INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY IN THE GULF OF MAINE AREA

(CANADA/UNITED STATES OF AMERICA)

VOLUME VII

Oral Proceedings *(concluded)*; Correspondence

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE LA DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LA RÉGION DU GOLFE DU MAINE

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The case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, entered on the Court's General List on 25 November 1981 under number 67, was the subject of a Judgment delivered on 12 October 1984 by the Chamber constituted by the Order made by the Court on 20 January 1982 (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246).

The pleadings and oral arguments in the case are being published in the following order:

Volume I. Special Agreement; Memorial of Canada.
Volume II. Memorial of the United States of America.
Volume III. Counter-Memorial of Canada.
Volume IV. Counter-Memorial of the United States of America.
Volume V. Replies of Canada and the United States of America.
Volume VI. Commencement of Oral Arguments.
Volume VII. Conclusion of Oral Arguments; Documents submitted to the Court after closure of the written proceedings; Correspondence.
Volume VIII. Maps, charts and illustrations.

Canada filed its pleadings both in English and in French. Although Canada has two official languages, only the English text of those documents is reproduced on the ensuing pages of these volumes, as Canada has informed the Registry that the English text should be seen as authoritative for the purposes of interpretation.

Certain pleadings and documents of this edition are reproduced photographically from the original printed text.

In addition to the normal continuous pagination, the Volumes feature on the inner margin of pages a bracketed indication of the original pagination of the Memorials, the Counter-Memorials, the Replies and certain Annexes.

In internal references, bold Roman numerals (in the text or in the margin) are used to refer to Volumes of this edition; if they are immediately followed by a page reference, this relates to the new pagination of the Volume in question. On the other hand, the page numbers which are preceded by a reference to one of the pleadings relate to the original pagination of that document and accordingly refer to the bracketed pagination of the document in question.

The main maps and charts are reproduced in a separate Volume (Vol. **VIII**), with a renumbering, indicated by ringed numerals, that is also added in the margin in Volumes **I-VII** wherever corresponding references appear; the absence of such marginal reference means that the map or illustration is not reproduced in the present edition.

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L'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine*, inscrite au rôle général de la Cour sous le numéro 67 le 25 novembre 1981, a fait l'objet d'un arrêt rendu le 12 octobre 1984 par la Chambre constituée par ordonnance de la Cour du 20 janvier 1982 (*Délimitation de la frontière maritime dans la région du golfe du Maine, arrêt, C.I.J. Recueil 1984*, p. 246).

Les pièces de procédure écrite et les plaidoiries relatives à cette affaire sont publiées dans l'ordre suivant :

Volume I. Compromis; mémoire du Canada.
Volume II. Mémoire des Etats-Unis d'Amérique.
Volume III. Contre-mémoire du Canada.
Volume IV. Contre-mémoire des Etats-Unis d'Amérique.
Volume V. Répliques du Canada et des Etats-Unis d'Amérique.
Volume VI. Début de la procédure orale.
Volume VII. Suite et fin de la procédure orale; documents présentés à la Cour après la fin de la procédure écrite; correspondance.
Volume VIII. Cartes et illustrations.

Le Canada a déposé ses pièces de procédure écrite en anglais et en français. Bien que le Canada ait deux langues officielles, seul le texte anglais de ses écritures est reproduit dans les volumes ci-dessus, le Canada ayant fait savoir au Greffe que, en cas d'interprétation, c'était le texte anglais qui devait faire foi.

Certaines pièces de la présente édition sont photographiées d'après leur texte imprimé original.

Outre leur pagination continue habituelle, les volumes comportent, entre crochets sur le bord intérieur des pages, l'indication de la pagination originale des mémoires, des contre-mémoires, des répliques et de certaines de leurs annexes.

S'agissant des renvois, les chiffres romains gras (dans le texte ou dans la marge) indiquent le volume de la présente édition; s'ils sont immédiatement suivis par une référence de page, cette référence renvoie à la nouvelle pagination du volume concerné. En revanche, les numéros de page qui sont précédés de l'indication d'une pièce de procédure visent la pagination originale de ladite pièce et renvoient donc à la pagination entre crochets de la pièce mentionnée.

Les principales cartes sont reproduites dans un volume séparé **(VIII)** où elles ont reçu un numérotage nouveau indiqué par un chiffre cerclé. Dans les volumes **I** à **VII**, les renvois aux cartes et illustrations du volume **VIII** sont portés en marge selon ce nouveau numérotage, et l'absence de tout renvoi à la présente édition signifie qu'une carte ou illustration n'est pas reproduite.

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PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au palais de la Paix, à La Haye,
du 3 au 11 mai et le 12 octobre 1984,
sous la présidence de M. Ago, président de la Chambre

NINETEENTH PUBLIC SITTING (3 V 84, 3 p.m.)

Present: [See sitting of 2 IV 84.]

REJOINDER OF MR. LEGAULT

AGENT FOR THE GOVERNMENT OF CANADA

Mr. LEGAULT:

I. Introduction

Mr. President, distinguished Judges, I now have the honour to take up the Canadian case once again at the outset of the second round of these oral proceedings.

Canada is grateful to the Chamber for already having put questions to the Parties. Counsel for Canada will attempt to answer these questions in the course of this second round. Today I shall address Judge Mosler's question regarding the 1979 Agreement on East Coast Fishery Resources (VI, p. 463), and my closing statement at the end of Canada's second round will address the President's question (VI, p. 461). Other counsel for Canada will identify the questions with which they will deal as the occasion arises.

My statement today will begin with an overview of this case as it now stands, after three rounds of written pleadings and one round of oral pleadings. Second, it will deal with the legal vacuum in the United States case. Third, it will touch upon geography and its legal consequences in the Gulf of Maine area. This part of my statement will deal with questions relating both to proximity and equidistance, and to the relevance of geographical position and scale. Fourth, I shall review the implications of certain economic factors and aspects of the conduct of the Parties introduced by the United States. Fifth, I shall respond to Judge Mosler's question regarding the 1979 Agreement on East Coast Fishery Resources. Next, I shall digress for some few minutes to discuss the subject of factual assertions in the pleadings of both Parties. And finally, I shall attempt to draw some general conclusions.

II. Overview

I begin my overview, Mr. President, distinguished Judges, by noting again that there is one important respect in which this case differs from other maritime boundary cases that have come before the Court. In the *North Sea Continental Shelf* cases, the Court was asked for principles alone (*I.C.J. Reports 1969*, p. 6). In the *Tunisia/Libya* case, the Court was asked for both principles and an indication of practical methods for their implementation (*I.C.J. Reports 1982*, p. 21). In the present case, the process is carried one step further. The Chamber must obviously deal with principles of law. But the decision will also deal with method in prescribing the exact course of the boundary, and the line so prescribed will be final and binding upon the Parties.

As things now stand there is a marked imbalance in the way each of the

Parties has placed its case before the Chamber, and in the extent to which each Party has given the other a clearly stated and fully defined case to meet.

Canada, for its part, has committed itself to a clearly defined and integrated set of principles and to a definite method and line. My concluding statement in the first round pointed out that Canada's case and Canada's line are based on the legal content of a 200-mile zone; on geographical adjacency measured from the coast; on the equidistance-special circumstances rule of Article 6 of the Continental Shelf Convention, which is binding on the Parties; on the vital importance of the Georges Bank fishery to the adjacent coastal communities of Nova Scotia; and on the confirming evidence provided by the history of the dispute (**VI**, p. 227).

These considerations all point in the same direction and form part of a single integrated pattern. And they all confirm the appurtenance of eastern Georges Bank to Canada by reason of the geographical position of Nova Scotia, and the scale and extent of its coasts. Moreover, the principles on which our case is based are given a definite and concrete expression in the Canadian line. It is a line in being, a line whose origins date back to the mid-1960s when Canada first used an equidistance line for continental shelf oil and gas concessions. In sum, the Canadian case is a simple, even conservative one, based both on an integrated set of principles and on a clearly defined and legally recognized method.

It is otherwise with the United States case. In the first place, the United States has not proposed a single, integrated framework, but rather two alternative and conflicting theories, both equally novel and both equally unfounded. As I will show in a few moments, the theory of perpendicular or uni-directional extension of the coastal front and the theory of the natural boundary are not complementary but mutually exclusive. And because they are mutually exclusive, there is an essential ambivalence about the basic principles espoused by the United States in this case.

The United States position on the actual method and line the Chamber should adopt is even more elusive. The United States does, of course, have a proposal in form: the adjusted perpendicular line. But the role of that proposal in the United States case is more an illustration of the concepts advocated by the United States than a claim that represents the real substance of its case.

The United States had very little to say about its adjusted perpendicular line in the first round, and very little to say about Canada's many objections to that line.

Ambassador Stevenson said, in effect, that any method or combination of methods would be satisfactory so long as the end result was to "confirm United States jurisdiction over all of Georges Bank" (**VI**, p. 286).

Mr. Colson spoke in similar terms (**VI**, p. 322). But the point to which he attached particular importance was that the line must be turned seaward as quickly as possible. Thus, he said, "The fundamental difference between the equidistant line and an equitable solution in this case is the location of the point at which the boundary *turns seaward*" (**VI**, *p.* 323).

And by "seaward", of course, he simply meant away from the coast of Maine and towards the coast of Nova Scotia.

As Canada sees it, the United States position on method and line boils down to this. *First*, the line should not be an equidistance line, at least beyond its initial segments. *Second*, the line should turn away from the United States coast and towards Nova Scotia as soon as possible. *Third*, it should ensure that all of Georges Bank is allotted to the United States.

This is all we really know. We face an objection to equidistance and two alternative theories of delimitation. But we do not have a definite claim to which the United States will unequivocally commit its case. And so, Mr. President, I

regret to say that even at this late stage in the proceedings, which represents Canada's last opportunity to speak, the issues have been less than fully joined.

There is, I believe, an explanation for the reticence of the United States on this question of method and line. And it lies precisely in the fact that the United States case is based not upon a single integrated framework, but rather upon two different theories that are mutually incompatible in the circumstances of this case. I refer, of course to the theory of the natural boundary and the theory of coastal front extensions of so-called primary coasts. Because these two theories are in contradiction, they cannot be combined in order to produce a single coherent result.

I have already spoken of the factual incompatibility of the two United States theories in the first round. The United States view of uni-directional extension of jurisdiction holds that the entire area seaward of the Gulf of Maine is within the seaward extension of the so-called primary coastal front at the back of the Gulf – the coast of Maine. This, of course, assumes an essential continuity between that coast and the outer area. But if the criteria implicit in the natural boundary theory were to be accepted on their own terms, this continuity would be decisively interrupted. And this for two reasons. First, according to the United States view, there is a division between the so-called ecological régime of the Gulf of Maine itself and the so-called ecological régime of Georges Bank. Secondly, the Gulf of Maine Basin, lying between Maine and the outer area, is both deeper and over four times as broad as the Northeast Channel. How can it be that the seaward extension of Maine can jump from one purported ecological régime to another, but the seaward extension of Nova Scotia cannot? How can it be that Maine can vault a geomorphological feature as pronounced as the Gulf of Maine Basin, while the seaward extension of Nova Scotia must be stopped short by a feature of much slighter dimensions? These are the *factual* contradictions inherent in the two United States theories.

Of equal importance is the reality that the two theories are *conceptually* incompatible. They rest on totally different conceptions of how the coastal geography relates to the area of Georges Bank. They reflect two conflicting versions of appurtenance, two conflicting versions of what the Court has called the "geographical correlation" of the coast and the sea (*I.C.J. Reports 1982*, p. 61, para. 73).

It is obvious from any chart that the Northeast Channel has absolutely no connection with the coastal geography of Maine. The Northeast Channel simply makes no sense as a dividing line between the seaward extensions of Maine and Nova Scotia, either in terms of its location or its alignment. What it implies, in fact, is a completely different coastal relationship. That coastal relationship is one that would require a maritime boundary between the opposite coasts of Nova Scotia on the east and Massachusetts on the west. Such a view of the coastal relationship looks *across* the area and not outward from the back of the Gulf. This, in fact, was the frame of reference implied by the 1976 claim of the United States, and the Northeast Channel argument is simply a vestige of that obsolete claim or "shadow claim". And we presume that the 1976 claim was abandoned in recognition of the fact that once Massachusetts and Nova Scotia are identified as the coasts that abut the outer area – the controlling coasts – the balance in the geography of these two coastal areas points almost inexorably towards equidistance.

Now, Mr. President, we are fully aware that the natural boundary theory was given a well-deserved demotion in the first round of the United States oral pleadings. It no longer ranks alongside the theory of uni-directional or perpendicular extensions of jurisdiction as an independent principle of delimita-

tion, but only as an alleged relevant circumstance that is said to "confirm independently" the result desired by the United States (VI, p. 457). But that only makes the confusion worse. Because if the United States scheme of uni-directional coastal front extension is taken on its own, it necessarily implies a total gap in the seaward extension of Nova Scotia outside the closing line of the (37) Gulf. I refer, of course, to the effect, shown on Figure 31 of the United States Memorial. Canada would then be deemed to have no natural prolongation or seaward extension *anywhere in the vicinity of the Northeast Channel*. The Northeast Channel could play no conceivable role as a natural boundary, because there could be no need for a delimitation anywhere in this area. The United States extension itself would have disposed of the question.

So clearly, the United States claim does depend on the combined application of the two theories of uni-directional extension of jurisdiction and the so-called natural boundary. And the question that remains is simply this: if Nova Scotia does have a seaward extension up to the Northeast Channel, why not beyond? The answer cannot lie in the coastal geography, because once the principle is accepted that Nova Scotia does project in this direction, there can be no geographical reason why it should not project as far in that direction as the United States coast. So the only possible answer for the United States must lie in the theory of the natural boundary.

But then I must come back to my earlier question. How can Nova Scotia be stopped by the Northeast Channel if Maine, which lies further away, is not to be stopped by the Gulf of Maine Basin? In short, how can any part of Georges Bank lie within the seaward extension of Maine if the principles of the natural boundary are valid? Is it that the theory can be applied against only one Party? And if, on the other hand, the natural boundary theory is not valid, on what possible basis should the seaward extension of Nova Scotia be stopped at the Northeast Channel?

The contradictions in the United States case are brought to light in the vagaries of the adjusted perpendicular line. The awkwardness of its construction is a reflection of the fact that the United States case is based on an unhappy marriage of two contradictory theories. The perpendicular portions of the line represent the special view of the United States on a uni-directional coastal extension from the back of the Gulf, while the adjusted portions of the line reflect the United States theory of the natural boundary. In other words, the "vertical" parts of the line reflect one theory and the "horizontal" parts reflect the other theory. And the structural incoherence of the whole, which is obvious from a glance at the map, is the natural consequence of the unnatural union that has given it birth.

