shoal, Tinker Island, Southeast Rocks, SW Shag Rock, Ireland Island, Miffel Island and SW Turr Island (part of the Ramea Islands) off the Newfoundland coast. See **Figure 7**. The Tribunal has already explained why each of these points may be used in constructing the equidistance line, and in particular why St. Paul Island should be given full effect.

5.5 The Tribunal is not persuaded by Newfoundland's argument that the so-called protrusion of the Cape Breton coast, together with the so-called recessiveness of the Newfoundland coast, combine to create an inequitable effect, at Newfoundland's cost, in the central portion of the inner area. The Tribunal also rejects as unfounded Newfoundland's assertion that the coast of Newfoundland between Cape Ray and the Burin Peninsula is "squeezed" between the jurisdictions of France (St. Pierre and Miquelon) and Nova Scotia, so that the use of the equidistance method produces a cut-off effect in respect of the Newfoundland coast in the inner area. It is evident from a glance at the map — without the illusory perceptions created by colour tinting — that there is no squeeze and no cut-off effect.

5.6 Finally, the Tribunal rejects Newfoundland and Labrador's argument that an equidistance line in the inner area is inherently inequitable because of the difference in the respective lengths of the Parties' coasts in this area.

Expert to meet this requirement. In addition, this recomputation has also taken into account improvements in coastal mapping since 1969, in order to fix more accurately the positions of the shore points used in the determination of the three turning points concerned.

Newfoundland and Labrador maintained that the equidistance method will invariably drive the line toward the middle of the closing line of the concavity. In fact, as was pointed out above, the equidistance line intersects the closing line 11.8 nautical miles west of the mid-point of the closing line. This compares with the point 34.6 nautical miles west of the mid-point at which Newfoundland and Labrador's claim meets the closing line. In the Tribunal's view, such a shift would be excessive and unreasonable: it would amount to the dividing up of offshore areas on a strict mathematical basis, a procedure which the International Court has consistently denied is required by equitable principles.[161]

5.7 The Tribunal now proposes to examine its provisional equidistance line in the light of the conduct of the Parties. As has already been seen, the dividing line conditionally drawn in the inner area in 1964, and conditionally affirmed in 1972, was essentially a simplified median line. As has also been seen, Newfoundland never raised any objection to or difficulty with that line up to turning point 2017. For this reason, and to a lesser extent for reasons of administrative convenience, the Tribunal considers that it would be both equitable and appropriate to simplify its strict equidistance line by drawing a straight line between turning points 2016 and 2017. The Tribunal has already explained why it does not consider the conduct of the Parties to be relevant beyond turning point 2017. Nevertheless, the Tribunal is of the view that it would be appropriate, for reasons of convenience and consistency, to simplify the last segment of the inner equidistance line by drawing a straight line between turning point 2017 and the point where the equidistance line meets the closing line of the inner area.

5.8 From what has already been said, it is clear that the simplified equidistance line reflects and responds to the relevant circumstances of geography and conduct of

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[161] See *e.g. Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 37-43 (para. 54). See also *ibid.*, at p. 44-45, (para. 57) citing the Anglo-French Court of Arbitration, (1977), 54 I.L.R. 6 at p. 67-68 (paras. 100-101).

the Parties that the Tribunal has identified for this area. The result is not significantly different from that which would be achieved by a strict equidistance line or the lines respectively proposed by Nova Scotia and Newfoundland and Labrador. The Tribunal must, of course, reserve its judgment on the equity of the entire length of the delimitation line it is now constructing until it has taken the line to its terminal point in the outer area. It is to this task that the Tribunal now turns.

(c) The Outer Area

5.9 As already noted, the coasts in the outer area stand in a relationship of increasing adjacency rather than oppositeness as the eye moves seaward from the closing line of the inner area. Nevertheless, as was done in the *Qatar/Bahrain* case[162] and the *Anglo/French* case,[163] it is appropriate to draw a provisional strict equidistance line in the outer area as well, beginning from the point of intersection of both the simplified and strict equidistance lines with the closing line of the inner area and continuing to the outer edge of the continental margin. Having done so, the Tribunal will consider whether there are circumstances that require modification of that line, which is shown in **Figure 7**.

5.10 The Tribunal stresses at the outset that the strict equidistance line in the outer area begins 11.8 nautical miles west of the mid-point of the Scatarie Island-Lamaline Shag Rock closing line. It is controlled by basepoints on, or lying off, the coasts of Cape Breton Island (Nova Scotia) and the island of Newfoundland, and trends generally southeastward 85 nautical miles until it comes under the control of basepoints on Sable Island, 88 nautical miles south of mainland Nova Scotia. There it deflects to the east for a distance of 106 nautical miles until it comes

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162 (2001) 40 I.L.M. 847.
163 (1997) 18 R.I.A.A. 3.

under the control of Cape Pine on the coast of Newfoundland, where it partially resumes its southeasterly course.

5.11 In the area eastward of Scatarie Island-Lamaline Shag Rock closing line, the conduct of the Parties does not justify any departure from the provisional equidistance line. The Tribunal has already reviewed the conduct of the Parties in the outer area but it will be helpful to recapitulate its conclusions here.[164] The oil permit practice in the offshore can be discounted because: (a) it was equivocal and uncertain; (b) it was limited in extent; (c) the Tribunal is not satisfied it was concordant; and (d) the area was federal and any real activity took place only on the basis of federal licences, so that there is no sufficient evidence of reliance on provincial licences as a basis for oil activity in this region. None of this amounts to the clear, substantial and unequivocal practice required to establish a distinct *de facto* line. In particular, Newfoundland clearly expressed to Nova Scotia its objection to the line for the outer area in Minister Doody's letter of October 6, 1972, after which the existence of a disagreement in this sector was generally known to those concerned.

5.12 Accordingly, the Tribunal agrees with Newfoundland and Labrador that beyond the Scatarie-Lamaline Shag Rock closing line, this case is to be decided exclusively on grounds of the relevant coastal geography.

5.13 The Tribunal has already discussed the position of Sable Island.[165] Having regard to its remote location and to the very substantial disproportionate effect this small, unpopulated island would have on the delimitation if it were given full effect, the Tribunal will initially consider an adjustment of the provisional equidistance line so as to give Sable Island half effect: this adjusted line is shown in **Figure 7**.

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164 See above, paragraph 3.11.

165 See above, paragraph 4.32.

5.14 The question is whether the adjusted provisional equidistance line so drawn produces an inequitable result between Nova Scotia and Newfoundland and Labrador. In outer shelf areas where large spaces are at stake, the question is not so much one of strict proportionality as a manifest lack of disproportion. As the Court said in *Libya/Malta*, if proportionality were the criterion for delimitation, it would exclude all other factors.[166] In particular, Newfoundland and Labrador's line has the appearance of being constructed using proportionality of coasts as the sole criterion of division, as well as ignoring the areas beyond 200 nautical miles, despite the fact that the Tribunal's task is, as both Parties recognize, to delimit to the outer edge of the continental shelf.

5.15 Another significant concern relates to the cut-off effect that the provisional line has on the southwest coast of Newfoundland. Although giving half effect to Sable Island reduces the cut-off effect, the Tribunal considers that it should be further reduced in some limited measure. While agreeing that it is especially important to ensure that a delimitation line does not come "too close" to the coast of one of the states concerned, the Tribunal is not persuaded by Nova Scotia's argument that the cut-off effect necessarily becomes irrelevant as the distance from the coast increases. As the International Court stated in *Libya/Malta*, the principle of non-encroachment "is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances".[167] There is no suggestion that this principle applies only so far from the coast and no further. Moreover, the Tribunal is of the view that a further adjustment of the equidistance line (beyond giving only half effect to Sable Island) would accommodate in a reasonable way the disparity in the lengths of the Parties' coasts (as determined by the Tribunal) in both the inner and outer areas.

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166 [1985] I.C.J. Rep. 13 at p. 45 (para. 58).

167 *Ibid.*, at p. 39 (para. 46).

Accordingly, the Tribunal further adjusts the equidistance line by giving no effect whatever to Sable Island. This zero-effect equidistance line is defined by geodesic lines connecting a series of turning points which themselves are defined by the controlling basepoints on the coasts of both Parties as set out in the Technical Report. While the Parties had requested the Tribunal to define the dividing line by means of a rhumb line, the Tribunal considers that geodesic lines better approximate the equidistance line.

(d) From Cabot Strait Northwestward in the Gulf of St. Lawrence

5.16 Canada claims the area from Cabot Strait northwestward in the Gulf of St. Lawrence as Canadian internal waters which, however, have not been enclosed within straight baselines. This claim, of course, is consistent with the fact that Canada represents a single state surrounding the Gulf. Since Nova Scotia and Newfoundland and Labrador, under the Terms of Reference, must be treated as states in their own right, the Gulf cannot be regarded as internal waters for the purposes of this arbitration. This was the position taken by Newfoundland and Labrador, and the Tribunal agrees with it. Accordingly, the delimitation of this area is also to be governed by the international law of the continental shelf. Northwestward of turning point 2016, a strict equidistance line between the adjacent coasts here concerned would terminate at a tripoint with Québec slightly to the north of turning point 2015. The difference between the two lines and the areas they divide is not significant, and the Tribunal, having regard to the conduct of the Parties in this sector, considers it appropriate to delimit this small, innermost area by a straight line joining turning points 2016 and 2015. The Tribunal emphasizes that its decision on this matter, as indeed the whole of its decision, is binding only on the Parties to this case and cannot prejudice the rights of any other parties that may be concerned.

(e) Confirming the Equity of the Delimitation

5.17 The Tribunal notes that it is not the inevitable or even the most frequent practice of the International Court of Justice or arbitral tribunals to apply the so-called proportionality test by comparing the lengths of the relevant coasts of the parties with the respective areas awarded to them as a means of assessing the equity of the delimitation. In particular, the Tribunal notes that in the cases where relative lengths of coasts have been treated as relevant circumstances in the actual determination of the dividing line (*Gulf of Maine, Libya/Malta, Jan Mayen*) the Court has not applied this test, for reasons which appear to relate, *inter alia*, in some measure at least, to the fact that the proportionality factor has already been taken into account in drawing the line. In addition, the Tribunal wishes to stress once again that proportionality is not and cannot be a principle of delimitation or a basis of title.

5.18 A significant difficulty that often arises in relation to the proportionality test is the imprecision and "impressionism" involved in identifying the relevant area to be used for this purpose. The arguments of the Parties in the present case are rich in such imprecision and impressionism, owing in good part to the fact that it is the first case involving the delimitation of the continental shelf beyond the 200 nautical mile limit to the outer edge of the continental margin. The extreme difference between the present Parties' respective approaches to the definition of the relevant area and the application of the proportionality test is a striking example of the pitfalls inherent in this exercise. The fact that each Party, despite the great difference in their approaches, was able more or less convincingly to satisfy the proportionality test down to almost the last decimal point only confirms that the test may be more contrived than constructive in some instances. The Tribunal further notes that during oral argument the Parties agreed that such a proportionality test was not mandatory.

5.19 While the Tribunal has rejected the relevant areas and proportionality tests proposed by both Parties, it may nevertheless be of interest to note the results that would be obtained by applying a hypothetical proportionality test using the line determined by the Tribunal and the relevant areas defined respectively by Nova Scotia and by Newfoundland and Labrador, modified in the latter instance so as to extend its western and eastern perpendicular limits to the outer edge of the continental margin. Using the Nova Scotia relevant area, the result would be a coastal ratio of 52% for Nova Scotia and 48% for Newfoundland and Labrador, as compared with an area ratio of 39% for the former Party and 61% for the latter. Using the relevant area defined by Newfoundland and Labrador, as modified to include the areas beyond 200 nautical miles to the outer edge of the continental margin, the result would be a coastal ratio of 33% for Nova Scotia and 67% for Newfoundland and Labrador, as compared to an area ratio of 38% for the former Party and 62% for the latter. While noting that such results would reveal no shocking disproportionality over such great areas even if the Parties' relevant areas were appropriately defined — which they have been held not to be — the Tribunal draws no conclusions from them beyond the fact that they demonstrate the vagaries associated with the definition of relevant areas and the use of a proportionality test.

AWARD

6.1 For the foregoing reasons, the Tribunal unanimously determines that the line of delimitation dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia is as described in the following paragraphs.

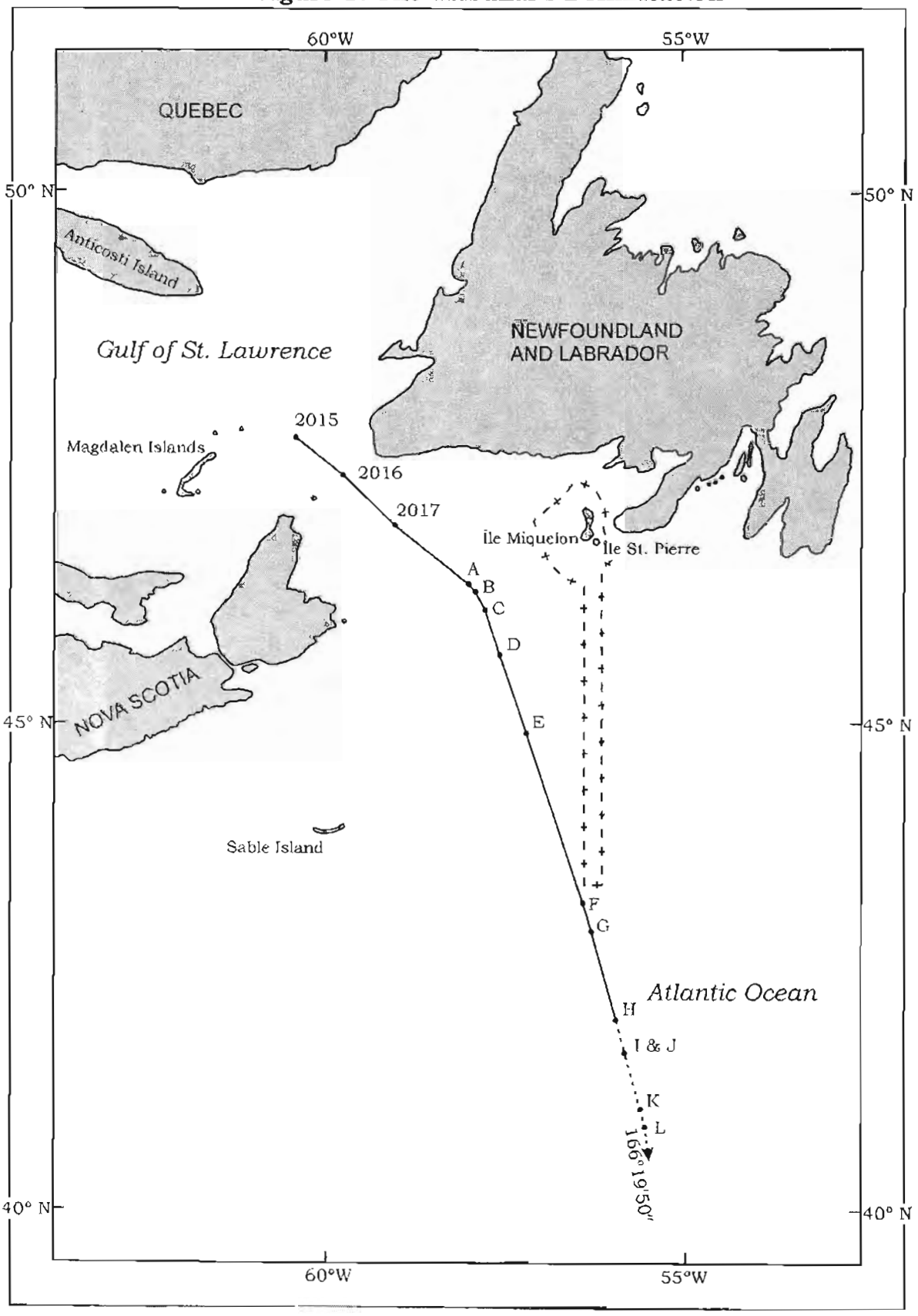
6.2 In accordance with Article 7.1 of the Terms of Reference, the Tribunal is charged with describing the line in a technically precise manner. In particular, the positions of all the points mentioned are to be given in reference to the North American Datum 1983 (NAD 83) geodetic reference system. To this end, the coordinates of turning points previously prepared by the Joint Mineral Resources Committee have been revised by being computed on NAD 83.

6.3 In accordance with Article 3.2 (ii) of the Terms of Reference, the course of the delimitation line is defined in terms of geodesic lines connecting the turning points listed below and shown in **Figure 8**. The geographical coordinates are:

Point	**Latitude North**	**Longitude West**
2015 (revised)	47° 45′ 41.8"	60° 24′ 12.5"
2016 (revised)	47° 25′ 31.7"	59° 43′ 37.1"
2017 (revised)	46° 54′ 48.9"	59° 00′ 34.9"
A	46° 22′ 51.7"	58° 01′ 20.0"

6.4 From point "A", the course of the delimitation line is defined in terms of geodesic lines connecting the turning points listed below and shown in **Figure 8**, to the

Figure 8: The Tribunal's Delimitation



point where the delimitation line intersects the outer limit of the continental margin of Canada as it may be determined in accordance with international law.

Point	**Latitude North**	**Longitude West**
B	46° 17' 25.1"	57° 53' 52.7"
C	46° 07' 57.7"	57° 44' 05.1"
D	45° 41' 31.4"	57° 31' 33.5"
E	44° 55' 51.9"	57° 10' 34.0"
F	43° 14' 13.9"	56° 23' 55.7"
G	42° 56' 48.5"	56° 16' 52.1"
H	42° 03' 46.3"	55° 54' 58.1"
I	41° 45' 00.8"	55° 47' 31.6"
J	41° 42' 24.7"	55° 46' 23.8"
K	41° 06' 19.2"	55° 36' 10.9"
L	40° 58' 21.7"	55° 34' 23.3"

6.5 Should the outer limit of the continental margin, as it may be determined in accordance with international law, extend beyond point "L" above, the course of the delimitation line beyond that point shall be defined as a geodesic line along an azimuth of 166° 19' 50" to its point of intersection with the outer limit of the continental margin so determined.

6.6 The course of the delimitation has been depicted, for illustrative purposes only, on copies of Canadian Hydrographic Service chart 4001. An explanatory report of the Technical Expert is annexed to this decision.

DATED this 26th day of March, 2002.

Hon. Gérard La Forest (Chairperson)

Leonard Legault (Member)

James Richard Crawford (Member)

Heather M. Hobart (Registrar)

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TECHNICAL REPORT

David H. Gray, M.A.Sc., P.Eng., C.L.S.

1. The full description of the line of delimitation, together with the necessary geographical coordinates, is given in the Award. All computations have been made on the Geodetic Reference System (1980) ellipsoid and all geographical coordinates are referenced to the North American Datum 1983 (NAD 83). The International Nautical Mile of 1852 metres has been used.

2. Positions of the relevant geographical features have been taken from Canadian Hydrographic Service nautical charts, Canadian Hydrographic Service field sheets, Canadian National Topographic Maps at the scale of 1:50,000 as indicated in the tables at paragraphs 4 and 7. For many of these points, it has been necessary to convert the position from the geodetic datum used as a basis for the charting or mapping to the North American Datum 1983. The horizontal datum of some charts is so inaccurate that it has been necessary to use the topographic maps as the source document instead.

3. Given the scale of the topographic maps (1:50,000) and of most of the nautical charts (1:75,000), positions could only be determined to the nearest arc second. Given that the decision in the *St. Pierre and Miquelon* case used a precision of 0.1 arc seconds, I have done the same for any position given in the Award.

4. The turning points prepared by the Joint Mineral Resources Committee and approved by the provincial premiers in 1972 were the mid-points between the following basepoints:

   (a) Pointe de l'Est (Magdalen Islands) and Cape Anguille (Newfoundland),
   (b) St. Paul Island (Nova Scotia) and Cape Ray (Newfoundland), and
   (c) Flint Island (Nova Scotia) and Offer Island (near Grand Bruit, Nfld.).

I determined the basepoints on NAD 83 and taking into account improvements in coastal mapping, in order to fix more accurately the positions of the three turning points concerned. The geographical coordinates are:

Basepoint	**Source Document**	**NAD 83 Latitude North**	**NAD 83 Longitude West**
Pointe de l'Est	CHS 4952 (1992)	47° 37' 05"	61° 23' 20"
Cape Anguille	CHS 4682 (1962)	47° 53' 48"	59° 24' 46"
St. Paul Island	CHS 4450 (1973)	47° 13' 40"	60° 08' 24"
Cape Ray (closest to St. Paul I.)	NTS 11-O/11 (1986)	47° 37' 18"	59° 18' 39"
Flint Island	CHS 4375 (1985)	46° 10' 50"	59° 46' 10"
Offer Island (part closest to Flint I)	NTS 11-O/9 (1985)	47° 38' 28.8"	58° 13' 44.5"

5. The mid-points are on the geodesic lines between the associated two basepoints. These positions are:

Number	**Basepoints**	**NAD 83 Latitude North**	**NAD 83 Longitude West**
2015 (revised)	Pte. de l'Est & C. Anguille	47° 45' 41.8"	60° 24' 12.5"
2016 (revised)	St. Paul I. & C. Ray	47° 25' 31.7"	59° 43' 37.1"
2017 (revised)	Flint I. & Grand Bruit	46° 54' 48.9"	59° 00' 34.9"

6. The position of point "A" is computed as being a point on the rhumb line between Cormorandière Rocks (near Scatarie Island, NS) and Lamaline Shag

Rock. Point "A" is also equidistant from Cormorandière Rocks and SW Turr Island (part of the Ramea Islands, Nfld.), being the controlling basepoints for the strict equidistance line. The position is:

Number	NAD 83 Latitude North	NAD 83 Longitude West
A	46° 22' 51.7"	58° 01' 20.0"

7. The geographical positions of features used for the equidistance lines giving zero effect to Sable Island are:

Number	Geographical Feature	Source Document	NAD 83 Latitude North	NAD 83 Longitude West
Nova Scotia				
NS-1	Big Ledge (near Cape Canso)	CHS 4233 (1991)	45° 14' 36"	60° 58' 46"
NS-2	Rocks off Guyon I.	CHS 4374 (1985)	45° 46' 06"	60° 06' 12"
NS-3	Portnova Islands	CHS 4377 (1998)	45° 56' 14"	59° 47' 27"
NS-4	Scatarie Island	CHS 4375 (1985)	45° 59' 31"	59° 41' 58"
NS-5	Cormorandière Rocks	CHS 4375 (1985)	46° 02' 13"	59° 39' 40"
Newfoundland & Labrador				
N&L-1	SW Turr Island	NTS 11-P/12 (1988)	47° 30' 08"	57° 26' 47"
N&L-2	Colombier Island	CHS survey (1996)	47° 22' 32"	56° 59' 30"
N&L-3	Little Green Island	CHS FS 2472	46° 51' 35.9"	56° 05' 54.7"
N&L-4	Enfant Perdu	CHS FS 2472	46° 51' 19.9"	56° 05' 27.8"
N&L-5	Lamaline Shag Rock	CHS FS 2475	46° 50' 20.9"	55° 49' 26.2"
N&L-6	Shag Rock	CHS 4642 (1960)	46° 50' 17"	55° 44' 48"
N&L-7	St. Mary's Cays	CHS 4842 (2000)	46° 42' 54"	54° 13' 04"
N&L-8	Shoal Point	CHS 4842 (2000)	46° 36' 45"	53° 34' 42"
N&L-9	Cape Freels (part of Cape Pine)	CHS 4842 (2000)	46° 36' 39"	53° 33' 34"

8. For the purpose of computing an equidistance line giving Sable Island zero effect, starting at the point equidistant from Cormorandière Rocks (NS-5), SW Turr Island (N&L-1) and Colombier Island (N&L-2), the turning points are as listed:

Point	Nova Scotia	Newfoundland & Labrador	Other	NAD 83 Latitude North	NAD 83 Longitude West
B	NS-5	N&L-1	N&L-2	46° 17' 25.1"	57° 53' 52.7"
C	NS-5	N&L-2	N&L-3	46° 07' 57.7"	57° 44' 05.1"
D	NS-5	N&L-3	N&L-4	45° 41' 31.4"	57° 31' 33.5"
E	NS-5	N&L-4	NS-4	44° 55' 51.9"	57° 10' 34.0"
F	NS-4	N&L-4	N&L-5	43° 14' 13.9"	56° 23' 55.7"
G	NS-4	N&L-5	NS-3	42° 56' 48.5"	56° 16' 52.1"
H	NS-3	N&L-5	N&L-6	42° 03' 46.3"	55° 54' 58.1"
I	NS-3	N&L-6	NS-2	41° 45' 00.8"	55° 47' 31.6"
J	NS-2	N&L-6	N&L-7	41° 42' 24.7"	55° 46' 23.8"
K	NS-2	N&L-7	N&L-8	41° 06' 19.2"	55° 36' 10.9"
L	NS-2	N&L-8	NS-1	40° 58' 21.7"	55° 34' 23.3"
M	NS-1	N&L-8	N&L-9	38° 40' 27.7"	54° 51' 39.0"

9. The geodetic azimuth from point "L" to point "M" is 166° 19' 50" from North. Point "M" is not shown in **Figure 8** of the Award. It represents the tripoint that would be used for the construction of the delimitation line beyond point "L" should the outer edge of the continental margin be determined to lie beyond that latter point.

10. The line of delimitation has been shown on copies of Canadian Hydrographic Service chart 4001, for illustrative purposes only.

David H. Gray, Technical Expert

Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago, Award, 11 April 2006, reprinted in 27 RIAA 147.

ARBITRAL TRIBUNAL CONSTITUTED PURSUANT TO ARTICLE 287, AND IN ACCORDANCE WITH ANNEX VII, OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

IN THE MATTER OF AN ARBITRATION BETWEEN:

BARBADOS

- AND -

THE REPUBLIC OF TRINIDAD AND TOBAGO

AWARD OF THE ARBITRAL TRIBUNAL

The Arbitral Tribunal:

Judge Stephen M. Schwebel, President
Mr Ian Brownlie CBE QC
Professor Vaughan Lowe
Professor Francisco Orrego Vicuña
Sir Arthur Watts KCMG QC

The Hague, 11 April 2006

AGENTS, COUNSEL AND OTHER REPRESENTATIVES OF THE PARTIES

BARBADOS

- The Hon Mia A Mottley QC, Deputy Prime Minister, Attorney General and Minister of Home Affairs, Agent for Barbados
- Mr Robert Volterra, Co-Agent, Counsel and Advocate, Latham & Watkins
- Professor Sir Elihu Lauterpacht CBE, QC, Counsel and Advocate
- Professor Michael Reisman, Counsel and Advocate
- Mr Jan Paulsson, Counsel and Advocate, Freshfields Bruckhaus Deringer
- Sir Henry Forde QC, Counsel and Advocate
- Mr Stephen Fietta, Counsel and Advocate, Latham & Watkins
- Mr Adrian Cummins QC, Counsel
- Dr David Berry, Counsel
- Ms Megan Addis, Counsel, Latham & Watkins
- Ms Teresa Marshall, Permanent Secretary, Foreign Affairs
- Mr Edwin Pollard, High Commissioner for Barbados in London
- Mr Anthony Wiltshire, Minister/ Counsellor at the Barbados High Commission in London
- Mr François Jackman, Senior Foreign Service Officer
- Mr Tyronne Brathwaite, Foreign Service Officer
- Mr Christopher Parker, Fisheries Biologist, Fisheries Division
- Ms Angela Watson, President of Barbados Association of Fisherfolk Organisations
- Mr Anderson Kinch, Fisherman/Boat owner
- Mr Oscar Price, Latham & Watkins
- Ms Phillippa Wilson, Latham & Watkins
- Mr Dick Gent, UK Hydrographic Office
- Dr Robin Cleverly, UK Hydrographic Office
- Ms Michelle Pratley, Assistant, Latham & Watkins
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TRINIDAD AND TOBAGO

- The Hon John Jeremie, Attorney General, Agent for Trinidad and Tobago
- Mr John Almeida, Co-Agent, Charles Russell
- Mr Laurie Watt, Co-Agent, Charles Russell
- Ms Lynsey Murning, Charles Russell
- Professor James Crawford SC, Counsel
- Professor Christopher Greenwood, CMG, QC, Counsel
- Mr Samuel Wordsworth, Counsel
- H.E. Mr Phillip Sealy, Ambassador to the United Nations
- Mr Gerald Thompson, Director, Legal Affairs, Ministry of Foreign Affairs
- Mr Eden Charles, Ministry of Foreign Affairs
- Mr Martin Pratt, International Boundaries Research Unit
- Mr Francis Charles, Expert
- Dr Arthur Potts, Ministry of Fisheries and Agriculture
- Mr Charles Sagba, Ministry of Foreign Affairs
- Mr Andre Laveau, Ministry of Foreign Affairs
- Ms Glenda Morean, High Commissioner for Trinidad and Tobago in London

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CHAPTER I – PROCEDURAL HISTORY

1. By a Notice of Arbitration dated 16 February 2004 Barbados initiated arbitration proceedings concerning its maritime boundary with the Republic of Trinidad and Tobago. The proceedings, which, in the view of Barbados, relate to the delimitation of a single maritime boundary between the exclusive economic zones and the continental shelves appertaining to Barbados and Trinidad and Tobago respectively, were begun pursuant to Article 286 of the 1982 United Nations Convention on the Law of the Sea (the "Convention" or "UNCLOS") and, Barbados maintains, in accordance with Annex VII to the Convention.

2. In its concurrently submitted Statement of Claim, Barbados stated that neither Party had declared, pursuant to Article 298 of the Convention, any exceptions to the applicability of the dispute resolution procedures of Part XV, nor had either Party made a written declaration choosing the means for settlement of disputes under Article 287(1) of the Convention.

3. In its Notice of Arbitration, Barbados appointed Professor Vaughan Lowe as a member of the arbitral tribunal to be constituted pursuant to Annex VII. Trinidad and Tobago subsequently appointed Mr. Ian Brownlie CBE QC. The remaining three members of the Tribunal were duly appointed in accordance with Article 3 of Annex VII and are Judge Stephen M. Schwebel (President), Professor Francisco Orrego Vicuña, and Sir Arthur Watts KCMG QC.

4. On 15 April 2004 the Parties sent a joint letter to the Secretary-General of the Permanent Court of Arbitration ("PCA"), asking whether the PCA would be ready to serve as Registry for the proceedings.

5. On 16 April 2004 the Secretary-General of the PCA responded that the PCA was prepared to serve as Registry for the proceedings. Ms. Bette Shifman was appointed to serve as Registrar, assisted by Mr. Dane Ratliff. Ms. Shifman was subsequently replaced by Ms. Anne Joyce.

6. On 19 May 2004 the President of the Tribunal, counsel for the Parties, and a member of the Registry participated in a conference call. It was agreed that the Parties would each submit a brief to the Tribunal on 26 May 2004 with their respective views on the schedule and order of written pleadings. It was also provisionally agreed that a meeting be held in London on 21 June 2004 to determine any outstanding procedural matters.

7. On 26 May 2004 both Barbados and Trinidad and Tobago made written submissions on the timing and order of written pleadings. Barbados proposed that pleadings be exchanged simultaneously, whereas Trinidad and Tobago proposed that the pleadings be sequentially filed, with Barbados submitting its Memorial before Trinidad and Tobago submitted its Counter-Memorial.

8. On 3 June 2004 the Tribunal changed the date for the first procedural meeting of the Tribunal with the Parties from 21 June 2004 to 23 August 2004.

9. On 7 June 2004 the Tribunal issued Order No. 1[1] which provides in operative part:

> 1. Barbados shall file its Memorial no later than five months from the date of this Order, by 30 October 2004.
> 2. Trinidad and Tobago shall file its Counter-Memorial no later than ten months from the date of this Order, by 31 March 2005.
> 3. The question of whether and which further written pleadings shall be exchanged simultaneously or sequentially shall be the subject of a further Order.

10. On 17 August 2004 the Minister of Foreign Affairs of Guyana wrote to the President of the Tribunal and requested that the Tribunal make available to Guyana a copy of the Application and Statement of Claim by Barbados, together with copies of the written pleadings of both Parties, on the basis that it, as a neighboring State, had an interest in the proceedings. The President of the Tribunal consulted with the Parties regarding Guyana's request and subsequently responded (on 26 October 2004) that, based on the wishes of the Parties, the request could not be accepted.

11. Also on 17 August 2004 Trinidad and Tobago wrote to the Registry requesting an order from the Tribunal for "the disclosure of limited information and documentation from

[1] The Orders, Rules of Procedure, and the pleadings in the arbitration are filed in the archives of the PCA in The Hague, and are available on the PCA website at: http://www.pca-cpa.org.

Barbados" concerning "self-help" measures by Barbados (including making presentations to oil companies) with respect to four submarine areas for petroleum exploration and production known as blocks 22, 23(a), 23(b) and 24.

12. On 23 August 2004 the Tribunal met with the Parties in London to conclude arrangements for the logistical and procedural aspects of the arbitration, and heard arguments from both Parties on Trinidad and Tobago's application for disclosure. At the conclusion of the meeting, the Tribunal issued Order No. 2 which provides in operative part:

> 1. The Rules of Procedure as assented to by the Parties and as attached to Order No. 2 are adopted;
> 2. Following the submission of the Counter-Memorial, Barbados shall submit a Reply by 9 June 2005, and Trinidad and Tobago shall submit a Rejoinder by 18 August 2005;
> 3. The place of arbitration shall be The Hague;
> 4. Oral hearings shall be held in London, unless by 1 October 2004 the Parties have agreed on a situs in the Caribbean;
> 5. Oral hearings will take place in October or November 2005, on dates to be fixed by the Tribunal after further consultation with the Parties; and
> 6. Barbados shall submit its views by 6 September 2004 on Trinidad and Tobago's application for the disclosure of certain information by Barbados.

13. On 6 September 2004 Barbados submitted its views on the application of Trinidad and Tobago, arguing that the Tribunal did not have the power to issue the requested order, and asking that Trinidad and Tobago's request be refused, and if it were not, then Trinidad and Tobago should on the basis of reciprocity be required to disclose information to Barbados.

14. On 17 September 2004 the Tribunal issued Order No. 3 which provides in operative part:

> 1. Trinidad and Tobago shall on or before 1 October 2004 submit a Reply to the observations of Barbados in its Response, including its position on the Tribunal's jurisdiction to grant the request for disclosure made in Trinidad and Tobago's Application;
> 2. Barbados shall on or before 15 October 2004 submit a Rejoinder on the observations of Trinidad and Tobago made in its Reply, addressing in particular those on jurisdiction.

15. On 30 September 2004 the Parties informed the Tribunal that they would be available to attend oral hearings during the two-week period commencing on 17 October 2005. The

dates for the hearings accordingly were fixed for 17-28 October 2005, to take place in London.

16. On 1 October 2004 Trinidad and Tobago submitted its Reply to Barbados' Response of 6 September 2004, arguing, *inter alia*, that the Tribunal was empowered to make the requested order.

17. On 15 October 2004 Barbados filed a Rejoinder to Trinidad and Tobago's Reply of 1 October 2004, in which Barbados, *inter alia*, rejected Trinidad and Tobago's allegations that it engaged in "improper self-help".

18. On 26 October 2004 the Tribunal issued Order No. 4 regarding Trinidad and Tobago's application for disclosure of limited information and documentation from Barbados. Order No. 4 provides in operative part:

> 1. The Application of the Republic of Trinidad and Tobago for "disclosure of limited information and documentation from Barbados" is denied, but without prejudice to its reconsideration by the Tribunal, if Trinidad and Tobago, in light of Barbados' Memorial, decides to resubmit it.

19. On 1 November 2004 Barbados filed its Memorial.

20. On 23 December 2004 Trinidad and Tobago filed a Statement of Preliminary Objections, which it stated were made "pursuant to Article 1 of the Tribunal's Rules of Procedure" and within the time limit set forth in Article 10(2) thereof. In its Statement, Trinidad and Tobago asserted that Barbados' claim was outside the jurisdiction of the Tribunal, or alternatively, inadmissible. With respect to the timing of the Tribunal's potential ruling on its preliminary objections, Trinidad and Tobago stated that "it is Trinidad and Tobago's view that, given the nature of its objections and the existence of a timetable for a final hearing commencing on 17 October 2005, these objections should be joined to the merits and determined in the Tribunal's final Award".

21. On 28 March 2005 Barbados wrote to the Tribunal raising concerns about the admissibility of the agreed minutes of negotiations between Barbados and Trinidad and Tobago that preceded the initiation of arbitral proceedings (the "Joint Reports"), which Barbados understood were to be annexed to Trinidad and Tobago's Counter-Memorial. Barbados based its objections in part on an agreement between the Parties to the negotiations that "no information exchanged in the course of their negotiations will be used in any subsequent judicial proceedings which might arise unless both parties agree to its use". Barbados requested the Tribunal to instruct Trinidad and Tobago that inclusion of the Joint Reports or the substance thereof in Trinidad and Tobago's Counter-Memorial, without Barbados' agreement or the Tribunal's permission, would constitute a breach of the confidentiality agreement and asked that the Joint Reports be withheld from the Tribunal pending its decision.

22. On 29 March 2005 Trinidad and Tobago wrote to the Registry proposing that, "if Barbados wishes to persist with its submission", the issue of admissibility should be addressed by "brief written arguments" submitted by the Parties, followed by an oral hearing, pending which it was content for its Counter-Memorial to be circulated with instructions to the Tribunal not to read Chapter 2, section D, and without the relevant volume containing the Joint Reports.

23. On 30 March 2005 Barbados informed the Tribunal that Trinidad and Tobago's proposed approach with respect to treatment of the Counter-Memorial and the Joint Reports "largely meets the concern raised by Barbados in its letter . . . of 28 March", but that Barbados' "attitude towards the production of the Joint Reports will depend on the justification that Trinidad and Tobago may advance for its wish to refer to them".

24. On 31 March 2005 Trinidad and Tobago filed its Counter-Memorial and wrote to the Registry stating that "the issue of admissibility raised by Barbados [cannot] be left in abeyance", and requesting the Tribunal to invite Barbados to state, within three days, whether or not it was challenging the admissibility of the Joint Reports.

25. On 5 April 2005 Barbados stated that it was unable to agree to the admission of the Joint Reports until it was "in a position to know from Trinidad and Tobago the purpose for which the Joint Reports are to be used".

26. On 5 April 2005 the President of the Tribunal informed the Parties that the Tribunal had taken note of their positions on the admissibility of the Joint Reports, and requested both Parties to submit written analyses on the issue of admissibility by 25 April 2005, after which the Tribunal would decide whether an oral hearing was required.

27. On 22 April 2005 Barbados, in its submission on the issue of admissibility of the Joint Reports, stated that it would not "insist that Trinidad and Tobago withdraw its Counter-Memorial (including Volume 2(2)) and submit a revised Counter-Memorial that does not incorporate or refer to inadmissible material", but reserved its right to comment thereon in its Reply. Barbados also stated that it had not waived "the privileged and confidential status of the negotiations or Joint Reports", and asked the Tribunal "to take note of Trinidad and Tobago's violations [of confidentiality and its undertakings] in an appropriate manner".

28. On 25 April 2005 Trinidad and Tobago submitted its written arguments on the issue of admissibility of the Joint Reports, requesting that the Tribunal reject Barbados' objection to their admissibility.

29. Having reviewed the Parties' submissions, the President directed the Registry on 4 May 2005 to forward the Tribunal a copy of Volume 2(2) of the Counter-Memorial.

30. On 9 June 2005 Barbados filed its Reply.

31. On 17 August 2005 Trinidad and Tobago filed its Rejoinder.

32. On 9 September 2005 Barbados requested the Tribunal to grant it permission to submit supplemental evidence.

33. On 15 September 2005 Trinidad and Tobago responded to Barbados' letter of 9 September 2005 contesting Barbados' request to submit certain categories of supplemental evidence described by Barbados in its letter of 9 September 2005.

34. On 17 September 2005 the Registry informed the Parties that the Tribunal accepted the introduction of Barbados' supplemental evidence (to be filed by 19 September 2005), subject to the right of Trinidad and Tobago to transmit new evidence in rebuttal not later than 3 October 2005.

35. On 19 September 2005 Barbados informed the Tribunal that it would be willing to forego the opportunity of submitting evidence under two of the five contested categories. Barbados submitted its supplementary evidence relating to the remaining categories of evidence it set out in its letter of 15 September 2005.

36. On 3 October 2005 Trinidad and Tobago submitted evidence in rebuttal to the supplementary evidence of Barbados.

37. On 23 October 2005, after consultation with the Parties, the Tribunal appointed a hydrographer, Mr. David Gray, as an expert to assist the Tribunal pursuant to Article 11(4) of the Rules of Procedure.

38. During the period 17-28 October 2005 hearings were held at the International Dispute Resolution Centre in London.

39. On 24 October 2005, in the course of the hearings, Barbados objected to certain reports that had appeared in the Trinidad and Tobago press, and requested the President of the Tribunal to issue a statement recalling the Parties' undertaking of confidentiality regarding the arbitral proceedings. The President issued the following statement:

> Reports have appeared in the Caribbean press about contents of the arbitral proceedings currently taking place in London between Barbados and Trinidad and Tobago concerning their maritime boundary. In that regard, the Tribunal draws attention to its Rules of Procedure, which, in Article 13(1), provide: "All written and oral pleadings, documents, and evidence submitted in the arbitration, verbatim transcripts of meetings and hearings, and the deliberations of the Arbitral Tribunal, shall remain confidential unless otherwise agreed by the Parties".
>
> The Tribunal accordingly trusts that this rule will be observed by the Parties and any spokesmen for them.

40. On 28 October 2005 the President of the Tribunal was sent a letter by the Foreign Minister of Guyana, which provided information to the Tribunal regarding the outer limit of Guyana's Exclusive Economic Zone ("EEZ"). On 9 November 2005 the President responded to the Foreign Minister, acknowledging his letter and noting that it had been brought to the attention of the members of the Tribunal.

CHAPTER II – INTRODUCTION

A. BACKGROUND

41. While the Parties differed on many of the facts concerning their respective patterns of resource use, and salient features of geography, and the legal significance to be attached to those facts, it will be convenient at the outset to recall facts that appear to be common ground between the Parties.

1. Relevant Geography

42. The islands of Trinidad and Tobago lie off the northeast coast of South America. At their closest, Trinidad and Venezuela are a little over 7 nautical miles ("nm") apart. Seventy nm to the northwest, there starts a chain of rugged volcanic islands known collectively as the Windward Islands, made up of Grenada, The Grenadines, St. Vincent, St. Lucia, Martinique, Dominica, and others. Barbados is not part of that chain of islands, but sits east of them. Collectively, all the aforementioned islands, and others that are farther north, make up the Lesser Antilles Islands.

43. Barbados consists of a single island with a surface area of 441 sq km and a population of approximately 272,200. The island of Barbados is made up of a series of coral terraces resting on a sedimentary base. Barbados is situated northeast of Tobago by 116 nm and nearly 80 nm east of St. Lucia, the closest of the Windward Islands.

44. The Republic of Trinidad and Tobago is made up of the islands of Trinidad, with an area of 4,828 sq km and an approximate population of 1,208,300, and, 19 nm^2 to the northeast, the island of Tobago with an area of 300 sq km and an approximate population of 54,100, and a number of much smaller islands that are close to those two main islands. Trinidad and Tobago has declared itself an "archipelagic state" pursuant to provisions of UNCLOS. The islands of Trinidad and Tobago are essentially the eastward extension of the Andean range of South America.

[2] British Admiralty Chart 493, "Approaches to Trinidad including the Gulf of Paria", Scale 1:300,000, Taunton, UK, 8 May 2003, corrected for Notices to Mariners up to 5090/05.

45. East of Trinidad and Tobago, the coast of South America trends in an east-southeasterly direction, first with part of the coast of Venezuela, then the coasts of Guyana, Suriname, and French Guiana. The Windward Islands lie as a string of islands in a south to north orientation starting directly north of the Boca del Dragon, the channel between the northwest corner of the island of Trinidad and the Peninsula de Paria of Venezuela.

2. Factual Context

46. Over a period of some three decades prior to the commencement of this arbitration, the Parties held high-level diplomatic meetings and conducted negotiations concerning the use of resources in the maritime spaces they are respectively claiming, chief among them being fisheries and hydrocarbons.

47. Barbados adopted an "Act to provide for the establishment of Marine Boundaries and Jurisdiction" (the "Marine Boundaries and Jurisdiction Act") in February 1978, for the purpose of extending its jurisdiction beyond its territorial sea, and in order to claim its EEZ and the rights appertaining thereto.

48. After several meetings of the Parties concerning resource use and trade beginning in 1976, on 30 April 1979 the Parties entered into a Memorandum of Understanding on Matters of Co-operation between the Government of Barbados and the Government of Trinidad and Tobago, covering, *inter alia*, hydrocarbon exploration and fishing.

49. In 1986 Trinidad and Tobago adopted the "Archipelagic Waters and Exclusive Economic Zone Act" (the "Archipelagic Waters Act"), in order to define Trinidad and Tobago as an archipelagic State, and to claim its EEZ in accordance with UNCLOS.

50. On several occasions during the period 1988-2004 (approximately) Trinidad and Tobago arrested Barbadians fishing off Tobago and accused them of illegal fishing.

51. On 18 April 1990 Trinidad and Tobago and Venezuela concluded a "Treaty on the Delimitation of Marine and Submarine Areas". There was an Exchange of Notes

relating to that Treaty on 23 July 1991. The 1990 Treaty and 1991 Exchange of Notes are referred to as the "1990 Trinidad-Venezuela Agreement".[3]

52. In November 1990 the Parties concluded the "Fishing Agreement between the Government of the Republic of Trinidad and Tobago and the Government of Barbados" (the "1990 Fishing Agreement"), regulating, *inter alia*, aspects of the harvesting of fisheries resources by Barbadian fisherfolk in Trinidad and Tobago's EEZ, and facilitating access to Barbadian markets for Trinidad and Tobago's fish.

53. During the period July 2000 to November 2003 the Parties engaged in several rounds of bilateral negotiations which included maritime boundary negotiations and fisheries negotiations. The Parties differ as to whether the maritime boundary and fisheries negotiations were part of a single negotiating process or separate negotiations. A Joint Report of each round of negotiation was approved by the Parties. Those Joint Reports essentially set out the respective positions of each Party on the issues discussed at each meeting.

54. The Parties agreed at the end of the fifth round of maritime boundary negotiations in November 2003 to hold further negotiations in February 2004.

55. On 6 February 2004 Trinidad and Tobago arrested Barbadian fisherfolk and accused them of illegal fishing.

56. Prime Minister Manning of Trinidad and Tobago met, at his initiative, with Prime Minister Arthur of Barbados in Barbados on 16 February 2004. It is the contention of Barbados that, at that meeting, Prime Minister Manning characterized the maritime boundary dispute as "intractable", and challenged Barbados to take it to arbitration, statements that Trinidad and Tobago denies were ever made. Barbados commenced the present proceedings immediately after that meeting.

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[3] Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the delimitation of marine and submarine areas, 18 April 1990, *reprinted in The Law of the Sea – Maritime Boundary Agreements (1985-1991)* pp. 25-29 (Office for Ocean Affairs and the Law of the Sea, United Nations, New York 1992).

B. THE PARTIES' CLAIMS

57. On 16 February 2004 Barbados filed a Notice of Arbitration and Statement of Claim, claiming a "single unified maritime boundary line, delimiting the exclusive economic zone and continental shelf between it and the Republic of Trinidad and Tobago, as provided under Articles 74 and 83 of UNCLOS".

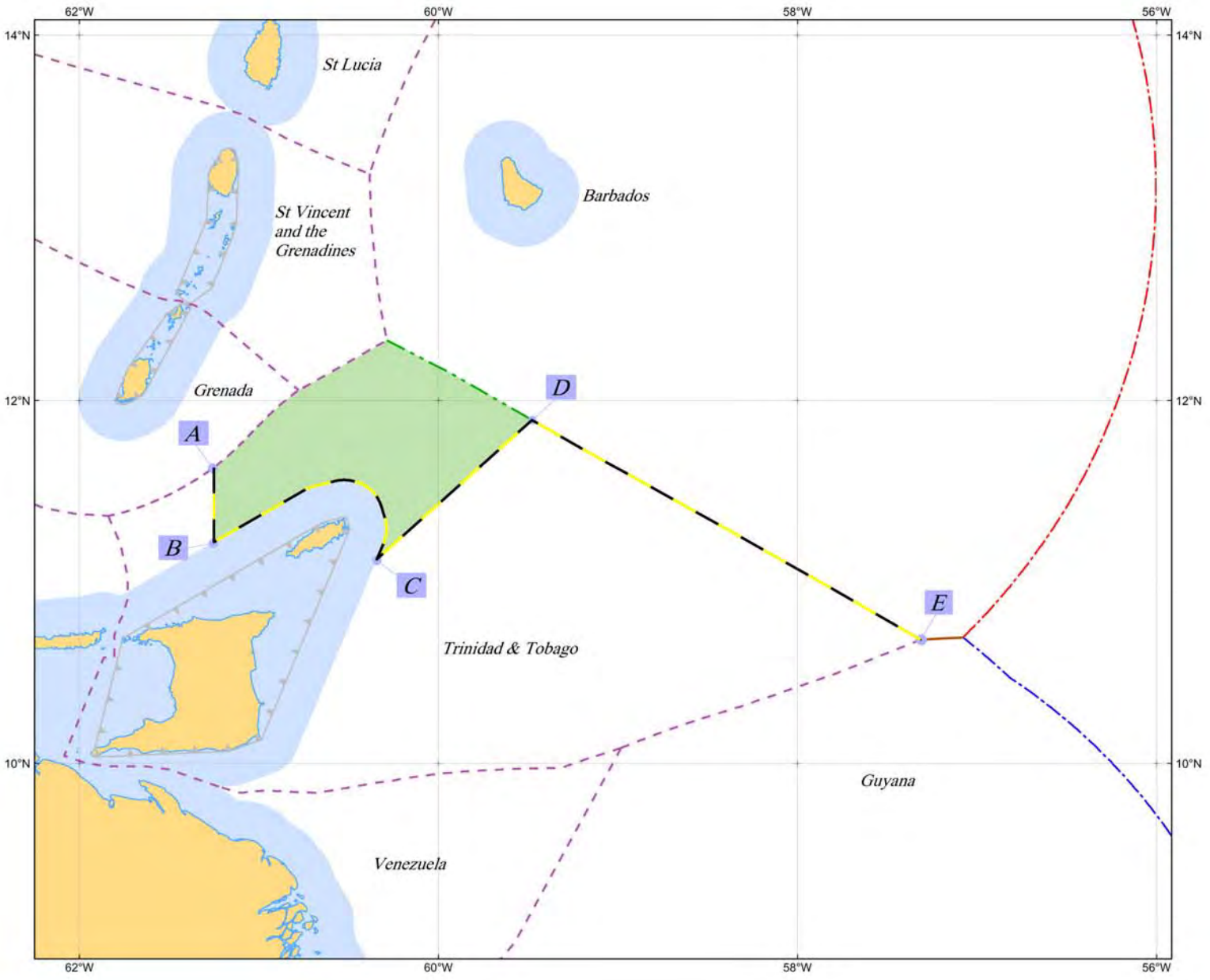
58. According to Barbados:

> [I]nternational authority clearly prescribes that the Tribunal should start the process of delimitation by drawing a provisional median line between the coasts of Barbados and Trinidad and Tobago. This line should be adjusted so as to give effect to a special circumstance and thus lead to an equitable solution. The special circumstance is the established traditional artisanal fishing activity of Barbadian fisherfolk south of the median line. The equitable solution to be reached is one that would recognise and protect Barbadian fishing activities by delimiting the Barbados EEZ in the manner illustrated on map 3.

59. Barbados' claim line for a single unified maritime boundary illustrated on Map 3 of its Memorial is reproduced as Map I, facing.

60. Barbados described the course of that claim line in its Memorial as follows:

> 142. The proposed delimitation line is a median line modified in the northwest to encompass the area of traditional fisheries enjoyed by Barbados. The line is defined in three parts from points A to B, B to C and the third part from points C to E.
>
> 143. The first part of the line from A to B is defined by the meridian 61° 15' W. This line runs south from point A, the point of intersection of this meridian with a line of delimitation between Trinidad and Tobago and Grenada, to point B, the intersection of this meridian with the 12 nautical mile territorial sea limit of Trinidad and Tobago.
>
> 144. The second part of the proposed delimitation line is the 12 nautical mile territorial sea limit of Trinidad and Tobago, running from point B around the northern shores of Tobago to point C, the intersection of the parallel 11° 08' N and the 12 nautical mile territorial sea limit of Trinidad and Tobago lying southeast of the island of Tobago.
>
> 145. The third part of the proposed delimitation line is defined by a geodesic line from point C, following an azimuth of 048° until it intersects with the calculated median line between Barbados and Trinidad and Tobago at point D; then the line follows the median line south eastwards running through intermediate points on the median line numbered 1 to 8.



Map 3

The median line adjusted so as to take account of the Barbadian fishery off Tobago.

Legend

- Adjusted median line
- Barbadian fishery off Tobago
- Barbados - Trinidad and Tobago median line
- Barbados - Guyana median line
- Barbados 200M EEZ limit
- Guyana 200M EEZ limit
- Archipelagic baseline
- Territorial sea

Scale 1 : 2,500,000
[at 12° N when printed at A3 size]
Projection: Mercator
Datum: WGS 84

0 50 100 150 km

0 20 40 60 80 100 M

Map 1

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146. From point 8, the proposed delimitation line follows an azimuth of approximately 120˚ for approximately five nautical miles towards the point of intersection with the boundary of a third State at point E.

61. The coordinates of Barbados' claim line are as follows:

Coordinates listed are related to WGS84 [World Geodetic System 1984] and quoted to 0.01 of a minute.

Point	Latitude			Longitude		
A[*]	*11*	*37.87*	*N*	*61*	*15.00*	*W*
B[#]	11	13.30	N	61	15.00	W
C[#]	11	08.00	N	60	20.47	W
D	11	53.72	N	59	28.83	W
1	11	48.25	N	59	19.23	W
2	11	45.80	N	59	14.94	W
3	11	43.61	N	59	11.08	W
4	11	32.88	N	58	51.40	W
5	11	10.76	N	58	11.42	W
6	10	59.71	N	57	51.54	W
7	10	49.21	N	57	33.15	W
8	10	43.54	N	57	23.23	W
E[*]	*10*	*41.03*	*N*	*57*	*18.83*	*W*

[*] Positions listed in italics are only indicative of the positions described in the text which will require separate bi-lateral or tri-lateral agreements to define coordinates.

[#] The latitude of point B and the Longitude of point C will change with the variation of the territorial sea limit of Trinidad and Tobago over time.

62. Trinidad and Tobago in its Counter-Memorial set out its own positive claim, and stated with respect thereto:

> In the relatively confined waters of the western or Caribbean sector, there is no basis for deviating from the median line – a line which Barbados has repeatedly recognised and which is equitable in the circumstances. The position is quite different in the eastern or Atlantic sector where the two states are in a position of, or analogous to, adjacent States and are most certainly not opposite. As a coastal State with a substantial, unimpeded eastwards-facing coastal frontage projecting on to the Atlantic sector, Trinidad and Tobago is entitled to a full maritime zone, including continental shelf. The claim that Barbados has now formulated in the Atlantic sector cuts right across the Trinidad and Tobago coastal frontage and is

plainly inequitable. The strict equidistance line needs to be modified in that sector so as to produce an equitable result, in accordance with the applicable law referred to in Articles 74 and 83 of the 1982 Convention.

63. Trinidad and Tobago described the course of its claim line as follows:

(a) to the west of Point A, located at 11˚45.80'N, 59˚14.94'W, the delimitation line follows the median line between Barbados and Trinidad and Tobago until it reaches the maritime area falling within the jurisdiction of Saint Vincent and the Grenadines;

(b) from Point A eastwards, the delimitation line is a loxodrome with an azimuth of 88˚ extending to the outer limit of the EEZ of Trinidad and Tobago;

(c) further, the respective continental shelves of the two States are delimited by the extension of the line referred to in paragraph (3)(b) above, extending to the outer limit of the continental shelf as determined in accordance with international law.

64. Trinidad and Tobago's claim line is illustrated in Figure 7.5 of its Counter-Memorial and is reproduced as Map II, facing.

65. Trinidad and Tobago objects to the entire claim of Barbados on grounds of inadmissibility, maintaining that the procedural preconditions of UNCLOS have not been fulfilled. Barbados objects that the claim of Trinidad and Tobago in respect of the extended continental shelf ("ECS" or "outer continental shelf") [4] is beyond the scope of the dispute referred to the Tribunal.

66. The arguments of the Parties with respect to their claims are summarized in the following Chapter.

[4] Although the Parties have used the term "extended continental shelf", the Tribunal considers that it is more accurate to refer to the "outer continental shelf", since the continental shelf is not being extended, and will so refer to it in the remainder of this Award.

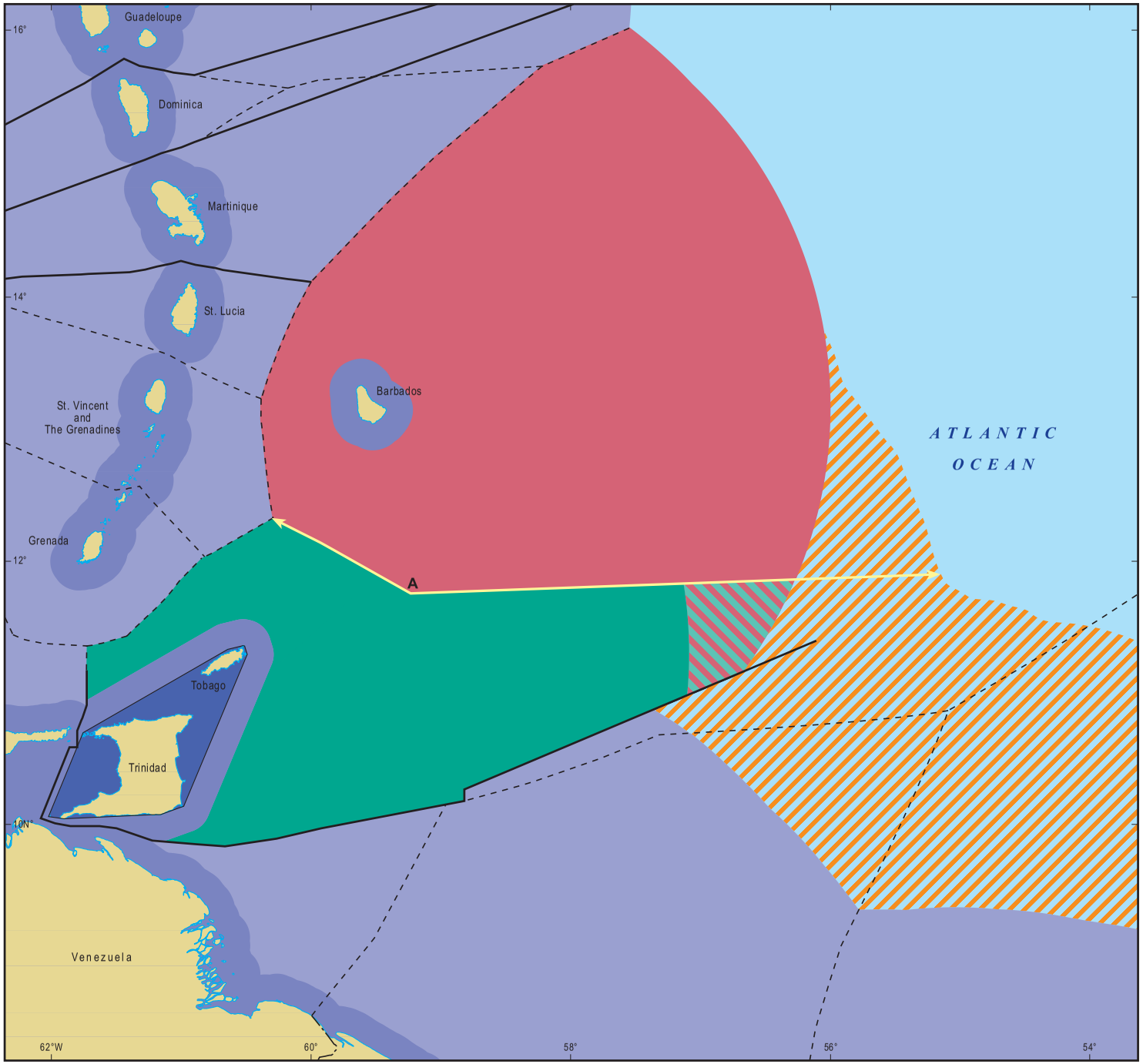

Figure 7.5
Trinidad and Tobago's claim line

Map II

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CHAPTER III – ARGUMENTS OF THE PARTIES

A. DOES THE TRIBUNAL HAVE JURISDICTION OVER BARBADOS' CLAIM, AND, IF SO, ARE THERE ANY LIMITS TO THAT JURISDICTION?

Barbados' Position

67. Barbados maintains that the Tribunal's jurisdiction is founded in the provisions of Part XV of the Convention concerning the settlement of disputes, and in particular Articles 286,[5] 287[6] and 288,[7] coupled with Annex VII to the Convention. Together,

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[5] Article 286 provides:
Application of procedures under this section
Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

[6] Article 287 provides:
Choice of procedure
1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
   (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
   (b) the International Court of Justice;
   (c) an arbitral tribunal constituted in accordance with Annex VII;
   (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.
2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.
3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.
4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.
5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.
6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.
7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.
8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

[7] Article 288 provides:
Jurisdiction
1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.

according to Barbados, these provisions "establish compulsory jurisdiction at the instance of any party". Barbados notes further that neither Party has made any declarations under Article 298[8] of UNCLOS, which sets out optional exceptions to the applicability of compulsory and binding procedures under Part XV, or made any written declaration selecting a particular means for the settlement of disputes pursuant to Article

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4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

[8] Article 298 provides:

Optional exceptions to applicability of section 2

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
   (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
   (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;
   (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;
   (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;
   (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.
2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.
3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.
4. If one of the States Parties has made a declaration under paragraph 1(a), any other State Party may submit any dispute falling within an excepted category against the declarant party to the procedure specified in such declaration.
5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.
6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

287 of UNCLOS. Barbados cites Article 74[9] (relating to delimitation of the EEZ) and Article 83[10] (relating to delimitation of the continental shelf ("CS")) both of which provide that "[i]f no agreement can be reached within a reasonable period, the States concerned shall resort to the procedures provided for in Part XV".

68. Barbados bases its submissions with respect to jurisdiction essentially on two arguments. First, it argues that the existence of a dispute was clear from the numerous differences between the Parties that emerged during multiple rounds of negotiations concerning access for Barbadian fisherfolk and delimitation of the maritime boundary. According to Barbados, the differences between the Parties included: the relationship of fisheries and maritime delimitation negotiations, the existence and legal implications of Barbadian artisanal fishing, the methodology of delimitation, and the nature and implications of the relationship between the Parties' coastlines. Second, Barbados argues that it understood the negotiations to have "deadlocked" when, according to Barbados, the Prime Minister of Trinidad and Tobago declared the issue of the maritime boundary "intractable" and invited Barbados to proceed with arbitration, if it so wished. As evidence for its understanding in this regard, Barbados submitted written and oral

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[9] Article 74 provides:
Delimitation of the exclusive economic zone between States with opposite or adjacent coasts
1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

[10] Article 83 provides:
Delimitation of the continental shelf between States with opposite or adjacent coasts
1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

testimony to this effect by Ms. Teresa Marshall, Permanent Secretary (Foreign Affairs) of the Ministry of Foreign Affairs and Foreign Trade. As a final point to justify the timing of its Notice of Arbitration, Barbados states that it "also had reason to believe that Trinidad and Tobago intended imminently to exercise its right to denounce its obligation to submit to third party dispute resolution under Article 298, paragraph 1, precisely to avoid this Tribunal's jurisdiction".

69. Five years and nine rounds of unsuccessful negotiations, involving extensive but unproductive exchanges of views between the Parties, Barbados argues, led it reasonably to conclude that a sufficient period of time had elapsed and that "the possibilities of settlement had been exhausted". In Barbados' view, such a conclusion is justifiable under the terms of the Convention, and is supported by the International Tribunal for the Law of the Sea's findings in the "relevant" case law – namely, previous arbitrations conducted pursuant to Annex VII of the Convention.[11] Furthermore, Barbados argues that nothing in UNCLOS grants a "recalcitrant party the unilateral right to extend negotiations indefinitely to avoid submission of the dispute to binding third-party resolution".

70. In response to arguments put forward by Trinidad and Tobago that Barbados has sought to "bypass" the "pre-conditions to arbitration" under UNCLOS, Barbados characterizes Trinidad and Tobago's multi-tiered approach as "idiosyncratic", "formalistic", and even, in the terms of the Vienna Convention on the Law of Treaties, "manifestly absurd or unreasonable". Moreover, Barbados states, "Trinidad and Tobago's interpretation would frustrate the object and purpose of Part XV as a whole".

[11] See the *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), International Tribunal for the Law of the Sea (ITLOS), Order of 27 August 1999, Request for Provisional Measures, *Reports of Judgments, Advisory Opinions and Orders, Vol. 3* (International Tribunal for the Law of the Sea, Kluwer Law International 1999); *The MOX Plant Case* (Ireland v. United Kingdom), ITLOS, Order of 3 December 2001, Request for Provisional Measures, *Reports of Judgments, Advisory Opinions and Orders, Vol. 5* (International Tribunal for the Law of the Sea, Kluwer Law International 2001); and *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor* (Malaysia v. Singapore), ITLOS, Order of 8 October 2003, Request for Provisional Measures, *Reports of Judgments, Advisory Opinions and Orders, Vol. 7* (International Tribunal for the Law of the Sea, Kluwer Law International 2003).

71. Barbados takes issue in particular with Trinidad and Tobago's argument that the agreement of both Parties is needed before moving from maritime boundary negotiations pursuant to Articles 74 and 83 of UNCLOS to dispute resolution procedures under Part XV. Barbados contends that this "would simply end the State's right to invoke an arbitration clause as long as the other State was willing to keep saying 'Let's talk more.'" Barbados also rejects Trinidad and Tobago's argument that, following a referral by the Parties to Part XV, a further "exchange of views" is then required pursuant to Article 283.[12] According to Barbados, "a more sensible reading of Article 283 would take the reference to the exchange of views, not as a requirement to go through what already had been done for another five or ten years, but to exchange views with respect to the organization of the arbitration, as was done". Barbados contends further that Trinidad and Tobago's arguments on this point lack legal foundation, whether one considers the text of UNCLOS itself, or the *travaux préparatoires*, or scholarly views, such as the UNCLOS commentary produced by the University of Virginia (*United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V* (Shabtai Rosenne & Louis B. Sohn eds., 1989) ("*Virginia Commentary*")).

72. At the oral proceedings, Barbados also addressed the issue of the Tribunal's jurisdiction to award a fisheries access regime for Barbadian fisherfolk in Trinidad and Tobago's EEZ. Barbados argues that, once a relevant circumstance has been established, the Tribunal "will have at its disposal a spectrum of remedies", including such an access regime. "As long as it is less than what Barbados has requested, it will still be *infra petita*." Barbados principally cites in support of this argument the award issued in Part II of the *Eritrea/Yemen* arbitration (*Eritrea/Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings* (*Maritime Delimitation*), 119 I.L.R. p. 417 (1999) ("*Eritrea/Yemen II*")) (see also paragraphs 272-283 below).

[12] Article 283 provides:
Obligation to exchange views
1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Trinidad and Tobago's Position

73. Trinidad and Tobago maintains that the Tribunal has no jurisdiction to hear Barbados' claims because Barbados has not given effect to "the wording of the relevant provisions of UNCLOS", which Trinidad and Tobago states are Articles 74 and 83, as well as 283, 286, and 298. In Trinidad and Tobago's view, Article 283 is of particular importance in this regard.

74. Trinidad and Tobago contends that Article 283(1) makes the exercise of jurisdiction by an Annex VII tribunal contingent upon two factors: first, the existence of a dispute, and second, an exchange of views having taken place regarding settlement by negotiation or other peaceful means.

75. As to whether a dispute exists in this case, Trinidad and Tobago argues that negotiations between the Parties were ongoing and at an early stage when Barbados initiated arbitral proceedings on 16 February 2004 and that, until such time as Barbados' claim line had been illustrated on a chart and discussed, meaningful negotiations as to Barbados' claim under Articles 74(1) and 83(1) of UNCLOS could not yet have taken place. Hence, a dispute as to the location of the maritime boundary could not exist. Trinidad and Tobago denies that its Prime Minister ever said that the maritime boundary dispute was "intractable". It rather maintains that all that was said was that "the delimitation negotiations were likely to be more protracted than the fisheries negotiations". In support of these submissions, Trinidad and Tobago cites, *inter alia*, two statements by the Prime Minister of Barbados – the first, shortly prior to submission of the Notice of Arbitration, for its indication that negotiations between the countries were going well, and the second, following submission of the Notice, for its failure to mention that negotiations had become "intractable" – as well as written and oral testimony from officials present at the meetings on 16 February 2004.

76. Trinidad and Tobago argues further that negotiations under Articles 74 and 83 are not in any event the same as the "exchange of views" referred to in Article 283(1) and that, moreover, where parties are engaged in such negotiations, and a dispute crystallises, they must agree jointly to proceed to such an exchange of views. "It is not envisaged

that one state acting alone will immediately and without notice resort to the procedures of Part XV."

77. In Trinidad and Tobago's view, even if the Parties were to be taken as being in a situation of dispute while they were in negotiations under Articles 74(1) and 83(1), Article 283(2) would require Barbados to "terminate the attempts at settlement of the dispute, *i.e.* the negotiations, and for the parties then to proceed expeditiously to an exchange of views". Citing the *Virginia Commentary*, Trinidad and Tobago maintains that "Article 283(2) ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision such as arbitration under Annex VII, 'only after appropriate consultations between all parties concerned'".

78. As to Barbados' contention that such consultations could have stimulated Trinidad and Tobago to opt out of compulsory dispute procedures pursuant to Article 298 of UNCLOS before Barbados could invoke arbitration, Trinidad and Tobago responds with a statement that such concerns were baseless, that Trinidad and Tobago had no such intention, and that it would undertake for the future not to exercise this right.

79. Trinidad and Tobago also questions what it terms the "scope" of Barbados' claims and challenges the Tribunal's jurisdiction to award Barbados' fisherfolk access to the fishery resources that lie within the EEZ of Trinidad and Tobago. Trinidad and Tobago contends, first, that Barbados has not put forward a claim for a fishing access regime in any of Barbados' written pleadings and it was thus not open to Barbados to seek to "broaden the remedy that it claims" in the oral proceedings. Moreover, Trinidad and Tobago argues, Article 297(3)(a) of the Convention, which states in relevant part that "coastal states shall not be obliged to accept the submission to . . . settlement [in accordance with Section 2 of Part XV] of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise", makes clear that the Tribunal has no jurisdiction to hear such a claim.

B. DOES THE TRIBUNAL HAVE JURISDICTION TO CONSIDER TRINIDAD AND TOBAGO'S CLAIM?

1. Are the requirements for jurisdiction under UNCLOS, Part XV, the same as, or different from, those for jurisdiction over Barbados' claim, and have they been met?

2. Should the Tribunal make a distinction between areas within 200 nm of the Parties' coasts and areas beyond 200 nm and, if so, what, if any, are the consequences of making the distinction?

Barbados' Position

80. Barbados' position is that the Tribunal does not have jurisdiction to hear Trinidad and Tobago's claim to the extent it involves a claim to Trinidad and Tobago's outer continental shelf. For the Tribunal to have jurisdiction over Trinidad and Tobago's claim, Barbados maintains, the two core elements of Article 283(1) of UNCLOS must be satisfied, *i.e.* the existence of a dispute, and an exchange of views regarding its settlement by negotiation or other peaceful means. Barbados claims that at no point in the negotiations did Trinidad and Tobago put forward any specific claims to the outer continental shelf, nor did Trinidad and Tobago raise the issue of delimitation between its possible outer continental shelf and the maritime territory of Barbados. In fact, according to Barbados, the transcripts of the meetings show that, "in the fifth round of negotiations, Trinidad and Tobago confirmed that its claim line stopped at the 200 nautical mile arc".

81. Barbados argues further that the Tribunal lacks jurisdiction to make any determination with respect to Trinidad and Tobago's outer continental shelf because the dispute submitted to the Tribunal did not relate to delimitation of any potential outer continental shelf entitlement beyond 200 nm of either of the Parties.

82. It is also Barbados' position that any delimitation of the outer continental shelf beyond 200 nm from Trinidad and Tobago, but within 200 nm of Barbados, would constitute a violation of Barbados' sovereign rights over its EEZ and would be contrary to Part V of UNCLOS. Moreover, Barbados maintains, "any delimitation over the ECS beyond 200 nm would affect the rights of the international community". In particular, delimitation of the outer continental shelf in the way proposed by Trinidad and Tobago would, in Barbados' view, interfere with the core function of the Commission on the Limits of the

Continental Shelf ("CLCS" or "Commission"). In support of its argument, Barbados relies primarily on the findings of the arbitral tribunal in the *St Pierre et Miquelon* case (*Case Concerning Delimitation of Maritime Areas between Canada and France* (*St Pierre et Miquelon*), 95 I.L.R. p. 645 (1992)).

Trinidad and Tobago's Position

83. Trinidad and Tobago's position is that the jurisdiction of the Tribunal extends to determining the maritime boundary to the full extent of its potential jurisdiction under international law, and, at a minimum, this means delimiting the maritime zones of the Parties which lie within 200 nm of either of them and which are claimed by both.

