

Delimitation of Maritime Boundaries: Continental Shelf and Exclusive Economic Zone, in Light of the Gulf of Maine Case, Canada v. U.S.A. (1984)

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Résumé de l'article

Le droit international applicable à la délimitation de frontières maritimes est très imprécis et, en conséquence, les décisions des tribunaux internationaux sont d'une grande importance. La récente décision d'une Chambre de la Cour internationale de justice dans *l'Affaire du golfe du Maine*, entre le Canada et les États-Unis, apporte une contribution significative au développement et à la clarification du droit applicable. Le jugement de la Chambre, qui est considéré comme rendu par la Cour elle-même, clarifie la différence entre des principes et règles de droit international, d'une part, et des critères équitables et méthodes pratiques, d'autre part. Les principes de droit sont limités à quelques normes fondamentales, telles que l'obligation de rechercher un accord et, si ce dernier s'avère impossible, l'obligation de recourir à une instance tierce en vue d'en arriver à une délimitation équitable en tenant compte de toutes les circonstances pertinentes. Les critères équitables, tels que la configuration géographique de l'endroit, et les méthodes pratiques, telles que celle de l'équidistance, sont nombreux et varient avec chaque cas d'espèce.

CHRONIQUE DE JURISPRUDENCE

Delimitation of Maritime Boundaries: Continental Shelf and Exclusive Economic Zone, in Light of the Gulf of Maine Case, Canada v. U.S.A. (1984)*

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ABSTRACT

The international law applicable to maritime boundary delimitation is very imprecise and, consequently, decisions of international tribunals are of the utmost importance. The recent decision of a Chamber of the International Court of Justice in the Gulf of Maine Case, between Canada and the United States, makes a significant contribution to the development and clarification of the applicable law. The Chamber's judgment, which is considered as one rendered by the Court itself, clarifies the difference between principles and rules of international law, on the

RÉSUMÉ

Le droit international applicable à la délimitation de frontières maritimes est très imprécis et, en conséquence, les décisions des tribunaux internationaux sont d'une grande importance. La récente décision d'une Chambre de la Cour internationale de justice dans l'Affaire du golfe du Maine, entre le Canada et les États-Unis, apporte une contribution significative au développement et à la clarification du droit applicable. Le jugement de la Chambre, qui est considéré comme rendu par la Cour elle-même, clarifie la différence entre des principes et règles de droit

* Text prepared from the outline of a Seminar given at the Faculty of Law, University of los Andes, Bogota, Colombia, on 20 February 1985. The Seminar was attended by nearly one hundred persons consisting mainly of specialists in the Law of the Sea: university professors and administrators, government officials from the Foreign Ministry and the President's Office of the Republic, senior officers of the navy and diplomatic representatives of various countries. The text summarizes the presentation itself, which lasted two hours, but does not attempt to incorporate the two-hour discussion which followed.

one hand, and equitable criteria and practical methods, on the other. Principles of law are limited to a few basic norms, such as the obligation to seek an agreement and, if one cannot be reached, to have recourse to third party procedure with a view to arriving at an equitable delimitation by taking all relevant circumstances into account. Equitable criteria, such as the geographical configuration of the area, and practical methods, such as that of equidistance, are numerous and vary with each concrete situation.

international, d'une part, et des critères équitables et méthodes pratiques, d'autre part. Les principes de droit sont limités à quelques normes fondamentales, telles que l'obligation de rechercher un accord et, si ce dernier s'avère impossible, l'obligation de recourir à une instance tierce en vue d'en arriver à une délimitation équitable en tenant compte de toutes les circonstances pertinentes. Les critères équitables, tels que la configuration géographique de l'endroit, et les méthodes pratiques, telles que celle de l'équidistance, sont nombreux et varient avec chaque cas d'espèce.

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The purpose of this seminar is to attempt to determine the law applicable to the delimitation of maritime boundaries between neighbouring

States, particularly in light of the recent Gulf of Maine decision by the International Court of Justice. This determination is of considerable importance for two reasons at least: first, the 1982 *Law of the Sea Convention* provides only a very general formula to effect such delimitation and second, the formula applies to both the continental shelf and the exclusive economic zone.¹ This importance is further enhanced by the fact that there are still well over 100 delimitation problems still to be resolved in various parts of the world. My presentation will consist of two parts: first, a review of the historical development of the applicable law; and second, an analysis of the Gulf of Maine decision.

I. THE INTERNATIONAL LAW OF DELIMITATION: ITS HISTORY

The Law pertaining to continental shelf delimitation between neighbouring States has had a rather difficult history, and a recall of its main stages is necessary to understand the applicable provisions now found in the 1982 Convention.

1) Convention of the Continental Shelf, 1958

The problem of continental shelf delimitation received very little attention in the early development of the continental shelf doctrine. The Truman Proclamation of 1945 simply stated that "in cases where the continental shelf extends to the shores of another State, or is shared with another

1. For recent literature on the question of delimitation, see the following: E. D. BROWN, "The Tunisia-Libya Continental Shelf Case, A missed Opportunity", (1983) 7 *Marine Policy* 142-162; D. M. McRAE, "The Gulf of Maine Case: The Written Proceedings", (1983) 21 *C.Y.I.L.* 266-283; F.-F. LABONZ, « L'Affaire du plateau continental tuniso-libyen », (1983) 101 *Maghreb* 46-65; M. B. FELDMAN, "The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise", (1983) 77 *A.J.I.L.* 219-238; J. I. CHARNEY, "Ocean Boundaries between Nations: a Theory for Progress", (1984) 78 *A.J.I.L.* 582-606; R. R. CHURCHILL, "Maritime Delimitation in the Jan Mayen Area", (1984) 9 *Marine Policy* 16-37; H. GHERARI, « Un problème d'actualité: la délimitation du plateau continental tuniso-libyen », (1984) 19 *Mois en Afrique*, N° 215/216, 39-58; D. C. HODGSON, "The Tuniso-Libyan Continental Shelf Case", (1984) 16 *Case W. Res. J. Int'l L.* 1-37; M. H. BRILLON, "Political-legal Interactions in the Gulf of Maine. A Canadian-American Dispute", (1984) 37 *J. Int'l Aff.* 357-365; K. M. SHUSTERICH, "International Jurisdictional Issues in the Arctic Ocean" in W. E. WESTERMAYER and K. M. SHUSTERICH (eds), *United States Arctic Interests*, 1984, 240-267; A. E. CHIRCOPI and I. T. GAULT, "The Making of an Offshore Boundary: the Gulf of Maine Case, 1984", (1984-85) 7 *Oil and Gas Law Tax Revue* 173-181; and T. L. McDORMAN *et al.*, "The Gulf of Maine Boundary: Dropping Anchor or Setting a Course", (1985) *Marine Policy* 90-107.

adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles".²

It was only when the International Law Commission prepared draft provisions on the law of the sea that this matter was fully examined. After receiving the advice of a committee of hydrographical experts on the delimitation of territorial waters, the Commission concluded in 1953 that it should formulate a general rule based on the principle of equidistance.³ The draft article agreed upon by the Commission was subsequently adopted as Article 6 of the Continental Shelf Convention of 1958. This article provided that, in the absence of agreement and unless another boundary line was justified by special circumstances, the boundary between opposite coasts was to be determined by the median line, and the boundary between adjacent States was to be governed by the equidistance method.⁴ To make it very clear that the equidistance method was intended to be the general rule, the International Law Commission explained in its Commentary that "the rule of equidistance is the general rule", although "it was subject to modification in cases in which another boundary line is justified by special circumstances".⁵ It gave three examples of special circumstances by specifying that "provision must be made for departure necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels".⁶ At the 1958 Geneva Conference, a fourth type of special circumstance was mentioned by the British hydrographer R. H. Kennedy, as being "the possession by one of the two states concerned of special mineral exploitation rights or fishery rights".⁷ Such was the legal situation when the Netherlands, Denmark and Germany went to the International Court in 1969.

2) North Sea Continental Shelf Cases (Netherlands/Denmark/Germany), 1969⁸

This case marks the beginning of an eventual complete departure from the equidistance as the primary method of delimitation between adjacent States. Germany not being a Party to the 1958 Convention, the Court had to decide on the applicability of the equidistance method in international customary law. It arrived at the conclusion that the equidistance method had not become part of customary law, neither before nor after 1958.

2. Quoted in 4 Whiteman, *Digest of International Law*, at 757 (1965).

3. *Int'l Law Com. Yearbook*, Vol. 2, at 216 (1953).

4. See Convention on the Continental Shelf, A/CONF.13/L.55 (1958).

5. *Supra*, note 3.

6. *Ibid.*

7. UN Conference on the Law of the Sea, A/CONF.13/42, at 93 (1958).

8. (1969) I.C.J. Rep. 4.

In reaching its conclusion, the Court recalled that equidistance was only one of four methods suggested to the International Law Commission by the committee of experts in 1953. The other three methods suggested by the committee were: the continuation in the seaward direction of the land frontier between two adjacent States; the drawing of a perpendicular to the coast at the point of its intersection with the land frontier; and, the drawing of a perpendicular to the line of the general direction of the coast.⁹

The equidistance method not being compulsory in customary law, the Court had to proceed further and answer the question of the Parties as to what principles and rules of international law were applicable. It stated that there were certain basic legal principles which required “that delimitation must be the object of agreement between the states concerned, and that such an agreement must be arrived at in accordance with equitable principles”.¹⁰ The first principle formulated by the Court is that the Parties have an obligation to enter into negotiations, with a view to arriving at an agreement. The second is that they are “under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied”.¹¹ The Court added that, for this purpose, the equidistance method could be used, but other methods existed and could be utilized either by themselves or in combination with the equidistance method, depending on the areas to be delimited. Thirdly, 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. The Court emphasized that, in certain geographical situations, the equidistance method could lead to inequity and that the goal to be attained was an equitable solution to the problem of delimitation at hand.¹²

As to the factors to be taken into account during the course of negotiations in order to arrive at an equitable solution, the Court spelled out three such factors: first, the general configuration of the coasts of the Parties, as well as any presence of any special or unusual features; second, the physical and geological structure and natural resources of the area, so far as they can be ascertained; and, third, a reasonable degree of proportionality between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline.¹³ The two geographic factors were particularly important to Germany, since the length of its coast on the North Sea was comparable to that of its neighbours and it was mainly because of the pronounced

9. *Id.*, para. 51.

10. *Id.*, para. 85.

11. *Ibid.*

12. *Ibid.*

13. Para. 101.

concavity of its coast that it was adversely affected by the application of the equidistance method. In these circumstances, it is not surprising that the agreement eventually concluded between the Parties, on the basis of the factors formulated by the Court, resulted in Germany obtaining a continental shelf considerably larger than what it would have obtained by a strict application of the equidistance method.¹⁴

3) English Channel Continental Shelf Case (France/United Kingdom), 1977¹⁵

Although both the United Kingdom and France were Parties to the 1958 Continental Shelf Convention, the Special Court of Arbitration¹⁶ interpreted Article 6 of the Convention as reflecting equitable principles and applied those, rather than Article 6 as such. This result was brought about by the Court's conclusion on the effect of the reservations by France and their rejection by the United Kingdom. It held that the "legal" effect was to render Article 6 inapplicable to the extent of the reservations¹⁷ but the "practical" effect was negligible. It decided that since "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".¹⁸ More specifically, "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".¹⁹

Although the Arbitration Court admitted that the equidistance method possessed an obligatory force under the Convention, which it did not have under customary law, "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' ".²⁰ The Court further specified that the rule contained in Article 6 merely gave "particular

14. See the delimitation agreements between the Parties, signed on January 28, 1971, in (1971) 10 *Int'l Legal Materials* 600-612, particularly at 602.

15. E. LAUTERPACHT (ed.), (1959) 54 *Int'l Law Rep.*, at 6.

16. The Court of Arbitration was composed of five members: Erik CASTREN, President, Herbert BRIGGS, André GROS, Endre USTOR, and Sir Humphrey WALDOCK.

17. Para. 61.

18. Para. 65.

19. *Ibid.*

20. *Id.*, para. 70.

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".²¹ It was, therefore, 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".²²

The Court emphasized that the equitable character of any method of delimitation, including the equidistance, was always "a function of the particular geographical situation".²³ Indeed, it attached much more importance to geography than to geology. Although it formally recognized the importance of the concept of natural prolongation, as expounded by the International Court in the Continental Shelf Case of 1969, it concluded that the effect to be given to this principle "is always dependent not only on the particular geographical and other circumstances but also on any relevant considerations of law and equity".²⁴ In these circumstances, the Court did not find it necessary to resolve the difference of opinion between the Parties as to the significance of the geological feature called the "Hurd Deep Fault Zone", which the United Kingdom submitted should be the dividing line if a continuous median line were not adopted. This was consonant with the Court's view that geography was of paramount importance to delimit the unresolved portions of the delimitation line between the Parties.