Here, if I may digress for a moment, I should like to recall the little lesson on sailing techniques Mr. Colson gave us on 13 April (VI, p. 323). When I reviewed that lesson with Commander John Cooper, Canada's nautical expert, he replied with the refrain from the old British folk song "What shall we do with the drunken sailor?" For in Commander Cooper's opinion, any master of a vessel who would navigate along the line suggested by Mr. Colson would have to be in a state of advanced inebriation indeed.

Mais laissons le marin de M. Colson zigzaguer à son aise et revenons à la méthode et à la ligne zigzagantes. The problem, and the difficulty that has confronted the United States throughout in devising a plausible method, is not simply that two bad theories cannot be added together to make a good one. The problem is more fundamental than that. It is that two *contradictory* theories, whether good or bad, cannot possibly point in the direction of a coherent result.

I must add a word on what we see as the *artificiality* of the United States

theory – first adopted in 1982 – that the coast of eastern Maine should dominate the entire delimitation. Maine has no coastline that actually borders the outer area. There are two other major coastal areas, Massachusetts and Nova Scotia, that do form part of the outer area to be delimited and that lie closer to Georges Bank. They are major landmasses, not incidental features. And it is in these areas of Massachusetts and Nova Scotia, not eastern Maine, that the great bulk of Georges Bank fishing operations are carried out, and where the principal impact of the decision will be felt.

III. The Legal Vacuum in the United States

Mr. President, the basic elements of the United States case may be internally inconsistent, but they have at least one thing in common. They have no foundation in the law of maritime boundaries. Neither of them is based on *Article 6 of the Continental Shelf Convention*. Neither of them takes account of the juridical content of the 200-mile zone. And neither of them is based on a proper appreciation of geographical adjacency measured from the coast, the common factor that links the several forms of jurisdiction comprising a 200-mile zone.

As we noted in the first round, the United States case gives no meaningful application to Article 6 of the Continental Shelf Convention (**VI**, pp. 22, 25-26). At the same time, the United States Reply takes the astonishing position that the juridical content of a 200-mile zone is unrelated to its delimitation (p. 56, para. 86). And so we pointed out that the United States case has been dissociated both from the conventional law and from the source from which principles of customary law must be drawn; in brief, that the United States case has been left in a legal vacuum (**VI**, pp. 22-23). Mr. President, distinguished Judges, the United States pleading in the first round has left this vacuum unfilled.

1. Article 6 of the Continental Shelf Convention

Let us look first at Article 6 of the Continental Shelf Convention. Professor Jaenicke will have more to say on this subject later. What I wish to stress here is that the United States refuses to come to grips with Article 6. It was given what I might call a "footnote" treatment by Ambassador Stevenson toward the end of his statement of 12 April (**VI**, pp. 284-285). But he dealt with it only as a sort of preambular introduction to his discussion of technical methods of delimitation, and not as a source of substantive principles of law.

The delimitation here under consideration does apply to the continental shelf and Article 6 is binding upon the Parties. Of that there can be no doubt. The United States recognized in its Memorial (**II**) that the convention is applicable (pp. 81-82, para. 135; p. 101, para. 165), and the United States Reply (**V**) affirmed that the delimitation should be consistent with the principles of the equidistance-special circumstances rule (pp. 70-71, para. 116). And Ambassador Stevenson said that the United States has "recognized the express applicability of Article 6 to a continental shelf determination between Parties to the Convention and as a source of law in delimiting a single maritime boundary" (**VI**, p. 284). That much is clear. But I regret to say that the United States position on Article 6 is fraught with ambiguity. Because Ambassador Stevenson also said that "the United States disagrees with Canada as to the application of Article 6 as a matter of treaty obligation" *(ibid.)*, and that "the United States does not regard equidistance as ultimately possessing that obligatory force of which the Anglo-French Tribunal spoke" *(ibid.)*. So it is understand-

able, Mr. President, that we have found the United States position on Article 6 somewhat difficult to grasp.

Article 6 cannot have lost its obligatory force unless it has been tacitly abrogated by the Special Agreement. Neither Party, of course, has taken this view, and it could not be seriously entertained in any event. On the contrary, the Special Agreement (Art. II) (I, p. 10) expressly requires that the provision be given its full effect, because it requests a decision based on the principles and rules of international law applicable in the matter as between the Parties. The agreement that the conventional law should be given its full effect could not be more explicit. For Article 6 *is the only written source of positive law that is* applicable here. As I said in the first round, Article 6 provides a point of mooring in otherwise uncharted waters.

Nor is there any impediment to the application of Article 6 in the context of a single maritime boundary. The application of Article 6 can take account of the broadened legal and factual context of the single maritime boundary, just as the Court of Arbitration in the Anglo-French case held that it could take account of the evolution of customary international law (para. 47). And as we have already pointed out, the principles of law applicable to a 200-mile zone of jurisdiction in relation to the water column have a common origin with the equidistance-special circumstances rule as a particular expression of a general norm. These principles of law owe their meaning and their content to the concepts of equity and geographical adjacency measured from the coast. They lead to a common framework that is fully compatible with the rule in Article 6.

The United States has said (VI, p. 286) that it disagrees with Canada's view of the operation of Article 6. Specifically, the United States disagrees that there is a legal obligation, under Article 6, to consider adjusted equidistance once a strict equidistance line is determined to be inapplicable.

Now Canada, of course, did not state its positions as rigidly as the United States has suggested. But we hold to our view that, within the framework of Article 6, an adjustment of equidistance is frequently preferable to its total abandonment. This approach is one that avoids a black and white polarization between the two branches of the rule. It recognizes that there is a single, combined rule and not two separate rules that operate in opposition to each other. This was the thrust of the reasoning of the Court of Arbitration in the Anglo-French case. Article 6 provides that equidistance should be used unless another line is justified by special circumstances. But why should the departure from equidistance be greater than the special circumstances require? In short, both the spirit and the structure of the rule favour an adjustment of the equidistance line in preference to its total abandonment.

2. The Basis of Title to a 200-Mile Zone

Mr. President, the United States is less ambivalent on the implications of the new law of the sea for the delimitation of a 200-mile zone. It says in effect that there are *no* implications, apart from the addition of certain purely factual considerations in the balancing up (VI, pp. 268-270). The United States challenges the relevance of the distance principle, the exclusive basis of title to a 200-mile zone (VI, p. 269). In effect, the United States challenges *(ibid.)* the Court's findings, made in the context of the new definition of the continental shelf, that "the distance of 200 nautical miles is in certain cases the basis for title of a coastal State" (*I.C.J. Reports 1982*, p. 48, para. 47) and that "in certain circumstances the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State" (*ibid.*,

pp. 48-49, para. 48). And yet, of course, the crucial difference in the present case is that the distance principle is the *sole* basis of title to a 200-mile water column zone.

The United States has thus retreated, without explanation, from the position in its Memorial (p. 101, para. 164) that this case was to be determined *not* solely on the basis of the law governing the delimitation of the continental shelf, but that the law governing the delimitation of the exclusive fisheries rights was also to be applied, as well as the law that serves "other purposes" for which the Parties may exercise their jurisdiction under international law.

This view of the law in the United States Memorial is a far cry from the view expressed in the United States Reply (pp. 54-60, paras. 80-92). There the United States argued that the juridical content of the 200-mile zone is irrelevant, and that the very emergence and nature of these zones has no real significance for their delimitation. And this reversal of positions suggests that the United States has recognized that the distance principle and other basic principles of the 200-mile régime are inimical to its case. The United States attempt to confuse the very different concepts of "coastal-State management" and "single-State management" only serves to underline this incompatibility.

I need not review the implications we have drawn from the basis of title to a 200-mile zone. They were fully set out in the first round. Mr. Hankey will comment on the United States response, including its contention that the distance principle is relevant only to outer limits. Here I will only note again that Canada does not hold that the distance principle makes equidistance inherently equitable or obligatory, but that it does make proximity to extensive coastal areas a very important factor. And it certainly rules out the idea that a seaward extension in any one direction is legally preferred.

IV. The Geographical Misconceptions of the United States Case

Mr. President, I turn now to the geographical misconceptions of the United States case.

I said at the end of the first round that the equidistance-special circumstances rule of Article 6 and the basis of title to a 200-mile zone are founded on the common principle of geographical adjacency measured from the coast (VI, p. 228). The United States case is built upon a faulty interpretation of the geographical configuration largely because the United States misconceives the practical implications of this principle.

I do not propose to analyse the flaws in the United States geographical argument in depth. I leave that task to my colleagues, Professor Weil, Professor Jaenicke and Mr. Hankey. And I leave the question of the proportionality test to Professor Malintoppi.

There are, however, two basic errors in principle in the United States argument that I cannot leave unnoticed. One lies in the confusion of proximity in a general sense with equidistance as a technical method. The other lies in the assumption by the United States that the geographical position of a landmass – without any regard to the question whether its effect is proportionate to its scale – can be relevant only as a source of inequity and not as a source of legitimate entitlement. In other words, the position of Maine, far removed from the outer area, is allegedly a source of inequity and must be rectified by literally shifting that position forward. The position of Nova Scotia, however, actually abutting on the outer area, allegedly entitles Nova Scotia to nothing. Much of the geographical argument put forward by the United States in the first round can ultimately be traced to these two fundamental errors of principle.

1. Proximity and Equidistance

I shall deal first with the role of proximity as a relevant factor and its relationship to the equidistance method. The United States says that because Canada relies on proximity to extensive stretches of coastline as a relevant geographical factor, we have reversed the hierarchy of solution and method (**VI**, p. 285; see also **VI**, p. 305). And in the United States view, any consideration of proximity – even proximity to a major landmass – is simply a covert restatement of the proposition that the equidistance is inherently equitable (see **VI**, p. 285; see also **VI**, p. 305).

This is not an accurate representation of Canada's position, or of the law. Although the law is neither silent nor indifferent on the question of method, we have recognized throughout these proceedings that the equitable result is indeed the paramount concern. What I want to focus on now, however, is the unwarranted confusion the United States has sought to create between equidistance as a technical method and proximity as a relevant factor, which has an independent and vitally important role in the law of delimitation.

Extensive passages of my opening statement were devoted to this very issue. I emphasized that "we rely upon proximity not to single, isolated points on the coast, but to the abutting coasts as a whole" (**VI**, pp. 32, 275). The United States has chosen to pass over this in silence, and here I regret to say that we appear to have been engaged in a dialogue with the deaf.

There is a logical fallacy in the United States argument on the interrelationship of proximity and equidistance. Equidistance obviously has a necessary correlation with proximity, in the sense that proximity provides its essential rationale. But it hardly follows that proximity as a relevant factor can simply be reduced to equidistance as a technical method. Indeed, as Canada showed in some detail in the first round, there are cases where equidistance fails to give adequate expression to proximity in a general sense, and there are cases where another method may do so better (see, e.g., **VI**, pp. 26-28).

And the other side of the coin is this. If the United States is right in arguing that proximity has no independent value as a relevant factor, then equidistance itself would almost never have an objective geographical foundation. The use of equidistance might occasionally be justified in the light of factors such as perpendicularity to a so-called primary coast, but never on the basis of proximity, which obviously constitutes the essential rationale for the equidistance method. It would, in other words, become impossible to justify an equidistance line as a line that is appropriate in many geographical situations because it leaves to each Party the areas that lie closest to its coast. There is clearly something radically wrong with this approach.

I hope we made it clear in the first round that Canada relies upon proximity in a general sense, and not upon any assumption that the equidistance method is inherently equitable or that it provides its own justification. We explicitly recognized that there are situations where equidistance, strictly applied, may disregard important questions of scale, may produce distortions, or may fail to reflect the true configuration of the coast by giving excessive weight to individual basepoints that do not correspond to that configuration. We explained in some detail that none of the potential pitfalls sometimes associated with equidistance has any application in this case (**VI**, pp. 26-28). And we showed that the Canadian line really does correspond to the overall configuration, that it really does reflect proximity in a general sense to the coasts as a whole (**VI**, p. 28). Indeed, even the system of coastal fronts constructed by the United States for the proportionality models in its Counter-Memorial (**IV**) bears out

this point, apart from the use of the off-lying island of Nantucket. I refer here to Figures 24 and 25 of the United States Counter-Memorial. And I might add that these very coastal fronts constructed by the United States, again despite their use of Nantucket, vividly illustrate that Cape Cod is the principal feature that diverges from the overall configuration.

2. The Relevance of Geographical Position and Scale

Mr. President, I turn now to a consideration of what has emerged as the central geographical issue raised by the United States argument – the relevance of geographical position and scale. The United States says it is inequitable that Nova Scotia, rather than eastern Maine, should control the eastern part of the outer area to be delimited. Canada says that this result is a natural and legitimate consequence of the geographical position of Nova Scotia. This difference of perspective has become the focal point of the geographical debate as approached by the United States.

For the United States, the position or location of a landmass is relevant only as a source of potential *inequity*, and irrelevant as a source of legitimate coastal entitlements. For Canada, on the other hand, the geographical position of a coastal area is the starting point from which coastal State entitlements are to be determined. Position can indeed be a source of inequity, but only when the effect that a landmass exerts by virtue of its geographical *position* is out of proportion to its *scale*. The general rule is that the position of a coastal area is simply a fact of nature and not an inequity to be remedied. It is only when a geographical feature is a source of inequitable distortion that equity calls for a remedy. This can arise where a feature is incidental or aberrant to the general configuration. But how can one take that view of the whole coast of southwest Nova Scotia?

Let me give a rather obvious example. No one could possibly doubt that the northern half of the English Channel appertains to the United Kingdom. That is a natural and obvious consequence of the geographical position of the United Kingdom. But the position of the Channel Islands in the southern half of the Channel would have produced a disproportionate effect in the light of their relative scale if the equidistance method had been used, and another method was therefore adopted. *Viola tout* (Anglo-French Award, para. 199).

Why has this question of geographical position assumed such great importance in this case? It is because the United States has focused so much of its geographical argument on a single stretch of the coast at the back of the Gulf. The United States considers that this stretch of coast is unduly cut off by the equidistance method. I refer, of course, to the eastern half of the State of Maine, from Penobscot Bay to the Canadian border. And the United States not only says that this stretch of coast is unduly cut off, but also goes so far as to insist that it should control the whole delimitation. Now, clearly, this issue turns to a great extent on the significance to be attached to the role of geographical *position* in the delimitation process. Because the key element that the United States leaves out of the picture, *except* as a source of alleged inequity, is the geographical position of eastern Maine in relation to that of Nova Scotia.

The essential facts are very simple. Nova Scotia is not only very large, but it actually borders the outer area to be delimited. Eastern Maine, on the other hand, lies in the deepest recesses of the concavity, fully one hundred nautical miles behind the closing line of the Gulf and the Atlantic coast of Nova Scotia. And the question before the Court is this: is the effect of the position of Nova Scotia and eastern Maine under the equidistance method a natural and therefore an equitable consequence of the geographical realities? Or is the effect so

produced an inequitable distortion of the geography, an aberration to be rectified? In the final analysis, the geographical issues raised by the United States argument amount to no more – and no less – than that.