84. Trinidad and Tobago argues that a State that submits a maritime delimitation claim to arbitration under UNCLOS cannot limit the Tribunal's jurisdiction to the scope of its own claim or prevent the Tribunal from dealing with the whole dispute (including claims made against it) by reference to Article 283. As Trinidad and Tobago is not the applicant in this case, and is not seeking to seize the Tribunal by virtue of Article 286, "the requirements of Article 283(1) do not have to be fulfilled for the Tribunal to exercise jurisdiction in respect of Trinidad and Tobago's claim". According to Trinidad and Tobago, "the only constraint on the Tribunal's jurisdiction and on the admissibility of the claim put forward by Trinidad and Tobago as the Respondent State is that it should form part of the overall dispute submitted to arbitration".

85. In response to Barbados' contention that Trinidad and Tobago never put forth its claim to an outer continental shelf, Trinidad and Tobago argues that the Joint Reports show that from the very first round of the maritime delimitation negotiations, Trinidad and Tobago was looking to agree on a boundary extending beyond 200 nm. Such a claim was also implicit in the 1990 Trinidad-Venezuela Agreement, where an open-ended delimitation extends beyond 200 nm. Accordingly, Trinidad and Tobago argues that even if Article 283 of UNCLOS applies to a respondent State, then Barbados had notice of the claim and sufficient opportunity to discuss it.

86. Relying on a number of earlier cases,[13] Trinidad and Tobago argues further that international tribunals can determine the direction of the maritime boundary as between the two States over which they do have jurisdiction even though, when faced with a potential tripoint with a third State, they cannot determine the extent of the entitlement of the third State to the EEZ or continental shelf. Citing the example of the 1990 Trinidad-Venezuela Agreement, Trinidad and Tobago observes that no State has made a claim to the north of the 1990 line and states that "the spectre of third State interests, so heavily relied on by Barbados, is illusory".

87. With respect to Barbados' arguments regarding the CLCS, Trinidad and Tobago acknowledges that under Article 76(8) of UNCLOS, the outer limit of the continental shelf is to be determined by processes that involve the CLCS. Trinidad and Tobago contends, however, that there is no overlap between the functions of the Commission and the Tribunal by virtue of Article 76, as Trinidad and Tobago is asking for "the establishment of a direction – an azimuth, not a terminus", while the Commission's concern is exclusively with the location of the outer limit of the shelf. Indeed, Trinidad and Tobago maintains, the CLCS "has no competence in the matter of delimitation between adjacent coastal States; that competence is vested in a tribunal duly constituted under Part XV of the Convention".

C. ESTOPPEL, ACQUIESCENCE, AND ABUSE OF RIGHTS

1. Has Barbados recognized and acquiesced in the existence of an EEZ appertaining to Trinidad and Tobago in the area claimed by Barbados to the south of the equidistance line and does Barbados' claim in this sector constitute an abuse of rights?

Trinidad and Tobago's Position

88. Trinidad and Tobago argues that Barbados' claim to an adjustment of the equidistance line in the Caribbean sector is inadmissible because Barbados has recognized Trinidad

[13] See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria: Equatorial Guinea intervening*), I.C.J. Reports 1998, p. 275; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, I.C.J. Reports 2001, p. 40; *Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act, Award of the Tribunal in the Second Phase*, 26 March 2002; and *Eritrea/Yemen II*, 119 I.L.R. p. 417.

and Tobago's sovereign rights to the area south of the equidistance line. In light of such recognition, Barbados' claim is also, in Trinidad and Tobago's view, an abuse of rights under Article 300[14] of the Convention.

89. Trinidad and Tobago argues that Barbados' recognition of Trinidad and Tobago's sovereign rights in the area south of the provisional equidistance line can be seen above all in the 1990 Fishing Agreement. According to Trinidad and Tobago, the development in the late 1970s of a Barbadian flyingfish fishing fleet with the capacity to fish in the waters off Tobago led to negotiations and discussions between the two governments, and the 1990 Fishing Agreement was the culmination of these negotiations. The 1990 Fishing Agreement was, in Trinidad and Tobago's view, "not a hasty compromise, pieced together to resolve a controversy regarding the arrests of Barbadian fishing vessels by the Trinidad and Tobago coastguard. […] It was the product of several years of negotiations about the terms on which Barbadian access to what were acknowledged to be Trinidad and Tobago's waters was to be granted." Trinidad and Tobago invokes the preamble to the 1990 Fishing Agreement in support of its claim, which states:

> [acknowledging] the desire of Barbados fishermen to engage in harvesting flying fish and associated pelagic species in the fishing area within the Exclusive Economic Zone of Trinidad and Tobago and the desire of the Republic of Trinidad and Tobago to formalize access to Barbados as a market for fish.

90. Trinidad and Tobago responds to Barbados' claim that the 1990 Fishing Agreement was provisional by stating that, although the Parties were unable to agree on the terms of a new agreement, Barbados made repeated calls for a new bilateral fishing agreement. Barbados also listed a series of concerns when meeting with Trinidad and Tobago officials such as the high cost of the licence fee, the desire for an extended fishing area and the restrictiveness of the fishing schedule, but "[a]t no point did Barbados question the principle that the waters to which the [1990 Fishing] Agreement applied belong to Trinidad and Tobago". Trinidad and Tobago views this as acquiescence by Barbados in its jurisdiction to the south of the equidistance line.

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[14] Article 300 provides:
Good faith and abuse of rights
States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

91. Trinidad and Tobago also contends that Barbados' recognition of Trinidad and Tobago's right to arrest Barbadian fisherfolk fishing in its waters negates the idea that Barbados believed that Barbadian fisherfolk exercised traditional fishing rights in an area claimed by Barbados as EEZ appertaining to Barbados. Trinidad and Tobago argues that Barbados did not protest the arrests as beyond the former's jurisdiction and instead sought only to inform its fisherfolk by a Government Information Service press release that they should remain within the waters of Barbados and should not fish south of the equidistance line. The only form of protest related to the severity of the measures being taken by Trinidad and Tobago and did not purport to suggest that the arrest of vessels and the trial of Barbadian nationals concerned were not within Trinidad and Tobago's rights. Although Prime Minister Arthur of Barbados requested a moratorium on arrests in January 2003, while the bilateral negotiations were in progress, he did not suggest that they were not within the authority of Trinidad and Tobago.

92. Finally, Trinidad and Tobago states that it does not argue that Barbados is estopped by virtue of the 1990 Fishing Agreement. Instead, it argues that the 1990 Fishing Agreement, read together with the Parties' prior and subsequent negotiations regarding fisheries, indicates that what was being negotiated was Trinidad and Tobago's granting access to Barbadian vessels to fish in Trinidad and Tobago's EEZ.

93. Trinidad and Tobago argues further that Barbados' claim is inadmissible because it constitutes an abuse of rights. Trinidad and Tobago's contention in this regard is that Barbados' employment of Article 286 to claim a single maritime boundary is incompatible with its previous recognition of the extent of the EEZ of Trinidad and Tobago and its own domestic legislation and is thus arbitrary and capricious and an abuse of its rights. In Trinidad and Tobago's view "[w]here, by treaty and by its own internal legislation, Barbados has recognised limits on the extent of its EEZ, [it] cannot ignore those constraints when it comes to formulating a good faith claim".

94. Trinidad and Tobago refers to the Marine Boundaries and Jurisdiction Act enacted by Barbados, Section 3(1) of which "established an exclusive economic zone, the outer limit of which was stated to be 200 nm from Barbados' baselines". According to Trinidad and Tobago, Section 3(1) was in turn made subject to Section 3(3) which provided that:

> Notwithstanding subsection (1), where the median line as defined by subsection (4) between Barbados and any adjacent or opposite State is less than 200 miles from the baselines of the territorial waters, the outer boundary limit of the Zone shall be that fixed by agreement between Barbados and that other State, *but where there is no such agreement, the outer boundary limit shall be the median line* (Emphasis added).

95. Trinidad and Tobago, meanwhile, in 1986 adopted the Archipelagic Waters Act, Section 14 of which provided that the outer limit of the EEZ was a line 200 nm from the Trinidad and Tobago baselines. Section 15 provided that:

> Where the distance between Trinidad and Tobago and opposite or adjacent States is less than 400 nautical miles, the boundary of the exclusive economic zone shall be determined by agreement between Trinidad and Tobago and the states concerned on the basis of international law in order to achieve an equitable solution.

96. Trinidad and Tobago maintains that "these were waters in respect of which Barbados made no claim during the fisheries negotiations and which, in accordance with Barbados' own legislation, fell outside the Barbados EEZ".

Barbados' Position

97. Barbados contends that it did not acquiesce in any of Trinidad and Tobago's exercises of sovereignty to the south of the equidistance line in the area of traditional fishing off the northwest, north and northeast of Tobago, and as a result Barbados cannot be estopped from making its claim for an adjustment of the equidistance line to the south. For largely the same reasons, Barbados rejects Trinidad and Tobago's claim that, by taking its claim to arbitration pursuant to Article 286, Barbados has engaged in an abuse of rights under Article 300 of UNCLOS.

98. In Barbados' view, no recognition of Trinidad and Tobago's sovereignty over the area south of the equidistance line may be implied from the 1990 Fishing Agreement because it was concluded for only one year and never renewed, was subsequently ignored by the Barbadian fishing communities, and did not change local and traditional fishing patterns. According to Barbados, the 1990 Fishing Agreement was only a "*modus vivendi*", which it was forced to conclude in order to enable Barbadian fisherfolk to resume their traditional fishing off Tobago without being arrested. In Barbados' view the situation was urgent as, following the 1989 arrests, the catches of Barbadian fisherfolk declined and the prices increased drastically, with the result that

many Barbadians were unable to afford a dietary staple. Furthermore, Barbados argues, the "preservation of rights" language in Article XI of the 1990 Fishing Agreement,[15] as well as similar draft language being considered in subsequent attempts to negotiate another fishing access agreement, provide ample evidence that Barbados never intended to recognize Trinidad and Tobago's sovereignty over the area south of the equidistance line.

99. In response to Trinidad and Tobago's suggestion that, by warning its fisherfolk to fish only north of the equidistance line, Barbados has recognized Trinidad and Tobago's sovereign rights to waters south of the equidistance line, Barbados contends that the warnings given by it to its fisherfolk were intended only to give fisherfolk notice that they risked arrest if they continued to fish off Tobago at that time. Rather, Barbados states, it protested those arrests that did take place, as well as Trinidad and Tobago's sporadic attempts to engage in hydrocarbon activities in the area.

100. With regard to the specific issue of whether its claim constitutes an "abuse of rights", Barbados contends that it instituted this arbitration after Trinidad and Tobago's Prime Minister declared a critical issue in the dispute to be "intractable", leading it reasonably to conclude that further negotiations would be to no avail, and as such its claim does not constitute an abuse of rights. Barbados argues that "a State's invocation of its right to arbitrate under a treaty after it exhausts the potential for a negotiated resolution" is not an abuse of right, and it had no choice but to exercise its right to arbitrate and was, indeed, challenged to do so by Trinidad and Tobago.

101. Barbados relies on Oppenheim's definition of an abuse of right, said to occur "when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage" (*Oppenheim's International Law* (Jennings & Watts eds., Longman 9th ed. 1992), at p. 407). Barbados argues that its actions in no way conform to this definition:

[15] Article XI of the 1990 Fishing Agreement provides:
Preservation of Rights
Nothing in this Agreement is to be considered as a diminution or limitation of the rights which either Contracting Party enjoys in respect of its internal waters, archipelagic waters, territorial sea, continental shelf or Exclusive Economic Zone nor shall anything contained in this Agreement in respect of fishing in the marine areas of either Contracting Party be invoked or claimed as a precedent.

it invoked its right to arbitrate after years of good-faith negotiations, not arbitrarily or capriciously, and arbitration does not "constitute an injury, much less one that cannot be justified by a legitimate consideration of its own advantage".

102. To the extent Barbados took positions in negotiations with Trinidad and Tobago that differ from those now claimed in the context of the arbitral proceedings, this is simply a reflection of the differences between negotiation and litigation, Barbados maintains. With respect to Trinidad and Tobago's claims concerning Barbados' domestic legislation, Barbados argues that "Trinidad and Tobago cannot allocate to itself an authoritative right to interpret Barbados' laws" and, in any event, Barbados law sets forth only "default principles pending agreement" and "does not preclude Barbados from entering into agreements establishing its own exclusive economic zone other than by a median line".

2. Has Trinidad and Tobago recognized and acquiesced in Barbados' sovereignty north of the equidistance line, and, if so, is Trinidad and Tobago estopped from making any claim for an adjustment of the equidistance line to the north?

Barbados' Position

103. Barbados takes the position with respect to the area claimed by Trinidad and Tobago north of the equidistance line, in the Atlantic sector, that "the evidence on the record confirms that Barbados has exercised its sovereign rights and jurisdiction in the area . . . for a prolonged period of time and in a notorious manner, without protest from Trinidad and Tobago [. . .] The Tribunal is therefore precluded from considering Trinidad's claims to the north of the provisional median line". Barbados argues that its claims to sovereign rights in this area have been manifested primarily by its hydrocarbon activities in the region over a period of more than twenty-five years. Barbados asserts further that its domestic legislation demonstrates a clear and consistent claim to sovereign rights to the north of the equidistance line, as its Marine Boundaries and Jurisdiction Act provides that, in the absence of any agreed EEZ boundaries with its maritime neighbours, the outer limit of Barbados' EEZ is the equidistance line. In addition, Barbados draws the Tribunal's attention to the Barbados/Guyana Joint Cooperation Zone Treaty dated 2 December 2003, the activities of its coast guard in the

disputed zone, and the work undertaken by Barbados in relation to a submission to the CLCS.

104. Barbados maintains that juxtaposed against this evidence of exercise of sovereign rights by Barbados is a notable silence and lack of protest on the part of Trinidad and Tobago. The open nature of Barbados' activities called for an immediate reaction by Trinidad and Tobago, if it considered that it had asserted any sovereign rights over that area. Further, and as evidence of recognition on the part of Trinidad and Tobago of the equidistance line as the maritime boundary between the two countries, Barbados relies on a map drawn during the negotiations between Trinidad and Tobago and Venezuela, which shows all delimitation lines, both proposed and final, stopping at the Barbados/Trinidad and Tobago equidistance line. Consequently, Barbados maintains that Trinidad and Tobago must be considered to have acquiesced in Barbados' claims to sovereign rights to the north of the equidistance line, and is now estopped from making a belated claim to sovereign rights over that area.

Trinidad and Tobago's Position

105. Trinidad and Tobago does not accept Barbados' argument that it is estopped from making a claim to the area north of the equidistance line in the Atlantic sector. In Trinidad and Tobago's view, none of the conditions needed for an estoppel – a clear statement made voluntarily, and relied upon in good faith, either to the detriment of the party so relying or to the advantage of the party making the statement – has been met.

106. In particular, Trinidad and Tobago seeks to refute Barbados' factual claims that it was late in protesting Barbados' grant of oil concessions to Mobil and CONOCO, by saying that Barbados' own protest against Trinidad and Tobago's offer for tender of deep water hydrocarbon blocks off the coast of Tobago in 1996, 2001 and 2003 was only made on 1 March 2004, *i.e.* after the commencement of this arbitration. Trinidad and Tobago relies on the International Court of Justice's statement in the *Cameroon v. Nigeria* case where it was held that

> 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. (I.C.J. Reports 2002, p. 303, at p. 447, para. 304.)

107. In Trinidad and Tobago's view, there was no express or tacit agreement with respect to Barbados' hydrocarbon activities in the area to the north of the equidistance line and it is not estopped by such.

108. Regarding Barbados' allegations of a lack of protest on the part of Trinidad and Tobago, the latter cites two Diplomatic Notes, one from 1992 and one from 2001, the first of which states: "The Government of Trinidad and Tobago does not recognize the equidistance method of delimitation and consequently rejects its applicability, save by express agreement to a maritime boundary delimitation". Trinidad and Tobago also seeks to refute with evidence of its own the evidence offered by Barbados concerning other activities in the sector claimed north of the equidistance line, and concludes that "in all of these cases the activity is transitory, occasional, relating to areas which are much broader than the areas in dispute here and not such as would, in any event, give rise to recognition or estoppel".

D. MERITS – GENERAL ISSUES

1. What is the significance of the fishery and maritime boundary negotiations between the Parties prior to the filing of the Statement of Claim? Are the records of the negotiations admissible?

Barbados' Position

109. Barbados claims that the issues of fisheries and maritime delimitation were linked and were negotiated together. It claims that this was made clear during the first five rounds of negotiations, and that Trinidad and Tobago had assented to this linkage. The primary significance ascribed to the negotiations by Barbados is that they show the existence of a dispute between the Parties, and one that had crystallised to the point where resort to arbitration under UNCLOS was both warranted and, in Barbados view, necessary.

110. As noted in paragraph 21 above, Barbados objected to the introduction into the pleadings of the so-called "Joint Reports" from the negotiations, as they considered such an introduction to be a violation of a confidentiality agreement between the Parties. Barbados further maintained that it is an accepted element of international adjudication and arbitration that settlement proposals are inadmissible in subsequent litigation. Barbados nevertheless agreed that the Joint Reports could be admitted to the record

while reserving its rights on the matter (see paragraph 27 above). There was no further discussion of the matter at the oral proceedings.

Trinidad and Tobago's Position

111. Trinidad and Tobago's position is that there were two entirely separate sets of negotiations. "The first concerned the maritime boundary between the two States; the second, which began only two years after the first set of negotiations had commenced, concerned the conclusion of a new fisheries agreement". Trinidad and Tobago contends that there were five rounds of delimitation negotiations and four separate rounds of fisheries negotiations and that the records of these negotiations evidence their separate nature.

112. In response to Barbados' objections, Trinidad and Tobago also argues that the records of negotiations should be admitted, in particular because they are central to the issues of jurisdiction. Without the records, Trinidad and Tobago maintains, the Tribunal cannot determine whether the preconditions to arbitration set out in Articles 283 and 286 of UNCLOS had been satisfied. Trinidad and Tobago also argues that the records of negotiations reveal the basis on which the Parties negotiated for years about access for Barbadian fishing vessels to the Trinidad and Tobago EEZ and is of significant relevance to Barbados' claims of "historic fishing rights". Finally, Trinidad and Tobago asserts that the Tribunal can only assess the veracity of claims by examining the agreed record of the negotiations.

113. Trinidad and Tobago also notes that Barbados made extensive reference to the records of the negotiations in the pleadings, despite Barbados' position that the Joint Reports are inadmissible.

2. What is the applicable law and appropriate method of delimitation in determining the boundary?

Barbados' Position

114. Barbados claims that under international law the application of what it terms the "equidistance/special circumstances rule" will produce the most equitable result. This

method requires that a provisional equidistance line be drawn, every point of which is equidistant from the nearest points on the respective baselines of the Parties, the baseline being that from which the breadth of the territorial sea is measured. The line so established must then be considered for adjustment if so required by any relevant circumstances.

115. In support of its position, Barbados relies upon the International Court of Justice decision in the *Libya/Malta* case stating "[t]he Court has itself noted that the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts" (*Case Concerning the Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), I.C.J. Reports 1985, p. 13). Barbados also refers to several other International Court of Justice decisions.[16]

116. Moreover, Barbados observes that "the approach identified is as applicable to the determination of a single maritime boundary as it is to the delimitation of the EEZ and CS separately".

117. With respect to Trinidad and Tobago's approach to maritime delimitation, Barbados argues that international law does not recognize "regional implications" under the "so-called '*Guinea/Guinea-Bissau* test'" (*Arbitration Tribunal for the Delimitation of a Maritime Boundary between Guinea and Guinea-Bissau*, 77 I.L.R. p. 635 (1985)) as a relevant circumstance for maritime delimitation and, in any event, the instant case is not analogous. In this connection, Barbados recalls that the 1990 Trinidad-Venezuela Agreement "is not opposable to Barbados or any other third party state", and argues that the "regional implication theory opens a Pandora's box of problems, some jurisdictional, some substantive . . . . It takes Tribunals beyond their consensual jurisdiction and it makes the acceptability of their decisions hostage to the concurrence of non-parties who have no obligation to accept the decisions."

[16] See *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v. Norway*), I.C.J. Reports 1993, p. 38 ("*Jan Mayen*"); the *North Sea Continental Shelf Cases* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands*), I.C.J. Reports 1969, p. 4; *Qatar v. Bahrain* , I.C.J. Reports 2001, p. 40; and *Cameroon v. Nigeria*, I.C.J. Reports 1994-2002.

Trinidad and Tobago's Position

118. Trinidad and Tobago agrees with Barbados that under international law, courts and tribunals apply an equidistance/special circumstances approach so as to achieve an equitable result, and that the starting point for any delimitation is a median or equidistance line. Trinidad and Tobago maintains, however, that, although equidistance is a means of achieving an equitable solution in many cases, it is a means to an end and not an end in itself. In Trinidad and Tobago's view, "the equidistance line is provisional and consideration always needs to be given to the possible adjustment of the provisional median or equidistance line to reach an equitable result".

119. According to Trinidad and Tobago, the equidistance principle has particular significance in the context of opposite coasts. Furthermore, in determining whether "special circumstances" exist to warrant a deviation from the equidistance line, certain types of circumstances – such as the projection of relevant coasts, the proportionality of relevant coastal lengths, and the existence of any express or tacit agreement as to the extent of the maritime areas appertaining to one or other party – have been, in Trinidad and Tobago's view, deemed by courts and tribunals to be more relevant than others. Trinidad and Tobago relies in particular on the findings in the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 4).

120. Finally, Trinidad and Tobago contends, "once a provisional delimitation line has been drawn by a tribunal, it is normal to check the equitable character of that line to ensure that the result reached conforms with international law". Trinidad and Tobago maintains that due regard must be paid in particular to other delimitations in the region, as was done in the *Guinea/Guinea-Bissau* case, and that courts and tribunals have also considered in this connection issues of proportionality and potentially "catastrophic" consequences.

3. Are the distinctions drawn by Trinidad and Tobago between a "Western" and an "Eastern" Sector (and between "opposite" and "adjacent" coastlines) appropriate and, if so, what is the legal significance of the distinctions?

Trinidad and Tobago's Position

121. Trinidad and Tobago distinguishes between two sectors, arguing that both Trinidad and Tobago and Barbados face west towards the Caribbean (the "Western" sector), and east onto the Atlantic (the "Eastern" sector), and contends that, while the Parties may be in a position of opposition in the Western sector, they are not "opposite" in relation to the Eastern sector. Rather, according to Trinidad and Tobago, the Parties are in a position of "adjacency" as the Atlantic coastline of Trinidad and Tobago faces eastwards and is wholly unobstructed by any other coast. Where States are opposite to one another, Trinidad and Tobago maintains, the equidistance line is the preferred method of maritime delimitation, but where States are adjacent, the equidistance line has been found to lead to inequitable results.

122. Trinidad and Tobago contends that international law has consistently recognised distinctions between different sectors of maritime space and argues that courts and tribunals "have never accepted the proposition that if two coastlines are opposite at one point, that relationship must always be the dominant one. Rather they have carefully taken into account the changing nature of the relationships between coasts where the geography so required". Trinidad and Tobago relies in this regard on several decisions of the International Court of Justice[17] and in particular on the *Anglo-French* arbitration (*Delimitation of the Continental Shelf* (*United Kingdom v. France*), 54 I.L.R. p. 6, paras. 233, 242 (1977)), where the Court of Arbitration held that the relationship between the UK and France was one of oppositeness in the Channel sector, but in the Western Approaches the relationship was essentially lateral. In Trinidad and Tobago's view, a similar approach was adopted by the International Court of Justice in the *Gulf of Maine* case (I.C.J. Reports 1984, p. 246). Trinidad and Tobago argues that these cases cannot be distinguished on the basis that the coasts of Barbados and Trinidad and Tobago are too far apart, when in fact the distances are comparable. Nor, in Trinidad

[17] See *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 4); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States*), I.C.J. Reports 1984, p. 246; *Qatar v. Bahrain* case, I.C.J. Reports 2001, p. 40.

and Tobago's view, does the fact that the two States in the present case are relatively small preclude the application of the foregoing principles.

Barbados' Position

123. Barbados does not accept the distinctions drawn by Trinidad and Tobago between a "Western" and "Eastern" sector and argues that the Parties are coastally opposite islands and not adjacent at any point. According to Barbados, "Trinidad and Tobago is attempting to refashion geography in an untenable manner". Barbados argues that adjacency is a spatial relationship associated with the idea of proximity and argues that there is no support for the proposition that "two distant island States can ever be in a situation of adjacency, in contrast to coastal opposition".

124. Barbados also asserts that Trinidad and Tobago's reliance on the *Anglo-French* arbitration (54 I.L.R. p. 6), and the *Gulf of Maine* (I.C.J. Reports 1984, p. 246) and *Qatar v. Bahrain* (I.C.J. Reports 2001, p. 40) cases to draw distinctions between a "Western" and an "Eastern", or a "Caribbean" and an "Atlantic", sector is misplaced, noting that "in each of the cases relied upon by Trinidad and Tobago, the actual physical relationship between the relevant coasts of the Parties changed along their length". In this case, however, Barbados maintains that there is no change in the physical relationship between the coasts of Barbados and Trinidad and Tobago: the two island States face each other across a significant expanse of sea, with extensive sea on either side of them. Barbados also rejects Trinidad and Tobago's reliance on the distinction between the Atlantic Ocean and Caribbean Sea: "Trinidad and Tobago never explains how nomenclature proposed for bodies of water can transform the spatial relationship between islands that are otherwise in situations of coastal opposition".

E. BARBADOS' PROPOSED ADJUSTMENT TO THE SOUTH OF THE EQUIDISTANCE LINE IN THE WESTERN SECTOR

1. What is the historical evidence of fishing activities in the sector claimed by Barbados south of the provisional equidistance line?

Barbados' Position

125. Barbados bases its claim in the Caribbean sector on "three core factual submissions": (1) There is a centuries-old history of artisanal fishing in the waters off the northwest, north and northeast coasts of the island of Tobago by Barbadian fisherfolk; (2) Barbadian fisherfolk are dependent upon fishing in the area claimed off Tobago; and (3) "The fisherfolk of Trinidad and Tobago do not fish in the area claimed by Barbados to the south of the equidistance line and are, thus, in no way dependent on it for their livelihoods".

126. Barbadian artisanal fishing is done for the flyingfish, "a species of pelagic fish that moves seasonally to the waters off Tobago". "Since the 1970s", Barbados states, "Barbadian fisherfolk fishing off Tobago have usually transported their catch back to Barbados on ice. Before then Barbadians fishing off Tobago used other preservation methods to transport their catches home, such as salting and pickling."

127. Barbados seeks to prove the historical nature of the artisanal fishing by proffering evidence to show that its fisherfolk had long-range boats and other equipment to enable them to fish off Tobago between the 18th century and the latter half of the 20th century. It states that a Barbadian schooner fleet operated off Tobago dating back to at least the 18th century, ice was available in Barbados from the 18th century onwards and its use for the storage of fish caught by Barbadian boats and schooners by the 1930s is documented. It refers to the availability and use of other storage methods for fish caught off Tobago; the public recognition by government ministers and officials from Trinidad and Tobago that Barbadians have traditionally fished in the waters off Tobago; the effect of the widespread motorisation of the Barbadian fishing fleet as early as the 1950s; and the fact that following the independence of Trinidad and Tobago in the early 1960s, Barbadian fisherfolk were recorded as fishing from Tobago for flyingfish in the traditional fishing ground.

128. Barbados states further that flyingfish is a staple part of the Barbadian diet, and constitutes an "important element of the history, economy and culture of Barbados". Barbados also argues that its limited land area and poor soil quality make it a weak candidate for agricultural diversification, making the contributions of its fishery sector to the economy even more important. Barbados argues that without the flyingfish fishery, the communities concerned would suffer severe economic disruption, and in some cases, a complete loss of livelihood. A quantity of affidavits of Barbadian fisherfolk, attesting to the tradition and to the vital nature of Barbadian fishing for flyingfish off Tobago, as well as video evidence, were submitted in support of these contentions.

129. Barbados also contrasts its situation to that of Trinidad and Tobago where, it claims, "fishing is not a major revenue earner" and "the fisherfolk of Tobago generally fish close to shore and do not rely upon flying fish". According to Barbados, "[t]he overwhelming proportion of fishing vessels that fish out of Tobago remain to this day small boats powered by outboard motors". Barbados cites in support of this argument both the testimony of its own fisherfolk and statements by Trinidad and Tobago fishing officials during the course of negotiations over renewal of the 1990 Fishing Agreement.

Trinidad and Tobago's Position

130. Trinidad and Tobago disputes Barbados' claims to centuries-old artisanal fishing off Tobago as a matter of fact. Trinidad and Tobago presents extensive documentary evidence in support of the proposition that Barbadian fisherfolk have been fishing in the waters now claimed by Barbados only since the late 1970s, and that there was no Barbadian fishing in the waters off Tobago before then. This, claims Trinidad and Tobago, is because before the late 1970s Barbadian flyingfish fisherfolk did not have the long-range boats and other equipment to enable them to fish in the area now claimed by Barbados. Trinidad and Tobago asserts that it was only with the introduction of ice-boats in the late 1970s that Barbadian fishermen had the means to fish in the area now claimed by Barbados, and, moreover, that Barbadian fishing in the waters off Tobago is "not artisanal or historic in character", but instead "of recent origin and highly commercial".

131. Trinidad and Tobago also claims that Barbados exaggerates the economic importance of its flyingfish fishery. For example, Trinidad and Tobago cites an FAO country profile for Barbados which states that "the contribution of all fisheries to Barbados' GDP was only about $12 million, that is around 0.6% of GDP", and argues that the figures for flyingfish would be considerably lower, with the figures for flyingfish catches from the area now claimed by Barbados lower still. Citing its own continued willingness to negotiate a new fishing agreement with Barbados, Trinidad and Tobago argues further that any negative consequences for Barbadian fisherfolk are of its own making. In any event, Trinidad and Tobago continues, the evidence offered by Barbados on this point is unconvincing. Accordingly, Trinidad and Tobago claims there is no prospect of anything remotely approaching a catastrophe if Barbadian fisherfolk were not to be able to fish off Tobago.

132. At the same time, Trinidad and Tobago maintains, Barbados unduly dismisses the significance of such fishing to Trinidad and Tobago, and to Tobago in particular. Citing a report by Tobago's Department of Marine Resources and Fisheries, Trinidad and Tobago asserts that "all coastal communities on the island depend greatly on the fishing fleet and their activities for daily sustenance, while the flyingfish fishery accounts for about 70-90% of the total weight of pelagic landings at beaches on the leeward side of Tobago".

2. What, if any, is the legal significance of Barbadian "historic, artisanal" fishing practices in the sector claimed by Barbados south of the provisional equidistance line? In particular, do Barbados' fishing practices in this sector constitute a "relevant" or "special" circumstance requiring deviation from the equidistance line?

Barbados' Position

133. In Barbados' view, the demonstrated factual circumstances have resulted in the acquisition of non-exclusive fishing rights "which can only be preserved by an adjustment of the median line". According to Barbados, four rules of law are relevant in this regard:

(i) the exercise of traditional artisanal fishing for an extended period has been recognized as generating a vested interest or acquired right; this is especially the case when the right was exercised in areas theretofore *res communis*;

(ii) such traditional artisanal fishing rights vest not only in the State of the individuals that traditionally exercised them, but also in individuals themselves and cannot be taken away or waived by their State;
(iii) such rights are not extinguished by UNCLOS or by general international law; and
(iv) such rights have been held to constitute a special circumstance requiring an appropriate adjustment to a provisional median line.

134. For the first legal proposition – that traditional artisanal fishing can generate a vested interest – Barbados particularly relies on the views of Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law", 30 BYIL p. 1 at p. 51 (1953). Barbados also cites the *Behring Sea Arbitration Award* (*Behring Sea Arbitration Award between Great Britain and the United States*, 15 August 1893, Consolidated Treaty Series, Vol. 179, No. 8, p. 98), as well as "State practice in the form of treaties", which, in Barbados' view, "has long recognized the existence and the need for the preservation of traditional fishing rights when new boundaries that might interfere with those rights are established".

135. In response to what Barbados terms Trinidad and Tobago's argument that Barbados is in fact claiming exclusive rights to the relevant maritime zones, Barbados argues that

> Barbados does not now and never has asserted an exclusive right based on the traditional artisanal fishing practices of its nationals, nor certainly does it claim that this right overrides or takes precedence over other putative sovereign interests. It is only because Trinidad and Tobago refuses to accommodate this non-exclusive right by recognising a regime of access for some 600 Barbadian nationals to continue to fish in the maritime zones at issue that a special circumstance arises that requires an adjustment to the provisional median line in favour of Barbados.

136. For the second proposition – that such rights vest not only in the State of the individuals but also in the individuals themselves – Barbados argues:

> A State that asserts an acquired, non-exclusive right in waters formerly part of the high seas on the basis of long use by some of its nationals need not, then, marshall evidence of its *effectivités à titre de souverain*. It need only establish that its nationals have for a sufficient period of time been exercising their non-exclusive rights in those waters.

137. Barbados also invites the Tribunal to take into account provisions of international human rights law, in particular that of the Latin American region.

138. As to the third proposition – that such rights survive the declaration by Trinidad and Tobago of an EEZ and the entry into force of UNCLOS – Barbados refers to the text of

UNCLOS itself, and in particular Articles 47(6)[18] and 51(1)[19] concerning archipelagic waters and the protection of traditional fishing rights therein. Moreover, Barbados maintains, "it would be contrary to established methods of interpretation of treaties to read into a treaty an intention to extinguish pre-existing rights in the absence of express words to that effect".

139. In response to arguments of Trinidad and Tobago based on Article 62 of UNCLOS,[20] Barbados argues that "Article 62 of UNCLOS does not purport to terminate acquired

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[18] Article 47(6) provides:

6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

[19] Article 51(1) provides:

1. Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.

[20] Article 62 provides:

Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.
3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.
4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, inter alia, to the following:
   (a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;
   (b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;
   (c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;
   (d) fixing the age and size of fish and other species that may be caught;
   (e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;

artisanal fishing rights or relegate them to a regime of access subject to the unilateral discretion of the coastal State". Further, Barbados contends that Article 62 has no application in the present dispute as the issue is not about sharing the surplus of Trinidad and Tobago's allowable catch, but Barbados' right to adjustment of the maritime boundary in light of its "special circumstances". Barbados also alludes to Article 293(1), which provides that principles of general and customary law apply in so far as they are not incompatible with UNCLOS. Accordingly, Barbados argues that the principle of intertemporality requires the conclusion that Barbadian nationals' pre-existing rights to engage in artisanal fishing off the coast of Tobago survive the entry into force of UNCLOS.

140. Barbados argues further that, as a general principle of international law, acquired rights survive unless explicitly terminated, and nothing in UNCLOS or its *travaux* suggests that States intended to surrender rights not specified in the text. Finally, Barbados argues that customary international law, particularly as evidenced in the *Eritrea/Yemen* arbitral awards (*Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of Dispute*), 114 I.L.R. p. 1 (1998) ("*Eritrea/ Yemen I*") and *Eritrea/Yemen II*, 119 I.L.R. p. 417), provides for the survival of traditional artisanal fishing rights where, as here, former areas of the high seas fished by one State's nationals are enclosed by the waters of another State.

141. As for the proposition that such rights have been held to constitute a "special circumstance" requiring an appropriate adjustment of a provisional equidistance line, Barbados states: "Access to fishery resources and fishing activities can constitute a 'special circumstance'", as confirmed by the International Court of Justice in the *Gulf of Maine* case (I.C.J. Reports 1984, p. 246) and, in particular, the *Jan Mayen* case (I.C.J. Reports 1993, p. 38), as well as by arbitral tribunals in *Eritrea/Yemen II* (119 I.L.R.

(f) requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;
(g) the placing of observers or trainees on board such vessels by the coastal State;
(h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;
(i) terms and conditions relating to joint ventures or other cooperative arrangements;
(j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;
(k) enforcement procedures.

5. Coastal States shall give due notice of conservation and management laws and regulations.

p. 417) and *St Pierre et Miquelon* (95 I.L.R. p. 645). It is also, in Barbados' view, confirmed by "highly qualified publicists in major treatises" and State practice.

142. Thus, it is Barbados' position that the centuries-old history of artisanal fishing in the waters off the northwest, north and northeast coasts of the island of Tobago by Barbadian fisherfolk, coupled with the importance of flyingfish to both the Barbadian diet and the Barbadian fishing economy, constitutes a "special circumstance" warranting an adjustment of the boundary to the south of the equidistance line. As Barbados submitted during the oral proceedings,

> under either the *Jan Mayen* or the *Gulf of Maine* standard, an adjustment in favour of Barbados to protect the traditional artisanal fishing rights of its nationals would be appropriate and indeed, warranted by international law in the absence of an alternative arrangement to guarantee these crucial economic facts.

Trinidad and Tobago's Position

143. Trinidad and Tobago contends that Barbados' fishing practices in Trinidad and Tobago's EEZ are of no consequence as a legal matter and, in particular, there is no "special circumstance" warranting an adjustment of the equidistance line to the south. In Trinidad and Tobago's view, even if the Tribunal were to find that artisanal fishing had historically occurred off the coast of Tobago, it would give Barbados no rights to an EEZ in this locality. "Distant-water fishing whether it occurs on the high seas or the territorial sea of another coastal State, gives no territorial or sovereign rights to the State of nationality of the vessels concerned."

144. Trinidad and Tobago's position is that Barbados could not acquire fishing rights by virtue of the long and continuous artisanal fishing practices of Barbadian nationals in waters near Tobago because those waters formerly had the status of high seas and were *res communis*. Trinidad and Tobago argues that fishing by Barbadian nationals in those waters could not give rise to any sovereign rights over those waters, because the conduct of private parties does not normally give rise to sovereign rights and fishing by private parties in the high seas could not affect the sovereign rights of the coastal State in the seabed. Further, Trinidad and Tobago argues, non-exclusive rights to fish in the EEZ of another State are not sovereign rights and it is only sovereign rights which are in issue in the present proceedings.

145. Trinidad and Tobago maintains that UNCLOS addresses the preservation of existing fishing interests in Article 62, pursuant to which fishing rights are to be accommodated by a regime of access rather than by adjustment of the equidistance line. Trinidad and Tobago also argues that, regardless of UNCLOS, the practice of the International Court of Justice and arbitral tribunals indicates that even where there is genuine historic fishing, it does not warrant a shift in a maritime boundary of the type proposed by Barbados. Citing the *Qatar v. Bahrain* (I.C.J. Reports 2001, p. 40) and *Cameroon v. Nigeria* (I.C.J. Reports 2002, p. 303) cases, Trinidad and Tobago also maintains that "recent decisions have suggested that historic activity, whether in the form of fishing activities or other forms of resource exploitation, could be relevant to delimitation only if they led to, or were bound up with, some form of recognition of territorial rights on the part of the State concerned".

146. Trinidad and Tobago argues further that fisheries are not the only resource in the area, and the existence of hydrocarbons there is very likely, with the result that fisheries cannot be decisive. How can it be, Trinidad and Tobago submits, that Barbados' fishing rights trump "any prior Continental Shelf rights" and that "a right of access to fishing in the EEZ can somehow convert what was previously one State's Continental Shelf into the Continental Shelf of another"? In this connection, Trinidad and Tobago distinguishes the *Jan Mayen* case (I.C.J. Reports 1993, p. 38), where the issue of access to fisheries led to an adjustment in the delimitation line, on the basis of the fact that, while a substantial portion of Greenland's population was almost wholly dependent on fishing, Jan Mayen has no fixed population at all. Trinidad and Tobago contrasts this with the fact that Trinidad and Tobago and Barbados both have substantial populations, both of which have "an interest in the fishery resources of the waters between the two islands".

147. Trinidad and Tobago also rejects the application of the "catastrophic consequences" proviso as not applicable under UNCLOS, and argues that were it to be found applicable, it would be necessary to examine the interests of the populations of both States. Trinidad and Tobago asserts as well that "it is highly unlikely that any maritime delimitation drawn in accordance with normal criteria could cause 'catastrophic repercussions'".

148. Finally, Trinidad and Tobago takes issue with Barbados' assertion that a "special circumstance" was created because its rights were denied when Trinidad and Tobago refused to agree to an access regime. In Trinidad and Tobago's view, Barbados is precluded from making this argument because it was Barbados that ended the negotiations by instituting arbitral proceedings. Moreover, even if – contrary to fact – Trinidad and Tobago had denied access rights, that of itself could not give rise to adjustment of the maritime boundary.

3. Do these fishing practices give rise to any continuing Barbadian fishing rights if the area were to be held to be the EEZ of Trinidad and Tobago?

Barbados' Position

149. As noted in paragraph 72 above Barbados argues that the Tribunal in this case is competent to award Barbados less than it has claimed, and, indeed, that if the Tribunal decides not to adjust the equidistance line as Barbados has petitioned, the Tribunal should instead award a fisheries access regime to Barbadian fisherfolk. Such an award would be consistent with the arbitral tribunal's award in *Eritrea/Yemen II* (119 I.L.R. p. 417), and would not be contrary to the holdings in other maritime delimitation cases.

Trinidad and Tobago's Position

150. For its part, Trinidad and Tobago argues that the Tribunal has no jurisdiction to consider, much less award, a claim, expressly stated or not, by Barbados for a fisheries access regime. Moreover, Trinidad and Tobago contends, Barbados has provided no guidance to the Tribunal about what regime of access it might be asked to give. "There is a real danger", Trinidad and Tobago submits, "in an access regime which does not have a regulatory framework built into it. We came close to agreement with Barbados about such a regulatory framework. Before [the Tribunal] they have said nothing about the details that concerned them in those negotiations at all".

F. TRINIDAD AND TOBAGO'S PROPOSED ADJUSTMENT TO THE NORTH OF THE EQUIDISTANCE LINE IN THE EASTERN SECTOR

1. General

(a) What is the legal significance of the following "relevant" circumstances claimed by Trinidad and Tobago:

(i) Frontal projection and potential cut-off (application of the principle of non-encroachment)?

Trinidad and Tobago's Position

151. In Trinidad and Tobago's view, the principal issue in this case is "the delimitation of the Atlantic (eastern) sector, and the principal feature to which effect must be given in that delimitation is the lengthy eastern frontage of Trinidad and Tobago that gives unopposed onto the Atlantic". According to Trinidad and Tobago, the "relevant coasts are those looking on to or fronting upon the area to be delimited; this is not the same thing as the distances between the points which determine the precise location of the line eventually drawn". Trinidad and Tobago takes issue with Barbados' position that relevant coasts are those which generate the equidistance line and argues in this regard that the determination of relevant coasts must be carried out as an initial matter. Trinidad and Tobago cites the *Gulf of Maine* (I.C.J. Reports 1984, p. 246) and *Jan Mayen* (I.C.J. Reports 1993, p. 38) cases for support on this point.

152. Adoption of the equidistance line in the Atlantic sector, as claimed by Barbados, would, Trinidad and Tobago maintains, prevent Trinidad and Tobago from reaching the limit of its EEZ entitlement, and allow Barbados to claim 100% of the outer continental shelf in the area of overlapping entitlements, a result which Trinidad and Tobago argues is inequitable and in violation of the principle of non-encroachment.

153. Trinidad and Tobago argues further that where there are competing claims, the Tribunal should draw the delimitation "as far as possible so as to avoid 'cutting off' any State due to the convergence of the maritime zones of other States". Trinidad and Tobago cites, *inter alia*, *Tunisia/Libya (Case Concerning the Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*) (I.C.J. Reports 1982, p. 18)) and *Libya/Malta* (I.C.J. Reports 1985, p. 13) as support for this proposition. In Trinidad and Tobago's view, although the principle of non-encroachment is not an absolute rule (as encroachment is inevitable where the maritime entitlements of two coasts overlap), the non-encroachment principle

provides that "as far as possible the maritime areas attributable to one State should not preclude the other from access to a full maritime zone" and "should not cut across its coastal frontage so as to zone-lock it". Trinidad and Tobago argues that its geographic position is analogous to Germany in the *North Sea Continental Shelf* cases and cites the International Court of Justice's finding there that:

> delimitation is to be effected by agreement in accordance with equitable principles….in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other. (I.C.J. Reports 1969, p. 4, at p. 53, para. 101(C)(1))

Barbados' Position

154. Barbados rejects Trinidad and Tobago's submissions concerning relevant coasts, stating that "the two States' 'relevant coastal frontages', to use Trinidad and Tobago's phrase, can only be those that generate competing, overlapping entitlements". Barbados cites the *Jan Mayen* case (I.C.J. Reports 1993, p. 38) in support of this proposition and seeks to distinguish the *Anglo-French* arbitration (54 I.L.R. p. 6). "If anything", Barbados argues, "Trinidad and Tobago's southeast-facing coastal front produces an entitlement *vis-à-vis* Venezuela, Guyana and Suriname, not Barbados".

155. Barbados contends with respect to the notion of "cut-off" that it is a term of general reference, not a rule of absolute entitlement, and refers to an equitable delimitation that "takes account of geographical constraints and the claims of other States in order to ensure that a State will receive an EEZ and CS 'opposite its coasts and in their vicinity'". According to Barbados, "[a]ll the holdings of courts and tribunals on 'cut-off' claims refer to the CS or EEZ. None of them refer to a potential ECS claim".

156. In Barbados' view, an equidistance line boundary with Barbados will not in any event enclave or cut-off Trinidad and Tobago. The equidistance line gives Trinidad and Tobago a continental shelf in the Atlantic sector extending to more than 190 nm from its relevant baselines. "Thus", Barbados concludes, "the adjusted median line described in [Barbados'] Memorial does not constitute a 'cut-off' in the sense in which Germany might have suffered a cut-off of its access to the North Sea by the Denmark-Netherlands attempt to apply the median line".

157. Barbados argues further that Trinidad and Tobago misstates and misapplies the principle of non-encroachment in the present case and, contrary to Trinidad and Tobago's portrayal of the Eastern sector as being comprised of open ocean, there are overlapping EEZ claims in the region. Barbados contends that Trinidad and Tobago is constrained in any case from reaching its full 200 nm EEZ entitlement and any full potential ECS claim by the presence of Venezuela, Guyana, and Suriname. Barbados, for its part, is faced with claims from St. Lucia and France to its north and is constrained from reaching its full 200 nm EEZ entitlement and any full ECS claim by the presence of Trinidad and Tobago, Venezuela, Guyana and Suriname. Barbados also argues that it is wrong for Trinidad and Tobago to suggest that there is an open maritime area to which Trinidad and Tobago is entitled and to argue that "it is *ex ante* entitled to partake of a share of maritime areas to which it simply does not reach".

(ii) Proportionality

Trinidad and Tobago's Position

158. Trinidad and Tobago argues that the relationship between the coastal lengths of it and Barbados is "of major relevance to the delimitation". Trinidad and Tobago relies on the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 4), the *Gulf of Maine* case (I.C.J. Reports 1984, p. 246), the *Cameroon v. Nigeria* case (I.C.J. Reports 2002, p. 303, at pp. 446-447, paras. 301, 304) and the *Jan Mayen* case (I.C.J. Reports 1993, p. 38) where, Trinidad and Tobago asserts, the proportionality of the relevant coastlines was considered relevant to delimitation. Trinidad and Tobago also quotes the arbitral tribunal in *Eritrea/Yemen II* (119 I.L.R. p. 417) where it was stated that "the principle of proportionality . . . is not an independent mode or principle of delimitation, but rather a test of equitableness of a delimitation arrived at by some other means". Finally, Trinidad and Tobago takes issue with Barbados' view that, in Trinidad and Tobago's words, "proportionality is something that only comes at the end [of a delimitation]. Proportionality . . . is also and has been in many cases part of the initial case for an adjustment as in *Jan Mayen*".

159. According to Trinidad and Tobago, the coastal frontage of Trinidad and Tobago is much greater than that of Barbados (in a ratio of the order of 8.2:1). Trinidad and Tobago also argues in this regard that Barbados' claim line would produce a division of

the EEZ area of overlapping claims between the two states in a ratio of 58/42. Trinidad and Tobago's proposed claim line, on the other hand, would produce a division of approximately 50/50 of the overlapping claims.

Barbados' Position

160. Barbados argues that Trinidad and Tobago cannot use proportionality as a driving factor in delimitation. According to Barbados, "the concept of 'a reasonable degree of proportionality' was devised as a 'final factor' by which to assess the equitable character of a maritime delimitation effected by other means". Proportionality is not a positive method, it cannot produce boundary lines and it does not require proportional division of an area of overlapping claims, because it is not a source of entitlement to maritime zones. Barbados relies on the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 4), the *Gulf of Maine* case (I.C.J. Reports 1984, p. 246) and the *Nova Scotia v. Newfoundland* arbitration (*Award of the Tribunal in the Second Phase*, 26 March 2002), all of which, in Barbados' view, establish that proportionality is a final factor to be weighed only after all other relevant circumstances such as unusual features on the Parties' coasts, or islets off those coasts, have been accounted for.

161. Citing the *Tunisia/Libya* case (I.C.J. Reports 1982, p. 18), Barbados argues further that Trinidad and Tobago's reliance on proportionality is misplaced, as the archipelagic baseline referred to by Trinidad and Tobago is not a relevant coastline for the purposes of any argument of disproportionality. Moreover, Trinidad and Tobago ignores about half of Barbados' coastal length that would be relevant in a valid test of proportionality. Barbados also sought to demonstrate how, depending on the coastal factors considered, one might in any case arrive at a variety of conclusions regarding the proportional relationship of the Parties.

(iii) The "regional implications", including the 1990 Trinidad-Venezuela Agreement?

Trinidad and Tobago's Position

162. Trinidad and Tobago argues that "Barbados' claim line ignores the regional implications for all other States to the north and south" and is contrary to the principle

set out in the *Guinea/Guinea-Bissau* case (77 I.L.R. p. 635) where the arbitral tribunal stated: "A delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or still to be made in the region". "In the present case", Trinidad and Tobago argues, "in the Eastern Caribbean, the application of a rigid equidistance principle would give Barbados a massively disproportionate continental shelf at the expense of its neighbours, including Trinidad and Tobago".

163. In furtherance of its regional implications argument, Trinidad and Tobago points to two maritime boundary agreements in the region – the first between itself and Venezuela and the second between France and Dominica – which have, Trinidad and Tobago maintains, departed from the equidistance line "in order to take into account the general configuration of east-facing coastlines in the region, and to give at least some expression to the projection of these coastlines to an uninterrupted (if still constricted) EEZ and continental shelf".

164. With respect to the 1990 Trinidad-Venezuela Agreement, Trinidad and Tobago argues that no third State has made any claim as to the areas north and south of the line drawn by the agreement. Trinidad and Tobago also quotes language from the treaty that states: "no provision of the present treaty shall in any way prejudice or limit these rights [. . .] or the rights of third parties". The agreement is thus not "opposable" to Barbados. Nevertheless, Trinidad and Tobago argues, the maritime delimitation reflected in that agreement may be taken into account by the Tribunal as a "relevant regional circumstance". Moreover, in Trinidad and Tobago's view, the 1990 treaty also "marks the limit" of the Tribunal's jurisdiction. "Any claim Barbados may wish to make to areas south of this line is a matter for discussion between Barbados and Venezuela or between Barbados and Guyana".

165. Finally, Trinidad and Tobago maintains that it does not view agreements concluded in the region or implications for third States as determinative of the delimitation, but it does view them as relevant factors that should be taken into account, all the more since so doing would support an equitable delimitation which does not zone-lock or shelf-lock either of the Parties.

Barbados' Position

166. As noted above (see paragraph 117), Barbados argues that international law does not recognise "regional implications" as a relevant circumstance for the purpose of maritime delimitation. Barbados counters Trinidad and Tobago's reliance on the *Guinea/Guinea-Bissau* case (77 I.L.R. p. 635) by arguing that the arbitral tribunal did not establish a "regional implications" test, and nowhere was it stated that "coastal States should enjoy, in disregard of geographical circumstances, the maximum extent of entitlement to maritime areas recognised by international law, at the entire expense of other States' entitlements".

167. Barbados thus contends that the Tribunal should not adopt the regional implications concept developed by Trinidad and Tobago and argues that if it did so, "[m]aritime delimitation would no longer be subject to concrete geographical fact and law but instead would be swayed by the interests of non-participating third States or nebulous 'regional considerations', whose meaning would vary according to a potentially indefinite number of factors that would be impossible to predict". Moreover, Barbados states, "[t]he theory of regional implication permits the party arguing it to pick and choose from regional practice, relying on agreements which it believes support its claim and ignoring those which do not".

168. Barbados argues further that the 1990 Trinidad-Venezuela Agreement has no role in the current delimitation and can only operate and be given recognition within the maritime areas that unquestionably belong to Trinidad and Tobago and Venezuela, the parties to that agreement. According to Barbados, that agreement purported to apportion Barbados' maritime territory between Trinidad and Tobago and Venezuela as it disregarded the geographical entitlements of Barbados in clear violation of the principle of law of *nemo dat quod non habet*. Barbados adduces evidence contemporaneous with the negotiation of the agreement in the form of comments by Prime Minister Manning, then leader of the opposition in Trinidad and Tobago, contesting the propriety of the 1990 Trinidad-Venezuela Agreement on that very ground.

(b) If a deviation is required, is the turning point proposed by Trinidad and Tobago (Point A) the appropriate point, and what is the appropriate direction of the boundary line?

169. The map facing (Map III) illustrates Trinidad and Tobago's claim line in the Atlantic sector, as well as the location of the equidistance line in that sector.

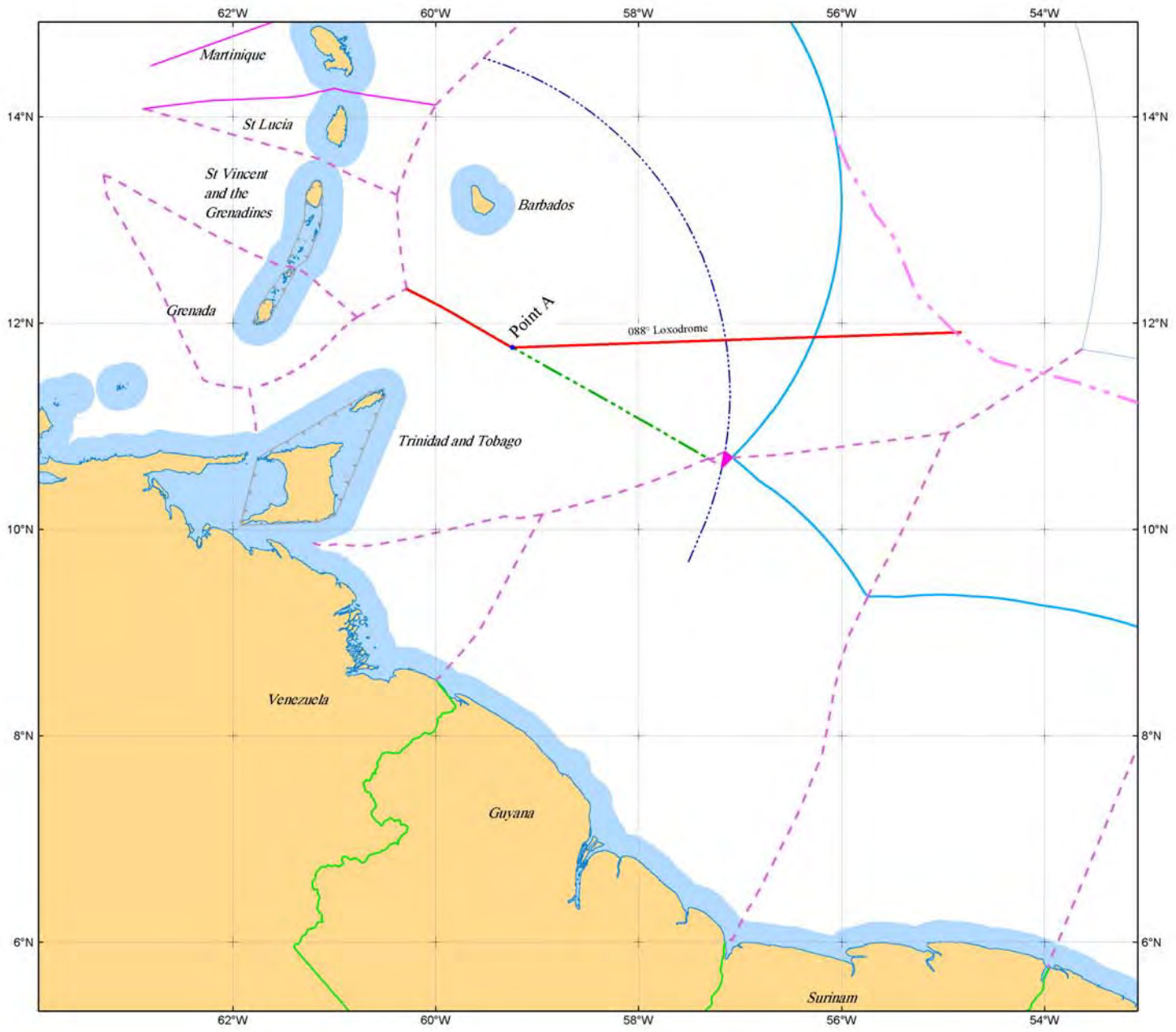
Trinidad and Tobago's position

170. Trinidad and Tobago argues that it is "appropriate that there be a deviation away from an equidistance line to reflect the change in the predominant relationship from one of oppositeness to one . . . of adjacency" and identifies the point ("Point A") as "the last point on the equidistance line which is controlled by points on the south-west coast of Barbados". "Moreover", Trinidad and Tobago argues, "Point A is just to the north of the location of the 12 mile territorial sea of Tobago and well, well to the south of the equivalent place of Barbados. It leaves Barbados' eastwards facing coastal projection completely unobstructed for as far as the coast of West Africa".

171. With respect to the direction of the line eastwards from Point A, Trinidad and Tobago states that, as a general matter, "the adjustment should give adequate expression on the outer limit of the EEZ to the long east-facing coastal frontage of Trinidad and Tobago". According to Trinidad and Tobago, "that frontage can fairly be represented at that distance by the north-south vector of the coastline", which is a line 69.1 nm in length, and the idea of using a vector is "a concept taken from the *St. Pierre et Miquelon* case" (95 I.L.R. p. 645). Thus, by proceeding along an azimuth of 88° from Point A to the outer or eastern edge of the EEZ of Trinidad and Tobago, the point of intersection ("Point B") lies 68.3 nm from the intersection of Trinidad and Tobago's EEZ with the Barbados-Guyana equidistance line. In Trinidad and Tobago's view, the adjustment "gives Trinidad and Tobago a modest EEZ façade of 51.2 nm, while leaving Barbados vast swathes of maritime zones to the north and north-east".

Barbados' position

172. Barbados argues that Trinidad and Tobago's Point A has been calculated "by using contrived and self-serving basepoints". Barbados rejects Trinidad and Tobago's



Map 1

Map of Trinidad and Tobago's claim line as shown by Trinidad and Tobago in its Counter Memorial

Legend

- Trinidad and Tobago's claim line
- Trinidad - Venezuela Agreement line
- Barbados - Trinidad and Tobago median line
- Other calculated median lines
- Archipelagic baselines
- 200M EEZ limits
- 200M arc drawn from the archipelagic baseline of Trinidad and Tobago
- ECS limit
- Barbados - Guyana EEZ Co-operation Zone

Scale: 1 : 4,500,000
[at 12°N when printed at A3 size]
Projection: Mercator
Datum: WGS 84

0 50 100 150 200 M

0 100 200 300 400 km

Map III

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description of Point A as "the last point on the median line that is controlled by basepoints on the section of the relevant Barbadian coast that is deemed by Trinidad and Tobago to be opposite Tobago". Barbados argues that Trinidad and Tobago has selectively ignored certain basepoints on the northeast-facing baseline of Little Tobago island "that actually assist in generating the median line" and claims that this is done because they "clearly contribute to the construction of the median line to the east of Point A". In short, Barbados claims that Trinidad and Tobago's localisation of Point A is "arbitrary and self-serving, without any objective circumstances".

173. With respect to the direction of Trinidad and Tobago's claim line from Point A eastwards, Barbados argues similarly that Trinidad and Tobago has made a "random selection" of a north-south vector "which happens to correspond to the distance . . . between the latitude of the northernmost point of the southeast-facing baseline and the latitude of the southernmost point of that baseline" and then adjusts the eastern terminus of the delimitation line northward along its 200 nm arc in direct proportion to the length of the vector. Barbados argues further that "a vector is not a coast" and "the direction of the vector constructed by Trinidad and Tobago distinctly deviated from the actual direction of its coastline". Moreover, Trinidad and Tobago, in Barbados' view, "fails to explain the relationship between [the vector used to determine the azimuth], Point A, the International Hydrographic Organization frontier between the Caribbean and the Atlantic, and adjacency", and "purports to ignore the jurisprudence that allows adjustment of the median line only exceptionally, in cases of vast disproportionality between the relevant coasts, and even then implements only very limited adjustments to that line".

2. Delimitation beyond 200 nm: Does Trinidad and Tobago enjoy an entitlement to access to the ECS, and one that takes precedence over Barbados' EEZ entitlement or one that would accord Trinidad and Tobago continental shelf rights within the area of the EEZ of Barbados?

Trinidad and Tobago's Position

174. With respect to the area it claims beyond 200 nm from its coast (*i.e.* beyond its EEZ), Trinidad and Tobago argues that pursuant to Articles 76(4)-(6) of UNCLOS, coastal States have an entitlement to the continental shelf out to the continental margin. In addition, with reference to the specific area beyond its EEZ, but within 200 nm of

Barbados, Trinidad and Tobago contends: "Under general international law as well as under the 1982 Convention, claims to continental shelf are prior to claims to EEZ".

175. Trinidad and Tobago argues that the older regime of the continental shelf cannot be subordinated to the later regime of the EEZ. According to Trinidad and Tobago, although the EEZ became a treaty-based concept and part of customary international law through UNCLOS, there was no expression of any intention in UNCLOS to repeal or eliminate existing rights to the continental shelf, which traces its roots to customary international law and the 1958 Geneva Convention on the Continental Shelf. Rather, Trinidad and Tobago maintains, UNCLOS created two distinct zones, and, while there is "undoubtedly some overlap between the two zones", it is important to remember that "UNCLOS proceeds by addition and cumulation, not by substitution or derogation, unless it expressly so provides", and that the EEZ is "an optional elected zone", with not all States having declared EEZs. Trinidad and Tobago refers to scholarly commentary for support of its view, as well as to the text of UNCLOS itself, where it points out, *inter alia*, that sedentary species, unlike other living marine natural resources, are deemed part of the continental shelf under Article 77, as they had been prior to the adoption of the Convention. Trinidad and Tobago also relies on the text of Article 56(3), which states: "The rights set out in this Article with respect to the seabed and subsoil should be exercised in accordance with Part VI". The phrase "in accordance with", in Trinidad and Tobago's view, signifies that the drafters intended the terms of Part V (concerning the EEZ) to be, in effect, subject to those of Part VI (concerning the continental shelf).

176. Trinidad and Tobago argues further that, despite Barbados' arguments to the contrary, there is no reason why the Tribunal cannot award Barbados EEZ rights and Trinidad and Tobago its continental shelf in the area beyond Trinidad and Tobago's EEZ, but within 200 nm of Barbados. According to Trinidad and Tobago, although it may be desirable for the continental shelf and EEZ boundaries to coincide, this is not legally required, either by UNCLOS or judicial precedent. Three International Court of Justice cases in particular are cited by Trinidad and Tobago in support of this view: *Jan Mayen* (I.C.J. Reports 1993, p. 38); *Libya/Malta* (I.C.J. Reports 1985, p. 13); and *Qatar v. Bahrain* (I.C.J. Reports 2001, p. 40).

177. Trinidad and Tobago also points to examples in State practice where different limits have been adopted for the continental shelf and the EEZ or fisheries jurisdiction zones – namely, the Torres Strait Treaty entered into by Australia and Papua New Guinea and the agreement between the UK and Denmark and the Faroe Islands in relation to the delimitation of maritime boundaries. With respect to the France-Dominica agreement cited by Barbados as a counter-example, Trinidad and Tobago argues, "There is no indication in the *travaux* of the agreement that the line stopped because of some *a priori* rule of international law that you cannot go within 200 nm of another State".

178. Finally, Trinidad and Tobago argues that "the coexistence of water column rights in one State with seabed rights in another" is not, as Barbados has argued, unworkable, particularly as there is no evidence that any fishing occurs in the area concerned, "nor is there any evidence of artificial islands or other conflicting activities to which Barbados refers". Moreover, Trinidad and Tobago maintains, the situation of overlapping EEZ/CS rights occurs with some frequency around the world and thus the issue of which rights take precedence is "not a mere abstract question".

Barbados' Position

179. Barbados contends that, if the Tribunal finds that it has jurisdiction to hear Trinidad and Tobago's claim to an outer continental shelf, it should still reject the claim, which, in Barbados' view, invites the Tribunal to delimit five separate and distinct maritime areas with correspondingly different regimes of sovereign rights. According to Barbados, "Trinidad and Tobago cannot claim a right to an ECS unless and until it establishes that it is the relevant coastal State with an entitlement in accordance with Article 76 of UNCLOS". "In the area beyond the 200 nm arc of Trinidad and Tobago but within the undisputed EEZ of Barbados", Barbados argues, "Barbados enjoys sovereign rights under UNCLOS, including rights in relation to the sea-bed and its subsoil, that would be lost in the event that the Tribunal recognised Trinidad and Tobago's claim".

180. If the Tribunal were to accord Trinidad and Tobago continental shelf rights within the area of the EEZ of Barbados, it would, in Barbados' view, create an unprecedented and unworkable situation of overlap between sea-bed and water column rights. Barbados

contends that a scheme of this sort can only be adopted with the consent of the States concerned, and that "instances of such State consent to apportion EEZ and CS jurisdiction are extremely rare". Barbados also notes that such a scheme was in fact not adopted in the France-Dominica Agreement of 7 September 1987 – an agreement on which Trinidad and Tobago otherwise relies and one where Dominica's 200 nm limit, like Trinidad and Tobago's, "does not reach the high seas so as to give it any entitlement to an ECS".

181. Barbados argues further that the Tribunal is precluded from drawing anything but a single maritime boundary in this case, in part because such a boundary was the focus of the negotiations between the Parties preceding the arbitration. Moreover, Barbados argues, the historical background outlined by Trinidad and Tobago with respect to the continental shelf is "of secondary importance to the contemporary state of international law under UNCLOS". Barbados continues:

> Pursuant to UNCLOS, the legal concepts of the EEZ and the CS exist side by side, with neither taking precedence over the other. If the sovereign rights of coastal states in each juridical area are to be exercised effectively under UNCLOS, each must be delimited within a single common boundary, save in those exceptional cases where the coastal States concerned reach some form of agreement as to the exercise of overlapping rights within a given area of maritime space.

182. Barbados cites several provisions of UNCLOS which it says would be "unworkable if 'the coastal State' in respect of a given area of EEZ were different from 'the coastal State' in respect of an overlapping CS", including: the "inter-relationship and overlap" between Articles 56 and 77 of UNCLOS, the interlinkage between Articles 60 and 80, and "the right of coastal States to 'regulate, authorize and conduct marine scientific research' in their EEZ and on their CS under Article 246". Barbados also refers in this regard to the fact that Article 56(3) uses the phrase "in accordance with" Part VI, rather than the phrase "subject to", which, Barbados states, was used elsewhere in the Convention and was thus "part of the lexicon of the drafters".

183. In support of its argument, Barbados also cites "the writings of highly qualified publicists", and dismisses as irrelevant the examples of State practice where different boundaries have been agreed. Barbados goes on to distinguish two of the cases cited by Trinidad and Tobago, arguing that *Libya/Malta* (I.C.J. Reports 1985, p. 13) "does no more than confirm that the legal concepts of the EEZ and CS remain separate and

distinct at international law" and *Jan Mayen* (I.C.J. Reports 1993, p. 38), which Barbados contends "was of course regulated by a different law from that applicable to the present case". Rather, Barbados states, "in all of those cases of maritime delimitation that have been decided to date by courts or tribunals pursuant to UNCLOS (namely *Qatar v. Bahrain*, *Eritrea/Yemen* and *Cameroon v. Nigeria*), a single boundary has been the result".

184. With respect to Trinidad and Tobago's historical arguments for the precedence of continental shelf rights over those conferred by an EEZ, Barbados argues that international law concerning the continental shelf has evolved over time, and that, based on continental shelf definitions that pre-dated UNCLOS, "it was only under the 1982 Convention that Trinidad and Tobago could have first made a claim . . . [to] the areas beyond 200 nm which it is now claiming as its continental shelf". Moreover, Barbados contends, if "Trinidad and Tobago automatically acquired a continental shelf at some moment in the past then Barbados must have acquired its shelf at the same time. And Trinidad and Tobago's shelf would have stopped where Barbados' shelf encountered it".

185. Finally, Barbados submits that if Trinidad and Tobago's claim to the ECS were granted, it would produce "a grossly inequitable result. Barbados would receive 25 per cent of the extended continental shelf to which it is entitled under international law". In Barbados view, Trinidad and Tobago's approach is thus "a formula for inequity in this case and for chaos and conflict in any other cases in which it might be applied".

G. FINAL SUBMISSIONS OF THE PARTIES

1. Barbados

186. The final submissions of Barbados, made in the Reply, were as follows (footnote omitted):

> In conclusion, for the reasons set out in this Reply and in the Memorial, and reserving the right to supplement these submissions, Barbados responds to the submissions of Trinidad and Tobago as follows:
>
> (1) the Tribunal has jurisdiction over Barbados' claim as expressed at Chapter 7 of the Memorial and that claim is admissible;
> (2) the maritime boundary described with precision at Chapter 7 of the Memorial is the equitable result required in this delimitation by UNCLOS and applicable rules of international law;

(3) the Tribunal has no jurisdiction over Trinidad and Tobago's claim beyond its 200 nautical mile arc; and

(4) notwithstanding jurisdiction and admissibility, the delimitation proposed by Trinidad and Tobago represents an inequitable result. Being thus incompatible with UNCLOS and the applicable rules of international law, it must be rejected in its entirety by the Tribunal.

Barbados accordingly affirms its claims as expressed in its Memorial and repeats its request that the Tribunal determine a single maritime boundary between the EEZs and CSs of the Parties that follows the line there described.

2. Trinidad and Tobago

187. The final submissions of Trinidad and Tobago, made in the Rejoinder, were as follows:

1. For the reasons given in Chapters 1 to 5 of this Rejoinder, the arguments set out in the Reply of Barbados are unfounded.

2. Trinidad and Tobago repeats and reaffirms, without qualification, the submissions set out on page 103 of its Counter-Memorial, namely that it requests the Tribunal:-
   (1) to decide that the Tribunal has no jurisdiction over Barbados' claim and/or that the claim is inadmissible;
   (2) to the extent that the Tribunal determines that it does have jurisdiction over Barbados' claim and that it is admissible, to reject the claim line of Barbados in its entirety;
   (3) to decide that the maritime boundary separating the respective jurisdictions of the Parties is determined as follows:
      (a) to the west of Point A, located at 11° 45.80′ N, 59° 14.94′ W, the delimitation line follows the median line between Barbados and Trinidad and Tobago until it reaches the maritime area falling within the jurisdiction of Saint Vincent and the Grenadines;
      (b) from Point A eastwards, the delimitation line is a loxodrome with an azimuth of 88° extending to the outer limit of the EEZ of Trinidad and Tobago;
      (c) further, the respective continental shelves of the two States are delimited by the extension of the line referred to in paragraph (3)(b) above, extending to the outer limit of the continental shelf as determined in accordance with international law.

CHAPTER IV – JURISDICTION

188. The Tribunal must begin by addressing the question of its jurisdiction to hear and determine the dispute which has been brought before it, which is a matter on which the Parties have taken opposing positions.

189. Barbados submits that the Tribunal has jurisdiction over the dispute which it, Barbados, has submitted to it, but that the Tribunal is without jurisdiction over what Barbados regards as an additional element introduced by Trinidad and Tobago concerning the boundary of the continental shelf beyond the 200 nm limit (see paragraphs 67-72, 80-82 above).

190. Trinidad and Tobago takes a different view, submitting that the Tribunal is without jurisdiction to hear the dispute which Barbados submitted to arbitration, but that if it did have such jurisdiction the dispute also involves the continental shelf boundary between the two States beyond 200 nm (see paragraphs 73-79, 83-87 above).

191. The Tribunal recalls that, at all relevant times, both Parties have been parties to UNCLOS. Accordingly, both Parties are bound by the dispute resolution procedures provided for in Part XV of UNCLOS in respect of any dispute between them concerning the interpretation or application of the Convention. Section 2 of Part XV provides for compulsory procedures entailing binding decisions, which apply where no settlement has been reached by recourse to Section 1 (which lays down certain general provisions, including those aimed at the reaching of agreement through negotiations and other peaceful means). Article 287 of UNCLOS allows parties a choice of binding procedures for the settlement of their disputes, but neither Party has made a written declaration choosing one of the particular means of dispute settlement set out in Article 287, paragraph 1 (see footnote 6 above). Accordingly, under paragraph 3 of that Article, both Parties are deemed to have accepted arbitration in accordance with Annex VII to UNCLOS.

192. Article 298 makes provision for States to make optional written declarations excluding the operation of procedures provided for in Section 2 with respect to various categories of disputes, but neither Party has made such a declaration. It follows that both Parties have agreed to their disputes concerning the interpretation and application of UNCLOS

being settled by binding decision of an arbitration tribunal in accordance with Annex VII, without any limitations other than those inherent in the terms of Part XV and Annex VII.

193. In the present case, the Parties are in dispute about the delimitation of their continental shelf and EEZ in the maritime areas opposite or adjacent to their coasts. In accordance with Articles 74(1) and 83(1) of UNCLOS, they were obliged to effect such a delimitation "by agreement on the basis of international law … in order to achieve an equitable solution".