In the Channel itself, the Court decided to draw two boundaries: a primary one, following the mid-channel median line between the two coasts; and, a second boundary, following a line 12 nautical miles from established baselines of the territorial sea of the Channel Islands, thus enclosing the latter in an enclave.²⁵ In drawing the segment of the mid-channel median line facing Eddystone Rock off the coast of England, the Court used the Rock as a base point after finding as a fact that France had itself previously accepted Eddystone Rock as a base point for the measurement of fishery limits.²⁶ In these circumstances, the Court did not have to rule on the argument of the United Kingdom, that the Eddystone Rock constituted an island on the basis that it was uncovered at mean high water springs.

As for the Atlantic region portion of the delimitation line, the Court considered that the geographical situation was one of two laterally related coasts and that, in principle, the equidistance method was applicable. However, that line had to be corrected because of the prolongation southwestward of the Scilly Isles off the coast of the United Kingdom

21. *Ibid.*

22. *Id.*, para. 82.

23. *Id.*, para. 84.

24. *Id.*, para. 194.

25. *Id.*, para. 203.

26. *Id.*, paras 140 and 141.

which resulted in "an inequitable distortion of the equidistance line producing disproportionate effects of the areas of shelf accruing to the two States".²⁷ The location of the Scillies had the same tendency to distort the equidistance line as the projection of an exceptionally long promontory and, thus, constituted a special circumstance justifying a boundary other than the strict median line.²⁸ Consequently, the Scillies were attributed only half effect in the drawing of the equidistance line, in order to arrive at an equitable delimitation.²⁹ On the other hand, the Court decided to give full effect to the Ushant Islands, west of the French coast and roughly in line with the Scillies, because the Ushants were twice as close to the French coast as the Scillies were to the English coast and did not have any real distorting effect on the equidistance line.

4) Convention on the Law of the Sea, 1982

On the specific question of the applicable method of delimitation, the 1977 arbitral decision did little to diminish the existing uncertainties. Consequently, the delegates at the Third Law of the Sea Conference continued to divide themselves into two groups: one, maintaining that equidistance should be the basic method; the other, arguing that such delimitation should be made in accordance with equitable principles. A compromise formula was inserted in the 1979 Informal Composite Negotiating Text which provided that "the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law" and that "such agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned".³⁰ The same provision was inserted for the delimitation of the exclusive economic zone between neighbouring States.³¹

This provision, however, did not rally a sufficiently wide support at the Conference to remain in the text, and, on August 28, 1981, was replaced by yet another compromise formula. The latter was incorporated in the Draft Convention on the Law of the Sea of 1981³² and was retained in the Convention itself adopted on April 30, 1982. It provides that "the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international

27. *Id.*, para. 243.

28. *Id.*, para. 245.

29. *Id.*, para. 251.

30. A/CONF.62/WP.10/Rev.1, 28 April 1979, Art. 83, para. 1.

31. *Id.*, art. 74.

32. A/CONF.62/L.78, 28 August 1981.

law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".³³ Since the provision gives no guideline whatever as to how to achieve an equitable solution, guidance must continue to be sought from international decisions.

5) Tunisia/Libya Continental Shelf Case, 1982³⁴

In this case, the Parties asked the Court what were the principles and rules of international law applicable to the delimitation of their continental shelf and agreed that the Court should take account of equitable principles and the relevant circumstances in the area, as well as the recent trends admitted at the Third Law of the Sea Conference.³⁵ Neither Libya nor Tunisia was a Party to the 1958 Continental Shelf Convention and, therefore, the Court was essentially in the same situation as it was in the North Sea Continental Shelf Case in 1969, in its task of determining the applicable law. The difference was that, in this case and at the express request of the Parties, the Court could take into account the developing law.

By the time the Court wrote its judgment, the provision which was eventually incorporated in the 1982 Convention had already been presented to the Conference on 28 August, 1981 and had become part of the Official Draft of the Convention. As noted by the Court, "in the new text, 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".³⁶ Consequently, the new provision was not of much assistance to the Court since it merely specified that the object of the delimitation was to achieve an equitable solution, with which the Parties and the Court were already in full agreement. On the question of the applicable law, the Court stated that it was "bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result".³⁷

As to the actual methods of delimitation, the Court emphasized that those methods should be dictated by the equitableness of the solution and that "equidistance is not [. . .] either a mandatory legal principle, or

33. UN Convention on the Law of the Sea, A/CONF.62/122, 7 October 1982, Article 74. The same provision was adopted for the delimitation of the exclusive economic zone and appears as Article 83.

34. (1982) I.C.J. Rep. 4.

35. *Id.*, para. 2.

36. *Id.*, para. 50.

37. *Id.*, para. 71.

a method having some privileged status in relation to other methods".³⁸ In these circumstances and having rejected the arguments based on geology, the Court proceeded to apply two geometrical methods. For the first segment of the delimitation, the Court followed a line beginning at the land frontier, perpendicular to the coast (approximately 26° east of north) and which had been used to delimit fishery jurisdiction in 1919 and petroleum concessions between 1955 and 1977. This segment of the line continued as far as its intersection with the parallel of latitude at the point in the Gulf of Gabes which marks a change in direction of the coast of Tunisia. For the second segment of the line, where the coasts of Tunisia and Libya are closer to being opposite than adjacent, the Court adopted a line approximating the equidistance, and giving half effect only to the Kerkennah Islands, located some eleven miles east of the Tunisian coast and joined by shoals and low tide elevations on the seaward side. The precise geometrical method used by the Court for this second segment was a "parallel to a line drawn from the most westerly point of the Gulf of Gabes bisecting the angle formed by a line from that point to Ras Kaboudia and a line drawn from that same point along the seaward coast of the Kerkennah Islands, the bearing of the delimitation line parallel to such bisector being 52° to the meridian".³⁹