This difference of perspective on the role of geographical position explains the conflicting geographical frameworks that have been urged upon the Chamber by each of the Parties. For Canada, equidistance is equitable in the present case because it respects and reflects the position of the abutting coasts in each sector of the boundary, without producing any element of distortion or exaggeration. And we identify the abutting coasts on the basis of their geographical position in relation to each sector of the boundary. This means that the coastal wings of Nova Scotia and Massachusetts must control the delimitation of the outer area. They lie a hundred miles seaward of eastern Maine. And they actually border the outer area whereas no part of the coast of Maine forms part of the outer area. They are, in short, the abutting coasts.

Now let us look at the geographical framework proposed by the United States. The United States proposes a scheme of perpendicularity with which we have now become familiar – the idea of delimiting the boundary on the basis of coastal front extension in a single direction, a direction that is perpendicular to an assumed general direction of the continental seaboard. The practical effect of the United States scheme of uni-directional coastal front extension is exactly the same in its basic principles as if the whole coast of eastern Maine were physically moved up to the closing line of the Gulf, and positioned on the same alignment as the Atlantic coast of Nova Scotia itself. The Gulf no longer exists at all. The back no longer controls the front. The back *becomes* the front.

I recognize of course, that the United States scheme would allow adjustments to give Nova Scotia a sort of *cordon sanitaire* of maritime jurisdiction and permit it to retain a few of its inshore fishing banks. But I think Canada's view of the United States coastal front extension system as applied here is an accurate one in terms of its concept or principles. In fact, what I am saying can readily be seen both from Figure 31 of the United States Memorial and from the so-called cut-off diagrams produced in the United States first round (Figs. 11-16). And again, the net effect is to treat the coast of Maine as if it were actually situated on the closing line of the Gulf and aligned side by side with Nova Scotia. This, Mr. President, is a refashioning of geography on a scale as yet unheard of.

The United States cut-off argument, its contention that eastern Maine is inequitably cut off from its seaward extension by the equidistance line, is merely a restatement of exactly the same theory in yet another form. Mr. Hankey will show that the graphic demonstration of this argument was based on a series of geographical misconceptions. The most remarkable misconception, perhaps, is that it gave eastern Maine what amounts to a 300-mile zone by depicting a vast area beyond 200 miles of its coast as an area of cut-off. The United States has portrayed as an area of cut-off the entire area that would belong to eastern Maine if Nova Scotia did not exist (see, e.g., Fig. 16). Indeed, the United States has even added to this area of imaginary cut-off. But the United States depiction has no connection whatever with the idea of inequitable cut-off as known to the law, which is a function of inequitable distortion.

And all the United States diagrams could really show, in the final analysis, is a more or less self-evident truth. It is that a coast that borders the open sea will always control a greater maritime area than a coast which is located at the back of a relatively confined area. Here the logic of the United States case partakes of Kafka as well as Descartes. *"Alle diese Gleichnisse"*, said Kafka, *"alle diese Gleichnisse wollen eigentlich nur sagen, dass das Unfassbare unfassbar ist, und das haben wir gewusst"*. "All of these parables", if I may translate, "All of these

parables only go to show that the incomprehensible is incomprehensible, and that we already know." And in the end, all of Mr. Colson's trigonometry only went to show that the obvious is obvious, and that was already obvious.

For it is both obvious and equitable that Massachusetts and Nova Scotia should command a greater ocean area than the coasts at the back of the Gulf. They do so because they actually abut the outer area, and because Maine is far removed from that area. There is no distortion involved in this result. It simply reflects the controlling, essential characteristics of the geographical situation, without giving an exaggerated effect to incidental features at the expense of those essential characteristics. Nor is there any disproportion, because Nova Scotia and Massachusetts represent major landmasses and major coastal areas that are entitled in equity to the full benefit of their geographical position.

Mr. President, the United States case is built upon a failure to appreciate the crucial distinction between equitable principles and refashioning geography. This distinction lies in the concept of inequitable distortion, in the absence of which the geographical position of an area must be taken as a fact of nature and given its full effect in the delimitation.

V. Economic Factors and the Conduct of the Parties

I turn now to the non-geographical factors the United States has invoked in support of its claim. Because the United States claim has no foundation in law or in geography, our opponents have sought to prop it up by an appeal to a theory that is foreign to both those disciplines. It is for this purpose that the United States has devised its thesis on historic "dominance".

In Canada's view, the maxim that the land dominates the sea can only mean, on the basis of accepted legal and geographical principles, that the abutting coast of Nova Scotia dominates eastern Georges Bank. Not so, says the United States: because it is the United States that has dominated Georges Bank from early colonial times. The United States asserts that until the 1960s all activities in the Gulf of Maine area "evidenced the complete dominance of the United States" over this area (United States Memorial, para. 135, pp. 81-82). The United States says, in effect, that Nova Scotia's stronger geographical and human links with eastern Georges Bank cannot avail against this purported record of historic "complete dominance". But even if the United States assertions were factually tenable, they would only reflect the earlier development and greater power of the United States as a political and economic force.

The United States thesis of historic "dominance" has two separate dimensions. The first is economic, and rests in the contention that United States nationals dominated the Georges Bank fishery from early historical times, and the further contention that the notion of "single-State management" entitles the United States to monopolize the fisheries of this area. The other dimension of the United States thesis lies in the record of various kinds of State activities that have been carried out in the Gulf of Maine area.

Mr. President, we challenge the dominance theory on several grounds. First, the theory fails when tested against the facts, as we have shown in the extensive and incontroverted evidence filed with the Canadian Counter-Memorial (III, Anns., Vol. II) and Reply (V, Anns., Vol. II, Parts I and II). Secondly, the theory is largely based on activities that are legally irrelevant – irrelevant because, in the light of their subject-matter or their remoteness in time, they have little or nothing to do with the 200-mile régime. Thirdly, the United States theory has nothing to do with equity. It detaches the equities of the delimitation from the contemporary fishery, which lies at the heart of the dispute and constitutes a

vital element of the 200-mile zone, and which is where the impact of the decision will be felt. And at the same time, the United States dominance theory attempts to shift the focus of attention to factors that have no real connection with the 200-mile zone and will not be affected in the slightest by the outcome of these proceedings.

Against this background I would now propose to examine very briefly both the economic assumptions of the United States and the inferences it draws from the conduct of the Parties in the Gulf of Maine area.

1. Economic Factors

Both Parties have appealed to economic factors, in one way or another, directly or indirectly, in their written or oral pleadings. I shall deal here with the United States position, as I understood it. Mr. Binnie, of course, will treat this subject in greater detail later.

In the United States first round, Ambassador Stevenson said that resource activities can be relevant "if these activities are long-standing and are dominant" (VI, p. 282). Now, Mr. President, Canada agrees that fishing activities must be sufficiently long-standing to provide some assurance of their stability. But the question is: what is a sufficient period? Mr. Binnie has already pointed out that the fishing patterns relied upon by Canada meet this test. The Chamber will recall his discussion of the *Grisbadarna* principle and its implications in terms of the truly relevant period, as well as the observations of Judge Jessup on this question in the *North Sea Continental Shelf* cases *(ibid.)*.

In addition, Canada denies that historic dominance, as that concept is used by the United States, is an equitable consideration. Our written pleadings have shown that the history of the Georges Bank fishery bears little resemblance to the picture the United States has painted. But whatever the facts, a claim of historic dominance based on the fishing patterns of comparatively early times is devoid of equitable significance for the simple reason that it is devoid of practical significance. Historic dominance of this kind, even where based in fact, is nothing more than a reflection of different rates of national development in past times, and is not an indication of present or future realities. It is associated with the very considerations of relative national wealth ostensibly rejected by the United States. It is repugnant to equitable principles and to the ethos of the new law of the sea. And it has nothing to do with the purpose of the 200-mile zone, which has been designed solely as a response to modern conditions.

Perhaps the most striking reliance on economic factors in the United States approach is found in the notion of "single-State management". The United States has objected to our characterization of this concept as one of "administrative convenience" or monopoly (VI, pp. 264-265). But the inevitable and intended effect of the single-State management theory is that a claim to the whole of a resource-bearing area would be favoured over a claim to only a portion of the area. Indeed, the claim to the whole would benefit from a legal presumption as against the claim to the part. I said this in my opening statement (VI, p. 22), but I am obliged to say it again. For it is in the United States principles themselves that the element of monopoly lies.

These so-called principles are, of course, another manifestation of the United States theory of the natural boundary. They run counter to the obligation to co-operate in the management of shared or transboundary resources as reflected in the provisions of the 1982 Law of the Sea Convention, and in well-established rules of customary international law.

Mr. Colson said on 19 April that "The flaw in Canada's reasoning is its

assumption that all resources are transboundary and must be shared" (VI, p. 439). Mr. President, that is not Canada's reasoning.

Canada's view is that the boundary must be determined on equitable principles within the law, and that if an equitable boundary leaves resources on either side of the line – on both sides of the line – then the conservation of these resources must be assured by co-operation. The flaw in the United States reasoning is its assumption that *equity itself* has a bias against transboundary resources and against international co-operation; that *equity itself* requires that the whole or the bulk of the resources of a boundary area must be left on one side of the line, if possible. Mr. Colson went on to say *(ibid.)* that the mere assertion of a claim cannot "render" resources transboundary. Of course it cannot. But can a *claim* be made equitable by the mere assumption of a self-styled principle that the need for co-operation is an evil to be avoided to the maximum extent possible, in a situation where two coastal States abut upon the same boundary area? Again the answer is, of course not. Yet that is exactly what is meant by the notion of single-State management.

The idea of single-State management is as incompatible with the bilateral relationship of Canada and the United States as it is with general international law. Canada shares a land boundary of 8,891 kilometres with the United States – an undefended boundary as it is usually described, and not a "demilitarized" one, as it was described by the distinguished Agent for the United States on 9 April (VI, p. 231). We share a continent. We share one of the greatest and most extensive systems of lakes and rivers in the world. We share four maritime boundary areas. Yes, we have differences and problems, but we manage to overcome them, peacefully and more or less sensibly, in the end. We muddle through. But now the Chamber is told by the distinguished Agent of the United States that any boundary that does not grant the whole of Georges Bank to the United States will "perpetuate a major irritant in United States relations with our friend, Canada, that can only become more serious as time passes" (VI, p. 232). Is this a legal argument, Mr. President? Is this an argument that would persuade the United States to abandon its policies of extra-territorial jurisdiction, which are the very antithesis of single-State management, and which might also be described as a major irritant?

I must say that we find it difficult to recognize the relationship of Canada and the United States as we know it, from the description it has been given in the United States pleadings, just as we find it difficult to recognize the geography of the Gulf of Maine area and the economic situation of Nova Scotia as they have been described in the United States pleadings. Co-operation, not conflict, is the hallmark of our relationship, although no relationship is free of irritants. And even if Mr. Robinson were right in his remarks about "perpetuating an irritant", that would not give an equitable character to the boundary he proposes. But with great respect, we do *not* believe he is right on this point. We have greater confidence than that in the relationship of Canada and the United States. We believe the Chamber has greater confidence than that. And indeed we *know* that the United States has greater confidence than that, outside the context of these proceedings.

The answer to the conservation of natural resources is not single-State ownership, whether in the Gulf of Maine area or in other situations involving neighbouring coastal States abutting upon an area to be delimited. The solution – the solution provided by law – lies instead in co-ordination and co-operation. And if Canada and the United States cannot achieve this, then co-operation in the management of shares or transboundary resources has little future in any part of the world. But Canada and the United States *can* achieve this, and will

have to do so wherever the boundary is placed, as the United States has conceded in paragraph 146 of its Reply, and again in these oral proceedings.

The Court adjourned from 4.15 p.m. to 4.30 p.m.

Le PRÉSIDENT DE LA CHAMBRE: M. Schwebel, pour des raisons personnelles, a dû s'absenter et prie de l'en excuser.

2. Conduct of the Parties

Mr. President, distinguished Judges, as with economic factors, both Parties have laid a heavy but very different stress on the conduct of the Parties or, in United States terminology, the "activities of the Parties". Again I shall deal only with certain aspects of the United States view – very briefly, of course, because Professor Bowett will be covering this ground. I only wish to make three points here.

First, the heavy United States insistence on the theme of "complete dominance" is strongly suggestive of an implicit claim of historic title or prescription that is inconsistent with the law of the continental shelf and of the exclusive economic zone.

Second, even assuming that we are not dealing here with a *de facto* claim of historic title, the theme of "complete dominance" is incompatible with the concept of a delimitation between sovereign and equal States on the basis of equitable principles.

Third, leaving aside the serious deficiencies in the historical record as presented by the United States, some of the activities relied upon by the United States have implications going far beyond their lack of relevance. Humanitarian and other forms of co-operative arrangements are entered into without prejudice to claims of sovereignty or jurisdiction, whether they relate to the ICAO zones delineated for search and rescue activities, or to zones delineated for purposes of international fisheries co-operation, or to yet other kinds of zones referred to by the United States. To invoke such zones in the context of a maritime boundary dispute serves no one's interests, and certainly not the interests of international order and the minimization of disputes.

I would not have returned to this theme of dominance if I could have avoided doing so. Canada believed that it had been left behind by the United States at the Reply stage of the written proceedings, but it has been raised again in these oral proceedings, for instance by the distinguished Agent for the United States, on 9 April, in his reference to a number of lines and zones used by the Parties for various purposes (VI, p. 247).

Indeed, Mr. Robinson went so far as to suggest, in his final statement, that the ICNAF line between Subareas 4 and 5 was comparable to the 26° line that the Court considered relevant in the *Tunisia/Libya* case (VI, p. 459). The comparison is not only wrong; it is fanciful. In fact, this ICNAF line could not even be compared to the 45° line or the due north line that the Court considered irrelevant because, as the Court said in reference to the first of these two, it was "never plotted for the purpose of lateral maritime delimitation, either in the seas or on the continental shelf below them" (*I.C.J. Reports 1982*, p. 68, para. 90). The ICNAF line was never used to divide either jurisdictions or resources or anything else between Canada and the United States. In fact, it never had anything to do with the bilateral relations of Canada and the United States as such.

The ICNAF line referred to by the United States formed one single part of an

extensive grid intended primarily for the compilation of fisheries statistics, and for the purpose of indicating areas of interest for the groups of States that formed the panels set up under a multilateral convention. Since both Canada and the United States were founding members of the panels for both Subareas 4 and 5, how could the line between these subareas possibly be said to have divided anything between them? And indeed the convention (Art. I) itself makes it clear that none of its provisions could affect the jurisdictional interests of the contracting parties.