194. Since about the late 1970s the Parties have held discussions about the use of resources (especially fisheries and hydrocarbon resources) in the maritime spaces which are currently the subject of their competing claims (see paragraphs 46-48, 52 above). In July 2000 they began several rounds of more formal negotiations. Between then and November 2003 they held a total of nine rounds of negotiations, some devoted to questions of delimitation and others to associated problems of fisheries in waters potentially affected by the delimitation: a further round was to be held in February 2004 (see paragraphs 53-54 above). Despite their efforts, however, they failed to reach agreement.

195. In the Tribunal's view the Parties had negotiated for a reasonable period of time. No agreement having been reached within a reasonable period of time, Articles 74(2) and 83(2) of UNCLOS imposed upon the Parties an obligation to resort to the procedures provided for in Part XV of UNCLOS.

196. It was clear, by the very fact of their failure to reach agreement within a reasonable time on the delimitation of their EEZs and continental shelves and by their failure even to agree upon the applicable legal rules especially in relation to what was referred to as the ECS, that there was a dispute between them.

197. That dispute concerned the interpretation or application of Articles 74 and 83 of UNCLOS, and in particular the application of the requirement in each of those Articles that the agreement was to be "on the basis of international law": the Parties, however, could not agree on the applicable legal rules.

198. The fact that the precise scope of the dispute had not been fully articulated or clearly depicted does not preclude the existence of a dispute, so long as the record indicates with reasonable clarity the scope of the legal differences between the Parties. The fact that in this particular case the Parties could not even agree upon the applicable legal rules shows that *a fortiori* they could not agree on any particular line which might follow from the application of appropriate rules. Accordingly, to insist upon a specific line having been tabled by each side in the negotiations would be unrealistic and formalistic. In the present case the record of the Parties' negotiations shows with sufficient clarity that their dispute covered the legal bases on which a delimitation line should be drawn in accordance with international law, and consequently the actual drawing of that line.

199. The existence of a dispute is similarly not precluded by the fact that negotiations could theoretically continue. Where there is an obligation to negotiate it is well established as a matter of general international law that that obligation does not require the Parties to continue with negotiations which in advance show every sign of being unproductive.[21] Nor does the fact that a further round of negotiations had been fixed for February 2004 preclude Barbados from reasonably taking the view that negotiations to delimit the Parties' common maritime boundaries had already lasted long enough without a settlement having been reached, and that it was now appropriate to move to the initiation of the procedures of Part XV as required by Articles 74(2) and 83(2) of UNCLOS – provisions which, it is to be noted, subject the continuation of negotiations only to the temporal condition that an agreement be reached "within a reasonable period of time".

200. Given therefore that a dispute existed, and had not been settled within a reasonable period of time, the Parties were under an obligation under Articles 74 and 83 to resort to the procedures of Part XV.

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[21] See, e.g., *Mavrommatis Palestine Concessions Case* (*Jurisdiction*), 1924 P.C.I.J. (Ser. A) No. 2, p. 13; *South West Africa Cases* (*Preliminary Objections*), I.C.J. Reports 1962, p. 319, at pp. 345-346; *Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1947*, I.C.J. Reports 1988, p. 12, at pp. 33-34, para. 55.

(i) Articles 279-280 of that Part recall the Parties' general obligation to settle their disputes by peaceful means, and their freedom to do so by means of their own choosing.

(ii) Article 281 applies where Parties "have agreed" to seek settlement of their dispute by a peaceful means of their own choice. Since it appears that Article 282 applies where the Parties have a standing bilateral or multilateral dispute settlement agreement which could cover the UNCLOS dispute which has arisen between them, it would appear that Article 281 is intended primarily to cover the situation where the Parties have come to an *ad hoc* agreement as to the means to be adopted to settle the particular dispute which has arisen. Where they have done so, then their obligation to follow the procedures provided for in Part XV will arise where no settlement has been reached through recourse to the agreed means and where their agreement does not exclude any further procedure. In the present case the Parties have agreed in practice, although not by any formal agreement, to seek to settle their dispute through negotiations, which was in any event a course incumbent upon them by virtue of Article 74(1) and 83(1). Since their *de facto* agreement did not exclude any further procedures, and since their chosen peaceful settlement procedure – negotiations – failed to result in a settlement of their dispute, then both by way of Articles 74(2) and 83(2) and by way of Article 281(1) the procedures of Part XV are applicable.

(iii) Article 282 applies where the Parties have agreed upon a binding dispute settlement procedure under a general, regional or bilateral agreement, but that is not the case here (other than, of course, their obligations under UNCLOS itself).

201. Recourse to Part XV brings into play the obligation under Article 283(1) to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means". The Tribunal must preface its consideration of Article 283 with the observation that that Article does not readily fit the circumstances to which Articles 74 and 83 give rise, nor does it sit easily alongside the realities of what is involved in "negotiations" which habitually cover not only the specific matter under negotiation but also consequential associated matters. The Tribunal notes that Article 283 is of general application to all provisions of UNCLOS and is designed for the situation where "a

dispute arises", that is where the first step in the dispute settlement process is the bare fact of a dispute having arisen. Articles 74 and 83 involve a different process, in that they impose an obligation to agree upon delimitation, which necessarily involves negotiations between the Parties, and then takes the Parties to Part XV when those negotiations have failed to result in an agreement. In this situation Part XV – and thus Article 283 – is thus not the first step in the process, but one which follows the Parties' having already spent a "reasonable period of time" (in the present case several years) seeking to negotiate a solution to their delimitation problems.

202. The Tribunal consequently concludes that Article 283(1) cannot reasonably be interpreted to require that, when several years of negotiations have already failed to resolve a dispute, the Parties should embark upon further and separate exchanges of views regarding its settlement by negotiation. The requirement of Article 283(1) for settlement by negotiation is, in relation to Articles 74 and 83, subsumed within the negotiations which those Articles require to have already taken place.

203. Similarly, Article 283(1) cannot reasonably be interpreted to require that once negotiations have failed to result in an agreement, the Parties must then meet separately to hold "an exchange of views" about the settlement of the dispute by "other peaceful means". The required exchange of views is also inherent in the (failed) negotiations. Moreover, Article 283 applies more appropriately to procedures which require a joint discussion of the mechanics for instituting them (such as setting up a process of mediation or conciliation) than to a situation in which Part XV itself gives a party to a dispute a unilateral right to invoke the procedure for arbitration prescribed in Annex VII.

204. That unilateral right would be negated if the States concerned had first to discuss the possibility of having recourse to that procedure, especially since in the case of a delimitation dispute the other State involved could make a declaration of the kind envisaged in Article 298(1)(a)(i) so as to opt out of the arbitration process. State practice in relation to Annex VII acknowledges that the risk of arbitration proceedings being instituted unilaterally against a State is an inherent part of the UNCLOS dispute settlement regime (just as a sudden submission of a declaration accepting the compulsory jurisdiction of the International Court of Justice is a risk for other States

which have already made such an "optional clause" declaration and which have a current dispute with the State now making the sudden declaration).

205. The Tribunal reaches the same conclusion in respect of the possibility that the requirement to negotiate a settlement under Articles 74(1) and 83(1) could be regarded as a "procedure for settlement" which had been "terminated without a settlement" so as to bring paragraph 2 of Article 283 into play, and by that route require the Parties to "proceed expeditiously to an exchange of views" after the unsuccessful termination of their delimitation negotiations. To require such a further exchange of views (the purpose of which is not specified in Article 283(2)) is unrealistic.

206. In practice the only relevant obligation upon the Parties under Section 1 of Part XV is to seek to settle their dispute by recourse to negotiations, an obligation which in the case of delimitation disputes overlaps with the obligation to reach agreement upon delimitation imposed by Articles 74 and 83. Upon the failure of the Parties to settle their dispute by recourse to Section 1, *i.e.* to settle it by negotiations, Article 287 entitles one of the Parties unilaterally to refer the dispute to arbitration.

207. This unilateral right to invoke the UNCLOS arbitration procedure is expressly conferred by Article 287 which allows the unsettled dispute to be referred to arbitration "at the request of any party to the dispute"; it is reflected also in Article 1 of Annex VII. Consequently, Articles 74(2) and 83(2), which refer to "the States concerned" (in the plural) resorting to the procedures (stated generally) provided for in Part XV, must be understood as referring to those procedures in the terms in which they are set out in Part XV: where the procedures require joint action by the States in dispute they must be operated jointly, but where they are expressly stated to be unilateral their invocation on a unilateral basis cannot be regarded as inconsistent with any implied requirement for joint action which might be read into Articles 74(2) or 83(2).

208. For similar reasons, the unilateral invocation of the arbitration procedure cannot by itself be regarded as an abuse of right contrary to Article 300 of UNCLOS, or an abuse of right contrary to general international law. Article 286 confers a unilateral right, and its exercise unilaterally and without discussion or agreement with the other Party is a straightforward exercise of the right conferred by the treaty, in the manner there

envisaged. The situation is comparable to that which exists in the International Court of Justice with reference to the commencement of proceedings as between States both of which have made "optional clause" declarations under Article 36 of the Court's Statute.

209. Barbados in the present proceedings having chosen, in accordance with Article 287, to refer its dispute with Trinidad and Tobago to an arbitration tribunal constituted in accordance with Annex VII, the Tribunal, under Article 288, has jurisdiction over any dispute concerning the interpretation or application of UNCLOS which is submitted to it in accordance with Part XV. Paragraph 4 of that Article also provides that if there is a dispute as to whether the Tribunal has jurisdiction, the matter shall be settled by decision of that Tribunal.

210. The requirements regarding the submission of a dispute to the Tribunal are set out in Annex VII, which forms part of the scheme established by Part XV.

211. Article 1 of Annex VII allows any party to the dispute to submit the dispute to arbitration by written notification, which has to be accompanied by a statement of the claim and the grounds on which it is based. Barbados filed its written notification on 16 February 2004, accompanied by the required statement and grounds. Barbados accordingly complied with the requirements of UNCLOS for the submission of the dispute to arbitration under Annex VII.

212. Paragraph 2 of Barbados' Statement of Claim says that "[t]he dispute relates to the delimitation of the exclusive economic zone and continental shelf between Barbados and the Republic of Trinidad and Tobago", and by way of relief sought states (in paragraph 15) that "Barbados claims a single maritime boundary line, delimiting the exclusive economic zone and continental shelf between it and the Republic of Trinidad and Tobago, as provided under Articles 74 and 83 of UNCLOS".

213. There was some difference between the Parties as to the scope of the matters which constituted the dispute with which the Tribunal was required to deal, particularly as regards what the Parties referred to as "the extended continental shelf", by which they meant that part of the continental shelf lying beyond 200 nm. Trinidad and Tobago submitted that that matter was part of the dispute submitted to the Tribunal, while

Barbados submitted that it was excluded by the terms of its written notification instituting the arbitration, particularly its description of the dispute and the statement of the relief sought. The Tribunal considers that the dispute to be dealt with by the Tribunal includes the outer continental shelf, since (i) it either forms part of, or is sufficiently closely related to, the dispute submitted by Barbados, (ii) the record of the negotiations shows that it was part of the subject-matter on the table during those negotiations, and (iii) in any event there is in law only a single "continental shelf" rather than an inner continental shelf and a separate extended or outer continental shelf.

214. Since the outer continental shelf is, in the Tribunal's view, included within the scope of the dispute submitted to arbitration, the Tribunal does not consider that there is any requirement (as there might have been in the case of something more in the nature of a counterclaim) for the procedural requirements of Section 1 of Part XV, particularly those of Article 283, to be separately satisfied in respect of the outer continental shelf.

215. The dispute submitted to arbitration by Barbados, and the relief sought, relate respectively to "the delimitation of the exclusive economic zone and continental shelf between Barbados and the Republic of Trinidad and Tobago", and to the determination of "a single maritime boundary line, delimiting the exclusive economic zone and continental shelf between [Barbados] and the Republic of Trinidad and Tobago, as provided under Articles 74 and 83 of UNCLOS". Although the alleged existence of Barbadian fishing rights in the waters affected by the delimitation was argued to be a relevant circumstance which could modify the delimitation line which might otherwise be adopted (an aspect of the matter which is addressed by the Tribunal in its consideration of the merits), the dispute submitted to arbitration does not give it the jurisdiction to render a substantive decision as to an appropriate fisheries regime to apply in waters which may be determined to form part of Trinidad and Tobago's EEZ: nor did Barbados seek from the Tribunal the elaboration of such a fisheries regime. Such a regime would involve separate and discrete questions of substance which neither form part of the delimitation dispute referred to arbitration, nor can be regarded as a lesser form of relief to be regarded as falling within the scope of the relief requested (which was limited to the drawing of a single line of maritime delimitation).

216. Moreover, as is explained in paragraphs 276-283 below, the question of jurisdiction over an access claim is determined by Article 297(3) of UNCLOS.

217. For the foregoing reasons the Tribunal decides that:

(i) it has jurisdiction to delimit, by the drawing of a single maritime boundary, the continental shelf and EEZ appertaining to each of the Parties in the waters where their claims to these maritime zones overlap;

(ii) its jurisdiction in that respect includes the delimitation of the maritime boundary in relation to that part of the continental shelf extending beyond 200 nm; and

(iii) while it has jurisdiction to consider the possible impact upon a prospective delimitation line of Barbadian fishing activity in waters affected by the delimitation, it has no jurisdiction to render a substantive decision as to an appropriate fisheries regime to apply in waters which may be determined to form part of Trinidad and Tobago's EEZ.

218. The Tribunal wishes to emphasise that its jurisdiction is limited to the dispute concerning the delimitation of maritime zones as between Barbados and Trinidad and Tobago. The Tribunal has no jurisdiction in respect of maritime boundaries between either of the Parties and any third State, and the Tribunal's award does not prejudice the position of any State in respect of any such boundary.

CHAPTER V – MARITIME DELIMITATION: GENERAL CONSIDERATIONS

219. The Tribunal will now set out the general considerations that will guide its examination of the issues concerning maritime delimitation that the Parties have put forth in their claims and allegations.

A. APPLICABLE LAW

220. Article 293 of UNCLOS provides:

> *Applicable Law*
> 1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
> 2. Paragraph 1 does not prejudice the power of the court or Tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree.

221. Articles 74(1) and 83(1) of UNCLOS lay down the law applicable to the delimitation of the exclusive economic zone and the continental shelf, respectively. In the case of States with either opposite or adjacent coasts, the delimitation of such maritime areas "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

222. This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.

223. As noted above, both Barbados and Trinidad and Tobago are parties to UNCLOS, the principal multilateral convention concerning not only questions of delimitation strictly speaking but also the role of a number of other factors that might have relevance in effecting the delimitation. Bilateral treaties between the parties and between each party and third States might also have a degree of influence in the delimitation. In a matter that has so significantly evolved over the last 60 years, customary law also has a

particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation.

B. THE DELIMITATION PROCESS

224. As a result of the development in the law noted above, it is today well established that the starting point of any delimitation is the entitlement of a State to a given maritime area, in this case both to an exclusive economic zone and to a continental shelf. At the time when the continental shelf was the principal national maritime area beyond the territorial sea, such entitlement found its basis in the concept of natural prolongation (*North Sea Continental Shelf Cases*, I.C.J. Reports 1969, p. 4). However, the subsequent emergence and consolidation of the EEZ meant that a new approach was introduced, based upon distance from the coast.

225. In fact, the concept of distance as the basis of entitlement became increasingly intertwined with that of natural prolongation. Such a close interconnection was paramount in the definition of the continental shelf under UNCLOS Article 76, where the two concepts were assigned complementary roles. That same interconnection became evident in the regime of the EEZ under UNCLOS Article 56, distance being the sole basis of the coastal State's entitlement to both the seabed and subsoil and the superjacent waters.

226. In spite of some early doubt about the continuing existence of the concept of the continental shelf within an area appertaining to the coastal state by virtue of its entitlement to an EEZ, it became clear that the latter did not absorb the former and that both coexisted with significant elements in common arising from the fact that within 200 nm from a State's baselines distance is the basis for the entitlement to each of them (*Libya/Malta*, I.C.J. Reports 1985, p. 13).

227. The trend toward harmonization of legal regimes inevitably led to one other development, the establishment for considerations of convenience and of the need to avoid practical difficulties of a single maritime boundary between States whose entitlements overlap.

228. The step that followed in the process of searching for a legal approach to maritime delimitation was more complex as it dealt with the specific criteria applicable to effect delimitation. This was so, at first because there was a natural reluctance on the part of courts and tribunals to give preference to those elements more closely connected to the continental shelf over those more closely related to the EEZ or *vice versa*. The quest for neutral criteria of a geographical character prevailed in the end over area-specific criteria such as geomorphological aspects or resource-specific criteria such as the distribution of fish stocks, with a very few exceptions (notably *Jan Mayen*, I.C.J. Reports 1993, p. 38).

229. There was also another source of complexity in the search for a generally acceptable legal approach to maritime delimitation. Since the very outset, courts and tribunals have taken into consideration elements of equity in reaching a determination of a boundary line over maritime areas. This is also the approach stipulated by UNCLOS Articles 74 and 83, in conjunction with the broad reference to international law explained above.

230. Equitable considerations *per se* are an imprecise concept in the light of the need for stability and certainty in the outcome of the legal process. Some early attempts by international courts and tribunals to define the role of equity resulted in distancing the outcome from the role of law and thus led to a state of confusion in the matter (*Tunisia/Libya*, I.C.J. Reports 1982, p. 18). The search for predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases, emphasized that the role of equity lies within and not beyond the law (*Libya/Malta*, I.C.J. Reports 1985, p. 13).

231. The identification of the relevant coasts abutting upon the areas to be delimited is one such objective criterion, relating to the very source of entitlement to maritime areas. The principle of equidistance as a method of delimitation applicable in certain geographical circumstances was another such objective determination.

232. The search for an approach that would accommodate both the need for predictability and stability within the rule of law and the need for flexibility in the outcome that could meet the requirements of equity resulted in the identification of a variety of criteria and methods of delimitation. The principle that delimitation should avoid the encroachment

by one party on the natural prolongation of the other or its equivalent in respect of the EEZ (*North Sea Continental Shelf* cases, I.C.J. Reports 1969, p. 4; *Gulf of Maine*, I.C.J. Reports 1984, p. 246; *Libya/Malta*, I.C.J. Reports 1985, p. 13), the avoidance to the extent possible of the interruption of the maritime projection of the relevant coastlines (*Gulf of Maine*, I.C.J. Reports 1984, p. 246) and considerations ensuring that a disproportionate outcome should be corrected (*Libya/Malta*, I.C.J. Reports 1985, p. 13), are all criteria that have emerged in this context.

233. These varied criteria might or might not be appropriate to effect delimitation in the light of the specific circumstances of each case. The identification of the relevant circumstances becomes accordingly a necessary step in determining the approach to delimitation. That determination has increasingly been attached to geographical considerations, with particular reference to the length and the configuration of the respective coastlines and their characterization as being opposite, adjacent or in some other relationship (*Gulf of Maine*, I.C.J. Reports 1984, p. 246). That does not mean that criteria pertinent to the continental shelf have been abandoned, as both the continental shelf and the EEZ are relevant constitutive elements integrated in the process of delimitation as a whole, particularly where it entails the determination of a single maritime boundary.

234. In fact, the continental shelf and the EEZ coexist as separate institutions, as the latter has not absorbed the former (*Libya/Malta*, I.C.J. Reports 1985, p. 13) and as the former does not displace the latter. Trinidad and Tobago has correctly noted in its argument that the decisions of courts and tribunals on the determination of a single boundary line have been based on the agreement of the parties. As the International Court of Justice held in *Qatar v. Bahrain*,

> The Court observes that the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various – partially coincident – zones of maritime jurisdiction appertaining to them (I.C.J. Reports 2001, p. 40, at p.93, para. 173).

235. Yet it is evident that State practice with very few exceptions (most notably, with respect to the Torres Strait) has overwhelmingly resorted to the establishment of single maritime boundary lines and that courts and tribunals have endorsed this practice either

by means of the determination of a single boundary line (*Gulf of Maine*, I.C.J. Reports 1984, p. 246; *Guinea/Guinea-Bissau*, 77 I.L.R. p. 635; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40) or by the determination of lines that are theoretically separate but in fact coincident (*Jan Mayen*, I.C.J. Reports 1993, p. 38).

236. The question of coastal length has come to have a particular significance in the process of delimitation. This is not, however, because the ratio of the parties' relative coastal lengths might require that the determination of the line of delimitation should be based on that ratio or on some other mathematical calculation of the boundary line, as has on occasion been argued.

237. In fact, decisions of international courts and tribunals have on various occasions considered the influence of coastal frontages and lengths in maritime delimitation and it is well accepted that disparities in coastal lengths can be taken into account to this end, particularly if such disparities are significant. Yet, as the International Court of Justice clarified in the *Jan Mayen* case, this is not "a question of determining the equitable nature of a delimitation as a function of the ratio of the lengths of the coasts in comparison with that of the areas generated by the maritime projection of the points of the coast" (I.C.J. Reports 1993, p. 38, at p. 68, para. 68, with reference to *Libya/Malta*, I.C.J. Reports 1985, p. 13, at p. 46, para. 59). Nor, as the Court held in the *North Sea Continental Shelf* cases, is it a question of "rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline" (I.C.J. Reports 1969, p. 4, at p. 50, para. 91).

238. The Tribunal also notes that in applying proportionality as a relevant circumstance, the decisions of the International Court of Justice cited above kept well away from a purely mathematical application of the relationship between coastal lengths and that proportionality rather has been used as a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion.

239. The reason for coastal length having a decided influence on delimitation is that it is the coast that is the basis of entitlement over maritime areas and hence constitutes a relevant circumstance that must be considered in the light of equitable criteria. To the extent that a coast is abutting on the area of overlapping claims, it is bound to have a strong

influence on the delimitation, an influence which results not only from the general direction of the coast but also from its radial projection in the area in question.

240. Thus the real role of proportionality is one in which the presence of different lengths of coastlines needs to be taken into account so as to prevent an end result that might be "disproportionate" and hence inequitable. In this context, proportionality becomes the last stage of the test of the equity of a delimitation. It serves to check the line of delimitation that might have been arrived at in consideration of various other factors, so as to ensure that the end result is equitable and thus in accordance with the applicable law under UNCLOS.

241. Resource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance. As noted above, the *Jan Mayen* decision is most exceptional in having determined the line of delimitation in connection with the fisheries conducted by the parties in dispute. However, as the question of fisheries might underlie a number of delimitation disputes, courts and tribunals have not altogether excluded the role of this factor but, as in the *Gulf of Maine*, have restricted its application to circumstances in which catastrophic results might follow from the adoption of a particular delimitation line. In the *Gulf of Maine* case the Chamber held:

> It is, therefore, in the Chamber's view, evident that the respective scale of activities connected with fishing –or navigation, defence or, for that matter, petroleum exploration and exploitation– cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned (I.C.J. Reports 1984, p. 246, at p. 342, para. 237).

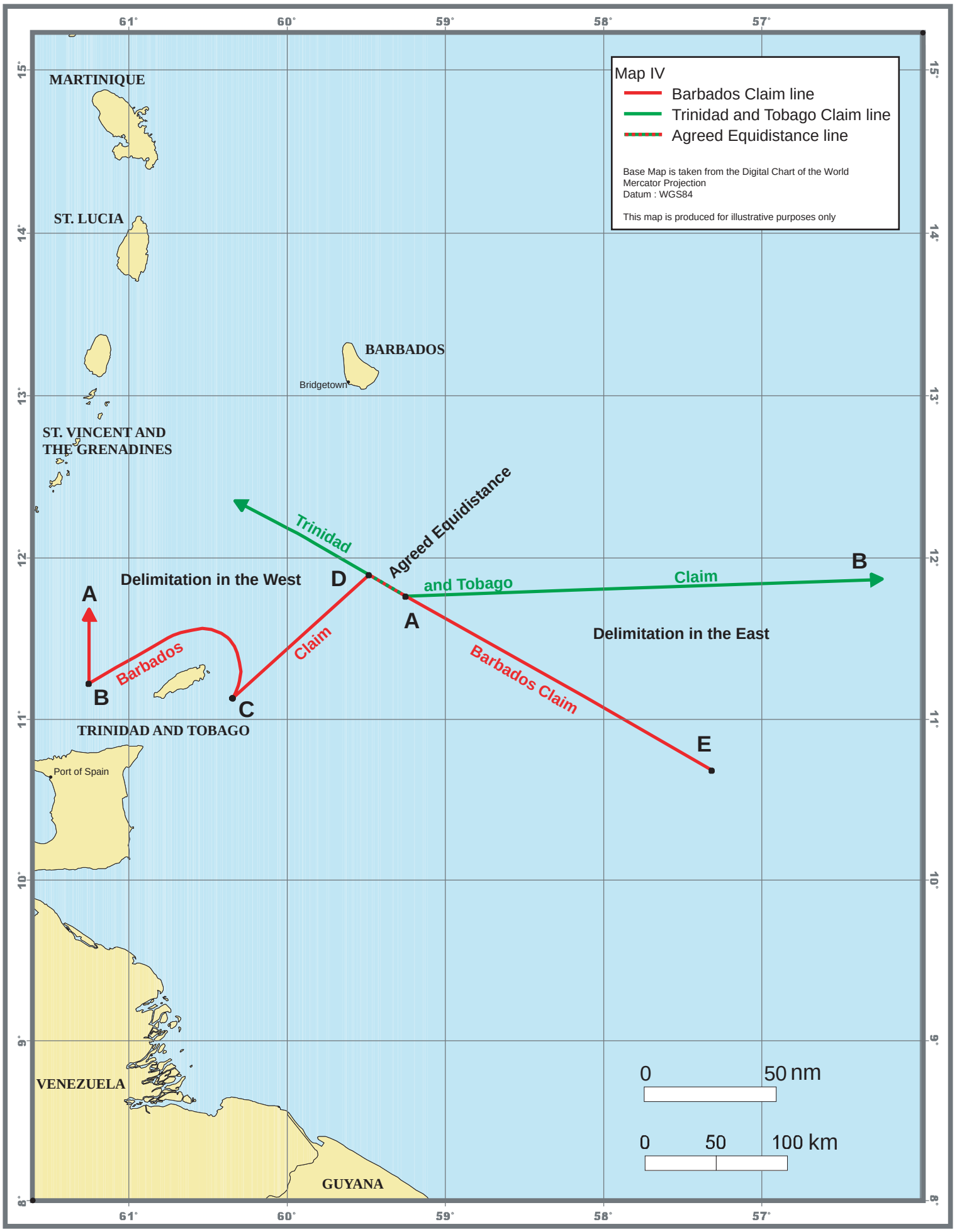
242. The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is

necessary to adjust the provisional equidistance line in order to achieve an equitable result (*Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 303; Prosper Weil, *Perspectives du droit de la délimitation maritime* p. 223 (1988)). This approach is usually referred to as the "equidistance/relevant circumstances" principle (*Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40; *Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 303). Certainty is thus combined with the need for an equitable result.

243. The process of achieving an equitable result is thus constrained by legal principle, in particular in respect of the factors that may be taken into account. It is furthermore necessary that the delimitation be consistent with legal principle as established in decided cases, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the Convention.

244. Within those constraints imposed by law, the Tribunal considers that it has both the right and the duty to exercise judicial discretion in order to achieve an equitable result. There will rarely, if ever, be a single line that is uniquely equitable. The Tribunal must exercise its judgment in order to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are thus integral parts of the process of delimitation.

245. This is the process of delimitation that the Tribunal will now undertake in respect of the dispute submitted to it and the respective claims of the Parties. A chart, Map IV, facing, depicts the claim line of Barbados, the claim line of Trinidad and Tobago, and the segment of the equidistance line that is agreed between them.


Map IV
Barbados Claim line
Trinidad and Tobago Claim line
Agreed Equidistance line
Base Map is taken from the Digital Chart of the World
Mercator Projection
Datum : WGS84
This map is produced for illustrative purposes only
MARTINIQUE
ST. LUCIA
BARBADOS
Bridgetown
ST. VINCENT AND
THE GRENADINES
TRINIDAD AND TOBAGO
Port of Spain
VENEZUELA
GUYANA
Trinidad
and Tobago
Agreed Equidistance
Claim
Delimitation in the West
Delimitation in the East
Barbados
Barbados Claim
A
B
C
D
E
0 50 nm
0 50 100 km
61°
60°
59°
58°
57°
15°
14°
13°
12°
11°
10°
9°
8°

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CHAPTER VI – DELIMITATION IN THE WEST

A. THE FLYINGFISH FISHERY AND BARBADOS' CLAIM TO ADJUST THE EQUIDISTANCE LINE

1. The Positions of the Parties

246. It is common ground between the Parties that the line of delimitation in the west is provisionally to be found in the equidistance line between their coasts, coasts which both Parties accept here to be opposite. Trinidad and Tobago maintains that that provisional equidistance line in the west should be the line of delimitation to be laid down by this Tribunal. Barbados maintains that that provisional line should be subjected to the very major adjustment depicted and described in paragraphs 59-61 above.

247. Barbados submits that the requisite equitable solution is to be achieved by application of the "equidistance/special circumstances rule". It contends that the governing "special circumstance" is "the fact that Barbados fisherfolk have traditionally fished by artisanal methods in the waters off the northwest, north and northeast coasts of the island of Tobago", principally for "flyingfish, a species of pelagic fish that moves seasonally to the waters off Tobago. The flyingfish is a staple component of the Barbados diet and an important part of the history, economy, and culture of Barbados. Barbadians have continuously fished off Tobago during the fishing season to catch the flying fish …". Barbados maintains that, as early as the 17th century, Barbados employed a fleet of long-range vessels which engaged in fishing for pelagic species, that the flyingfish fishery has for centuries made up a significant component of Barbados' fishing sector, that the flyingfish is the mainstay of a large part of the Barbadian population and its most popular food, that flyingfish makes up almost two-thirds of the annual Barbadian fish catch by weight, and that throughout the flyingfish season, from November to February and from June to July, large numbers of Barbadian fisherfolk have traditionally followed the movement of flyingfish to an area off the northwest, north and northeast coasts of Tobago. It contends that over 90% of Barbados' 2,200 fisherfolk and 500 fish vendors are directly reliant upon the flyingfish fishery for their livelihoods. Barbados argues that the earliest records of Barbadian fishing off Tobago date to the first half of the 18th century and it cites records in support of that contention. It observes that, from the time when Great Britain finally acquired Tobago definitively in 1814, the maritime area bounded by Grenada, St. Vincent and the Grenadines, St. Lucia,

Barbados, and Tobago became, in effect, a British lake, governed as a single colonial unit from Barbados. The question of which British subject was fishing where in this British lake became unimportant. "Although there can be no doubt that fishermen from Barbados have fished off Tobago for centuries, there is a dearth of direct evidence to this effect for the period from the early 19th century to the mid-20th century. One must therefore rely on other evidence and the oral tradition that has passed down through the generations." Barbados submits fifteen affidavits of contemporary fisherfolk attesting that they, and their forebears, habitually fished off Tobago. For example, the affidavit of Joseph Knight states that, "I do most of my fishing off the coast of Tobago … I have been fishing there for all of my life. As far as I know from stories I hear from fisherfolk, this has always been the way for Barbadian fisherfolk … Fishing off the coast of Tobago is also very important to my survival. I depend on it … I would say that the majority of my income comes from the fish that I catch off the coast of Tobago". Some of the witnesses testify to having fished off Tobago around 20-25 years ago, *i.e.* perhaps as long ago as 1979-80; but none of the witnesses testifies that he himself fished off Tobago prior to that time. Angela Watson, President of the Barbados National Union of Fisherfolk Organisations, submitted a sixteenth affidavit. She says that, "Barbadians have fished off the northwest, north and northeast coasts of Tobago for many years and I understand that this has been going on for generations. This is certainly the history as you hear it in the fishing communities". She says that Barbadian fisherfolk fished off Tobago until 1988 with no interference from the Trinidad and Tobago authorities.

248. The modern-day boats from Barbados that fish in the waters off Tobago are "ice boats", about 190 in number, small craft which, since the 1970s, have been used to transport catch back to Barbados on ice. Barbados asserts that there is evidence of the use of ice on Barbadian craft in the waters in question prior to the introduction of the ice boats, since 1942; in other words, there has been fishing there by Barbadian fisherfolk for more than two generations. Barbados maintains that in earlier times Barbadian fisherfolk used other preservation methods to transport their catches home, such as salting and pickling (see paragraphs 126-127 above). In addition, Barbados infers from the fact that it is clearly established that Barbadian fisherfolk were fishing off Tobago, where they had followed the migrating flyingfish, at the time of independence in 1962, that "it is inconceivable that Barbadians were not involved in any way in fishing in the traditional fishing grounds off Tobago during the long period of unified colonial

jurisdiction and governance". It also points to the evidence of fishing for snapper by Barbadian schooners off Brazil in the early 20th century and says that "it would have been remarkable for Barbadians to be fishing so far from home for fish of unsubstantial demand in Barbados whilst at the same time leaving completely unfished the rich flyingfish fishing grounds off Tobago, fishing grounds that had been known to Barbadians for centuries".

249. Barbados contends that, so important is Barbadian fishing for flyingfish off Tobago that, were it to be indefinitely debarred from fishing there, the results for Barbadian fisherfolk and their families, and for the economy of Barbados at large, would be "catastrophic".[22] At the same time, it contends that the flyingfish fishery of the fisherfolk of Tobago, such as it is, is inshore, within the territorial sea of Tobago; hence Barbadian fishing in waters adjacent to that territorial sea does not affect the livelihoods of fisherfolk of Tobago. The affidavits submitted by Barbadian fisherfolk support both of these contentions.

250. Thus, as was noted in paragraph 125 of this Award, Barbados bases its claim on "three core factual submissions": (1) there is a centuries-old history of Barbadian artisanal fishing in the waters off Tobago; (2) Barbadian fisherfolk are critically dependent on the maintenance of access to that fishery and (3) the fisherfolk of Trinidad and Tobago do not fish in those waters for flyingfish and hence do not depend upon that fishery for their livelihoods.

251. To these factual contentions, Barbados adds a further contention of fact and law: that the refusal by Trinidad and Tobago to conclude an agreement according renewed and continuing access for Barbadian fisherfolk to the waters off Tobago justifies adjusting the maritime boundary so as to place the waters in dispute within the EEZ not of Trinidad and Tobago but of Barbados.

252. Barbados applies to the foregoing portrayal of the essential facts its view of the law which is summarized in paragraphs 133-142 of this Award.

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[22] See the quotation from the *Gulf of Maine* case which refers to "catastrophic circumstances", para. 241 above.

253. Trinidad and Tobago contests virtually every element of Barbados' factual and legal positions.

254. In respect of the first of Barbados' core factual arguments about the reality of traditional artisanal fishing by Barbadian fisherfolk in waters off Tobago, Trinidad and Tobago contends that it is "fiction". Trinidad and Tobago describes Barbadian fishing in the waters off Tobago as "of recent origin and highly commercial". The closest distance of the waters of Tobago at issue is 58 nm from Barbados. Trinidad and Tobago argues that, far from being able to fish for flyingfish in those waters across the centuries, Barbadian fisherfolk could not feasibly have reached waters off Tobago with small sailing craft and returned to Barbados with preserved catch. On the contrary, the evidence, as set out in authoritative Barbadian sources quoted by Trinidad and Tobago, a salient example of which appears below, is that, up to the 1940s, the traditional Barbadian flyingfish sailboat fishery took place solely three to four miles off Barbados. In the 1950s, Barbadian fisherfolk converted to diesel-powered vessels that made one-day fishing trips to fishing grounds within 40 miles of Barbados. In the late 1970s, Barbadian vessels designed to stay at sea for up to ten days began fishing in waters off Tobago. As from 1978, long-range vessels, ice boats of eight ton capacity, came into use and took over the fleet by the mid-1980s. Trinidad and Tobago argues that in truth Barbados seeks not protection of a traditional, artisanal flyingfish fishery but an ice boat fleet which, Trinidad and Tobago claims, engaged in large-scale semi-industrial operations as from the late 1970s. Trinidad and Tobago quotes from the 1992 and 2001 reports of officials of Barbados, as well as an FAO report, in support of the foregoing analysis. A report made in 2001 by Christopher Parker of the Fisheries Division of the Ministry of Agriculture and Rural Development of Barbados states that:

> The vessels used in the flying fish fishery during the first half of the century were small open sail boats ranging in size between 18' to 25'…. The boats carried no ice onboard to preserve the catch thus the time between taking the fish onboard and returning to shore to sell them was limited. The difficulty in manoeuvring and the comparatively slow speed of the vessels together effectively narrowed the fishing range to within approximately 4-5 miles from shore….
>
> In the 1970's 80-180 H.P. engines became common allowing a further extension of the fishing range to 40 miles from shore … but these vessels generally fished within 30 nautical miles from shore….

> It was not until 1978 that the first truly commercial ice-boat entered the fleet . . . . The increased efficiency of the iceboat is a product of ability to stay at sea fishing for longer periods (up to around two weeks) and to fish further from Barbados in areas of potentially higher fish densities without fear of the catch spoiling.

255. Trinidad and Tobago's counsel in oral argument concluded that: "the evidence could not be stronger, there was no fishing off Tobago prior to the late 1970s. Barbadian fishermen had no means of getting to ranges from 58 to 147 nm from Barbados until the very late 1970s. They had no means of storing fish on board until the introduction of ice boats in the late 1970s. Since the late 1970s there has been an explosion in the number of ice boats from one or two … to [currently] 190. Hence the extraordinary pressure for Barbados to try and expand into an entirely new fishing area". By contrast with the weight to be attached to official reports of Barbados, Trinidad and Tobago dismisses the affidavits of Barbadian fisherfolk as "utterly worthless". For all these reasons, it concludes that the first core factual submission of Barbados is unsustainable. Far from Barbados' flyingfish fishery off Tobago being traditional, it actually subsisted for just six or eight years between the introduction of ice boats and the proclamation of Trinidad and Tobago's EEZ in 1986.

256. As to the second core factual submission, Trinidad and Tobago maintains that, in fact, Barbadians are not critically dependent on fishing for flyingfish off Tobago, most notably because their inability to do so in recent years demonstrably has not produced catastrophic consequences. No evidence of such consequences has been proffered. Trinidad and Tobago argues that fisheries represent less than one percent of the gross national product of Barbados, of which the flyingfish sector is only a part and the flyingfish harvested off Tobago an even smaller part.

257. As to the third of the core factual submissions of Barbados, Trinidad and Tobago submits evidence showing that its fisherfolk do fish for flyingfish off Tobago and that that fishery is of "significant commercial importance" (S. Samlasingh, E. Pandohee & E. Caesar, "The Flyingfish Fishery of Trinidad and Tobago", in *Biology and Management Options for Flying Fish in the Eastern Caribbean* p. 46 (H.A. Oxenford et al. eds., Biology Dept. of the University of the West Indies and Bellairs Research Institute of McGill University, Barbados, W.I. 1992)). Trinidad and Tobago acknowledges that the Barbadian ice boat fleet was first in the field but it maintains that

that is not sufficient reason to deprive fisherfolk of Tobago of the opportunity of increased fishing off Tobago for a resource that must be guarded against overfishing.

258. Trinidad and Tobago also denies that it has refused to accord renewed and continuing access to the waters off Tobago to Barbadian fisherfolk. It argues that, on the contrary, it is Barbados that brought negotiations on a fishing agreement to an end, a few weeks after officially acknowledging the progress made towards its conclusion. It refers to Trinidad and Tobago's Cabinet Note of 17 February 2004 in which it is recorded that the Prime Minister of Trinidad and Tobago emphasized to the Prime Minister of Barbados that it was the view of the former's Government "that the issue of access by Barbados boats to the fishery resources of Trinidad and Tobago was eminently solvable". Trinidad and Tobago maintains that the argument of Barbados that it is entitled to radical boundary adjustment because Trinidad and Tobago refused fishing access not only is factually baseless but is devoid of any legal rationale or support. Nor, in its view, is there room for the Tribunal to entertain indications from Barbados, not found in its Statement of Claim, that, if the maritime boundary is not adjusted to meet its claims, Barbados should be granted fishing access to the EEZ of Trinidad and Tobago. So doing would be beyond the jurisdiction of the Tribunal by virtue of the terms of Article 297(3)(a) of UNCLOS.

259. Trinidad and Tobago also emphasizes that adjustment of the equidistance line to meet the claims of Barbados would involve transfer not only of fishery resources but potentially significant oil and gas resources that may be found in the seabed and subsoil of its EEZ.

260. Trinidad and Tobago further contends that, before the onset of this arbitration, Barbados had repeatedly officially recognized that the waters in question were part of the EEZ of Trinidad and Tobago. It recalls that the 1990 Fishing Agreement contains the preambular provision:

> Acknowledging the desire of Barbados fishermen to engage in harvesting flying fish and associated pelagic species in the fishing area within the Exclusive Economic Zone of Trinidad and Tobago … .

261. Article II of the 1990 Fishing Agreement provides, under the caption "Access to the Exclusive Economic Zone of Trinidad and Tobago":

> 1. The Government of the Republic of Trinidad and Tobago in the exercise of its sovereign rights and jurisdiction shall, for the purpose of harvesting flying fish and associated pelagic species, afford access to its Exclusive Economic Zone…to not more than forty (40) fishing vessels which fly the flag of Barbados and which are duly authorized by the Government of Barbados, through the issuance of a maximum of forty (40) licenses […]
> 2. The access to which paragraph 1 of this Article refers shall be subject to the terms and conditions set out in the Agreement […]
> 3. The fishing vessels which are accorded access to the Exclusive Economic Zone of the Republic of Trinidad and Tobago in accordance with the provisions of the present Agreement shall not engage in activities other than fishing.

262. The Agreement goes on to specify the locus and methods of authorized fishing of Barbadian vessels, provides that Barbados shall submit to Trinidad and Tobago a list of vessels eligible for licensing, and further provides for payment to Trinidad and Tobago for fishing licenses. It specifies that authorized Barbadian fishing vessels shall comply strictly with the fisheries laws and regulations of Trinidad and Tobago "while engaged in fishing activities in the waters under the jurisdiction of the Republic of Trinidad and Tobago" (Article IX). Article XI provides that,

> Nothing in this Agreement is to be considered as a diminution or limitation of the rights which either Contracting Party enjoys in respect of its…Exclusive Economic Zone nor shall anything contained in this Agreement in respect of fishing in the marine areas of either Contracting Party be invoked or claimed as a precedent.

263. Trinidad and Tobago further cites a press release of Barbados of 1992 advising Barbados fishermen not to go beyond the equidistance line, the point at which Barbadian waters ended. It points out that, when fishing vessels of Barbadian registry were arrested in the EEZ of Trinidad and Tobago, Barbados did not allege that those vessels were illegally apprehended in waters appertaining to Barbados. Indeed the High Commissioner of Barbados acknowledged that sanctions imposed on Barbados vessels by Trinidad and Tobago for fishing in the latter's EEZ were legally permissible.

2. The Conclusions of the Tribunal

264. Having regard to the factual and legal contentions of the Parties that are set out in this Award and in the written and oral pleadings of the Parties, and having given those contentions the most careful consideration, the Tribunal has arrived at the following conclusions in respect of the line of delimitation in the west.

265. A provisionally drawn equidistance line is, in principle, subject to adjustment to take account of relevant circumstances, a proposition encapsulated in the "equidistance/ special circumstances rule" which is elaborated above at paragraphs 224-244. Whether the circumstances pleaded by Barbados, if proved, are of the requisite character need not be decided, because the Tribunal finds that it is unable to conclude that any of the three core factual circumstances invoked by Barbados have been proved.

266. As to the first core contention of Barbados, the weight of evidence – and the Tribunal has considered the full range of evidence presented by Barbados – does not sustain its contention that its fisherfolk have traditionally fished for flyingfish off Tobago for centuries. Evidence supporting that contention is, if understandably, nevertheless distinctly, fragmentary and inconclusive. The documentary record prior to the 1980s is thin. The Tribunal is aware of the risk of giving undue weight to written reports which may represent no more than a record of hearsay evidence and oral tradition. Nonetheless, those reports, especially reports of Barbadian officials, that were written more or less contemporaneously with the events that they describe must be given substantial weight, and more weight than affidavits written after this dispute arose and for litigious purposes. Those contemporaneous reports indicate that the practice of long-range Barbadian fishing for flyingfish, in waters which then were the high seas, essentially began with the introduction of ice boats in the period 1978-1980, that is, some six to eight years before Trinidad and Tobago in 1986 enacted its Archipelagic Waters Act. Indeed, that appears to be consistent with the direct evidence in the affidavits of the Barbadian fisherfolk, none of whom testifies that they themselves fished off Tobago prior to that time. Those short years are not sufficient to give rise to a tradition. Once the EEZ of Trinidad and Tobago was established, fishing in it by Barbados fisherfolk, whether authorized by agreement with Barbados or not, could not

give rise either to a non-exclusive fishing right of Barbados fisherfolk or, *a fortiori*, to entitlement of Barbados to adjustment of the equidistance line.

267. As to the second core contention of Barbados, Barbados has not succeeded in demonstrating that the results of past or continuing lack of access by Barbados fisherfolk to the waters in issue will be catastrophic. The Tribunal accepts that communities in Barbados are heavily dependent upon fishing, and that the flyingfish fishery is central to that dependence. The Tribunal recognizes that some 190 ice boats owned and manned by Barbados nationals currently cannot fish off Tobago as they had done previously, that this deprivation is profoundly significant for them, their families, and their livelihoods, and that its deleterious effects are felt in the economy of Barbados. But injury does not equate with catastrophe. Nor is injury in the course of international economic relations treated as sufficient legal ground for border adjustment. Whether it is sufficient ground for access of Barbados fisherfolk to the EEZ of Trinidad and Tobago is addressed elsewhere in this Award.

268. As to the third core contention of Barbados, while there is evidence that fisherfolk of Trinidad and Tobago have preferred inshore fishing to fishing in the waters off Tobago favored by fisherfolk of Barbados, that evidence is not conclusive and, in any event, it does not justify the grant to Barbadian fisherfolk of a right of access to flyingfish in the EEZ of Trinidad and Tobago seaward of those inshore waters.

269. While the foregoing findings of fact are dispositive and support the decision not to adjust the equidistance line in the west, the Tribunal feels bound to add that, even if Barbados had succeeded in establishing one or all of its core factual contentions, it does not follow that, as a matter of law, its case for adjustment would be conclusive. Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking. Support is most notably found in speculations of the late eminent jurist, Sir Gerald Fitzmaurice, and in the singular circumstances of the judgment of the International Court of Justice in the *Jan Mayen* case (I.C.J. Reports 1993, p. 38). That is insufficient to establish a rule of international law.

270. The Tribunal finds further confirmation of its conclusions in the undoubted, repeated recognition by Barbados that its fisherfolk were fishing in waters of the EEZ of Trinidad and Tobago, and that, insofar as they so fished without the licensed permission of Trinidad and Tobago, they were subject to lawful arrest. It is not persuaded by the argument of Barbados that the 1990 Fishing Agreement was a mere *modus vivendi*, entered into in exigent circumstances which permit its recognition of the EEZ of Trinidad and Tobago to be discounted. The Tribunal further observes that the fishing agreement under negotiation on the eve of the initiation of these arbitral proceedings, based on a draft prepared by Barbados, likewise embodied recognition by Barbados of the EEZ of Trinidad and Tobago.

271. In the light of the foregoing analysis, the Tribunal concludes that the equidistance line in the west shall be the line of delimitation between Barbados and Trinidad and Tobago.

B. BARBADOS' CLAIM TO A RIGHT OF ACCESS TO THE FLYINGFISH FISHERY WITHIN THE EEZ OF TRINIDAD AND TOBAGO

272. The Tribunal has decided that the pattern of fishing activity in the waters off Trinidad and Tobago was not of such a nature as to warrant the adjustment of the maritime boundary. This does not, however, mean that the argument based upon fishing activities is either without factual foundation or without legal consequences.

273. Barbados argues that if the Tribunal does not adjust the equidistance line, it may nevertheless order that Barbadian fishermen be allowed access to the stocks of flyingfish while they are within the waters of Trinidad and Tobago.

274. The jurisdiction of the Tribunal to determine that issue depends upon the provisions of UNCLOS and upon the Statement of Claim that initiated these proceedings.

275. The Statement of Claim stipulated, in paragraph 2, that "the dispute relates to the delimitation of the exclusive economic zone and continental shelf between Barbados and the Republic of Trinidad and Tobago". The final chapter of Barbados' Memorial, headed "Barbados' Conclusion and Submission", is similarly confined. It states in paragraph 141 that Barbados "requests the Tribunal to determine a single maritime boundary between the EEZs and CSs of the parties that follows the line described below

and is illustrated on Map 3". In its Reply, Barbados "affirms its claims as expressed in its Memorial and repeats its request that the Tribunal determine a single maritime boundary between the EEZs and CSs of the Parties that follows the line there described."[23]

276. The pattern of Barbadian fishing activity is relevant to the task of delimitation as a relevant circumstance affecting the course of the boundary, and as such it is plainly a matter that must be considered by the Tribunal. Taking fishing activity into account in order to determine the course of the boundary is, however, not at all the same thing as considering fishing activity in order to rule upon the rights and duties of the Parties in relation to fisheries within waters that fall, as a result of the drawing of that boundary, into the EEZ of one or other Party. Disputes over such rights and duties fall outside the jurisdiction of this Tribunal because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII Tribunal "any dispute relating to [the coastal State's] sovereign rights with respect to the living resources in the exclusive economic zone", and Trinidad and Tobago has made plain that it does not consent to the decision of such a dispute by this Tribunal.

277. Furthermore, no dispute of that kind was put as such before the Tribunal; neither were the pleadings of the Parties directed to a dispute over their respective rights and duties in respect of the fisheries in the EEZ of Trinidad and Tobago. Barbados stated clearly that its submissions in respect of its claim to a right to fish within the EEZ of Trinidad and Tobago were made on the basis that such a right could be awarded by the Tribunal as a remedy *infra petita* in the dispute concerning the course of the maritime boundary.

278. In the "Response of Barbados to Questions posed by Professor Orrego Vicuña and Professor Lowe on 21 October 2005 (Day 4) and 24 October 2005 (Day 5)", Barbados cited a number of cases in support of its claim that an order regarding fishery access would be a remedy *infra petita* in this case. [24]

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[23] *Cf.* the closing submissions made on behalf of Barbados: Trans. Day 6, pp. 74-75.

[24] See *Eritrea/Yemen I and II*, 114 I.L.R. p. 1 and 119 I.L.R. p. 417; *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), I.C.J. Reports 1974, p. 3; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40; *Western Sahara*, I.C.J. Reports 1975, p. 18; *Eritrea-Ethiopia Boundary Commission* (*Determinations*, 7 November 2002),

279. The Tribunal does not consider that those cases support Barbados' submission. The first decision cited was the award in Phase I of the *Eritrea/Yemen* case (114 I.L.R. p. 1). In that case the Tribunal was instructed by the agreed compromis (a) to decide "territorial sovereignty … on the basis, in particular, of historic titles" and (b) to "decide on the definition of the scope of the dispute". Given the range in the content of historic titles,[25] and the Tribunal's power to decide on the scope of the dispute, it is readily understandable that the Tribunal in that case should make plain that its finding on sovereignty, based on historic title, did not extinguish a pre-existent traditional fishing regime in the region which included a right of access. That is very different from saying that a Tribunal has an inherent power to *create* a right of access by way of a remedy in a delimitation dispute.

280. In the *Fisheries Jurisdiction Case* (I.C.J. Reports 1974, p. 3) the question was the validity of a claim to exercise fisheries jurisdiction over an area viewed by the United Kingdom as beyond the exclusive fisheries jurisdiction of Iceland. The *dispositif* did not create a right for Iceland or for the United Kingdom; it merely indicated factors to be taken into account in negotiating an equitable solution of the differences between the two States in respect of their right to fish in an area to which each of them had a right of access. Furthermore, the compromissory clause in that case gave the International Court of Justice jurisdiction over "a dispute *in relation to*" an "extension of fisheries jurisdiction around Iceland", and it was (as Barbados points out in paragraph 20 of the "Response of Barbados to Questions posed by Professor Orrego Vicuña and Professor Lowe on 21 October 2005 (Day 4) and 24 October 2005 (Day 5)") the interpretation of that specific provision that led the Court to proceed to comment on the factors to be taken into account in negotiations.

281. The other cases are also distinguishable from that before this Tribunal. The *Western Sahara* case (I.C.J. Reports 1975, p. 18) was an Advisory Opinion given by the International Court of Justice to the General Assembly, in which no question of prescribing a remedy could arise. The Determinations of the Commission in the *Eritrea-*

PCA Archives, *available at* http://www.pca-cpa.org; and *Right of Passage* (*Right of Passage over Indian Territory* (*Portugal v. India*)), I.C.J. Reports 1960, p. 6.

[25] See *Tunisia/Libya*, I.C.J. Reports 1982, p. 18, at pp. 73-75, paras. 100-102.

Ethiopia Boundary Commission case cited by Barbados were explicitly tied to its power to take decisions "on any matter it finds necessary for the performance of its mandate to delimit and demarcate the boundary". The analogy in the present case would be with the consideration of fisheries activities in order to determine whether an adjustment to the provisional equidistance line is needed. There is no "necessity" for any action on fisheries access in order to implement the boundary that the Tribunal has decided upon. The relevance of the *Right of Passage* case (I.C.J. Reports 1960, p. 6) appears to be that the International Court of Justice there gave a decision other than that sought by the Applicant State, because the Applicant claimed a general right of passage over Indian territory and the Court found that the right of passage was confined to "civilian" traffic. That is, however, a case of the Court making a declaration of the rights claimed by the Applicant in terms more limited than those in which the claim had been presented: it is not at all of the same kind as the difference between declaring what the boundary line is and declaring that a right of access to fisheries within the EEZ of one of the parties exists. *Right of Passage* (I.C.J. Reports 1960, p. 6) is a true instance of a ruling *infra petita*.

282. That leaves the *Qatar v. Bahrain* case (I.C.J. Reports 2001, p. 40). In that case, the International Court of Justice did not award any relevant remedy: it merely drew attention to legal provisions relevant to the position of the Parties as that position resulted from the boundary line drawn by the Court.

283. The Tribunal accordingly considers that it does not have jurisdiction to make an award establishing a right of access for Barbadian fishermen to flyingfish within the EEZ of Trinidad and Tobago, because that award is outside its jurisdiction by virtue of the limitation set out in UNCLOS Article 297(3)(a) and because, viewed in the context of the dispute over which the Tribunal does have jurisdiction, such an award would be *ultra petita*. Nonetheless, both Parties have requested that the Tribunal express a view on the question of Barbadian fishing within the EEZ of Trinidad and Tobago. Barbados has done so by requesting that the Tribunal "order a regime for non-exclusive fishing use". Trinidad and Tobago has done so by requesting the Tribunal "to find that there was no fishing by Barbados in the area claimed prior to the late 1970s".

284. In these circumstances the Tribunal believes that it is appropriate, and will be helpful to the Parties, to follow the approach of the International Court of Justice in the *Qatar v. Bahrain* case (I.C.J. Reports 2001, pp. 112-113, para. 236 *et seq.*) and to draw attention to certain matters that are necessarily entailed by the boundary line that it has drawn.

285. It is common ground between the Parties that the flyingfish migrate through the waters of both Barbados and Trinidad and Tobago. UNCLOS Article 63(1) stipulates that:

> Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

286. It necessarily follows that Trinidad and Tobago and Barbados are under a duty "to agree upon the measures necessary to co-ordinate and ensure the conservation and development" of the flyingfish stocks.

287. Both Barbados and Trinidad and Tobago emphasised before the Tribunal their willingness to find a reasonable solution to the dispute over access to flyingfish stocks. The Deputy Prime Minister and Attorney-General for Barbados spoke at the opening of the hearing of Barbados' foreign policy being marked by an "assiduous pursuit of negotiated agreement". She said also that "Barbados indeed is looking within the framework of a maritime delimitation for a guarantee of continuing access" to flyingfish stocks in the waters off Tobago; and she drew attention to the dislocation that Barbadian fisherfolk and those dependent upon them would suffer if access ceased.

288. Trinidad and Tobago emphasised before the Tribunal its readiness to negotiate an access agreement with Barbados. The Attorney-General for Trinidad and Tobago said on the last day of the hearing:

> I say again in peremptory fashion that we are still prepared to negotiate a fisheries access agreement with Barbados. In the meantime, individuals, Barbadians and others, who wish to apply for individual licences under our archipelagic waters and exclusive economic zone legislation will be entitled to have their application considered on the merits.

289. The question whether the Barbadian fishing activity is artisanal in nature, and the question of the degree of dependence of Barbados upon fishing for flyingfish, are not

material to the making or existence of these commitments, and it is unnecessary to comment upon those questions.

290. The Tribunal notes and places on record the commitments referred to in paragraphs 258, 287, and 288 above.

291. It is well established that commitments made by Agents of States before international tribunals bind the State, which is thenceforth under a legal obligation to act in conformity with the commitment so made.[26] This follows from the role of the Agent as the intermediary between the State and the tribunal.[27]

292. Accordingly, Trinidad and Tobago has assumed an obligation in the terms stated above. It is obliged to negotiate in good faith an agreement with Barbados that would give Barbados access to fisheries within the EEZ of Trinidad and Tobago, subject to the limitations and conditions spelled out in that agreement and to the right and duty of Trinidad and Tobago to conserve and manage the living resources within its jurisdiction. In these circumstances, the observations of the Tribunal in the *Lac Lanoux* case as to the reality and nature of an obligation to negotiate an agreement[28] are applicable.

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[26] See, e.g., *Dispute Concerning Filleting within the Gulf of St Lawrence* ("La Bretagne"), 82 I.L.R. p. 591 (1986), at p. 637, para. 63(2); *Southern Bluefin Tuna*, ITLOS, Order of 27 August 1999, *Reports of Judgments, Advisory Opinions and Orders*, *Vol. 3* (1999), at paras. 83-84; *The MOX Plant Case*, ITLOS, Order of 3 December 2001, *Reports of Judgments, Advisory Opinions and Orders*, *Vol. 5* (2001), at paras. 78-80; *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor*, Order of 8 October 2003, *Reports of Judgments, Advisory Opinions and Orders*, *Vol. 7* (2003), at paras. 76-81. See *Mavrommatis Jerusalem Concessions*, 1925 P.C.I.J. (Ser. A) No. 5, p. 37. See also the jurisprudence of the ICJ on unilateral declarations: *Nuclear Tests*, I.C.J. Reports 1974, p. 253, at pp. 267-270, paras. 42-52; *Frontier Dispute*, I.C.J. Reports 1986, p. 554, at p. 574, para. 40.

[27] See *Affaire des navires "Cape Horn Pigeon", "James Hamilton Lewis", "C.H. White" et "Kate and Anna"* (*Etats-Unis d'Amérique contre Russie*), *Sentence préparatoire*, *reprinted in* IX United Nations Reports of International Arbitral Awards (RIAA) p. 59, at pp. 60-61; *Georges Pinson (France)* v. *United Mexican States* (1928), *reprinted in* V RIAA p. 327, at pp. 355-356; Convention for the Pacific Settlement of International Disputes, The Hague (1907), art. 62.

[28] *Lac Lanoux Arbitration* (France v. Spain), 24 I.L.R. p. 101 (1957), at p. 128: "one speaks, although often inaccurately, of the 'obligation of negotiating an agreement'. In reality engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusal to take into consideration adverse proposals or interests, and, more generally, in cases of the violation of the rules of good faith".

293. The willingness of Trinidad and Tobago to negotiate an agreement on access to fisheries within its EEZ is consistent with its duties under UNCLOS as described above. The Tribunal expresses its hope that as a result of negotiations between Barbados and Trinidad and Tobago a satisfactory solution to the dispute over access to fisheries in the EEZ of Trinidad and Tobago, consonant with the principles set out in UNCLOS in relation to fisheries and to relations between neighbouring States, will quickly be found. It was said that the fisherfolk of Barbados and Trinidad and Tobago are not in competition because they fish in different areas and for different species: in such circumstances, it should be the more possible to find an agreed solution from which both States will benefit, without the gains of one being at the expense of the other.

CHAPTER VII – CENTRAL SEGMENT OF THE LINE: EQUIDISTANCE NOT DISPUTED

294. Following the western segment of the delimitation line, there is a central segment that extends from Point D of Barbados' claim to Point A of Trinidad and Tobago's claim. In this short segment of approximately 16 nm, the Parties do not argue for any adjustment of the provisional equidistance line in the light of any relevant circumstance. The equidistance line is accordingly agreed to in this segment, short as it may be.

CHAPTER VIII – DELIMITATION IN THE EAST

A. THE ENTITLEMENT TO MARITIME AREAS AND THE NATURE OF THE MARITIME BOUNDARY

295. It is not disputed that both Barbados and Trinidad and Tobago have a legal entitlement to a continental shelf and an EEZ in the east as a consequence of having coasts abutting upon those areas. The claims put forth by the Parties significantly overlap.

296. The Parties, however, disagree about the nature of the maritime boundary that will come to separate the areas which overlap. Barbados has requested the Tribunal to determine a single maritime boundary for the exclusive economic zones and continental shelves of the Parties. Trinidad and Tobago objects to this request on the basis that the continental shelf and the EEZ are separate and distinct institutions, that there may therefore be different lines of delimitation for each, and that the Parties have not agreed to request delimitation by means of a single maritime boundary, as in its view is required.

297. In the present case, the question is largely theoretical because Trinidad and Tobago accepts that there is in fact no reason for the Tribunal to draw different boundary lines for the EEZ and the continental shelf within 200 nm of its own baselines. The Tribunal notes furthermore that the equidistance line running through the first and second segments described above is in fact a single maritime boundary that Trinidad and Tobago accepts in spite of its conceptual reservations. In Trinidad and Tobago's submissions, the need for a separate boundary line appears to be associated with its claim over the outer continental shelf beyond its 200-mile area. For reasons explained below, however, this last claim will be dealt with by the Tribunal in the context of the boundary line determined for the respective 200-mile areas of entitlement in respect of both the EEZ and the continental shelf.

298. The Tribunal will accordingly determine a single boundary line for the delimitation of both the continental shelf and the EEZ to the extent of the overlapping claims, without prejudice to the question of the separate legal existence of the EEZ and the continental shelf.

B. CRITERIA GOVERNING DELIMITATION: EQUIDISTANCE/RELEVANT CIRCUMSTANCES

299. Barbados and Trinidad and Tobago, as Parties to UNCLOS, both agree that Article 74(1) and Article 83(1) are the relevant provisions of UNCLOS governing the delimitation of the EEZ and the continental shelf, respectively (see footnotes 9 and 10 above).

300. The Parties further agree that delimitation is to be effected by resort to the equidistance/relevant circumstances method. The Parties also agree that the Tribunal should move from the hypothesis of a provisional equidistance line to a consideration of the question whether there are relevant circumstances that make departures from an equidistance line necessary to attain an equitable solution.

301. The Parties do, however, have differences about how the principles of delimitation should be applied in the present case. While Barbados asserts that the equidistance/relevant circumstances method is the proper method prescribed by international law, occasionally describing it as a rule, Trinidad and Tobago emphasizes that equidistance is not a compulsory method of delimitation and that there is no presumption that equidistance is a governing principle. The Tribunal considers that there are many different ways of applying the settled approach to delimitation described above. It is thus not surprising that while both Parties agree that the end result must be equitable, there are fundamental differences between them about what the relevant circumstances are and about the extent and location of any adjustments that such circumstances may require.

302. These different approaches of the Parties are evident in the terms of the domestic legislation of the two States. Barbados' Marine Boundaries and Jurisdiction Act 1978 provided that in the absence of an agreement with another State, "the outer boundary limit shall be the median line" (Section 3(3)). Trinidad and Tobago's Archipelagic Waters Act provided that delimitation "shall be determined by agreement between Trinidad and Tobago and the states concerned on the basis of international law in order to achieve an equitable solution" (Section 15).

303. The difference was marked by a 1992 Diplomatic Note to Barbados, in which Trinidad and Tobago affirmed that "it does not recognize the equidistance method of delimitation as being an obligatory method of delimitation and consequently rejects its applicability, save by express agreement, to a maritime boundary delimitation between Trinidad and Tobago and Barbados … in the Caribbean Sea and Atlantic Ocean".

304. As noted above, the equidistance/relevant circumstances method is the method normally applied by international courts and tribunals in the determination of a maritime boundary. The two-step approach described in paragraph 242 above results in the drawing of a provisional equidistance line and the consideration of a subsequent adjustment, a process the International Court of Justice explained as follows:

> The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances (*Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40, at p. 94, para. 176).

305. While occasionally there has been a distinction made between the equidistance/relevant circumstances method applied to the delimitation of the territorial sea and the approaches characterising the delimitation of the EEZ and the continental shelf under the UNCLOS Articles 74 and 83, which rely more explicitly on equitable principles and the role of relevant circumstances in their identification, in the end, as concluded by the International Court of Justice, they are both very similar processes, in view of the common need to ensure an equitable result (*Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 303, at p. 441, para. 288).

306. The Tribunal notes that while no method of delimitation can be considered of and by itself compulsory, and no court or tribunal has so held, the need to avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified. A different method would require a well-founded justification and neither of the Parties has asked for an alternative method. As a domestic tribunal applying international law has explained,

> In the context of opposite coasts and latterly adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstances justify it. (*Newfoundland v. Nova Scotia*, Award of the Tribunal in the Second Phase, 26 March 2002, para. 2.28.)

307. The Tribunal is therefore satisfied that the delimitation method discussed ensures both the need for certainty and the consideration of such circumstances that might be relevant for an equitable solution. Technical experts of the Parties have also been in agreement about the identification of the appropriate base points and the methodology to be used to this effect.

C. DIFFERENT SECTORS AND RELEVANT COASTS DISTINGUISHED

308. Trinidad and Tobago maintains that to effect the delimitation in this dispute it is necessary to distinguish between two different geographical areas. The first is described as the "Caribbean sector" and the second as the "Atlantic sector". The former lies between the islands of Barbados and Tobago and extends from the tri-point where the boundaries of the Parties meet with that of Saint Vincent and the Grenadines to Point A, which serves in Trinidad and Tobago's claim as the appropriate turning point of the equidistance line. The "Atlantic sector" is that facing the broad Atlantic Ocean.

309. In Trinidad and Tobago's view, the "Caribbean sector" is characterized by short coastlines of the Parties that are opposite to each other, while the "Atlantic sector" involves a vast open ocean where the coasts of the Parties are in a situation of adjacency rather than oppositeness. According to this argument, different criteria should apply to the delimitation of each sector, equidistance being the appropriate method only in the Caribbean sector. Trinidad and Tobago, however, had not made this distinction in the diplomatic Note referred to above, which opposed equidistance, both in the Caribbean Sea and the Atlantic Ocean.

310. Trinidad and Tobago invokes in justification of its approach the decisions of international courts and tribunals distinguishing between different sectors of the relevant waters in the cases before them for the purpose of delimitation (*North Sea Continental Shelf* cases, I.C.J. Reports 1969, p. 4; *Anglo-French* arbitration, 54 I.L.R. p. 6; *Gulf of Maine*, I.C.J. Reports 1984, p. 246; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40), as well as a report of the International Hydrographic Organization describing the

eastern limit of the Caribbean Sea (*Limits of Oceans and Seas* (International Hydrographic Organization, 3rd ed. 1953)).

311. Barbados argues that, on the contrary, the relevant coasts of the two States are at all times in a situation of oppositeness and that there is no justification for making a distinction between Caribbean and Atlantic sectors. It is further asserted that the principle of equidistance is applicable to the drawing of the whole of the delimitation line, and that all of the relevant basepoints in Trinidad and Tobago lie on the coast of Tobago, so that the island of Trinidad has no influence on the course of the delimitation.

312. In Barbados' view, adjacency is associated with the idea of proximity and this finds no support in the geographical context of this dispute, where Barbados lies almost 116 nm from Tobago. So too, Barbados argues, the decisions of international courts and tribunals invoked by Trinidad and Tobago are entirely distinguishable from this dispute as the parties in those cases were separated by rather narrow waters or other geographical features that opened to the vast ocean beyond a certain point, a situation not obtaining in this case where waters are at all times open. Nor, it is further asserted, does the report of the International Hydrographic Organization on the nomenclature of waters in the region have legal relevance.

313. The Tribunal does not find the distinction between the "Caribbean sector" and the "Atlantic sector" persuasive in the light of the geographical characteristics of the disputed area. There are no waters that could be described as a narrow strip, a corridor or a channel, nor is there a bay that at some point opens up to the ocean. In this respect, the geographical features of the area in dispute in this case are very different from the confined area where delimitation was effected in the North Sea, as they are also different from the spatial relationship between the English Channel and the Western Approaches or the narrow waters involved in a sector of the *Qatar v. Bahrain* dispute (I.C.J. Reports 2001, p. 40). The geographical features in the present case are also very different from those in the Gulf of Maine and its opening towards the Atlantic, and the spatial relationship between the Parties' coasts is not interrupted by any narrowness or cape or protuberance.

314. Nor does the report by the International Hydrographic Organization constitute a convincing reason for distinguishing between maritime sectors based upon its definitions of the "Caribbean" and the "Atlantic". This report was not intended to be used as a basis for delimitation or for any specific attribution of rights; it was simply an effort to identify broad geographical denominations, no more precise than the distinctions between the Eastern, Central and Western Pacific.

315. The Tribunal notes, moreover, that the applicable law under UNCLOS is the same in either case: Articles 74 and 83 do not distinguish between opposite and adjacent coasts. It follows that there is no justification to approach the process of delimitation from the perspective of a distinction between opposite and adjacent coasts and apply different criteria to each, which in essence is the purpose of the two sectors argument.

316. It is quite true, as Trinidad and Tobago has argued, that the further out in the Atlantic one goes, the more the waters in dispute appear to be in a lateral position, but what governs the delimitation essentially are the geographical elements which are at its origin, close to land, and not at its end, except where, as in the Gulf of Maine, the delimitation line might be affected by a major geographical feature further towards the open sea. Otherwise there would be no delimitation that could withstand the effect of distance and, as the *Gulf of Maine* Chamber noted in connection with a comparable argument made in that case, the continuity of the line is the inevitable expression of the principle that the "land dominates the sea" (I.C.J. Reports 1984, p. 246, at p. 338, para. 226). This is why the distinction between opposite and adjacent coasts, while relevant in limited geographical circumstances, has no weight where the delimitation is concerned with vast ocean areas.

317. This finding of the Tribunal does not mean however that the equidistance line is an absolute line that is not subject to adjustment. As explained above, the essence of the method normally followed in international practice is that the equidistance line is only a provisional line which serves as the starting point for the consideration of relevant circumstances that might require its adjustment in order to achieve the equitable solution that the law requires. The maritime boundary is the outcome of various checks made in connection with the provisional line in the light of the specific circumstances that are relevant to the disposition of the dispute.

318. Several issues raised by Trinidad and Tobago in connection with the distinction between the two sectors that it proposes are in fact matters to be examined in the light of those specific circumstances, with particular reference to the question of the relevant coasts to be considered and the basepoints to be used in the delimitation. These the Tribunal addresses below.

D. TRINIDAD AND TOBAGO'S CLAIM IN THE EAST

319. The provisional equidistance line of delimitation extends in the east from Point A of Trinidad and Tobago's claim to Point E of Barbados' claim, where it ends. This is the area where Trinidad and Tobago claims a major adjustment of the equidistance line to the north as from Point A.

320. Trinidad and Tobago invokes three principal relevant circumstances that in its view justify the adjustment of the equidistance line it claims in the east: the projection of the relevant coasts and the avoidance of any cut-off effect or encroachment; the proportionality of relevant coastal lengths; and the regional implications of the delimitation. The Tribunal will examine these circumstances in turn.

1. The Relevant Coasts and Their Projection

321. Trinidad and Tobago argues that to effect delimitation, coasts should be taken to project frontally in the direction in which they face, as held by the arbitration tribunal in the case of *St. Pierre et Miquelon* (95 I.L.R. p. 645). The line delimiting the competing claims, it is further argued, should be drawn so far as possible so as to avoid "cutting-off" any State from its maritime projection under the principle of non-encroachment, applied by international courts and tribunals on several occasions (*North Sea Continental Shelf* cases, I.C.J. Reports 1969, p. 4; *Libya/Malta*, I.C.J. Reports 1985, p. 1; *Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 303).

322. The fact that, on its view, its coasts project eastward into the Atlantic leads Trinidad and Tobago to conclude that this constitutes a relevant circumstance strong enough to alter the direction of the provisional equidistance line as from Point A, because an equidistance line would result in the cut-off effects that the delimitation should avoid as far as possible.

323. Barbados, while accepting the need to identify relevant coasts in order to effect delimitation, argues that the geographical situation does not support Trinidad and Tobago's conclusions. The coasts invoked by Trinidad and Tobago, except for those contributing basepoints to the drawing of the equidistance line, do not in Barbados' view abut upon the disputed area because they all face in a southeasterly direction actually pointing away from the overlapping area in dispute.

324. In any event, Barbados asserts that the equidistance line would in no way result in a cut-off effect on the continental shelf and EEZ of Trinidad and Tobago, which would extend more than 190 nm until their terminus at the tri-point with Guyana. If every coastal frontage were necessarily to be given unobstructed access to the open ocean, Barbados also argues, this would result in delimitation ignoring the entitlements of other States and therefore the configuration of coasts would become irrelevant.

325. The Parties also disagree about the role of basepoints in effecting delimitation in this case. Barbados argues that the relevant basepoints are those coastal points that contribute to the equidistance line, and that the coastline to be taken into account in considering matters such as the respective coastal lengths of the Parties is only that part of the coastline on which the relevant basepoints lie. Trinidad and Tobago, on the other hand, is of the view that a broader concept of relevant coastlines ought to be applied in considering matters such as the respective coastal lengths of the Parties.