II. THE GULF OF MAINE MARITIME BOUNDARY CASE (CANADA/U.S.A.), 1984⁴⁰

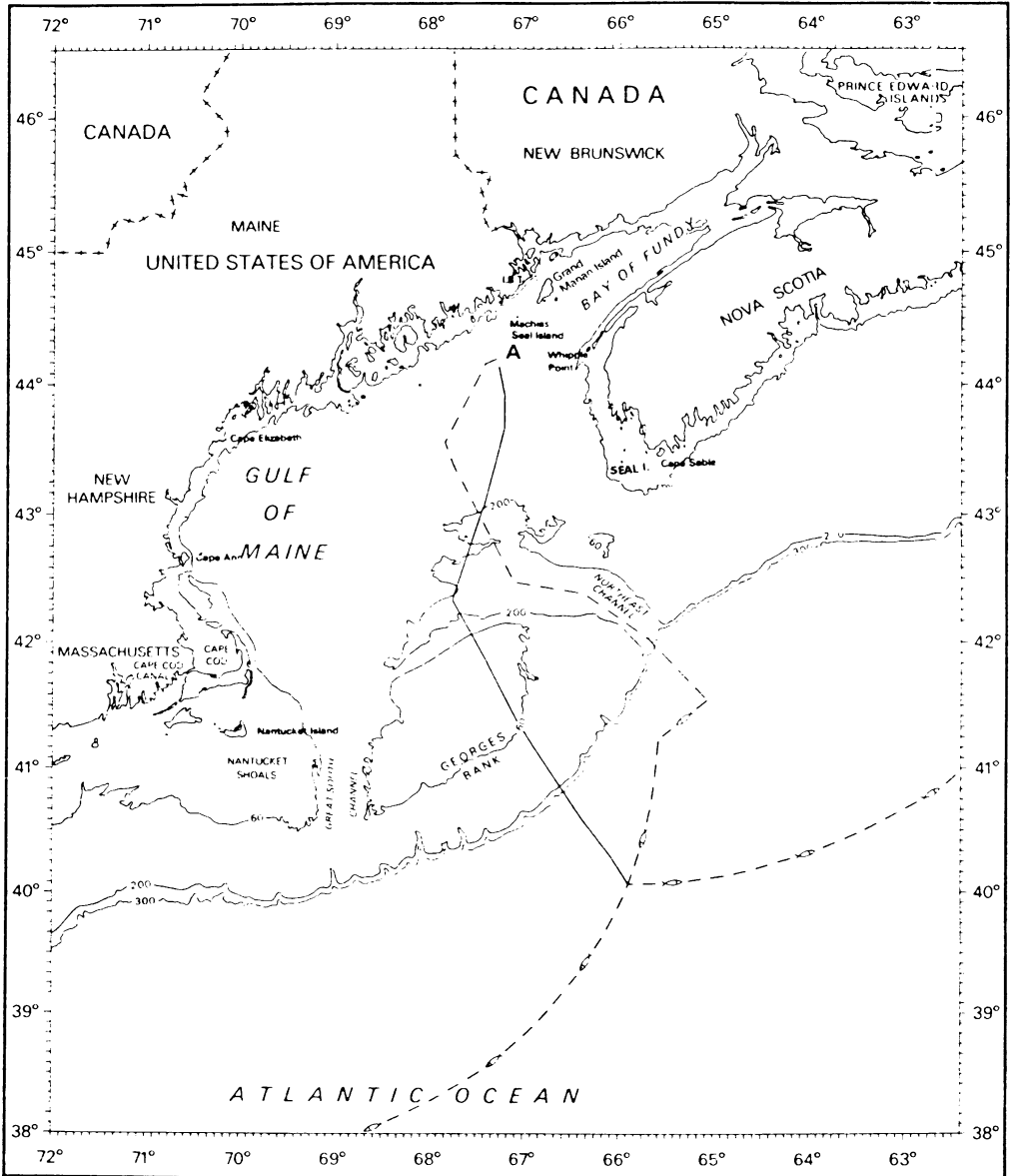
The case centered on a dispute over both the rich fishery resources and the potential hydrocarbon resources of Georges Bank, lying seaward of the Gulf of Maine off the coast of Nova Scotia and Massachusetts. The dispute materialized with respect to the continental shelf in 1969, when the United States formally protested the validity of oil and gas exploration permits issued by Canada as far as the equidistance line on Georges Bank, beginning in 1964. The scope of the dispute was then expanded in 1977, when both the United States and Canada adopted a 200-mile exclusive fishing zone. Canada adopted the strict equidistance line whereas the United States followed the line of greatest depth in the Northeast Channel (see *Figure 1*). In 1979, after the English Channel Case decision, Canada moved its equidistance line westward, by disregarding Cape Cod and adjoining features off the coast of Massachusetts. In 1981, the Parties agreed to

38. *Id.*, para. 110.

39. *Id.*, para. 133, C, 3).

40. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America), 12 October 1984, typewritten copy, 106 pages, plus the Separate Opinion of Judge SCHWEBEL (6 pages) and the Dissenting Opinion of Judge GROS (30 pages).

Figure 1



LEGEND

- Canadian Claim (1977)
- - - - - United States Claim (1977)
- ◁ - - - - ▷ 200 - mile Fishing Zone

submit their dispute to a Chamber of the International Court of Justice and, in 1982, the United States moved its line eastward by adopting an adjusted perpendicular to the general direction of the coast of Maine (see *Figure 2*).

This case marks the first time that a Chamber of the Court was formed to decide a dispute on the merits.⁴¹ The Chamber was composed of five judges: Roberto Ago, of Italy, presiding; André Gros, of France; Hermann Mosler, of The Federal Republic of Germany; Stephan Schwebel, of the United States; and Maxwell Cohen, of Canada. The latter was chosen by Canada as judge *ad hoc* pursuant to Article 31 of the Statute of the Court, since the Chamber included a judge of the nationality of the United States and no judge of the nationality of Canada.⁴²

1) A Single Line for the Continental Shelf and the E.E.Z.

In their Special Agreement, the Parties asked the Chamber for a decision which would contain two new elements. Firstly, the International Court was asked to actually draw the course of the delimitation line. In the two previous continental shelf cases decided by the International Court, the Parties had only asked to be informed of the principles of law and the practical methods to be applied. Secondly, in the present case, the line to be drawn was to delimit, not only the continental shelf, but the fisheries zones as well. This explains why the Parties adopted the term "single maritime boundary". Of course, the term "boundary" was not used in the strict sense and, as pointed out by the Chamber, the French expression « frontière maritime » might incorrectly suggest the idea of a real boundary between two sovereign States. However, as the Chamber specified, "the task which it has been given only relates to a delimitation between the different forms of partial jurisdiction".⁴³