I now leave this unfortunate theory of "complete dominance" to deal with the new-found United States reliance on the Truman Proclamation, asserted perhaps in an attempt to suggest a historic title, but above all in a last-ditch attempt to escape the legal effects of United States acquiescence in Canada's equidistance claim. Not the Truman Proclamation itself, however: rather a *press release* issued by the State Department at the time of the proclamation, which referred to the 100-fathom depth not as a basis of delimitation, but only as a description of the areas "*generally*" comprising the shelf as the term was then understood (VI, p. 233).

Mr. President, distinguished Judges, the idea that Canada was put on notice of a potential 100-fathom boundary claim by the Truman Proclamation is belied by the terms of the proclamation itself, which called for delimitation on the basis of equitable principles and made no reference whatever to the 100-fathom depth *(ibid.)*. And the idea is contradicted decisively by the explanatory memorandum the United States issued with the proclamation, stating that delimitation issues could "be left until some future time" (Canadian Counter-Memorial, para. 392). Can the United States really contend that its *ex post facto* rationalization is remotely compatible with its ratification of the 1958 Continental Shelf Convention without any reservation whatsoever? Or remotely compatible with its subsequent conduct in relation to the issuance of Canadian continental shelf permits from 1964 to 1969?

Mr. President, I will add only the further point that none of the diplomatic correspondence between the Parties provides any support for the novel uses to which the United States seeks to put the Truman Proclamation 40 years later. On the contrary, the only time a reference to the Truman Proclamation actually appears is in a diplomatic note of 20 May 1976 (*ibid.*, Anns., Vol. III, Ann. 32, p. 115). And the implications of that notice are totally inconsistent with the thesis now adopted by the United States. I will take the liberty of quoting from the note:

> "The United States wishes to emphasize that since the Truman Proclamation of 1945 Canada has known that the position of the United States with respect to continental shelf boundaries with Canada is that they shall be determined in accordance with equitable principles, and that this is confirmed by the 1958 Geneva Convention on the Continental Shelf and other relevant principles of international law."

The plain fact is that the 100-fathom claim is a complete invention that dates not from 1945 but from 1982, when the written proceedings in this case first began.

Why has the United States found it necessary to turn the ICNAF statistical grid to ends that would have shocked the contracting parties, and to invent the 100-fathom claim that never existed in law or in fact? Why has it found it necessary to grasp at these straws? I suggest that all of this confirms the serious deficiencies of the United States case. And the same, I submit, is true of the special importance the United States has recently begun to attach to the fact that the Gulf of Maine is called the Gulf of Maine (VI, pp. 290, 302). I shall not dwell

upon the implications that nomenclature would have for the United States in the Gulf of Mexico. Let me only mention that the Court of Arbitration in the Anglo-French Award held that "it is the physical facts of geography, not nomenclature, with which this Court is concerned" (para. 204).

The United States thesis of "complete dominance" over the Gulf of Maine area, and the related *ex post facto* interpretation now conferred upon a press release associated with the Truman Proclamation, have together given a special character to the United States approach to the present case. Thus it is that the United States in these proceedings has consistently treated Canada as a petitioner coming before the Chamber asking for a slice of the American apple pie, to borrow Mr. Robinson's metaphor (VI, p. 231) – asking, in other words, for a delimitation based on distributive justice.

As we made clear in the written proceedings and in the opening round of the oral proceedings, this characterization of Canada's position before the Chamber may reflect wishful thinking on the part of the United States, but it certainly does not accord with the law or the facts. Canada will have more to say later about this attempt to colour the atmosphere. At present, however, I wish to make only a few remarks on the Canadian view of the legal consequences of the conduct of the Parties.

The Canadian case on acquiescence and estoppel stands unrebutted after the United States first round. We shall return to this later, but here I shall only respond to one comment made by the distinguished Agent for the United States on 9 April. I quote Mr. Robinson's precise words:

> "The United States is saddened that Canada would seek in the proceedings to turn United States political restraint, over a period of many years during which a political settlement was sought, into now a Canadian legal claim of acquiescence and estoppel." (VI, p. 237).

In response, I must emphasize that Canada's claim of acquiescence and estoppel rests on the period from 1964 to 1969, when no political settlement was being sought because none was considered necessary on either side. What the Parties faced during that period was a legal question and not a political one. And what the United States demonstrated during that period was not "political restraint", nor legal restraint for that matter. It was a failure to protest in the face of public activities by Canada known to the United States. It was, in a word, acquiescence. Political restraint can never justify the absence of a diplomatic protest. On the contrary, it is precisely the requirement of international stability and fair dealing that calls for a timely protest or a reservation of rights in a matter of sovereignty or jurisdiction.

VI. Response To Judge Mosler's Question

I have now concluded my review of the United States case as Canada sees it from the perspective of the first round of the oral proceedings. I shall now endeavour to reply to Judge Mosler's question of 17 April regarding the 1979 Agreement on East Coast Fishery Resources.

With your permission, Mr. President, I shall not read Judge Mosler's question to the Chamber, but only suggest that it might be included in the verbatim record at this point, for reasons of convenient reference by later readers.

> "The Agreement on East Coast Fisheries Resources of 1979 and the Treaty to submit to Binding Dispute Settlement the Settlement of the Maritime Boundary in the Gulf of Maine Area were originally linked with one another by their ratification clauses. The Treaty on Settlement alone

went into force after these clauses had been separated; the Agreement on fisheries did not. The Chamber, of course, cannot refer to its provisions.

Both Parties explained to the Court, while disagreeing on the legal conclusions, the provisions of the Agreement providing for co-operation of the USA and Canada in fishery matters, notwithstanding the future delimitation of their respective zones of maritime jurisdiction, which was to be decided according to the procedure agreed upon in the Special Agreement.

If the Chamber had had to decide in the circumstances originally envisaged, the Fisheries Resources Agreement being in force, it could not have taken into account the management of fisheries resources dealt with therein. Has the fact that the Agreement did not enter into force the effect that the matters dealt with in that Agreement are now excluded from the consideration as relevant circumstances, or, on the contrary, should they be taken into account in that sense by the Chamber?" (**VI**, p. 463.)

If I have correctly understood Judge Mosler's question, it starts from the premise that the Chamber could not have taken into account the management provisions of the 1979 fisheries agreement in the determination of the boundary, if that agreement had come into force. Accordingly, I must stress at the outset that with or without prior agreement on management questions, the task of the Chamber is to delimit a single maritime boundary for the continental shelf and 200-mile fishing zones of the Parties in the Gulf of Maine area. *It was and remains the responsibility of the Parties themselves* to work out any co-operative arrangements they consider necessary for the management of fishery resources, in the light of applicable principles of international law on the management of shared or transboundary natural resources.

As to the task of the Chamber, if the 1979 fisheries agreement had come into force, the competing fisheries interests of the Parties would already have been largely settled by the Parties themselves, and, of course, the result of the boundary decision would have had far less impact on the interests in question. Clearly, however, the Chamber still could and should have proceeded from the basic fact underlying the agreement: namely, that Canada is a coastal State in relation to Georges Bank, with established legal interests therein.

I turn now to the situation we face today, where the 1979 fisheries agreement has not and will not come into force. The most important difference between the present situation and the one originally envisaged is that the competing fishery interests of the Parties have not been settled in any way, and will now be resolved exclusively by the single maritime boundary to be fixed by the Chamber. It is also obvious that in the absence of the 1979 fisheries agreement, co-operative arrangements for the management of the fishery resources of the area to be delimited will still have to be worked out by the Parties themselves; no longer, of course, in advance of the boundary decision, but rather at some future time, in the light of that decision.

Now what is the legal significance of this changed situation for the task of the Chamber? The question, as it seems to us, must be answered at two levels.

First, the Chamber still can and should proceed from the basic fact that underlay the 1979 fisheries agreement – namely that Canada is a coastal State in relation to Georges Bank, with established legal interests therein. This fact has not changed, but only the nature of one part of the evidence attesting to it.

Second, now that the competing fisheries interests of the Parties are to be settled exclusively by the single maritime boundary to be fixed by the Chamber, these interests should be taken into account by the Chamber as relevant

circumstances going to the heart of the dispute. In Canada's view, the most objective evidence for the definition of those interests is provided by the conduct of the Parties as reflected in the negotiation and signature of the 1979 fisheries agreement. This evidence indicates that the interests of the Parties lay in their entitlements to the fishery resources of Georges Bank as determined on the basis of a given period.

In brief, the conduct of the Parties in relation to the negotiation and signature of the 1979 fisheries agreement provides indicia of what the Parties themselves considered to be an equitable result so far as the fisheries equities in this case are concerned. This conduct itself is a relevant circumstance of great importance. The fisheries interests dealt with in the 1979 agreement are not excluded from consideration as relevant circumstances, and should indeed be taken into account by the Chamber. Canada has invoked the 1979 fisheries agreement not as a legal instrument but as part of the history of the dispute, as evidence of the views the Parties themselves took on these matters.

Mr. President, distinguished Judges, I have taken some time to answer Judge Mosler's question because of its great importance. I hope I have understood it correctly and responded to it fully.

VII. Factual Assertions

In a few minutes I shall attempt to draw some general conclusions from this review of the situation at the end of the first round of oral pleadings by both Parties. Before doing so, however, I must deal with a charge levelled against Canada in the statement made on 11 April by the distinguished Agent of the United States, my good friend Mr. Davis Robinson. "It appears to us", Mr. Robinson said, "that Canada's pleadings have been replete with statements of purported fact that are so exaggerated in their description as to be completely lacking in credibility" (VI, p. 243).

This is a serious and unfounded charge. Let me first deal with the examples of so-called "distortions" cited by Mr. Robinson.

Mr. Robinson said that paragraph 190 of the Canadian Memorial suggests that Canada "had started the scallop fishery on Georges Bank" *(ibid.)*. With all due respect, I must emphasize that the paragraph under reference makes no such suggestion. It is part of a section of the Canadian Memorial (I) entitled "Historical Evolution of Canada's Presence in the Georges Bank Fishery" (pp. 83-91, paras. 179-202). And it made two points: namely, that the Canadian scallop fishery was pioneered by Captain John Beck in 1945, and that by 1966, according to an official United States document, there had been a "virtual abandonment" of eastern Georges Bank by the United States scallop fleet (p. 87, para. 190).

These are perfectly accurate statements, and Canada continues to abide by them. Mr. Robinson's complaint appears to be founded on the view that the history of the Canadian scallop fishery should begin with an account of United States activities. This is like saying that a history of Canada should begin not with Cartier in Quebec but rather with the Pilgrim Fathers in Massachusetts. And I would also emphasize that Canada in any event has given credit where credit was due in respect of United States activities in the scallop fishery. Mr. Robinson himself in his statement of 11 April quoted from documents cited and deposited by Canada which amply acknowledge these activities of United States nationals (VI, p. 244). Unfortunately, however, Mr. Robinson attempted to suggest that the materials deposited by Canada were evidence of a Canadian denial of United States activities. If Canada had not deposited these materials,

the distinguished Agent for the United States might have grounds for complaint. As matters stand, he has none.

The second alleged distortion referred to by the distinguished Agent for the United States (VI, pp. 244-245) refers to Canada's description of lobster migrations throughout the Gulf of Maine area, as set out in the Annexes to the Canadian Counter-Memorial (Vol. I, pp. 79-83, para. 131 and Fig. 41).

This saga of the "adventurous lobsters", to use Mr. Robinson's picturesque phrase (VI, p. 245), begins with the United States Memorial. In Annex 1, page 138, paragraph 97, the United States asserts that "the lobster stocks found on Georges Bank (and in the Georges Bank canyons) and on Browns Bank, are separate and identifiable". Act II of the lobster saga is found in the Annexes to the Canadian Counter-Memorial, to which I have already referred. There Canada stated that "scientific evidence fails to support the view that there are separate stocks of cusk or Atlantic lobster on each side of the Northeast Channel" (Anns., Vol. I, p. 179, para. 131). Part of the evidence used to support this conclusion was the tagging study noted by Mr. Robinson.

Mr. President, distinguished Judges, Canada stands behind this study. It has not been challenged outside the context of these proceedings. Moreover, Canada's assertion that the lobsters in the Gulf of Maine area appear to constitute a single stock unit is supported by other scientific evidence. I refer the Chamber, for instance, to a study in the *Canadian Journal of Fisheries and Aquatic Sciences*, a learned periodical recently given an award for excellence by the American Fisheries Society. A copy of Volume 40, 1983, has been deposited with the Registry. At page 180, referring to lobsters in the Gulf of Maine area, the three authors of the study in question interpreted their results "to indicate a single stock with common recruitment". The conclusions in that study appear to be generally accepted. In fact, they are reflected in an article in the February 1984 issue of the United States trade publication *National Fisherman*, a copy of which we have deposited with the Registry. Based on interviews with leading United States scientists, this article concludes, at page 17, that the evidence suggests that "the entire East Coast lobster resource can be regarded as a single stock".

Where is the distortion here? Uncertainty, perhaps. But fisheries science is replete with uncertainties and controversies, as Canada has emphasized again and again. It is not Canada that is trying to fix a boundary on the basis of these uncertainties and controversies. It is not Canada that carries the burden of proof in this matter. And it is not Canada's evidence that is lacking. I hope, therefore, that we can bring the lobster saga to a close at this point.

I have no wish to enter into an exchange of compliments with my good friend, the distinguished Agent for the United States. But I am obliged to describe some of the difficulties that Canada has faced with regard to the United States pleadings throughout this case. Let me also give two examples.

The illustrations presented by the United States throughout its written pleadings and now in the oral proceedings consistently fail to identify the Great South Channel and to depict the 60-metre isobath on Georges Bank. The object, of course, has been to give greater prominence to the Northeast Channel and to portray Georges Bank as a kind of physical "natural prolongation" of Massachusetts – despite the United States assertions concerning the perpendicular extension of the coast of Maine. This is one aspect of the "cartographic impressionism" to which Canada has objected (Canadian Counter-Memorial, p. 14, para. 38). The United States Reply, however, alleged that "it is Canada's depiction of a 60-metre depth contour that is a departure from standard practice" (p. 122, para. 214, fn. 5).

(162) Mr. President, that is not the case. Figure 15 of the Canadian Reply

reproduced the American Geographical Society Bathymetric Map of the Gulf of Maine area, published in 1974. That map makes prominent use of the 60-metre-depth contour on Georges Bank and clearly labels the Great South Channel.

In addition, Canada has deposited with the Registry five charts published by the United States Department of Commerce – that is, charts 13003, 13006, 13009, 13204 and 13260. All of these clearly show the 30-fathom-depth contour on Georges Bank – and 30 fathoms, of course, represent the virtual equivalent of 60 metres – and all of them clearly identify the Great South Channel whenever that feature is part of the area covered by the map.