326. In Trinidad and Tobago's view, five miles of opposite coasts between the Parties cannot determine the fate of hundreds of miles of maritime boundary. Trinidad and Tobago measures its eastward-facing coastal frontage as 74.9 nm and that of Barbados as 9.2 nm, resulting in a ratio of 8.2:1. Barbados, while contesting these measurements, for its part asserts that Trinidad and Tobago cannot purport to use its archipelagic baselines to support entitlement to the areas in question or to buttress arguments concerning the disparity of the respective coastal frontages.

327. The Tribunal finds no difficulty in concluding that coastal frontages are a circumstance relevant to delimitation and that their relative lengths may require an adjustment of the provisional equidistance line. The International Court of Justice held in *Jan Mayen* that "the differences in length of the respective coasts of the Parties are so significant that this feature must be taken into account during the delimitation operation …" (I.C.J. Reports 1993, p. 38, at p. 68, para. 68). Adjustments have also been allowed in accordance with this principle in other decisions, notably the *Gulf of Maine* (I.C.J. Reports 1984, p. 246) and *Libya/Malta* (I.C.J. Reports 1985, p. 13), albeit to a limited extent.

328. However, as was observed above (paragraph 236) this does not require the drawing of a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines. Although mathematically certain, this would in many cases lead to an inequitable result. Delimitation rather requires the consideration of the relative lengths of coastal frontages as one element in the process of delimitation taken as a whole. The degree of adjustment called for by any given disparity in coastal lengths is a matter for the Tribunal's judgment in the light of all the circumstances of the case.

329. The Tribunal is not persuaded by arguments that would give basepoints a determinative role in determining what the relevant coastal frontages are. Basepoints contributing to the calculation of the equidistance line are technically identifiable and have been identified in this case. To this extent, such basepoints have a role in effecting the delimitation and in the drawing of the provisional equidistance line. But relevant coastal frontages are not strictly a function of the location of basepoints, because the influence of coastlines upon delimitation results not from the mathematical ratios discussed above or from their contribution of basepoints to the drawing of an equidistance line, but from their significance in attaining an equitable and reasonable outcome, which is a much broader consideration.

330. Barbados has argued that, except for those basepoints affecting the equidistance line, Trinidad and Tobago's coastline has for the most part a southeasterly orientation facing away from the disputed area, and that this coastline could not be taken into account without refashioning nature and disregarding the actual geographical orientation of the whole territory of Trinidad and Tobago. Such coastlines, in Barbados' view, do not meet the requirements of a coastal frontage relevant to delimitation.

331. However, if coastal frontages are viewed in the broader context referred to above, what matters is whether they abut as a whole upon the disputed area by a radial or directional presence relevant to the delimitation, not whether they contribute basepoints to the drawing of an equidistance line. In this connection, the island of Trinidad has a not insignificant coastal frontage which clearly abuts upon the disputed area, and this is also true of the coastline of the island of Tobago. Some of these coastal frontages even have a clearly easterly orientation. These frontages are indeed a relevant circumstance to be taken into account in the adjustment of the equidistance line.

332. The Tribunal must also note that the differences between the Parties in respect of coastal orientation and its influence on the delimitation seem to stem to a large extent from the fact that each is envisaging a different geographical element as the basis of its conclusion. Barbados examines the orientation arising from Trinidad and Tobago's archipelagic baselines and in this perspective the orientation is indeed a southeasterly one. Trinidad and Tobago relies on the actual presence of the bulk of its coastline, irrespective of the archipelagic baselines.

333. The Parties have quite naturally shaped their arguments to support their respective claims but in doing so, contradictions become apparent. Barbados asserts that archipelagic basepoints cannot be used for calculating the equidistance line, yet archipelagic baselines are used by it for concluding that Trinidad and Tobago's coastal frontages are orientated towards the southeast. Trinidad and Tobago claims to the contrary that its archipelagic baselines can be counted as basepoints for the drawing of the equidistance line and other effects, but that such baselines are not to be used for determining the coastal orientation.

334. The Tribunal's conclusion in this connection is that the orientation of coastlines is determined by the coasts and not by baselines, which are only a method to facilitate the determination of the outer limit of the maritime zones in areas where the particular geographical features justify the resort to straight baselines, archipelagic or otherwise. In this perspective, the Tribunal must also conclude that broad coastal frontages of the island of Trinidad and of the island of Tobago as well as the resulting disparity in coastal lengths between the Parties, are relevant circumstances to be taken into account in effecting the delimitation as these frontages are clearly abutting upon the disputed area of overlapping claims.

2. Proportionality as a Relevant Circumstance

335. The second circumstance invoked by Trinidad and Tobago as relevant to the adjustment of the equidistance line is proportionality. According to Trinidad and Tobago's estimates, the adjustment claimed by it leads to 49% of the overlapping EEZ entitlements being attributed to Barbados and 51% attributed to Trinidad and Tobago, a result that it considers equitable in the light of the test of proportionality and thus consistent with UNCLOS Article 74. Proportionality in this argument is related to and is a function of the coastal lengths and relevant frontages discussed above, as these frontages are those producing entitlement to the areas to be attributed.

336. In Barbados' view, the fact that a delimitation line might be found to be inequitable because it results in a disproportionate division of the disputed area does not mean that proportionality can be used as an independent method of delimitation and hence it cannot by itself produce a boundary line or require a proportional division of the area where claims overlap. As has been noted, Barbados also opposes Trinidad and Tobago's identification of the relevant coastal frontages and the relevance of coastal lengths to effect delimitation, thus also disagreeing about their eventual role in the test of proportionality.

337. The Tribunal has explained above the meaning that the principle of proportionality has in maritime delimitation as developed by the decisions of international courts and tribunals. In the light of such considerations, the Tribunal concludes that proportionality is a relevant circumstance to be taken into consideration in reviewing the equity of a tentative delimitation, but not in any way to require the application of ratios or

mathematical determinations in the attribution of maritime areas. The role of proportionality, as noted, is to examine the final outcome of the delimitation effected, as the final test to ensure that equitableness is not contradicted by a disproportionate result.

338. The Tribunal will thus not resort to any form of "splitting the difference" or other mathematical approaches or use ratio methodologies that would entail attributing to one Party what as a matter of law might belong to the other. It will review the effects of the line of delimitation in the light of proportionality as a function of equity after having taken into account any other relevant circumstance, most notably the influence of coastal frontages on the delimitation line.

3. Regional Considerations as a Relevant Circumstance

339. The third circumstance invoked by Trinidad and Tobago as relevant to the justification of its claim is the effect of the delimitation for the region as a whole.

340. Just as the tribunal in *Guinea/Guinea-Bissau* held that an equitable delimitation cannot ignore other delimitations already made or still to be made in the region (*Guinea/Guinea-Bissau*, 77 I.L.R. p. 635, at p. 682, para. 104), so too, Trinidad and Tobago asserts, the delimitation between Trinidad and Tobago and Venezuela in the region south of Barbados and that between France (Guadeloupe and Martinique) and Dominica in the region north of Barbados need to be considered in this dispute as they entail a recognition of a departure from the equidistance line in order to avoid a cut-off effect.

341. Trinidad and Tobago explains that one purpose of the 1990 Trinidad-Venezuela Agreement is to allow Venezuela access to the Atlantic ("*salida al Atlántico*"), an access that would be impeded by an equidistance line delimitation between Trinidad and Tobago and Barbados in that area. Trinidad and Tobago further explains that Point A on the delimitation line it proposes in the present case, and the vector it claims in respect of delimitation with Barbados, discussed below, also find a justification in the contribution that they make to facilitation of the "*salida al Atlántico*".

342. Trinidad and Tobago also invokes to this effect the Agreement of 7 September 1987 between France (Guadeloupe and Martinique) and Dominica where a tentative

equidistance line was adjusted to avoid a cut-off effect and prevent Dominica and Martinique being deprived of an outlet to the Atlantic.

343. Barbados argues, to the contrary, that the *Guinea/Guinea-Bissau* decision (77 I.L.R. p. 635) has a different significance since it concerned geographical and historical circumstances entirely different from those relevant to this dispute. Yet, not even in that different context did the arbitral tribunal purport to formulate a rule of delimitation requiring that "regional implications" be taken into account. Nor does the France (Guadeloupe and Martinique) agreement with Dominica have any relevance, Barbados further argues, since the EEZ of Dominica resulting from the adjustment is still encircled by that of France and does not extend as far as the open Atlantic. Similarly, Barbados asserts, the 1990 Trinidad-Venezuela Agreement cannot validly provide Venezuela with a corridor out to the Atlantic as such a corridor would impinge upon the maritime entitlements of third countries.

344. The Tribunal must in the first place rule out any effect, influence, or relevance of the agreement between France (Guadeloupe and Martinique) and Dominica. It has no connection at all to the present dispute, direct or indirect.

345. The position in respect of the 1990 Trinidad-Venezuela Agreement is different. This treaty, while not binding on Barbados, does establish the southern limit of Trinidad and Tobago's entitlement to maritime areas. Trinidad and Tobago has so argued before the Tribunal and various maps it has introduced in evidence clearly indicate the Trinidad and Tobago-Venezuela delimitation line as the agreed maritime boundary between the two countries (*i.e.* Trinidad and Tobago's claim line, illustrated in Figure 7.5 of Trinidad and Tobago's Counter-Memorial, reproduced as Map II and referred to above at paragraph 64). Trinidad and Tobago has described this delimitation line as one that "involved a northwards shift in the median line between Trinidad and Tobago and Venezuela" (*i.e.* a shift which was adverse to Trinidad and Tobago).

346. The Tribunal is not concerned with the political considerations that might have led the Parties to conclude the 1990 Trinidad-Venezuela Agreement, and certainly Barbados cannot be required to "compensate" Trinidad and Tobago for the agreements it has made by shifting Barbados' maritime boundary in favour of Trinidad and Tobago. By

its very terms, the treaty does not affect the rights of third parties. Article II(2) of the treaty states in fact that "no provision of the present Treaty shall in any way prejudice or limit … the rights of third parties". The treaty is quite evidently *res inter alios acta* in respect of Barbados and every other country.

347. The Tribunal, however, is bound to take into account this treaty, not as opposed in any way to Barbados or any other third country, but in so far as it determines what the maritime claims of Trinidad and Tobago might be. The maritime areas which Trinidad and Tobago has, in the 1990 Trinidad-Venezuela Agreement, given up in favour of Venezuela do not any longer appertain to Trinidad and Tobago and thus the Tribunal could not draw a delimitation line the effect of which would be to attribute to Trinidad and Tobago areas it no longer claims. Nor has this been requested by Trinidad and Tobago.

348. It follows that the maximum extent of overlapping areas between the Parties is determined in part by the treaty between Trinidad and Tobago and Venezuela, in so far as Trinidad and Tobago's claim is concerned. This the Tribunal will take into account in determining the delimitation line.

349. Barbados has also invoked the Barbados/Guyana Joint Cooperation Zone Treaty as a relevant circumstance influencing the delimitation between Barbados and Trinidad and Tobago. This other treaty, however, is also *res inter alios acta* in respect of Trinidad and Tobago and as such could not influence the delimitation in the present dispute, except in so far as it would reflect the limits of Barbados' maritime claim.

E. THE ADJUSTMENT OF THE EQUIDISTANCE LINE: TRINIDAD AND TOBAGO'S CLAIMED TURNING POINT

350. The Tribunal has concluded above that there are in this case relevant circumstances that justify the adjustment of the equidistance line and has identified their meaning. The disparity of the Parties' coastal lengths resulting in the coastal frontages abutting upon the area of overlapping claims is sufficiently great to justify an adjustment. Whether this adjustment should be a major one or a limited one is the question the Tribunal must now address.

351. Trinidad and Tobago has identified Point A of its claim as the turning point for the adjustment claimed, in the belief that all the circumstances it has argued as relevant to the delimitation justify a major adjustment as from that point.

352. Trinidad and Tobago explains that the rationale for Point A is that it is the "last point on the equidistance line which is controlled by points on the south-west coast of Barbados". In Trinidad and Tobago's view, Point A is thus the appropriate turning point as it separates the area in which delimitation is between opposite coasts from that where coasts are adjacent. To the east of that point, it says, only the adjacent eastern coastal frontages of the Parties influence the line; and those frontages generate a ratio of coastline lengths of 8.2:1 in favour of Trinidad and Tobago.

353. The adjusted line claimed by Trinidad and Tobago then proceeds along a constant azimuth of 88° from Point A to the outer limit of the EEZ of Trinidad and Tobago (Point B).

354. Barbados is of the view that no adjustment of the equidistance line is necessary and that in particular, Point A has been calculated by a reference to basepoints that has no justification, as there is no coastal adjacency involved in this case. But even if there were a situation of adjacency, Barbados asserts, any necessary adjustment would turn the equidistance line south, not north.

355. The Tribunal has found above that there is no justification for distinguishing between opposite and adjacent coasts as the equidistance line moves outward but that a deviation from that line might be justified at some point in the light of the relevant circumstances.

356. Point A has been described by Trinidad and Tobago as being "not far north of the most northerly point of the territorial sea around Tobago". The Tribunal finds in this respect that the territorial sea, or for that matter baselines, have no role in the determination of what is a relevant coast, and the Tribunal does not consider that the relationship of Point A to the territorial sea around Tobago is a sufficient reason for using Point A as a turning point for an adjustment of the delimitation line.

357. Moreover, geography does not support this contention as Point A is situated far north of any relevant coastal frontage. The projection of the coastal frontages of the island of Trinidad and of the island of Tobago comes nowhere near Point A and only becomes relevant to the delimitation much further southeast.

358. Trinidad and Tobago's argument is inextricably linked to the method it uses to determine its relevant frontage. To this end, Trinidad and Tobago has constructed a north-south vector of 69.1 nm in length along what it considers to be its east-facing coastal frontage. This vector is then placed at the outer limit of the claimed EEZ (Point B), which lies 68.3 nm from the intersection of Trinidad and Tobago's EEZ with the Barbados-Guyana equidistance line. As the two distances are comparable, Trinidad and Tobago argues, the vector gives full effect to the claimed coastal frontage using Point A as the turning point.

359. Barbados has argued that the vector used in this way by Trinidad and Tobago does not follow the actual orientation of Trinidad and Tobago's coastline but is drawn on a north-south axis, and that to transpose this north-south vector to the outer limit of the EEZ results in a maximalist claim that has no justification.

360. The Tribunal concludes on this question not only that the "relevant circumstances" provide no justification for the use of Point A as a turning point, but also that the vector approach itself is untenable as a matter of law and method. In fact, such an approach entails projecting straight out the whole coastline, while at the same time moving the projection northwards, without regard to the geographical circumstances the Tribunal considers relevant, and then using the northern limit of that projection as the delimitation line with Barbados. Equidistance and relevant circumstances are simply discarded so as to favour a wholly artificial construction.

F. ACQUIESCENCE AND ESTOPPEL NORTH OF THE EQUIDISTANCE LINE

361. Barbados contends that Trinidad and Tobago is prevented from claiming an adjustment of the equidistance line to the north because Trinidad and Tobago has consistently recognised and acquiesced in Barbados' exercise of sovereignty in the area. Barbados asserts that it has conducted hydrocarbon activities in the area since 1978, particularly in the form of seismic surveys and oil concessions, and that the area has been regularly patrolled by its Coast Guard, and that at no time before 2001 did Trinidad and Tobago protest against these activities.

362. Trinidad and Tobago asserts on its part that no significant activities have been conducted by Barbados in the area north of the equidistance line in the Atlantic, and that such activity as has taken place has been concentrated in the vicinity of Barbados' land territory. In Trinidad and Tobago's view, if there has been any activity at all, it has certainly not been on the scale of the extensive exploration that Barbados suggests. In any event, it is further argued, the equidistance method of delimitation, as noted above, was objected to by Trinidad and Tobago by Diplomatic Note of 1992, which was followed in 2001 by Notes specifically protesting the actual or potential grant of concessions in this area by Barbados. Trinidad and Tobago also claims to have exercised jurisdiction north of the equidistance line in connection with a proposed seismic shoot in 2003.

363. In examining the record of this case, the Tribunal does not find activity of determinative legal significance by Barbados in the area claimed by Trinidad and Tobago north of the equidistance line. Seismic surveys sporadically authorised, oil concessions in the area and patrolling, while relevant do not offer sufficient evidence to establish estoppel or acquiescence on the part of Trinidad and Tobago. Nor, on the other hand, is there proof of any significant activity by Trinidad and Tobago relevant to the exercise of its own claimed jurisdiction north of the equidistance line.

364. Moreover, Trinidad and Tobago's argument to the effect that, as held by the International Court of Justice in *Cameroon v. Nigeria* (I.C.J. Reports 2002, p. 303), oil wells are not in themselves to be considered as relevant circumstances, unless based on express or tacit agreement between the parties, finds application in this context. While the issue of seismic activity was regarded as significant by the International Court of

Justice in the *Aegean Sea* case (I.C.J. Reports 1976, p. 3), the context of that decision on an application for provisional measures is not pertinent to the definitive determination of a maritime boundary.

365. The fact that in 1978 Barbados enacted legislation providing that in the absence of agreement with a neighboring State the boundary of its EEZ would be the equidistance line does not result in any form of recognition of, or acquiescence in, the equidistance line as a definitive boundary by any neighbouring State.

366. The Tribunal accordingly does not consider that the activities of either Party, or the responses of each Party to the activities of the other, themselves constitute a factor that must be taken into account in the drawing of an equitable delimitation line.

G. TRINIDAD AND TOBAGO'S CLAIM TO AN OUTER CONTINENTAL SHELF

367. Trinidad and Tobago principally justifies its claim to the adjustment of the equidistance line on the ground of an entitlement to a continental shelf out to the continental margin defined in accordance with UNCLOS Article 76(4)-(6). To this end, Trinidad and Tobago argues that its continental shelf extends to an area beyond 200 nm from its own baselines that lies within, and beyond, Barbados' 200 nm EEZ so as to follow on uninterruptedly to the outer limit of the continental margin. Trinidad and Tobago asserts that its rights to the continental shelf cannot be trumped by Barbados' EEZ.

368. The Tribunal has concluded above that it has jurisdiction to decide upon the delimitation of a maritime boundary in relation to that part of the continental shelf extending beyond 200 nm. As will become apparent, however, the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm. The problems posed by the relationship in that maritime area of CS and EEZ rights are accordingly problems with which the Tribunal has no need to deal. The Tribunal therefore takes no position on the substance of the problem posed by the argument advanced by Trinidad and Tobago.

H. THE ADJUSTMENT OF THE EQUIDISTANCE LINE

369. Because the Tribunal has found that there should be no adjustment of the equidistance line at Point A of Trinidad and Tobago's claim, the equidistance line continues unbent in its southeasterly direction further out to the ocean. This does not mean, however, that the line will not be subject to an adjustment further out.

370. The Tribunal has found above that the provisional equidistance line needs to be examined in the light of the circumstances that might be relevant to attain the equitable solution called for by UNCLOS Articles 74 and 83.

371. While the Tribunal has found that regional circumstances do not have a role to play in this delimitation, except to the extent that the area to which one party maintains a claim is determined by agreements it has made with a third country in the region, there is one relevant circumstance invoked by Trinidad and Tobago that does indeed have such a role and which needs to be taken into consideration in order to determine whether it is necessary to adjust the equidistance line and, if so, where and to what extent.

372. This relevant circumstance is the existence of the significant coastal frontage of Trinidad and Tobago described above. This particular coastal frontage abuts directly upon the area subject to delimitation and it would be inequitable to ignore its existence. Just as opposite coasts have influenced the orientation of the line from its starting point for a significant distance out to the sea, so too a lengthy coastal frontage abutting directly upon such area is to be given a meaningful influence in the delimitation to be effected. The mandate of UNCLOS Articles 74 and 83 to achieve an equitable result can only be satisfied in this case by the adjustment of the equidistance line.

373. There is next the question of where precisely the adjustment should take place. There are no magic formulas for making such a determination and it is here that the Tribunal's discretion must be exercised within the limits set out by the applicable law. The Tribunal concludes that the appropriate point of deflection of the equidistance line is located where the provisional equidistance line meets the geodetic line that joins (a) the archipelagic baseline turning point on Little Tobago Island with (b) the point of intersection of Trinidad and Tobago's southern maritime boundary with its 200 nm EEZ limit. This point, described in the Tribunal's delimitation line as "10", is situated at

11° 03.70′N, 57° 58.72′W. This point gives effect to the presence of the coastal frontages of both the islands of Trinidad and of Tobago thus taking into account a circumstance which would otherwise be ignored by an unadjusted equidistance line.

374. The delimitation line is then drawn from this point in a straight line in the direction of its terminal point, which is located at the point of intersection of Trinidad and Tobago's southern maritime boundary with its 200 nm EEZ limit. This point, described in the Tribunal's delimitation line as "11", has an approximate geographic coordinate of 10° 58.59′N, 57° 07.05′W. The terminal point is where the delimitation line intersects the Trinidad and Tobago-Venezuela agreed maritime boundary, which as noted establishes the southernmost limit of the area claimed by Trinidad and Tobago. This terminal point marks the end of the single maritime boundary between Barbados and Trinidad and Tobago and of the overlapping maritime areas between the Parties.

375. In effecting this adjustment the Tribunal has been mindful that, as far as possible, there should be no cut-off effects arising from the delimitation and that the line as drawn by the Tribunal avoids the encroachment that would result from an unadjusted equidistance line.

376. The Tribunal having drawn the delimitation line described above, it remains to examine the outcome in the light of proportionality, as the ultimate test of the equitableness of the solution. As has been explained, proportionality is not a mathematical exercise that results in the attribution of maritime areas as a function of the length of the coasts of the Parties or other such ratio calculations, an approach that instead of leading to an equitable result could itself produce inequity. Proportionality is a broader concept, it is a sense of proportionality, against which the Tribunal can test the position resulting from the provisional application of the line that it has drawn, so as so avoid gross disproportion in the outcome of the delimitation.

377. In reaching this conclusion the Tribunal is mindful of the observation of the Chamber of the International Court of Justice in the *Gulf of Maine* case that "maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that

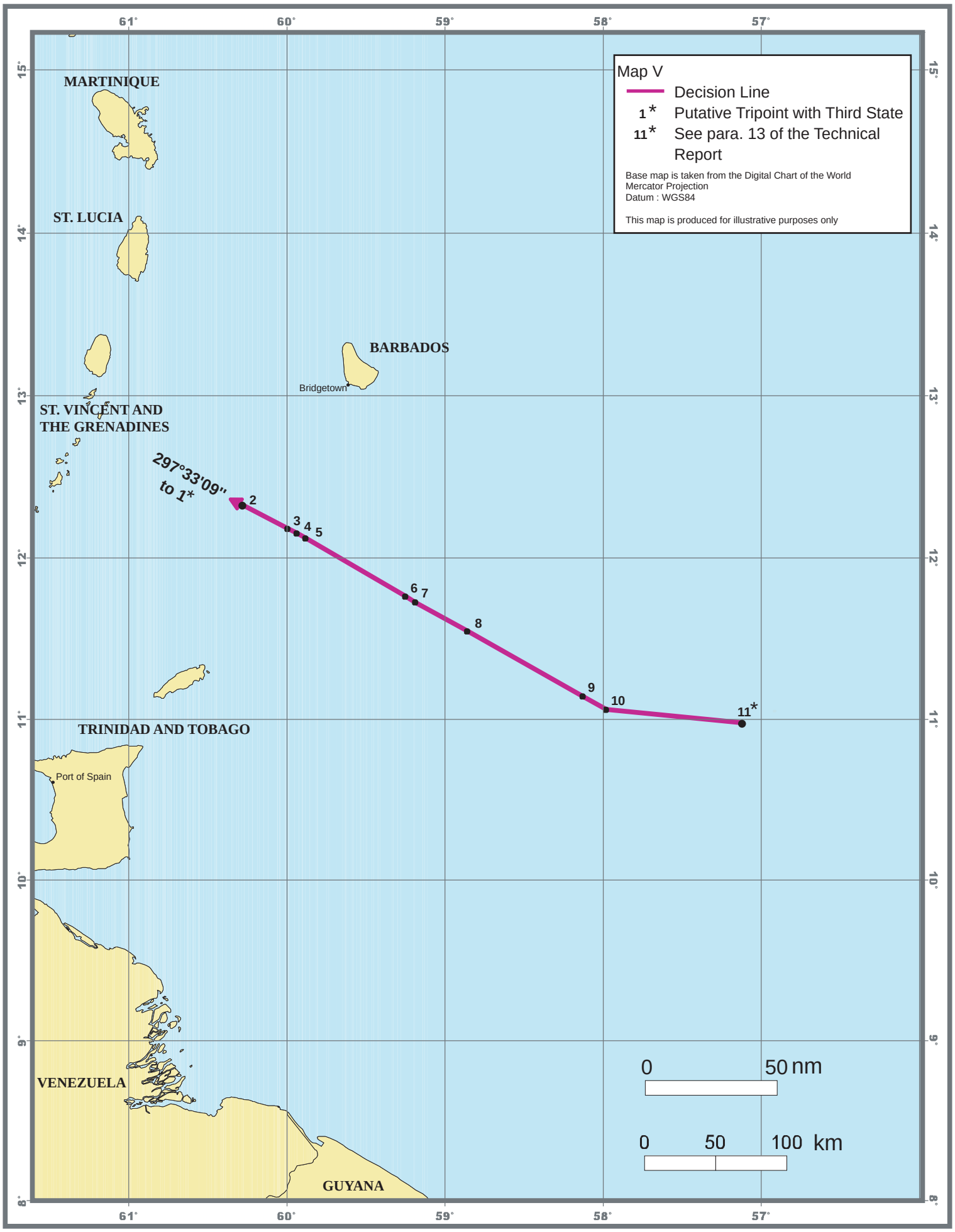
resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction" (I.C.J. Reports 1984, p. 323, at para. 185).

378. In examining the provisional equidistance line in the light of that sense of proportionality, the Tribunal finds that a provisional equidistance line influenced exclusively by short stretches of coasts that are opposite to each other cannot ignore the influence of a much larger relevant coastline constituting coastal frontages that are also abutting upon the area of delimitation. While not a question of the ratio of coastal lengths, it would be disproportionate to rely on the one and overlook the other as if it did not exist. Equity calls for the adjustment of the equidistance line on this basis as well.

379. The Tribunal is also satisfied that the deflection effected does not result in giving effect to the relevant coastal frontages in a manner that could itself be considered disproportionate, as would be the case if the coastal frontages in question were projected straight out to the east. The bending of the equidistance line reflects a reasonable influence of the coastal frontages on the overall area of delimitation, with a view to avoiding reciprocal encroachments which would otherwise result in some form of inequity.

380. In the light of the foregoing analysis, the Tribunal concludes that the maritime boundary between Barbados and Trinidad and Tobago shall run as depicted in the map on the facing page. Map V is illustrative of the line of maritime delimitation; the precise, governing coordinates are set forth below and are explicated in the Appendix to the Award.

381. The verbal description of the maritime boundary is as follows. The delimitation shall extend from the junction of the line that is equidistant from the low water line of Barbados and from the nearest turning point of the archipelagic baselines of Trinidad and Tobago with the maritime zone of a third State that is to the west of Trinidad and Tobago and Barbados. The line of delimitation then proceeds generally south-easterly as a series of geodetic line segments, each turning point being equidistant from the low water line of Barbados and from the nearest turning point or points of the archipelagic


Map V
Decision Line
1* Putative Tripoint with Third State
11* See para. 13 of the Technical Report
Base map is taken from the Digital Chart of the World
Mercator Projection
Datum : WGS84
This map is produced for illustrative purposes only
MARTINIQUE
ST. LUCIA
BARBADOS
Bridgetown
ST. VINCENT AND
THE GRENADINES
297°33'09"
to 1*
2
3
4
5
6
7
8
9
10
11*
TRINIDAD AND TOBAGO
Port of Spain
VENEZUELA
GUYANA
0 50 nm
0 50 100 km
61°
60°
59°
58°
57°
15°
14°
13°
12°
11°
10°
9°
8°

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baselines of Trinidad and Tobago until the delimitation line meets the geodetic line that joins the archipelagic baseline turning point on Little Tobago Island with the point of intersection of Trinidad and Tobago's southern maritime boundary, as referred to in paragraph 374 above, with its 200 nm EEZ limit. The boundary then continues along that geodetic line to the point of intersection just described.

382. The coordinates of the delimitation line are as follows.

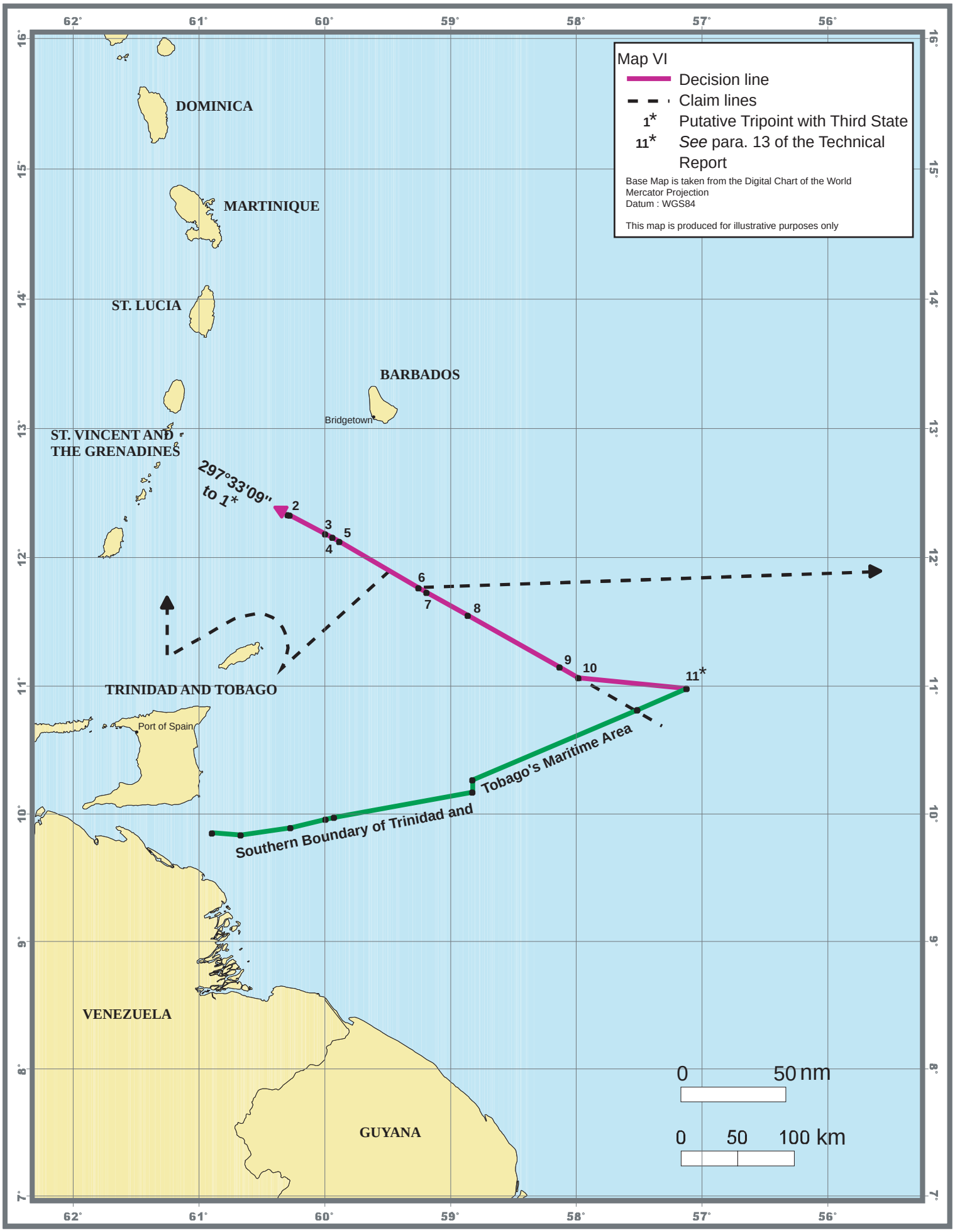
1. The delimitation line is a series of geodetic lines joining the points in the order listed:
   2. 12° 19.56′N, 60° 16.55′W
   3. 12° 10.95′N, 59° 59.53′W
   4. 12° 09.20′N, 59° 56.11′W
   5. 12° 07.32′N, 59° 52.76′W
   6. 11° 45.80′N, 59° 14.94′W
   7. 11° 43.65′N, 59° 11.19′W
   8. 11° 32.89′N, 58° 51.43′W
   9. 11° 08.62′N, 58° 07.57′W
   10. 11° 03.70′N, 57° 58.72′W
   11. Point #11 is the junction of Trinidad and Tobago's southern maritime boundary with its 200 nm EEZ limit, which has an approximate geographic coordinate of: 10° 58.59′N, 57° 07.05′W (reference is made to paragraph 13 of the attached Technical Report of the Tribunal's Hydrographer).

2. The delimitation line extends from Point #2 listed above, along the geodetic line with an initial azimuth of 297° 33′09" until it meets the junction with the maritime zone of a third State, that junction point being Point #1 of this Decision.

3. The geographic coordinates and azimuths are related to the World Geodetic System 1984 (WGS-84) geodetic datum.

4. Geographic coordinate values have been rounded off to 0.01 minutes at the request of the Parties to reflect the accuracy of the points along the low water line and of the turning points of the archipelagic baselines.

383. For the sake of a fuller understanding of the import of the Tribunal's Award, the map facing (Map VI) shows the relevant lines, including that of the southern maritime boundary of Trinidad and Tobago as described in paragraph 6 of the Technical Report accompanying this Award.


Map VI
Decision line
Claim lines
1* Putative Tripoint with Third State
11* See para. 13 of the Technical Report
Base Map is taken from the Digital Chart of the World
Mercator Projection
Datum : WGS84
This map is produced for illustrative purposes only
DOMINICA
MARTINIQUE
ST. LUCIA
BARBADOS
Bridgetown
ST. VINCENT AND THE GRENADINES
297°33'09" to 1*
2
3
4
5
6
7
8
9
10
11*
TRINIDAD AND TOBAGO
Port of Spain
Southern Boundary of Trinidad and Tobago's Maritime Area
VENEZUELA
GUYANA
0 50 nm
0 50 100 km

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DISPOSITIF

384. For the reasons stated in paragraphs 188-218 of this Award, the Tribunal holds that it has jurisdiction in these terms:

(i) it has jurisdiction to delimit, by the drawing of a single maritime boundary, the continental shelf and EEZ appertaining to each of the Parties in the waters where their claims to these maritime zones overlap;

(ii) its jurisdiction in that respect includes the delimitation of the maritime boundary in relation to that part of the continental shelf extending beyond 200 nm; and

(iii) while it has jurisdiction to consider the possible impact upon a prospective delimitation line of Barbadian fishing activity in waters affected by the delimitation, it has no jurisdiction to render a substantive decision as to an appropriate fisheries regime to apply in waters which may be determined to form part of Trinidad and Tobago's EEZ.

385. Accordingly, taking into account the foregoing considerations and reasons,

THE TRIBUNAL UNANIMOUSLY FINDS THAT

1. The International Maritime Boundary between Barbados and the Republic of Trinidad and Tobago is a series of geodetic lines joining the points in the order listed as set forth in paragraph 382 of this Award;

2. Claims of the Parties inconsistent with this Boundary are not accepted; and

3. Trinidad and Tobago and Barbados are under a duty to agree upon the measures necessary to co-ordinate and ensure the conservation and development of flyingfish stocks, and to negotiate in good faith and conclude an agreement that will accord fisherfolk of Barbados access to fisheries within the Exclusive Economic Zone of Trinidad and Tobago, subject to the limitations and conditions of that agreement and to the right and duty of Trinidad and Tobago to conserve and manage the living resources of waters within its jurisdiction.

APPENDIX

Technical Report of the Tribunal's Hydrographer

David H. Gray, M.A.Sc., P.Eng., C.L.S.

1. The geographic coordinates of the pertinent points along the Low Water Line of the coast of Barbados are:

Barbados 1	B1	13° 04′ 41.24542″N,	59° 36′ 48.90963″W
Barbados 2	B2	13° 04′ 31.57388″N,	59° 36′ 25.42871″W
Barbados 3	B3	13° 02′ 46.75981″N,	59° 31′ 55.69412″W
Barbados 4	B4	13° 02′ 40.24680″N,	59° 31′ 37.86967″W
Barbados 5	B5	13° 02′ 40.05335″N,	59° 31′ 37.24482″W
Barbados 6	B6	13° 02′ 40.21456″N,	59° 31′ 36.25823″W
Barbados 7	B7	13° 02′ 46.21169″N,	59° 31′ 07.18662″W
Barbados 8	B8	13° 03′ 08.29753″N,	59° 30′ 14.79852″W
Barbados 9	B9	13° 03′ 08.78115″N,	59° 30′ 14.10790″W
Barbados 10	B10	13° 05′ 00.20132″N,	59° 27′ 47.69746″W
Barbados 11	B11	13° 05′ 11.90349″N,	59° 27′ 34.34557″W

These geographic coordinates were provided by the Parties, with agreement, and were stated to be related to World Geodetic System 1984 (WGS-84).

2. The geographic coordinates of the pertinent turning points of the Trinidad and Tobago archipelagic baseline system are:

Trinidad 1	T1	11° 17′ 45.49028″N,	60° 29′ 33.99944″W
Trinidad 2	T2	11° 21′ 34.49088″N,	60° 30′ 46.02075″W
Trinidad 3	T3	11° 21′ 45.49173″N,	60° 31′ 31.00940″W
Trinidad 4	T4	11° 20′ 03.49398″N,	60° 38′ 36.00089″W

These geographic coordinates were provided by the Parties, with agreement, and were stated to be related to World Geodetic System 1984 (WGS-84).

3. The turning points along the equidistance line between Barbados and Trinidad and Tobago are:

Point	From	From	From	Latitude	Longitude
A.	T4	T3	B1	12° 38′ 53.80651″N,	60° 54′ 22.44157″W
B.	T3	T2	B1	12° 19′ 33.70864″N,	60° 16′ 33.00194″W
C.	T2	B1		12° 13′ 09.28660″N,	60° 03′ 52.68858″W

D.	T2	B1	B2	12° 10′ 57.11540″N,	59° 59′ 31.68810″W
E.	T2	B2	B3	12° 09′ 12.13386″N,	59° 56′ 06.33455″W
F.	T2	B3	B4	12° 07′ 19.07138″N,	59° 52′ 45.59547″W
G.	T2	B4	B5	12° 05′ 41.88429″N,	59° 49′ 54.18423″W
H.	T2	B5	B6	11° 48′ 07.35321″N,	59° 19′ 00.16556″W
I.	T2	B6	B7	11° 45′ 48.23439″N,	59° 14′ 56.37611″W
J.	T2	T1	B7	11° 43′ 38.75334″N,	59° 11′ 11.23435″W
K.	T1	B7	B8	11° 32′ 53.69120″N,	58° 51′ 26.05872″W
L.	T1	B8	B9	11° 08′ 37.26750″N,	58° 07′ 34.14883″W
M.	T1	B9	B10	10° 59′ 42.54270″N,	57° 51′ 32.71969″W

4. Since Point "C" is on the geodetic line between Points "B" and "D", Point "C" can be excluded as a turning point of the delimitation line. Similarly, since Points "G" and "H" are within 1 metre of the geodetic line between Points "F" and "I", Points "G" and "H" can be excluded as turning points of the delimitation line.

5. The geodetic azimuth from Point "B" towards Point "A" is 297° 33′ 08.97″.

6. The Trinidad and Tobago/Venezuela Agreement establishing the maritime boundary between the two countries defines geographic coordinates in terms of the 1956 Provisional South American Datum.[1] Points 1 through 22 are described by latitudes and longitudes on that datum. However Point "21-a" is defined as being on an azimuth of 67° from Point 21 and on the outer limit of the Exclusive Economic Zone. Geodetic azimuth is assumed, since all lines are described as being geodesics. The Agreement does not state which State's EEZ is being referred to in the definition of Point "21-a".

7. The conversion of the geographic coordinates of Points 21 and 22 from 1956 Provisional South American Datum to WGS 84 was done using the mathematical constants for the standard Molodensky formulae given by the "Users' Handbook on

[1] Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the delimitation of marine and submarine areas, 18 April 1990, *reprinted in The Law of the Sea – Maritime Boundary Agreements (1985-1991)* pp. 25-29 (Office for Ocean Affairs and the Law of the Sea, United Nations, New York 1992).

Datum Transformations Involving WGS-84".[2] The 1956 Provisional South American Datum coordinates and the resulting transformed coordinates are:

21.	10° 16′ 01″N,	58° 49′ 12″W	1956 PSAD
22.	11° 24′ 00″N,	56° 06′ 30″W	1956 PSAD
21.	10° 15′ 49.82297″N,	58° 49′ 17.35061″W	WGS 84
22.	11° 23′ 48.99715″N,	56° 06′ 34.89543″W	WGS 84

8. The approximate location of the relevant point on the Venezuela low water line, taken from British Admiralty chart 517,[3] which is based on WGS 84, that is used to construct the EEZ of Venezuela in the vicinity of the Trinidad and Tobago/Venezuela Agreement Line is 8° 31′ N, 59° 58′W.

9. The intersection of the EEZ of Venezuela and the geodetic line from Point 21 which has an initial azimuth of 67° is at:

   Point 21-a 10° 48′ 43.05918″N, 57° 30′ 32.28158″W.

10. The geodetic azimuth from Point 21-a to 22 is 66° 55′ 25.876″.

11. The intersection of the 200 nautical mile EEZ limit of Trinidad and Tobago and the geodetic line from Point 21-a which has an initial geodetic azimuth of 66° 55′ 25.876″ is at:

    T 10° 58′ 35.53602″N, 57° 07′ 02.73864″W.

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[2] *Users' Handbook on Datum Transformations Involving WGS 84*, International Hydrographic Organization, Special Publication No. 60 (Monaco, 3rd ed. July 2003).

[3] British Admiralty Chart 517, "Trinidad to Cayenne", Scale 1:1,500,000, Taunton, UK, 6 March 2003, corrected for Notices to Mariners up to 4715/05.

12. The point of intersection of the geodetic line from Point "T" to the archipelagic baseline turning point on Little Tobago Island (Point T1 in paragraph 2, above) which is equidistant from the low water line of Barbados and from the archipelagic baseline turning point on Little Tobago Island is at:

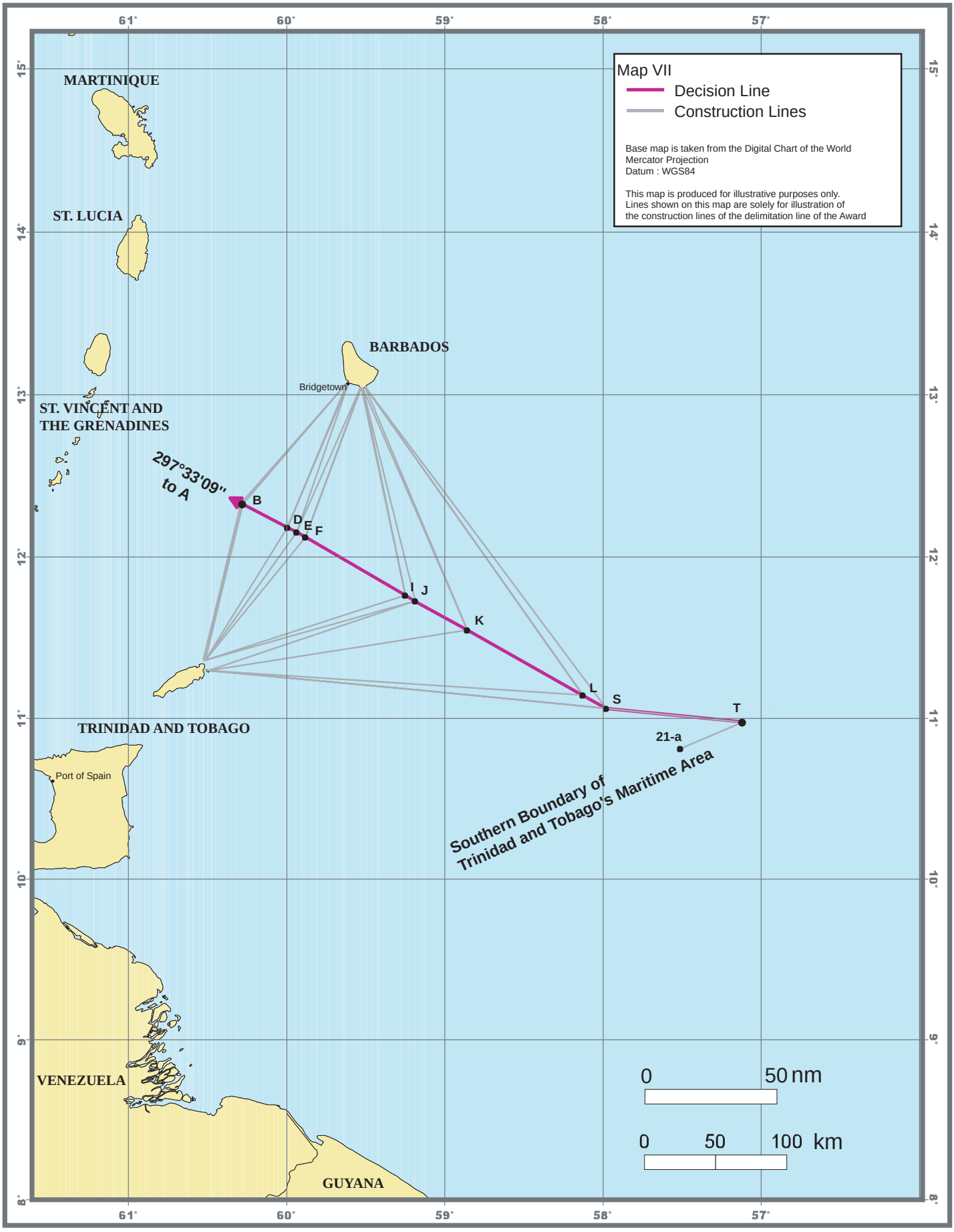
S 11° 03′ 42.14967″N, 57° 58′ 43.22048″W.

13. Because Trinidad and Tobago's southern maritime boundary lacks a precise technical definition, the inexactitude of the mathematical conversion from 1956 Provisional South American Datum to WGS-84 particularly offshore, and limited precision of a small-scale nautical chart, the geographic coordinate of Point "T" must be regarded as approximate until such definition is precisely established.

14. Because the Parties asked that the coordinates used in the Dispositif be expressed in 0.01 minutes of arc of Latitude and Longitude, and because selected points have now been omitted, the correlation of points in this Technical Report and the Dispositif are interrelated in the following table:

Decision Point	Technical Report Pt.	Latitude	Longitude
2.	B	12° 19.56′N	60° 16.55′W
3.	D	12° 10.95′N	59° 59.53′W
4.	E	12° 09.20′N	59° 56.11′W
5.	F	12° 07.32′N	59° 52.76′W
6.	I	11° 45.80′N	59° 14.94′W
7.	J	11° 43.65′N	59° 11.19′W
8.	K	11° 32.89′N	58° 51.43′W
9.	L	11° 08.62′N	58° 07.57′W
10.	S	11° 03.70′N	57° 58.72′W
11.	T	10° 58.59′N (approx.)	57° 07.05′W (approx.)

See also Map VII, facing.


Map VII
Decision Line
Construction Lines
Base map is taken from the Digital Chart of the World
Mercator Projection
Datum : WGS84
This map is produced for illustrative purposes only.
Lines shown on this map are solely for illustration of
the construction lines of the delimitation line of the Award
MARTINIQUE
ST. LUCIA
BARBADOS
Bridgetown
ST. VINCENT AND
THE GRENADINES
297°33'09"
to A
B
D
E
F
I
J
K
L
S
T
21-a
TRINIDAD AND TOBAGO
Port of Spain
Southern Boundary of
Trinidad and Tobago's Maritime Area
VENEZUELA
GUYANA
0 50 nm
0 50 100 km
61°
60°
59°
58°
57°
15°
14°
13°
12°
11°
10°
9°
8°

Delimitation of Maritime Boundary between Guyana and Suriname,
Award, 17 September 2007.

ARBITRAL TRIBUNAL CONSTITUTED PURSUANT TO ARTICLE 287, AND IN ACCORDANCE WITH ANNEX VII, OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

IN THE MATTER OF AN ARBITRATION BETWEEN:

GUYANA

- AND -

SURINAME

AWARD OF THE ARBITRAL TRIBUNAL

The Arbitral Tribunal:

H.E. Judge L. Dolliver M. Nelson, President

Professor Thomas M. Franck

Dr. Kamal Hossain

Professor Ivan Shearer

Professor Hans Smit

Registry:

Permanent Court of Arbitration

The Hague, 17 September 2007

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AGENTS, COUNSEL AND OTHER REPRESENTATIVES OF THE PARTIES

GUYANA

- Hon. S.R. Insanally, O.R., C.C.H., M.P. Minister of Foreign Affairs
- Hon. Doodnauth Singh, S.C., M.P., Attorney General and Minister of Legal Affairs
- Ambassador Elisabeth Harper, Director General, Ministry of Foreign Affairs
- Mr. Keith George, Head, Frontiers Division, Ministry of Foreign Affairs
- Ambassador Bayney Karran, Ambassador of Guyana to the United States
- Ms. Deborah Yaw, First Secretary, Embassy of Guyana, Washington
- Mr. Forbes July, Second Secretary, Embassy of Guyana, Washington
- Sir Shridath Ramphal, S.C., Co-Agent for Guyana
- Mr. Paul S. Reichler, Foley Hoag LLP, Co-Agent for Guyana
- Professor Payam Akhavan, Associate Professor, Faculty of Law, McGill University, Co-Agent for Guyana
- Professor Philippe Sands, Q.C., Professor of Law, University College London
- Professor Nico Schrijver, Professor of Public International Law, University of Leiden
- Mr. Lawrence Martin, Foley Hoag LLP
- Mr. Andrew Loewenstein, Foley Hoag LLP
- Ms. Sarah Altschuller, Foley Hoag LLP
- Ms. Nienke Grossman, Foley Hoag LLP
- Ms. Clara Brillembourg, Foley Hoag LLP
- Ms. Blinne Ní Ghrálaigh, Matrix Chambers, London

SURINAME

- Hon. Lygia L.I. Kraag-Keteldijk, Minister of Foreign Affairs and Agent
- Mr. Caprino Allendy, Deputy Speaker of Parliament
- Mr. Henry Iles, Ambassador of Suriname
- Mr. Winston Jessurun, Member of Parliament
- Ms. Jennifer Pinas, Ministry of Foreign Affairs
- Mr. Krish Nandoe, Ministry of Justice and Police
- Mr. Hans Lim A Po, Co-Agent for Suriname
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- Dr. Galo Carrera, Scientific/Technical Expert
- Mr. Scott Edmonds, International Mapping Associates
- Mr. Thomas Frogh, International Mapping Associates
- Mr. Coalter Lathrop, Cartography Consultant, Sovereign Geographic, Inc. Boundary Consultation and Cartographic Services
- Mr. David Swanson, Cartography Consultant, David Swanson Cartography
- Mr. Brian J. Vohrer, Attorney, LeBoeuf, Lamb, Greene & MacRae LLP
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- Ms. Rebecca R. Silber, Attorney, Cravath, Swaine & Moore LLP
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- Ms. Brittany Olwine, Legal Assistant, Cravath, Swaine & Moore LLP
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CHAPTER I - PROCEDURAL HISTORY

1. By its Notification and Statement of Claim dated 24 February 2004, Guyana initiated arbitration proceedings concerning the delimitation of its maritime boundary with Suriname, and concerning alleged breaches of international law by Suriname in disputed maritime territory. Guyana has brought these proceedings pursuant to Articles 286 and 287 of the 1982 United Nations Convention on the Law of the Sea (the "Convention") and in accordance with Annex VII to the Convention. Guyana and Suriname (the "Parties") ratified the Convention on 16 November 1993 and 9 July 1998, respectively.

2. In its Notification and Statement of Claim, Guyana stated that the Parties are deemed to have accepted arbitration in accordance with Annex VII of the Convention by operation of Article 287(3) of the Convention. Guyana noted that neither Party had made a declaration pursuant to Article 287(1) of the Convention regarding their choice of compulsory procedures, and that neither Party had made a declaration pursuant to Article 298 regarding optional exceptions to the applicability of the compulsory procedures provided for in Section 2.

3. In its Notification and Statement of Claim, Guyana appointed Professor Thomas Franck as a member of the Arbitral Tribunal in accordance with Article 3(b) of Annex VII. In its 23 March 2004 "Notification under Annex VII, Article 3(c) of UNCLOS Regarding Appointment to the Arbitral Tribunal with Reservation", Suriname appointed Professor Hans Smit in accordance with Article 3(c) of Annex VII, but reserved its right "to present its views with regard to jurisdiction and any other preliminary matters to the full Arbitral Tribunal when it is constituted".

4. By joint letter to the Secretary-General of the Permanent Court of Arbitration ("PCA") dated 15 June 2004, the Parties noted that they had agreed to the appointment of the remaining three members of the Tribunal in accordance with Article 3(d) of Annex VII, being:

H.E. Judge L. Dolliver M. Nelson (President);
Dr. Allan Philip; and
Dr. Kamal Hossain.

5. In their 15 June 2004 joint letter to the Secretary-General of the PCA, the Parties also requested that the PCA serve as Registry to the Tribunal.

6. On 16 June 2004, the Secretary-General of the PCA responded that the PCA was willing to serve as Registry for the proceedings. Ms. Bette Shifman was appointed to serve as Registrar with Mr. Dane Ratliff acting as assistant. Ms. Shifman was subsequently replaced by Ms. Anne Joyce, who was in turn replaced by Mr. Brooks W. Daly.

7. On 30 June 2004, the Parties sent draft Rules of Procedure for the conduct of the proceedings to the Tribunal for consideration at a procedural meeting to be held on 30 July 2004 in London.

8. At a procedural meeting held on 30 July 2004 in London, the Tribunal adopted its Rules of Procedure and Terms of Appointment with the Parties' consent. The Rules of Procedure specified that Guyana should submit its Memorial on or before 15 February 2005, Suriname should submit its Counter-Memorial on or before 1 October 2005, Guyana could submit a Reply on or before 1 March 2006, and that Suriname could submit a Rejoinder on or before 1 August 2006.

9. On 3 September 2004, Dr. Allan Philip tendered his resignation. Dr. Philip died later that same month. The Tribunal regrets the loss of his commendable service.

10. In a letter dated 3 September 2004, the President of the Tribunal asked the Parties to attempt to agree on a replacement for Dr. Philip in accordance with Article 6(1)(b) of the Tribunal's Rules of Procedure and Article 3(d) of Annex VII to the Convention.

11. In a joint letter dated 29 September 2004, the Parties informed the Tribunal that they had agreed that hearings should be held in Washington, D.C., at the headquarters of the Organization of the American States ("OAS").

12. In a further joint letter dated 30 September 2004, the Parties informed the Tribunal that they had not been able to agree on a substitute arbitrator for Dr. Philip and requested the Arbitral Tribunal to select the substitute arbitrator in accordance with Article 6(b) of the Tribunal's Rules of Procedure.

13. In its letter to the President dated 1 October 2004, Guyana set out its views on the replacement procedure for Dr. Philip, and, in its letter to the President dated 6 October 2004, Suriname did the same.

14. In a letter to the Parties dated 27 October 2004, the President of the Tribunal communicated the Tribunal's selection of Professor Ivan Shearer as substitute arbitrator for Dr. Philip in accordance with Article 6(1)(b) of its Rules of Procedure.

15. Guyana, in its letter to the President dated 28 October 2004, and Suriname, in its letter to the President dated 29 October 2004, indicated their acceptance of Professor Shearer as substitute arbitrator for Dr. Philip.

16. In a letter to the President dated 4 November 2004, Guyana stated that Suriname had objected to Guyana's access to specific files located in the archives of The Netherlands Ministry of Foreign Affairs, and reserved its right to petition the Tribunal to require Suriname to withdraw its objection to Guyana having access to those files.

17. In a letter to the President dated 22 December 2004, Guyana set out its views on Suriname's refusal of access to certain files in the archives of The Netherlands Ministry of Foreign Affairs, and requested the Tribunal to "require Suriname to take all steps necessary to enable the parties to have access to historical materials on an equal basis and immediately to advise The Netherlands that it withdraws its objection of 7 December [2004]".

18. In its letter to the President dated 27 December 2004, Suriname responded to Guyana's 22 December 2004 letter, stating that "this is not a case of 'equal access' to public records. The records in question are not public", and, "[t]hey cover many sensitive subjects including national security matters and matters pertaining to Suriname's other territorial disputes with Guyana". Further, Suriname stated that access to the files was restricted under a general policy of The Netherlands regarding records relevant to ongoing international boundary disputes.

19. Guyana responded by letter to the President dated 4 January 2005 and requested that the Tribunal "adopt an Order requiring both parties to cooperate and to refrain from

interference with each other's attempts to obtain documents or other information from non-parties; and, in the case of any interference already consummated, to take all necessary action to undo the effects of such interference".

20. In a letter to the Parties dated 17 January 2005, the President solicited Suriname's comments on Guyana's letter dated 4 January 2005 and emphasized to both Parties the importance of equality of arms and good faith cooperation in international legal proceedings, recalling that these principles are laid down in the instruments governing the arbitration, including Articles 5 and 6 of Annex VII to the Convention, and Articles 7(1) and (2) of the Tribunal's own Rules of Procedure.

21. In its letter to the President dated 18 January 2005, Suriname requested an extension to the deadline set for its response to the President's 17 January 2005 letter, from 21 January 2005 to 24 January 2005. This request was granted.

22. In its letter to the President dated 24 January 2005, Guyana requested an extension of two weeks for the submission of its Memorial, from 15 February 2005 until 1 March 2005, which the Tribunal granted.

23. In its letter to the President dated 26 January 2005, Suriname assented to Guyana's request for an extension noting a reciprocal offer made by Guyana to agree to an extension of two weeks to the deadline for submission of the Counter-Memorial to 1 November 2005. The Tribunal consented to the extension.

24. On 27 January 2005, Suriname responded to the Tribunal by providing comments on Guyana's letter dated 4 January 2005, observing, *inter alia*, that some of the files in question are "unrelated to the maritime boundary dispute" and involve third party States.

25. In a letter to the President dated 1 February 2005, Guyana reiterated its request for an Order in the terms set out in its letter of 4 January 2005.

26. On 7 February 2005, the President invited Guyana to submit a "list of the specific documents and information in the archives of The Netherlands Ministry of Foreign Affairs it is seeking to access, indicating in general terms the relevance of each item

solely as it pertains to the maritime boundary dispute before this Arbitral Tribunal", and invited Suriname to "communicate ... Suriname's position as to whether the specific items sought by Guyana in that list should be released to Guyana, and if not, on what basis they should be withheld" following receipt of the list.

27. In a letter to the President dated 14 February 2005, Guyana responded to the Tribunal's letter dated 7 February 2005 by providing a list of documents to which it sought access at The Netherlands Ministry of Foreign Affairs, and a list of subjects those documents "consist of, discuss or relate to, ... all of which self-evidently pertain directly to the maritime boundary dispute presently before the [T]ribunal".

28. In a letter to the President dated 21 February 2005, Suriname stated that "Guyana has not identified a single specific document that it needs nor has it even attempted to explain why it needs the documents in question", and that "Suriname's position is that none of the items on Guyana's list ... is a file or document that Suriname has an obligation under international law to make available to Guyana".

29. On 22 February 2005, Guyana submitted its Memorial.

30. In a letter to the President dated 2 March 2005, Guyana stated that "since access to [the] files was denied, Guyana [was] not in a position to identify the documents with any greater precision", and suggested modalities by which the Tribunal might examine the documents in question.

31. In a letter to the President dated 9 March 2005, Suriname stated that Guyana had not complied with the Tribunal's 7 February 2005 request, and that Guyana's request should "be denied or at least held in abeyance until after Suriname's Counter-Memorial is submitted".

32. In a letter to the President dated 28 March 2005, Guyana argued that it required "access to the documents at the earliest possible time, so as to allow sufficient time for their precise translation from Dutch to English, careful review of their contents, and their potential use in connection with the submission of Guyana's Reply", adding that "[d]ue

to the shortness of time ... Guyana requires access to the documents before Suriname's Counter-Memorial is filed".

33. In a letter to the President dated 30 March 2005, Suriname noted that Guyana's letter was "highly inappropriate" and that "[t]his matter has been fully discussed".

34. In a letter to the Parties dated 2 May 2005, the President invited the Parties to set out their positions in full concerning Guyana's request for an Order and the Tribunal's power to make such an Order, and established 6 and 7 July 2005 as dates for a hearing on the matter in The Hague.

35. On 4 May 2005, Suriname wrote to the President, to note that it would be likely to file Preliminary Objections, to request an oral hearing on any such Preliminary Objections should they be filed, and to request that the deadline for submissions on access to documents be extended from 23 May 2005 to 13 June 2005.

36. By letter dated 6 May 2005, the President extended the deadline for submissions on access to documents from 23 May 2005 to 13 June 2005.

37. In a letter dated 6 May 2005, Guyana set out its views on the proposed hearing dates and noted that it would oppose any proposal to bifurcate the proceedings to hold a separate hearing on Suriname's Preliminary Objections.

38. On 13 May 2005, Suriname indicated that it would file Preliminary Objections on jurisdiction and admissibility pursuant to Article 10(2)(a) of the Tribunal's Rules of Procedure, and requested suspension of proceedings on the merits and an oral hearing on its Preliminary Objections.

39. In a letter to the President dated 17 May 2005, Guyana opposed Suriname's proposals as to a separate pleading schedule and an oral hearing to decide the issues raised in Suriname's Preliminary Objections.

40. On 20 May 2005, Suriname filed Preliminary Objections on jurisdiction and admissibility.

41. In a letter to the Parties dated 24 May 2005, the President invited submissions by 10 June 2005 on "whether or not the preliminary objections should be dealt with as a preliminary matter and the proceedings suspended until these objections have been ruled on" and noted that the Tribunal would on the basis of those views determine whether to reserve time at the hearing on 7 and 8 July 2005 to discuss the procedure for dealing with Suriname's Preliminary Objections.

42. Suriname, in its letter to the President dated 26 May 2005, submitted its views in response to the President's letter to the Parties dated 24 May 2005, and, *inter alia*, requested that its Preliminary Objections "be dealt with as a preliminary matter and that the proceedings on the merits remain suspended until there has been a decision on those Preliminary Objections".

43. In a letter to the President dated 10 June 2005, Guyana responded to the President's 24 May 2005 request, submitting, *inter alia*, that none of Suriname's Preliminary Objections could "be said to be preliminary (or exclusively preliminary) in character, and none [could] properly be said to go exclusively to the question of the Tribunal's jurisdiction". Guyana submitted that the proceedings should not be suspended, and that consideration of Suriname's Preliminary Objections should be joined to the merits.

44. On 13 June 2005, the Parties submitted further views on Guyana's application for an Order requesting access to documents in the archives of The Netherlands Ministry of Foreign Affairs.

45. By letter dated 23 June 2005, the President of the Tribunal invited the Parties to a meeting in The Hague on 7 and 8 July 2005, at which each Party would 1) "be given [the opportunity] to present its case on access to documents held in [The Netherlands' National Archives]", and 2) be given an opportunity to present its arguments on whether Suriname's Preliminary Objections should be "ruled on as a preliminary issue, or whether a ruling on these Objections should be made in the Tribunal's final [a]ward". The President informed the Parties of the Tribunal's intention to issue an Order disposing of these matters subsequent to the meeting.

46. The Tribunal met with the Parties in The Hague on 7 and 8 July 2005 and heard the Parties' arguments on the issues identified in the President's 23 June 2005 letter.

47. On 18 July 2005, the Tribunal issued Order No. 1 entitled "Access to Documents", which sets out in operative part:

> THE ARBITRAL TRIBUNAL UNANIMOUSLY DECIDES AND ORDERS:
>
> 1. the Tribunal shall not consider any document taken from a file in the archives of The Netherlands to which Guyana has been denied access;
>
> 2. Suriname shall take all measures within its power to ensure that Guyana have timely access to the entire file from which any such document already introduced or to be introduced into evidence was taken, either by withdrawing its objections made to The Netherlands government, or, if this proves unsuccessful, by providing such file directly to Guyana;
>
> 3. each Party may request the other Party, through the Tribunal, to disclose relevant files or documents, identified with reasonable specificity, that are in the possession or under the control of the other Party;
>
> 4. the Tribunal shall appoint, pursuant to article 11(3) of the Tribunal's Rules of Procedure and in consultation with the Parties, an independent expert competent in both the Dutch and English languages;
>
> 5. the expert shall, at the request of the Party producing the file or document, review any proposal by that Party to remove or redact parts of that file or document [as each Party may have a legitimate interest in the non-disclosure of information that does not relate to the present dispute, or which, for other valid reasons, should be regarded as privileged or confidential].
>
> 6. any disputes between the Parties concerning a Party's failure or refusal to produce, in whole or in part, any document or file referred to in paragraphs 1 and 2, shall be resolved in a timely manner by the expert referred to in paragraph 4 of this Order;
>
> 7. as provided in article 11(4) of the Tribunal's Rules of Procedure, the Parties shall cooperate fully with the expert appointed pursuant to paragraph 4 of this Order.

48. On 18 July 2005, the Tribunal also issued Order No. 2 entitled "Preliminary Objections", which sets out in operative part:

THE ARBITRAL TRIBUNAL UNANIMOUSLY DECIDES AND ORDERS:

1. under article 10 of the Tribunal's Rules of Procedure, the submission of Suriname's Preliminary Objections did not have the effect of suspending these proceedings;

2. because the facts and arguments in support of Suriname's submissions in its Preliminary Objections are in significant measure the same as the facts and arguments on which the merits of the case depend, and the objections are not of an exclusively preliminary character, the Tribunal does not consider it appropriate to rule on the Preliminary Objections at this stage;

3. having ascertained the views of the parties, the Tribunal shall, in accordance with article 10(3) of the Tribunal's Rules of Procedure, rule on Suriname's Preliminary Objections to jurisdiction and admissibility in its final award;

4. after the Parties' written submissions have been completed, the Tribunal shall, in consultation with the Parties, determine the further procedural modalities for hearing the Parties' arguments on Suriname's Preliminary Objections in conjunction with the hearing on the merits provided for in article 12 of the Tribunal's Rules of Procedure.

49. By letter to the President dated 20 July 2005, Guyana requested certain "relevant files" in the possession or under the control of Suriname, pursuant to the Tribunal's Order No. 1.

50. On 25 July 2005, Suriname asked the Tribunal to reject Guyana's request for access to documents made on 20 July 2005, but stated that it would comply with its obligations under paragraph 2 of Order No. 1.

51. Suriname wrote to the President again on 29 July 2005, setting out the manner in which it intended to implement paragraph 2 of Order No. 1, and agreed to give Guyana access to certain files and documents, provided they did not exclusively concern the maritime boundary between Suriname and French Guiana or exclusively concern the land boundary dispute between British Guiana and Suriname.

52. On 2 August 2005, Guyana renewed its request, by letter to the President, for disclosure of the files it had identified on 20 July 2005 pursuant to paragraph 3 of Order No. 1 and set out its reasons why Suriname's proposal for the handling of File 169A would violate paragraph 2 of Order No. 1.

53. On 8 August 2005, Suriname clarified by letter to the President that it interpreted paragraph 3 of Order No. 1 to mean that "if Suriname chooses not to present any documents from The Netherlands files, the paragraph 2 procedure does not apply and Guyana will have no right of access to those files unless it can make a showing of specific need for specific documents, beyond a general claim of 'relevance'", and asked the Tribunal to confirm that Suriname's reading was correct. Suriname also stated that documents concerning the boundary between French Guiana and Suriname "have nothing to do with the case before the Tribunal", and that, if the independent expert was expected to make determinations of relevance on his own, it would be appropriate for the Parties to ask the Tribunal to review those determinations. Suriname agreed nonetheless to arrange for Files 161 and 169A to be submitted to the independent expert.

54. In its letter dated 12 August 2005, Guyana explained its view that the role of the independent expert was "to review any proposal by a Party to remove or redact a file or document, and to resolve in a timely manner any dispute between the Parties over the failure or refusal of a Party to produce, in whole or in part, any such file or document". Guyana stated that it was "ready and willing" to disclose documents to Suriname in accordance with paragraph 3 of Order No. 1.

55. By an e-mail dated 23 August 2005, the President circulated draft terms of reference for the independent expert, inviting the Parties' comments.

56. On 25 August 2005, Guyana set out its comments by letter to the President on the role of the independent expert and on the draft terms of reference.

57. In a letter to the President dated 30 August 2005, Suriname commented on the role of the independent expert and on the draft terms of reference, reiterating its request for interpretation of Order No. 1.

58. By letter to the President dated 31 August 2005, Guyana expressed its concern that the expert should act expeditiously regarding Guyana's request for access to documents.

59. In his e-mail to the Parties dated 13 September 2005, the President proposed to appoint Professor Hans van Houtte as the independent expert pursuant to paragraph 4 of Order No. 1.

60. On 16 September 2005, both Parties wrote to the President endorsing the appointment of Professor van Houtte as the independent expert pursuant to paragraph 4 of Order No. 1.

61. Suriname notified the Tribunal, by letter to the President dated 4 October 2005, that it would be represented by a new Agent, the Honourable L.I. Kraag-Keteldijk, Minister of Foreign Affairs for the Republic of Suriname, who replaced the Honourable Maria E. Levens.

62. On 12 October 2005, the Tribunal issued Order No. 3, the operative part of which provides as follows:

> THE ARBITRAL TRIBUNAL UNANIMOUSLY ORDERS:
>
> 1. Prof. Hans van Houtte is appointed to serve the Arbitral Tribunal as the independent expert pursuant to paragraph 4 of Order No. 1;
>
> 2. the attached terms of reference for the independent expert appointed pursuant to paragraph 4 of Order No. 1 are adopted; and
>
> 3. the Arbitral Tribunal shall finally resolve any disputes that the independent expert cannot resolve pursuant to paragraph 2.12 of the terms of reference.
>
> ***
>
> INDEPENDENT EXPERT'S TERMS OF REFERENCE
>
> IN ACCORDANCE WITH TRIBUNAL ORDER NO. 1
>
> 1. BACKGROUND
>
> 1.0. In the context of the arbitration before the Arbitral Tribunal concerning the delimitation of the maritime boundary between Suriname and Guyana ("the Parties"), the Parties are in dispute concerning access to certain documents in the archives of The Netherlands Ministry of Foreign Affairs. The Tribunal's "Order No. 1 of 18 July 2005, Access to Documents" ("the Order") summarizes the arguments of the Parties regarding "Guyana's application for an Order requesting

access to documents in The Netherlands' archives, and is attached hereto as "Annex 1".

1.1. Paragraph 4 of the Order provides:

the Tribunal shall appoint, pursuant to article 11(3) of the Tribunal's Rules of Procedure and in consultation with the Parties, an independent expert competent in both the Dutch and English languages.

1.2. The Expert has signed a confidentiality undertaking and declared that he "will, as directed by the Arbitral Tribunal, perform his duties honourably and faithfully, impartially and conscientiously, and will refrain from divulging or using, outside the context of the tasks to be performed by him in this arbitration, any documents, files and information which may come to his knowledge in the course of the performance of his task."

1.3. The Parties are to cooperate with the Expert pursuant to paragraph 7 of the Order, which reads:

as provided in article 11(4) of the Tribunal's Rules of Procedure, the Parties shall cooperate fully with the expert referred to in paragraph 4 of this Order.

1.4. The Expert or the Tribunal may terminate this agreement at any time by providing notice of intent to terminate one month before the termination should become effective.

1.5. The Tribunal reserves the right to modify these Terms of Reference from time to time as it determines necessary.

2. SCOPE

General

2.0. The Expert shall consult the Tribunal when in doubt regarding questions of procedure. The Expert shall follow such guidelines for determining relevance as may be communicated to him by the Tribunal, including attempting to distinguish between files and documents that relate exclusively to the land boundary between the Parties, other disputes or boundaries with third Parties, and those that relate to the maritime boundary between the Parties to this dispute. In light of the Parties' arguments, and in accordance with the Rules of Procedure of the Arbitral Tribunal, the United Nations Convention on the Law of the Sea ("UNCLOS"), and the relevant Tribunal Orders, the Expert shall not, in carrying out any tasks associated with this section 2, be bound by strict rules of evidence and may evaluate documents or files in any form permitted by the Arbitral Tribunal. The Tribunal, in its final award, will decide on the relevance, cogency and weight to be given to any files or documents, or parts thereof, ultimately disclosed and relied upon by the Parties in their pleadings.

Procedure to be followed pursuant to paragraph 5 of the Order

2.1. Paragraph 5 of the Order provides:

the expert shall, at the request of the Party producing the file or document, review any proposal by that Party to remove or redact parts of that file or document for the reasons set forth under (c) in the last preambular paragraph of this Order.

2.2. Sub-paragraph (c) of the last preambular paragraph of the Order provides:

each Party may nevertheless have a legitimate interest in the non-disclosure of information that does not relate to the present dispute, or which, for other valid reasons, should be regarded as privileged and confidential.

2.3. In accordance with paragraphs 2, 3 and 5 of the Order, where a Party has invoked paragraph 5 of the Order, and produced a file or document, but proposed removal or redaction of it for the reasons set forth in sub-paragraph (c) of the last preambular paragraph of the Order, the Party proposing removal or redaction shall produce the entire un-redacted file or document for the Expert's inspection. After having satisfied himself that the file or document before him is complete, the Expert may invite the Party seeking to redact or remove the files or documents, to set out, and/or elaborate on reasons already given, why those documents or files (or parts thereof) should be removed or redacted. Where the Expert so invites the Party seeking to redact or remove files or documents, he shall thereafter invite the Party seeking access to the documents or files, to comment on the reasons given by the Party seeking to withhold the documents or files.