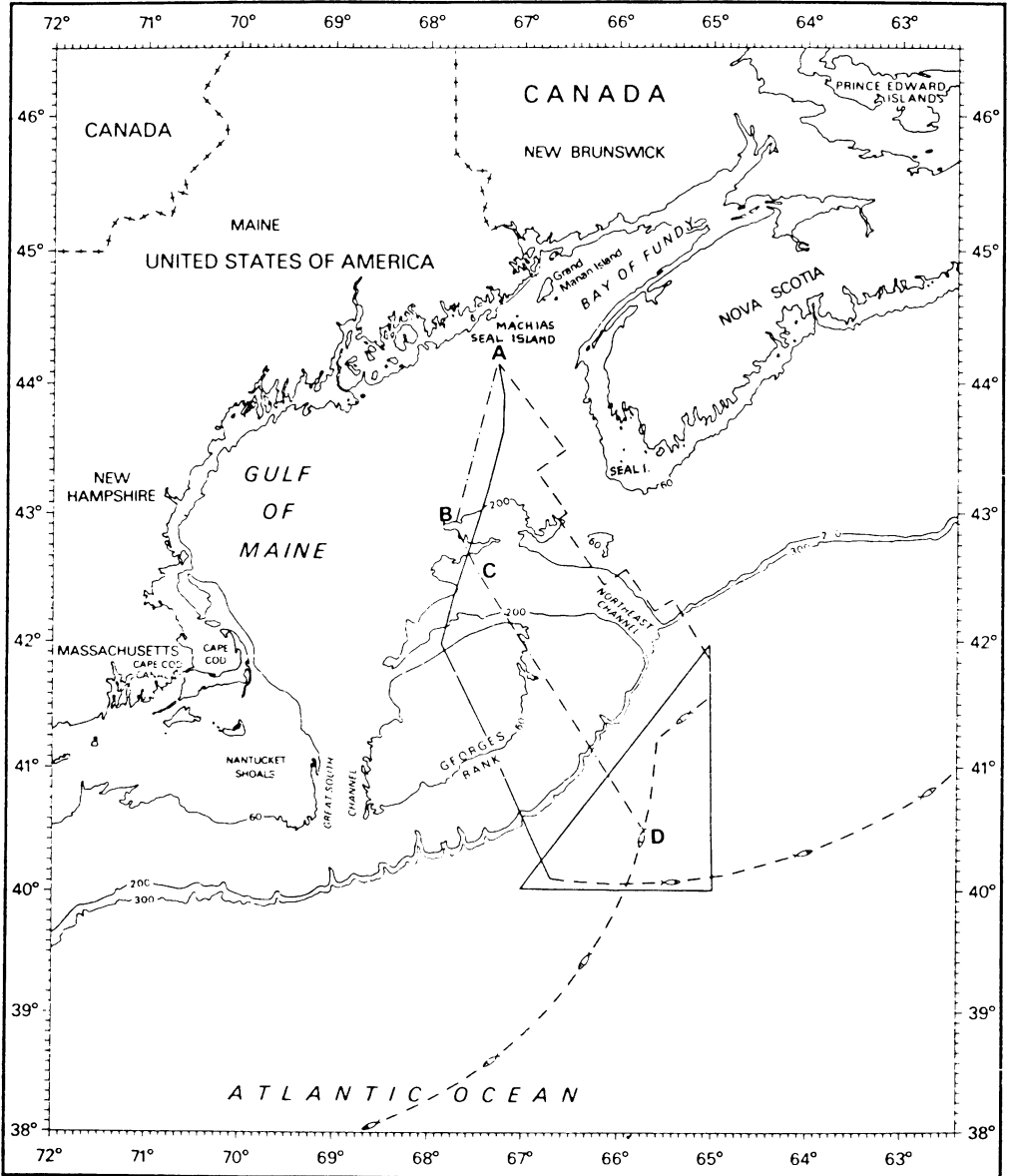
Although there was no precedent for the drawing of a single line for two different types of jurisdiction, the Chamber decided that, since

41. The Chamber was formed pursuant to Article 26 of the Statute of the Court and to Article 26 of the Rules. The latter were amended by the Court in 1972 to provide greater flexibility and allow Parties to dispute to have a decisive influence in the composition of *ad hoc* Chambers. See E. JIMÉNEZ DE ARECHAGA, "The Amendments to the Rules of Procedure of the International Court of Justice", (1973) 67 *Amer. J. Int'l L.* 1-22, at 2-3. For the text of the 1972 Rules, see (1972) 11 *Int'l Legal Materials* 899 and for the latest Rules, see (1979) 17 *Int'l Legal Materials* 1286.

42. Pursuant to Article 31, paragraph 4 of the Statute, the Acting President of the Court requested Judge RUDA, one of the five elected to the Chamber, to give place to judge *ad hoc* COHEN and Judge RUDA indicated his readiness to do so (see para. 3 of the judgment of the Chamber).

43. *Supra*, note 40, para. 19.

Figure 2



LEGEND

- Canadian Claim (1979)
- - - United States Claim (1982)
- ◊ - - - ◊ 200 - mile Fishing Zone
- · - · - Boundary Drawn by the Chamber

there was no rule of international law to the contrary and it was physically possible to draw such a single line, it should acquiesce in the request of the Parties. Judge Gros, who dissented from the majority on the location of the delimitation line, was of the opinion that the Chamber had to find an enabling rule of international law permitting the drawing of a single line, before responding favourably to the request of the Parties.⁴⁴ It is interesting to note that, in the more recent case on the *Delimitation of the Maritime Boundary (Guinea/Guinea-Bissau)* of 14 February 1985, the three-member arbitral tribunal did not hesitate to draw the single line asked by the Parties. Having determined that the 1886 Franco-Portuguese Convention did not establish a maritime boundary, the tribunal interpreted its mandate to draw such a boundary as including the territorial sea, the exclusive economic zone and the continental shelf, and drew a delimitation line accordingly.⁴⁵

2) The Delimitation Area and its Characteristics

The delimitation area consists of two main parts, the Gulf of Maine itself, which has the shape of an elongated rectangle, when considered separately from the Bay of Fundy, and the maritime expanse seaward of the Gulf as far as the outer edges of a triangle agreed upon by the Parties.⁴⁶ The main object of the dispute, Georges Bank, lies completely within the seaward portion of the delimitation area. As regards geology, the Parties agreed that the geological structure was essentially continuous and, in addition, the Court concluded that the geomorphology of the area consisted of a single uninterrupted physiographical structure. More specifically, it was satisfied that the Northeast Channel at the eastern end of Georges Bank did not have the characteristics of a real trough separating two geomorphologically distinct units.⁴⁷ With respect to the water column above the continental shelf, the Chamber did not believe that it was possible to discern any genuine and stable "natural boundaries" with different ecological regimes, as had been suggested by the United States.⁴⁸ The Chamber was also of the opinion that the socio-economic conditions, such

44. See Dissenting Opinion of Judge Gros, paras 5 and 6.

45. See *Tribunal Arbitral pour la Délimitation de la frontière maritime Guinée/Guinée-Bissau, sentence du 14 février 1985*, typewritten copy, 55 pages, at paras 42, 86 and 111.