I invite the Chamber's particular attention, however, to chart No. 13006. This is one of the two charts on which the Chamber is requested to depict the course of the single maritime boundary, for illustrative purposes only, according to Article 2, paragraph 2, of the Special Agreement. When the Chamber has this chart before it, I would invite it to note that the 30-fathom contour is clearly outlined. Note, too, that the Great South Channel is clearly labelled and note, on the other hand – note above all – that the Northeast Channel is *not*. Not named, not labelled, not identified, despite its unique status as a so-called "natural boundary". The words "Northeast Channel" simply do not appear at all. So much for any relationship between "standard practice" and the illustrations used in the United States pleadings. And so much for the "natural boundary" once more.

My second example of Canada's difficulties with the United States pleadings relates to the treatment of the Bay of Fundy. The United States Counter-Memorial (in fn. 2 to para. 17 at p. 14), asserts that "The Bay of Fundy (including Chignecto Bay) is not part of the Gulf of Maine or the Atlantic Ocean". Mr. President, now let me quote from the 18th edition of the *United States Pilot, I, Atlantic Coast, Eastport to Cape Cod*, which Canada has deposited with the Registry. This is an official publication of the United States Department of Commerce, National Oceanic and Atmospheric Administration. At page 58 the *Coast Pilot* reads as follows: "The Gulf of Maine is the great indentation of the coast between the Canadian Province of Nova Scotia on the northeast and Massachusetts on the southwest. *It includes the Bay of Fundy and Massachusetts Bay as subsidiary features.*" (Italics added.)

Which definition of the Gulf of Maine are we to accept in the face of these contradictions? The one advanced in the United States *Coast Pilot* in 1982, or the one asserted in the United States Counter-Memorial in 1983? Does the citation of a 1953 IHO publication (VI, p. 331), obviate the authority of the 1982 United States *Coast Pilot* so that it can be passed over in silence? And by way of postscripts I might add that the limited uses for which the 1953 IHO publication were intended were made clear in a preface which the United States did not include with the extracts it annexed to its pleadings (Counter-Memorial, Ann. 11). The entire document has been deposited by Canada.

I could multiply these examples but I have already taken too much of the Chamber's time on this matter. I could not, however, let such a serious accusation go unchallenged. And I can sum up my rebuttal very succinctly: if Mr. Robinson's target was Canada's alleged distortions of fact, then he aimed at nothing – and missed. But now I wish to turn to my general conclusions, after this long but important digression.

VIII. Conclusions

Mr. President, distinguished Judges, allow me to recapitulate the major themes of this statement, beginning with an assessment of the case as it now

stands in the light of the United States pleadings in the first round. It goes without saying, of course, that United States contentions not specifically addressed in this or later statements by counsel for Canada, cannot be deemed to have been accepted by Canada.

The United States case, in the Canadian submission, is dominated by a combination of two mutually exclusive theories: uni-directional or perpendicular extensions of jurisdiction, and the so-called natural boundary, which has now assumed the more modest outward demeanour of an alleged relevant circumstance. The latent contradictions in these two competing theories account for the structural incoherence of the adjusted perpendicular line; and they also account, I suggest, for the pronounced ambivalence of the United States position on the entire question of method and line.

At a more fundamental level, the United States case is also totally divorced from the rules and principles of international law respecting the delimitation of maritime boundaries. It gives no meaningful application to the conventional law. And it repudiates the juridical content and basis of title to a 200-mile zone as a source of law for the delimitation of these zones. The United States case has therefore been cast adrift from any solid moorings in the law.

Two basic errors in principle underlie the United States approach to the geographical issues in its case. One error lies in the deliberate confusion of proximity in a general sense as a relevant geographical factor, with the quite distinct question of equidistance as a technical method. The second error lies in the United States assumption that the geographical position of a landmass can only be a source of inequity and not a source of legitimate entitlements, whether or not its effect is proportionate to its scale.

The geographical principles of the United States case require, above all, a refashioning of *physical geography* to shift the State of Maine up to the closing line of the Gulf. But they also require a transformation of *political geography*. Because the burden of the United States argument is to portray the State of Maine as if it were an independent country bordered by foreign States not only on the east but on the west as well.

Indeed, in its graphic depiction of the cut-off effect, the United States has taken the process one step further. Here, it is the eastern half of Maine that is isolated and represented as if it were a separate entity – a geographically disadvantaged State, bounded on the west by a foreign power. And why this truncation of Maine? Because no doubt, the graphic effect would be spoilt if the areas of jurisdiction extending from western Maine and from New Hampshire and Massachusetts were also shown.

I will say this much about the United States approach; it takes as many liberties with the geography of the United States as it does with the geography of Canada. But I cannot emphasize too strongly that Canada is dealing here with a single sovereign State. If the United States showed as much concern for "single-State geography" as it does for its theory of "single-State management", then the issues arising out of this case would be greatly simplified. For it is the whole of the relevant geography of the United States in the Gulf of Maine area that must be taken into account – but taken into account where it is found and not where the United States might wish it to be.

What the United States approach adds up to in the end, Mr. President, distinguished Judges, is a refashioning of *legal geography*. The perpendicular geometry of the United States, coupled with its novel doctrine of "secondary coasts", simply means that only the United States would enjoy any protection from the cut-off effect.

The radial projection of jurisdiction, on the other hand – the only form of

extension of jurisdiction that is consistent with the distance principle, means *reciprocal* cut-off, *mutual* cut-off, *shared* cut-off – in brief, *equitable* cut-off. Small wonder, then, that we have heard nothing from the United States about President Reagan's proclamation of a 200-mile exclusive economic zone based on the distance principle. Small wonder then that the United States has not even tried to explain away the fact that its lobster line of 1974 and its Northeast Channel line of 1976 swung far more sharply in front of the state of Maine than does the Canadian line.

The United States theory of historical "complete dominance" can hardly fill the legal vacuum in the United States case, nor resolve its internal conflicts or contradictions. For the theory is unfounded in reality and relies largely on factors that are remote in time; that have little or nothing to do with the real object of this dispute; that can serve only to divert attention from the practical meaning of an equitable result in this case; and that would promote rather than minimize disputes, and indeed call into question various forms of international co-operation. Nor, finally, is the legal vacuum filled by the *ex post facto* construction the United States now seeks to place upon the Truman Proclamation.

In brief, like the Holy Roman Empire – which was neither holy, nor Roman, nor an empire – the line the United States has advanced as representing an equitable, natural, single maritime boundary is neither equitable, nor natural: nor is it even single, because the United States remains embroiled in a conflict between its own various lines and its own mutually incompatible approaches.

Against all this, Mr. President, Canada affirms that the Canadian case is based on a clear and simple set of principles that are firmly grounded in equity and in law, and on a clearly defined and legally recognized method. Most important of all, the Canadian line achieves the overriding goal of an equitable result in the light of all the relevant circumstances.

RÉPLIQUE DE M. WEIL

CONSEIL DU GOUVERNEMENT CANADIEN

M. WEIL: Monsieur le Président, Messieurs les juges, les problèmes juridiques fondamentaux de la présente affaire ont été traités par l'agent du Canada ou vont l'être par lui dans sa déclaration finale.

Il m'appartient essentiellement d'apporter les réponses du Canada aux questions de M. Gros, à la deuxième question de M. Mosler et à la première question de M. Cohen.

Je voudrais cependant faire précéder ces réponses de quelques observations de caractère général.

Derrière la querelle des méthodes, derrière la guerre des graphiques, derrière le conflit des lignes, se profile, me semble-t-il, une opposition infiniment plus profonde entre les Parties.

Cette opposition se situe à un double niveau.

C'est, en premier lieu, le concept même de délimitation maritime que le Canada et les Etats-Unis abordent de manière tout à fait différente.

Pour le Canada, l'opération de délimitation consiste à déterminer et à mettre en œuvre le critère juridique permettant de fixer la ligne à laquelle devront s'arrêter les juridictions et droits souverains de chacun des deux Etats, alors que chacun des deux Etats aurait un titre juridique à exercer ces droits au-delà de cette ligne. C'est pour le Canada une opération globale dans laquelle les côtes des deux Parties et les circonstances pertinentes afférentes aux deux Parties doivent être appréhendées en même temps.

Les Etats-Unis, au contraire, abordent l'opération de délimitation de manière unilatérale. Il s'agit, pour eux, moins de délimiter les droits de même nature des deux Etats que de définir l'extension des droits et juridictions des Etats-Unis en partant des côtes des Etats-Unis et des circonstances pertinentes qui concernent les Etats-Unis. Quant aux droits et juridictions du Canada, ils ne sont pris en considération que de manière résiduelle. Aux yeux des Etats-Unis, l'opération de délimitation est appréhendée dans la perspective d'une seule des Parties. Le concept même de délimitation se trouve du même coup nié.

Il n'est pas surprenant, dans ces conditions, qu'un abîme sépare les Parties en ce qui concerne le droit régissant la délimitation.

Pour le Canada, la frontière maritime doit être le fruit d'une méthode qui trouve ses racines et sa justification dans des principes et règles de caractère juridique. Le caractère équitable du résultat est certes fondamental, mais le cheminement qui aura permis d'y aboutir importe lui aussi. Pour le Canada, il existe un *corpus juris* régissant la délimitation.

Pour les Etats-Unis, au contraire, le droit de la délimitation se ramène à une proposition unique: le résultat, dit-on, doit être «équitable» – et l'«équité», bien sûr, c'est le banc de Georges tout entier aux Etats-Unis. Sur le cheminement qui aura permis d'y aboutir, le droit, à en croire les Etats-Unis, n'a tout simplement rien à dire.

Par-delà les divergences sur le contenu du droit applicable, c'est en définitive l'existence même d'un tel droit qui est mise en question par les Etats-Unis et qui est en cause devant la Chambre.

Concept de la délimitation, contenu – voire existence – du droit de la

délimitation: tels sont, me semble-t-il, les aspects fondamentaux qui constituent l'ossature des thèses qui s'affrontent devant la Chambre.

Ce sont ces deux aspects que je souhaiterais, Monsieur le Président, Messieurs les juges, évoquer au cours de mon intervention.

LE CONCEPT DE DÉLIMITATION

Au terme du premier tour des plaidoiries orales il apparaît, plus clairement encore qu'à la fin de la procédure écrite, que la position des Etats-Unis repose essentiellement sur le postulat de la projection frontale et perpendiculaire, jusqu'à l'extrême limite de la juridiction nationale des Etats-Unis, de leurs côtes dites «primaires» situées dans le fond du golfe du Maine.

C'est sur ce postulat que les Etats-Unis ont construit leur opération offensive contre la ligne canadienne et la méthode d'équidistance qu'elle utilise. C'est ce postulat aussi qui, de manière parallèle et corollaire, leur sert d'explication – et est invoquée par eux comme justification – de leur propre revendication à une frontière située aux alentours du chenal Nord-Est, quelle que soit par ailleurs la méthode à laquelle on recourrait pour tracer une frontière permettant d'obtenir ce résultat.

Dans leurs plaidoiries orales, les Etats-Unis ont cependant revêtu leur thèse d'un habillage nouveau: celui du *cut-off effect*, c'est-à-dire de l'effet d'amputation. Les Etats-Unis ont probablement estimé que leur postulat de base avait plus de chances d'être regardé comme acceptable par la Chambre s'ils le présentaient sous les couleurs du non-empiétement que sous celles de la hiérarchie des côtes: mais si l'emballage est plus chatoyant, la marchandise est bien toujours la même.

Dans l'espoir d'améliorer la présentation de leur produit, nos amis américains ont tenté en outre de lui conférer une apparence scientifique, destinée à parer du prestige de la mathématique une thèse qu'il leur était difficile de défendre sur le plan du droit et de la raison.

Les Etats-Unis ont-ils renforcé leur situation en s'appuyant aussi massivement sur la thèse de l'amputation, revêtue des séduisants attraits des sciences exactes?

Je ne le pense pas.

Sur le plan scientifique la théorie du *cut-off*, telle qu'elle nous a été présentée il y a quelques jours, ne résiste pas à la critique. Mes collègues établiront ce point, et je ne m'y arrêterai pas.

Sur le plan juridique la démonstration soi-disant mathématique de nos adversaires est tout simplement dépourvue de pertinence: le droit international ne fait pas dépendre la validité juridique d'une délimitation d'effets géométriques tels que ceux qui nous ont été présentés. Sur cet aspect essentiel j'aurai l'occasion de m'expliquer tout à l'heure.

La théorie de l'amputation, telle qu'elle nous a été présentée, suppose préalablement acquis, à titre d'axiome, que les côtes latérales de la Nouvelle-Ecosse ne peuvent, par nature même, avoir de projection vers l'intérieur du golfe ou que, si elles avaient une telle projection, celle-ci n'aurait pas de valeur suffisante pour subsister face à la projection des côtes du Maine et du New Hampshire. De même que l'on expliquait, il y a quelques siècles, que l'opium fait dormir parce qu'il a une vertu dormitive, les Etats-Unis expliquent aujourd'hui à la Chambre que les côtes américaines du fond du golfe doivent se projeter dans une direction perpendiculaire, à travers le banc de Georges et au-delà, parce que leur vertu inhérente est de s'épanouir par-dessus toutes les projections que pourraient engendrer les autres côtes bordant le golfe du Maine. C'est, très

exactement, résoudre la question par la question ou, si l'on préfère, supposer le problème résolu. Dans la terminologie de nos adversaires, *cut-off effect*, *coastal front extension*, *primary coasts* opposées aux *secondary coasts* apparaissent comme autant de manières différentes d'exprimer la même idée, et cette idée repose sur un cercle vicieux.

La vérité est que nos adversaires méconnaissent la nature même d'une opération de délimitation.

Dans son arrêt de 1969, la Cour a défini la délimitation comme une opération qui: «consiste essentiellement à tracer une ligne de démarcation entre des zones relevant déjà de l'un ou de l'autre des Etats intéressés» (*C.I.J. Recueil 1969*, p. 22, par. 20).

L'idée qui se trouve à la base de toute délimitation est donc l'existence de projections maritimes d'égales valeur des deux Etats intéressés et l'impossibilité de permettre à chacun de bénéficier de l'intégralité de sa projection. Par hypothèse, le problème de la délimitation ne se pose que s'il n'existe pas d'espaces maritimes suffisants pour que chacune des côtes en présence puisse se projeter jusqu'à l'extrême limite de la juridiction nationale. Permettre un épanouissement complet à l'une d'entre elles serait nier le droit à l'existence de l'autre.

C'est pourquoi toute opération de délimitation maritime consiste par définition à amputer la projection maritime des deux Etats intéressés par rapport au droit que chacun aurait eu si l'autre n'existait pas. L'empiétement et l'amputation – l'*encroachment* et le *cut-off* – sont inhérents au concept de délimitation. Toute délimitation implique nécessairement une amputation réciproque. Cela est particulièrement vrai dans le cas d'une concavité, où les projections maritimes se chevauchent inévitablement faute de pouvoir s'épanouir librement.