2.4. The Expert shall produce a report on his findings, preserving to the fullest extent possible the confidential nature of the files or documents at issue, and setting out the reasons for his conclusions. The report shall be communicated to the Parties and the Tribunal. The Tribunal will consider the report and determine whether redaction or removal is appropriate.

Procedure to be followed pursuant to paragraph 3 of the Order

2.5. Paragraph 3 of the Order provides:

each Party may request the other Party, through the Tribunal, to disclose relevant files or documents, identified with reasonable specificity, that are in the possession or under the control of the other Party.

2.6. The Tribunal may engage the Expert to review a request made pursuant to paragraph 3 of the Order, in order to aid the Tribunal in its determination of whether the files or documents which are the subject of the request, are indeed prima facie relevant, and have been identified with reasonable specificity. To that end, the Tribunal may ask the Party in possession or control of the files or documents to produce them to the Expert for his inspection.

2.7. The Expert shall produce a report on his findings, preserving to the fullest extent possible the confidential nature of the files or documents at issue, and setting out the reasons for his conclusions. The report shall be communicated to the Parties and the Tribunal. The Tribunal will consider the report and determine whether access is to be granted or denied.

Procedure to be followed pursuant to paragraph 6 of the Order

2.8. Paragraph 6 of the Order provides:

any disputes between the Parties concerning a Party's failure or refusal to produce, in whole or in part, any document or file referred to in paragraphs 1 and 2, shall be resolved in a timely manner by the expert referred to in paragraph 4 of this Order.

2.9. The Expert shall be free to propose his own solution to resolve a dispute between the Parties pursuant to paragraph 6 of the Order. The Expert shall at every stage afford both Parties an opportunity to set out their position, and shall fully take into account the arguments of the Parties.

2.10. The Expert shall keep the Tribunal apprised of his progress in resolving a dispute pursuant to paragraph 6 of the Order. The Expert shall consult the Tribunal regarding his proposed solution to such a dispute, before such solution is communicated to the Parties.

2.11. Once the Tribunal has acted upon the Expert's proposed solution, it shall be communicated to the Parties.

2.12. Where the Expert determines that a dispute cannot be resolved in a timely manner by him, he shall refer it to the Tribunal.

63. On 12 October 2005, the Tribunal also issued Order No. 4, the operative part of which provides:

THE ARBITRAL TRIBUNAL UNANIMOUSLY ORDERS:

1. (a) Suriname shall cooperate fully with the independent expert appointed pursuant to The Tribunal's Order No. 3, and facilitate his immediate access to the entire File 169A and entire File 161 in The Netherlands' Foreign Ministry archives ensuring that such access is granted within two weeks from the date of this Order, indicating which documents, and on what basis, it wishes to remove or redact from those files before they are to be given to Guyana; and

(b) the independent expert shall, in accordance with paragraph 5 of Order No. 1 and the Terms of Reference, review Suriname's proposal(s) for removal or redaction of documents mentioned above.

2. (a) The independent expert shall review Guyana's request in its letter dated 20 July 2005 for access to documents pursuant to paragraph 3 of Order No. 1, in order to determine whether those files have been identified with reasonable specificity and appear relevant; and

(b) Suriname shall facilitate the independent expert's timely access to the files identified in Guyana's letter dated 20 July 2005, to the extent the expert

may deem such access necessary to determine reasonable specificity and relevance in accordance with paragraph 3 of Order No. 1.

3. The independent expert shall endeavour to report on his findings as soon as possible.

64. In a letter dated 14 October 2005, Suriname informed the President that it had requested The Netherlands Ministry of Foreign Affairs to provide the independent expert access to Files 161 and 169A, pursuant to Order No. 4.

65. On 24 October 2005, Suriname sent a Memorandum to the President proposing which documents in Files 161 and 169A Guyana could be given access to, and which should be withheld, but it did not disclose that Memorandum to Guyana on grounds that its contents were confidential.

66. By letter dated 27 October 2005, Guyana objected to Suriname not disclosing its 24 October 2005 Memorandum to Guyana and proposed a method of disclosure to preserve the confidentiality of the documents.

67. On 28 October 2005, Guyana sent a letter to the independent expert providing its views "in connection with paragraph 2 (a)" of Order No. 4, as to which documents and files the independent expert should review and why.

68. On 31 October 2005, Suriname filed its Counter-Memorial, dated 1 November 2005, with the PCA Registry.

69. By letter to the President dated 2 November 2005, Suriname responded to Guyana's letter of 27 October 2005, asking that the Tribunal disregard Guyana's objection and requesting that the independent expert review all the documents being withheld from Guyana in The Netherlands Ministry of Foreign Affairs archives.

70. By letter to the President dated 4 November 2005, Guyana responded to Suriname's letter dated 2 November 2005, submitting that the Terms of Reference allow for disclosure of Suriname's Memorandum to Guyana.

71. On 8 November 2005, Suriname wrote to the President in response to Guyana's 4 November 2005 letter and reiterated its objections to disclosure to Guyana of Suriname's Memorandum or the files in The Netherlands Ministry of Foreign Affairs archives before the independent expert had made his determination in respect of them.

72. On 10 November 2005, Guyana wrote to Suriname agreeing to disclose to Suriname, in accordance with Order No. 1, documents that Suriname had requested in a letter to Guyana dated 8 November 2005, which had not been copied to the Tribunal.

73. On 10 November 2005, Guyana wrote to the President in response to Suriname's letter of 8 November 2005 addressed to the President and reaffirmed the views it had set out in its letters dated 4 November 2005 and 28 October 2005.

74. In a letter to the Parties dated 28 November 2005, the President rejected Guyana's request for disclosure of Suriname's 24 October 2005 Memorandum, but allowed Guyana's request made in its letter dated 28 October 2005 that the independent expert inspect certain files in The Netherlands Ministry of Foreign Affairs archives.

75. On 12 December 2005, Guyana wrote to Professor van Houtte asking to "be afforded a timely opportunity to present its comments pursuant to paragraph 2.3 [of the Terms of Reference] before any decisions relating to disclosure or withholding of documents are made".

76. On 18 January 2006, following an examination of the files in question, the independent expert submitted a report of his findings and recommendations to the Tribunal.

77. Guyana set out its views in a letter to Suriname dated 18 January 2006 on documents it had been requested to disclose to Suriname and requested certain further documents from Suriname. On 24 January 2006, Suriname requested further documents from Guyana by letter.

78. At the President's request, the Registrar provided the Parties with a copy of the independent expert's report on 26 January 2006, and invited comments on it by 31 January 2006.

79. On 31 January 2006, Suriname sent two letters to the President concurring with several of the independent expert's findings and recommendations but objecting to the disclosure of a specific document in File 161. Suriname disagreed with the independent expert's finding that its position and practice with regard to its eastern maritime boundary "might be relevant" to the present dispute concerning Suriname's western maritime boundary.

80. In a letter to the President dated 31 January 2006, Guyana concurred with the independent expert's findings and requested that the Tribunal immediately adopt his recommendation "to the effect that this material should be disclosed to the Tribunal and Guyana".

81. Suriname and Guyana wrote to the President on 1 February 2006 and 2 February 2006, respectively, further elaborating their views as to the relevance of documents concerning Suriname's eastern maritime boundary.

82. The Parties each wrote to the President on 3 February 2006, setting out their proposals for the scheduling of the oral hearing.

83. In a letter to Suriname dated 10 February 2006, Guyana responded to Suriname's requests for documents made on 8 November 2005 and 24 January 2006 and reiterated its own requests for documents from Suriname.

84. On 16 February 2006, the Tribunal issued Order No. 5, the operative part of which provides:

> THE ARBITRAL TRIBUNAL UNANIMOUSLY ORDERS:
>
> 1. The recommendations of the independent expert in Sections 5 and 6 of his report (concerning documents in Files 161 and 169A) are hereby adopted, and Suriname is hereby requested to grant Guyana immediate access to the files in accordance with those recommendations;
>
> 2. The documents compiled from Files 162, 311, 2022, and 2949 and referred to by the independent expert, in Section 7 of his report, shall be sent immediately to Suriname for comment and possible redaction;

> 3. Suriname, on an expedited basis and in any case no later than 22 February 2006, shall transmit directly to Guyana any documents that it does not propose to redact or withhold, and shall indicate to the independent expert any proposals for redaction or withholding and the reasons therefor.

85. Suriname wrote to Guyana on 17 February 2006, responding to Guyana's letter dated 18 January 2006 and disclosing some of the requested documents. Suriname produced further requested documents on 21 February 2006.

86. Suriname produced certain documents pursuant to the Tribunal's Order No. 5 under cover of two letters to Guyana dated 22 February 2006, and noted that it would submit others to the independent expert for possible redaction "in accordance with paragraph 3 of the Tribunal's Order No. 5".

87. On 22 February 2006, Suriname provided the Registrar with documents that it wished to have redacted by the independent expert, which were in turn forwarded to the independent expert on 24 February 2006.

88. In a letter to the President dated 24 February 2006, Guyana noted that, according to its understanding of the schedule of pleadings, Guyana's Reply would be due on 1 April 2006 and Suriname's Rejoinder on 1 September 2006, and requested confirmation from the Tribunal as to these dates.

89. On 27 February 2006, Suriname provided a "Memorandum for the independent expert setting forth Suriname's reasons for the proposed redactions in the documents that were sent to you by letter dated 22 February 2006" under cover of a letter to the Registrar. This Memorandum was not sent to the Co-Agent for Guyana in accordance with the Tribunal's decision in its letter dated 28 November 2005.

90. In a letter to the President dated 27 February 2006, Suriname stated that it had no objection to Guyana's understanding of the pleading schedule and noted that, "except for the eighteen pages containing Suriname's proposed redactions that were sent to you on 22 February 2006, all of the remaining documents that Suriname had been ordered to produce to Guyana have now been produced".

91. The independent expert set out his recommendations on Suriname's 22 February 2006 proposals for redaction in a letter to the President dated 28 February 2006.

92. On instruction of the President, the Parties were informed by the Registry on 1 March 2006 that their understanding of the pleading schedule was correct, thereby confirming the due date for Guyana's Reply as 1 April 2006 and for Suriname's Rejoinder as 1 September 2006.

93. In a letter to Guyana dated 2 March 2006, Suriname requested production of any further documents that might pertain to Suriname's 8 November 2005 request for documents.

94. On 6 March 2006, Guyana confirmed by letter that it had produced all documents requested of it.

95. The President wrote to the Parties on 6 March 2006, noting his full agreement with the independent expert's recommendations, and instructing Suriname to implement those recommendations "without delay".

96. On 6 March 2006, Suriname requested by e-mail certain clarifications from the independent expert regarding his recommendations.

97. Suriname disclosed documents, under cover of a letter to Guyana dated 7 March 2006, in accordance with the decision of the Tribunal of 6 March 2006, but withheld others pending clarification from the independent expert.

98. Suriname disclosed further documents, under cover of a letter to Guyana dated 10 March 2006, in accordance with clarifications received from the independent expert.

99. Suriname provided the independent expert with the full set of documents it had disclosed to Guyana from Files 161 and 169A under cover of a letter to the independent expert dated 22 March 2006.

100. Guyana filed its Reply dated 1 April 2006 with the Registry on 31 March 2006.

101. The Registrar wrote to the Parties on 4 April 2006, to communicate the Tribunal's proposal that the oral hearings be held in Washington, D.C. from 7 to 20 December 2006 and asking the Parties to confirm their availability on those dates.

102. On 4 April 2006, the Registrar forwarded a letter to Suriname from the independent expert dated 30 March 2006 requesting Suriname to "indicate the references for the enclosed documents, which [the independent expert] was unable to find in the bundle [he] received from [Suriname] of documents submitted to Guyana".

103. In a letter to the Parties dated 6 April 2006, the Registrar confirmed that the oral hearings would be held at the headquarters of the OAS from 7 to 20 December 2006.

104. Suriname wrote to Guyana on 14 April 2006 proposing a schedule for the oral hearings, and Guyana proposed a different schedule in a letter to Suriname dated 28 April 2006.

105. Suriname noted its disagreement with Guyana's proposed schedule in a letter to Guyana dated 28 April 2006.

106. On 2 May 2006, Guyana wrote to Suriname modifying its proposed schedule in response to Suriname's letter of 28 April 2006.

107. Suriname filed its Rejoinder dated 1 September 2006 with the Registry on 30 August 2006.

108. On 27 November 2006, after consultation with the Parties, the Tribunal issued Order No. 6 appointing a hydrographer, Mr. David Gray (the "Hydrographer"), as an expert to assist the Tribunal pursuant to Article 11(3) of the Tribunal's Rules of Procedure. The operative part of Order No. 6 provides as follows:

> THE ARBITRAL TRIBUNAL UNANIMOUSLY ORDERS:
>
> 1. Mr. David H. Gray is appointed to serve the Arbitral Tribunal as a hydrographic expert pursuant to Article 11(3) of the Tribunal's Rules of Procedure;
>
> 2. the attached terms of reference for the hydrographic expert are adopted.
>
> ***

HYDROGRAPHER'S TERMS OF REFERENCE

IN ACCORDANCE WITH ARTICLE 11(3) OF THE RULES OF PROCEDURE

1. Background

1.1. As set out in Guyana's "Statement of the Claim and the Grounds on Which it is Based," dated 24 February 2004, Guyana has initiated an arbitration pursuant to Articles 286 and 287 of the 1982 United Nations Convention on the Law of the Sea (the "Convention") and Article 1 of Annex VII to the Convention with regard to a dispute concerning the delimitation of its maritime boundary with Suriname.

1.2. The Parties to the Arbitration are:

(a) Guyana, represented by H.E. Samuel Rudolph Insanally, as Agent, and Sir Shridath Ramphal and Mr. Paul S. Reichler, as Co-Agents.

(b) Suriname, represented by the H.E. Lygia L.I. Kraag-Keteldijk, as Agent, and Mr. Paul C. Saunders and Mr. Hans Lim A Po, as Co-Agents.

1.3. Addresses for the Agents and Co-Agents are on file with the Permanent Court of Arbitration ("PCA"), which is serving as Registry for the Arbitration.

1.4. The Arbitral Tribunal, which has been validly constituted in accordance with Article 3 of Annex VII to the Convention, is composed of:

H.E. Judge L. Dolliver M. Nelson (President)
Dr. Kamal Hossain
Professor Thomas M. Franck
Professor Ivan Shearer
Professor Hans Smit

1.5. Rules of Procedure for the Arbitration were adopted on 30 July 2004. Written pleadings have been submitted by the Parties in accordance with the Rules of Procedure, as amended. Oral hearings are to be held from 7 December 2006 to 20 December 2006 in Washington D.C.

1.6. The Expert or the Tribunal may terminate this agreement at any time by providing written notice of intent to terminate one month before the termination should become effective.

1.7. The Tribunal reserves the right to modify these Terms of Reference from time to time as it determines necessary.

2. The Expert

Pursuant to Article 11(3) of the Rules of Procedure, Mr. David H. Gray (the "Expert"), hydrographer, shall serve as an expert to assist the Arbitral Tribunal in accordance with these Terms of Reference.

> 2.2. The Expert hereby declares that he will, as directed by the Arbitral Tribunal, perform his duties honourably and faithfully, impartially and conscientiously, and will refrain from divulging or using, outside the context of the tasks to be performed by him in this arbitration, any documents, files and information, including all written or oral pleadings, evidence submitted in the Arbitration, verbatim transcripts of meetings and hearings, or the deliberations of the Arbitral Tribunal, which may come to his knowledge in the course of the performance of his task.
>
> 3. Scope
>
> 3.1. The Expert shall assist the Arbitral Tribunal, should it determine that it has jurisdiction to do so, in the drawing and explanation of the maritime boundary line or lines in a technically precise manner.
>
> 3.2. The Expert will make himself available to assist the Arbitral Tribunal as required by it in the preparation of the Award.
>
> 3.3 The Expert shall perform his duties according to international hydrographic and geodetic standards.

109. Oral hearings were held in Washington, D.C., at the headquarters of the OAS, from 7 to 20 December 2006.

110. The Hydrographer, on 20 December 2006, requested the following in writing:

> [T]hat the Parties provide the position of Marker "B", and other points in this 1960 survey within the geographic area of the mouth of the Corentyne River, their geodetic datum, and the WGS-84 datum position of these points if they have been determined by re-computation of the 1960 survey.

111. Guyana, in a letter dated 28 December 2006, provided World Geodetic System 1984 ("WGS-84") coordinates for Marker "B" obtained from a 2004 GPS Survey conducted at the site of what Guyana claimed to be Marker "B".

112. The Hydrographer, in a communication from the Registrar to the Parties dated 7 January 2007, requested clarification of Guyana's response to his 20 December 2006 request as it appeared that Guyana had provided the WGS-84 coordinates of Marker "A" and not those of Marker "B" and that the coordinates given did not exactly correspond to those of Marker "A" as stated in Guyana's Memorial, paragraph 2.10.

113. Guyana, in a communication dated 10 January 2007, confirmed that it had mistakenly provided coordinates for Marker "A" in its letter dated 28 December 2007 and that

those coordinates had been rounded off for the sake of simplicity, and provided WGS-84 coordinates for Marker "B" obtained from a 2004 GPS Survey conducted at the site of what Guyana claimed to be Marker "B".

114. Suriname, in a letter dated 12 January 2007, informed the Tribunal that it had been unable to find any information in response to the Hydrographer's request of 20 December 2006, contested the use of the WGS-84 coordinates for Marker "A" provided in Guyana's Memorial, paragraph 2.10, claiming that it "does not have the ability to verify those coordinates" as Guyana could not provide any evidence as to the discovery or location of Marker "B", and urged the Tribunal to use the astronomical coordinates previously used by both Parties as the WGS-84 coordinate values.

115. Guyana, in a letter dated 19 January 2007, argued that the Tribunal should reject Suriname's proposal to use astronomical coordinates for Marker "A", as these coordinates were inaccurate and represented a difference of more than 411 metres with the WGS-84 coordinates, and claimed that there was no ground to assume that Marker "B" was no longer in its original location and that there was no need for any data in support of its determination of the coordinates of Marker "A".

116. Suriname, in a letter dated 29 January 2007, argued that there was no evidence that what Guyana alleged was Marker "B" was indeed Marker "B" or that what Guyana alleged was Marker "B" was in the location where the 1936 Mixed Boundary Commission ("Mixed Boundary Commission")[1] placed Marker "B", and contended further that a site visit would have no value as it "would not provide any enlightenment on the question of whether the current location of Marker "B" is the same as its original location".

117. Guyana, in a letter dated 13 February 2007, offered further arguments regarding the discovery and location of Marker "B" and evidence in the form of two affidavits.

118. Suriname, in a letter dated 16 February 2007, requested that the Tribunal disregard Guyana's letter dated 13 February 2007 on the grounds that the Parties "have no right to introduce any new material".

[1] See paras. 137 and 138.

119. Guyana, in a letter dated 21 February 2007, argued that "all correspondence concerning the coordinates of Marker 'B' has been proper" as it was submitted in response to a request made by the Hydrographer.

120. The Tribunal, on 12 March 2007, issued Order No. 7, which provided in operative part:

> 1. The correspondence and materials submitted to date by the Parties regarding the discovery and location of Marker "B" were submitted in response to the Hydrographer's inquiry of 20 December 2006 and form part of the record in this matter;
>
> 2. The Parties shall not make further communications to the Tribunal or Registrar relating to the location of Markers "A" and "B" except after first seeking leave of the Tribunal or upon request of the Tribunal;
>
> 3. The Hydrographer shall, after inviting the Parties' representatives to be present, conduct a site visit in Guyana. The modalities for the Hydrographer's site visit shall be established through one or more orders in coming days

121. The Tribunal issued Order No. 8 on 21 May 2007, which provided in operative part:

> 1. The Hydrographer's terms of reference for the site visit are to inspect what Guyana alleges to be Marker "B" and the surrounding area, as he deems appropriate, and to gather data relevant to the issues that have arisen as a result of his question to the Parties of 20 December 2006 and the Parties' subsequent correspondence;
>
> 2. Unless otherwise agreed with the Hydrographer, the Parties, the Hydrographer, and the Registrar shall travel to the site from Georgetown on the mornings of 31 May and 1 June 2007, returning to Georgetown in the afternoon or evening of each day;
>
> 3. As soon as possible, Guyana shall propose a time and place for participants in the site visit to meet in Georgetown on the mornings of 31 May and 1 June for transportation to the site;
>
> 4. The Parties' representatives shall cooperate fully with the Hydrographer;
>
> 5. Following the site visit, the Hydrographer shall submit a written report to the Tribunal, which shall be shared with the Parties. The Tribunal shall provide the Parties an opportunity to comment on the Hydrographer's report.

122. On 31 May 2007, the Hydrographer conducted a site visit in Guyana, accompanied by the Registrar and the representatives of the Parties.

123. On 4 July 2007, the Hydrographer's "Report on Site Visit" was sent to the Parties, who were invited to provide comments on it.

124. On 24 July 2007, Suriname submitted its comments on the Hydrographer's Report accepting the Hydrographer's conclusions and suggesting the correction of certain typographical errors and the addition of one clarification.

125. On 25 July 2007, Guyana submitted its comments on the Hydrographer's Report, accepting the Hydrographer's conclusions and stating no objection to the changes suggested by Suriname.

126. On 30 July 2007, the Hydrographer submitted a "Corrected Report on Site Visit" reflecting Suriname's suggested changes, which was circulated to the Parties.

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CHAPTER II - INTRODUCTION

A. GEOGRAPHY

127. Guyana and Suriname are situated on the northeast coast of the South American continent and are separated by the Corentyne (in Dutch, Corantijn) River, which flows northwards into the Atlantic Ocean.

128. The territory of Guyana spans approximately 214,970 square kilometres and its approximate population is 769,000. Guyana's land boundaries, which in part follow the course of rivers, are shared with Venezuela to the west and south, Brazil to the south and east, and Suriname to the east. To the north, it faces the Atlantic Ocean. Guyana became an independent State in 1966, after more than 160 years of British colonial rule.

129. The territory of Suriname is approximately 163,270 square kilometres and its approximate population is 438,000. Suriname shares borders with Guyana to the west, Brazil to the south, and French Guiana to the east. To the north, it also faces the Atlantic Ocean. Suriname gained independence from The Netherlands in 1975, after more than 170 years of Dutch colonial rule.

130. The coastlines of Guyana and Suriname are adjacent. They meet at or near to the mouth of the Corentyne River and together form a wide and irregular concavity. There are no islands in Guyana and Suriname's territorial seas.

131. Neither Guyana nor Suriname has signed international maritime boundary agreements with their neighbouring States.

132. The length of the straight-line coastal frontage of Guyana as calculated from the approximate coordinates of the land boundary terminus with Venezuela to the approximate coordinates of the mouth of the Corentyne River is 223 nautical miles ("nm"), and the length of the straight-line coastal frontage of Suriname as calculated from the approximate coordinates of the land boundary terminus with French Guiana to the approximate coordinates of the mouth of the Corentyne River is 191 nm.

133. The seafloor off the coasts of Guyana and Suriname consists of soft mud out to the 20 metre depth contour and is constantly subjected to erosion and accretion. The horizontal distance between the high water line and the low water line, i.e. the area of tidal flats, low tide elevations and drying areas, is as much as 3 nm in several places along both coasts. The seafloor does not attain a 50-metre depth contour (25 fathoms) until about 50 nm offshore, and does not attain a 200-metre depth contour (often considered the geological continental shelf break) until 80 nm offshore.

134. The Corentyne River is navigable inland for about 50 miles and is also tidal for many miles inland. At Bluff Punt, Suriname, where the river is about 4 nm wide, the river begins to widen out considerably so that just 5 nm farther seaward, the low water lines are 12 nm apart. In that trapezoidal area, the river exhibits large tidal flats, drying areas and shoals such that most marine traffic follows a channel along the east side of the river estuary; there is a shallower navigation channel in the western half.

135. Navigation into the Corentyne River from seaward is normally in the deeper channel, which is closer to the east bank of the river. However, there were, at least in 1940, navigational aids to assist passage through the shallower channel that is closer to the west bank of the river. For example, prior to 1928 and ending prior to 1940 there was a leading line of 190½° through this channel using the chimneys at Skeldon and Springlands as a set of range markers.[2] From sometime after 1928 until sometime prior to 1949, there were also buoys along the west side of this channel.[3] Additionally, there was a 10-metre high beacon built in 1938 as part of the 1936 boundary survey and it is still shown on both the British and Dutch charts, although the beacon ceased to exist prior to 2004.[4]

136. The vertical range of the tide between high water and low water is generally in the order of three metres along the coast. In the Corentyne River, the effect of the tide is felt

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[2] The leading line was printed on the 1928 edition of NL chart 222, and was cancelled by a Notice to Mariners in 1940.

[3] The buoys were added by hand on the 1928 edition of NL chart 222 (unknown date), and the buoys were noted as "not present" in 1949.

[4] Guyana Memorial, Annex 11, para. 6. and Minutes of 3rd Conference of the Mixed Commission for the Definition of the Boundary between British Guiana and Surinam, 21 December 1938. Suriname's Judge's binder Tab C-5. The beacon was not there when Counsel for Guyana visited the site in 2004.

several miles inland. In the mouth of the river, the in-going tidal stream sets southwest whilst the out-going stream sets north. In the rainy season, the out-going stream attains rates of 3 to 3½ knots and its influence is felt 10 or 12 nm offshore; the edge of the stream is distinctly marked by discoloured water.

B. HISTORICAL BACKGROUND

137. The efforts to establish a border between Guyana and Suriname date back to colonial times. In 1799, the border between Suriname and Berbice, a colony then situated in the eastern part of modern Guyana, was agreed by colonial authorities to run along the west bank of the Corentyne River. A Mixed Boundary Commission including members from the United Kingdom, The Netherlands, and Brazil was formed in 1934 to establish the southern and northern points of the boundary with greater precision. The southern point, being a tri-junction between the boundaries of British Guiana, Suriname, and Brazil, was established at the source of the Kutari River, a tributary of the Corentyne River. In 1936, the Mixed Boundary Commission made its recommendation that the northern end of the border between British Guiana and Suriname should be fixed at a specific point on the west bank of the Corentyne River, near to the mouth of the river, a point then referred to as "Point 61" or the "1936 Point". The rationale for locating the border along the western bank of the Corentyne River rather than its thalweg and locating the border terminus on the western bank was to enable The Netherlands to exercise supervision of all traffic in the river.

138. In 1936, the British and Dutch members of the Mixed Boundary Commission also concluded that the maritime boundary in the territorial sea should be fixed at an azimuth of N10°E from Point 61 (the "10º Line") to the limit of the territorial sea.

139. In 1939, the United Kingdom prepared a draft treaty on the delimitation of the boundary between British Guiana and Suriname, which provided that the boundary of the territorial sea would lie along the 10º Line; however, the Second World War intervened and the Dutch government did not respond to the United Kingdom's draft treaty.

140. In 1957, the United Kingdom Foreign Office decided that it would delimit the British Guiana-Suriname maritime boundary from that time onwards by means of an equidistance line, which it understood would follow the 10º Line up to the three mile

limit from the coast and then an azimuth of N33ºE to its intersection with the 25 fathom line. In 1958, British Guiana granted exploration rights to the California Oil Company in an area up to a line following N32ºE from Point 61. Later, in 1965, a concession in an almost identical geographical area was granted to Guyana Shell Limited, a subsidiary of Royal Dutch Shell. Between that time and the year 2000, Guyana granted several other concessions allowing operations in the area disputed in these proceedings.[5] For instance, in 1988, it granted a concession for oil exploration to a consortium of LASMO Oil (Guyana) Limited and BHP Petroleum (Guyana) Inc. (the "LASMO/BHP Consortium").

141. Suriname has also granted concessions for oil exploration in an area of competing claims in these proceedings.[6] In 1957, a concession agreement was entered into with the Colmar Company and in 1964, the concession agreement was amended to clarify the western limit of the concession area as the 10º Line in respect of the territorial sea and, beyond that, in respect of the continental shelf.

142. In 1961, the United Kingdom prepared a new draft delimiting the territorial seas along the 10º Line and the contiguous zones, as well as the continental shelf, by means of what it regarded as an equidistance line. In 1962, The Netherlands responded to the United Kingdom draft treaty with a draft of its own, providing, without reference to specific maritime zones, that the maritime boundary was to follow the 10º Line.

143. In 1965, the United Kingdom prepared a new draft treaty, providing this time that the entire maritime boundary, in the territorial sea as well as the continental shelf, would extend along an equidistance line, seaward from Point 61 to the outer limits of the continental shelf; however, it was not accepted by The Netherlands.

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[5] Between 1965 and 2000, Guyana issued nine concessions to various companies and consortiums: to Oxoco (1971), Major Crude (1980), Seagull-Denison (1979-81), Lasmo-BHP (1988), Petrel (Albary concession, 1989), Petrel (Berbice concession, 1989), Maxus (1997), CGX (1998), and Esso (1999). See Guyana Memorial, paras. 4.9, 4.21-4.43; Suriname Counter-Memorial, paras. 5.7-5.44.

[6] Suriname issued one concession directly to Colmar in 1957, and later entered into service contracts through Staatsolie with five other companies or consortia: Suriname Gulf Oil Company (1980), Pecten (1993), Burlington Resources (1999), Repsol (2003), and Maersk (2004). See Suriname Counter-Memorial, paras. 5.7-5.44; Guyana Memorial, paras. 4.9, 4.21-4.43.

144. In 1966, shortly after Guyana achieved independence, the United Kingdom hosted direct talks between Guyana and Suriname referred to as the "Marlborough House talks". The negotiations failed due to the Parties' inability to reach agreement on the location of the land boundary. With regard to the maritime boundary, Guyana advocated use of the equidistance principle for delimitation resulting in a line of N33°E to N34°E, whereas Suriname's position was that the demarcation of the boundary should be carried out in accordance with other geographic considerations.

145. In 1971, Guyana prepared a draft boundary treaty providing for Guyanese sovereignty over an inland area in the region of the sources of the Corentyne River disputed by the Parties, and Surinamese sovereignty over the Corentyne River itself. With regard to the maritime boundary, the draft treaty adopted the same approach as the United Kingdom's draft treaty of 1965 as it relied on an equidistance line seaward from Point 61. This proposal was rejected by Suriname.

146. In 1977 and 1978, Guyana and Suriname each adopted domestic legislation relating to their maritime boundaries. On 30 June 1977, Guyana enacted its Maritime Boundaries Act 1977, which defined Guyana's maritime boundaries as those determined by agreement with adjacent States or, in the absence of agreement, by means of equidistance lines (Article 35(1) of the Act). On 14 April 1978, Suriname enacted the Law Concerning the Extension of the Territorial Sea and the Establishment of a Contiguous Economic Zone, which did not define the lateral boundaries of the territorial sea or the exclusive economic zone.

147. In 1980, Suriname established its national petroleum company, Staatsolie. From that year to the present, Staatsolie has held the exclusive right to obtain concessions to all of Suriname's open offshore area, limited to its west by the 10º Line. During this period, three of Staatsolie's concessions were granted in the area in dispute between the Parties.

148. In 1989, the maritime boundary between Guyana and Suriname was discussed during the talks held in Paramaribo between President Hoyte of Guyana and President Shankar of Suriname. They agreed that modalities for joint utilization of the border area should be established pending settlement of the border question and that concessions that had already been granted should remain in force. Representatives of the Guyana Natural

Resources Agency and Staatsolie met in 1990 and 1991 pursuant to the agreement reached by Presidents Hoyte and Shankar, but no agreement was reached by them. The Parties, however, signed a Memorandum of Understanding governing "Modalities for Treatment of the Offshore Area of Overlap Between Guyana and Suriname as it Relates to the Petroleum Agreement Signed Between the Government of Guyana and the LASMO/BHP Consortium on 26 August 1988", which was a preliminary document stating that the rights granted to the LASMO/BHP consortium in the "area of overlap" were to be fully respected. The Memorandum of Understanding provided that, within thirty days, representatives of both governments would meet to conclude discussions on modalities for joint utilization of the area, pending the conclusion of a final boundary agreement. The Memorandum of Understanding, however, was never implemented by Suriname, and the negotiations on joint utilization did not progress any further.

149. Both Parties submit that they have been issuing fishing licences and patrolling the waters belonging to the area of overlapping claims in these proceedings between 1977 and 2004.

150. Among the concessions issued by Guyana for oil exploration in the disputed area of the continental shelf was a concession granted in 1998 to CGX Resources Inc. ("CGX"), a Canadian company. In 1999, CGX arranged for seismic testing to be performed over the entire concession area, the eastern border of which was a line following an azimuth of N34ºE. On 11 and 31 May 2000, Suriname demanded through diplomatic channels that Guyana cease all oil exploration activities in the disputed area. On 31 May 2000, Suriname ordered CGX to immediately cease all activities beyond the 10º Line. On 2 June 2000, Guyana responded to Suriname, stating that, according to its position, the maritime boundary between Guyana and Suriname lay along an equidistance line.

151. On 3 June 2000, two patrol boats from the Surinamese navy approached CGX's oil rig and drill ship, the *C.E. Thornton*, which was located at 7° 19′ 37″N, 56° 33′ 36″W, approximately 15.4 miles west of the eastern limit of the concession area. The Surinamese patrol boats ordered the ship and its service vessels to leave the area within twelve hours. The crew members aboard the *C.E. Thornton* detached the oil rig from the sea floor and withdrew from the concession area. The Surinamese patrol boats

followed them throughout their departure. CGX has not since returned to the concession area.

152. Also operating in the disputed area under licences from Guyana were the oil companies Maxus Guyana Ltd. ("Maxus") (concession granted in 1997) and Esso Exploration and Production (Guyana) Company ("Esso") (concession granted in 1999). On 8 June and 18 August 2000, Staatsolie informed Esso that it was operating in Surinamese waters without a licence, and that this was unacceptable to Suriname. In September 2000, Esso invoked the *force majeure* clause in its concession agreement with Guyana and ceased its operations in the concession area. Citing the approach taken by Suriname, Maxus also refrained from carrying out exploration activities in its concession area.

153. On 6 June 2000, the Prime Minister of Trinidad and Tobago offered and subsequently provided his good offices at a meeting between the Guyanese and Surinamese foreign ministers. Both foreign ministers expressed a desire to resolve the dispute peacefully. Guyana's draft Memorandum of Understanding, which would have allowed all existing exploration concessions and licences to be respected until a final agreement on the maritime boundary could be reached, was not accepted by Suriname. The foreign ministers of Guyana and Suriname agreed that a Joint Technical Committee should begin working immediately and that they should reconvene the joint meetings of their respective national border commissions ("National Border Commissions"). The Joint Technical Committee held several meetings in June 2000; however, no agreement was reached.

154. At the Twenty-First Meeting of the Heads of Government of the Caribbean Community and Common Market ("CARICOM"), held at St. Vincent and the Grenadines from 2 to 5 July 2000, the Presidents and Prime Ministers of CARICOM issued a statement affirming the importance of settling the dispute by peaceful means and offering the good offices of Prime Minister Patterson of Jamaica to that end. Talks were held between Presidents Jagdeo of Guyana and Wijdenbosch of Suriname from 14 to 17 July 2000 at Montego Bay and Kingston. No agreement was reached during these negotiations.

155. In 2000 and 2002, President Jagdeo met with the new Surinamese President Venetiaan and the Parties agreed to reconstitute their respective National Border Commissions. The National Border Commissions held a joint meeting in 2002 and formed a joint Subcommittee on Hydrocarbons. Having met several times in 2002, the Subcommittee on Hydrocarbons reported that it could not find common ground even in interpreting its mandate. The National Border Commissions likewise held several more joint meetings in 2002 and 2003, but were not able to reach agreement.

156. Eleven months after the last meeting of the National Border Commission and in view of the lack of progress in diplomatic negotiations, Guyana initiated the present proceedings on 24 February 2004.

C. THE PARTIES' CLAIMS

157. Guyana sets forth its claims in its Notification and Statement of Claim dated 24 February 2004, which were further specified in its Memorial and Reply. Guyana, in its Reply, requests that the Arbitral Tribunal adjudge and declare that:

> (1) Suriname's Preliminary Objections are rejected as being without foundation;
>
> (2) from the point known as Point 61 (5° 59' 53.8" north and longitude 57° 08' 51.5" west), the single maritime boundary which divides the territorial seas and maritime jurisdictions of Guyana and Suriname follows a line of 34° east and true north for a distance of 200 nautical miles;
>
> (3) Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea, the Charter of the United Nations, and general international law to settle disputes by peaceful means because of its use of armed force against the territorial integrity of Guyana and/or against its nationals, agents, and others lawfully present in maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, but in any event no less than U.S. $33,851,776, for the injury caused by its internationally wrongful acts;
>
> (4) Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea to make every effort to enter into provisional arrangements of a practical nature pending agreement on the delimitation of the continental shelf and exclusive economic zones in Guyana and Suriname, and by jeopardising or hampering the reaching of the final agreement; and that Suriname is under an obligation to provide reparation, in a form and in an

> amount to be determined, for the injury caused by its internationally wrongful acts.[7]

158. In the course of its oral pleadings, Guyana reaffirmed its claims as set forth in its Reply, and modified its fourth submission as follows:

> in relation to submission 4, that is in relation to our allegation that Suriname was in breach of its obligations concerning provisional measures, Guyana … limits its claim which it advances with utmost strength, but limits its claim to one for declaratory relief.[8]

159. In its Reply, Guyana described the course of its claim line as commencing "from the outer limit of the territorial sea boundary at a point located at 6° 13′ 46″N, 56°59′ 32″W, and should from there follow a line of N34°E up to the 200-mile limit to a point located at 8° 54′ 01.7″N, 55° 11′ 07.4″W."[9]

160. Suriname, in its Memorandum setting out Preliminary Objections of 23 May 2005, requested the Tribunal to adjudge and declare that:

> 1. The Tribunal does not have jurisdiction to determine Guyana's Claim;
>
> 2. In the event the Tribunal does not uphold Suriname's first submission, Guyana's second and third submissions are inadmissible; [and]
>
> For the foregoing reasons, the Tribunal should bring these proceedings to a close forthwith.

161. Suriname, in its Counter-Memorial, further specified its claims, which it subsequently modified in its Rejoinder and reaffirmed during the oral proceedings:

> Suriname respectfully requests the Tribunal
>
> 1. To uphold Suriname's Preliminary Objections, filed 23 May 2005, as reaffirmed in its Counter-Memorial, filed 1 November 2005, in accordance with the Rules of Procedure.
>
> Alternatively, Suriname respectfully requests the Tribunal

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7 Guyana Reply, para. 10.1.

8 Transcript, p. 1465.

9 Guyana Reply, para. 7.59.

2. A. To reject Guyana's three submissions set forth at page 135 of its Memorial and Guyana's four submissions set forth at page 153 of its Reply.

2. B. To determine that the single maritime boundary between Suriname and Guyana extends from the 1936 Point as a line of 10° east of true north to its intersection with the 200-nautical mile limit measured from the baseline from which the breadth of Suriname's territorial sea is measured.

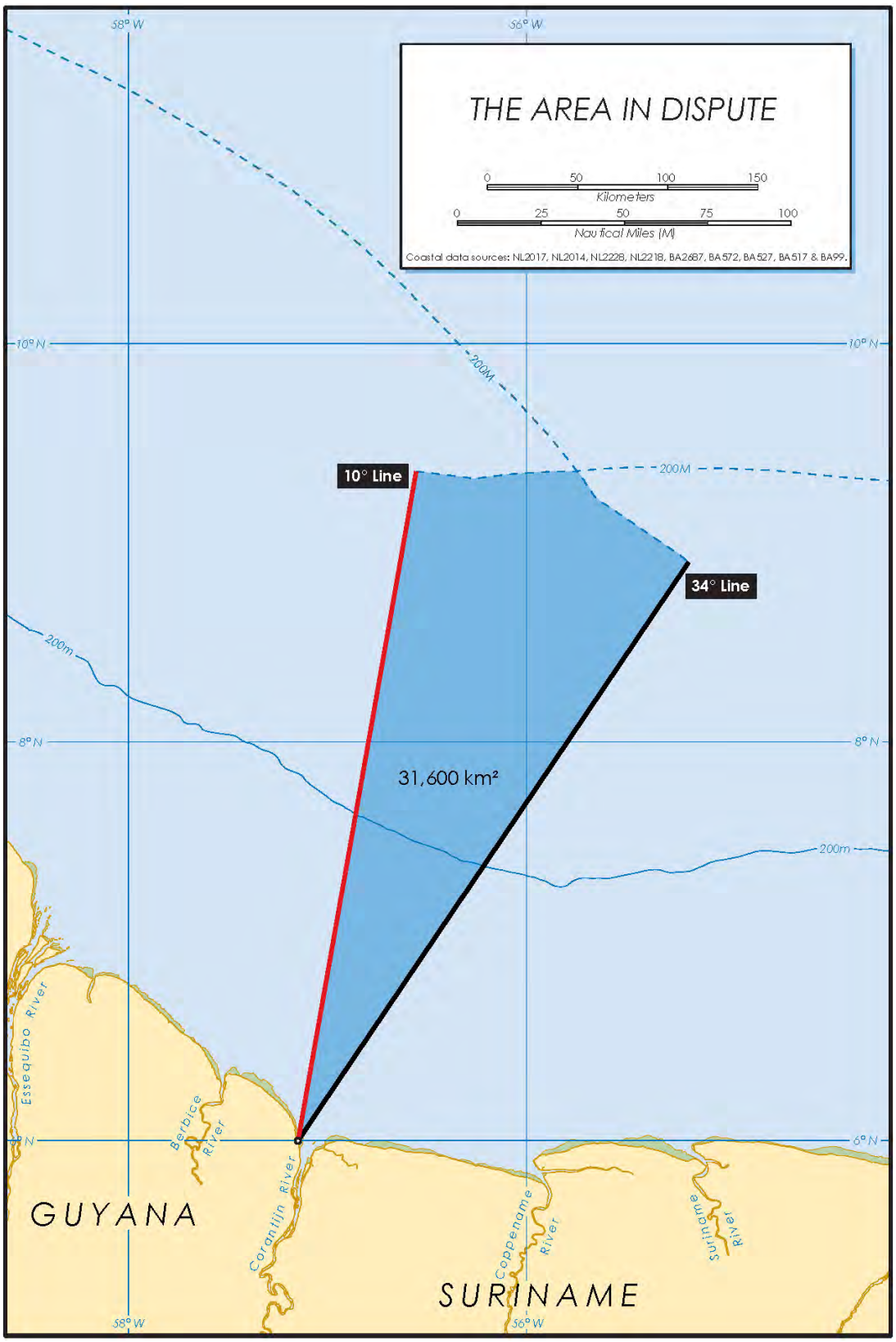
2. C. To find and declare that Guyana breached its legal obligations to Suriname under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention, by authorizing its concession holder to drill an exploratory well in a known disputed maritime area thereby jeopardizing and hampering the reaching of a maritime boundary agreement.

2. D. To find and declare that Guyana breached its legal obligations to Suriname under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention, by not making every effort to enter into a provisional arrangement of a practical nature.

162. Suriname's N10°E claim line (the "Suriname Claim Line"), contrasted with Guyana's N34°E claim line (the "Guyana Claim Line"), is illustrated in Map 1 at the end of this Chapter.

163. The arguments of the Parties with respect to their claims are summarized in the following Chapter.

Map 1



(Figure 1 from Suriname Counter-Memorial)

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CHAPTER III - ARGUMENTS OF THE PARTIES

A. SUBMISSIONS ON JURISDICTION

Guyana's Position

164. It is Guyana's position that it has complied fully with all requirements for the submission of this dispute to resolution under Part XV of the Convention. Guyana states that it brings the claim to uphold its rights under Articles 15, 74, 83 and 279 of the Convention and that the dispute concerns exclusively the maritime boundary between Guyana and Suriname.[10]

165. Guyana sets out the attempts between the two States to resolve the maritime boundary dispute following June 2000, referring in particular to the establishment of a Joint Technical Committee and negotiations under the good offices of the Prime Minister of Jamaica.[11] It submits that the Parties' efforts to settle their maritime boundary dispute from 1975 to 2000 and the acceleration of these efforts after June 2000, discharge the requirement in Article 279 of the Convention to seek a solution by peaceful means in accordance with the UN Charter.[12] Guyana maintains that there has been a full exchange of views between the two States[13] and that Guyana has complied with the requirement of Article 283(1) of the Convention to proceed expeditiously with such an exchange.[14]

166. In Guyana's view, all possibility of settlement by direct negotiation or third party facilitation had been exhausted by February 2004, and there is no requirement for it to

[10] For Guyana's submissions on jurisdiction, see Guyana Memorial, Vol. I, Chapter 6.

[11] Guyana Memorial, paras. 6.5-6.6; for a general description of those negotiations, see Guyana Memorial, paras. 5.13-5.19.

[12] Guyana Memorial, para. 6.7.

[13] Guyana Memorial, paras. 5.13-5.19.

[14] Guyana Memorial, para. 6.8.

continue attempts to negotiate where it concludes that the possibilities of settlement are exhausted.[15]

167. According to Guyana, it is entitled under Article 286 of the Convention to pursue recourse to binding decisions under Section 2 of Part XV, and as neither Guyana nor Suriname has made a written declaration pursuant to Article 287(1) of the Convention as to a choice of means for the settlement of disputes, arbitration under Annex VII is deemed to be accepted by both States by operation of Article 287(3).[16] Guyana adds that neither Guyana nor Suriname has made a declaration pursuant to Article 298 of the Convention that it does not accept one or more of the possible procedures provided for in Section 2 of Part XV.[17]

168. Guyana contends that the dispute concerns the interpretation and the application of Articles 15, 74, 83 and 279 of the Convention and does not concern any matter other than the delimitation of the maritime boundary, making it unnecessary for an Annex VII Tribunal to reach a finding of fact or law regarding land or riverine boundaries.[18] Guyana disputes Suriname's assertion that the Tribunal would be required to determine the unresolved status of the land boundary terminus in delimiting the maritime boundary.[19] Guyana's position is that the Parties have always been in agreement as to the status of Point 61 as the land boundary terminus and the starting point of maritime boundary claims, as is evidenced by the conduct of the Parties and their colonial predecessors over 70 years.[20] Guyana maintains that the purpose of the Mixed

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[15] Guyana Memorial, para. 6.9, citing the following cases: *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999, ITLOS Reports 1999, p. 280, at para. 60 ("*Southern Bluefin Tuna*"); *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 ("*MOX Plant*"); *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, at para. 48 ("*Land Reclamation*"); see also Transcript, pp. 59-60.

[16] Guyana Memorial, paras. 6.10-6.12; Transcript, p. 60.

[17] Guyana Memorial, para. 6.14.

[18] Guyana Memorial, para. 6.15.

[19] Guyana Reply, paras. 1.19-1.21, Chapter 2.

[20] Guyana Reply, paras. 4.8-4.11.

Boundary Commission was to fix the boundary definitively and considers that Suriname has itself accepted, and relied upon, Point 61 as the land boundary terminus.[21]

169. Guyana does not agree with Suriname that Point 61 and a territorial sea delimitation following N10°E from that point were identified by the Parties in combination.[22] Guyana argues instead that the Mixed Boundary Commission first identified Point 61 and then adopted a territorial sea delimitation. Guyana maintains that the N10°E line dividing the territorial seas was chosen despite previous instructions to continue the boundary in a N28°E direction and was considered to be a provisional arrangement solely to allow for the possibility that the western channel approach to the Corentyne River might be used for navigation,[23] a purpose it states had disappeared by the early 1960s.[24]

170. Guyana argues that under Article 9 of the Convention:

> the Tribunal has jurisdiction to determine the location of the mouth of the Corentyne River, where the Parties agree that their land boundary terminus was established. Guyana submits that a determination under Article 9 would lead the Tribunal to the same conclusion that the conduct of the Parties for 70 years establishes: that Point 61 is located at the mouth of the river. However, even if, for the sake of argument, the Tribunal were to determine that the mouth of the river is at another point, it would have jurisdiction to start the delimitation of the maritime boundary at that point.[25]

171. Guyana further contends that "even Suriname's erroneous argument that the mouth of the Corentyne River should be determined under Article 10, rather than Article 9, confirms the Tribunal's jurisdiction under Article 288(1)".[26]

172. Guyana also submits that "the Tribunal can still interpret and apply Articles 74 and 83 of the Convention, and at the very least affect a partial delimitation of the maritime boundary in the exclusive economic zone and continental shelf without deciding on any

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[21] Guyana Reply, paras. 2.9-2.28.

[22] Guyana Reply, paras. 2.1-2.8, 2.29-2.36.

[23] Guyana Reply, paras. 1.20, 2.29-2.36.

[24] Guyana Reply, paras. 5.57-5.67.

[25] Guyana Reply, para. 2.37.

[26] Guyana Reply, para. 2.38.

dispute over the land boundary terminus".[27] In support of this argument, Guyana cites the *Gulf of Maine* case, in which a Chamber of the ICJ effected a partial maritime delimitation between Canada and the United States from a point at sea designated as Point A.[28]

173. Regarding Suriname's additional submission that Guyana's second and third claims are inadmissible as Guyana acted in bad faith and lacks clean hands, Guyana argues that Suriname's submission has no factual basis[29] and is not supported by legal authority.[30]

Suriname's Position

174. Suriname contends that the Tribunal has no jurisdiction in respect of Guyana's first claim regarding the maritime delimitation between Guyana and Suriname if there is no agreement on the 1936 Point,[31] and that Guyana's second and third claims are inadmissible.[32] Suriname has however conceded that if there is an agreed maritime boundary in the territorial sea, the 1936 Point "provides a perfectly adequate starting point" and as a result, the Tribunal would have jurisdiction in respect of Guyana's first claim.[33]

175. Suriname agrees with Guyana that the Tribunal's jurisdiction is founded on Part XV of the Convention, but contends that Article 288(1) of the Convention, which provides that "a court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention" precludes the Tribunal from having jurisdiction over Guyana's first claim if there is no agreement on the 1936 Point.[34] Suriname maintains that the drafting history of the dispute resolution clauses of the Convention demonstrates that its dispute resolution provisions were never intended

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[27] Guyana Reply, para. 2.42.

[28] Guyana Reply, para. 2.46, citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246 ("*Gulf of Maine*").

[29] Transcript, pp. 581-582.

[30] Guyana Reply, paras. 2.6, 2.47-2.48.

[31] Transcript, pp. 795-796.

[32] Suriname Preliminary Objections, para. 1.1.

[33] Transcript, pp. 795-796.

[34] Suriname Preliminary Objections, para. 4.1.

to give rise to jurisdiction to determine territorial issues.[35] Moreover, Articles 15, 74 and 83 of the Convention do not admit the determination of land boundary termini[36] so the Tribunal should exercise caution when considering its jurisdiction in these circumstances.[37]

176. Suriname's position is that if there is no agreement on the maritime boundary in the territorial sea, there has been no agreement between the Parties or their colonial predecessors as to the location of the land boundary terminus, and that the Tribunal therefore lacks jurisdiction to resolve Guyana's first claim.[38] Suriname's interpretation of the history of negotiations and other practices of the Parties and their colonial predecessors is that the 1936 Point has never been regarded as definitive,[39] as evidenced by, *inter alia*, the British draft treaty proposal of 1939 and the opinion of the Prime Minister of The Netherlands on Surinamese independence in 1975 regarding the territorial extent of Suriname.[40]

177. Suriname maintains that, in the absence of an agreement on the maritime boundary in the territorial sea, the 1936 Point amounted only to a recommendation in preparation for agreement by treaty and that the actual location of the land boundary terminus was open to doubt at the time of the Boundary Commission's work.[41] In Suriname's view, the precise location of the land boundary terminus makes a substantial difference to the maritime entitlements in this case,[42] referring in particular to an analysis using Point X (6° 08′ 32″N, 57° 11′ 22″W), the position Suriname considers to be the most northerly possible location for a land boundary terminus. Suriname contends that the 1936 Point is not located where the western bank of the Corantijn River joins the sea, being the reference point established in the 1799 Agreement of Cession, and cites, *inter alia*,

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35 Suriname Preliminary Objections, paras. 4.2-4.7.

36 Suriname Preliminary Objections, para. 4.11; Transcript, pp. 772-773.

37 Suriname Rejoinder, paras. 2.70-2.80; Transcript, pp. 767-768.

38 Suriname Preliminary Objections, paras. 1.8-1.11, 4.14; Suriname Rejoinder, paras. 2.6-2.9; Transcript, pp. 761-762, 778-779.

39 Suriname Rejoinder, paras. 2.15-2.29.

40 Suriname Preliminary Objections, paras. 2.1-2.12.

41 Suriname Preliminary Objections, paras. 2.1-2.10; Suriname Rejoinder, paras. 2.15-2.23.

42 Suriname Preliminary Objections, paras. 2.19-2.22.

instances where the land boundary terminus has been referred to without mention of the 1936 Point.

178. Suriname argues that, in the absence of an agreement on the maritime boundary in the territorial sea, the location of the 1936 Point inland from the low water mark means that it cannot, by definition, be the land boundary terminus in any event.[43] According to Suriname, the Tribunal would need to select a land boundary terminus on the low water line, thereby prejudicing the position of the land boundary, as Suriname contends Guyana does by selecting base point G1 (6° 00′ 27.9″N, 57° 08′ 21.1″W) as its point of commencement of the maritime boundary at the low water line.

179. It is Suriname's position that the land boundary terminus and the disputed maritime and land claims have been part of a broader dispute between the Parties, which is supported by the historical record of the Parties' negotiations and practice.[44] Suriname maintains that the work of the Boundary Commission in the 1930s was to recommend a settlement of the land boundary as a whole and therefore rejects Guyana's view that the location of the 1936 Point should be accepted as a land boundary terminus, given that other parts of the boundary remain in dispute.[45]

180. Suriname maintains that, in the absence of an agreement on the maritime boundary in the territorial sea, the 1936 Point could only bind it by agreement, by acquiescence, or by Suriname's actions and reliance on them estopping it from claiming an alternative location for the land boundary terminus.[46] Suriname points to the absence of a treaty and argues that, to acquiesce, Suriname must have remained consistently silent in the face of Guyana's assertion of a contrary position, which the historical record does not evidence. Suriname argues that it cannot be estopped from questioning the status of the 1936 Point, since representations regarding the 1936 Point were made only in the context of negotiations, and that Guyana's awareness of Suriname's overall claim

[43] Suriname Rejoinder, paras. 2.10-2.14.

[44] Suriname Preliminary Objections, paras. 3.4-3.15.

[45] Suriname Rejoinder, para. 2.22.

[46] As to Suriname's submissions on these points in general, see Suriname Preliminary Objections, paras. 5.1-5.15.

necessarily precluded Guyana from relying on any statement, action or inaction to its detriment.[47]

181. It is Suriname's submission that the Tribunal lacks jurisdiction to delimit a boundary by determining a closing line across the mouth of the Corantijn River under Articles 9 and 10 of the Convention.[48] Suriname maintains that it is Article 10, relating to bays, which would apply in respect of the Corantijn mouth in any event. It further argues that the drawing of any baseline or closing line is for the coastal State and not for a court or tribunal, although a court or tribunal can find that the manner in which those lines are drawn violates international law.[49] Moreover, Suriname disputes Guyana's argument that the Tribunal would have jurisdiction to make a partial delimitation from a point at 15 nm from coastal baselines should it not have jurisdiction to make a full delimitation, submitting that Guyana wrongly relies upon the *Gulf of Maine* case and fails to establish that such partial delimitations are possible in the instant case in which a starting point has not been agreed upon.[50]

182. Suriname contends that Guyana's second and third claims are inadmissible, as Guyana did not act in good faith and lacks clean hands.[51] Suriname maintains that the doctrine of clean hands has been recognized since the early jurisprudence of the Permanent Court of International Justice and that recent International Court of Justice ("ICJ") judgments and opinions leave it open to parties to invoke the doctrine.[52] In Suriname's view, even if these claims are found to be admissible, clean hands should be considered in determining the merits of Guyana's claims. According to Suriname, Guyana lacks clean hands as it authorized drilling in the disputed area, gave no notice to Suriname

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47 Suriname Preliminary Objections, paras. 5.10-5.15.

48 Suriname Rejoinder, paras. 2.55-2.61.

49 Transcript, pp. 800-801.

50 Suriname Rejoinder, paras. 2.62-2.69, citing *Gulf of Maine*, Judgment, I.C.J. Reports 1984, p. 246.

51 Suriname Preliminary Objections, paras. 7.1-7.9; Suriname Rejoinder, paras. 2.81-2.120; Transcript, pp. 1100-1101.

52 Suriname Rejoinder, paras. 2.91-2.109.

(press reports being insufficient), and failed to withdraw support for the activity following Suriname's first complaints.[53]

183. Suriname maintains that Guyana's second claim, that it engaged in a wrongful act by expelling the CGX vessel in June 2000, must fail as Suriname has not acquiesced in Guyana's claim to maritime territory[54] and Guyana cannot claim that it exercises lawful jurisdiction in the disputed area. Suriname points out that the ICJ has never in the same judgment awarded reparations for violation of State sovereignty in a case in which it was requested to delimit a boundary determining such sovereignty.[55] According to Guyana, such a claim would amount to an *ex post facto* application of Guyana's first claim and would encourage States in the future to engage in activity designed to create facts on the ground in support of their claims. Suriname asserts that based on the oil concession practice of the Parties, Guyana's actions were in breach of the 1989 *modus vivendi* and signalled an aggressive posture by Guyana.[56]

184. With respect to Guyana's third claim, Suriname contends that Guyana lacks clean hands and that the record demonstrates Guyana's failure to negotiate in good faith.[57] Suriname argues, with reference to the Parties' negotiating history since the June 2000 incident, that Guyana unreasonably demanded the reinstatement of the CGX operation while offering little in return, thereby jeopardizing resolution of the dispute and breaching Articles 74(3) and 83(3) of the Convention. Suriname further argues that Guyana withheld information regarding its oil concessions in bad faith and maintains that Guyana's core request, that exploration activities resume, amounted to a request that Suriname acquiesce in Guyana's prejudicial activity.[58]

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53 Suriname Rejoinder, paras. 2.110-2.115.

54 Suriname Preliminary Objections, paras. 6.7-6.11.

55 Suriname Rejoinder, paras. 2.84-2.90.

56 Suriname Preliminary Objections, paras. 6.3-6.6.

57 Suriname Preliminary Objections, paras. 6.39-6.44.

58 Suriname Rejoinder, paras. 2.116-2.120.

185. Accordingly, Suriname requests that the Tribunal find that it does not have jurisdiction to determine Guyana's maritime delimitation claim and that Guyana's second and third claims are inadmissible.[59]

B. THE PARTIES' INTERPRETATION OF THE FACTUAL RECORD

Guyana's Position

186. Guyana bases its claims in part on an account of the record of the practices of Guyana and Suriname and their colonial predecessors. Guyana refers to the work of the Mixed Boundary Commission, constituted by The Netherlands and the United Kingdom in 1934, and argues that the historical record demonstrates that the northerly point of the boundary it established, Point 61, was treated as the northern land boundary terminus between the colonies until the independence of Guyana and Suriname. It argues further that Point 61 has been recognized expressly by Guyana and Suriname since independence.[60]

187. Guyana refers to the work of the Mixed Boundary Commission and to the positions taken by The Netherlands and the United Kingdom at the time, and submits that the *de facto* delimitation of the territorial sea recommended by the Commission along an azimuth of N10°E from Point 61 was reached to accommodate The Netherlands' practical concern at the time that both navigable approaches to the mouth of the Corentyne River should remain under its authority to allow it to carry out its administration of shipping on the river. Guyana emphasized that this delimitation did not purport to follow an equidistance line, and was provisional and liable to change, being "motivated solely by considerations of administrative and navigational efficiencies."[61]

188. Guyana maintains that the attempts in 1939 by the United Kingdom and The Netherlands to draft a treaty settling the entire length of the boundary, based on a delimitation of the territorial waters along an azimuth of N10°E from a beacon to be

[59] Suriname Preliminary Objections, Chapter 8.

[60] Guyana Memorial, para. 3.10.

[61] Guyana Memorial, para. 3.16.

erected at the northern terminus of the land boundary,[62] reflected a consensus between the two countries at that time.[63] Guyana argues it was the outbreak of war in 1939 and the occupation of The Netherlands in 1940 that prevented signature of the treaty and that the English text proposed by the United Kingdom for a treaty settling the boundary in 1949 was identical to the 1939 draft treaty.

189. Guyana refers to the United Kingdom's own 1957-1958 delimitation, which was carried out in order to enable an oil concession to be granted to the California Oil Company in 1958. The United Kingdom delimited the territorial sea along a line following an azimuth of N10°E from Point 61 to a distance of three miles from the coast and then an azimuth of N33°E thereafter until intersection with the 25 fathom depth line (45.7 metres), which Guyana argues reflected a good faith attempt to establish a boundary based on the equidistance principle.[64] Guyana states that this is demonstrated by the intention of the British to conduct this exercise in accordance with the principles embodied in the UN International Law Commission's ("ILC") 1956 Draft Articles on Maritime Delimitation[65] (the "ILC Draft Articles"), which were subsequently adopted in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (the "1958 Territorial Sea Convention") and the 1958 Geneva Convention on the Continental Shelf (the "1958 Continental Shelf Convention" and together, the "1958 Conventions").[66]

190. Guyana points to the British use of Dutch maps in support of its contention that the exercise was carried out in good faith and submits that The Netherlands did not object to the California Oil Company concession, having been informed of it and knowing that the grant of the concession was made in reliance on the equidistance principle. Guyana also refers to Dutch willingness in 1958 to delimit the maritime boundary in conformity with Article 6(2) of the 1958 Continental Shelf Convention, the United Kingdom's positive response to such a proposal, and Dutch charts illustrating a "median line" dating from 1959 as evidence for The Netherlands' support for such an approach.

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62 Guyana Memorial, paras. 3.17-3.19.

63 Guyana Memorial, para. 3.19.

64 Guyana Memorial, paras. 3.22-3.31.

65 *Report of The International Law Commission to the General Assembly*, Yearbook of the International Law Commission 1956, Vol. II, Doc. A/3159 ("YBILC").

66 Guyana Memorial, para. 3.24.

191. Guyana submits that the segmented line adopted by the United Kingdom in its 1961 draft treaty reflected an attempt to track the course of a true equidistance line more closely in proposing the prolongation of the territorial sea delimitation along an azimuth of N10°E to a distance of six miles from the coast and the continuation of the boundary along an azimuth of N33°E for 35 miles, N38°E for a further 28 miles, and along an azimuth of N28°E to the edge of the continental shelf as defined by international law.[67]

192. Guyana argues that The Netherlands' draft treaty proposed in 1962 did not reject the concept of using an equidistance line to delimit the continental shelf area, which it failed to address, as the true focus of the dispute rested on competing territorial claims inland.[68] According to Guyana, the record relating to the exchange of draft treaties in 1961-1962 reflects a common understanding that Point 61 represented the northern land boundary terminus and a commitment to delimitation of the continental shelf based on equidistance.[69]

193. It is Guyana's contention that the United Kingdom took an approach consistent with its position in the 1961-1962 exchange in delimiting British Guyana's western maritime boundary, and that this approach was also embodied in the United Kingdom's draft treaty of 1965, which dispensed with the earlier use of a N10°E azimuth to delimit the territorial sea, proposing an equidistance delimitation from Point 61 to the edge of the continental shelf. Guyana submits that the United Kingdom considered the original rationale for delimiting the territorial sea in this way was no longer applicable as commercial ships could not use the western channel accessing the Corentyne River. In Guyana's view, the Dutch were in agreement that the old rationale was no longer valid, but did not sign the treaty due to disagreements over the competing inland claims,[70] objecting to the proposed change as a negotiating tactic. Guyana points out that The Netherlands supported delimitation based on the principle of equidistance in other contexts, referring, *inter alia*, to the position taken by The Netherlands in its maritime

[67] Guyana Memorial, paras. 3.37-3.39.

[68] Guyana Memorial, para. 3.42.

[69] Guyana Memorial, para. 3.43.

[70] Guyana Memorial, para. 3.46.

boundary dispute with Germany in 1965,[71] and with respect to the treaty concerning the North Sea maritime boundary concluded with the United Kingdom in the same year.[72]

194. For Guyana, the record of negotiations between the Parties in 1966 demonstrates its consistent assertion that delimitation should be according to the equidistance principle and reveals that Suriname's approach was rooted in political considerations rather than the applicable law. Guyana submits that Suriname's proposal to adopt a boundary following a N10°E azimuth from Point 61 to the edge of the continental shelf, reflecting the direction of the thalweg of the Corentyne River's western channel, was at odds with the position previously accepted by The Netherlands.[73] Further, the Dutch Prime Minister's advice to Suriname as to the extent of its territory on independence is cited by Guyana as consistent with the principle of equidistance in its description of Suriname's eastern maritime boundary.

195. Guyana argues that the practice of the Parties between 1966 and 2004 reflects a mutual recognition that the boundary should follow an equidistance line "to a very great extent the line of N34E". This is evidenced by the grant of oil concessions and the conduct of seismic testing[74] based upon an equidistance line matching that developed by the United Kingdom in 1957-1958. Guyana asserts that its practice from 1966 to the present day, and the United Kingdom's practice from 1957-1958, has been largely unopposed by The Netherlands[75] and that it has maintained a position based on delimitation by equidistance in negotiations with Suriname, in domestic legislation, in the grant of concessions for oil exploration, in the exercise of fisheries, and in law enforcement activities.[76] For Guyana, Suriname has conducted itself since independence in a manner "generally respectful" of the line delimited by the United Kingdom in 1957-1958, as did its colonial predecessor over a greater historical period,[77] largely refraining from

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[71] *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3 ("*North Sea Continental Shelf*").

[72] Guyana Memorial, paras. 3.45-3.48.

[73] Guyana Memorial, paras. 4.6-4.8.

[74] Guyana Memorial, Chapter 4.

[75] Guyana Memorial, para. 4.1.

[76] Guyana Memorial, para. 4.1.

[77] Guyana Memorial, para. 4.2.

granting oil concessions, sanctioning exploration, exercising fisheries jurisdiction or otherwise enforcing its laws in the continental shelf area to the west of an equidistance line.[78]

196. Guyana refers to the Parties' domestic legislation enacted in 1977-1978 and argues that territorial definitions used in the legislation reflect Guyanese acceptance of a boundary following an azimuth of N34°E. While Surinamese legislation remained silent on the matter, Guyana maintains that an explanatory memorandum to its 1978 Act indicates acceptance of delimitation by the equidistance principle wherever possible.[79] The Parties' domestic laws regulating petroleum exploitation in 1980-1986 are also described by Guyana as reliant on such an understanding.[80] Guyana maintains that its own initiatives to advertise petroleum exploration opportunities, manifest in its 1986 Petroleum Act, were based on a delimitation following a N34°E azimuth and were not objected to by Suriname or Staatsolie.

197. Referring to graphical depictions,[81] Guyana states that the pattern of oil concessions granted by the Parties in the continental shelf area makes "abundantly clear" that a boundary situated along an azimuth of N34°E was generally respected.[82] Guyana contends that it has pursued a consistent practice of allowing surveying activities and granting oil concessions in areas up to the Guyana Claim Line,[83] referring in particular to the activities of Royal Dutch Shell in 1966-1975, the oil concession granted by Guyana to Seagull-Denison in 1979-1981, and its concession granted to LASMO/BHP in 1988, as well as what it sees as Surinamese complicity with this practice.[84] Guyana argues, *inter alia*, that Royal Dutch Shell's exploration activities under a Surinamese concession were to the east of the Guyana Claim Line, while its activities to its west

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78 Guyana Memorial, paras. 4.2.

79 Guyana Memorial, paras. 4.12-4.14, referring to the Law Concerning the Extension of the Territorial Sea and the Establishment of a Contiguous Economic Zone of 14 April 1978 ("Surinamese April 1978 law").

80 Guyana Memorial, paras. 4.15-4.20.

81 Guyana Memorial, Plate 9, Plate 13; Vol. V, Plate 11, Plate 12.

82 Guyana Memorial, paras. 4.3-4.5.

83 Guyana Memorial, paras. 4.21-4.43.

84 Guyana Memorial, paras. 4.25-4.29.

were conducted under a Guyanese concession.[85] While both the licence issued by Staatsolie to Gulf in 1981 and the 1989 proposed concession to IPEL extended to territory to the west of the Guyana Claim Line, resulting in Guyanese protests, Guyana maintains that activities under Surinamese concessions in fact took place to the east of the Line.[86]

198. Guyana maintains that Suriname did not object to two of Guyana's concessions covering areas up to or approaching the Guyana Claim Line following the Joint Communiqué agreed between the Presidents of Guyana and Suriname in 1989[87] and continued to respect Guyana's concessions west of the line despite failed negotiations in 1991 and 1994. As further evidence of its respect for the Guyana Claim Line, Suriname did not protest against activity under the eleven concessions issued in the maritime area subject to this arbitration before May 2000, including frequent requests for entry into Surinamese waters by seismic survey ships.

199. Guyana submits that Staatsolie's activities and public statements have an official and public character and "are to be treated as reflecting ... the views of Suriname", due to its State ownership and regulatory remit.[88] In Guyana's view, Staatsolie's concession agreements are also broadly consistent with a Guyana Claim Line delimitation[89] and its activities, including materials used to promote oil concessions, also reflect such a delimitation.

200. The exercise of fisheries jurisdiction by Guyana and Suriname between 1977 and 2004 is said by Guyana to reflect a recognition or acquiescence in a boundary along the Guyana Claim Line.[90] Guyana refers, *inter alia*, to Suriname's alleged admission that it has not exercised fishing jurisdiction east of the line, to Guyana's establishment of a fishery zone, to its grants of fishing licences, and to its practices regarding the seizure of

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85 Guyana Memorial, para. 4.26.

86 Guyana Memorial, paras. 4.38-4.39.

87 Guyana Memorial, para. 4.32.

88 Guyana Memorial, para. 4.15.

89 Guyana Memorial, para. 4.43.

90 Guyana Memorial, paras. 4.44-4.52.

unlicensed fishing vessels as evidence of consistent conduct supporting its claim.[91] Guyana also refers to the activities of its coast guard, defence force, and Transport and Harbours Department in areas west of the line, and claims that Surinamese agencies have engaged in no such activities to the west of the line.

201. Regarding the activity of CGX under its 1998 concession, Guyana maintains that Suriname did not protest against this activity and expressly consented to crossings into the Surinamese side of the Guyana Claim Line.[92] Guyana contends that Suriname expressed no concern at CGX's presence west of the line until May 2000, when anti-Guyana rhetoric in the run-up to Surinamese parliamentary elections placed political pressure on its government to move against the CGX concession.[93] According to Guyana, Surinamese demands for Guyana to cease oil exploration activities in areas west of the Guyana Claim Line, including its 31 May 2000 demand that CGX cease its activities, were also the product of political change in Suriname.[94]

202. Guyana avers that on 2 and 3 June 2000 Suriname used its navy and air force to intimidate the CGX oilrig and drill ship, the *C.E. Thornton*, in defiance of Guyana's immediate proposal for dialogue and complaints that the action was taking place while Guyana was calling for diplomatic negotiations regarding the matter.[95] Guyana further contends that the 14 September 2000 apprehension of Guyanese-licensed fishing trawlers in an area previously understood to be Guyanese waters was Suriname's first action of this type.[96]

Suriname's Position

203. Suriname argues that to the extent that there was an agreement regarding the 1936 Point and the land boundary terminus, that agreement was established only with reference to the maritime boundary in the territorial sea along an azimuth of N10°E from that

[91] Guyana Memorial, paras. 4.45-4.49.

[92] As to Guyana's arguments regarding Surinamese expulsion of a CGX vessel in 2000 in general, see Guyana Memorial, Chapter 5.

[93] Guyana Memorial, paras. 5.3-5.7.

[94] Guyana Memorial, paras. 5.4-5.7.

[95] Guyana Memorial, paras. 5.8-5.9.

[96] Guyana Memorial, para. 5.12.

point.[97] Suriname reviews the genesis of the delimitation in the territorial seas and the 1936 Point and asserts that the location of the latter was determined largely by the need for a stable location away from the shore and the former by the need to secure Dutch responsibility for shipping traffic in the approaches to the Corantijn River.[98]

204. According to Suriname, there was little agreement between the Parties and their colonial predecessors as to the adoption of an equidistance line and Suriname and Guyana have never worked jointly to identify a line based upon this principle.[99] Suriname maintains that The Netherlands' policy on national resources from the end of the 1950s, as well as Suriname's own since independence, have reflected the view that Suriname's western limit of the continental shelf area was not bounded by an equidistance line.[100] Suriname argues that its domestic law is consistent with its continental shelf claim and distinguishes the explanatory memorandum to its April 1978 law,[101] contending that Suriname after independence did not become a party to the 1958 Conventions and, in its view, neither did Guyana.[102]

205. It is Suriname's contention that the United Kingdom relied on the N10°E azimuth territorial sea boundary following completion of the work of the Mixed Boundary Commission in attempts to delimit the maritime boundary as a whole during the 1950s.[103] Suriname argues that the Parties' conduct shows acknowledgement of special circumstances justifying the territorial sea boundary, and disagrees that delimitations proposed in the 1950s were based on equidistance principles.[104] Suriname suggests that the United Kingdom's abandonment of the N10°E azimuth territorial sea boundary from 1965 related to an aim to achieve an equidistance settlement similar to that achieved over the North Sea continental shelf.[105] However, Suriname submits that following

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[97] Suriname Counter-Memorial, para. 3.2.

[98] Suriname Counter-Memorial, paras. 3.3-3.13.

[99] Suriname Counter-Memorial, para. 3.14.