46. The Parties agreed that the delimitation line should begin at Point A (shown on *Figures 1* and *2*) south of Machias Seal Island, over which the sovereignty is contested between the Parties, and end within the triangle (also shown on *Figures 1* and *2*) so that the Parties themselves may later try to agree on the seaward extension of the line.

47. *Id.*, para. 46.

48. *Id.*, para. 54.

as fishing, oil exploration, scientific research and common defense arrangements, could be considered only in verifying the equitableness of the result and not in the actual drawing of the delimitation line.

3) Principles and Rules of International Law Applicable

The Chamber began by making a distinction between *principles and rules* of international law, on the one hand, and *equitable criteria and practical methods*, on the other.⁴⁹ International law, primarily customary law, can only provide a few basic legal principles to be used as guidelines, and not equitable criteria and practical methods, for the drawing of the line.⁵⁰ In this regard, the only principle of international law, which the 1958 Convention incorporated in its Article 6, was that any delimitation of the continental shelf must not be done unilaterally but, rather, by agreement negotiated in good faith. The Chamber recalled that the Courts had emphasized, in the cases of 1969, 1977 and 1982, the importance of equitable principles in the delimitation process. As for the delimitation provisions in the 1982 Convention applicable to the continental shelf and the exclusive economic zone, the Chamber was of the opinion that they could be “regarded as consonant at present with general international law on the question”.⁵¹ The Chamber did admit, however, that the provision was singularly concise, but that it served “to open the door to continuation of the development effected in this field by international case law”.⁵²

The Chamber went on to deal with some of the arguments presented by the Parties as to the existence of certain rules which, in their opinion, were mandatory in the delimitation process. On the argument of adjacency presented by Canada, the Chamber answered that, although it was correct to say that “international law confers on the coastal State a legal title to an *adjacent* continental shelf or to a maritime zone *adjacent* to its coasts, it would not be correct to say that international law recognizes the title *conferred on the state by the adjacency* of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences”.⁵³

On the question whether equidistance could be considered as a rule of law, the Chamber was quite emphatic that it was not, but was merely a practical method which could be applied for the purposes of delimitation.⁵⁴ Indeed, the Chamber emphasized that although the equidistance method had been useful in many situations, it had not become a

49. *Id.*, para. 80.

50. *Id.*, para. 81.

51. *Id.*, para. 94.

52. *Id.*, para. 95.

53. *Id.*, para. 103; emphasis already in text.

54. *Id.*, para. 106.

rule of general international law and “neither had it been adopted into customary law simply as a method to be given priority or preference”.⁵⁵ In a similar way, the Chamber rejected the argument of the United States that there existed a rule under which preference should be given to “primary” coasts, because they followed the general direction of the coast-line as a whole, over “secondary” coasts which deviated from that direction.

The Chamber also rejected the argument that the preservation of existing fishing patterns and the optimum conservation and management of living resources could be considered as rules of customary international law, although it admitted that, in certain circumstances, they could constitute equitable criteria.⁵⁶

The Chamber concluded this part of its judgment by stating that the fundamental norm of general international law contains a dual prescription: (1) delimitation must be effected by agreement or by reference to a third party, but not unilaterally; and (2) in either case, delimitation must be effected by equitable criteria and practical methods to ensure an equitable result, taking into account the geographic configuration of the area and other relevant circumstances.⁵⁷

4) Equitable Criteria and Practical Methods Applicable

Since general customary law did not provide for the application of particular equitable criteria or the use of practical methods, the Chamber looked at special international law, more specifically the 1958 Continental Shelf Convention. It concluded that the use of the median line and the lateral equidistance line represented a method derived from a particular equitable criterion, namely, that “the equitable solution, at least *prima facie*, is an equal division of the areas of overlap of the continental shelves of the two litigant states”.⁵⁸ However, Article 6 of the Convention, which would have applied in this case if the Parties had asked for a delimitation of the continental shelf only because both were Parties to the Convention, could not apply since they had requested a single delimitation line for both the continental shelf and the exclusive fishing zone.⁵⁹

In addition, the Chamber held that there was no general norm of international law which required the equidistance method to be used in

55. *Id.*, para. 107. The same view was adopted by the arbitral tribunal in the *Guinea/Guinea-Bissau Case*: see *supra*, note 45, at para. 102.

56. *Id.*, para. 110.

57. *Id.*, para. 112. The French text, which is the authoritative one, does not put as much emphasis on the importance of “the geographical configuration of the area” by the use of the expression *compte tenu* which was translated into English as “with regard to”.

58. *Id.*, para. 115.

59. *Id.*, paras 121 and 125.

those cases where it produced an equitable result, because “to accept this idea would amount to transforming the ‘combined equidistance-special circumstances rule’ into a rule of general international law [. . .] whereas there is no trace in international custom of such a transformation having occurred”.⁶⁰ The Chamber found also that the United States had not by its conduct acquiesced in the equidistance method as a specific mode of delimitation.⁶¹ Consequently, the Parties were not bound by any special rule applicable between themselves to apply certain equitable criteria or particular methods of delimitation.⁶² The Chamber recalled the requirement of the fundamental norm of general international law that the delimitation line was to be drawn on the basis of a) the most equitable criteria in relation to all relevant circumstances, and b) the most appropriate method or combination of methods with a view to reaching an equitable result.⁶³

The Chamber gave a few examples of equitable criteria and practical methods. As examples of equitable criteria, it mentioned the following: the land dominates the sea; the equal division of the areas of overlap, where no special circumstances exist; the non-encroachment upon areas too close to the coast of another State, whenever possible; the avoidance, as far as possible, of any cut-off of the seaward projection of the coast of either State; and, in certain circumstances, the consideration of any inequalities in the extent of the coasts of two States.⁶⁴ As examples of practical methods, the Chamber chose the following: a line perpendicular to a coast or its general direction; the prolongation of an existing delimitation line for territorial waters; the prolongation of the final segment of the land boundary; and the continuation of the overall direction of a land boundary.⁶⁵ The Chamber rejected the criteria and methods proposed by both the United States⁶⁶ and Canada⁶⁷, and re-stated that general international law required the delimitation line to be drawn on the basis of the most equitable criteria and the most appropriate method or combination of methods in order to reach an equitable result.

5) Equitable Criteria and Practical Methods Actually Applied

a) Equitable Criteria

The Chamber emphasized that the criteria utilized must respond

60. *Id.*, para. 122.

61. *Id.*, paras 126 to 152.

62. *Id.*, para. 155.

63. *Id.*, para. 191.

64. *Id.*, para. 157.

65. *Id.*, para. 159.

66. *Id.*, paras 166 to 177.