Ce que le droit international exige, c'est que cet empiétement et cette amputation s'effectuent de manière équitable et raisonnable. Ce que le droit international interdit, c'est que cet empiétement et cette amputation privilégient d'une manière inéquitable l'une des côtes au détriment de l'autre ou conduisent à accorder un rôle disproportionné, c'est-à-dire déraisonnable, à une configuration mineure et non essentielle de l'une des côtes au détriment de l'autre côte.

Comme dans un mariage, il faut être deux dans une délimitation et, comme dans un bon mariage, une délimitation conforme au droit se fait au prix de concessions réciproques.

De là il découle que nos adversaires sont à côté de la question lorsqu'ils tentent d'établir, géométrie à l'appui, que la ligne canadienne ampute les côtes américaines du fond du golfe d'une partie de la projection maritime à laquelle elles auraient droit si la côte canadienne n'était pas là où elle est et ce qu'elle est. Bien sûr – on en revient toujours à cette constatation – la délimitation serait plus favorable aux Etats-Unis si la Nouvelle-Ecosse n'existait pas et si la côte canadienne prolongeait en un alignement rectiligne la côte américaine de l'autre côté de la frontière terrestre.

Mais l'inverse est tout aussi vrai. La projection maritime de la Nouvelle-Ecosse vers le sud-ouest pourrait s'épanouir infiniment plus librement – *to the end of the coastal jurisdiction*, comme diraient nos amis américains – si la côte américaine n'était pas, elle aussi, là où elle est et ce qu'elle est.

Il suffit de se reporter aux développements de M. Colson et aux graphiques qu'il a produits devant la Chambre, et plus particulièrement aux figures 10, 15 et 29, pour constater que ce n'est jamais sous l'angle de l'amputation mutuelle qu'il envisage la délimitation, mais toujours, toujours, sous celui de l'Etat appelé *State A*, c'est-à-dire les Etats-Unis.

L'illustration la plus frappante de cette approche unilatérale nous est fournie

(232) par la figure 29 A présentée par les Etats-Unis et qui est reproduite sous le numéro 114 de nos propres illustrations. Commentant ce graphique, M. Colson a dénoncé le caractère inéquitable de la ligne d'équidistance dessinée en rouge, en relevant que cette ligne ampute la projection maritime de l'Etat A, et il a vanté les mérites de la ligne de couleur noire parce qu'elle tourne suffisamment tôt, a-t-il dit, pour rendre l'effet d'empiétement et d'amputation supportable à l'Etat A (VI, p. 317-318).

La partie adverse me répondrait sans doute qu'elle n'a pas négligé les droits de l'Etat B et que mon accusation d'unilatéralisme n'est pas fondée. L'Etat B reçoit, nous a-t-on dit et répété sur tous les tons du côté adverse, *a band of maritime jurisdiction* à l'intérieur du golfe, et il s'épanouit librement devant sa côte qui fait face au large sur l'Atlantique (VI, p. 248, 308, 318 et 323).

Mais comment, Monsieur le Président, ne pas être frappé par deux faits? L'extension libre et sans entrave vers le large concédée par nos adversaires à l'Etat B au titre de sa côte faisant face au large, c'est-à-dire à la côte de la Nouvelle-Ecosse faisant face à l'Atlantique, s'effectue dans une région située de toute manière hors de la juridiction nationale de l'Etat A, c'est-à-dire des Etats-Unis. Il n'y a là aucun problème de délimitation, car seul le Canada est concerné. C'est comme si nous venions arguer devant la Chambre que la ligne canadienne est équitable parce qu'elle laisse aux Etats-Unis l'intégralité de leurs projections maritimes devant les côtes du Rhode Island!

Quand à la «bande» maritime concédée au Canada devant la côte de la Nouvelle-Ecosse donnant sur le golfe, rien ne saurait mieux illustrer son caractère résiduel que cette phrase des plaidoiries adverses: *«the United States line leaves to Canada's southwest coastal front a generous band of maritime jurisdiction extending seaward.»* (VI, p. 323.) L'idée est claire. Pour les Etats-Unis cette côte canadienne n'aurait dû engendrer aucune projection maritime – ce que montrent la ligne américaine de départ avant ses ajustements et la fameuse (114) figure 31 du contre-mémoire américain. C'est en quelque sorte par grandeur d'âme que les Etats-Unis, après avoir envisagé d'enclaver cette côte par une étroite ceinture de 12 milles marins, ont consenti à lui «laisser» la «généreuse bande» dont on nous a si abondamment parlé. Le Canada serait mal venu à se montrer trop gourmand, on nous l'a dit très clairement: *«the aspirations of the coastal front of Canada must be reduced»* (VI, p. 321).

Pour me résumer, une délimitation exige la prise en compte simultanée et globale des côtes des deux Parties. L'exigence d'une délimitation équitable et raisonnable n'est que la traduction juridique de cette proposition de bon sens. S'enfermer, comme le font nos adversaires, dans le point de vue de l'un des Etats, l'Etat A – les Etats-Unis – et ne regarder la situation que dans la perspective de l'un des Etats – l'Etat A, les Etats-Unis – c'est le contraire d'une approche raisonnable et équitable.

La Cour a défini la négociation par la prise en considération raisonnable par chacune des Parties des droits de l'autre (*Compétence en matière de pêcheries, C.I.J. Recueil 1974*, p. 33, par. 78). Il paraîtrait difficilement concevable que dans le règlement judiciaire – dont chacun sait depuis l'arrêt des *Zones franches de la Haute-Savoie et du Pays de Gex* qu'il «n'est qu'un succédané du règlement direct et amiable» (*C.P.J.I. série A n° 22*, p. 13) – une démonstration géométrique caractérisée par son égocentrisme et son unilatéralisme se substitue au droit.

Je ne résiste pas à la tentation de reprendre modestement à mon compte ce que l'illustre Maurice Bourquin a dit à cette même place il y a plus de trente ans:

> «Je n'ai jamais été très fort en mathématique et j'avoue que des formules de ce genre m'impressionnent beaucoup. Elles me remplissent d'une sorte de

crainte respectueuse. J'ai fait ce que j'ai pu pour saisir le mécanisme de ce système... Ce que j'en ai compris est suffisant pour en apprécier la valeur juridique.» (*C.I.J. Mémoires, Pêcheries*, vol. IV, p. 256.)

(232) Ce que j'ai compris en regardant attentivement la figure 29 A des Etats-Unis, qui est, je le répète, la figure 114 de notre procédure orale, c'est ceci. Une fois que tout a été dit et vu, laquelle de ces deux lignes ampute-t-elle plus manifestement la côte de l'un des Etats? Laquelle comporte-t-elle une amputation réciproque et raisonnablement balancée? La réponse, me semble-t-il, saute littéralement aux yeux: la ligne rouge, qui stylise la ligne canadienne, est à coup sûr la plus raisonnable; la ligne noire, qui stylise la ligne américaine, protège certes les droits de l'Etat A, mais sacrifie ceux de l'Etat B et, de ce fait, est inéquitable et déraisonnable.

Puis-je me permettre à présent, Monsieur le Président, Messieurs les juges, de vous inviter à vous tourner en ma compagnie vers la carte de la région qui porte le numéro 116 de la procédure orale? Cette carte ne comporte pas la bathymétrie; elle ne dessine pas le banc de Georges; elle se concentre sur la configuration côtière, dont les deux Parties s'accordent à reconnaître la primauté. Sur cette carte figurent la ligne canadienne et la ligne d'équidistance stricte. Si l'on aborde cette illustration avec un regard nouveau, peut-on dire, je me permets de poser la question, qu'elle fait apparaître «de prime abord» *(on the face of it)*, comme le dit l'arrêt de 1969, un effet d'amputation «anormal» ou «déraisonnable» sur les espaces maritimes des Etats-Unis? Sur cette carte, plus encore peut-être que sur toutes les autres, la réponse ne paraît guère discutable.

LE CONCEPT DE DROIT DE LA DÉLIMITATION

Dès lors que les Etats-Unis envisagent la délimitation comme une opération destinée à assurer la prééminence de leur propre point de vue, on ne pouvait guère s'attendre à ce qu'ils conçoivent le droit régissant la délimitation de la frontière maritime unique sous la forme de règles juridiques propres à assurer la prise en considération équilibrée et raisonnable des côtes des deux Parties.

Sans doute nos distingués contradicteurs n'ont-ils pas cessé d'insister sur la primauté de la géographie côtière et sur la nécessité de tenir compte dans la délimitation, avant toute autre chose, de la relation géographique entre les côtes des Parties et les espaces maritimes en cause (**VI**, p. 246, 254, 255, 256, 263, 268, 274, 281-282, 286, 324 et 457), et de cela nous ne pouvons que nous féliciter.

D'un autre côté, cependant, le processus qu'ils préconisent pour l'opération de délimitation ne part pas de la géographie pour arriver à la ligne en passant par la mise en œuvre de méthodes appropriées; il commence d'emblée par la ligne – c'est-à-dire par le résultat – sans se préoccuper du droit dont la méthode est le fruit et la géographie le point d'appui. Cela a été dit par M. Stevenson (**VI**, p. 286), répété par M. Colson (**VI**, p. 310-311), réaffirmé par M. Robinson:

> «Equitable principles and an equitable solution are the master. The particular method or methods of reaching an equitable solution in accordance with those principles are but the servant.» (**VI**, p. 456.)

La séquence normale qui mène à la ligne en partant du droit et de la géographie, et en passant par la méthode qui jette un pont entre eux, est purement et simplement renversée, puisqu'on commence par la fin.

Mais les Etats-Unis vont plus loin encore. Non seulement le choix de la

méthode succède au tracé de la ligne, mais ce choix n'est soumis à aucune règle de droit et ne présente d'autre intérêt que de justifier *a posteriori* le tracé retenu.

J'ai déjà dénoncé dans ma précédente intervention la thèse selon laquelle «any method or combination of method that produces an equitable result may be applied» (**VI**, p. 169). Nos adversaires ont repris cette proposition (**VI**, p. 310) au cours du premier tour des plaidoiries orales. Mais ils la poussent à présent si loin qu'ils en arrivent à ne plus attacher d'importance à leur propre méthode, et ils déclarent s'en remettre à la Chambre pour choisir elle-même la ou les méthodes conduisant au résultat qu'ils souhaitent. Cette surprenante attitude, qui consiste à prendre du recul par rapport à ses propres thèses juridiques et à dire en quelque sorte à la Chambre: «Donnez-nous ce que nous voulons, c'est-à-dire le banc de Georges, et justifiez-le comme vous voulez», a trouvé son expression la plus remarquable dans la bouche de M. Stevenson:

> «The United States does not exclude that the Chamber may be attracted to another method or methods that produce a result satisfying the equitable principles and relevant circumstances...» (**VI**, p. 286.)

Si l'on pousse l'analyse un peu plus loin, on voit apparaître en filigrane derrière les formules américaines une caractéristique d'une grande portée: comme l'a souligné mon ami M. Legault, le cas américain se réduit aujourd'hui à une revendication qui, selon nos adversaires, doit trouver sa justification en elle-même. M. Stevenson a déclaré: «A claim ... is not an entitlement» (**VI**, p. 253), mais aucun de nos distingués contradicteurs n'a justifié le droit des Etats-Unis sur la totalité du banc de Georges – «and beyond», comme l'a répété M. Robinson dans sa déclaration finale (**VI**, p. 458) – autrement que par la valeur prétendue de la revendication elle-même. Quant aux moyens de satisfaire à cette revendication en droit, ils sont considérés par nos adversaires comme indifférents. Je dirais volontiers que le cas américain n'est plus qu'un dispositif dépourvu de motifs. Ce dispositif – à savoir, la totalité du banc de Georges aux Etats-Unis – trouve dès lors sa justification en lui-même et non pas dans les règles et principes du droit international applicables à la délimitation de la frontière maritime unique. Le sort du banc de Georges, au lieu d'être déterminé à la fin du processus judiciaire, est regardé par les Etats-Unis comme le point de départ obligé de ce processus. C'est dire que les Etats-Unis ne demandent pas à la Chambre un jugement motivé en droit, mais une décision qui réalise l'équité telle que définie par les Etats-Unis et vue dans la perspective des Etats-Unis. Et cette équité – qui pourrait en douter? – repose paradoxalement sur ces considérations économiques dont les Etats-Unis essaient de persuader la Chambre qu'elles vicient jusqu'à la racine la position canadienne.

La position américaine ne réserve en conséquence aucune place au droit régissant la délimitation. Dès lors que seul compte le résultat, la démarche juridique devient indifférente. C'est ce qui explique que dans le premier tour de leurs plaidoiries nos adversaires n'aient pas jugé nécessaire de justifier de façon sérieuse aucune de leurs lignes, mais se soient bornés à tenter de jeter le discrédit sur les méthodes enracinées dans le droit qui sont à la base de la ligne canadienne. La position américaine revient en définitive à nier l'existence même d'un droit de la délimitation des espaces maritimes.

Mais il y a plus grave encore. S'il n'existe aucune règle gouvernant le processus de délimitation et si seul compte le résultat, comme le proclament nos amis américains, cela signifie que chaque cas doit être réglé au coup par coup sans qu'il puisse être recouru à une norme préexistante quelconque.

Le Canada n'ignore pas qu'en toute matière c'est le droit lui-même qui «exige une application raisonnable», c'est-à-dire correspondant «aux circonstances de

l'affaire»: la Chambre aura reconnu la formule employée par la Cour dans l'affaire de la *Barcelona Traction* (*C.I.J. Recueil 1970*, p. 48, par. 93). C'est le droit lui-même qui exige qu'une règle générale soit «adaptée à la diversité des situations de fait»: la Cour l'a dit en ces termes dans l'affaire des *Pêcheries* en 1951 (*C.I.J. Recueil 1951*, p. 133) et elle l'a redit en ces mêmes termes en 1969 dans l'affaire du *Plateau continental de la mer du Nord* (*C.I.J. Recueil 1969*, p. 51, par. 94). La nécessité de prendre en compte les circonstances propres à chaque affaire a été répétée avec force tant dans la sentence de 1977 que dans l'arrêt de 1982. L'équité est bien, selon la forte expression de Charles De Visscher, «la norme du cas individuel».

Certes ce n'est jamais la même eau qui coule sous le même pont. Mais de là à contester la légitimité de toute ligne directrice de caractère tant soit peu général, il y a un pas que rien n'autorise, me semble-t-il, à franchir. Par sa nature même la norme juridique doit revêtir un certain degré de généralité, faute de quoi l'une des fonctions fondamentales du droit, celle de la prévisibilité et de la sécurité, ne serait pas remplie. En recourant au règlement judiciaire ou arbitral de leurs différends de délimitation maritime, les gouvernements s'engageraient dans la voie incertaine de décisions qui ne seraient plus justifiées en droit. Par-delà l'existence d'un droit de la délimitation, c'est la fonction même du règlement judiciaire ou arbitral en matière de délimitation que la conception longuement exposée par nos adversaires met ainsi en péril.