[100] Suriname Counter-Memorial, paras. 3.19-3.21.

[101] Suriname Counter-Memorial, paras. 3.22-3.26.

[102] Suriname Counter-Memorial, para. 3.24.

[103] Suriname Counter-Memorial, paras. 3.28-3.29.

[104] Suriname Counter-Memorial, para. 3.30.

[105] Suriname Counter-Memorial, paras. 3.31-3.32.

1965, a need continued for Surinamese sovereignty over the western approach to the Corantijn River to allow for the regulation of lighter shipping vessels.[106]

206. Suriname does not accept that the United Kingdom believed that The Netherlands was likely to agree to a territorial sea and continental shelf boundary based on equidistance.[107] Suriname maintains, *inter alia*, that Guyana's first proposal to delimit the continental shelf along an azimuth of N34°E was made at the Marlborough House talks in 1966[108] and that Guyana's practice regarding the eastern limit of its continental shelf has been inconsistent, with reference to the differing eastern boundaries of Guyanese oil concessions.[109] Suriname submits that an inconsistency of approach is reflected in Guyanese legislation, such as its 1977 Maritime Boundaries Act and Guyana's definition of its fishery zone pursuant to that Act, and Guyana's activities in enforcing its fisheries jurisdiction.[110] Suriname illustrates this variance graphically[111] and contends that the Guyana Claim Line is unrelated to the various equidistance lines Guyana argues the Parties have historically favoured.[112]

207. Suriname agrees that the Dutch chart 217 and British chart 1801 were the most accurate available in the 1950s, but submits that the equidistance line set out in Guyana's Memorial based on these charts and recent U.S. National Imagery and Mapping Agency ("NIMA") charts is not calculated accurately and does not represent an historical equidistance line.[113] Suriname disagrees that the Guyana Claim Line approximates modern equidistance lines and lines based on the principle of equidistance historically proposed by the Parties,[114] and that the Parties' conduct has been consistently based on such a line.[115] Suriname disputes the allegation that The Netherlands and Suriname

[106] Suriname Counter-Memorial, para. 3.33.

[107] Suriname Counter-Memorial, paras. 3.34-3.35.

[108] Suriname Counter-Memorial, para. 3.36.

[109] Suriname Counter-Memorial, paras. 3.36-3.42.

[110] Suriname Counter-Memorial, paras. 3.39-3.42.

[111] Suriname Counter-Memorial, Figures 3, 4 and 5.

[112] Suriname Counter-Memorial, paras. 3.43-3.51.

[113] Suriname Counter-Memorial, paras. 3.15-3.18 and 3.45-3.46.

[114] Suriname Counter-Memorial, paras. 3.52-3.58.

[115] Suriname Counter-Memorial, para. 3.58.

made no objection to Guyana's reliance on the Guyana Claim Line, referring in particular to the position taken at the 1966 Marlborough House talks that the maritime boundary followed a N10°E line from a land boundary terminus yet to be established.[116]

208. Suriname argues that it has consistently maintained that the position of its maritime boundary with Guyana should follow the Suriname Claim Line with respect to the territorial sea, continental shelf, and exclusive economic zone[117] and that only for a brief period was delimitation of the continental shelf by the equidistance method considered.[118] Suriname cites, *inter alia*, the diplomatic record as evidence that from 1954 onwards, Suriname advanced its own position within The Kingdom of The Netherlands and that The Netherlands acted only as its advisor. Suriname further points out that the 1958 Dutch proposal based on Article 6 of the 1958 Continental Shelf Convention was not acted upon by the United Kingdom.[119] According to Suriname, Guyana and the United Kingdom have not consistently proposed the Guyana Claim Line, as evidenced by a number of proposals that incorporated a delimitation of the territorial sea following an azimuth of N10°E and other equidistance lines not adopting a N34°E course.

C. GUYANA'S DELIMITATION CLAIM

1. Applicable Law and Approach to Delimitation

Guyana's Position

209. Guyana refers to Article 293 of the Convention directing the Tribunal to apply the law embodied in the Convention and "*other rules of international law not incompatible with this Convention*". Guyana also submits that the conduct of the Parties must be seen in the context of international law relating to maritime boundaries as it has developed since the Parties and their predecessor colonial powers have sought to delimit the

[116] Suriname Counter-Memorial, para. 3.59.

[117] Suriname Counter-Memorial, paras. 3.26 and 3.60-3.62.

[118] Suriname Counter-Memorial, paras. 3.44 and 3.61.

[119] Suriname Rejoinder, paras. 3.90-3.121.

boundary and that its evolution falls into the following periods: prior to 1958, 1958-1982, and 1982 onwards.[120]

210. Guyana's view is that international law, as it developed from the period prior to 1958, has reflected the principle that delimitation between adjacent States should be carried out according to equidistance, as reflected in the 1956 ILC Draft Articles, embodied in the 1958 Conventions, including the 1958 Territorial Sea Convention and the 1958 Continental Shelf Convention now forming the basis of delimitation under the Convention on the Law of the Sea.[121]

211. Guyana reviews what it argues was the law applicable to maritime boundary delimitation during the periods prior to 1982 and asserts, referring to its account of the historical record, that the Parties and their colonial predecessors understood that the applicable law required an equidistance approach to be adopted. Guyana refers, *inter alia*, to legislation passed by the Parties following independence, which it argues was enacted in response to the requirements of the 1958 Conventions, thereby demonstrating acceptance of the principles reflected in the 1958 Conventions in the years prior to 1982.[122] Such principles, Guyana argues, included an approach based on equidistance, such as that required under Article 6 of the 1958 Continental Shelf Convention.[123]

212. Guyana submits that the territorial sea should be delimited in accordance with Article 15 of the Convention to the distance specified in Article 3.[124] Guyana contends that Part VI of the Convention is applicable to the Parties as to their rights over, and the delimitation of, the continental shelf as defined in Article 76(1) of the Convention.[125] Guyana refers to the provisions of Part VI of the Convention it considers relevant to the determination of the outer extent of the continental shelf, and asserts that the sovereign rights to exploration and exploitation of natural resources provided for under that Part

[120] For Guyana's submissions regarding the applicable law, see Guyana Memorial, paras. 7.1-7.37. See also Transcript, pp. 237-305.

[121] Transcript, pp. 244-250.

[122] Guyana Memorial, paras. 7.18-7.19. See Transcript, pp. 247-249.

[123] Guyana Memorial, para. 7.19, with reference in particular to the explanatory memorandum accompanying the Surinamese April 1978 law.

[124] Guyana Memorial, paras. 7.22-7.23.

[125] Transcript, p. 238.

are inherent rights. Guyana submits that Part V of the Convention is applicable to the Parties as to their rights regarding the exclusive economic zone and its delimitation and refers to the provisions of Part V of the Convention it considers relevant to the determination of the outer extent of the exclusive economic zone.[126]

213. Guyana requests that the Tribunal decide on the course of a single boundary line delimiting the territorial sea, continental shelf, and exclusive economic zone so as to avoid the disadvantages inherent in a plurality of separate delimitations.[127] Guyana maintains that this approach does not preclude the Tribunal from delimiting the territorial sea prior to the continental shelf and exclusive economic zone.[128]

214. In Guyana's view there is a difference in approach as to how the territorial sea and the exclusive economic zone and continental shelf are to be delimited, stemming from the differences in accepted practice between the application of Article 15 of the Convention using the "equidistance/special circumstances rule" and the application of Articles 74 and 83 of the Convention under which delimitation is effected in accordance with the "equitable principles/relevant circumstances rule".[129] Guyana argues that the approach adopted by the ICJ recognizes this distinction, but finds the approaches to be closely related.[130]

215. Regarding each of the maritime zones in dispute, Guyana considers that the Tribunal should follow what it identifies as the delimitation practice of the ICJ and arbitral tribunals. Pursuant to this practice, the Tribunal would draw a provisional equidistance line, consider whether there are any special circumstances that justify a shift in that equidistance line to achieve an equitable solution, and then decide whether historical special circumstances or the conduct of the Parties justify a shift in the equidistance line

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[126] Transcript, p. 238.

[127] Guyana Memorial, para. 7.30, citing *Gulf of Maine*, Judgment, I.C.J. Reports 1984, p. 246, at p. 327, para. 194.

[128] Guyana Memorial, para. 7.31, citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p. 40, at pp. 93-94, paras. 174, 176 ("*Qatar/Bahrain*").

[129] Transcript, pp. 260-261.

[130] Guyana Memorial, para. 7.32, citing *Qatar/Bahrain* and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. 2002, p. 303, at para. 288 ("*Cameroon/Nigeria*").

to achieve an equitable solution.[131] In Guyana's submission, equidistance should be calculated by identification of the relevant coasts of the Parties and the identification of relevant baselines and base points from which an equidistance line can be measured.[132] According to Guyana, the relevant coast of Guyana facing the region over which the delimitation is to be effected spans 255 kilometres along its low-water line and that of Suriname spans 224 kilometres along its low-water line on the same basis and it depicts these coastlines respectively on U.S. NIMA charts 24380 and 24370.[133]

216. Guyana argues that the Tribunal should not apply an equidistance line derived from modern charts, as such a delimitation would ignore the conduct of the Parties since the 1960s and lead to an inequitable result.[134] Guyana points out that international tribunals have long taken into account the conduct of the parties, in particular their grant of oil and gas concessions, as circumstances to be taken into account in boundary delimitation.[135]

217. Guyana's position is that the Convention does not admit the approach advanced by Suriname calling for a delimitation of maritime areas by reference to general principles of equity.[136] Guyana distinguishes Suriname's approach, which it argues is aimed at the apportionment of maritime space *de novo*, from the delimitation of maritime areas that already appertain to the coast of a State. Guyana argues that neither the Convention, nor the jurisprudence of the ICJ support the former approach or the concept that a State might be disadvantaged by its geography in the manner suggested by Suriname.[137]

[131] Guyana Reply, para. 1.22. Transcript, pp. 263-268.

[132] Guyana Memorial, para. 8.33.

[133] Guyana Memorial, para. 8.35.

[134] Guyana Memorial, para. 8.50.

[135] Guyana Memorial, paras. 7.34-7.35.

[136] Guyana Reply, paras. 5.24-5.28.

[137] Guyana Reply, paras. 5.29-5.32.

Suriname's Position

218. Subject to its preliminary objections on jurisdiction, Suriname agrees to the application of a single maritime boundary.[138] Suriname submits, with reference to international jurisprudence relating to the use of single maritime boundaries, that such a maritime boundary may be applied notwithstanding oil concession or fisheries practice at variance with it.[139] Suriname contends that such practice is not likely to be of legal relevance unless it demonstrates express or tacit agreement as to the location of a boundary.[140]

219. Suriname maintains that delimitations based on the equidistance method are subject to adjustment or abandonment if an equitable solution is not achieved[141] and that, as a matter of practice, any initial step of identifying a provisional equidistance line should be subordinate to that objective.[142] In Suriname's view the various equidistance lines presented by Guyana illustrate that changes to coastal geography over time have a disproportionate effect on the location of an equidistance line; therefore, this method does not lead to an equitable result with regard to the delimitation between Guyana and Suriname.[143]

220. Suriname refers to the findings in the award of the arbitral tribunal constituted under Annex VII of the Convention in *Barbados/Trinidad and Tobago*[144] in support of its position on the approach applicable to delimitation of a single maritime boundary. According to Suriname, this case illustrates that relevant circumstances taken into consideration in delimiting a single maritime boundary are geographic in nature. Suriname submits that the *Barbados/Trinidad and Tobago* tribunal treated resource-

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[138] Suriname Counter-Memorial, para. 4.3.

[139] Suriname Counter-Memorial, paras. 4.4-4.17.

[140] Suriname Counter-Memorial, paras. 4.54-4.55; Transcript, pp. 896-899.

[141] Suriname Counter-Memorial, para. 4.17-4.18.

[142] Suriname Counter-Memorial, para. 4.42, citing, *inter alia*, *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*), Judgment, I.C.J. Reports 1982, p. 18, at p. 79, para. 109 ("*Tunisia/Libya*").

[143] Suriname Counter-Memorial, paras. 3.50-3.51.

[144] Suriname Rejoinder, paras. 3.9-3.22, citing *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award (11 April 2006), 45 I.L.M. p. 798 (2006), online: <http://www.pca-cpa.org> ("*Barbados/Trinidad and Tobago*").

related considerations cautiously (distinguishing the *Jan Mayen* case),[145] and accepted that the ratio of adjacent States' relevant coastal lengths are relevant for an equitable delimitation. Suriname further argues that the tribunal in *Barbados/Trinidad and Tobago* correctly regarded a provisional equidistance line as "hypothetical" only.

221. Suriname's position is that the present dispute can and should be resolved on the basis of the geographical characteristics of the coast and that the relationship between such characteristics and the maritime delimitation area should be the primary relevant special circumstance.[146] For Suriname, the maritime boundary should divide the area of overlap created by the frontal projection of neighbouring States' coastlines and the delimitation within this area should be based on equitable principles aimed at an equal division,[147] avoiding a "cut-off" of the seaward projection of the coast of either neighbouring State.[148] Suriname contends that this approach avoids distortions to the line of the boundary that are inherent in the equidistance method and allows for flexibility in achieving an equitable solution.[149] Suriname finds precedent for use of bisector angles drawn between coastal fronts in the *Gulf of Maine* and the *Tunisia/Libya* cases and submits that the "angle bisector" method is the most appropriate in the current proceedings as it gives rise to a straight line boundary from the coast and reflects the overall geographic relationship between the Parties.[150]

222. In disputing Guyana's reliance on equidistance, Suriname argues that the two-step process advanced by Guyana is to be used only where appropriate, and that principles of non-encroachment and avoidance of a "cut-off" effect are also pertinent.[151] Suriname

[145] Suriname Rejoinder, paras. 3.12-3.13; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 38 ("*Jan Mayen*").

[146] Suriname Counter-Memorial, paras. 4.19-4.22.

[147] Suriname Counter-Memorial, paras. 4.27-4.36.

[148] Suriname Counter-Memorial, paras. 4.29-4.30, citing *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at p. 53.

[149] Suriname Counter-Memorial, paras. 4.35-4.36, citing *Gulf of Maine*, Judgment, I.C.J. Reports 1984, p. 246.

[150] Suriname Rejoinder, paras. 3.230-3.241; Transcript, pp. 976-982.

[151] Suriname Rejoinder, paras. 3.26-3.44.

denies that there is a legal presumption in favour of equidistance delimitation, such a presumption having been rejected by the drafters of the Convention.[152]

223. Suriname rejects the proposition that the Parties' calculations of equidistance lines reflect agreement between them, citing the Parties' disagreement as to the location of the starting point of the line, the charts used, and the effect of Vissers Bank on an equidistance projection.[153] Suriname also contends that other South American delimitations depart in varying degrees from true equidistance lines, and questions the relevance of the Suriname/French Guiana maritime boundary in the absence of a binding agreement between those States.[154]

2. The Role of Coastal Geography

Guyana's Position

224. Guyana disputes Surinamese claims regarding the coastal geography of the Parties.[155] Guyana asserts that there are no configurations along the coastlines of the Parties that have a material prejudicial effect on the course of a provisional equidistance line, except for a protrusion in the coast of Suriname at Hermina Bank that Guyana argues causes the line to follow a northerly course to the prejudice of Guyana.[156] In Guyana's view, its relevant coastline is modestly concave[157] and Suriname's is convex[158] (due to the protrusion of Hermina Bank) rather than vice versa, and Guyana's relevant coastline is materially longer than Suriname's rather than shorter, as Suriname claims.[159] Guyana contends that the relevant coastal configurations and lengths presented by Suriname are inaccurate due to the exclusion of relevant basepoints further west on the Guyana coast (Devonshire Castle Flats), the inclusion of a new base point on the Surinamese coast (Vissers Bank) that, it argues, charts existing prior to the date of Guyana's Memorial do

[152] Suriname Rejoinder, paras. 3.45-3.52.

[153] Suriname Rejoinder, paras. 3.206-3.219; Transcript, pp. 958-963.

[154] Suriname Rejoinder, paras. 3.220-3.229.

[155] Guyana Reply, paras. 1.24-1.27, Chapter 3, paras. 5.33-5.52.

[156] Transcript, pp. 157-158.

[157] Transcript, pp. 161, 194.

[158] Transcript, pp. 161-162, 195.

[159] Guyana Reply, paras. 3.10-3.24.

not support, and the inaccurate contention that the coastline west of the Essequibo River is disputed by Venezuela.[160] In this connection Guyana made clear that its land boundary with Venezuela was fixed in 1899 by a competent international arbitral tribunal and as a member of CARICOM, Suriname itself has repeatedly confirmed its full support of Guyana's sovereignty over this territory.[161]

225. Guyana also disputes Suriname's method of representing the facing coasts of the Parties by their approximation to single axis façades, which it argues are not representative, and by the use of perpendiculars to those axes to project the Parties' appurtenant maritime areas.[162] According to Guyana, the jurisprudence of the ICJ regarding maritime boundary delimitation does not support the approximation or "refashioning" of the geographical reality of coastlines, nor has the ICJ recognized a right to delimitation by coastal front projection, distinguishing situations where such a method has been used and where a "cut-off" has been avoided on the basis of disproportionate encroachment on a maritime area.[163] Further, Guyana's calculation of the maritime areas appurtenant to the Parties' relevant coasts using the relevant coastal lengths presented by Guyana reveals Guyana to have a larger appurtenant maritime area than Suriname, rather than a smaller one as Suriname claims.[164]

226. In Guyana's view, both Suriname's maritime claim line and its proposed provisional equidistance line would fail to divide the maritime areas appurtenant to the Parties' relevant coasts equitably,[165] in part because of the distorting effects of the coastal headland at Hermina Bank.[166] Guyana rejects Suriname's contention that its provisional equidistance line is prejudicial to Suriname and "cuts off" its coastal area, arguing, *inter alia*, that Suriname's position is at odds with the equidistance delimitation achieved between Suriname and French Guiana and that the angle of the Corentyne River thalweg does not amount to a relevant special circumstance. Guyana's position is that

[160] Guyana Reply, paras. 3.19-3.24.

[161] Guyana Reply, paras. 3.19-3.24; Transcript, pp. 170-172.

[162] Guyana Reply, paras. 3.28-3.34; Transcript, pp. 233-234.

[163] Guyana Reply, paras. 5.33-5.52; Transcript, p. 200.

[164] Guyana Reply, paras. 3.28-3.34.

[165] Guyana Reply, paras. 3.35-3.51; Transcript, p. 199.

[166] Transcript, p. 214.

the Guyana Claim Line divides these maritime areas equitably, representing a division of appurtenant maritime areas more closely reflecting the ratio of the relevant coastal lengths of the Parties. Guyana also argues that equidistance delimitation reflects practice in South America generally.[167]

Suriname's Position

227. Suriname asserts that, when plotting a boundary based on the equidistance method in the present case, micro-geography of the coastal configurations gives rise to unwanted distortions, which are caused by reliance on coastal baselines.[168] For Suriname, the equidistance method is overly reliant on micro-geography, rather than dominant coastal features, and has been properly criticized for this reason.[169] Suriname therefore prefers the determination of relevant coasts, in order to avoid what are asserted to be distortions caused by the use of coastal baselines.

228. Disputing Guyana's basis for determining the relevant coasts[170] Suriname submits that between adjacent States, the relevant coast for calculation of an equidistance line is the part of the coast facing the area being delimited, rather than the outer extent of the baselines.[171] Suriname contends that the relevant coasts identified by Guyana are excessive in length and that broader equitable principles can be taken into account in identifying them. In Suriname's view, the length and direction of the Parties' coastlines are relevant factors as they illustrate whether a delimitation line is equitable.[172] While the disparity is not as great as that found to be significant in *Barbados/Trinidad and Tobago*, Suriname argues that the disparity in relative relevant coastal lengths favours Suriname in this case.[173] Suriname also disputes the basis on which Guyana calculates appurtenant maritime areas, asserting that the area of overlapping maritime entitlements

[167] Guyana Reply, paras. 3.50, 3.51-3.58.

[168] Suriname Counter-Memorial, paras. 4.44-4.49.

[169] Suriname Counter-Memorial, paras. 4.44-4.53; Transcript, p. 976.

[170] Suriname Rejoinder, paras. 3.160-3.170.

[171] Transcript, p. 935.

[172] Suriname Rejoinder, paras. 3.171-3.182.

[173] See Transcript, p. 935.

is to be determined using lines perpendicular to the angles of the States' coastal fronts.[174]

229. According to Suriname, the section of its provisional equidistance line nearer to the coast cuts across the coastal front of Suriname due to the effect of a coastal convexity on the western side of the mouth of the Corantijn River, and a concavity on the east side exaggerates this effect.[175] For Suriname, this is an example of the undue influence of coastal irregularities that, with Guyana's arguments regarding the same effect caused by Hermina Bank, make the case against equidistance delimitation. Suriname, however, denies that Hermina Bank is an irregularity with reference to the overall aspect of its coast.

3. Conduct of the Parties

Guyana's Position

230. For Guyana, the conduct of the Parties is relevant in determining whether there has been a tacit agreement on the location of the boundary, but may also be evidence of whether the Parties have considered a boundary line to be equitable.[176] Guyana maintains that there is no evidence that the Parties considered the Suriname Claim Line to be equitable,[177] arguing, *inter alia*, that it was rejected by the United Kingdom from the early 1960s and that it was advanced merely as a negotiation tactic by Suriname in the context of the disputed land boundary. With reference to certain contemporary sources, Guyana argues in particular that The Netherlands did not support the Suriname Claim Line.

231. Guyana asserts that the Parties' conduct shows that they considered delimitation using an equidistance method appropriate and therefore accepted the Guyana Claim Line as equitable.[178] According to Guyana, the record demonstrates that The Netherlands found

[174] Suriname Rejoinder, paras. 3.195-3.199.

[175] Suriname Rejoinder, paras. 3.183-3.194; Transcript, pp. 936-937.

[176] Guyana Reply, paras. 4.3-4.7.

[177] Guyana Reply, paras. 4.12-4.22.

[178] Guyana Reply, paras. 4.23-4.49.

it acceptable or desirable to approach delimitation using an equidistance method, referring in particular to negotiations in 1958 and to Suriname's behaviour with regard to Guyana's grant of oil concessions,[179] and distinguishing the position taken by The Netherlands and Suriname in the 1966 negotiations in London. Guyana maintains that Suriname overstates the geographical extent of Suriname's oil concessions, and argues that those extending west of the Guyana Claim Line were inactive in that area or were material on paper only.[180] Guyana argues that Suriname also misrepresents the status of the 1991 Memorandum of Understanding, which it did not implement.[181] For Guyana, its adherence to an equidistance position, represented by the Guyana Claim Line, is manifest from its legislation, fisheries and oil practice; while oil concessions were not all granted up to a line of N34°E, their eastern limits were generally consistent with it.

232. Guyana contends that it would be inequitable to ignore the existence of an historical equidistance line reflected by the Guyana Claim Line and the conduct of the Parties in respecting that line.[182] Regarding oil concessions, Guyana maintains that its concessions were granted having regard to the Guyana Claim Line and that Suriname has offered or granted oil concessions respecting a similar delimitation; Guyana distinguishes from their habitual practice the occasions since independence when Suriname has granted concessions on the Guyanese side of the Guyana Claim Line.[183] Guyana further argues that fishing practice and the exercise of other forms of governmental authority show recognition of the line in question.[184]

Suriname's Position

233. The conduct of the Parties is, in Suriname's submission, of limited legal relevance, in the context of a single maritime boundary,[185] as it must demonstrate the Parties' mutual

[179] Transcript, pp. 283-284.

[180] Guyana Reply, paras. 3.31-3.39.

[181] Guyana Reply, para. 4.36.

[182] Guyana Memorial, para. 8.51; Transcript, pp. 337-338.

[183] Guyana Memorial, para. 8.51; Transcript, p. 338.

[184] Guyana Memorial, paras. 8.51-8.56.

[185] Suriname Counter-Memorial, paras. 4.37-4.41.

intention to accept a specific delimitation.[186] Suriname argues that international tribunals have only considered party conduct relevant where it is "mutual, sustained, consistent, and unequivocal" and that the conduct referred to by Guyana does not meet this standard,[187] but in fact demonstrates the existence of a "notorious, long-lived, public and contentious" maritime boundary dispute.[188]

234. Suriname contends that the approach to party conduct taken by the ICJ in the *Tunisia/Libya* case[189] is not applicable in the present case.[190] There, Suriname argues, the ICJ had reference to a *modus vivendi* only in respect of a part of the Tunisia/Libya maritime boundary and only by reason of the colonial powers' (France and Italy) demonstration of consistent acceptance of a boundary[191] as part of an intentional effort to avoid overlapping oil concessions over an extended period.[192] Suriname also cites ICJ precedent rejecting similar arguments that States should be bound by acquiescence or estoppel by reason of its oil concession practices.[193]

235. Suriname disputes Guyana's reference to forty years of consistent oil concession practice as not grounded in fact.[194] According to Suriname, the geographical extent of oil concessions from 1965 until 2000[195] shows that both of the Parties had concessions in operation in the area of overlapping claims for the majority of the period since the 1950s. Suriname maintains that from 1957, with Suriname's earliest offshore petroleum concession, a N10°E azimuth line bounded the western limit of the concession area

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[186] Suriname Counter-Memorial, para. 4.37.

[187] Suriname Rejoinder, paras. 3.90-3.143, 3.144-3.157.

[188] Suriname Rejoinder, para. 3.84.

[189] Suriname Counter-Memorial, para. 5.1, citing *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18.

[190] As to Suriname's submission on this point generally, see Suriname Counter-Memorial, Chapter 5; Transcript, pp. 999-1010.

[191] Suriname Counter-Memorial, paras. 5.45-5.55.

[192] Suriname Counter-Memorial, paras. 5.49-5.53.

[193] Suriname Counter-Memorial, para. 5.71; Transcript, pp. 1010-1014, citing *Gulf of Maine*, Judgment, I.C.J. Reports 1984, p. 246. Suriname in its oral pleadings also dealt with *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13 ("*Libya/Malta*") (Transcript, pp. 1014-1016) and the *Jan Mayen* case (Transcript, pp. 1016-1022).

[194] Suriname Counter-Memorial, para. 5.4.

[195] Suriname Counter-Memorial, paras. 5.9-5.44.

granted by Suriname[196] and that Guyana's oil concessions adopted various eastern limits not tending to demonstrate consistent use of the Guyana Claim Line.[197]

236. Suriname's position is that the concerns of concession holders and operators as to the overlapping nature of concessions gave rise to negotiations in 1989, the 1989 *modus vivendi*,[198] and ultimately the 1991 Memorandum of Understanding.[199] For Suriname, Staatsolie's grant of concessions outside of the area of overlapping claims does not reflect Suriname's acceptance of the Guyana Claim Line.[200] Instead, Suriname maintains that its position regarding its claim to the Suriname Claim Line has historically been well known to Guyana, so no action of Staatsolie could be taken as a renunciation of Suriname's claim. Suriname submits that its oil concession practice demonstrates its consistent assertion of the Suriname Claim Line and rejects Guyana's suggestion that its conduct demonstrated respect for the Guyana Claim Line, distinguishing its restraint from 1999 onwards as reflecting a wish not to exacerbate the dispute and a lack of interest by concessionaires in disputed areas.[201] Regarding the legal significance of its restraint, Suriname asserts that the ICJ has not taken restraint pending the resolution of a dispute as prejudicing the position of a party exercising such restraint.[202] As to Guyana's fisheries conduct, Suriname disputes Guyana's contention that it refrained from carrying out enforcement west of the Guyana Claim Line, maintaining the converse to be true and also citing its conduct of marine biology research as supportive of its own claim.[203]

[196] Suriname Counter-Memorial, paras. 5.7, 5.13.

[197] Suriname Counter-Memorial, para. 5.13.

[198] Suriname Counter-Memorial, para. 5.36.

[199] Transcript, pp. 1058-1059.

[200] Suriname Counter-Memorial, paras. 5.56-5.72.

[201] Suriname Rejoinder, paras. 3.122-3.133.

[202] Suriname Counter-Memorial, paras. 5.73-5.79.

[203] Suriname Rejoinder, paras. 3.135-3.143.

4. Delimitation of the Territorial Seas

Guyana's Position

237. The delimitation of the territorial seas should, in Guyana's view, follow an "historical equidistance line" following an azimuth of N34°E from Point 61 for a distance of 12 nm to a point at the outer limit of the territorial sea[204] (the "Guyana Territorial Sea Line").[205] Guyana maintains that there are no grounds admissible under Article 15 of the Convention for departing from the Guyana Territorial Sea Line.

238. According to Guyana, an equidistance line delimiting the territorial sea along a line following the course of the Guyana Territorial Sea Line has historically been given effect by the Parties.[206] Further or alternatively, Guyana submits that even if the Guyana Territorial Sea Line were not to be regarded as the relevant equidistance line, then the conduct of the Parties since 1966 in following it would be sufficient to constitute a "special circumstance" justifying an adjustment to the equidistance line.[207]

239. Point 61 is Guyana's starting point for maritime delimitation because, Guyana argues, the Parties' conduct reflects a long-standing agreement that it should be treated as such[208] and both Guyana's and Suriname's claims rely on this point.[209]

240. Relying on Article 5 of the Convention, Guyana maintains that the low-water line along the coast marked on charts officially recognized by the coastal State provides the normal baseline for measuring the breadth of the territorial sea, and that no reason exists to depart from this approach.[210] Guyana refers to various charts used by the Parties and cites the U.S. NIMA charts 24370 and 24380 as the most recent charts on which it relies.

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[204] Guyana identifies two different coordinates for this point: 6° 13′ 49.0″N, 56° 59′ 21.2″W (Guyana Reply, para. 6.44) and 6° 13′ 46″N, 56° 59′ 32″W (Guyana Reply, paras. 7.1, 7.59).

[205] As to Guyana's arguments concerning delimitation of the territorial sea, see Guyana Memorial, Chapter 8. See also Transcript, pp. 276-365.

[206] Guyana Memorial, para. 8.31(b); Transcript, pp. 337-338.

[207] Guyana Memorial, para. 8.31(c); Transcript, pp. 338-339.

[208] Guyana Memorial, para. 8.31(a); Transcript, pp. 76-136, 289.

[209] Guyana Reply, paras. 6.5-6.6.

[210] Guyana Memorial, para. 8.39.

241. With regard to the location of a provisional equidistance line in the territorial sea, Guyana states that both Parties' calculations give rise to lines that "closely track the N34°E historical equidistance line", at least with regard to the part of the line beyond the first 3 nm.[211]

242. Guyana contends that both the United Kingdom's delimitation of the equidistance line in 1957, based on Dutch chart 217 and British chart 1801, and equidistance lines extended to a distance of twelve miles from Point 61 on the recent U.S. NIMA charts, follow azimuths ranging from N34°E to N36°E; to Guyana there is no material difference between the equidistance lines based on these three charts.[212]

243. In its analysis, Guyana finds no special circumstances that would justify an adjustment to an equidistance line delimiting the territorial seas.[213] Guyana argues that neither Party has claimed historic title[214] and disputes Suriname's reliance on the navigational requirements giving rise to the use of a line following an azimuth of N10°E as a special circumstance justifying an adjustment.[215] Guyana asserts that the Tribunal should be cautious in finding that navigational requirements could amount to a special circumstance, distinguishing the *Beagle Channel* case as precedent for the relevance of navigational requirements and maintaining that any such decision in the present case would be the first of its kind.[216]

244. Guyana submits, in the alternative, that the accommodation of the potential need for navigational access to the Corentyne western channel was provisional in any event, had become irrelevant through lack of use by the early 1960s,[217] and had been expressly rejected by the United Kingdom since that time.[218] In Guyana's view, such a

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[211] Guyana Reply, paras. 1.23, 6.13-6.22.

[212] Guyana Memorial, paras. 8.41-8.43.

[213] Guyana Reply, paras. 6.23-6.43.

[214] Guyana Memorial, para. 8.44; Guyana Reply, para. 6.23.

[215] Transcript, pp. 351-358.

[216] Guyana Reply, paras. 6.24-6.34, citing *Controversy concerning The Beagle Channel Region (Argentina/Chile)*, Award of 18 February 1977, 17 I.L.M. p. 634, at p. 673, para. 108 (1978), R.I.A.A., Vol. 21, p. 53 (1997) ("*Beagle Channel*").

[217] Guyana Reply, paras. 6.35-6.37; Transcript, p. 342.

[218] Guyana Memorial, para. 8.46; Transcript, p. 343.

circumstance could not require alteration to the course of the territorial sea boundary beyond 3 nm in any event.[219] Guyana disputes that as a matter of law it is possible for the Parties to have inherited a delimitation of the territorial seas along the Suriname Claim Line, distinguishing the present case from one where the principle of *uti possidetis* or Article 62 of the Vienna Convention on the Law of Treaties might be applicable, or where colonial practice might constitute a special circumstance meriting adjustment to an equidistance line.[220]

Suriname's Position

245. Suriname maintains that the territorial sea boundary has in fact been long established along the Suriname Claim Line.[221] In Suriname's view, the position of the 1936 Point and the direction of the N10°E Line to the limit of the territorial waters were established in combination and, should the Tribunal find that the 1936 Point is established, it must also find that the N10°E Line is binding on the Parties to the limit of the territorial sea.[222] The navigational requirement for Surinamese control of the approaches to the Corantijn River would, for Suriname, remain a special circumstance requiring the adoption of such a boundary in any event.[223]

5. Delimitation of the Continental Shelf and Exclusive Economic Zone

Guyana's Position

246. Guyana invites the Tribunal to find that the delimitation of the continental shelf and the exclusive economic zone should follow the Guyana Claim Line along an azimuth of N34°E up to 200 nm from coastal baselines from the terminus point of the boundary it

[219] Guyana Reply, paras. 6.38-6.43.

[220] Guyana Reply, paras. 5.57-5.67.

[221] Suriname Counter-Memorial, paras. 4.56-4.72.

[222] Suriname Counter-Memorial, paras. 4.60-4.61; Transcript, p. 830.

[223] Suriname Counter-Memorial, paras. 6.50-6.53; Suriname Rejoinder, paras. 3.256-3.273.

proposes in the territorial sea.[224] Guyana reserves its rights in respect of any delimitation of the continental shelf beyond the 200 nm limit.[225]

247. With respect to the continental shelf, Guyana submits that application of the "equitable principles/relevant circumstances rule" in accordance with the practice of international tribunals and States[226] requires the Tribunal to calculate an equidistance line across the continental shelf by reference to coastal basepoints starting from the northern terminus of the agreed land boundary, in the same way as for delimitation of the territorial sea.[227] Guyana submits further that in the same way as for the line delimiting the territorial seas, the Tribunal should adjust the equidistance line to reflect any special circumstances that might exist in order to achieve an equitable outcome.[228]

248. Guyana describes the Guyana Claim Line in the continental shelf and the exclusive economic zone as an "historical equidistance line" and argues that the Parties' conduct is significant in this case as the Parties have sought to identify and agree upon an equidistance line for a period in excess of forty years, a period over which international law has been developing with respect to the delimitation of maritime boundaries.[229] Guyana reviews the attempts to agree on delimitation made by the colonial powers prior to independence, and subsequently by Guyana and Suriname, in support of its argument that the Guyana Claim Line reflects historical acceptance of a line based on principles of equidistance.[230]

249. Guyana contends that the equidistance line drafted by the United Kingdom in 1957-1958 reflected British efforts to ensure that the California Oil Company concession was granted on the basis of a unilateral delimitation that adhered as closely as possible to the

[224] Guyana identifies two different coordinates for this point: 6° 13′ 49.0″N, 56° 59′ 21.2″W (Guyana Reply, para. 6.44) and 6° 13′ 46″N, 56° 59′ 32″W (Guyana Reply, paras. 7.1, 7.59).

[225] Guyana Memorial, para. 9.1.

[226] Guyana Memorial, paras. 9.3-9.4.

[227] Guyana Memorial, para. 9.8.

[228] Guyana Memorial, para. 9.4.

[229] Guyana Memorial, para. 9.5.

[230] Guyana Memorial, paras. 9.6-9.25.

principle of equidistance embodied in the ILC Draft Articles.[231] Guyana refers to the reasoning of British officials on the matter to argue that the equidistance calculation, based on Dutch chart 217 of February 1939, was made to give as little ground for objection from The Netherlands as possible.[232]

250. Guyana argues that the efforts of the United Kingdom in 1957-1958 later formed the basis of the British draft treaty proposals, which in turn were based on the principle of equidistance.[233] According to Guyana, The Netherlands' own projection, prepared in 1959 on the basis of Dutch chart 222, was also charted on the basis of equidistance.[234] The British draft treaty proposal of 1961 is cited by Guyana as amounting to a simplification of the equidistance line, extending it from the limit of the 3 nm territorial sea to the 200-metre isobath.[235] Guyana submits that the concession given in 1965 to Royal Dutch Shell, in an area extending up to the 200-metre isobath, was based on the United Kingdom delimitation and did not elicit an objection from The Netherlands.[236] Guyana also relies upon correspondence from the Dutch Prime Minister to the new Surinamese government in 1975, which in its view makes clear that The Netherlands did not support a claim delimiting the continental shelf along a N10°E azimuth.[237]

251. In Guyana's view, the Guyana Claim Line also emerged over time as an historical equidistance line by reason of its use as a basis for the grant of oil concessions by the United Kingdom and subsequently by Guyana until the present time. To Guyana, this line was based on broad agreement and consistent practice between the United Kingdom and The Netherlands, also reflecting an understanding that delimitation would be effected by the application of the equidistance principle.[238] Guyana submits that there has been no record of a formal objection to such a delimitation until the year 2000.[239]

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[231] Guyana Memorial, paras. 9.9-9.17.

[232] Guyana Memorial, paras. 9.9-9.17.

[233] Guyana Memorial, para. 9.18; Transcript, p. 400.

[234] Guyana Memorial, para. 9.19.

[235] Guyana Memorial, para. 9.18.

[236] Guyana Memorial, para. 9.20.

[237] Guyana Memorial, para. 9.21.

[238] Guyana Memorial, para. 9.22; Guyana Reply, paras. 7.38-7.44.

[239] Guyana Memorial, para. 9.24.

The Guyana Claim Line therefore reflects a reasonable and equitable delimitation that has served as a basis for a "*de facto modus vivendi*" between Guyana and Suriname, initially up to the 200-metre isobath and latterly up to a 200 nm limit.[240]

252. Guyana maintains that there are no grounds for departing from the Guyana Claim Line, which it considers to be an "equitable solution" within the meaning of Article 83 of the Convention.[241] For Guyana, contemporaneous and modern charts where relevant circumstances such as islands or other geographic features are absent provide no support for accepting the Suriname Claim Line as equidistance.[242] As argued in the context of the delimitation of the territorial seas, Guyana again asserts that ease of navigation as the original justification for a N10°E azimuth line has disappeared, and, in any event, a N10°E line has never been followed beyond the historic 3 nm limit to the territorial seas.

253. Guyana accepts that the Guyana Claim Line is at modest variance to an equidistance line calculated on the basis of modern U.S. NIMA charts, but submits that modern projections closely approximate historical equidistance lines.[243] Guyana argues that while equidistance projections based on the most recent charts depart from the Guyana Claim Line between the 200-metre isobath and the 200 nm limit of the continental shelf,[244] they would not achieve an equitable solution, as they would ignore the practice of the two States over a forty-year period.[245] Guyana contends that international tribunals have long recognized the conduct of the parties as relevant in achieving an equitable solution[246] and that the Guyana Claim Line reflects what the Parties have

[240] Guyana Memorial, para. 9.25.

[241] Guyana Memorial, paras. 9.29-9.31.

[242] Guyana Memorial, paras. 9.32-9.33.

[243] Guyana Memorial, paras. 9.26-9.28.

[244] Guyana Memorial, para. 9.34.

[245] Guyana Memorial, paras. 9.34-9.37.

[246] Guyana Memorial, paras. 9.35-9.37.

believed to represent equidistance since the 1950s[247] and therefore constitutes, unlike the Suriname Claim Line, an equitable outcome.[248]

254. As to the exclusive economic zone, Guyana's position is that the approach to be taken in delimiting the zone is the same as that to be taken with respect to the continental shelf,[249] with the aim of achieving an equitable solution. Guyana submits that there is a representative body of practice supporting the determination of a single maritime boundary for both the continental shelf and the exclusive economic zone.[250]

255. Guyana rejects Suriname's analysis melding the delimitation of the territorial sea, continental shelf, and exclusive economic zone into one.[251] Guyana's view is that, while the basepoints are not all agreed, the Parties are in fact in agreement as to the location of the provisional equidistance line for the continental shelf and exclusive economic zone.[252] Guyana argues such agreement confirms acceptance of the coastal starting point of the delimitation and shows that the coastline creates no material complication to delimitation.

256. In Guyana's view, geographical circumstances justify an adjustment of the equidistance line in favour of the Guyana Claim Line.[253] According to Guyana, the Parties' coastal configurations are not unusual and, with the exception of Hermina Bank, the relevant coasts do not give rise to special circumstances accepted in international jurisprudence as warranting adjustment to an equidistance line.

Suriname's Position

257. Suriname submits that the coastline of Guyana is characterized by coastal convexities between the Corantijn, Berbice, Essequibo rivers and beyond, while the Suriname coast

[247] Guyana Memorial, para. 9.37.

[248] Guyana Reply, paras. 7.45-7.57.

[249] Guyana Memorial, paras. 9.43-9.45.

[250] Guyana Memorial, para. 9.45.

[251] Guyana Reply, paras. 7.6-7.14.

[252] Guyana Reply, paras. 7.15-7.22.

[253] Guyana Reply, paras. 7.23-7.37; Transcript, pp. 437-444.

is characterized by concavities between its river estuaries.[254] For purposes of an equidistant boundary, Suriname considers that its relevant coast runs east from the west bank of the mouth of the Corantijn River to the east end of the Warappa bank and the relevant coastline of Guyana is the coastline east of the Essequibo river.[255]

258. Without prejudice to its overall claim, Suriname presents a graphical and descriptive representation of a provisional equidistance line using base points on what it submits are the relevant coasts of Guyana and Suriname.[256] Suriname submits that the coastal fronts of Guyana and Suriname, which it contends face N34°E and 0° respectively, produce an overlapping area when projected seaward to a distance of 200 nm[257] and that its provisional equidistance line fails to divide this area of overlap in an equitable manner.[258]

259. Suriname argues that its provisional equidistance line excessively "cuts off" the maritime area abutting Suriname's coast in breach of the "non-encroachment" principle, particularly with respect to the first section of the line (to shortly beyond the 200-metre isobath)[259] due to the effect of convexities and concavities, a trend, Suriname states, that employing a river closing line would not totally alleviate.[260] In Suriname's analysis, the Guyana Claim Line cuts off a still greater area of Suriname's coastal front projection than does its provisional equidistance line.[261]

260. Suriname calculates that a line dividing the area of overlapping coastal projections calculated equally would adopt an azimuth of N17°E from the 1936 Point, but submits

[254] Suriname Counter-Memorial, paras. 6.4-6.7, citing *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at p. 17, para. 8; Suriname Counter-Memorial, paras. 6.8-6.9, 6.24-6.35.

[255] Suriname Counter-Memorial, paras. 6.8-6.12.

[256] Suriname Counter-Memorial, paras. 6.13-6.18, Figure 31.

[257] Suriname Counter-Memorial, paras. 6.24-6.26, 6.41-6.44, Figure 33.

[258] Suriname Counter-Memorial, paras. 6.27-6.30.

[259] Suriname Counter-Memorial, para. 6.20.

[260] Suriname Counter-Memorial, paras. 6.20-6.21; Transcript, pp. 964-965.

[261] Suriname Counter-Memorial, para. 6.36.

that it is necessary to consider whether such a line should be adjusted in order to achieve an equitable delimitation.[262]

261. The need to prolong the existing Suriname-Guyana boundary along what it sees as its current course is also pointed to by Suriname as a relevant circumstance in the establishment of a single maritime boundary beyond the territorial sea.[263] According to Suriname, a N10°E azimuth extending the land boundary into the sea would reflect the "geographical reality" of the relationship between the two countries.[264] Moreover, the relative length of the relevant coasts of Suriname and Guyana is also a relevant circumstance that has been taken into account by previous international tribunals.[265] Suriname holds out the Suriname Claim Line as an equitable division, asserting that it would be based on a method reliant on coastal fronts rather than the selection of isolated base points, would not be influenced by protruding incidental features, and would not project towards the coast of either Party.[266]

262. Regarding the Guyana Claim Line, Suriname considers that Guyana's position has not been consistent, that the line is not equidistant, and that it is not equitable.[267] Suriname disagrees that the coastlines of Guyana and Suriname do not lend themselves to an approach using generalizations of the coastlines in straight segments[268] and rejects Guyana's view that the Suriname Claim Line is advanced for strategic reasons, arguing that the claim has been maintained since 1962. Suriname further contends that the Guyana Claim Line is perpendicular to Guyana's coast, does not divide the area of overlap and accordingly, cannot be regarded as equitable.

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[262] Suriname Counter-Memorial, paras. 6.48-6.49.

[263] Suriname Counter-Memorial, paras. 6.54-6.57.

[264] Suriname Counter-Memorial, paras. 6.56-6.57.

[265] Suriname Counter-Memorial, para. 6.59, citing *Gulf of Maine* (Judgment, I.C.J. Reports 1984, p. 246), *Libya/Malta* (Judgment, I.C.J. Reports 1985, p. 13), and *Jan Mayen* (Judgment, I.C.J. Reports 1993, p. 38); Suriname Rejoinder, paras. 3.274-3.279.

[266] Suriname Counter-Memorial, para. 6.60.

[267] Suriname Rejoinder, paras. 3.242-3.253.

[268] Suriname Counter-Memorial, paras. 6.37-6.38, citing the approach taken in *Gulf of Maine* (Judgment, I.C.J. Reports 1984, p. 246).

D. GUYANA'S THIRD SUBMISSION: ALLEGED UNLAWFUL THREAT AND USE OF FORCE BY SURINAME

Guyana's Position

263. Guyana claims that Suriname's actions in June 2000 represented a breach of the requirement in Article 279 of the Convention to resolve disputes by peaceful means, a breach of Article 2(3) of the UN Charter requiring Member States to settle international disputes by peaceful means not endangering international peace and security, and Article 33(1) of the UN Charter requiring recourse to judicial settlement, negotiation and other forms of dispute resolution methods in such circumstances.[269] Guyana also claims that Suriname has breached Article 2(4) of the UN Charter in using or threatening to use force in its international relations against the territorial integrity of Guyana, which it argues remains applicable in the context of territorial or maritime boundary disputes.[270]

264. Guyana asserts that Suriname's 11 May 2000 complaint was its first formal protest against exploratory activity by Guyanese licensees and that Suriname adopted a military option notwithstanding Guyana's offers to negotiate made in response to Suriname's initial demands for termination of exploration activity.[271]

265. According to Guyana, the CGX rig operators were sufficiently threatened by Suriname's actions that a return to the area was considered unsuitable[272] and subsequent intimidation of the licensee Esso E & P Guyana similarly prevented its continued operations and caused it to terminate all exploration activities in its Guyanese concession area.[273] Guyana also maintains that Suriname threatened its licensee Maxus with respect to operations in the disputed area and that this in turn caused Maxus not to carry out further exploration in the area of its concession.[274]

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[269] Guyana Memorial, para. 10.3; Transcript, pp. 573-576.

[270] Guyana Memorial, paras. 10.4-10.5; Transcript, pp. 576-581.

[271] Guyana Memorial, paras. 10.12-10.23; Transcript, pp. 551-556.

[272] Transcript, pp. 562-564, 571.

[273] Guyana Memorial, paras. 10.17-10.21.

[274] Guyana Memorial, para. 10.21; Transcript, pp. 570-571.

266. In the context of the small-scale military capabilities of Guyana and Suriname, Guyana sees Suriname's threat or use of armed force as significant and amounting to an internationally wrongful act, engaging the international responsibility of Suriname.[275] Guyana claims to have suffered material injury in the form of loss of foreign investment in offshore exploration, loss of licensing fees, and other sources of income and foregone benefits in the development of Guyana's offshore resources.[276] In addition, Guyana claims an entitlement to compensation for losses occasioned by the adverse effect of Suriname's action on Guyana's standing as a nation.[277]

267. Guyana rejects Suriname's assertion that it took action against CGX, Esso E & P Guyana, and Maxus' operations in order to maintain the *status quo*, as well as Suriname's characterization of its operations as police action.[278] Guyana contends that the activities it authorized in the disputed maritime area were in line with a *status quo* represented by 40 years of oil practice by the Parties, that it gave notice of the proposed activities, and that drilling was accelerated in response to positive geological findings rather than in order to change the *status quo*. According to Guyana, force used in a disputed area of territory cannot be reconciled with the requirement to act with restraint under Articles 74(3) and 83(3) of the Convention. Guyana rejects Suriname's contention that Surinamese actions were lawful countermeasures in response to an unlawful act, stating that there was no unlawful act on the part of Guyana, and that such countermeasures would be illegal in any case as violations of the obligation to refrain from threatening to use force.[279] Guyana disputes that Suriname had "no choice" but to take the action, citing the possibility of requesting ITLOS to prescribe provisional measures,[280] and submits that such action was at variance with the requirements under Article 279 of the Convention and Article 33(1) of the UN Charter to resort first to alternative means.

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[275] Guyana Memorial, paras. 10.23-10.24.

[276] Transcript, p. 572.

[277] Guyana Memorial, paras. 10.27-10.33.

[278] Guyana Reply, paras. 8.1-8.19.

[279] Transcript, pp. 582-586.

[280] Transcript, pp. 556-557.

Suriname's Position

268. According to Suriname, Guyana's claim that Suriname's escort of the CGX vessel from its location in June 2000 was unlawful is based on the erroneous premise that Guyana has title to the disputed maritime area.[281] Suriname posits that Guyana must wait for the establishment of legal title to the disputed area prior to seeking any judicial benefit from it. Suriname also asserts that Guyana's conduct in the disputed area constitutes an internationally wrongful act and that as a result Guyana lacks clean hands with respect to this submission.[282]

269. In Suriname's view, Guyana's second claim must also fail because no breach of the Convention has occurred. Suriname maintains that Article 279 of the Convention prohibits the use of force in the context of an attempt to resolve a "dispute ... concerning the interpretation or application of th[e] Convention" and that Article 301 of the Convention prohibits the use of force in the context of a party "exercising [its] rights and performing its duties under th[e] Convention". Suriname contends that neither circumstance applies and points to the requirement to exchange views under Article 283 of the Convention[283] as well as its view that Guyana did not consider there was a dispute until 2000. Moreover, according to Suriname, the breach of the UN Charter pleaded by Guyana cannot form the basis of a claim under the Convention alone.[284]

270. Suriname submits that Guyana exaggerates the nature of its naval operation[285] and characterizes it as a law enforcement measure of no greater force than was strictly necessary to achieve legitimate objectives.[286] Suriname further submits that the circumstances surrounding the action, including, *inter alia*, its instructions not to use or threaten force, are consistent with law enforcement under its domestic legislation and consistent with the type of force considered acceptable on arrest of a ship.[287] Suriname

[281] Suriname Counter-Memorial, para. 7.1; Transcript, pp. 1076-1079.

[282] Suriname Counter-Memorial, para. 7.3.

[283] Transcript, pp. 1193-1198.

[284] Suriname Rejoinder, paras. 4.5-4.11; Transcript, p. 1092.

[285] Suriname Counter-Memorial, paras. 7.13-7.16.

[286] Suriname Counter-Memorial, para. 7.23; Transcript, pp. 1106-1110.

[287] Suriname Rejoinder, paras. 4.32-4.56.

denies that a use or threat of force has been proven or that any action was directed at Guyana because of the foreign nationality of the flag and crew of the vessel, and takes the position that exercise of coastal jurisdiction does not amount to armed force.[288] In the alternative, Suriname claims that its actions would constitute a lawful countermeasure against Guyana's actions.[289]

271. Suriname disputes that State responsibility was engaged by its acts and asserts that there has been no case in the context of a territorial dispute where a State found not to have title to territory has been held responsible for its actions in an area which had been the subject of dispute.[290]

272. According to Suriname, a decision was taken, in a departure from the established CGX concession work program initially agreed upon, to accelerate the drilling of a well and to locate it deliberately in the disputed area. This decision, it argues, was made in breach of the 1989 *modus vivendi* and 1991 Memorandum of Understanding.[291] Suriname submits that Articles 74(3) and 83(3) of the Convention create two obligations: to "make every effort to enter into provisional arrangements of a practical nature" and "not to jeopardize or hamper the reaching of a final agreement", the latter specifically requiring restraint.[292] Suriname distinguishes between transitory or occasional actions characterizing the *status quo* and those representing irreparable prejudice,[293] and argues that exploratory drilling is an invasive exercise of sovereign rights over natural resources causing such prejudice.[294] Suriname contends that Guyana authorized drilling without adequate notice, consent or acquiescence in disputed waters

[288] Suriname Rejoinder, paras. 4.57-4.73; Transcript, pp. 1110-1111, 1116-1126.

[289] Transcript, pp. 1126-1131.

[290] Suriname Counter-Memorial, paras. 7.17-7.21; Transcript, pp. 1101-1106.

[291] Suriname Counter-Memorial, para. 7.11.

[292] Suriname Rejoinder, para. 4.13.

[293] Suriname Counter-Memorial, paras. 7.42-7.43, citing *Aegean Sea Continental Shelf (Greece v. Turkey)*, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976, paras. 30-31 ("*Aegean Sea*").

[294] Suriname Rejoinder, paras. 4.13-4.16.

in breach of Articles 74(3) and 83(3) of the Convention, and that its own actions in response were necessary.[295]

273. In Suriname's estimation, Guyana has suffered no loss and alone bears the consequences of offering contracts concerning areas for which it does not have secure title.[296] The calculation of Guyana's claim[297] and Guyana's method of valuation of work to be performed under terminated concessions are disputed by Suriname. Suriname also disputes that the claims advanced relate to losses suffered by Guyana rather than its licensees and submits that the claim for loss of licensing fees is speculative.[298] Regarding Esso's invocation of a *force majeure* clause, Suriname argues that it may have been related to factors other than the dispute with Suriname[299] and that the concession areas in question concerned maritime territory that was for the larger part outside of the disputed area in any event.

E. GUYANA'S FOURTH SUBMISSION AND SURINAME'S SUBMISSIONS 2.C AND 2.D: BREACH OF ARTICLES 74(3) AND 83(3) OF THE CONVENTION

Guyana's Position

274. Guyana claims that Suriname breached Articles 74(3) and 83(3) of the Convention by failing to seek resolution by resort to practical provisional arrangements and by conducting itself in a manner that jeopardized reaching a final agreement.[300] Guyana submits that these breaches represent a serious threat to international peace and security[301] and that a forcible expulsion of a licensee's vessels from a disputed maritime area cannot be likened to the arrest of a ship on the high seas for law enforcement purposes.[302]

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[295] Suriname Counter-Memorial, paras. 7.40-7.45; Suriname Rejoinder, paras. 4.17-4.31.

[296] Suriname Counter-Memorial, paras. 7.26-7.39; Transcript, pp. 1131-1132.

[297] Suriname Counter-Memorial, paras. 7.29-7.39.

[298] Suriname Counter-Memorial, paras. 4.74-4.79.

[299] Suriname Counter-Memorial, paras. 7.35-7.36.

[300] Guyana Memorial, para. 10.6.

[301] Guyana Memorial, para. 10.7.

[302] Guyana Memorial, para. 10.8.

275. Guyana disagrees with Suriname's account of the negotiations between the Parties following the 1989 *modus vivendi*, the 1991 Memorandum of Understanding, and the events of June 2000.[303] Guyana maintains that Suriname rejected the 1991 Memorandum of Understanding by disavowing it, failing to ratify it, and thwarting efforts to establish modalities of operation subsequently. According to Guyana, Suriname similarly failed to cooperate following the action it took in June 2000, while Guyana did provide information regarding its oil concessions, but could not proceed further in the absence of agreement by Suriname on modalities for operation. In response to Suriname's claim that events prior to 1998 (the year of Suriname's accession to the Convention) are irrelevant to the Tribunal's determination as to a breach of Articles 74(3) and 83(3) of the Convention, Guyana argues that those events are relevant to the interpretation of post-1998 conduct as they demonstrate a consistent pattern of negative conduct.[304]

Suriname's Position

276. Suriname submits that only conduct after 8 August 1998, being the date on which the Convention came into force between the Parties, can be relevant to Guyana's allegation of breach of Articles 74(3) and 83(3) of the Convention. Further, Suriname maintains that to the extent that the obligations to make every effort to enter into provisional arrangements of a practical nature pending a final agreement under those Articles are enforceable, these have been breached by Guyana, rather than Suriname, through its unyielding approach in negotiations following the events of early June 2000.[305]

277. Regarding the negotiations attempted by the Parties, Suriname complains that Guyana's proposals were unworkable and that disclosure as to the commercial arrangements under the Guyana-CGX concession was lacking.[306] Suriname contends that Guyana's approach was to avoid formal commitments relating to anything other than the recommencement of operations under its concession agreements. Suriname submits that the 1989 *modus vivendi* and 1991 Memorandum of Understanding themselves

[303] Guyana Reply, paras. 9.1-9.14.

[304] Transcript, pp. 607-609.

[305] Suriname Rejoinder, paras. 5.6-5.14.

[306] Suriname Counter-Memorial, paras. 8.2-8.10.

amounted to provisional arrangements of a practical nature pending resolution of the dispute, and that Guyana's entry into contracts with oil companies covering much of the disputed area constituted an unreasonable departure from those agreements.[307]

278. Suriname invites the Tribunal to find that Guyana lacks entitlement to a remedy in any event and, in the alternative, that Guyana has forfeited the right to bring this claim by acting in an obstructive manner.[308]

[307] Suriname Counter-Memorial, paras. 8.11-8.16.

[308] Suriname Rejoinder, paras. 5.15-5.21.

CHAPTER IV - JURISDICTION TO DETERMINE THE MARITIME BOUNDARY

279. The Parties' positions regarding the Tribunal's jurisdiction to determine the maritime boundary are set out above in Chapter III(A) of this Award. Pursuant to its Procedural Order No. 2 (*supra*), the Tribunal deferred its decision on Suriname's Preliminary Objections to the Final Award.

280. The Tribunal takes note of Suriname's statement at the hearing that:

> If ... there is indeed an agreed boundary in the territorial sea ... then the terminus of the maritime boundary provides a perfectly adequate starting point, and every issue that this Tribunal would have to decide would be governed by the provisions of the Law of the Sea Convention.[309]

In light of the Tribunal's finding in Chapter V of the Award that the starting point of the maritime delimitation between the Parties is the intersection of the low water line of the west bank of the Corentyne River and the geodetic line of N10°E which passes through Marker "B" established in 1936, the Tribunal need not consider further Suriname's jurisdictional objection with respect to Guyana's maritime delimitation claim. Accordingly, the Tribunal finds that it has jurisdiction to delimit the maritime boundary in dispute between the Parties.

[309] Transcript, pp. 795-796.

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CHAPTER V - DELIMITATION IN THE TERRITORIAL SEA

A. THE PARTIES' POSITIONS

Suriname's N10°E Line to 12 nm

281. Suriname submits that the delimitation of the territorial sea should proceed along an azimuth of N10°E from the 1936 Point/Point 61 (the "10° Line") and that this boundary delimits the twelve-mile territorial sea of Suriname. Suriname posits that the 10° Line "began as an agreed boundary for the territorial sea",[310] and maintains that the Parties have never worked jointly to identify the equidistance line, much less agreed on its use to delimit their maritime boundary.[311]

Special Circumstances and Historical Evidence of an Agreement

282. According to Suriname the consistent and concerted behaviour of The Netherlands and the United Kingdom in their dealings with each other over many years established their mutual acceptance of that boundary through tacit or *de facto* agreement, acquiescence or estoppel.[312] Suriname contends that the need to guarantee The Netherlands' sole responsibility for the care for and supervision of all shipping traffic in the approaches to the Corentyne, a river under its sovereignty, constitutes a special circumstance under Article 15 of the Convention.[313]

283. For Suriname, the meaning of Article 15, including its reference to special circumstances, is to be understood in the context of the regime in which it appears. Article 2 of the Convention provides that the sovereignty of a coastal State extends beyond its land territory to an adjacent belt of sea described as the territorial sea, so that all activities in the territorial sea are subject to control and regulation by the coastal State, except as expressly provided otherwise.[314] Consequently, Suriname posits that

[310] Suriname Rejoinder, para. 3.259.

[311] Suriname Counter-Memorial, para. 3.14.

[312] Transcript, p. 829.

[313] Suriname Counter-Memorial, para. 3.12, Suriname Rejoinder, paras. 3.263, 3.264.

[314] Transcript, p. 835.

"such navigational considerations", namely the control of shipping by the coastal State, are special circumstances for the purposes of Article 15.[315]

284. In 1936 the Mixed Boundary Commission established the location of what Suriname called the 1936 Point, on the ground near the mouth of the Corentyne. Its purpose was "to indicate the direction of the boundary line in the territorial waters on a True bearing of N10°E, this direction being parallel to the mid-channel as indicated on the chart".[316] The bearing of N10°E was a modification by the Mixed Boundary Commission to the proposals of the Governments of the United Kingdom and The Netherlands of a line following a bearing of N28°E. Suriname notes that this modification was accepted by The Netherlands and the United Kingdom by an exchange of notes of 22 November 1937 and 25 July 1938.[317]

285. Suriname maintains that, although they did not reach an agreement binding on the Parties, the United Kingdom and The Netherlands respected the 10° Line as the territorial sea boundary in their mutual relations from 1939 to 1965. Support for this position is found in the United Kingdom's acceptance of the 10° Line through its failure to protest when The Netherlands provided details of its territorial sea boundary between Suriname and British Guiana to the International Law Commission in 1953. Suriname argues that the determination of the 10° Line was, among other things, "motivated solely by considerations of administrative and navigational efficiencies".[318] The 1936 Point in combination with the 10° Line guaranteed The Netherlands' sole control over the territorial waters in the approach to the Corentyne River.[319] Suriname contends that this navigational consideration still exists as a special circumstance under Article 15 of the Convention.

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[315] Suriname Counter-Memorial, paras. 6.51-6.52; Suriname Rejoinder, para. 3.265.

[316] Suriname Counter-Memorial, para. 3.8, citing Report on the Inauguration of the Mark at the Northern Terminal of the Boundary Between Surinam and British Guiana, Guyana Memorial, Annex II, at para. 4.

[317] Suriname Counter-Memorial, para. 3.9.

[318] Suriname Counter-Memorial, para. 3.12, citing Guyana Memorial, para. 3.16.

[319] Suriname Counter-Memorial, para. 3.13.

Evolution of Historical Territorial Sea Agreement from 3 to 12 nm

286. The historical acceptance of the 10° Line as the boundary of the territorial sea was in Suriname's view not altered by the extension of the breadth of the territorial sea to twelve miles. Suriname argues that where a text specifies the location and direction of the territorial sea boundary without reference to geographic limit, the correct interpretation is the ordinary meaning of the text, so that the boundary applies to the entire territorial sea up to the limits claimed by the parties at any given time in accordance with international law.[320] Suriname relies on the finding of the ICJ in the *Aegean Sea* case that an agreement "must be interpreted in accordance with the rules of international law as they exist today, not as they existed in 1931".[321] This is known as the inter-temporal law.

Application of the Inter-temporal Law

287. For Suriname, if the only reason for using the 10° Line in the present delimitation is that it was agreed in 1936, the Tribunal must apply the inter-temporal law in order to determine whether the 1936 agreement applies to the present-day extent of the territorial sea.[322] Where the location and direction of a territorial sea boundary is specified in an agreement but its seaward boundary is not specified, Suriname maintains that the question of whether the territorial sea boundary established by the Parties applies to all or only part of the territorial sea depends on the agreement's object and purpose.[323] Suriname's position is that the object and purpose of the territorial sea boundary established by the Parties was "clearly to limit the extent of Guyana's territorial sea",[324] for reasons of Suriname's having control over the approaches to the Corentyne.

[320] Transcript, p. 850.

[321] Transcript, p. 851; *Aegean Sea*, Judgment, I.C.J. Reports 1978, p. 3, at p. 33, para. 80.

[322] Transcript, p. 852.

[323] Transcript, p. 853.

[324] Transcript, p. 854.

Guyana's N34°E Line to 12 nm

288. Guyana's position is that the delimitation of the territorial sea should follow an "historical equidistance line" along an azimuth of N34°E from Point 61 for a distance of 12 nm to a point at the outer limit of the territorial sea (being the Guyana Territorial Sea Line).[325] Guyana considers Point 61 as the appropriate starting point for maritime delimitation because the Parties' conduct reflects a long-standing agreement, over seventy years, that this point should be treated as such and both Guyana's and Suriname's claims rely on it. Guyana contends that both the United Kingdom's delimitation of the equidistance line in 1957, based on Dutch chart 217 and British chart 1801, and equidistance lines extended to a distance of twelve miles from Point 61 on the recent U.S. NIMA charts follow azimuths ranging from N34°E to N36°E.

Historical Evidence of an Agreement on an Equidistance Line

289. Guyana argues that the Guyana Territorial Sea Line is an equidistance line which should be followed when delimiting the territorial sea under Article 15 of the Convention as this line has historically been given effect by the Parties. Alternatively, Guyana submits that even if the Guyana Territorial Sea Line were not to be regarded as the relevant equidistance line, then the conduct of the Parties since 1966 in following it would be sufficient to constitute a special circumstance justifying an adjustment to the equidistance line.

290. Guyana takes the view that the arrangement made by the Mixed Boundary Commission resulting in the adoption of a 10° Line in 1936 was provisional in nature. Guyana accepts that during the period between 1936 and 1965, the conduct of the Parties generally followed a line of N10ºE, but submits this was limited to a distance falling within the three-mile territorial sea as permitted by international law. Guyana notes that in 1965 the United Kingdom first proposed a draft treaty which departed from the 10° Line, and that this was due to the United Kingdom's decision to implement the median line principle enshrined in Article 12(1) of the 1958 Territorial Sea Convention. Further, explanatory documents prepared contemporaneously by officials from the

[325] Guyana identifies two different coordinates for this point: 6° 13′ 49.0″N, 56° 59′ 21.2″W (Guyana Reply, para. 6.44) and 6° 13′ 46″N, 56° 59′ 32″W (Guyana Reply, paras. 7.1, 7.59).

United Kingdom and British Guiana indicate that the original navigational reasons put forward by The Netherlands for the 10° Line in the territorial sea were no longer applicable.[326] Guyana maintains that in 1966 on achieving independence Guyana informed The Netherlands that it shared this view. Guyana contends that thereafter its practice was predicated on the equidistance line as required by Article 12(1) of the 1958 Territorial Sea Convention.[327] According to Guyana, after Suriname achieved independence in 1975, its conduct was generally consistent with that of Guyana rather than with the 10° Line.[328] Guyana puts forward that the conduct of the parties in the grant of oil concessions respected the historical equidistance line of N34E within the territorial waters up to the three-mile limit and then up to the twelve-mile limit once that was established.[329]

291. Guyana argues that "special circumstances" for the purposes of maritime delimitation include the conduct of the Parties, particularly the existence, if there is one, of a *modus vivendi* reflected in a pattern of oil and gas concessions, as well as the conduct of the former colonial powers.[330] Guyana submits that:

> the special circumstances in the territorial sea or beyond do not include land mass and geographic and geological factors which pertain to the seabed. Seabed special circumstances do not come within the Article 15 definition of special circumstances and that is long established, since at least 1985, and stated very clearly at paragraph 39 of the Libya-Malta case. That case, of course, was dealing with the continental shelf but the principle enunciated by the Court applies equally to the territorial sea.[331]

Absence of Navigation by Early 1960s

292. Guyana contends that by the early 1960s any potential need for navigational access to the Corentyne western channel had disappeared, in view of the lack of actual usage by that time. In that connection, Guyana cites the draft treaty proposed by the United

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[326] Guyana Memorial, para. 8.26.

[327] Guyana Reply, para. 8.20.

[328] Guyana Memorial, para. 8.30.

[329] Guyana Reply, para. 6.41.

[330] In support of this argument, Guyana cites *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18, at paras. 84, 94, 119.

[331] Transcript, p. 332.

Kingdom in 1965, which took Point 61 as the starting point, but in Draft Article VII(1) proposed the use of a line to be drawn "in accordance with the principle of equidistance from the nearest points of the base lines from which the territorial sea of British Guiana and Surinam respectively is measured".[332] Contemporaneous documents prepared by officials of the United Kingdom and British Guiana indicate that the original reasons given by The Netherlands no longer applied since the western channel of the Corentyne River was no longer navigable by commercial ships, which had become much larger and heavier than those operating in the 1930s.

The N10°E Line, if it Governed Relations Between the Parties, Did Not Exist Beyond 3 nm

293. Guyana disputes that even if there were a navigational factor to be treated as a special circumstance, it could not require alteration to the course of the territorial sea boundary beyond 3 nm. Guyana maintains that "the United Kingdom and The Netherlands agreed that any delimitation outside the territorial sea beyond three miles from Point 61 was to be carried out in accordance with the principle of equidistance".[333] The United Kingdom in 1957 calculated the methodology to be applied in establishing an equidistance line using Dutch chart 217 and British chart 1801, and proposed a segmented line with a general bearing of N34°E. Guyana argues that The Netherlands did not object to this line or to its adoption by the United Kingdom and Guyana as an equidistance line in the territorial sea and eventually up to a limit of 12 nm.[334] Thus, according to Guyana, as a matter of law it was impossible for the Parties to have inherited a delimitation of the territorial seas beyond three miles along the 10° Line.[335]

No Justification for Departure from the Provisional Equidistance Line

294. Guyana maintains that there is no justification admissible under Article 15 of the Convention for departing from the provisional equidistance line in Suriname's favour, and notes that Suriname has never claimed that it has an historic title to any maritime

[332] Guyana Memorial, para. 8.26.

[333] Guyana Memorial, para. 8.24.

[334] Guyana Memorial, para. 8.24.

[335] Guyana Memorial, para. 8.28.

territory east of the 10° Line.[336] Guyana disputes that the arrangement made in 1936 between the Parties' colonial predecessors is a special circumstance. Guyana argues that there is very limited judicial authority for the proposition that navigational requirements can be treated as a special circumstance "having so decisive an effect" as that argued for by Suriname[337] and it distinguishes the *Beagle Channel* award on the grounds that the deviation accepted in that case was "relatively unimportant".[338] In the alternative, Guyana argues that navigational factors should not be treated as a special circumstance in the absence of an actual navigational need as opposed to a "purely hypothetical one", as in the western channel of the Corentyne River.[339]

B. THE TRIBUNAL'S FINDINGS PERTAINING TO THE DELIMITATION OF THE TERRITORIAL SEA

295. The Tribunal recalls Article 15 of the Convention, which is based on Article 12 of the 1958 Territorial Sea Convention. Article 15 of the Convention provides that:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

296. Thus, Article 15 of the Convention places primacy on the median line as the delimitation line between the territorial seas of opposite or adjacent States.

Special Circumstances and Historical Evidence of an Agreement

297. There is no evidence before the Tribunal to suggest that some form of historic title to the territorial waters in dispute had inured to either Party, nor are there any geographical features such as low-tide elevations or islands that the Tribunal would have to consider in delimiting the territorial sea.

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[336] Guyana Reply, para. 6.23.

[337] Guyana Reply, para. 6.26.

[338] Guyana Reply, para. 6.30, *Beagle Channel*, 17 I.L.M. p. 634, Annex IV, para. 4, XXI R.I.A.A. p. 57.

[339] Guyana Reply, para. 6.33.

298. The question remaining before the Tribunal is whether there are any special circumstances which might justify a departure from the median line approach prescribed by Article 15 of the Convention.

299. As has been recalled above, The Netherlands claimed control over the approaches to the Corentyne River by virtue of the fact that the waters of the River were under its exclusive sovereignty. At the time, an additional motivation for the United Kingdom to accept the claim of The Netherlands was that the burden of administering the maritime area would fall upon Suriname. Although the proposed treaty embodying this agreement was not signed, in large part because of the advent of the Second World War, the parties acted upon it for thirty years and, in their relations, regarded the 10° Line as the proper delimitation line in the territorial sea.

300. There is disagreement between the Parties as to what constitutes a special circumstance, and in particular, whether navigational considerations, such as those cited by Suriname to support the N10ºE line in the territorial sea, can constitute a special circumstance.[340] Guyana reasons that the authorities for varying the median line to accommodate special circumstances of navigation are scarce and that where they do exist, for such a variation to take place there must be:

> a known navigational channel or an established practice of navigation, and not the situation (as arises in the present case) where the navigational interest identified in 1936 was both hypothetical and recognised to be subject to change, and in respect of which for over 40 years there has been no evidence of any navigational use.[341]

301. In the Commentary accompanying the International Law Commission's ("ILC") proposals concerning the delimitation of the territorial sea, it was said that the presence of a navigable channel could make a boundary based on equidistance inequitable and could indicate the appropriateness of utilising the thalweg as the boundary.[342] This is not the situation in the present case, where the thalweg is to the east of a line based on equidistance and where, indubitably, a binding agreement between the Parties places the boundary in the river on the western bank. Moreover, the equidistance line is to the east

[340] Guyana Reply, paras. 1.6, 3.51-3.53; Suriname Counter-Memorial, paras. 3.32-3.33, 6.51-6.53

[341] Guyana Reply, para. 6.30.