67. *Id.*, paras 178-189.

to the requirements of a single line to delimit both types of resources,⁶⁸ which excludes the ecological criterion and would exclude the geological criterion if it applied.⁶⁹ Because of the foreseeable adoption of a single delimitation by maritime States, preference must be given to criteria of a neutral character best suited for use in a multi-purpose delimitation.⁷⁰

The Chamber adopted three criteria: a basic one and two auxiliary ones. The basic criterion was derived from the geography of the coasts, "namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be affected converge and overlap".⁷¹ The two auxiliary criteria, applied as a corrective measure, involved giving effect to the difference between the lengths of the respective coastlines in the delimitation area and to the presence of islands.⁷²

b) Practical Method

Only geometrical methods were held to be appropriate to suit geographic criteria.⁷³ In addition, the Chamber thought that, to apply the basic criterion of equal division, it may be appropriate to ignore certain minor geographic features (tiny islands, uninhabited rocks and low-tide elevations) as basepoints for the construction of the line, subject to the possibility of those features being allowed some limited corrective effect.⁷⁴ Furthermore, it believed that a technical method for the drawing of a line may result in a complicated or a zigzag path, but the "exploitation of the sea's fishery resources calls for the existence of clear boundaries of a constant course"⁷⁵ and the drawing of the line may need to be simplified.⁷⁶

Having made the general observation that "the delimitation of the line to be drawn in a given area will depend upon the coastal configuration", the Chamber held that "the configuration of the Gulf of Maine coastline [. . .] is such as to exclude any possibility of the boundary's being formed by a basically unidirectional line [. . .]".⁷⁷ Because the

68. *Id.*, para. 192.

69. *Id.*, para. 193.

70. *Id.*, para. 194.

71. *Id.*, para. 195.

72. *Id.*, para. 196.

73. *Id.*, para. 199.

74. *Id.*, para. 201.

75. *Id.*, para. 202.

76. *Id.*, para. 203.

77. *Id.*, para. 205.

prevailing relationship of the coasts of the United States and Canada changes from that of lateral adjacency, at the back of the Gulf, to that of oppositeness, at the entrance of the Gulf, a line with two segments had to be drawn within the limits of the Gulf⁷⁸ (see *Figure 2*). A third and last segment was then drawn outside the Gulf.

The first segment (A to B), the Chamber was convinced, should represent an equal division of the overlap of maritime projections of the coasts, since there was no special circumstance standing in the way.⁷⁹ In the opinion of four of the five members of the Chamber, a lateral equidistance line could not effect that equal division for two reasons: first, minor geographical features should be discounted to arrive at an equal division, and, second, starting point A agreed upon by the Parties because of the remaining uncertainty as to the sovereignty over Machias Seal Island cannot be located on the path of any equidistance line.⁸⁰ These reasons, however, did not prevent dissenting Judge Gros to adopt a line which he qualified as being “essentially an equidistance line constructed from mainland base points”.⁸¹ His line did not pass through Point A, treated certain small islands on both sides as part of the mainland and took no account of Nantucket Island south of Cape Cod or of Seal Island off Nova Scotia.

The practical method adopted for the first segment of the line was a *bisector of two perpendiculars* to the two basic coast lines, namely the line from Cape Elizabeth to the International boundary terminus in Grand Manan Channel and the line from that point to Cape Sable at the south west extremity of Nova Scotia⁸² (see *Figure 2*).

The second segment of the line (B to C) crosses the Gulf where the coasts of the two States are opposite and the appropriate method of delimitation was held to be a *median line*.⁸³ However, the median line was corrected to take into account two special circumstances or auxiliary criteria: first, the difference in the lengths of the respective coasts and second, the presence of Seal Island off the coast of Nova Scotia.⁸⁴ The proportion or ratio between the lengths of the respective coastlines was found to be 1.38 to 1, the American coastline being 284 miles long and the Canadian, 206 miles.⁸⁵ The median line was, therefore, shifted toward Canada to reflect that ratio. It is interesting to note that, in calculating the length of the Canadian coastline, the Chamber included the Bay of Fundy up to a point in the bay where there ceases to be any waters more

78. *Id.*, paras 206 and 207.

79. *Id.*, para. 209.

80. *Id.*, paras 210 and 211.

81. *Supra*, note 44, para. 45.

82. *Supra*, note 40, para. 213.

83. *Id.*, para. 216.

84. *Id.*, paras 217, 218 and 222.

85. *Id.*, paras 221 and 222.

distant than 12 miles from a low-water line. In the view of Judge Schwebel, who wrote a separate concurring opinion, the included coast of the Bay of Fundy should not have reached quite as far into the bay and should have ended at Saint John, at the most.⁸⁶ His reason was that Canada claimed the Bay of Fundy as historic internal waters and it was unclear in Canadian law where the territorial sea began.⁸⁷

As for the presence of Seal Island (together with its smaller neighbour, Mud Island), the Chamber considered that it could not be disregarded, because of its dimensions and its geographical position, particularly the latter.⁸⁸ The Island is situated 13 miles off the mainland coast of Nova Scotia, is 2½ miles long, rises some 50 feet above sea level and is inhabited year round. In the circumstances, it was felt appropriate to award it half effect and the median line was adjusted accordingly, which shifted the line slightly toward the United States.

The third segment of the line (C to D) depended on the previous segment for its starting point and, since there was no geographical point of reference outside the actual shores of the Gulf, the Chamber found that the most appropriate method was to draw a *perpendicular to the closing line of the Gulf*.⁸⁹ In so drawing the line, it was noted that the direction of the closing line of the Gulf corresponded to the general direction of the coastline at the back of the Gulf.⁹⁰ The terminus of the delimitation line, which had to be located within the triangle agreed upon by the Parties, was determined to coincide with the last point of overlap between the 200-mile fishing zones claimed by the Parties.

6) Verification of the Equitable Character of the Delimitation Line

No verification of the equitable character of the first two segments of the line was held necessary, as it was drawn on the basis of geography alone.⁹¹ As for the third segment, which crosses Georges Bank, the United States had invoked its historical presence in fishing and Canada had insisted on the necessity to maintain the fishing patterns for the last 15 years.⁹² These socio-economic aspects were rejected as not constituting an equitable criterion in the present circumstances. The Chamber recalled that the exclu-

86. See Separate Opinion of Judge SCHWEBEL, at p. 3.

87. *Id.*, at p. 2.

88. *Id.*, para. 222.

89. *Id.*, para. 224.

90. *Id.*, para. 225.

91. *Id.*, para. 231.