Monsieur le Président, Messieurs les juges, la position du Canada est diamétralement opposée.

Si, comme je l'ai indiqué dans mon précédent exposé, deux gouvernements sont libres de définir une frontière maritime qui leur paraît équitable sans se soucier de la méthodologie permettant d'y conduire, la délimitation par voie judiciaire ou arbitrale doit au contraire reposer sur le choix d'une ou plusieurs méthodes enracinées dans le droit. Ce que j'ai cru pouvoir appeler «la méthode de la non-méthode» n'a pas de place ici (**VI**, p. 170 et suiv.).

Les vues du Canada sur le droit applicable à la délimitation de la frontière maritime unique dans notre affaire sont connues de la Chambre, et je n'y reviendrai pas.

Les exposés de nos adversaires ont cependant donné de ces vues une image tellement déformée – pour ne pas dire faussée – qu'il me faut dénoncer quelques-unes des distorsions dont nos thèses ont été l'objet.

Où avons-nous déclaré que la méthode de l'équidistance is «inherently equitable» (**VI**, p. 246 et 457), ou que l'équidistance est en elle-même un principe équitable applicable à toute délimitation maritime parce que aboutissant toujours à un résultat équitable (**VI**, p. 267 et 270)?

Où avons-nous proposé un «very sophisticated way of arguing» afin de suggérer que «what really is important is not the physical geographic relationship between the coasts and the maritime area to be delimited» (**VI**, p. 255)?

Où avons-nous exprimé l'opinion que, si le principe du non-empiétement a pu être applicable à la délimitation du plateau continental, il ne l'est plus à la délimitation des zones des 200 milles (**VI**, p. 260)?

Où avons-nous laissé entendre que le principe de distance pourrait devenir absolu au point d'éliminer toute considération de circonstances géographiques spéciales (**VI**, p. 327)?

Sur tous ces points, Monsieur le Président, la Chambre le sait, non seulement nous n'avons pas dit cela, mais nous avons dit exactement le contraire.

Nos adversaires se sont engagés, plus encore que par le passé, dans une véritable croisade contre l'équidistance. Tout leur effort s'est concentré sur une attaque massive et excessive, non pas tellement contre la ligne canadienne, mais

contre l'équidistance elle-même, présentée comme le mal absolu en matière de délimitation maritime. Sans doute les Etats-Unis continuent-ils à reconnaître du bout des lèvres que l'équidistance est parfois équitable (**VI**, p. 268 et 269-270), mais pour eux ce n'est quasiment jamais l'occasion du «parfois». On nous a longuement expliqué que cette méthode n'est concevable que dans deux hypothèses: celle d'une côte rectiligne et celle d'une concavité dans laquelle la frontière terrestre aboutirait au milieu de la concavité (**VI**, p. 300 et 310) – autant dire presque jamais. On nous a expliqué aussi que cette méthode crée un effet inacceptable d'amputation dans toutes les autres hypothèses – autant dire presque toujours. Tant et si bien que, si l'équidistance est toujours réservée, elle devient une formule creuse, une mention rhétorique, rien de plus.

Ce thème, qui a constitué le leitmotiv des plaidoiries orales de nos amis américains, vise à jeter le discrédit sur la méthode de l'équidistance. Il se situe dans le droit fil de la guerre de religion menée par certains contre l'équidistance au nom des «principes équitables», comme si ces deux concepts étaient antinomiques et comme si l'équidistance était nécessairement inéquitable. Il participe de la campagne qui cherche à opposer la *flexibilité généreuse des principes* équitables au rigorisme aveugle de la géométrie équidistante.

Indépendamment de toute autre considération, on peut se demander, Monsieur le Président, comment tant de gouvernements – y compris les Etats-Unis eux-mêmes – ont pu recourir si souvent à une méthode qui nous a été présentée sous d'aussi sombres couleurs!

L'audience est levée à 17 h 58

VINGTIÈME AUDIENCE PUBLIQUE (4 V 84, 10 h)

Présents: [Voir audience du 2 IV 84.]

M. WEIL: J'ai tenté de montrer hier qu'une opposition profonde sépare les Etats-Unis et le Canada en ce qui concerne le concept même d'une opération de délimitation: opération équilibrée prenant en compte, de manière simultanée et globale, les côtes des deux Parties pour le Canada; opération conçue dans une perspective unilatérale pour les Etats-Unis.

J'ai abordé ensuite ce qui me semble constituer une non moins profonde divergence de vues entre les Parties: je veux parler du contenu, pour ne pas dire de l'existence, d'un droit régissant la délimitation. A la fin de l'audience, j'ai évoqué la croisade entreprise par nos adversaires contre la méthode de l'équidistance, présentée, ai-je cru pouvoir dire, comme le mal absolu en matière de délimitation maritime.

Monsieur le Président, les Etats-Unis semblent ignorer l'extrême commodité et simplicité de la méthode. «Aucune autre méthode de délimitation, a dit pourtant la Cour, ne combine au même degré les avantages de la commodité pratique et de la certitude dans l'application»: son emploi, a-t-elle ajouté, «est indiqué dans un très grand nombre de cas» (*C.I.J. Recueil 1969*, p. 23, par. 22-23). Le tribunal arbitral franco-britannique a précisé que

> «le bien-fondé de ces observations est certainement confirmé par la pratique des Etats; celle-ci montre que jusqu'à ce jour un nombre considérable de délimitations de plateaux continentaux ont été effectuées par l'application soit de la méthode de l'équidistance, soit, assez fréquemment, par quelque variante de cette méthode» (sentence, par. 85).

Le contraste avec la thèse selon laquelle l'équidistance ne serait appropriée que dans des situations tout à fait exceptionnelles est saisissant.

Nos adversaires semblent ignorer également que c'est justement dans des configurations géographiques irrégulières que l'équidistance se révèle la plus appropriée. Ainsi que la Cour l'a déclaré dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* cette méthode a précisément «l'avantage – peut-être aussi l'inconvénient – de reproduire presque toutes les irrégularités des côtes prises comme base» (*C.I.J. Recueil 1982*, p. 88, par. 126).

Nos adversaires semblent ignorer enfin que la méthode de l'équidistance se prête avec une souplesse particulière aux ajustements qui peuvent apparaître nécessaires afin de remédier à l'inconvénient que la Cour avait signalé et de satisfaire à l'exigence d'un résultat équitable. Comme nous l'avons dit au cours de la procédure écrite:

> «La ligne d'équidistance fournit une norme objective pour l'appréciation du caractère équitable de toute autre ligne et pour l'évaluation des effets raisonnables ou déraisonnables, proportionnés ou disproportionnés, équitables ou inéquitables de caractéristiques ou de configurations géographiques particulières.» (III, contre-mémoire du Canada, par. 680.)

Il est curieux de constater que cet avantage, très généralement reconnu à l'équidistance, a été transféré par nos adversaires à la méthode de la perpendiculaire, alors qu'ils ne songent pas un instant à en créditer celle de l'équidistance (VI, p. 322).

A quoi s'ajoutent, bien entendu, le poids particulier conféré à l'équidistance dans notre affaire par l'application de l'article 6, au sujet de laquelle les deux Parties sont d'accord, ainsi que le fait qu'aucune autre méthode, comme je l'ai montré dans ma précédente plaidoirie, n'incorpore autant que l'équidistance les deux composantes du fondement juridique du titre de l'Etat côtier à la zone des 200 milles, à savoir le concept de côtes et celui de distance (**VI**, p. 178 et 189-192).

Il est évident que ces raisons convergentes ne font pas de l'équidistance une méthode juridiquement obligatoire et qu'elles ne conduisent pas à considérer l'équidistance comme constituant en elle-même un principe équitable. Que les choses soient bien claires, Monsieur le Président. Le Canada n'entend pas se placer dans le sillage des thèses soutenues par les Pays-Bas et le Danemark dans l'affaire du *Plateau continental de la mer du Nord*. Le Canada n'entend pas faire appel, si j'ose dire, de l'arrêt de 1969. Le Canada admet parfaitement que l'équidistance soit ajustée – voire, à la limite, abandonnée au profit d'une autre méthode – lorsqu'elle conduit à un résultat inéquitable.

Tel est le cas lorsqu'un accident géographique *mineur* – une île ou un rocher, un saillant isolé de la côte ou un promontoire exceptionnellement long – provoque une déviation *majeure* génératrice d'une amputation ou d'un empiétement déraisonnables.

C'était là le sens que la Commission du droit international et la conférence de Genève attachaient au concept de «circonstances spéciales». Le commentaire de la Commission sur ce qui allait devenir l'article 6 de la convention de 1958 évoquait, à cet égard, «une configuration exceptionnelle de la côte ou encore la présence d'îles ou de chenaux navigables» (Commission du droit international, *Annuaire 1956*, vol. II, p. 300); et les mêmes exemples furent donnés, au cours de la conférence de Genève, par le Commander Kennedy dans une déclaration souvent citée (*Documents officiels*, vol. VI, p. 112).

C'est là également la position de la jurisprudence, dont la terminologie est significative. L'arrêt de 1969 parle ainsi de «la présence de toute caractéristique spéciale ou inhabituelle» (p. 54, par. 101 D), de «l'effet exagéré de déviation» produit par «des îlots, des rochers ou des légers saillants de la côte» (p. 36, par. 57), de «résultats de prime abord extraordinaires, anormaux ou déraisonnables» (p. 23, par. 24), d'une «particularité non essentielle d'où pourrait résulter une injustifiable différence de traitement» (p. 50, par. 91). La sentence arbitrale de 1977 déclare, de son côté, qu'il faut éviter que des «configurations particulières de la côte», des «caractéristiques particulières», des «particularités non essentielles» (par. 100, 101, 251) ne créent une «distorsion dans le tracé de la limite» (par. 100); elle parle d'«effets disproportionnés» (par. 250), de «distorsion radicale de la délimitation, créatrice d'inéquité» (par. 199).

Ce n'est donc pas, contrairement aux affirmations de nos adversaires, toute distorsion, quelque minime qu'elle soit, qui sera condamnée comme génératrice d'inéquité, mais seulement celle qui provoque un «effet exagéré de déviation», qui conduit à une «différence injustifiable de traitement», qui produit des «résultats de prime abord (*on the face of them* dit le texte anglais de l'arrêt) extraordinaires, anormaux ou déraisonnables». Bref, de distorsions mineures, le juge ne tient pas compte: *de minimis non curat delimitator*.

L'observation que j'ai faite au début de mon exposé prend ainsi son véritable sens. Les «minutieux» et «savants calculs» – les *nice calculations* – que le tribunal arbitral a considérés comme inappropriés dans le cadre du test de proportionnalité (par. 27 et 250), et auxquels les Etats-Unis se sont livrés dans notre affaire à propos du *cut off*, sont tout simplement dépourvus ici de toute pertinence juridique.

D'abord, parce qu'on ne saurait qualifier de «circonstance spéciale», c'est-à-dire regarder comme une «particularité non essentielle», l'ensemble de la configuration géographique du golfe du Maine, comme le suggèrent MM. Stevenson et Feldman (**VI**, p. 285 et 333).

Ensuite, parce qu'il resterait encore à démontrer que le caractère «extraordinaire, anormal ou déraisonnable» de l'effet de déviation apparaît «de prime abord», *on the face of it*, *prima facie* – en quelque sorte, qu'il saute aux yeux, qu'il ait quelque chose de manifestement scandaleux. Comme j'espère l'avoir montré
(232) à l'aide du graphique de nos adversaires et de la carte de la région, tel n'est manifestement pas le cas.

Une dernière considération enfin. M. Stevenson a certes admis que dans notre affaire la Chambre prenne en considération la méthode de l'équidistance, mais il a contesté qu'elle doive prendre en considération également une ligne d'équidistance ajustée avant de passer à une méthode radicalement différente (**VI**, p. 285).

En limitant la mission du juge à la seule prise en considération de l'équidistance stricte, les Etats-Unis privent cette méthode de la souplesse et de l'adaptabilité qui font sa force. L'ayant ainsi dépouillée d'une partie de ses qualités, il leur devient plus facile d'en demander le rejet au nom de sa rigidité. L'équidistance, à leurs yeux, ne peut plus alors s'appliquer qu'à titre tout à fait *exceptionnel, et c'est la non-équidistance qui devient la solution* la plus fréquente. Les données de la question se trouvent tout simplement inversées.

De l'avis du Canada, si l'équidistance n'est jamais juridiquement obligatoire indépendamment du caractère équitable de son résultat, elle ne peut pas non plus être réduite au rang d'une méthode d'application exceptionnelle et marginale.

Que certains aient pu songer naguère à la surestimer, cela est un fait. Mais cela ne justifie pas les Etats-Unis à la traîner dans la boue. Elle ne méritait pas cet excès d'honneur; elle ne mérite pas cette indignité.

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Monsieur le Président, Messieurs les juges, j'en viens à présent à la réponse du Canada à certaines questions posées par les membres de la Chambre.

Réponses aux première et deuxième questions de M. Gros et à la seconde question de M. Mosler

M. Gros et M. Mosler ont demandé certaines précisions relatives au point A et au triangle.

M. Gros a d'abord posé une question intéressant à la fois le point A et le triangle. Il a demandé s'il s'agit là:

> «[d']éléments agréés définitivement par les Parties dans le compromis, l'un comme point de départ, l'autre comme zone d'arrivée de la ligne de délimitation entre les zones maritimes relevant de leur juridiction dans la zone du golfe du Maine qu'il est demandé à la Chambre de fixer» (**VI**, p. 461).

De l'avis du Canada, la réponse à cette question est affirmative. Sans doute, comme je l'ai dit, la délimitation entre le point de départ et la zone d'arrivée ne représente-t-elle qu'un maillon – de grande importance, sans doute, mais partiel quand même – de l'ensemble de la frontière maritime qui séparera un jour les Etats-Unis et le Canada depuis le point terminal de la frontière terrestre dans le fond de la baie de Passamaquoddy jusqu'au-delà du triangle en direction du rebord externe de la marge continentale. Cette délimitation n'en sera pas moins définitive, et il n'est pas question que le point de départ ou le point d'arrivée à fixer par la Chambre à l'intérieur du triangle puissent être remis en cause le jour où les Parties s'attacheront à délimiter le segment compris entre le point terminal

de la frontière internationale délimitée en 1925 et le point A, ainsi que le segment au-delà du point terminal fixé par la Chambre à l'intérieur du triangle.