[342] YBILC, 1952, Vol. II, Doc.A/CN.4/53.

of the N10°E line. The ILC Commentary is instructive, however, in that it broadly indicates that navigational interests may constitute special circumstances.[343]

302. International courts and tribunals are not constrained by a finite list of special circumstances. The arbitral tribunal in the *UK – French Continental Shelf* arbitration took the approach that the notion of special circumstances generally refers to equitable considerations rather than a notion of defined or limited categories of circumstances:

> The role of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles. In addition, Article 6 neither defines 'special circumstances' nor lays down the criterion by which it is to be assessed whether any given circumstances justify a boundary line other than the equidistance line.[344]

303. The ICJ has followed a similar approach in its jurisprudence. The Court in the *Libya/Malta* case found that there is "assuredly no closed list of considerations".[345] Furthermore, in the *Jan Mayen* case, after having found that it was appropriate "to begin the process of delimitation by a median line provisionally drawn",[346] the ICJ stated that it was "now called upon to examine *every particular factor* of the case which might suggest an adjustment or shifting of [that] line" [emphasis added].[347] The Court continued by stating that an adjudicative body called upon to effect a delimitation of a maritime boundary "will consult not only 'the circumstances of the case' but also previous decided cases and the practice of States",[348] and will be mindful of the need to achieve "consistency and a degree of predictability".[349] The Tribunal agrees that special

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[343] See also ibid., Doc. A/CN.4/61/Add.1/Annex.

[344] *UK – French Continental Shelf*, 54 I.L.R. p. 5 (1979), para. 70.

[345] *Libya/Malta*, Judgment, I.C.J. Reports 1985, p. 13, at p. 40, para. 48. However, it should be noted that that statement was limited; the Court found in that case that "only [considerations] that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion."

[346] *Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, at para. 53.

[347] *Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, at para. 54.

[348] *Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, at para. 58.

[349] The Court in *Jan Mayen* (I.C.J. Reports 1993, p. 38, at para. 58) quoting the *Libya/Malta* Judgment (I.C.J. Reports 1985, p. 39, at para. 45).

circumstances that may affect a delimitation are to be assessed on a case-by-case basis, with reference to international jurisprudence and State practice.

304. Navigational interests have been found to constitute such special circumstances. Indeed, at the first Geneva Conference on the Law of the Sea, Commander Kennedy expressed the view that a special circumstance may consist in "the presence of a navigable channel."[350] Arbitral tribunals subsequently adhered to this view, notably in the *Beagle Channel* arbitration. The tribunal in that case stated that it had been guided:

> in particular by mixed factors of appurtenance, coastal configuration, equidistance, and also of convenience, navigability, and the desirability of enabling each Party so far as possible to navigate in its own waters. None of this has resulted in much deviation from the strict median line, except ... near Gable Island where the habitually used navigable track has been followed.[351]

305. Guyana attempted to limit the relevance of the finding of the tribunal in that case. Guyana argued that there is no habitual use of the western channel, that the deviation from the median line would not be minor, and that there are no islands in the territorial sea of the Parties.[352] The Tribunal does not agree with Guyana's submission on the significance of the *Beagle Channel* award. The *Beagle Channel* tribunal's statement that there was little deviation from the strict median line was merely descriptive; it was not prescribing that any deviation from the median line based on navigational concerns need be minor. On the contrary, the tribunal's finding prescribes that factors such as "convenience, navigability, and the desirability of enabling each Party *so far as possible* to navigate in its own waters" [emphasis added], be taken into account.[353]

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[350] Proceedings of the Geneva Conference on the Law of the Sea, Thirty-second meeting, 9 April 1958, in *United Nations Conferences on the Law of the Sea: Official Records* (Buffalo: Hein, 1980), p. 93.

[351] *Beagle Channel*, 17 I.L.M. p. 634, at p. 673, para. 110 (1978).

[352] Guyana Reply, paras. 6.29-6.30.

[353] The arbitral tribunal in the *UK – French Continental Shelf* arbitration similarly considered the navigational, defence and security interests of both parties in its delimitation (54 I.L.R. p. 5, at para. 188 (1979)). Those considerations included defence plans, sea rescue, control of navigation, and responsibility for lights and buoys (para. 163). Although the arbitral tribunal considered those interests, it found that they did not exercise "a decisive influence on the delimitation of the boundary" in that case due to the "very particular character of the English Channel as a major route of international maritime navigation serving ports outside the territories of either of the Parties" (para. 188). However, the tribunal did find that even in that case, they could "support and strengthen … any conclusions that are already indicated by the geographical, political and legal circumstances of the region" (para. 188).

306. The Tribunal concludes that special circumstances of navigation may justify deviation from the median line, and that the record amply supports the conclusion that the predecessors of the Parties agreed upon a N10°E delimitation line for the reason that all of the Corentyne River was to be Suriname's territory and that the 10° Line provided appropriate access through Suriname's territorial sea to the western channel of the Corentyne River. Contrary to Guyana's assessment above, Suriname has presented evidence of navigation in the western channel, albeit of small local craft, rather than large ocean-going vessels. The fact is that there is an "established practice of navigation"[354] in the western channel, not only a hypothetical one. Furthermore, the Tribunal must take account of Guyana's own admissions that there was recognition of a N10°E line for 3 nm:

> from the late 1930s to the late 1950s – when a 'navigation channel' was thought to be a 'possibility', it was understood by both colonial powers to extend no farther than 3 nm from the Guyana coast. Thus, even if such a channel had existed, there is no basis for treating it as a special circumstance affecting maritime delimitation beyond 3 nm, let alone for a distance of 200 nm;[355] and,

> To the extent that there ever was any agreement in relation to a 10-degree line, it was, in any event, limited to a distance of no more than 3 nautical miles. At no point during which United Kingdom and the Dutch appeared to have followed the line did the territorial sea ever exceed 3 miles. The 10-degree line was rejected by the United Kingdom in the early 1960s, well before the extension of the breadth of the territorial sea to 12 nautical miles by Guyana in 1977 and by Suriname in 1978. There are no grounds for now claiming that a 10-degree line should automatically extend 12 nautical miles as a result of a change in the law.[356]

307. The Tribunal holds that the 10° Line is established between the Parties from the starting point to the 3 nm limit. As the Tribunal accepts the 10° Line to the 3 nm limit, it also accepts the 1936 Point/Point 61 as a reference point for drawing the maritime delimitation line. Indeed, the Tribunal agrees with Suriname that the 1936 Point/Point 61 is inextricably linked to the Parties' agreement on a maritime boundary following the 10° Line.[357]

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[354] Guyana Reply, para. 6.30.

[355] Guyana Reply, para. 3.53.

[356] Transcript, p. 344.

[357] Suriname Preliminary Objections, para. 5.7.

308. An additional source of disagreement between the Parties has been the question of how to use the 1936 Point/Point 61 to determine the starting point of the maritime boundary. Guyana argued that the proper starting point was on the low water line at the shortest distance from the 1936 Point/Point 61,[358] a proposition disputed by Suriname.[359] As the 1936 Point/Point 61 was the reference point for the 10° Line which the Tribunal has accepted up to the 3 nm limit, the Tribunal finds that the starting point of the boundary ("Point 1") is the intersection of the low water line of the west bank of the Corentyne River and the geodetic line of N10°E which passes through Marker "B", a marker placed by the 1936 Mixed Boundary Commission 220 metres distant on an azimuth of 190° from Marker "A", also known as the 1936 Point/Point 61. The Tribunal recalls that Suriname argued that it does not have jurisdiction to determine any question relating to the land boundary between the Parties.[360] The Tribunal's findings have no consequence for any land boundary that might exist between the Parties, and therefore, in light of Suriname's statement at the hearing discussed in Chapter IV,[361] this jurisdictional objection does not arise.

309. The Tribunal also recalls that the Parties were unable to agree on the coordinates of Marker "B". The Tribunal Hydrographer requested, on 20 December 2006, "that the Parties provide the position of Marker 'B'."[362] In response, Guyana provided a set of WGS-84 coordinates which Suriname disputed,[363] urging the Tribunal to refer to the astronomical coordinates previously used by both Parties.[364] The Hydrographer therefore made a site visit to the location of Marker "B", and determined its WGS-84 coordinates to be 5° 59′ 46.21″N, 57° 08′ 50.48″W.[365] The Parties accepted these coordinates as the location of Marker "B" and so does the Tribunal.

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[358] Transcript, pp. 179-180.

[359] Transcript, p. 691.

[360] Suriname Preliminary Objections, para. 4.14.

[361] "If … there is indeed an agreed boundary in the territorial sea … then the terminus of the maritime boundary provides a perfectly adequate starting point, and every issue that this Tribunal would have to decide would be governed by the provisions of the Law of the Sea Convention." (Transcript, pp. 795-796)

[362] Written Question to the Parties from the Tribunal Hydrographer, 20 December 2006.

[363] Letter from Guyana to the Tribunal, 10 January 2007.

[364] Letter from Suriname to the Tribunal, 12 January 2007.

[365] Tribunal Hydrographer Corrected Report on Site Visit, 30 July 2007, para. 42.

The Boundary Between 3 and 12 nm

310. When Guyana and Suriname, as independent nations, extended the breadth of their territorial seas from 3 to 12 nm (in 1977 and 1978, respectively), neither addressed directly the question of the continuation of the 10° Line from the previous to the current limit of their territorial seas. That question appeared to have been subsumed within the wider question of the delimitation of the continental shelf and exclusive economic zone and the difference in approach between the Parties on this question.

311. Rather surprisingly, the question of whether and how, in the absence of an agreement to do so, a delimitation should be extended from the previous limit of territorial seas to a newly established limit, does not appear to have engaged the attention of States, courts, or commentators. The Tribunal agrees with Guyana that the *Guinea-Bissau – Senegal* case cited by Suriname does not support the view that there should be automatic extension of the territorial sea from the previously accepted limit of 3 nm, to the current limit of 12 nm. Indeed, the difference between this case and *Guinea-Bissau – Senegal* is that there was a written agreement between the parties in the latter case, given effect by the tribunal in that case. No authority was cited to the Tribunal of a comparable situation in any other case, although Suriname states:

> The object and purpose of choosing the 10° Line was that navigation entering the river would be regulated by The Netherlands/Suriname and would not be subject to regulation by the United Kingdom/Guyana. Thus, the question is not just a technical issue of intertemporal law regarding the breadth of the territorial sea, but rather one of applying the contemporary law of the sea in light of the object and purpose of the agreement on the 10° Line. In this connection, an examination of the broad unilateral regulatory and enforcement powers of the coastal state with respect to navigation in the territorial sea in the 1982 Convention, as set forth in articles 19, 21, 22, 23, 25, 211(4) and 220(2)-(6), suggests that the application of the 10° Line to the full 12-nautical-mile territorial sea is required in order to achieve the object and purpose of the agreement.[366]

312. In the above submission, Suriname raises the conduct of the Parties over some thirty years to the level of a perfected instrument, a notion that the Tribunal rejects. Uncompleted treaties, such as the 1939 or 1949 British draft treaty, do not create legal rights or obligations merely because they had been under consideration. This point was

[366] Suriname Rejoinder, para. 3.75.

decided by the ICJ in the *Sovereignty over certain Frontier Lands* case.[367] There, the Court considered efforts in 1889 and 1892 "by the two States to achieve a regular and continuous frontier between them" which ended in the drafting of a convention, but not in its ratification. The Court concluded that "[t]he unratified Convention of 1892 did not, of course, create any legal rights or obligations".[368]

313. However, the Tribunal accepts that it must apply the Convention to the entirety of the case before it, and Article 15 allows the Tribunal to consider historic title and special circumstances as reasons for varying the median line in conducting a delimitation of the territorial sea. The Tribunal is also persuaded that coastal States need to exercise regulatory and enforcement powers with respect to navigation in the territorial sea under the Articles cited by Suriname. These regulatory enforcement powers extend to both Parties, although Suriname's control over the approaches to the Corentyne River further justify the line the Tribunal has taken in delimiting the territorial sea along the N10°E azimuth to the 3 nm limit.

314. An automatic extension of the line, as it proceeds seaward, would however rapidly cease to have relevance to the special circumstances of navigation and control that brought it about.

315. Beyond the 3 nm limit to the 12 nm limit it is necessary to find a principled method by which the 10° Line may be connected to the single maritime boundary line determined by the Tribunal to delimit the continental shelves and exclusive economic zones of the Parties.

316. In a general sense, the extension of the territorial sea from its former limits to a distance of 12 nm from territorial sea baselines recognised by the Convention favours greater coastal State control over navigation, pollution, customs, and other coastal State laws, including its general criminal law. Such was recognised, for example, in the United States when a report was issued by the 105th Congress on the Coast Guard Authorization Act of 1997. Noting that Presidential Proclamation 5928 of December

[367] C*ase concerning Sovereignty over certain Frontier Land* (*Belgium v. Netherlands*), Judgment, I.C.J. Reports 1959, p. 209.

[368] Ibid. at p. 229.

27, 1988, had defined the territorial sea of the United States as extending to 12 nm, the Report stated:

> This will enable the Coast Guard to establish vessel operating requirements including vessel traffic systems, for all U.S. and foreign vessels within the 12-mile territorial sea. This will also clarify the area in which the Captain of the Port can direct a vessel to operate or anchor, establish safety zones to protect the navigable waters, protect the nation from terrorism, and investigate vessel casualties. In addition, the Coast Guard will be able to keep out of the expanded territorial sea vessels with a history of accidents, pollution incidents, or serious repair problems and vessels that discharge oil or hazardous substances or that are improperly manned. Currently, these substandard vessels may approach as close as three nautical miles to our coast before they can be instructed not to enter our waters. This additional area of legislative jurisdiction will enable the Coast Guard, through its Port State Control Program, to deal more effectively with substandard foreign flag vessels seeking to enter our ports.[369]

317. In an age of increased security and safety concerns regarding international boundaries, certainly navigational concerns have been imbued with greater significance. As cited above, similar arguments were advanced by Suriname in support of its view that the 10° Line had been accepted as the boundary between the two territories at a time when the territorial sea limit had been recognised by both The Netherlands and the United Kingdom as extending to 3 nm, and that the previous limit should automatically be regarded as extending on the same azimuth to the currently recognised territorial sea limit of 12 nm.[370] In its view, the logic behind the choice of a 10° Line in place of an equidistance line applied as strongly to the currently claimed and permissible 12 nm limits in the territorial seas.

318. Suriname also argued that not extending the 10° Line beyond the 3 nm limit would cause Guyana's territorial sea to "wrap-around" the northern limit of Suriname's territorial sea, thus defeating what it claimed was the "object and purpose" of the choice of the 10° Line in the first place, when the areas beyond were regarded by the international law of the time as high seas. In that connection, appeal was also made by Suriname to the inter-temporal law principle, applying it in this case to submit that

[369] United States Congress, From 1st Session, Report of the 105th Congress, 105-236, Coast Guard Authorization Act of 1997.

[370] It should be noted that Guyana ratified the United Nations Convention on the Law of the Sea, 1982, on 31 July 1993 and has declared a 12 nm territorial sea and a contiguous zone extending to 24 nm. Suriname ratified the Convention on 9 July 1998 and has declared a 12 nm territorial sea. It has not declared a contiguous zone.

references to the territorial sea in the earlier instruments and instances of conduct should be regarded as references to the "limits claimed by the parties at any given time in accordance with international law."[371] The Tribunal, however, cannot accept this submission in the present case, where the issue turns on conduct of the Parties justifying an adjustment based on special circumstances. The portion of the decision in the *Aegean Sea* case quoted by Suriname to support its submission,[372] where the ICJ regarded the definition of "territory", appearing in an instrument dated 1931, as now including the continental shelf,[373] is not relevant.

319. The evidence in the case of the navigational and other interests of Suriname extending beyond 3 nm is, however, of some consequence. These considerations appear to have been present in the mind of British government experts, such as Commander Kennedy and Mr. Scarlett, who raised the new issue of the contiguous zone in internal discussions of the boundary.[374] It appears to have been a result of these discussions that the 1961 British draft treaty submitted to The Netherlands proposed that the N10°E line extend to 6 nm before turning to other directions beyond that point.

320. It is to be noted that, at the time of the discussions leading up to the United Kingdom's draft treaty of 1961, there was no stated outer limit to the territorial sea contained in the 1958 Territorial Sea Convention. The limit of 12 nm established for the outer limit of the contiguous zone, however, effectively put a cap on any claims to territorial waters beyond that limit, in which event the claiming State would forego a claim to a contiguous zone.

321. It should also be noted that Article 24 of the 1958 Territorial Sea Convention specifies a median line in the delimitation of overlapping adjacent or opposite contiguous zones, in the absence of agreement, without regard to special circumstances. This provision does not appear in Article 33 of the Convention which is modelled on Article 24 of the 1958 Territorial Sea Convention.

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[371] Transcript, p. 850.

[372] Transcript, p. 851.

[373] *Aegean Sea*, Judgment, I.C.J. Reports 1978, p. 3, at pp. 35-36, para. 86.

[374] Commander Kennedy to Mr. Scarlett, 15 January 1959, Guyana Memorial, Annex 24; Mr. Scarlett to Commander Kennedy, 11 February 1959, Guyana Memorial, Annex 25.

322. Much attention was devoted at the hearing to the problem of the so-called wrap-around, or cut-off, effect of a delimitation of the territorial seas extending only to 3 nm. Such a delimitation line along the N10°E azimuth would allow Guyana's territorial sea to cut across the approaches to the river and thus defeat the purpose of that line to protect Suriname's navigational interests. A solution suggested by Suriname, based on the angle bisector method of delimitation, would be to extend the 10° Line to 12 nm and thereafter to proceed on a direction line of N17°E, the effect of which would be to divide equally the area of overlap. However, Suriname did not urge this solution on the Tribunal since its central argument was to promote a single maritime boundary on an azimuth of N10°E to the 200 nm limit. In its view, the N17°E line would have to be adjusted by reason of geographical circumstances and equitable criteria to a N10°E line for a distance of 200 nm. This line would, of course, remove the overlap altogether.

323. The Tribunal considers that, in determining a delimitation line dividing the Parties' territorial seas from the point at which the N10°E line ends at 3 nm to the 12 nm limit, a special circumstance is constituted by the very need to determine such a line from a point at sea fixed by historical arrangements of an unusual nature. Bearing this special circumstance in mind, the Tribunal arrives at a line continuing from the seaward terminus of the N10°E line at 3 nm, and drawn diagonally by the shortest distance to meet the line adopted later in this Award to delimit the Parties' continental shelf and exclusive economic zone.

324. In the judgment of the Tribunal, this line is in conformity with the relevant provisions of the Convention. It avoids a sudden crossing of the area of access to the Corentyne River, and interposes a gradual transition from the 3 nm to the 12 nm point. It also ensures that the line is convenient for navigational purposes.

325. The Tribunal therefore concludes that the territorial sea delimitation must be drawn from the point at which the N10°E line intersects the 3 nm limit to the point at which the equidistance line drawn by the Tribunal in Chapter VI of this Award intersects the 12 nm limit.

326. For illustrative purposes only, Map 2 at the end of this Chapter shows the course of the delimitation line through the territorial sea.

327. The verbal description of the international maritime boundary through the territorial sea is as follows. The delimitation line commences at Point 1, being the intersection of the low water line of the west bank of the Corentyne River and the geodetic line of N10°E which passes through Marker "B" established in 1936. Marker "B" has a WGS-84 position of 5º 59′ 46.21″N, 57º 08′ 50.48″W.[375]

328. From Point 1, the delimitation line proceeds along geodetic lines to the following points in the order given:

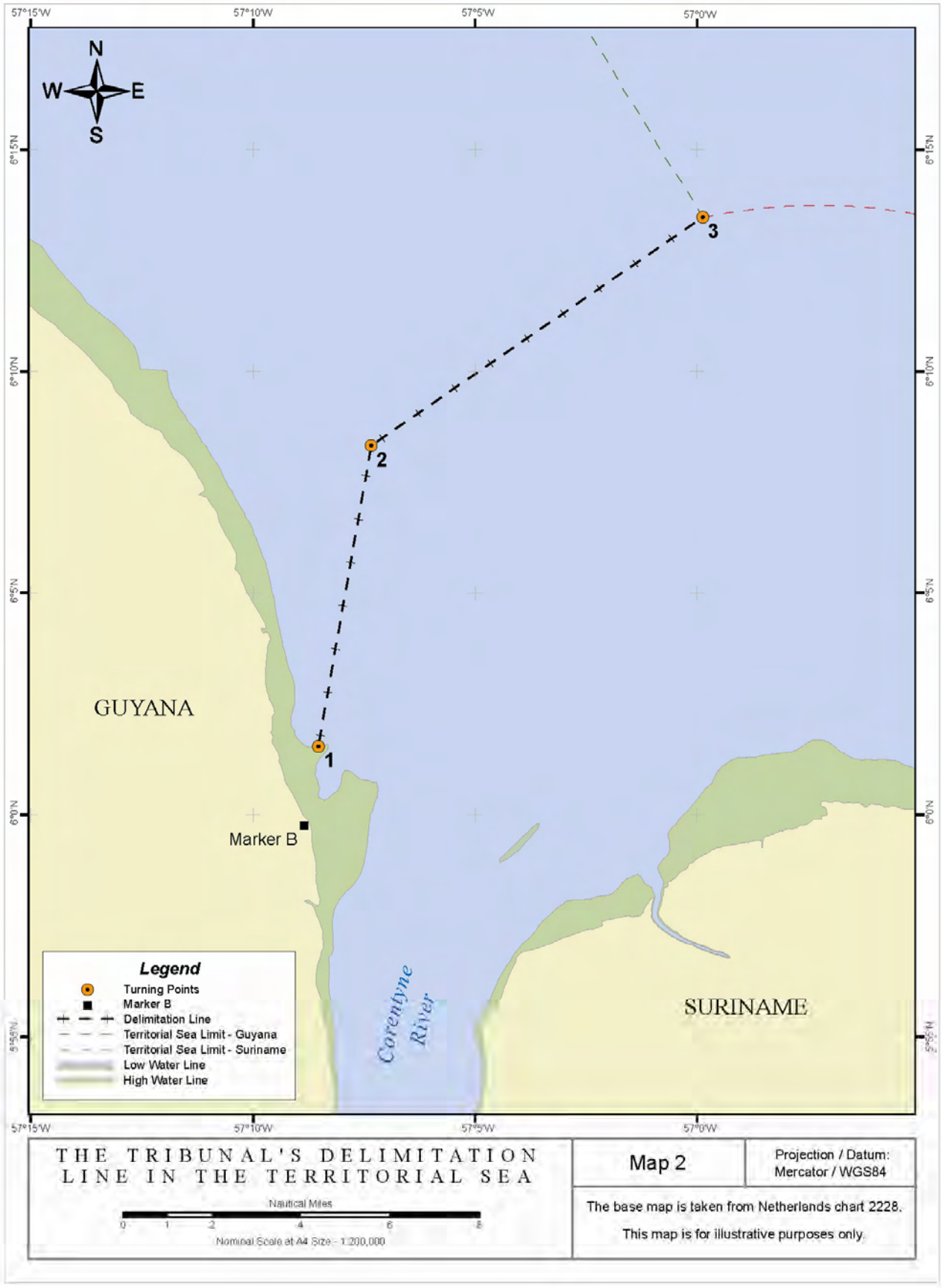
Point 2	6° 08.33′N,	57° 07.33′W
Point 3	6° 13.47′N,	56° 59.87′W.

Geographic coordinates refer to the World Geodetic System 1984 (WGS-84).

329. From Point 3 onward, the delimitation line continues as described in Chapter VI.

[375] Tribunal Hydrographer Corrected Report on Site Visit, 30 July 2007, para. 42.

Map 2


57°15'W
57°10'W
57°5'W
57°0'W
N
W
E
S
6°15'N
6°10'N
6°5'N
6°0'N
5°55'N
1
2
3
GUYANA
Marker B
SURINAME
Corentyne River
Legend
Turning Points
Marker B
Delimitation Line
Territorial Sea Limit - Guyana
Territorial Sea Limit - Suriname
Low Water Line
High Water Line
THE TRIBUNAL'S DELIMITATION LINE IN THE TERRITORIAL SEA
Nautical Miles
0 1 2 4 6 8
Nominal Scale at A4 Size - 1:200,000
Map 2
Projection / Datum:
Mercator / WGS84
The base map is taken from Netherlands chart 2228.
This map is for illustrative purposes only.

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CHAPTER VI - DELIMITATION OF THE CONTINENTAL SHELF AND EXCLUSIVE ECONOMIC ZONES

330. Both the Republic of Guyana and the Republic of Suriname are parties to the United Nations Convention on the Law of the Sea, which they ratified on 31 July 1996 and 9 July 1998 respectively. They are therefore bound by the relevant provisions of the Convention and especially by the Articles concerning the delimitation of the exclusive economic zone and the continental shelf between States.[376] Neither Guyana nor Suriname has made declarations under Article 298 excluding maritime boundary disputes from the compulsory procedures specified in Part XV of the Convention.

331. These Articles provide that the delimitation of the continental shelf and the exclusive economic zone between States with opposite or adjacent coasts "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".[377]

332. Emphasis is placed in both of these Articles on the equitable result.[378] The Court in the *Tunisia/Libya* case made this quite clear. It stated that:

> In the new text (i.e. the official draft convention before the Conference the text of which has remained unchanged), any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of the continental shelf areas are those which are appropriate to bring about an equitable result.[379]

333. The tribunal in the *Barbados/Trinidad and Tobago* arbitration has cast some useful light on the significance of this text. It remarked that:

> This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of

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[376] Articles 74 and 83.

[377] Articles 74(1) and 83(1).

[378] *Eritrea/Yemen*, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), 119 I.L.R. p. 417, at para. 116 (1999), *The Eritrea-Yemen Arbitration Awards of 1998 & 1999* (Permanent Court of Arbitration Award Series 2005), online: <http://www.pca-cpa.org> ("*Eritrea/Yemen II*").

[379] *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18, at para. 50.

> general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.[380]

334. It is particularly important to note that this Tribunal has to determine a single maritime boundary delimiting both the continental shelf and the exclusive economic zone. These regimes are separate, but to avoid the difficult practical problems that could arise were one Party to have rights over the water column and the other rights over the seabed and subsoil below that water column, a single maritime boundary can be drawn. It is generally acknowledged that the concept of the single maritime boundary does not have its origin in the Convention but is squarely based on State practice and the law as developed by international courts and tribunals.[381] That is why the Tribunal has to be guided by the case law as developed by international courts and tribunals in this matter. This Tribunal has also taken into account the dictum of the *Barbados/Trinidad and Tobago* tribunal's award in drawing a single maritime boundary where it states:

> Within those constraints imposed by law, the Tribunal considers that it has both the right and the duty to exercise judicial discretion in order to achieve an equitable result. There will rarely, if ever, be a single line that is uniquely equitable. The Tribunal must exercise its judgment in order to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are thus integral parts of the process of delimitation.[382]

335. In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance. The process of delimitation is divided into two stages. First the court or tribunal posits a provisional equidistance line which may then be adjusted to reflect special or relevant circumstances. It was in the *Jan Mayen* case that the ICJ clearly espoused this approach when it stated:

> Thus, in respect of the continental shelf boundary in the present case, even if it were appropriate to apply, not Article 6 of the 1958 Convention, but customary law concerning the continental shelf as developed in the decided cases, it is in accord

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[380] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 222, online: <http://www.pca-cpa.org>.

[381] See *Qatar/Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p. 40, at para. 173; and *Cameroon/Nigeria*, Judgment, I.C.J. Reports 2002, p. 303, at para. 286.

[382] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 244, online: <http://www.pca-cpa.org>.

> with precedents to begin with the median line as a provisional line and then to ask whether "special circumstances" require any adjustment or shifting of that line.[383]

336. With respect to the boundary of the fishery zone, it went on to add:

> It thus appears that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn.[384]

337. The same approach was followed by the ICJ in the *Qatar/Bahrain* case. It expressly stated that

> for the delimitation of the maritime zones beyond the 12-mile zone (i.e. the exclusive economic zone and the continental shelf) it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.[385]

338. It is important to note that recent decisions indicate that the presumption in favour of equidistance, established in the case law relating to States with opposite coasts, also applies in the case of States with adjacent coasts. In the *Cameroon/Nigeria* case, the ICJ applied this method to determine a lateral boundary between States with adjacent coasts.[386] It also should be recalled that this delimitation process was used in the northern sector of the boundary between Qatar and Bahrain "where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts".[387]

339. Arbitral tribunals have also adhered to this approach. In the maritime boundary dispute between Newfoundland and Labrador and Nova Scotia, the Tribunal stated:

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[383] *Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, at para. 51.

[384] Ibid., at para. 53.

[385] *Qatar/Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p. 40, at para. 230.

[386] *Cameroon/Nigeria*, Judgment, I.C.J. Reports 2002, p. 303, at para. 290.

[387] See *Qatar/Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p. 40, at para. 170.

> In the context of opposite coasts and latterly adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments and to adopt some other method of delimitation only if the circumstances justify it.[388]

340. The *Barbados/Trinidad and Tobago* tribunal described a two-step approach to delimitation:

> The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result. This approach is usually referred to as the "equidistance/relevant circumstances" principle. Certainty is thus combined with the need for an equitable result.[389]

341. As noted above, that tribunal went on to add "[c]ertainty, equity, and stability are thus integral parts of the process of delimitation"[390] – a proposition which accords with the view of this Tribunal.

342. Articles 74 and 83 of the Convention require that the Tribunal achieve an "equitable" solution. The case law of the International Court of Justice and arbitral jurisprudence as well as State practice are at one in holding that the delimitation process should, in appropriate cases, begin by positing a provisional equidistance line which may be adjusted in the light of relevant circumstances in order to achieve an equitable solution. The Tribunal will follow this method in the present case.

A. RELEVANT COASTS

343. The Tribunal will now turn its attention to the coasts of the Parties which are relevant to this maritime boundary delimitation – the relevant coasts "from which will be

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[388] Award of the Tribunal in the Second Phase, 26 March 2002, para. 2.28. See also *Eritrea/Yemen II*, 119 I.L.R. p. 417 (1999), *The Eritrea-Yemen Arbitration Awards of 1998 & 1999* (Permanent Court of Arbitration Award Series 2005), online: <http://www.pca-cpa.org>.

[389] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 242, online: <http://www.pca-cpa.org>. The *Barbados/Trinidad and Tobago* tribunal refers to the ICJ decisions in *Cameroon/Nigeria* (Judgment, I.C.J. Reports 2002, p. 303) and *Qatar/Bahrain* (Judgment, I.C.J. Reports 2001, p. 40), as well as Prosper Weil's text *Perspectives du droit de la délimitation maritime* (p. 223 (1988)), in support of its two-step approach.

[390] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 244, online: <http://www.pca-cpa.org>.

determined the location of the baselines and the pertinent basepoints which enable the equidistance line to be measured".[391]

The Parties' Positions

344. In its Memorial, Guyana contends that the determination of the relevant coasts involved the identification of the coastal fronts that generate legal entitlement to the maritime area in dispute based on the principle that "the land dominates the sea" citing the *North Sea Continental Shelf* cases;[392] the *Aegean Sea* case;[393] and *Qatar/Bahrain*.[394]

345. Guyana considered:

> the relevant coastline for each Party to be the length of coast that lies between the outermost points along the coastal baseline that control the direction of the provisional equidistance line to a distance of 200 nm. These coastal basepoints define the limits of each Party's area of legal entitlement. No other portions of the coastline beyond either outer basepoints are relevant because they do not generate legal entitlement to any maritime areas subject to delimitation by the Tribunal.[395]

346. Guyana explained that:

> [its] relevant coast – the portion responsible for 'generating the complete course of the median line' – lies between Point 61 (its easternmost basepoint) and Devonshire Castle Flats (its westernmost basepoint). ... Guyana and Suriname are in agreement on the locations of these outer basepoints, as confirmed by Figure 31 in the Counter-Memorial. The distance between them is 215 km. In like manner, Suriname's relevant coast extends from Point 61 in the west to the easternmost point along the Suriname coast that controls the direction of the provisional equidistance line. In Guyana's view, this point is located on Hermina Bank at 55° 45' 55.1"W; 6° 0' 39.8"N. Suriname refers to this basepoint as S13. Suriname's coastline between Point 61 and basepoint S13 ... measures 153 km. The ratio of the lengths of the Parties' relevant coastlines is thus 1.4 to 1 (215 km to 153 km) in Guyana's favour.[396]

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[391] *Qatar/Bahrain*, Judgment, I.C.J. Reports 2001, p. 40, at para. 178.

[392] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at para. 96.

[393] *Aegean Sea*, Judgment, I.C.J. Reports 1978, p. 3, at para. 86.

[394] Guyana Memorial, para. 8.35; *Qatar/Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p. 40, at para. 185.

[395] Guyana Reply, para. 3.17.

[396] Guyana Reply, para. 3.18.

347. Guyana's contention is based on the dictum in the *Jan Mayen* case which treated certain sections of the coast as relevant, "in view of their role in generating the complete course of the median line provisionally drawn which is under examination".[397]

348. Suriname has argued that, since the area being delimited in the *Jan Mayen* case was the area between two opposite coasts, it was of little use in a case where the adjacent relevant coasts have somewhat different general directions and thus form an angle where they meet.[398]

349. In the view of Suriname:

> the relevant coasts are coasts that face onto or abut the area to be delimited. And this means that the relevant coasts are those that extend to a point where the coasts face away from the area to be delimited. On the Suriname side, the relevant coast extends from the Corentyne River to the Warrapa Bank. From there on, the coasts turn southeasterly, and since it no longer faces or abuts onto the area to be delimited, it is no longer relevant.[399]

350. Suriname continues:

> On the Guyana side, the relevant coast extends from the Corentyne River to the Essequibo River, and ... after a short turn northwards, the coast returns to [a] northwesterly trend, but from Devonshire Castle Flats on, it no longer faces or abuts into the area to be delimited.[400]

351. This criterion for determining the relevant coasts finds its basis in the *Tunisia/Libya* Judgment where the Court observed that:

> [i]t is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation. The sea-bed areas off the coast beyond that point cannot therefore constitute an area of overlap of the extensions of the territories of the two Parties, and are therefore not relevant to the delimitation.[401]

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[397] *Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, at para. 67.

[398] Suriname Rejoinder, para. 3.164.

[399] Transcript, p. 920.

[400] Transcript, pp. 920-921.

[401] *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18, at para. 75.

The Tribunal's Findings

352. As the Tribunal proposes to begin this delimitation process with a provisional equidistance line, it seems logical and appropriate to treat as relevant the coasts of the Parties which generate "the complete course" of the provisional equidistance line.[402] "The equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured",[403] a definition which is itself based on article 15 of the 1982 Convention. In the view of the Tribunal, the relevant coast of Guyana extends from Devonshire Castle Flats to a point just seaward of Marker "B", and the relevant coast for Suriname extends from Bluff Point, the point on the east bank of the Corentyne River used in 1936 as the mouth of the river, to a point on Vissers Bank.

B. COASTAL GEOGRAPHY

353. As noted above, both Parties have requested the Tribunal, if it finds that it has jurisdiction, to determine a single maritime boundary delimiting the territorial seas, exclusive economic zones and continental shelves of Guyana and Suriname.[404] The Tribunal was not invited to delimit maritime areas beyond 200 miles from the baselines of Guyana and Suriname. Both Parties reserved their rights under Article 76(4) of the Convention. Thus in the present case the Tribunal is not concerned with matters concerning the delimitation of the outer continental shelf of the Parties.

354. It should be pointed out that the Parties themselves have agreed that geological or geophysical factors are of no relevance in this case.[405]

355. The Chamber of the ICJ in the *Gulf of Maine* case was the first international judicial body to be faced with the delimitation of a single maritime boundary – establishing a

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[402] *Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, at para. 67; *Arbitration between Newfoundland and Labrador and Nova Scotia*, Second Phase (2002), at para. 4.20 ("*Newfoundland and Labrador and Nova Scotia*").

[403] *Qatar/Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p. 40, at para. 177.

[404] Guyana Memorial, p. 135; Suriname Counter-Memorial, Chapter 6.

[405] Guyana Memorial, para. 7.35; Suriname Counter-Memorial, para. 2.6.

line which in that case divided both the exclusive fishing zone and the continental shelf. The Chamber explained that:

> 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.[406]

The Chamber proceeded to make clear what was meant by criteria of a "more neutral character":

> 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 the coasts which has primarily a physical aspect, to which may be added, in the second place, a political aspect.[407]

356. Geography, in particular coastal geography, provided the Chamber with a neutral criterion which favoured neither one nor the other of the two realities – the seabed of the continental shelf and the water column of the exclusive economic zone. "The quest for neutral criteria of a geographical character", as was stated in the *Barbados/Trinidad and Tobago* arbitral award, "prevailed in the end over area-specific criteria such as geomorphological aspects or resource-specific criteria such as the distribution of fish stocks, with a very few exceptions (notably Jan Mayen, ICJ Reports 1993, p. 38)".[408]

357. Both Parties are in agreement that geography (coastal geography) is of "fundamental importance" in the delimitation of the maritime boundary. In fact Suriname considers that the dispute should be resolved exclusively on the basis of the coastal geography of

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[406] *Gulf of Maine*, Judgment, I.C.J. Reports 1984, p. 246, at para. 194.

[407] Ibid., at para. 195.

[408] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at p. 837, para. 228, online: <http://www.pca-cpa.org>.

the delimitation area. Guyana relies not only on coastal geography but on history, including the conduct of activities by the Parties.[409]

C. THE PROVISIONAL EQUIDISTANCE LINE

358. The Tribunal will now begin its examination of the provisional equidistance line to determine whether the line needs to be adjusted or shifted in order to achieve an equitable result. The Tribunal will first consider the arguments of the Parties with respect to the provisional equidistance line.

The Parties' Positions

359. For its analysis of the provisional equidistance line, Suriname divides the line into three sections. The first section starts from the coast up to the 200 metre isobath. The second section commences shortly after the provisional equidistance line leaves the 200 metre isobath, and the third section starts just as the provisional equidistance line approaches the 200-nautical-mile limit.

360. Suriname, in its Counter-Memorial, argues that:

> due to geographical circumstances, the first section of the provisional equidistance line thrust east northeast in front of the mouth of the Corantijn River and continues in a northeasterly direction across the coastal front of Suriname.[410]
>
> ...
>
> The cut-off effect is caused by a combination of Suriname's concavity pulling, and Guyana's convex coastline west of the mouth of the Corantijn River pushing, the provisional equidistance line toward and in front of Suriname's coast. ... The intense congregation of Guyana's basepoints just west of the Corantijn River on the convex coast of Guyana direct the provisional equidistance line in segment after segment as it extends into the sea. On the adjacent Suriname coast the controlling basepoints are spread out and indeed are largely absent from Suriname's recessed coast reaching toward the Coppename River. Thus, the coastal configuration of Guyana from the mouth of the Corantijn River west to the Berbice River pushed the first segment of the provisional equidistance line eastward. At the same time, the concave coast of Suriname does not offer any countervailing protuberance, and thus there are no basepoints on Suriname's coast to counter those of Guyana in order to turn the provisional equidistance line away from the front of the coast of

[409] Guyana Reply, para. 3.1; Suriname Counter-Memorial, para. 2.18.

[410] Suriname Counter-Memorial, para. 6.20.

> Suriname. Out as far as the 200-meter depth contour, the relative position of the basepoints on the adjacent coasts continues to direct the provisional equidistance line in this way: the provisional equidistance line continues to be pushed by Guyana's convex coast near the mouth of the Corantijn River and pulled by the concave nature of Suriname's coast toward and in front of the coast of Suriname.[411]

From this Suriname concludes that a line is created "that violates the principle of non-encroachment."[412]

361. The provisional equidistance line changes direction in the second section and then veers towards the north, owing to the fact, according to Suriname, that the eastern headland of Suriname's concavity (Hermina Banks) begins to take effect on the line. Thus, in Suriname's words:

> for the first time basepoints on Suriname's coast counter the influence of the basepoints on Guyana's protruding convex coast just west of the mouth of the Corantijn River and turn the provisional equidistance line so that it ceases its swing in front of Suriname's coastal front. While the northward direction of the provisional equidistance line in this second sector might suggest that it is a reasonable line, it is in fact not an equitable delimitation line in this sector since it starts from an eastward point that has been determined by the convex/concave relationship between the neighboring coasts.[413]

362. It noted that the provisional equidistance line "begins in the wrong place too far to the east to mitigate the encroachment that is the result of the first segment of the provisional equidistance line".[414]

363. In the third sector, as the provisional equidistance line approaches the 200 nm limit, Suriname claims that the "basepoints on Guyana's prominent convex coastline west of the Essequibo River cause the provisional equidistance line [to] change direction and veer to the east across Suriname's coastal front" to Suriname's disadvantage.[415]

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[411] Suriname Counter-Memorial, para. 6.21.

[412] Suriname Counter-Memorial, para. 6.27.

[413] Suriname Counter-Memorial, para. 6.22.

[414] Suriname Counter-Memorial, para. 6.28.

[415] Suriname Counter-Memorial, para. 6.23.

364. Suriname concluded that the provisional equidistance line does not produce an equitable delimitation and that it must be adjusted, or another method employed, in order to achieve an equitable delimitation result.[416]

365. Guyana, for its part, responded with its own analysis of the provisional equidistance line. With respect to the first section of the line it agrees that:

> it is true that the provisional equidistance line heads out from Point 61 for a very short distance in a direction toward Suriname's coast. But this is not caused by any alleged "convexity" along Guyana's coast. Rather, it is due to the fact that Point 61 is located on Guyana's coast and not in the middle of the Corentyne River. Once the provisional equidistance line encounters the first basepoints along Suriname's coast, it is pushed northward and away from Suriname. Thereafter, the corresponding coastal basepoints on each side of the Corentyne River provide a countervailing effect. Thus, after the first few km the provisional equidistance line is no longer affected by the fact that it starts from a point on Guyana's coast, and it proceeds thereafter without any further effect from its starting point or from any localised convexities on either bank at the mouth of the Corentyne River to the end of its first segment. Accordingly, the first segment of the provisional equidistance line does not produce a cut-off effect on Suriname any more than it produces on Guyana.[417]

366. As to the second section, Guyana agreed with Suriname that this section of the line represented the "first pronounced change in direction of the provisional equidistance line" and that that change was caused "by the fact that the eastern headland of the Suriname concavity (Hermina Bank) begins to take effect on the line".[418] But it argues that Suriname "understates the pronounced effects produced by the headland or convexity at Hermina Bank".[419] In Guyana's view, "the Suriname basepoints on Hermina Bank control the direction of the entire provisional equidistance line in its second section".[420]

367. Guyana argued that the first section of the provisional equidistance line:

> follows a relatively straight course for approximately 100 nm. But for the coastal change from concavity to convexity at Hermina Bank, the relatively constant

[416] Suriname Counter-Memorial, para. 6.30.

[417] Guyana Reply, para.3.45.

[418] Guyana Reply, para. 3.46, citing Suriname Counter-Memorial, para. 6.22.

[419] Guyana Reply, para. 3.46.

[420] Ibid.

> course of the equidistance line would likely continue along the same course all the way to the 200 nm EEZ limit.[421]

This coastal change as a consequence "gives Suriname more than 4,000 km² at Guyana's expense."[422] Guyana considered itself "prejudiced by the purported hypersensitivity of the provisional equidistance line".[423]

368. In reply to Suriname's claims that in the third section the provisional equidistance line "veers 'to the east to Suriname's disadvantage' because 'Guyana's controlling basepoints are located on the protruding coast west of the Essequibo River'", Guyana pointed out that its "basepoints at Devonshire Castle Flats are not located on a 'protruding coast', but on the main body of the coastline where it changes to a more southeasterly direction".[424] It stated that "[t]he third segment of the provisional equidistance line cannot credibly be described as 'inequitable' to Suriname" and concluded that "*none of the three segments* of the line is in any way inequitable to Suriname".[425]

The Tribunal's Findings

369. The Tribunal will deal first with the following argument submitted by Suriname. Suriname contends that:

> the equidistance method does not produce an equitable result when employed in these geographic circumstances. The reason it does not do so is that it responds to incidental coastal features of the geographical situation. In doing so, as it often does in adjacent state situations, it cuts off the projection of the coastal front of one of the states – in this case it cuts off the projection of Suriname's coastal front. Accordingly, another delimitation method is required to create an equitable solution.[426] [emphasis added]

and has put forward the argument:

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[421] Ibid.

[422] Ibid.

[423] Ibid.

[424] Guyana Reply, para. 3.47.

[425] Ibid.

[426] Suriname Rejoinder, p. 69, para. 3.79.

> that when the equidistance method is not suitable in a delimitation between adjacent states, a method that employs coastal fronts and methods such as bisectors of the angle formed by adjacent coastal fronts or perpendiculars to the general direction of the common coastal front will do so.[427]

370. Suriname's preferred method was the bisection of the angle formed by the adjacent coastal fronts of Suriname and Guyana which extends from the coast at N17°E.[428] In support of its argument Suriname cited a number of cases which it claimed illustrated the utility of delimitation methods adopted to give effect to the relationship between neighbouring coastal fronts and thus taking into account the principle of non-encroachment to avoid the cut-off effect. These cases were *Tunisia/Libya*, *Gulf of Maine*, and *St-Pierre et Miquelon (Canada v. France)*.[429] Suriname contended that all these cases made use of simplified representation. It chose the *Gulf of Maine* as the best example of angle bisectors which it considered appropriate when the neighbouring 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 cavity":[430]

> 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 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. 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.[431]

371. In its oral pleadings Guyana argued that:

> When the provisional equidistance line does not, on its own, create an equitable solution, the consequence of that is to make adjustments to the provisional equidistance line that are required to achieve an equitable solution[,] [n]ot to abandon the equidistance methodology or the provisional equidistance line

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[427] Suriname Counter-Memorial, p. 103, para. 6.46.

[428] Suriname Counter-Memorial, paras. 6.47-6.48.

[429] *St-Pierre et Miquelon (Canada v. France)*, 95 I.L.R. p. 645 ("*St-Pierre et Miquelon*").

[430] Suriname Counter-Memorial, para. 4.34.

[431] Suriname Counter-Memorial, para. 4.32.

> altogether, and certainly not to substitute an entirely unorthodox and highly subjective methodology in its place.[432]

372. The Tribunal is bound to note that the coastlines at issue in these cited cases cannot be compared to the configuration of the relevant coastlines of Guyana and Suriname. For instance, the *Gulf of Maine* case where the angle bisector was utilised in the maritime delimitation between Canada and the United States bears little resemblance to the maritime area which is of concern in this delimitation. It seems to this Tribunal that the general configuration of the maritime area to be delimited does not present the type of geographical peculiarities which could lead the Tribunal to adopt a methodology at variance with that which has been practised by international courts and tribunals during the last two decades. Such peculiarities may, however, be taken into account as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line.[433] The Tribunal is therefore not persuaded that it should adopt in the present case what may be called the "angle bisector methodology".

373. The Tribunal has noted that neither Guyana nor Suriname considers that the provisional equidistance line represents an equitable delimitation as required by international law, due to the geographical circumstances of the maritime area to be delimited. Here, the Tribunal must recall the statement made by the International Court of Justice in *Cameroon/Nigeria* with respect to coastal geography which because of its relevance is quoted in full:

> The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation. As the Court had occasion to state in the *North Sea Continental Shelf* cases, "[e]quity does not necessarily imply equality", and in a delimitation exercise "[t]here can never be any question of completely refashioning nature". Although certain geographical peculiarities of maritime areas to be delimited may be taken into account by the Court, this is solely as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line. Here again, as the Court decided in the *North Sea Continental Shelf* cases, the Court is not required to take all such geographical peculiarities into account in order to adjust or shift the provisional delimitation line: "[i]t is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of

[432] Transcript, p. 198.

[433] *Cameroon/Nigeria*, Judgment, I.C.J. Reports 2002, p. 303, at para. 295. See *UK – French Continental Shelf*, 54 I.L.R. p. 5 (1979), at para. 249.

> quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result".[434]

374. In short, international courts and tribunals dealing with maritime delimitation should be mindful of not remaking or wholly refashioning nature, but should in a sense respect nature.

375. In their written and oral pleadings, both Parties agree that in the maritime delimitation area "there are no major promontories, islands, or other coastal features that render that coastline extraordinary";[435] and that the coastal geography is "unremarkable".[436] They both agree also that "there are no offshore islands and the coastlines on either side of the land boundary terminus are although not completely regular throughout their course, do not contain features such as peninsulas, major bays, island fringes or other such configurations.[437] It is fair to point out that Suriname uses this representation of the coastline to support its bisector approach. However, the Tribunal takes the view that the characterisation of the coastline as "unremarkable" only strengthens the methodology adopted by the Tribunal.

376. Turning to the question of whether there are any features in the geographical configuration of the relevant coastlines which justify an adjustment of the equidistance line, the Tribunal must mention the following observation found in the report of the independent expert appointed by Guyana:

> An important geographic reality in this case is that there are no offshore features, such as islands or low-tide elevations that influence the drawing of an equidistant line. Nor are there are large peninsulas or protrusions from one of the coastlines that dramatically skew the course of an equidistant line.[438]

377. The Tribunal agrees with this assessment of the coastal geography. In its view, the relevant coastlines do not present any marked concavity or convexity. After careful examination the Tribunal accordingly concludes that the geographical configuration of

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[434] *Cameroon/Nigeria*, Judgment, I.C.J. Reports 2002, p. 303, at para. 295, citing *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 50, para. 91.

[435] Suriname Rejoinder, para. 3.183; Transcript, p. 162.

[436] Transcript, pp. 162, 227, 904; Guyana Reply, para. 3.2.

[437] Transcript, p. 162; Suriname Rejoinder, para. 3.183.

[438] Guyana Reply, Annex R.1, para. 4.

the relevant coastlines does not represent a circumstance that would justify any adjustment or shifting of the provisional equidistance line in order to achieve an equitable solution.

D. CONDUCT OF THE PARTIES

378. The Tribunal will now turn its attention to the question of the relevance of the conduct of the Parties with respect to the shifting or adjustment of the provisional equidistance line. Guyana has stated that:

> in respect of the delimitation of the territorial sea and the continental shelf and exclusive economic zone, international courts and tribunals have long recognised that the conduct of the parties – and in particular the existence of a *modus vivendi* reflected in a pattern of oil and gas concessions – is an important circumstance to be taken into account in effecting a boundary delimitation. In the present case, the parties' oil concessions date back nearly 50 years and are based on a serious and good faith effort to identify a historical equidistance line which was plotted on the basis of the best British and Dutch charts available at the time (British chart 1801 and Dutch chart 217). The concessions reflect a *de facto* pattern of acceptance that the line extending from Point 61 on a bearing of approximately N34E has long been treated as reflecting an equidistance line which divides the parties' maritime spaces.[439]

379. Suriname, for its part, contended that:

> [t]he 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.[440]

380. This Arbitral Tribunal must first examine the case law of international courts and tribunals with respect to the conduct of activities, especially oil practice, in the relevant area.

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[439] Guyana Memorial, para. 7.34.

[440] Suriname Counter Memorial, para. 4.37.

381. The International Court of Justice examined for the first time the relevance of oil practice in the maritime boundary delimitation dispute between Tunisia and Libya. The Court in that case noted that "it is evident that the Court must take into account whatever indicia are available of the line or lines which the parties themselves may have considered equitable or acted upon as such".[441] It was thus acknowledged that the conduct of the parties themselves with regard to oil concessions may determine the delimitation line.

382. In the *Gulf of Maine* case, Canada had requested the Chamber to find that the conduct of the parties proved at least the existence of a "*modus vivendi* maritime limit" or a "*de facto* maritime limit" based on the coincidence between the Canadian equidistance line (the "strict equidistance" line) and the United States "BLM line" (U.S. Bureau of Land Management) which it claimed was respected by the two parties and by numerous oil companies from 1965 to 1972. Canada relied on the findings of the Court in the *Tunisia/Libya* case. The United States denied that oil practice respected any particular line, but also denied the very existence of the "BLM line".

383. The Chamber in the *Gulf of Maine* case had this to say on the oil practice of the parties throwing into relief a distinctive feature of the *Tunisia/Libya* case:

> [T]he Chamber notes that, even supposing that there was a *de facto* demarcation between the areas for which each of the Parties issued permits (Canada from 1964 and the United States from 1965 onwards), this cannot be recognized as a situation comparable to that on which the Court based its conclusions in the *Tunisia/Libya* case. It is true that the Court relied upon the fact of the division between the petroleum concessions issued by the two States concerned. But it took special account of the conduct of the Powers formerly responsible for the external affairs of Tunisia – France – and of Tripolitania – Italy –, which it found amounted to a *modus vivendi*, and which the two States continued to respect when, after becoming independent, they began to grant petroleum concessions.[442]

384. In the *Libya/Malta* case, the ICJ expressly referred to "its duty to take into account whatever indicia are available of the (delimitation) line or lines which the Parties themselves may have considered equitable or acted upon as such"[443] – which was of

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[441] *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18, at para. 118.

[442] *Gulf of Maine*, Judgment, I.C.J. Reports 1984, p. 246, at para. 150.

[443] *Libya/Malta*, Judgment, I.C.J. Reports 1985, p. 13, at p. 29, para. 25.

course the criterion introduced by the ICJ in the *Tunisia/Libya* case. It, however, concluded that it was:

> unable to discern any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court. Its decision must accordingly be based upon the application to the submissions made before it of principles and rules of international law.[444]

385. This Tribunal finds that, with respect to the role of oil practice in maritime delimitation disputes, the Judgment in the *Cameroon/Nigeria* case is of particular significance. It should be noted that the delimitation line had to be determined "in an area of very highly concentrated petroleum exploration and exploitation activity".[445] Nigeria had contended that State practice with respect to oil concessions was "a decisive factor in the establishment of maritime boundaries" and added it was not the business of the Court to "redistribute such oil concessions between the States party to the delimitation".[446] On the other hand, Cameroon held the view that "the existence of oil concessions has never been accorded particular significance in matters of maritime delimitation in international law".[447]

386. The ICJ for its part having made an analysis of the case law relating to the role of oil practice in maritime delimitation declared 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 generally 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".[448]

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[444] Ibid.

[445] Suriname Rejoinder, para. 3.147; Suriname Rejoinder, Annex 41.

[446] *Cameroon/Nigeria*, Judgment, I.C.J. Reports 2002, p. 303, at p. 447, para. 303.

[447] Ibid.

[448] Ibid., at pp. 447-448, para. 304.

387. Arbitral tribunals have supported this approach. The *St-Pierre et Miquelon* arbitration paid little regard to the oil practice of the parties. In this case, permits for exploration had been issued by both parties in areas of overlapping claims but "after reciprocal protests no drilling was undertaken". The tribunal held that in the circumstances it had no reason "to consider the potential mineral resources as having a bearing on the delimitation".[449]

388. In the view of the tribunal in the arbitration between Newfoundland and Labrador and Nova Scotia, "in order to establish that a boundary (not settled or determined by agreement) has been established through conduct, it is necessary to show an unequivocal pattern of conduct as between the two parties concerned relating to the area and supporting the boundary, which is in dispute", citing the dictum in the *Libya/Malta* case, already referred to.[450]

389. The dictum that oil wells are not in themselves to be considered as relevant circumstances unless based on express or tacit agreement between the parties was expressly applied in the award in the *Barbados/Trinidad and Tobago* arbitration.[451] The award also made clear that the tribunal did "not consider the activities of either Party, or the responses of each Party to the activities of the other, themselves constitute a factor that must be taken into account in the drawing of an equitable delimitation line".[452]

390. The cases reveal a marked reluctance of international courts and tribunals to accord significance to the oil practice of the parties in the determination of the delimitation line. In the words of the Court in the *Cameroon/Nigeria* case, "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".[453] The Tribunal is guided by this jurisprudence. Having carefully examined the practice of the

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[449] *St-Pierre et Miquelon*, 95 I.L.R. p. 645.

[450] *Newfoundland and Labrador and Nova Scotia*, Award Second Phase (2002), at para. 3.5.

[451] *Barbados/Trinidad and Tobago*, 45 I.L.M. p. 798 (2006), at para. 364, online: <http://www.pca-cpa.org>.

[452] Ibid., at para. 366.

[453] *Cameroon/Nigeria*, Judgment, I.C.J. Reports 2002, p. 303, at para. 304.

Parties with regard to oil concessions and oil wells, the Tribunal has found no evidence of any agreement between the Parties regarding such practice. The Tribunal takes the view that the oil practice of the Parties cannot be taken into account in the delimitation of the maritime boundary in this case.

391. Guyana, in support of the use of the equidistance method, had argued that it was of "material significance" that the draft agreement between Suriname and France (French Guiana) on the maritime boundary applies the principle of equidistance and follows a line of N30°E.[454] For its part, Suriname contended that its boundary negotiations with French Guiana had no relevance to this case. It made clear that there was no maritime boundary agreement in force between Suriname and France with respect to French Guiana, and even if there were, Suriname averred such would be "totally irrelevant to these proceedings".[455] It held that the case between Guyana and Suriname took place in a different locale and the relevant considerations are notably different.[456] Suriname found support for its argument that the draft agreement between Suriname and French Guiana had little to do with the present case in the *Jan Mayen* case between Norway and Denmark where the Court stated that:

> By invoking against Norway the Agreements of 1980 and 1981, Denmark is seeking to obtain by judicial means equality of treatment with Iceland. It is understandable that Denmark should seek such equality of treatment. But in the context of relations governed by treaties, it is always for the parties concerned to decide, by agreement, in what conditions their mutual relations can best be balanced. In the particular case of maritime delimitation, international law does not prescribe, with a view to reaching an equitable solution, the adoption of a single method for the delimitation of the maritime spaces on all sides of an island, or for the whole of the coastal front of a particular State, rather than, if desired, varying systems of delimitation for the various parts of the coast. The conduct of the parties will in many cases therefore have no influence on such a delimitation. The fact that the situation governed by the Agreements of 1980 and 1981 shares with the present dispute certain elements (identity of the island, participation of Norway) is of no more than formal weight. For these reasons, the Court concludes that the conduct of the Parties does not constitute an element which could influence the operation of delimitation in the present case.[457]

[454] Guyana Memorial, para. 3.50.

[455] Suriname Counter-Memorial, para. 2.20.

[456] Ibid.

[457] *Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, at para. 86.

This Tribunal accepts the contention of Suriname and therefore takes no account in the present case of the boundary negotiations which have been conducted between Suriname and France with respect to French Guiana. In the view of the Tribunal, this conduct is not relevant to the present case.

E. CONCLUSION OF THE TRIBUNAL

392. In light of the foregoing, the Tribunal does not consider that there are any relevant circumstances in the continental shelf or exclusive economic zone which would require an adjustment to the provisional equidistance line. There are no factors which would render the equidistance line determined by the Tribunal inequitable. The Tribunal has checked the relevant coastal lengths for proportionality and comes up with nearly the same ratio of relevant areas (Guyana 51% : Suriname 49%) as it does for coastal frontages (Guyana 54% : Suriname 46%); likewise there are no distortions caused by coastal geography. As the Parties have not chosen to argue the relative distribution of living and non-living natural resources throughout these zones, the Tribunal did not take these matters into account.

393. The Tribunal accepts the basepoints for the low-water lines of Suriname and Guyana provided by the Parties that are relevant to the drawing of the equidistance line beyond the territorial sea.[458]

394. Guyana has argued that Suriname's location of basepoint S1 is "inconsistent with the requirements of the [Convention], Article 5 of which provides that the normal baseline for measuring the breadth of the territorial sea is 'the low-water line along the coast.'"[459] The Tribunal accepts the equidistance line beyond the 12 nm limit. As S1 does not affect the equidistance line beyond 12 nm,[460] the Tribunal does not need to consider point S1 further, nor any other basepoints that would affect only the equidistance line within the 12 nm limit.

[458] See Suriname Counter-Memorial, Annex 69; Guyana Reply, Annex 26.

[459] Guyana Reply, para. 6.14.

[460] See Technical Report of the Tribunal's Hydrographer in the Appendix to this Award.

395. Guyana also objected to Suriname's basepoint S14, which Suriname had identified relying on what Guyana claimed to be an inaccurate chart. The chart in question, NL 2218, was produced by the Netherlands Hydrographic Office (with the assistance of the Maritime Authority Suriname) in June 2005 after the proceedings in this arbitration had commenced.[461] In addition, Guyana claims that another Dutch chart, NL 2014, as well as satellite imagery, "disprov[e] the existence of a low-tide coast at Vissers Bank where Suriname placed its purported basepoint S14."[462]

396. The Tribunal is not convinced that the depiction of the low-water line on chart NL 2218, a chart recognised as official by Suriname, is inaccurate. As a result, the Tribunal accepts the basepoint on Vissers Bank, Suriname's basepoint S14.

397. Each Party provided its computed results of the provisional equidistance line based on the basepoints that it indicated. As described in the Appendix to the Award analysing the data provided by both Parties, the turning points indicated by the Parties have been recomputed because certain of them were not equidistant from the supposed basepoints within the limits of the rounding-off of the positional values and because neither Party computed the equidistance line using all the basepoints accepted by the Tribunal.

398. The Tribunal concludes that the single maritime boundary delimiting the exclusive economic zone and continental shelf between Guyana and Suriname shall be as shown for illustrative purposes only on Map 3 at the end of this Chapter. The precise, governing coordinates are set forth below and are explicated in the Appendix to the Award.

399. The delimitation of the exclusive economic zone and continental shelf shall commence at Point 3, being the intersection of the 12 nm limit with the boundary delimiting the territorial sea.

[461] Guyana Reply, paras. 1.10, 3.19; Transcript, pp. 170-172; Suriname Rejoinder, Annex SR43.

[462] Guyana Reply, para. 3.19.

400. The coordinates of the turning points of the delimitation line through the exclusive economic zone and continental shelf are as follows:

a. The delimitation line is a series of geodetic lines joining the points in the order listed:

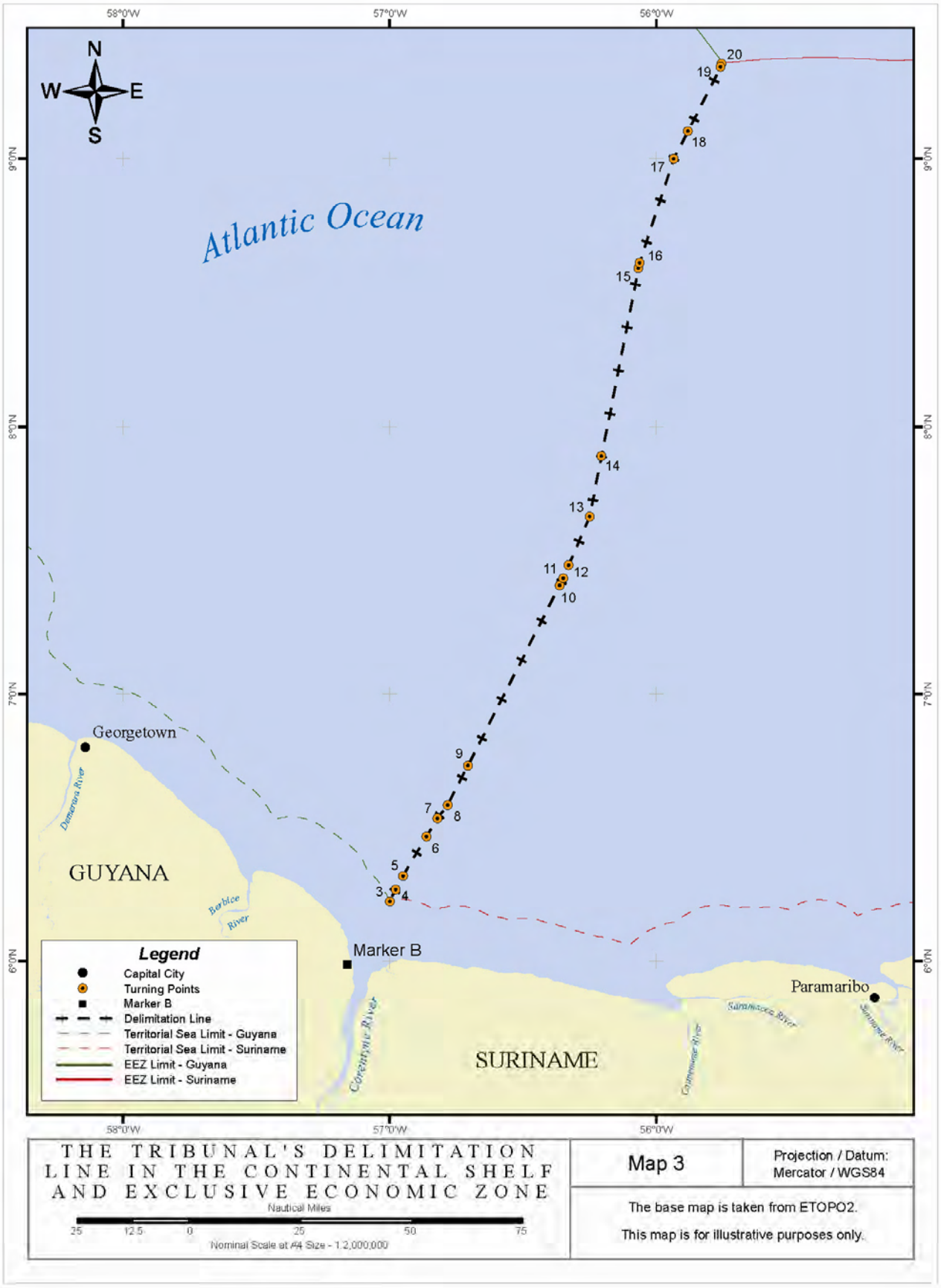
Point #	Latitude	Longitude
3.	6° 13.47′N,	56° 59.87′W
4.	6° 16.19′N,	56° 58.63′W
5.	6° 19.17′N,	56° 57.01′W
6.	6° 28.01′N,	56° 51.70′W
7.	6° 32.12′N,	56° 49.22′W
8.	6° 35.13′N,	56° 46.92′W
9.	6° 43.99′N,	56° 42.34′W
10.	7° 24.45′N,	56° 21.74′W
11.	7° 26.11′N,	56° 20.88′W
12.	7° 28.98′N,	56° 19.69′W
13.	7° 39.96′N,	56° 14.99′W
14.	7° 53.48′N,	56° 12.31′W
15.	8° 35.61′N,	56° 03.99′W
16.	8° 36.76′N,	56° 03.75′W
17.	9° 00.03′N,	55° 56.09′W
18.	9° 06.27′N,	55° 52.88′W
19.	9° 20.66′N,	55° 45.42′W

b. From Point 19, the delimitation line proceeds on a geodetic azimuth of N23° 57′ 10″E to the 200 nautical mile limit of the exclusive economic zones of Guyana and Suriname, having an approximate position of:

Point 20	9° 21.35′N,	55° 45.11′W.

c. Geographic coordinates and azimuths refer to the World Geodetic System 1984 (WGS-84) geodetic datum.

Map 3


58°0'W
57°0'W
56°0'W
9°0'N
8°0'N
7°0'N
6°0'N
N
W
E
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Atlantic Ocean
20
19
18
17
16
15
14
13
11
12
10
9
7
8
6
5
3
4
Georgetown
Demerara River
GUYANA
Berbice River
Marker B
Coeroeni River
SURINAME
Paramaribo
Suriname River
Commewijne River
Legend
Capital City
Turning Points
Marker B
Delimitation Line
Territorial Sea Limit - Guyana
Territorial Sea Limit - Suriname
EEZ Limit - Guyana
EEZ Limit - Suriname
THE TRIBUNAL'S DELIMITATION LINE IN THE CONTINENTAL SHELF AND EXCLUSIVE ECONOMIC ZONE
Nautical Miles
25 12.5 0 25 50 75
Nominal Scale at A4 Size - 1:2,000,000
Map 3
Projection / Datum:
Mercator / WGS84
The base map is taken from ETOPO2.
This map is for illustrative purposes only.

CHAPTER VII - GUYANA'S THIRD SUBMISSION

401. Guyana's third submission seeks recovery for damages suffered as a result of Suriname's allegedly unlawful actions in the 3 June 2000 incident concerning the *C.E. Thornton* drilling rig (the "CGX incident") as well as action subsequently taken by Suriname with respect to two additional Guyanese concession holders:

> Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea, the Charter of the United Nations, and general international law to settle disputes by peaceful means because of its use of armed force against the territorial integrity of Guyana and/or against its nationals, agents, and others lawfully present in maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, but in any event no less than U.S. $33,851,776, for the injury caused by its internationally wrongful acts.[463]

A. JURISDICTION AND ADMISSIBILITY

1. The Tribunal's Jurisdiction over Claims Relating to the UN Charter and General International Law

402. Guyana stated in its third submission, *inter alia*, that Suriname was "internationally responsible for violating its obligations under the Convention, the Charter of the United Nations, and general international law to settle disputes by peaceful means because of its use of armed force".[464] Suriname is of the view that the Tribunal had no jurisdiction to adjudicate alleged violations of the UN Charter or customary international law and declared that "to the extent that Guyana's claims are based on those violations, they must be dismissed".[465]

403. The law which this Tribunal is authorised to apply is contained in Article 293, paragraph 1, of the Convention, which reads as follows: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention".

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[463] Guyana Reply, para. 10.1.

[464] Guyana Reply, para. 10.1.

[465] Transcript, p. 1092.

404. In addition, this Tribunal notes that the preamble of the Convention itself has preserved the applicability of general international law, when, in its ultimate paragraph, it affirmed "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law".[466]

405. The International Tribunal for the Law of the Sea ("ITLOS") has interpreted Article 293 as giving it competence to apply not only the Convention, but also the norms of customary international law (including, of course, those relating to the use of force). It made this clear in its findings in the *Saiga* case:

> In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. *Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention*, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. [emphasis added][467]

406. In the view of this Tribunal this is a reasonable interpretation of Article 293 and therefore Suriname's contention that this Tribunal had "no jurisdiction to adjudicate alleged violations of the United Nations Charter and general international law"[468] cannot be accepted. Furthermore, as the Tribunal will find (see paragraph 486 *infra*), the conduct of Suriname in the disputed area constituted a breach of its obligations under Articles 74(3) and 83(3) of the Convention over which the Tribunal has jurisdiction by virtue of Article 293, paragraph 1, of the Convention.

2. The Obligation to Exchange Views

407. Suriname has raised another jurisdictional issue. It stated that:

> In the period from the time of the CGX incident, June 3rd, 2000, up until the point where the application was filed before this Tribunal in February 2004, Guyana never informed Suriname that Guyana believed that Suriname had violated Articles

[466] The Convention, preamble.

[467] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 7, at para. 155 ("*Saiga*").

[468] Suriname Rejoinder, para. 4.7.

279 or 301, or even that it had violated the Law of the Sea Convention generally by Suriname's conduct in June 2000.[469]

408. Suriname contends that Guyana was under an obligation as specified in Article 283 of the Convention to inform Suriname of any alleged breach of the Convention, in particular Articles 279 and 301. "By failing to fulfill that obligation, Guyana did not undertake recourse to the Section 1 Procedures, and because of that failure to take recourse to Section 1 procedures, Guyana cannot avail itself of the Section 2 compulsory dispute jurisdiction".[470]

409. Suriname made reference to the case law of ITLOS to highlight the importance of the procedural requirements provided for in Article 283(1), that is the obligation to exchange views. It cited in particular the *Southern Bluefin Tuna* cases,[471] the *MOX Plant* case,[472] and the *Land Reclamation* case.[473] It will be recalled that in these cases ITLOS held that a party was under no obligation to exchange views when it concluded that the possibilities of reaching agreement had been exhausted.

410. This dispute has as its principal concern the determination of the course of the maritime boundary between the two Parties – Guyana and Suriname. The Parties have, as the history of the dispute testifies, sought for decades to reach agreement on their common maritime boundary. The CGX incident of 3 June 2000, whether designated as a "border incident" or as "law enforcement activity", may be considered incidental to the real dispute between the Parties. The Tribunal, therefore, finds that in the particular circumstances, Guyana was not under any obligation to engage in a separate set of exchanges of views with Suriname on issues of threat or use of force. These issues can be considered as being subsumed within the main dispute.

[469] Transcript, pp. 1093-1094.

[470] Transcript, p. 1094.

[471] *Southern Bluefin Tuna*, Order of 27 August 1999, ITLOS Reports 1999, p. 280.

[472] *MOX Plant*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at para. 60.

[473] *Land Reclamation*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, at para. 47.

3. Article 297 and the Characterisation of Guyana's Claim

411. Suriname in its oral pleadings has raised another jurisdictional objection. It declared that since Guyana's claims relate to a dispute concerning a coastal State's enforcement of sovereign rights with respect to non-living resources, the claim falls outside this Tribunal's jurisdiction pursuant to Part XV, section 3 of the Convention. Suriname explained that:

> Article 297 says that section 2, compulsory dispute settlement, is only available for certain kinds of disputes that relate to the exercise by a coastal state of its sovereign rights or jurisdiction.[474]

412. Suriname further asserted that:

> Among the three kinds of disputes listed in Article 297, there is no reference to a dispute concerning a coastal state's enforcement of its sovereign rights with respect to nonliving resources. Since Guyana's submission is a dispute concerning a coastal state's enforcement of its sovereign rights with respect to nonliving resources, the dispute is not encompassed in Section 2 of the Law of the Sea Convention.[475]

413. As noted above, Article 293 of the Convention gives this Arbitral Tribunal jurisdiction over any dispute concerning the interpretation and application of the Convention. This jurisdiction is subject to the automatic limitations set out in Article 297 and the optional exceptions specified in Article 298. Article 286 reads as follows:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

414. Thus, any dispute concerning the interpretation or application of the Convention which is not excluded by the operation of Part XV, Section 3 (Articles 297 and 298) falls under the compulsory procedures in Section 2. Article 297, paragraph 3(a), which is relevant here, reads as follows:

> Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2,

[474] Transcript, p. 1099.

[475] Transcript, p. 1099.

> *except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise*, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations. [emphasis added]

415. Sovereign rights over non-living resources do not fall under this exception.

416. This Tribunal is therefore unable to entertain Suriname's argument that a dispute concerning a coastal State's enforcement of its sovereign rights with respect to non-living resources lies outside its jurisdiction.