92. *Id.*, paras 232 to 234.

sive fishing rights of the Parties began only in 1977⁹³ and considered that there was no danger of catastrophic consequences for the population concerned since the existing fishing patterns for scallop and lobster were not basically disturbed by the delimitation line.⁹⁴ As for free-swimming fish crossing the line, the Chamber felt certain that the Parties would succeed in arriving at an appropriate conservation system.⁹⁵

CONCLUSION AND SUMMARY

The international law applicable to maritime boundary delimitation is still very imprecise and will continue to be so until we have the benefit of a significant body of jurisprudence from international tribunals. The delimitation provisions of the Law of the Sea Convention of 1982 (not yet in force), applicable to both the continental shelf and the exclusive economic zone, limit themselves to formulating the goal to be attained, namely an "equitable solution", without specifying any principle or rule to attain such goal. Even when Parties to a dispute are bound by the Continental Shelf Convention of 1958, the equidistance-special circumstances rule incorporated in its Article 6 has been interpreted as merely giving a particular expression to a general norm that delimitation must be determined on the basis of equitable principles. In these circumstances, whether a delimitation problem relates to the continental shelf or to the exclusive economic zone, or both, the solution must be equitable and such solution can only be reached by applying equitable principles.

With so little law to guide international tribunals, it is not surprising that the few decisions handed down so far have sometimes given the impression that judges have applied equity, not *infra legem* but rather *ex æquo et bono*. Such an impression might be gained from the decision by the Chamber in the *Gulf of Maine Case*, particularly when one compares the line drawn by the Chamber with the lines proposed to the Parties (see *Figure 2*). The Chamber's line would appear to come close to "splitting the difference". However, an examination of the Chamber's decision, which is considered as one rendered by the International Court itself,⁹⁶ reveals that an effort was made throughout the judgment to rely on geographical criteria and thus minimize subjective appreciation. Indeed, the Chamber may be criticized for not taking into account such factors as the socio-economic importance of the area for the respective Parties in the

93. *Id.*, para. 235.

94. *Id.*, paras 237 and 238.

95. *Id.*, para. 240.

96. Statute of the International Court of Justice, Article 27.

actual drawing of the line. Nevertheless, the decision does make an appreciable contribution to the development and clarification of the law, as well as to the process and methodology in dealing with such a problem.⁹⁷

An important clarification made by the Chamber relates to the difference between *principles* and *rules* of international law, on the one hand, and equitable criteria and practical methods on the other. Up to then, there had been a tendency to use the term "principle" rather loosely and apply it to criteria and methods as well. The Chamber limited its use of the terms principles and rules to a few basic legal norms which lay down guidelines to attain an equitable solution. "Equitable criteria" are given a much narrower meaning and refer to the factors or circumstances which may be taken into account in the drawing of the delimitation line. "Practical methods" are limited to the ways and means by which the line is actually drawn. What follows is an attempt to summarize the main principles, criteria and methods formulated or applied by the Chamber in the *Gulf of Maine Case*.

Principles and Rules

1. *Negotiation of agreement*: States have an obligation to negotiate in good faith, with the genuine intention of arriving at an agreement.
2. *Third party procedure*: Where States have been unable to reach an agreement, they should have recourse to a third party possessing the necessary jurisdiction to effect a delimitation.
3. *Delimitation based on criteria and methods*: Whether by agreement or third party procedure, delimitation should be effected pursuant to equitable criteria and practical methods "capable of insuring, with regard to (*compte tenu*, in the French text) the geographic configuration of the area and other relevant circumstances, an equitable result".⁹⁸ The expression "with regard to", which is synonymous to "with respect to",⁹⁹ would seem to put considerably more emphasis on the importance of the geographic configuration of the area than does the expression *compte tenu* in the French text, which is the authoritative one in this case. That the degree of emphasis in the English text was probably not intended is born out by the fact that, when this same rule was reformulated at a later point in the judgment,

97. It is obvious, for instance, that the arbitral tribunal in *Guinea/Guinea-Bissau Case* relied heavily on this decision as to both the law applicable and the approach to be followed. See typewritten copy of the award of 14 February 1985, 55 pages.

98. *Supra*, note 57.

99. See *The Compact Edition of the Oxford English Dictionary*, Vol. II, p. 2469, col. 364 (1971).

reference was made only to “the relevant circumstances of the case” without specific mention of the geographic configuration of the area.¹⁰⁰ Of course, this *mise au point* does not alter the fundamental importance which the Chamber attached to geography in its decision, but it may become important to remember the precise formulation of the rule when applying it to other delimitation problems where geography might not be as determinant.

Equitable Criteria

1. *Criteria not rules of law*: Equitable criteria are not themselves rules of law and it is impossible to make an enumeration of such criteria in the abstract.¹⁰¹
2. *Selection of criteria*: The selection of criteria as being equitable and the degree of their importance will depend on the nature of the concrete delimitation problem and the task to be performed.¹⁰² In the case of a multi-purpose delimitation, covering both the continental shelf and the economic (or fisheries) zone, preference should be given to criteria of a “neutral character” and suitable to delimit both forms of jurisdiction.¹⁰³
3. *Geography as a criterion*: Subject to the existence of special circumstances such as a significant difference in the lengths of respective coastlines or the presence of coastal islands, the physical and political geography of the delimitation area constitutes an equitable criterion of fundamental importance and the solution should aim at an *equal division of the areas of overlap* of the maritime projections of the coasts.¹⁰⁴

Practical Methods

1. *No priority of method*: A number of practical methods of delimitation exist and no single method has intrinsic merits in the abstract which would justify giving it priority over other methods.¹⁰⁵ Equidistance, in particular, has not become a rule of

100. *Supra*, note 40, para. 191.

101. *Id.*, paras 157 and 158.

102. *Ibid.*

103. *Id.*, paras 192 and 194.

104. *Id.*, paras 195 and 196.

105. *Id.*, paras 161 and 162.

customary law and neither has it been adopted into such law as a method to be given preference over others.¹⁰⁶

2. *Geometrical methods*: When the criteria determined to be equitable are founded on geography, only geometrical methods are suitable¹⁰⁷ and such methods may vary with different segments of the delimitation line.¹⁰⁸ The choice of a particular method in a given area will depend upon the coastal configuration.¹⁰⁹
3. *Minor geographic features*: In the actual application of a certain method, it may be found appropriate to ignore certain minor geographic features (tiny islands, uninhabited rocks or low-tide elevations) as basepoints for the drawing of a line intended to effect an equal division of a given area, subject to their being allowed a limited corrective effect subsequently.¹¹⁰

106. *Id.*, para. 107.

107. *Id.*, para. 199.

108. *Id.*, para. 200.

109. *Id.*, para. 205.

110. *Id.*, para. 201.