4. Good Faith and Clean Hands

417. Suriname challenges the admissibility of Guyana's Third Submission on the grounds of lack of good faith and clean hands. It also argues in the alternative that the clean hands doctrine must be considered in deciding the merits of Guyana's Third Submission.

418. The doctrine of clean hands, as far as it has been adopted by international courts and tribunals, does not apply in the present case. No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely[476] and, when it has been invoked, its expression has come in many forms. The ICJ has on numerous occasions declined to consider the application of the doctrine,[477] and has never relied on it to bar admissibility of a claim or recovery. However, some support for the doctrine can be found in dissenting opinions in certain ICJ cases, as well as in opinions in cases of the Permanent Court of International Justice (the "PCIJ"). For example, Judge Anzilotti's 1933 dissenting opinion in the *Legal Status of Eastern Greenland* case states that "an unlawful act

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[476] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 162 (2002).

[477] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136 at para. 63; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, at para. 100; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 279: in this case Belgium raised the question of clean hands in its preliminary objections (Preliminary Objections of the Kingdom of Belgium, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, (5 July 2000), available at http://www.icj-cij.org/docket/files/105/8340.pdf), but the Court did not address the argument in its judgment.

cannot serve as the basis of an action at law".[478] In the *United States Diplomatic and Consular Staff in Tehran* case, in which the ICJ declined to consider the issue of clean hands, Judge Morozov wrote in his dissent that the United States had "forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation". However, Judge Morozov went to great lengths to stress that "[t]he situation in which the Court has carried on its judicial deliberation in the current case has no precedent in the whole history of the administration of international justice either before this Court, or before any international judicial institution",[479] citing the United State's coercive and military measures against Iran which were carried out *simultaneously* with its application to the ICJ.[480] In the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, *ad hoc* Judge Van den Wyngaert states that the Democratic Republic of Congo ("DRC") did not come to the ICJ with clean hands, citing its violation of the Geneva Conventions in failing to prosecute a Government Minister suspected of breaching humanitarian law.[481] The finding with respect to clean hands was not however dispositive; it was merely included in Judge Van den Wyngaert's discussion of immunity under international law and her conclusion that a Minister's immunity does not extend to war crimes and crimes against humanity. The doctrine was therefore neither used as a bar to the admissibility of the DRC's claim, nor as a ground to deny recovery. These cases indicate that the use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent.

419. Judge Schwebel's dissenting opinion in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, which Suriname characterises as "the strongest affirmation of the clean hands doctrine",[482] has also been relied on in support of the

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[478] *Legal Status of Eastern Greenland*, P.C.I.J. Series A/B, No. 53, p. 95 (Dissenting Opinion of Judge Anzilotti).

[479] *Diplomatic and Consular Staff*, Judgment, I.C.J. Reports 1980, p. 3, at p. 53 (Dissenting Opinion of Judge Morozov) [emphasis in original].

[480] *Diplomatic and Consular Staff*, Judgment, I.C.J. Reports 1980, p. 3, at p. 54 (Dissenting Opinion of Judge Morozov).

[481] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, at para. 35 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert).

[482] Suriname Rejoinder, para. 2.102.

application of the clean hands doctrine.[483] In his dissent, Judge Schwebel reasoned that Nicaragua "had deprived itself of the necessary *locus standi*" to bring its claims, as it was itself guilty of illegal conduct resulting in deaths and widespread destruction.[484] In doing so, he relied heavily on Judge Hudson's individual opinion in the *Diversion of Water from the Meuse* case,[485] which states:

> It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a *continuing* non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.[486] [emphasis added]

420. An important aspect of Judge Hudson's expression of the doctrine is the continuing nature of the non-performance of an obligation. In the *Diversion of Water from the Meuse* case, The Netherlands was seeking an order for Belgium to discontinue its violation of a treaty between the two countries while The Netherlands itself was engaging in "precisely similar action, similar in fact and similar in law" at the time its claim was brought before the PCIJ.[487] The fact that a violation must be ongoing for the clean hands doctrine to apply is consistent with the doctrine's origins in the laws of equity and its limited application to situations where equitable remedies, such as specific performance, are sought. Indeed, Judge Hudson reminds us that it is a principle of international law that any breach leads to an obligation to make reparation, and that only special circumstances may call for the consideration of equitable principles.[488] Such circumstances arise, in his opinion, where a claimant is seeking not reparation for a past violation, but protection against a continuance of that violation in the future, in other words a "kind of specific performance of a reciprocal obligation which the

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[483] See e.g. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, n. 82 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert).

[484] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at para. 272 (Dissenting Opinion of Judge Schwebel) ("*Nicaragua*").

[485] *Nicaragua*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at paras. 269-270 (Dissenting Opinion of Judge Schwebel).

[486] *Diversion of Water from the Meuse*, P.C.I.J. Series A/B, No. 70, p. 22, at p. 77 (Individual Opinion by Judge Hudson).

[487] *Diversion of Water from the Meuse*, p. 78 (Individual Opinion by Judge Hudson).

[488] Ibid.

demandant itself is not performing".[489] Judge Hudson also stresses the limited applicability of the doctrine in more general terms:

> The general principle is one of which an international tribunal should make *a very sparing application*. It is certainly not to be thought that a complete fulfillment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.[490] [emphasis added]

421. The Tribunal holds that Guyana's conduct does not satisfy the requirements for the application of the doctrine of clean hands, to the extent that such a doctrine may exist in international law. First, Guyana is seeking, with respect to its Third Submission, reparations for an alleged past violation by Suriname. Guyana is therefore not seeking a remedy of the type to which the clean hands doctrine would apply, even if it were recognised as a rule of international law. Secondly, the facts on which Suriname bases its assertion that Guyana has unclean hands do not amount to an ongoing violation of Guyana's obligations under international law,[491] as in the *Case Concerning the Arrest Warrant of 11 April 2000*, the *United States Diplomatic and Consular Staff in Tehran* case, and the *Water from the Meuse* case. Guyana had not authorised any drilling activities subsequent to the CGX incident and was as a result not in violation of the Convention as alleged at the time it made its Third Submission to the Tribunal. Finally, Guyana's Third Submission claims that Suriname violated its obligation not to resort to the use or threat of force, while Suriname bases its clean hands argument on Guyana's alleged violation of a different obligation relating to its authorisation of drilling activities in disputed waters. Therefore, there is no question of Guyana itself violating a reciprocal obligation on which it then seeks to rely.

422. The Tribunal's ruling on this issue extends both to Suriname's admissibility argument based on clean hands and to its argument that clean hands should be considered on the merits of Guyana's Third Submission to bar recovery.

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[489] Ibid.

[490] Ibid., at p. 77.

[491] Suriname Rejoinder, paras. 2.110-2.115.

5. The Admissibility of a State Responsibility Claim in a Maritime Delimitation Case

423. The Tribunal does not accept Suriname's argument that in a maritime delimitation case, an incident engaging State responsibility in a disputed area renders a claim for reparations for the violation of an obligation provided for by the Convention and international law inadmissible. A claim relating to the threat or use of force arising from a dispute under the Convention does not, by virtue of Article 2(3) of the UN Charter, have to be "against the territorial integrity or political independence" of a State to constitute a compensable violation. Moreover, the Convention makes no mention of the incompatibility of claims relating to the use of force in a disputed area and a claim for maritime delimitation of that area. As the Eritrea-Ethiopia Claims Commission explained, if the law recognised such an incompatibility, it would significantly weaken the fundamental rule of international law prohibiting the use of force:

> border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.[492]

424. In *Cameroon/Nigeria*,[493] a case in which the International Court of Justice was called on to delimit a boundary between the two parties, the Court entertained several claims engaging Nigeria and Cameroon's State responsibility for the use of force within the disputed area. The Court found however that for all but one of these claims, insufficient evidence had been adduced to prove them.[494] With respect to the final claim by which Cameroon requested an end to Nigerian presence in a disputed area, the Court found that the injury suffered by Cameroon would be sufficiently addressed by Nigeria's subsequent pull-out as a result of the delimitation decision, rendering it unnecessary to delve into the question of whether Nigeria's State responsibility was engaged.[495] Even so, the Court clearly considered questions of State responsibility relating to use of force,

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[492] *Eritrea-Ethiopia Claims Commission*, Partial Award, *Jus ad Bellum*: Ethiopia's Claims 1-8 (19 Dec. 2005), 45 I.L.M. p. 430 (2006), at para. 10, online: <http://www.pca-cpa.org>.

[493] *Cameroon/Nigeria*, Judgment, I.C.J. Reports 2002, p. 303.

[494] Ibid., at paras. 323-324.

[495] Ibid., at paras. 310, 319.

and the admissibility of Cameroon or Nigeria's claims was never put into question on the grounds submitted here by Suriname.[496]

B. THE THREAT OR USE OF FORCE

425. Guyana's claims, as formulated in its Third Submission, seek reparations for Suriname's alleged violation of its obligations under the Convention, the UN Charter, and general international law because of its use of armed force against the territorial integrity of Guyana and against its nationals, agents and others lawfully present in maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction. Guyana's claims in this respect arise from the CGX incident.

426. Guyana's position on the question of the threat or use of force can be summarized as follows. Guyana has claimed that Suriname has rejected Guyana's repeated offers of immediate high level negotiations concerning offshore exploratory activities by Guyana's licensee CGX. Instead it resorted to the use of force on 3 June 2000 to expel Guyana's licensee – the CGX exploratory rig and drill ship *C.E. Thornton* – and threatened similar action against other licensees, namely Esso E & P Guyana and Maxus. According to Guyana, Suriname's conduct has resulted in both material and non-material injury to Guyana, including the considerable loss of foreign investment and licensing fees. This has blocked the development of Guyana's offshore hydrocarbon resources, for which injuries Guyana is entitled to full reparation in accordance with international law.[497]

427. For Guyana the obligation to settle disputes by peaceful means is not subsumed under the prohibition of the use of force but "possesses a specific substance of its own".[498] Guyana declared that "the Tribunal need not conclude that Suriname's conduct

[496] In the jurisdiction and admissibility phase, Nigeria had argued that the State responsibility claims were inadmissible, but only on the grounds that Cameroon did not adduce enough evidence to support them. That challenge was rejected by the Court: *Cameroon/Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275.

[497] Guyana Memorial, Chapter 10.

[498] Transcript, pp. 573-574, citing Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, p. 587 (2nd ed., 2002).

amounted to use of force in order to find that it has violated its obligation to settle this dispute by peaceful means".[499]

428. In this respect Guyana has called attention to the various international instruments which have imposed upon States the obligation to settle disputes by peaceful means. It cites Article 279 of the Convention as embodying the central purpose of Part XV of the Convention which reads as follows:

> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

429. Guyana invokes the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, citing in particular the provision which reads:

> the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, *including territorial disputes and problems concerning frontiers of States.*[500] [emphasis added]

430. For Guyana this reflects an authoritative interpretation of the United Nations Charter falling within the ambit of Article 2(4) of the UN Charter.

431. In its oral pleadings, Guyana found further support for its argument in the 1982 Manila declaration on the peaceful settlement of international disputes, Article VII of which stated that "neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the states' parties to the dispute".[501]

432. With respect to the question of whether the CGX incident constituted a threat of force, the Tribunal considers it helpful to examine the statements of some of the main participants in that incident.

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[499] Transcript, pp. 575-576.

[500] Guyana Memorial, para. 10.5.

[501] Transcript, p. 575; G.A. Res. 37/10, Annex, U.N. Doc. A/RES/37/10 (15 Nov. 1982).

433. Mr Edward Netterville, the Rig Supervisor on the *C.E. Thornton*, described the incident in these terms in his witness statement:

> Shortly after midnight on 4 June 2000, while this coring process (drilling for core samples) was underway, gunboats from the Surinamese Navy arrived at our location. The gunboats established radio contact with the C.E. Thornton and its service vessels, and ordered us to "leave the area in 12 hours," warning that if we did not comply "the consequences will be yours." The Surinamese Navy repeated this order several times. I understood this to mean that if the C.E. Thornton and its support vessels did not leave the area within twelve hours, the gunboats would be unconstrained to use armed force against the rig and its service vessels.[502]

434. Mr. Netterville made the following observations on this incident:

> In my experience, Suriname's threat to use force against the C.E. Thornton is unprecedented. I have been employed for over forty years in the marine and oil industry during which time I have served aboard oil rigs throughout the world. I have never experienced, nor heard of, any similar instance in which a rig has been evicted from its worksite by the threat of armed force. Nor, in discussions with others in the industry after June 2000, has anyone told me of a similar incident.[503]

435. Mr. Graham Barber, who served as Reading & Bates Area Manager for the project and had overall responsibility for its rig and shore-based operations, gave similar testimony. He stated that:

> After midnight on 3 June 2000, during the jacking-up process, two gunboats from the Surinamese Navy approached us and shined their search lights on the rig. A Surinamese naval officer informed us by radio that we "were in Surinamese waters" and that we had 12 hours to leave the area or "face the consequences." He repeated this phrase, or variations of it, several times. ... Faced with these threats from the Surinamese Navy, in the early morning hours of 4 June 2003, I convened a meeting with other persons in authority aboard the C.E. Thornton. We decided that we had no alternative other than to evacuate the rig from the Eagle location.[504]

436. Major J.P. Jones, Commander Staff Support of the LUMAR (the Suriname Air Force and Navy), recorded this exchange between himself and the drilling platform:

> This is the Suriname navy. You are in Suriname waters without authority of the Suriname Government to conduct economic activities here. I order you to stop immediately with these activities and leave the Suriname waters.

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[502] Guyana Memorial, Annex 175.

[503] Guyana Memorial, Annex 175.

[504] Guyana Memorial, Annex 176.

> The answer to this from the platform was: "we are unaware of being in Suriname waters". I persisted saying that they were in Suriname waters and that they had to leave these waters within 12 hours. And if they would not do so, the consequences would be theirs. They then asked where they should move to. I said that they should retreat to Guyanese waters. He reacted by saying that they needed time to start up their departure. I then allowed them 24 hours to leave the Suriname waters. We then hung around for some time and after about one hour we left for New Nickerie.[505]

437. Major Jones added:

> If the platform had not left our waters voluntarily, I would definitely not have used force. I had no instructions to that effect and anyhow I did not have the suitable weapons to do so. I even had no instructions to board the drilling platform and also I did not consider that.[506]

438. The captains of the two Surinamese patrol boats, Mr. M. Galong and Mr. R.S. Bhola, both confirmed that the drilling platform was ordered to leave Suriname waters within 12 hours and if this order was not complied with, the consequences would be theirs. With respect to what the consequences would be, both Captain Galong and Captain Bhola noted that they had no instructions with regard to the use of force. Captain Bhola stated that:

> In the periods May 1989-1990 and 1997 up to now I have performed at least 30 patrol missions off the coast of Suriname. These patrol missions also involved the sea area between 10° and 30° North which is disputed between Suriname and Guyana. The patrols had mainly to do with expelling fishermen without a licence from Suriname waters. This has always been achieved by issuing summons. In such cases the commander of the vessel is in command of the operation. My instructions never imply that I may use force And I have never used force. All things considered the course of the removal of the drilling platform, as far as I am concerned, does not differ essentially from the course taken during other patrols.[507]

439. The testimony of those involved in the incident clearly reveals that the rig was ordered to leave the area and if this demand was not fulfilled, responsibility for unspecified consequences would be theirs. There was no unanimity as to what these "consequences" might have been. The Tribunal is of the view that the order given by Major Jones to the rig constituted an explicit threat that force might be used if the order was not complied with. The question now arises whether this threat of the use of force

[505] Suriname Rejoinder, Annex 20.

[506] Suriname Rejoinder, Annex 20.

[507] Suriname Rejoinder, Annex 16.

breaches the terms of the Convention, the UN Charter and general international law. The ICJ has thrown some light on the circumstances, where a threat of force can be considered illegal. It has declared that:

> Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.[508]

440. The Tribunal also takes into consideration the findings of the ICJ in the *Nicaragua* case where it had occasion to refer to the application of the "customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations"[509] to what the Court termed "less grave forms of the use of force".[510] The Court stated that:

> As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) ...). As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force.[511]

[508] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at para. 47. Scholarly opinion is in line with this proposition: see Ian Brownlie, *International Law and the Use of Force*, p. 364 (1964).

[509] *Nicaragua*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at para. 190.

[510] Ibid., at para. 191.

[511] Ibid.

C. LAW ENFORCEMENT ACTIVITIES

441. Suriname has maintained that the measures it undertook on 3 June 2000 were of the nature of reasonable and proportionate law enforcement measures to preclude unauthorized drilling in a disputed area of the continental shelf. It asserted that it was quite normal for coastal States to undertake law enforcement activities in disputed areas (usually in relation to fisheries) and also to do so against vessels under foreign flags including the flag of the other party to the dispute, unless specific arrangements exist. Suriname's practice in respect of fisheries enforcement in the disputed area is evidence of this. Suriname noted that it has drawn the Tribunal's attention to Article 2, paragraph 6, of its mining decree which provides that "he who undertakes mining activities without a licence can be punished by imprisonment for a maximum of two years, and/or fine of a maximum of 100,000 Suriname guilders."[512] The fact that the Attorney General was consulted before the 3 June 2000 action indicated that that action was a law enforcement measure.

442. Suriname has made much use of the case law of international courts and tribunals to support its claim. It has significantly relied on the judgment of the ICJ in the *Fisheries Jurisdiction* case (*Spain v. Canada*).[513] Suriname, in its Rejoinder, recalled that:

> Spain contends that an exercise of jurisdiction by Canada over a Spanish vessel on the high seas entailing the use of force falls outside of Canada's reservation to the Court's jurisdiction. Spain advances several related arguments in support of this thesis. First, Spain says that the use of force by one State against a fishing vessel of another State on the high seas is necessarily contrary to international law; and as Canada's reservation must be interpreted consistently with legality, it may not be interpreted to subsume such use of force within the phrase "the enforcement of such measures". Spain further asserts that the particular use of force directed against the *Estai* was in any event unlawful and amounted to a violation of Article 2, paragraph 4, of the Charter, giving rise to a separate cause of action not caught by the reservation.
>
> In rejecting Spain's argument, the Court stated that the "Court finds that the use of force authorized by the Canadian legislation and regulation falls within the ambit of what is commonly understood as enforcement of conservation and management measures and thus falls under the provisions of paragraph 2(d) of Canada's

[512] Suriname Rejoinder, para. 4.34; Decree of 8 May 1986, Suriname Counter-Memorial, Annex 54 (translation provided in Suriname Rejoinder, Annex SR31).

[513] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 ("*Fisheries Jurisdiction*").

> declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. *Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures according to a 'natural and reasonable' interpretation of the concept.*"
>
> The Court's reasoning squarely supports Suriname's position that a coastal state's instruction to an oil rig that it not conduct drilling on the continental shelf claimed by the coastal state, and that the oil rig depart the area, is an exercise of the law enforcement jurisdiction of the coastal state, not a violation of the prohibition on the international use of force.[514]

443. Suriname also relied on the judgment of ITLOS in the *Saiga* case to show that stopping and communicating with a vessel did not in themselves constitute "a use of force or threat to use force". It cited the Tribunal's views on the use of force in law enforcement activities:[515]

> The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered.[516]

444. Guyana for its part considered the *Fisheries Jurisdiction* case as wholly irrelevant as a precedent to the present case. Guyana contended, *inter alia*, that that case concerned enforcement measures against fishing vessels on the high seas and not the use of force directly arising from a maritime dispute between two sovereign States. In addition the case solely concerned the interpretation of Canada's reservation to the Court's jurisdiction with respect to disputes arising out of or concerning management measures taken by Canada and the enforcement of such measures. Guyana affirmed that it was very clear that this precedent is irrelevant because the Court was not purporting to define the meaning of the term armed force, but was simply attempting to define the scope of Canada's reservation to the Court's jurisdiction.[517]

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[514] Suriname Rejoinder, paras. 4.59-4.61.

[515] Suriname Rejoinder, para. 4.61.

[516] *Saiga*, Judgment, ITLOS Reports 1999, p. 7, at para. 156.

[517] Transcript, p. 580.

445. The Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary.[518] However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity. This Tribunal has based this finding primarily on the testimony of witnesses to the incident, in particular the testimony of Messrs Netterville and Barber. Suriname's action therefore constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law.

446. Suriname also argued that "should the Tribunal regard [its 3 June 2000] measures as contrary to international obligations owed by Suriname to Guyana, the measures were nevertheless lawful countermeasures since they were taken in response to an internationally wrongful act by Guyana in order to achieve cessation of that act".[519] It is a well established principle of international law that countermeasures may not involve the use of force. This is reflected in the ILC Draft Articles on State Responsibility at Article 50(1)(a), which states that countermeasures shall not affect "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations". As the Commentary to the ILC Draft Articles mentions,[520] this principle is consistent with the jurisprudence emanating from international judicial bodies.[521] It is also contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[522] the adoption of which, according to the ICJ, is an indication of State's *opinio juris* as to customary international law on the question.[523] Peaceful means of addressing Guyana's alleged breach of international law with respect to

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[518] See *S.S. "I'm Alone" (Canada/United States)*, R.I.A.A. Vol. 3, p. 1615; *Red Crusader (Commission of Enquiry, Denmark-United Kingdom)*, 35 I.L.R. p. 199; *Saiga*, Judgment, ITLOS Reports 1999, p. 7.

[519] Suriname Rejoinder, para. 4.32.

[520] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

[521] *Corfu Channel*, Judgment, I.C.J. Reports 1949, p. 4, at p. 35; *Nicaragua*, Merits, Judgment, I.C.J. Reports 1986, p. 16, at p. 127, para. 249.

[522] "States have a duty to refrain from acts of reprisal involving the use of force.": G.A. Res. 2625 (XXV) of 24 October 1970, first principle, para. 6.

[523] *Nicaragua*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at para. 191.

exploratory drilling were available to Suriname under the Convention. A State faced with a such a dispute should resort to the compulsory procedures provided for in Section 2 of Part XV of the Convention, which provide among other things that, where the urgency of the situation so requires, a State may request that ITLOS prescribe provisional measures.[524] As it involved the threat of force, Suriname's action against the *C.E. Thornton* cannot have been a lawful countermeasure.

447. Having reached this conclusion the Tribunal must now deal with the question of whether Suriname's action has raised an issue of State responsibility.

D. STATE RESPONSIBILITY

448. In addressing Suriname's State responsibility and Guyana's request that this Tribunal grant compensation and an order precluding Suriname from resorting to further threats of force against Guyana or its licensees, the Tribunal considers it useful to look at the *Nigeria/Cameroon* case. In that case, the Court entertained several claims engaging Nigeria and Cameroon's State responsibility for the use of force within the disputed area. Although the claims were deemed to be admissible, in the same way this Tribunal has found Guyana's Third Submission to be admissible, the Court did not assess Nigeria's State responsibility. In its Rejoinder, Suriname argued the relevance of the *Cameroon/Nigeria* judgment:

> In the *Cameroon v. Nigeria* case before the International Court of Justice, Cameroon alleged that Nigeria used force, in violation of UN Charter Article 2(4) and customary international law, by militarily occupying parcels of Cameroonian territory in the area of Lake Chad and the Peninsula of Bakassi. Even though the Court ultimately awarded to Cameroon certain areas along the border that were occupied by Nigerian military forces, the Court decided that its delimitation judgment (along with the anticipated evacuation of the Cameroonian territory by Nigeria) sufficiently addressed the injury allegedly suffered by Cameroon. Consequently, the Court did not further determine whether and to what extent Nigeria's responsibility to Cameroon had been engaged as a result of the occupation. On similar reasoning, even if the Tribunal in this case concludes that the incident occurred in waters that are now determined to be under Guyana's jurisdiction, the Tribunal should decline to pass upon Guyana's claim for alleged unlawful activities by Suriname.[525]

[524] Article 290(5) of the Convention.

[525] Suriname Rejoinder, para. 4.3.

449. Guyana for its part contended that Suriname has disregarded the rule set forth in Article 1 of the ILC Draft Articles that every internationally wrongful act of a State entails the responsibility of that State. It was, in Guyana's view, very clear that Article 279 of the Convention imposed an obligation on States parties that is independent of the laws applicable to maritime boundary delimitation and the obligations under the Convention. "To argue otherwise", it said "would mean that a boundary dispute, *ipso facto*, justifies recourse to armed force". It maintained that Suriname's reliance on the *Cameroon/Nigeria* case was misplaced. In that case, it held, the Court did not enumerate a general principle that State responsibility is irrelevant to boundary disputes but limited itself solely to the relief sought by Cameroon.

450. The Tribunal agrees with Guyana's characterisation of the ICJ's judgment in *Cameroon/Nigeria*, but considers that, as was the case in *Cameroon/Nigeria*, Guyana's request for an order precluding Suriname from resorting to further threats of force is sufficiently addressed by this Tribunal's delimitation decision. The findings in the *Cameroon/Nigeria* case may be recalled:

> In the circumstances of the case, the Court considers moreover that, by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation.[526]

451. In a like manner this Tribunal will not seek to ascertain whether and to what extent Suriname's responsibility to Guyana has been engaged as a result of the CGX incident of 3 June 2000. This dictum of the ICJ is all the more relevant in that as a result of this Award, Guyana now has undisputed title to the area where the incident occurred – the injury done to Guyana has thus been "sufficiently addressed".

452. This Tribunal will now deal with Guyana's claim for compensation. It is to be noted that the *Cameroon/Nigeria* judgment held that a declaratory judgment sufficed to satisfy the claim for compensation advanced by Cameroon. The circumstances of the claims in that case, however, are not entirely congruent with the claim made by Guyana with

[526] *Cameroon/Nigeria*, Judgment, I.C.J. Reports 2002, p. 303, para. 319.

respect to the CGX incident. The Tribunal is of the view that the damages, in these proceedings, have not been proved to the satisfaction of this Tribunal and the claim for compensation, accordingly, is rejected on that ground.

CHAPTER VIII - GUYANA'S FOURTH SUBMISSION AND SURINAME'S SUBMISSIONS 2.C AND 2.D

453. Guyana and Suriname have both made claims regarding breaches of Articles 74(3) and 83(3) of the Convention. Each Party alleges that the other breached its obligation to make every effort to enter into provisional arrangements. Guyana also claims that Suriname hampered or jeopardised the reaching of a final agreement by its conduct relating to the CGX incident. Suriname makes the same claim in respect of Guyana authorising its concession holder CGX to undertake exploratory drilling in the disputed area.

454. Guyana's Fourth Submission is set out as follows:

> Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea to make every effort to enter into provisional arrangements of a practical nature pending agreement on the delimitation of the continental shelf and exclusive economic zones in Guyana and Suriname, and by jeopardising or hampering the reaching of the final agreement; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, for the injury caused by its internationally wrongful acts.[527]

455. The Tribunal notes that Guyana withdrew its claim for reparation in respect of its Fourth Submission during the hearings.

456. Suriname's Submissions 2.C. and 2.D. are set out as follows:

> 2.C. To find and declare that Guyana breached its legal obligations to Suriname under Articles 74(3) and 83(3) of the 1982 Law of the Sea Convention, by authorizing its concession holder to drill an exploratory well in a known disputed maritime area thereby jeopardizing and hampering the reaching of a maritime boundary agreement.
>
> 2.D. To find and declare that Guyana breached its legal obligations to Suriname under Article 74(3) and 83(3) of the 1982 Law of the Sea Convention, by not making every effort to enter into a provisional arrangement of a practical nature.[528]

[527] Guyana Reply, para. 10.1.

[528] Suriname Rejoinder, Chapter 6.

A. JURISDICTION AND ADMISSIBILITY

457. Suriname challenges the Tribunal's jurisdiction over Guyana's Fourth Submission as well as its admissibility. It argues, as it did for Guyana's Third Submission, that Article 283(1) constitutes a bar to jurisdiction. For the same reasons that the Tribunal rejected the notion that Article 283(1) could bar its jurisdiction to hear Guyana's Third Submission, the Tribunal rules that it cannot bar its jurisdiction to hear Guyana's Fourth Submission. Suriname also contends that the claim is inadmissible as Guyana lacks clean hands.[529] The Tribunal rejects this argument for the same reasons the Tribunal rejected it in relation to Guyana's Third Submission.

458. Furthermore, Suriname claims that only conduct of the Parties after 8 August 1998, being the date of entry into force of the Convention between Guyana and Suriname,[530] is relevant to Guyana's Fourth Submission.[531] In this respect, the Tribunal recalls that an act of a State can constitute a breach of an international obligation only if the State is bound by that obligation at the time of the act. However, although acts prior to 8 August 1998 cannot form the basis of a finding by the Tribunal that Suriname violated an obligation under the Convention, such acts are relevant to the Tribunal's consideration of Suriname's subsequent conduct to the extent that they provide the background for that conduct and inform the Tribunal's interpretation of it.

B. THE OBLIGATIONS PROVIDED FOR BY ARTICLES 74(3) AND 83(3)

459. Articles 74(3) and 83(3) of the Convention impose two obligations upon States Parties in the context of a boundary dispute concerning the continental shelf and exclusive economic zone respectively. The two obligations simultaneously attempt to promote and limit activities in a disputed maritime area. The first obligation is that, pending a final delimitation, States Parties are required to make "every effort to enter into provisional arrangements of a practical nature." The second is that the States Parties

[529] Suriname Preliminary Objections, paras. 7.1-7.9.

[530] 8 August 1998 is the thirtieth day after Suriname ratified the Convention on the 9 July 1998: Transcript, p. 608.

[531] Suriname Rejoinder, para. 5(2)(i).

must, during that period, make "every effort ... not to jeopardize or hamper the reaching of the final agreement."

1. Provisional Arrangements of a Practical Nature

460. The first obligation contained in Articles 74(3) and 83(3) is designed to promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation.[532] In the view of the Tribunal, this obligation constitutes an implicit acknowledgment of the importance of avoiding the suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement. Such arrangements promote the realisation of one of the objectives of the Convention, the equitable and efficient utilisation of the resources of the seas and oceans.[533]

461. Although the language "every effort" leaves "some room for interpretation by the States concerned, or by any dispute settlement body",[534] it is the opinion of the Tribunal that the language in which the obligation is framed imposes on the Parties a duty to negotiate in good faith. Indeed, the inclusion of the phrase "in a spirit of understanding and cooperation" indicates the drafters' intent to require of the parties a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement. Such an approach is particularly to be expected of the parties in view of the fact that any provisional arrangements arrived at are by definition temporary and will be without prejudice to the final delimitation.[535]

462. There have been a number of examples of arrangements for the joint exploration and exploitation of maritime resources, often referred to as joint development agreements. Joint development has been defined as "the cooperation between States with regard to

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[532] Myron H. Nordquist, ed., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. II.*, p. 815 (Nijhoff) ("Virginia Commentary"); Rainer Lagoni, *Interim Measures Pending Delimitation Agreements*, 78 Am. J. Int'l L. p. 345, at p. 354 (1984).

[533] Thomas A. Mensah, *Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation*, in Rainer Lagoni & Daniel Vignes, *Maritime Delimitation*, p. 143, at p. 143 (Nijhoff 2006); the Convention, preamble.

[534] Virginia Commentary, Vol. II, p. 815.

[535] The Convention, Articles 74(3), 83(3).

exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims".[536]

463. Joint exploitation of resources that straddle maritime boundaries has been particularly encouraged by international courts and tribunals. In the *Eritrea/Yemen* arbitration, the arbitral tribunal, although no mineral resources had yet been discovered in the disputed waters, wrote that the parties "should give every consideration to the shared or joint or unitised exploitation of any such resources."[537] The ICJ in the *North Sea Continental Shelf* cases, in addressing the question of the unity of deposits as it relates to delimitation, noted that State practice in dealing with deposits straddling a boundary line has been to enter into undertakings with a view to ensuring the most efficient exploitation or apportionment of the products extracted.[538] Furthermore, the Court stated that agreements for joint exploitation were particularly appropriate where areas of overlapping claims result from the method of delimitation chosen and there is a question of preserving the unity of deposits.[539]

464. Provisional arrangements of a practical nature have been recognised as important tools in achieving the objectives of the Convention, and it is for this reason that the Convention imposes an obligation on parties to a dispute to "make every effort" to reach such arrangements.

2. Hampering or Jeopardising the Final Agreement

465. The second obligation imposed by Articles 74(3) and 83(3) of the Convention, the duty to make every effort ... not to jeopardise or hamper the reaching of the final agreement", is an important aspect of the Convention's objective of strengthening peace and friendly relations between nations and of settling disputes peacefully. However, it is important

[536] Rainer Lagoni, *Report on Joint Development of Non-living Resources in the Exclusive Economic Zone*, I.L.A. Report of the Sixty-Third Conference, p. 509, at pp. 511-512 (1988), quoted in Mensah, *Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation*, in Rainer Lagoni and Daniel Vignes, *Maritime Delimitation*, p. 143, at p. 146 (Nijhoff, 2006).

[537] *Eritrea/Yemen II*, 119 I.L.R. p. 417 (1999), *The Eritrea-Yemen Arbitration Awards of 1998 & 1999* (Permanent Court of Arbitration Award Series 2005), online: <http://www.pca-cpa.org>.

[538] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at para. 97.

[539] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 at para. 99.

to note that this obligation was not intended to preclude all activities in a disputed maritime area. The Virginia Commentary for example states that the obligation "does not exclude the conduct of some activities by the States concerned within the disputed area, so long as those activities would not have the effect of prejudicing the final agreement."[540]

466. In the context of activities surrounding hydrocarbon exploration and exploitation, two classes of activities in disputed waters are therefore permissible. The first comprises activities undertaken by the parties pursuant to provisional arrangements of a practical nature. The second class is composed of acts which, although unilateral, would not have the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary.

467. The Tribunal is of the view that unilateral acts which do not cause a physical change to the marine environment would generally fall into the second class. However, acts that do cause physical change would have to be undertaken pursuant to an agreement between the parties to be permissible, as they may hamper or jeopardise the reaching of a final agreement on delimitation. A distinction is therefore to be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration.

468. The distinction adopted by this Tribunal is consistent with the jurisprudence of international courts and tribunals on interim measures. The ICJ's decision in the *Aegean Sea* case between Greece and Turkey distinguishes between activities of a transitory character and activities that risk irreparable prejudice to the position of the other party. Greece had requested that Turkey be ordered to refrain from all exploratory activity or scientific research without its consent pending a final judgment. In particular, Greece requested that Turkey be ordered to cease its seismic exploration in disputed waters, an activity involving the detonation of small explosions aimed at sending sound waves through the seabed. The Court declined to indicate interim measures, citing three factors: (1) the fact that seismic exploration does not involve any risk of physical damage to the seabed or subsoil, (2) that the activities are of a transitory

[540] Virginia Commentary, Vol. II, p. 815.

character and do not involve the establishment of installations, and (3) that no operations involving the actual appropriation or other use of the natural resources were embarked upon.[541] In the circumstances, the Court found that Turkey's conduct did not pose the risk of irreparable prejudice to Greece's rights in issue in the proceedings.[542]

469. It should be noted that the regime of interim measures is far more circumscribed than that surrounding activities in disputed waters generally. As the Court in the *Aegean Sea* case noted, the power to indicate interim measures is an exceptional one,[543] and it applies only to activities that can cause irreparable prejudice. The cases dealing with such measures are nevertheless informative as to the type of activities that should be permissible in disputed waters in the absence of a provisional arrangement. Activities that would meet the standard required for the indication of interim measures, in other words, activities that would justify the use of an exceptional power due to their potential to cause irreparable prejudice, would easily meet the lower threshold of hampering or jeopardising the reaching of a final agreement. The criteria used by international courts and tribunals in assessing a request for interim measures, notably the risk of physical damage to the seabed or subsoil, therefore appropriately guide this Tribunal's analysis of an alleged violation of a party's obligations under Articles 74(3) and 83(3) of the Convention.

470. It should not be permissible for a party to a dispute to undertake any unilateral activity that might affect the other party's rights in a permanent manner. However, international courts and tribunals should also be careful not to stifle the parties' ability to pursue economic development in a disputed area during a boundary dispute, as the resolution of such disputes will typically be a time-consuming process. This Tribunal's interpretation of the obligation to make every effort not to hamper or jeopardise the reaching of a final agreement must reflect this delicate balance. It is the Tribunal's opinion that drawing a distinction between activities having a permanent physical impact on the marine environment and those that do not, accomplishes this and is consistent with other aspects of the law of the sea and international law.

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[541] *Aegean Sea*, Interim Protection, Order, I.C.J. Reports 1976, p. 3, at para. 30.

[542] Ibid. at para. 31.

[543] Ibid.

C. THE TRIBUNAL'S FINDINGS ON THE DUTY TO MAKE EVERY EFFORT TO ENTER INTO PROVISIONAL ARRANGEMENTS OF A PRACTICAL NATURE

471. Suriname claims that Guyana violated its duty to make every effort to enter into provisional arrangements as it persistently demanded that Suriname permit CGX to resume exploratory drilling and that Suriname accept Guyana's concessions in the disputed area.[544] Guyana, on its side, claims that Suriname, both before and after the CGX incident, failed to make serious efforts to negotiate provisional arrangements.[545]

472. The efforts by Guyana and Suriname to arrive at provisional arrangements appear to have started in 1989. The Joint Communiqué of 25 August 1989 between the President of Guyana and the President of Suriname recorded that the two Presidents expressed concern over the potential for disputes "with respect to petroleum development within the area of the North Eastern and North Western Seaward boundaries of Guyana and Suriname respectively".[546] They agreed that pending settlement of the boundary question, representatives of the Agencies responsible for petroleum development within the two countries should agree on modalities which would ensure that the opportunities available within the disputed area could be jointly utilised. Moreover, the Presidents agreed that concessions already granted in the disputed area would not be disturbed.[547]

473. The 1989 agreement led to the 1991 "Memorandum of Understanding – Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname" (the "MOU"). The Staatsolie representatives negotiating the MOU however claimed that they lacked the authority to negotiate an agreement on the actual utilisation of resources in the disputed area. The MOU was therefore limited in scope: it applied only to one Guyanese oil concession, the 1988 concession to Lasmo/BHP, and provided that further discussions would have to occur if the concession holder made any discoveries.[548] The MOU provided further that representatives of both governments would meet within

[544] Suriname Rejoinder, paras. 5.12-5.14.

[545] Guyana Reply, paras. 9.1-9.14.

[546] Joint Communiqué Signed at the Conclusion of the State Visit to Suriname by Hugh Desmond Hoyte, President of the Cooperative Republic of Guyana and Ramsewak Shankar, President of the Republic of Suriname (25 December 1989): Guyana Memorial, Annex 72.

[547] Guyana Memorial, para. 4.32.

[548] Suriname Preliminary Objections, paras. 6.26-6.28.

thirty days to conclude discussions on modalities for joint utilisation of the disputed area awaiting a final boundary agreement. Suriname, however, never sent a delegation or representative to conclude discussions, as contemplated by the MOU.[549] In 1994, Guyana submitted a new draft of proposed "Modalities for Treatment of the Offshore Area of Overlap between Guyana and Suriname"; however Suriname failed to respond to it.[550] Over the following years, Suriname did not engage in further discussions on the topic despite certain efforts by Guyana. There are also indications that the already limited MOU was disavowed by Suriname during that time.[551]

474. For the Tribunal, the evidence demonstrates that Suriname did not make every effort to enter into provisional arrangements before 8 August 1998. Although this alone cannot form the basis of a finding that Suriname violated the Convention, Suriname's subsequent conduct, which was consistent with its pre-1998 conduct, did constitute a failure to meet its obligations under Articles 74(3) and 83(3) and constituted a violation of the Convention.

475. Indeed, in the build-up to the CGX incident of 3 June 2000, Suriname did not fulfil its obligation to make every effort to enter into provisional arrangements relating to the exploratory activities of Guyana's concession holder CGX. While it was conducting seismic testing in the disputed area in 1999, CGX announced publicly that it had received approval from Guyana for its drilling programme,[552] and later the company announced a drilling schedule.[553] Less than three weeks after the latter announcement, which occurred on 10 April 2000, "the drilling plans had become known in Suriname via the 'grapevine'."[554] Suriname's first reaction came in the form of a diplomatic note dated 10 May 2000, in which it cautioned Guyana against its proposed course of conduct.[555] Following Guyana's response on 17 May 2000, asserting that all activities

[549] Suriname Preliminary Objections, para. 6.28.

[550] Guyana Memorial, paras. 4.36-4.37.

[551] Cable 94 Georgetown 2405 from the United States Embassy in Georgetown, Guyana to the United States Secretary of State (21 July 1994), Guyana Reply, Annex R11: "Mungra responded that the MOU had no validity because it had never been approved by the Surinamese Parliament."

[552] CGX Press Releases, 29 September 1999, reproduced in Guyana Memorial, Annex 158.

[553] Guyana Memorial, Annex 158.

[554] Suriname Preliminary Objections, paras. 6.34-6.35.

[555] Guyana Memorial, Annex 48.

were taking place within Guyanese territory,[556] Suriname again issued a *note verbale* objecting to the planned drilling, insisting on termination of all activities in the disputed waters, and informing Guyana of its intention to "protect its territorial integrity and national sovereignty".[557] On 2 June 2000, hours before the CGX incident occurred, Guyana invited Suriname to "send a high level delegation to Georgetown within twenty-four (24) hours to commence dialogue" on matters relating to the maritime boundary.[558]

476. At all times Suriname was under an obligation to make every effort to reach a provisional arrangement. However, this obligation became particularly pressing and relevant when Suriname became aware of Guyana's concession holder's planned exploratory drilling in disputed waters. Instead of attempting to engage Guyana in a spirit of understanding and cooperation as required by the Convention, Suriname opted for a harder stance. Even though Guyana attempted to engage it in a dialogue which may have led to a satisfactory solution for both Parties, Suriname resorted to self-help in threatening the CGX rig, in violation of the Convention. In order to satisfy its obligation to make every effort to reach provisional arrangements, Suriname would have actively had to attempt to bring Guyana to the negotiating table, or, at a minimum, have accepted Guyana's last minute 2 June 2000 invitation and negotiated in good faith. It notably could have insisted on the immediate cessation of CGX's exploratory drilling as a condition to participating in further talks. However, as Suriname did not opt for either of these courses of action, it failed, in the build-up to the CGX incident, in its duties under Articles 74(3) and 83(3) of the Convention.

477. The Tribunal rules that Guyana also violated its obligation to make every effort to enter into provisional arrangements by its conduct leading up to the CGX incident. Guyana had been preparing exploratory drilling for some time before the incident,[559] and should have, in a spirit of cooperation, informed Suriname directly of its plans. Indeed, notification in the press by way of CGX's public announcements was not sufficient for

[556] Guyana Memorial, Annex 77.

[557] Guyana Memorial, Annex 78.

[558] Guyana Memorial, Annex 79.

[559] Guyana appears to have authorised CGX to drill in the disputed area on 10 August 1999, almost a full year before the CGX incident: Press Releases, Guyana Memorial, Annex 158.

Guyana to meet its obligation under Articles 74(3) and 83(3) of the Convention. Guyana should have sought to engage Suriname in discussions concerning the drilling at a much earlier stage. Its 2 June 2000 invitation to Suriname to discuss the modalities of any drilling operations, although an attempt to defuse a tense situation, was also not sufficient in itself to discharge Guyana's obligation under the Convention. Steps Guyana could have taken consistent with efforts to enter into provisional arrangements include (1) giving Suriname official and detailed notice of the planned activities, (2) seeking cooperation of Suriname in undertaking the activities, (3) offering to share the results of the exploration and giving Suriname an opportunity to observe the activities, and (4) offering to share all the financial benefits received from the exploratory activities.

478. Following the CGX incident in June of 2000, numerous meetings and communications between the Parties took place in which, in the opinion of the Tribunal, they both engaged in good faith negotiations relating to provisional arrangements. Already on 6 June 2000 the Parties expressed their determination to "put in place arrangements to end the current dispute over the oil exploration concessions".[560] Further discussions then took place, including on 13 June 2000 at a meeting of the Joint Technical Committee,[561] as well as on 17-18 June 2000[562] and 28-30 January 2002.[563] A meeting of the Subcommittee of the Guyana-Suriname Border Commission was held on 31 May 2002, at which modalities for negotiating a provisional arrangement were discussed.[564] Subsequently, two joint meetings of the Suriname and Guyana Border Commissions were held (on 25-26 October 2002 and 10 March 2003).[565] Although they were ultimately unsuccessful in reaching a provisional arrangement, both Parties demonstrated a willingness to negotiate in good faith in relatively extensive meetings

[560] Guyana Memorial, Annex 81.

[561] Guyana Memorial, Annex 82.

[562] Guyana Memorial, Annex 83.

[563] Suriname Counter-Memorial, Annex 8, p. 6.

[564] Guyana Memorial, Annex 85.

[565] Guyana Memorial, Annexes 87-88.

and communications.[566] As a result, the Tribunal is satisfied that both Parties respected their obligation relating to provisional arrangements after the CGX incident.

D. THE TRIBUNAL'S FINDINGS ON THE DUTY NOT TO HAMPER OR JEOPARDISE THE REACHING OF A FINAL AGREEMENT

1. Suriname's Submission 2.C

479. Suriname claims that Guyana violated its obligation to make every effort not to hamper or jeopardise the reaching of a final agreement by allowing its concession holder to undertake exploratory drilling in the disputed waters.[567] With respect to this claim, the Tribunal finds that there is a substantive legal difference between certain oil exploration activities, notably seismic testing, and exploratory drilling.

480. The question that the Tribunal has to address here is whether a party engaging in unilateral exploratory drilling in a disputed area falls short of its obligation to make every effort, in a spirit of understanding and cooperation, not to jeopardise or hamper the reaching of the final agreement on delimitation. As set out above, unilateral acts that cause a physical change to the marine environment will generally be comprised in a class of activities that can be undertaken only jointly or by agreement between the parties. This is due to the fact that these activities may jeopardize or hamper the reaching of a final delimitation agreement as a result of the perceived change to the status quo that they would engender. Indeed, such activities could be perceived to, or may genuinely, prejudice the position of the other party in the delimitation dispute, thereby both hampering and jeopardising the reaching of a final agreement.

481. That however is not to say that all exploratory activity should be frozen in a disputed area in the absence of a provisional arrangement. Some exploratory drilling might cause permanent damage to the marine environment. Seismic activity on the other hand should be permissible in a disputed area. In the present case, both Parties authorised concession holders to undertake seismic testing in disputed waters, and these activities

[566] See Suriname Daily Judge's Folder, Vol. II, Tab H5 for a list of diplomatic post-August 1998 exchanges between Suriname and Guyana concerning a provisional arrangement or final delimitation of the maritime boundary.

[567] Suriname Rejoinder, Chapter 6, Submission 2.C.

did not give rise to objections from either side. In the circumstances at hand, the Tribunal does not consider that unilateral seismic testing is inconsistent with a party's obligation to make every effort not to jeopardise or hamper the reaching of a final agreement.

482. To the extent that Suriname believed that Guyana's authorisation of its concession holder to undertake exploratory drilling in disputed waters constituted a violation of its obligation to make every effort not to jeopardise or hamper the reaching of a final agreement on delimitation, and if bilateral negotiations failed to resolve the issue, a remedy is set out in the options for peaceful settlement envisaged by Part XV and Annex VII of the Convention. The obligation to have recourse to these options is binding on both Guyana and Suriname.

2. Guyana's Fourth Submission

483. Guyana claims Suriname violated its obligations under Article 74(3) and 83(3) to make every effort not to hamper or jeopardise the reaching of a final agreement by its use of a threat of force to respond to Guyana's exploratory drilling.[568]

484. Suriname had a number of peaceful options to address Guyana's authorisation of exploratory drilling. The first, in keeping with its other obligation under Articles 74(3) and 83(3), was to enter into discussions with Guyana regarding provisional arrangements of a practical nature to establish the modalities of oil exploration and potentially of exploitation. In the event of failure of the negotiations, Suriname could have invoked compulsory dispute resolution under Part XV, Section 2 of the Convention. That course of action would also then have given Suriname the possibility to request provisional measures "to preserve [its] rights ... or to prevent serious harm to the marine environment, pending the final decision."[569] The Tribunal finds that Surname's threat of force in a disputed area, while also threatening international peace and security, jeopardised the reaching of a final delimitation agreement.

[568] Guyana Reply, para. 8.1.

[569] The Convention, Article 290.

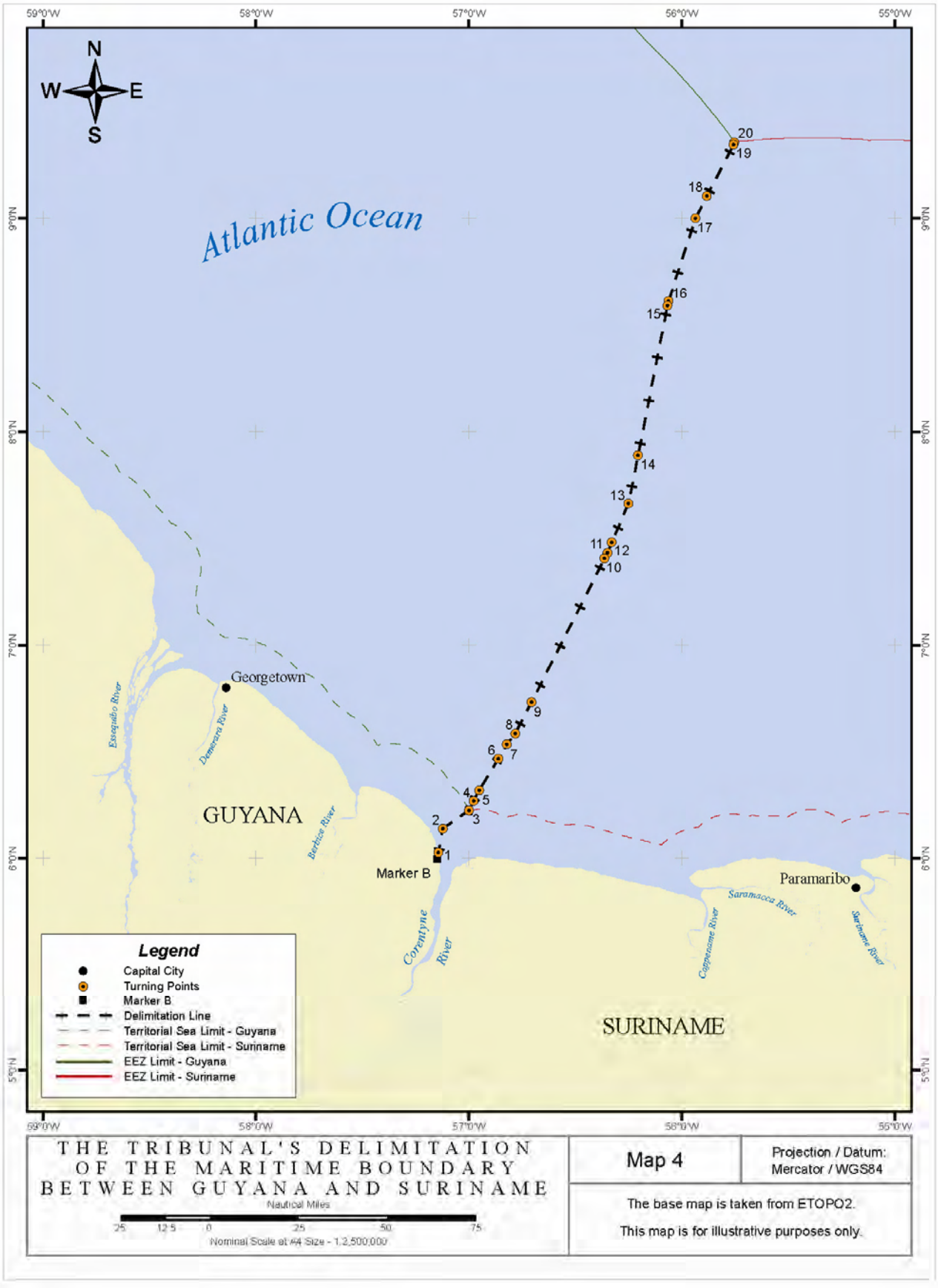
E. DECLARATORY RELIEF

485. Both Parties have requested the Tribunal to declare that violations of the Convention have taken place. The Tribunal notes that in certain circumstances, "reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right" or an obligation.[570]

486. The Tribunal therefore declares that both Guyana and Suriname violated their obligations under Articles 74(3) and 83(3) of the Convention to make every effort to enter into provisional arrangements of a practical nature. Furthermore, both Guyana and Suriname violated their obligations, also under Articles 74(3) and 83(3) of the Convention, to make every effort not to jeopardise or hamper the reaching of a final delimitation agreement.

[570] *Saiga*, Judgment, ITLOS Reports 1999, p. 7, at para. 171.

Map 4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Demerara River
GUYANA
Berbice River
Marker B
Corentyne River
Paramaribo
Saramacca River
Coppename River
Suriname River
SURINAME
Legend
Capital City
Turning Points
Marker B
Delimitation Line
Territorial Sea Limit - Guyana
Territorial Sea Limit - Suriname
EEZ Limit - Guyana
EEZ Limit - Suriname
THE TRIBUNAL'S DELIMITATION OF THE MARITIME BOUNDARY BETWEEN GUYANA AND SURINAME
Nautical Miles
25 12.5 0 25 50 75
Nominal Scale at A4 Size - 1:2,500,000
Map 4
Projection / Datum:
Mercator / WGS84
The base map is taken from ETOPO2.
This map is for illustrative purposes only.

CHAPTER IX - DISPOSITIF

487. For the reasons stated in paragraphs 280, 406, 410, and 457 of this Award, the Tribunal holds that:

(i) it has jurisdiction to delimit, by the drawing of a single maritime boundary, the territorial sea, continental shelf, and exclusive economic zone appertaining to each of the Parties in the waters where their claims to these maritime zones overlap;

(ii) it has jurisdiction to consider and rule on Guyana's allegation that Suriname has engaged in the unlawful use or threat of force contrary to the Convention, the UN Charter, and general international law; and

(iii) it has jurisdiction to consider and rule on the Parties' respective claims under Articles 74(3) and 83(3) of the Convention relating to the obligation to make every effort to enter into provisional arrangements of a practical nature and the obligation not to jeopardise or hamper the reaching of a final agreement.

488. Accordingly, taking into account the foregoing considerations and reasons,

THE ARBITRAL TRIBUNAL UNANIMOUSLY FINDS THAT

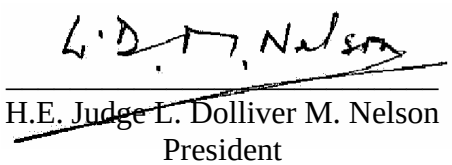
1. The International Maritime Boundary between Guyana and Suriname is a series of geodetic lines joining the points in the order listed as set forth in paragraphs 328 and 400 of this Award and shown for illustrative purposes only in Map 4 on the preceding page;

2. The expulsion from the disputed area of the CGX oil rig and drill ship *C.E. Thornton* by Suriname on 3 June 2000 constituted a threat of the use of force in breach of the Convention, the UN Charter, and general international law; however, for the reasons set out in paragraphs 450 and 452 of this Award, Guyana's request for an order precluding Suriname from making further threats of force and Guyana's claim for compensation are rejected;

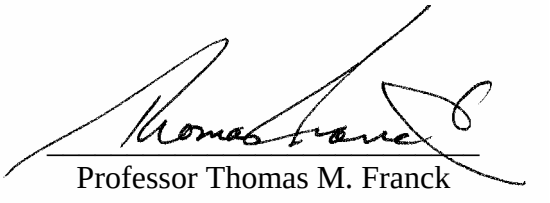
3. Both Guyana and Suriname violated their obligations under Articles 74(3) and 83(3) of the Convention to make every effort to enter into provisional arrangements of a practical nature and to make every effort not to jeopardise or hamper the reaching of a final delimitation agreement; and

4. The claims of the Parties inconsistent with this Award are rejected.

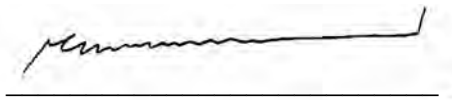
Done at The Hague, this 17th day of September 2007,



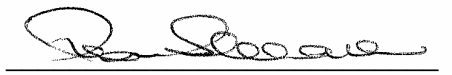
H.E. Judge L. Dolliver M. Nelson
President



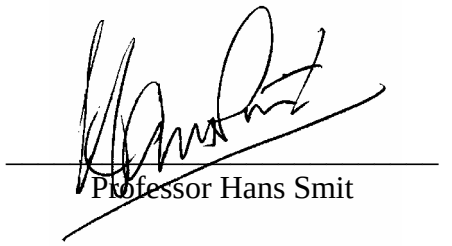
Professor Thomas M. Franck



Dr. Kamal Hossain



Professor Ivan Shearer



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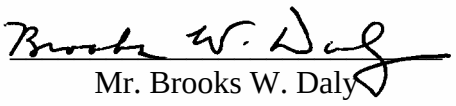

Mr. Brooks W. Daly
Registrar

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APPENDIX

Technical Report of the Tribunal's Hydrographer

David H. Gray
M.A.Sc., P.Eng., C.L.S.

1. The full description of the line of delimitation, together with the necessary geographical coordinates, is given in the Award. All computations have been made on the Geodetic Reference System (1980) ellipsoid and all geographical coordinates are referenced to the World Geodetic System 1984 (WGS-84). The International Nautical Mile of 1852 metres has been used.

2. In compliance with the Tribunal's Procedural Orders No. 7 and 8, I obtained Global Positioning System (GPS) data at Marker "B" of the 1936 Mixed Commission Boundary Survey over a period of 4 ½ hours. These data resulted in a World Geodetic System 1984 (WGS-84 ITRF05[1]) position of:

Latitude	=	5° 59′ 46.2059″N	(± 0.077 metres)
Longitude	=	57° 08′ 50.4824″W	(± 0.101 metres)
Ellipsoid Height	=	-24.022 metres	(± 0.180 metres)

Given the indicated accuracy of the results, it would be appropriate to round off the results to:

Latitude	=	5° 59′ 46.21″N
Longitude	=	57° 08′ 50.48″W

These values were computed using the Geodetic Survey of Canada's on-line Precise Point Positioning software and are based on the GPS satellite orbital parameters as derived from actual observations taken at tracking stations world-wide. The final values for the orbital parameters became available 21 days after the day on which the observations were taken.

The GPS survey data, in the form of RINEX files, have been provided to the Registry for permanent storage.

3. The location of Point 1 of the Award is the intersection of Low Water Line (LWL) along the west bank of the Corentyne River and a geodetic line through Marker "B" which has an initial azimuth of N10°E. Since this point moves with any movement of the Low Water Line, no geographical coordinates can be provided.

4. The geographic coordinates of base points along the Low Water Line of the coast of Suriname are:

Source and Number	Renumber	Latitude	Longitude
Annex CM69 S-1	S1	6° 01′ 34.0″	57° 08′ 22.0″
Annex CM69 S-2	S2	6° 01′ 19.0″	56° 59′ 02.0″
Annex CM69 S-3	S3	6° 01′ 40.0″	56° 57′ 24.0″

[1] Specifically, the International Terrestrial Reference Frame – 2005 version of WGS-84.

Annex CM69 S-4	S4	6° 01′ 41.0″	56° 57′ 21.0″
Annex CM69 S-5	S5	6° 01′ 41.0″	56° 57′ 15.0″
Annex CM69 S-6	S6	6° 00′ 10.0″	56° 45′ 10.0″
Annex CM69 S-7	S7	6° 00′ 09.0″	56° 44′ 48.0″
Annex CM69 S-8	S8	6° 00′ 08.0″	56° 44′ 29.0″
Annex CM69 S-9	S9	5° 57′ 25.0″	56° 29′ 57.0″
Annex CM69 S-10	S10	5° 57′ 21.0″	56° 29′ 18.0″
Annex CM69 S-11	S11	6° 00′ 17.0″	55° 46′ 44.0″
Annex CM69 S-12	S12	6° 00′ 22.0″	55° 46′ 22.0″
Annex CM69 S-13	S13	6° 00′ 22.0″	55° 45′ 56.0″
Annex CM69 S-14	S14	6° 01′ 35.0″	55° 23′ 19.0″

These geographic coordinates were provided by Suriname in Counter Memorial Annex 69, and were stated to be related to World Geodetic System 1984 (WGS-84).

5. The geographic coordinates of the pertinent turning points along the Low Water Line of the coast of Guyana are:

Source and Number	Renumber	Latitude	Longitude
Annex R26 G-1	G3	6° 00′ 27.9″	57° 08′ 21.1″
Annex R26 G-2	G9	6° 02′ 42.9″	57° 08′ 51.6″
Annex R26 G-3	G12	6° 03′ 07.6″	57° 08′ 54.0″
Annex R26 G-4	G13	6° 04′ 26.3″	57° 09′ 13.8″
Annex R26 G-5	G16	6° 05′ 26.8″	57° 09′ 26.6″
Annex R26 G-6	G18	6° 06′ 12.9″	57° 09′ 43.3″
Annex R26 G-7	G19	6° 06′ 43.2″	57° 09′ 52.8″
Annex R26 G-8	G21	6° 07′ 42.8″	57° 10′ 27.3″
Annex R26 G-9	G23	6° 09′ 21.1″	57° 11′ 28.2″
Annex R26 G-10	G25	6° 10′ 45.0″	57° 12′ 31.8″
Annex R26 G-11	G28	6° 16′ 22.3″	57° 16′ 28.0″
Annex R26 G-12	G30	6° 17′ 12.7″	57° 17′ 30.4″
Annex R26 G-13	G32	6° 18′ 32.1″	57° 19′ 06.4″
Annex R26 G-14	G33	6° 20′ 12.8″	57° 22′ 06.3″
Annex R26 G-15	G35	6° 40′ 44.1″	57° 50′ 17.7″
Annex R26 G-16	G38	7° 22′ 53.8″	58° 28′ 08.2″

These geographic coordinates were provided by Guyana in Reply Annex 26, and were stated to be related to World Geodetic System 1984 (WGS-84).

6. The geographic coordinates of the pertinent turning points along the Low Water Line of the coast of Guyana are:

Source and Number	Renumber	Latitude	Longitude
Annex CM69 G-1	G6	6° 01′ 36.0″	57° 08′ 33.0″
Annex CM69 G-2	G7	6° 02′ 35.0″	57° 09′ 06.0″
Annex CM69 G-3	G8	6° 02′ 45.0″	57° 09′ 04.0″
Annex CM69 G-4	G10	6° 02′ 52.0″	57° 09′ 04.0″
Annex CM69 G-5	G11	6° 02′ 58.0″	57° 09′ 05.0″
Annex CM69 G-6	G14	6° 05′ 00.0″	57° 09′ 35.0″
Annex CM69 G-7	G15	6° 05′ 14.0″	57° 09′ 37.0″

Annex CM69 G-8	G17	6° 06′ 05.0″	57° 09′ 54.0″
Annex CM69 G-9	G20	6° 07′ 33.0″	57° 10′ 32.0″
Annex CM69 G-10	G22	6° 07′ 48.0″	57° 10′ 41.0″
Annex CM69 G-11	G24	6° 10′ 44.0″	57° 12′ 19.0″
Annex CM69 G-12	G26	6° 10′ 50.0″	57° 12′ 24.0″
Annex CM69 G-13	G27	6° 16′ 20.0″	57° 16′ 31.0″
Annex CM69 G-14	G29	6° 17′ 12.0″	57° 17′ 29.0″
Annex CM69 G-15	G31	6° 18′ 28.0″	57° 19′ 06.0″
Annex CM69 G-16	G34	6° 20′ 15.0″	57° 22′ 11.0″
Annex CM69 G-17	G36	6° 40′ 44.0″	57° 50′ 21.0″
Annex CM69 G-18	G37	7° 22′ 02.0″	58° 27′ 32.0″
Annex CM69 G-19	G39	7° 23′ 04.0″	58° 28′ 14.0″

These geographic coordinates were provided by Suriname in Counter Memorial Annex 69, and were stated to be related to World Geodetic System 1984 (WGS-84).

7. Both Parties provided the geographical coordinates of the base points for determining the provisional equidistance line. Guyana objected to Suriname's points S1 and S14. Since the Tribunal has ruled that the delimitation within the territorial sea will be based on special circumstances, there is no need for the Tribunal to rule on the validity of Points S1 to S3 inclusive, and on the validity of Points G1 to G18 inclusive and Point G20. The Tribunal has ruled on the validity of point S14 in its Award. The Tribunal accepted the other base points provided by the Parties.

8. The turning points along the equidistance line between Guyana and Suriname from the outer limit of the Territorial Sea (12 nm) to the outer limit of Exclusive Economic Zone (200 nm) are:

Number	Controlling Points	Latitude	Longitude
Point 3	G21, S4	6° 13′ 28.45161″N,	56° 59′ 52.26218″W,
DHG-13	G21, S4, G23	6° 16′ 11.10279″N,	56° 58′ 37.51896″W
DHG-14	G23, S4, S5	6° 18′ 37.68430″N,	56° 57′ 17.99996″W
DHG-15	G23, S5, G24	6° 19′ 10.47780″N,	56° 57′ 00.33300″W
DHG-16	G24, S5, G26	6° 28′ 00.46428″N,	56° 51′ 42.18096″W
DHG-17	G26, S5, G28	6° 32′ 07.38098″N,	56° 49′ 13.06749″W
DHG-18	G28, S5, S6	6° 35′ 07.68334″N,	56° 46′ 55.20724″W
DHG-19	G28, S6, S7	6° 42′ 35.21247″N,	56° 43′ 03.39402″W
DHG-20	G28, S7, S8	6° 43′ 59.56866″N,	56° 42′ 20.14577″W
DHG-21	G28, S8, G29	7° 24′ 27.15434″N,	56° 21′ 44.54451″W
DHG-22	G29, S8, S9	7° 26′ 06.50731″N,	56° 20′ 52.94196″W
DHG-23	G29, S9, S10	7° 27′ 15.41697″N,	56° 20′ 24.14252″W
DHG-24	G29, S10, G32	7° 28′ 59.03779″N,	56° 19′ 41.27176″W
DHG-25	G32, S10, S11	7° 39′ 57.89461″N,	56° 14′ 59.67507″W
DHG-26	G32, S11, S12	7° 53′ 28.79027″N,	56° 12′ 18.58596″W
DHG-27	G32, S12, G33	8° 35′ 36.59110″N,	56° 03′ 59.52666″W
DHG-28	G33, S12, G35	8° 36′ 45.54470″N,	56° 03′ 45.09377″W
DHG-29	G35, S12, G37	9° 00′ 01.60724″N,	55° 56′ 05.23673″W
DHG-30	G37, S12, G39	9° 06′ 16.33399″N,	55° 52′ 52.78138″W
DHG-31	G39, S12, S13	9° 19′ 15.26503″N,	55° 46′ 08.99996″W
DHG-32	G39, S13, S14	9° 20′ 39.70398″N,	55° 45′ 25.31202″W

DHG-33 G39, S14 9° 21′ 21.26226″N, 55° 45′ 06.72306″W

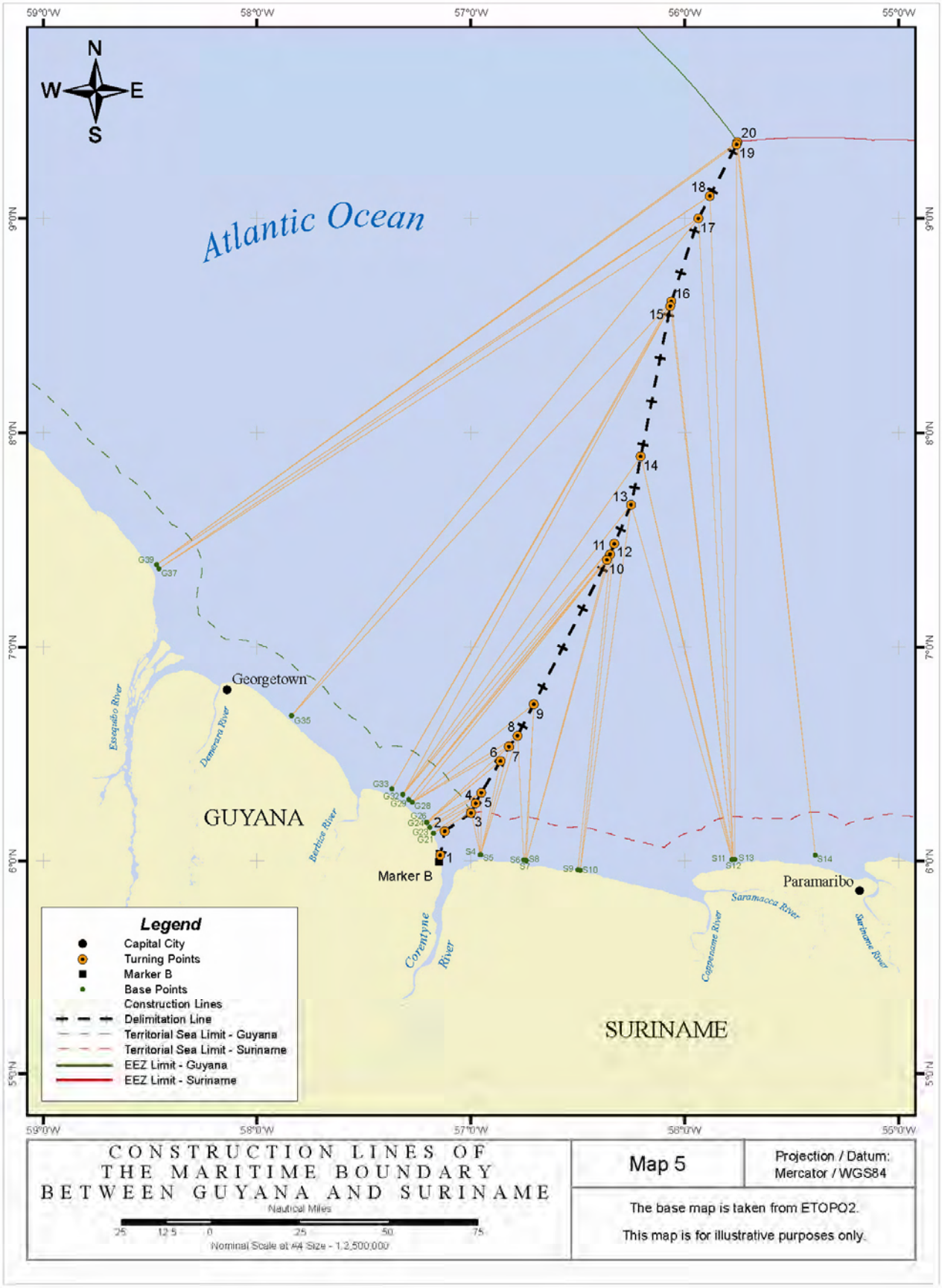
9. A line N10°E (geodetic azimuth) through Marker "B" intersects the envelope of 3 nautical mile arcs about the Guyanese controlling points (see paragraphs 5 and 6 above) – specifically point G19 – at:
Point 2 6° 08′ 19.76727″N, 57° 07′ 20.00890″W.

10. Points DHG-14, DHG-19, DHG-23 and DHG-31 are all less than 11 metres from the geodetic line between DHG-13-15, DHG-18-20, DHG-22-24, and DHG-30-32, respectively, and can be excluded as turning points of the delimitation line because of the rounding off of all geographical coordinates to the nearest 0.01 minutes of arc.

11. Because the coordinates used in the Award are to be expressed in 0.01 minutes of arc of Latitude and Longitude, and because selected points have now been omitted, the correlation of points in this Technical Report and the Award are interrelated in the following table:

Award Pt.	Technical Report Pt.	Latitude	Longitude
1.	1.	Intersection of LWL and N10°E line through Marker "B"	
2.	2.	6° 08.33′N,	57° 07.33′W
3.	3.	6° 13.47′N,	56° 59.87′W
4.	DHG-13	6° 16.19′N,	56° 58.63′W
5.	DHG-15	6° 19.17′N,	56° 57.01′W
6.	DHG-16	6° 28.01′N,	56° 51.70′W
7.	DHG-17	6° 32.12′N,	56° 49.22′W
8.	DHG-18	6° 35.13′N,	56° 46.92′W
9.	DHG-20	6° 43.99′N,	56° 42.34′W
10.	DHG-21	7° 24.45′N,	56° 21.74′W
11.	DHG-22	7° 26.11′N,	56° 20.88′W
12.	DHG-24	7° 28.98′N,	56° 19.69′W
13.	DHG-25	7° 39.96′N,	56° 14.99′W
14.	DHG-26	7° 53.48′N,	56° 12.31′W
15.	DHG-27	8° 35.61′N,	56° 03.99′W
16.	DHG-28	8° 36.76′N,	56° 03.75′W
17.	DHG-29	9° 00.03′N,	55° 56.09′W
18.	DHG-30	9° 06.27′N,	55° 52.88′W
19.	DHG-32	9° 20.66′N,	55° 45.42′W
20.	DHG-33	9° 21.35′N, Approximate value	55° 45.11′W Approximate value

Map 5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GUYANA
SURINAME
Georgetown
Paramaribo
Marker B
Essequibo River
Demerara River
Berbice River
Corentyne River
Coppename River
Saramacca River
Suriname River
Legend
Capital City
Turning Points
Marker B
Base Points
Construction Lines
Delimitation Line
Territorial Sea Limit - Guyana
Territorial Sea Limit - Suriname
EEZ Limit - Guyana
EEZ Limit - Suriname
CONSTRUCTION LINES OF THE MARITIME BOUNDARY BETWEEN GUYANA AND SURINAME
Nautical Miles
25 12.5 0 25 50 75
Nominal Scale at A4 Size - 1:2,500,000
Map 5
Projection / Datum: Mercator / WGS84
The base map is taken from ETOPO2.
This map is for illustrative purposes only.