Le compromis conclu en 1979 s'analyse comme une convention internationale par laquelle les Parties ont, entre autres, fixé d'un commun accord un point et une zone par lesquels doit passer leur frontière maritime. Cet accord a la même valeur que celui par lequel elles ont fixé d'ores et déjà un premier segment de leur frontière maritime en 1925. Quant à la fixation précise du point d'arrivée à l'intérieur du triangle et au tracé de la frontière que définira la Chambre, leur caractère définitif a été décidé conventionnellement par les Parties dans le paragraphe 4 de l'article II du compromis, aux termes duquel: «Les Parties acceptent comme définitive et obligatoire pour elles-mêmes la décision de la Chambre rendue en application du présent article.»

Il ressort de là que la décision de la Chambre ne sera pas seulement «obligatoire» pour les Parties conformément au Statut de la Cour, mais qu'elle aura aussi un caractère «définitif» interdisant sa remise en cause.

Les indications que je viens de donner permettent de répondre aux deux questions de M. Gros qui intéressent plus spécifiquement le point A.

M. Gros demande d'abord si les Parties reconnaissent que:

> «tout accord éventuel entre elles sur la limite de leurs eaux territoriales à partir de l'actuelle limite maritime internationale ne pourrait modifier le point de départ de la ligne de délimitation unique demandée à la Chambre» (VI, p. 461).

De l'avis du Canada, la réponse ne saurait là encore être qu'affirmative. Le point A ayant un caractère définitif, le segment à délimiter à partir du point terminal de la frontière internationale devra aboutir nécessairement au point A en application de l'article II, paragraphe 4, du compromis.

M. Gros pose la même question «à propos de la réserve faite en cas d'arbitrage sur la souveraineté de l'île Machias Seal et du North Rock» *(ibid.)*.

Là encore, et pour les mêmes raisons, la réponse est affirmative. Le Canada est d'accord avec les Etats-Unis pour estimer que la présente affaire et la solution que lui apportera la Chambre ne sauraient préjuger de la souveraineté sur l'île Machias Seal et sur North Rock, revendiquée à la fois par les Etats-Unis et le Canada. Par conséquent, et corollairement, toute solution, qu'elle soit conventionnelle, judiciaire ou arbitrale, qui sera apportée à la question de la souveraineté sur Machias Seal et sur North Rock, laissera intact le choix du point A comme point de départ du segment tracé par la Chambre et comme point d'arrivée du segment à délimiter en aval du point terminal actuel de la frontière internationale.

Le Canada croit nécessaire d'apporter une précision à ce sujet.

(15) Si la Chambre veut bien se reporter aux indications données dans notre mémoire sur la construction de la ligne canadienne (par. 335-336 et fig. 32) ainsi qu'à la figure 117 de la procédure orale, elle constatera ceci:

Premièrement: le point A ne correspond pas à un point d'infléchissement *(turning point)* canadien; il est situé entre les points d'infléchissement 41 et 42 de la ligne canadienne.

Deuxièmement: le point d'infléchissement 41 (situé en amont du point A et donc en dehors de la délimitation soumise à la Chambre), le point 42 (situé au sud du point A et qui fait donc partie de la délimitation soumise à la Chambre) et le point 43 (situé plus loin encore vers le sud) sont contrôlés par deux points voisins – «s» et «t» – situés sur l'île Machias Seal. C'est seulement au point d'infléchissement 44 que le point de contrôle «u» situé sur le récif de la Trinité, sur la côte de la Nouvelle-Ecosse, vient faire sentir son influence.

L'agent du Canada m'a autorisé à indiquer que le Canada ne verrait pas d'objection à ce que la frontière joigne directement, par une ligne droite, le point A, désigné conventionnellement par les Parties, au point d'infléchissement 44, à partir duquel la ligne canadienne cesse d'être contrôlée par l'île Machias Seal.

Il faut préciser que les Etats-Unis n'ont soulevé aucune objection à cet égard *au moment où le point A a été choisi d'un commun accord des deux* gouvernements comme point de départ de la délimitation à demander à la Chambre. Si nous avons pris l'initiative, Monsieur le Président, de soulever nous-mêmes ce problème ici, c'est afin de mettre la Chambre – et nos adversaires – en présence de tous les éléments du problème et d'éviter à la Chambre toute difficulté dans le tracé de la ligne.

M. Gros a également posé une question relative plus spécifiquement au *triangle. Avec son autorisation, je tenterai* d'y répondre après avoir fourni une réponse à la deuxième question de M. Mosler relative elle aussi au point A.

M. Mosler demande si

> «le fait que le point A est fixé à l'endroit défini par l'article II du compromis peut ... avoir, de l'avis des Parties, une incidence quelconque sur la méthode de la délimitation de la frontière maritime unique dans le secteur intérieur de la région du golfe du Maine» (VI, p. 462-463).

Ainsi que j'ai cru pouvoir le dire dans ma précédente intervention, le point A a été choisi parce qu'il constituait le point d'intersection des deux lignes officiellement publiées par les deux Parties lors de la conclusion du compromis. Le point A, ai-je précisé, est un point qui a été jugé équitable à la fois par les Etats-Unis et par le Canada ; c'est un point américain aussi bien qu'un point canadien (VI, p. 160).

Pour le Canada, le point A s'imposait, et s'impose encore aujourd'hui – exactement comme tous les autres points de sa ligne – comme un point d'équidistance. Pour les Etats-Unis, au contraire, le point A se rapportait, comme tous les autres points de leur ligne de 1976, à des considérations qui, si elles sont difficiles à identifier, sont à tout le moins étrangères à l'équidistance.

Dans ces conditions, il ne serait pas raisonnable d'inférer de la situation du point A que les deux Parties auraient été implicitement d'accord pour retenir une délimitation fondée sur la méthode d'équidistance. C'est là une thèse que le Canada n'a jamais défendue.

Cela dit, la situation du point A a néanmoins, de l'avis du Canada, une incidence sur la méthode de délimitation à l'intérieur du golfe. Le fait qu'il ait été choisi sans considération de l'emplacement de la frontière terrestre, et loin de son point terminal, atteste de la volonté implicite des Parties, telle que cette volonté s'est exprimée dans le texte même du compromis, de ne pas faire dépendre la méthode de délimitation – et, du même coup, le tracé de la frontière maritime unique – de la direction de la frontière terrestre et de l'emplacement de son point terminal. D'autre part, la situation même du point A, entre les côtes opposées et de configuration complexe des deux pays dans cette région et dans l'alignement de direction nord-est/sud-ouest avec le segment de la frontière internationale délimité en 1925, ne manque pas d'intérêt pour le tracé de la frontière maritime unique. Il faut noter enfin qu'en choisissant le point A comme point de départ de la délimitation, les Etats-Unis ont par là même considéré qu'une ligne passant par ce point ne se rapproche pas de leurs côtes au point de les amputer de leur projection maritime.

En bref, si la situation du point A ne commande pas directement la méthode de délimitation de la frontière maritime unique dans l'intérieur du golfe du

Maine, elle constitue à tout le moins une indication précieuse – fût-elle indirecte – que, selon le Canada, la Chambre ne devrait pas négliger.

J'en viens à présent à la question de M. Gros relative au triangle. Cette question est rédigée comme suit:

> «En ce qui concerne le triangle, quelle est la position juridique des Parties quant à l'effet de leur choix de ce procédé dans le compromis sur la compétence de la Chambre qui doit juger selon les règles et les principes de droit applicables à l'affaire?» (VI, p. 461.)

La relation entre le triangle et la compétence de la Chambre se situe au cœur de l'affaire.

J'ai déjà eu l'occasion il y a quelques jours d'en évoquer l'un des aspects. J'ai cru pouvoir relever que si la Chambre a pleine compétence pour fixer le point terminal de sa délimitation à n'importe quel point dans le triangle, le choix qu'elle fera dans l'exercice de cette compétence aura une répercussion directe sur l'étendue de la solution judiciaire et, par là même, sur l'importance du segment qui restera, le cas échéant, à délimiter au-delà de la limite de 200 milles. Ce choix, ai-je rappelé, aura également une incidence sur le prolongement ultérieur de la frontière en direction du rebord externe de la marge continentale. Selon l'emplacement de ce point terminal, il existera ou non une «zone grise» d'une plus ou moins grande étendue, zone dans laquelle – je me permets de le rappeler – la juridiction sur le plateau continental appartiendrait à l'un des Etats, tandis que la juridiction sur les eaux surjacentes ou bien n'appartiendrait à aucun Etat ou bien appartiendrait à l'autre Etat. Dans les deux cas, la situation serait complexe (VI, p. 162-164). C'est pourquoi j'avais cru pouvoir faire part à la Chambre du souhait du Canada de voir fixé le point terminal de la délimitation sur la limite extérieure des 200 milles de l'une des Parties et de voir évitée la création d'une «zone grise» d'une ampleur excessive (*ibid.*, p. 164). Mais il va de soi que ce souhait n'affecte en rien la plénitude de la compétence de la Chambre en ce qui concerne le choix du point terminal à l'intérieur de la zone triangulaire. A cet égard la compétence de la Chambre est discrétionnaire.

Le problème soulevé par M. Gros me semble comporter un second aspect, sur lequel je voudrais m'arrêter quelques instants.

Dans quelle mesure la zone en forme de triangle choisie par les Parties s'impose-t-elle à la Chambre? En d'autres termes, que se passerait-il si la mise en œuvre des principes et règles de droit applicables à l'affaire conduisait la Chambre à la conclusion que la ligne appropriée ne passerait pas par le triangle? Une question analogue pourrait d'ailleurs se poser pour le point A.

Pour répondre à cette question, on peut évoquer la manière dont le tribunal arbitral franco-britannique a conçu sa mission en 1977. Dans cette affaire, ainsi que le relate la sentence, ce n'est pas seulement sur des points, mais sur des segments entiers de la frontière de plateau continental dans la Manche que les Parties étaient tombées d'accord au cours des négociations antérieures, et le tribunal a demandé aux agents des Parties, pendant la procédure orale, de «confirmer formellement» les segments «acceptés par les Parties» et «d'identifier de façon précise les points extrêmes respectifs de chacun des segments acceptés» (par. 111). Les Parties ayant accédé à cette demande, le tribunal a pris acte des segments acceptés, et une illustration en a été insérée dans la sentence (par. 117). Le tribunal a en conséquence décidé de limiter sa mission au comblement de ce qu'il a appelé les «solutions de continuité» – *gaps* dans la version anglaise – dans le tracé accepté par les Parties (par. 121). Le tribunal s'est ainsi considéré comme lié à la fois par le point initial et par le point terminal des segments qui avaient fait l'objet d'un accord des Parties. Cette solution, il faut le

reconnaître, lui était d'autant plus facile que les Parties étaient d'accord pour considérer que dans la Manche, à l'exception du secteur des îles Anglo-Normandes, la limite devait être en principe la ligne médiane, et que tel était également l'avis du tribunal (par. 103).

Il convient par ailleurs de ne pas perdre de vue la place centrale qu'occupe l'accord des Parties dans le droit de la délimitation maritime. Après la proclamation Truman, l'article 6 de la convention de 1958 sur le plateau continental ainsi que les articles 73 et 84 de la convention de 1982 sur le droit de la mer illustrent cette philosophie conventionnelle que la Cour a développée de son côté dans l'arrêt de 1969, dans lequel elle a évoqué «l'obligation primordiale d'effectuer la délimitation par voie d'accord» (*C.I.J. Recueil 1969*, p. 42, par. 72).

Dans un domaine différent, il n'est pas sans intérêt de rappeler que dans l'affaire des *Minquiers et Ecréhous* la Cour a relevé que par le compromis la France et le Royaume-Uni l'avaient priée de décider auquel de ces deux pays appartenaient les îlots et rochers litigieux et que, ce faisant, les Parties avaient exclu le statut de *res nullius* et celui de *condominium*. C'est dans le cadre ainsi défini par le compromis que la Cour a conçu sa mission (*C.I.J. Recueil 1953*, p. 52).

Selon le principe énoncé par la Cour permanente dans l'affaire des *Zones franches de la Haute-Savoie et du Pays de Gex* que j'ai déjà eu l'occasion d'évoquer hier, «le règlement judiciaire des conflits internationaux, en vue duquel la Cour est instituée, n'est qu'un succédané au règlement direct et amiable de ces conflits entre les Parties» (*C.P.J.I. série A n° 22*, p. 13). Dans ces conditions il n'y a rien d'anormal, semble-t-il, à ce que deux gouvernements, qui sont tombés d'accord sur un segment ou sur un point de leur frontière maritime, ou sur une zone à l'intérieur de laquelle un segment ou un point doit se situer, en fassent part au juge ou à l'arbitre, qui continueront l'œuvre que les Parties n'ont réussi qu'à commencer. Loin de constituer un empiétement sur la liberté d'appréciation du juge, la coexistence entre une délimitation partiellement négociée et une délimitation partiellement décidée par le juge se situe, me semble-t-il, dans le droit fil de la mission judiciaire.

C'est exactement de cette manière que se présente la situation entre les Etats-Unis et le Canada dans la région du golfe du Maine. Pour le moment, seul le point de départ et la zone dans laquelle doit être fixé le point d'arrivée ont pu faire l'objet d'un accord entre les deux gouvernements. Ce qui est demandé à la Chambre aujourd'hui, c'est de combler le «gap» entre la certitude du point de départ et la semi-certitude du triangle d'arrivée.

Il ne me paraît pas en définitive y avoir de contradiction entre le pouvoir d'appréciation de la Chambre inhérent à sa mission judiciaire en matière de délimitation maritime, d'une part, et sa compétence liée qui lui prescrit d'arrêter la délimitation à l'intérieur du triangle, d'autre part.

Réponse à la première question de M. Cohen

J'en arrive à présent, Monsieur le Président, à la première question de M. Cohen:

> «Is there a unifying, dominant, legal principle that is to provide the basis for the location of a single maritime boundary that unites the old Continental Shelf Doctrine and the old Coastal Fisheries Doctrine to the new 200-mile zone?» (VI, p. 464.)

De l'avis du Canada, c'est le concept d'adjacence qui constitue le dénominateur commun de la doctrine du plateau continental, de celle des zones de pêche et de la nouvelle zone des 200 milles.

Le rôle de l'adjacence dans la théorie du plateau continental a été mis en lumière par la Cour dans son arrêt de 1969, lorsqu'elle a défini le plateau continental comme le prolongement naturel du territoire de l'Etat côtier sous la mer et qu'elle a énoncé le principe que la terre domine la mer. La Cour a ajouté que la délimitation doit s'opérer «de manière à attribuer, dans toute la mesure du possible, à chaque Partie, la totalité des zones du plateau continental qui constituent le prolongement naturel de son territoire sous la mer...» (*C.I.J. Recueil 1969*, p. 53, par. 101). La Cour a confirmé cette approche dans son arrêt de 1982 (*C.I.J. Recueil 1982*, p. 48; p. 71, par. 73-74).

En ce qui concerne les zones de pêche, une étude autorisée de la convention de Genève de 1958 sur la pêche et la conservation des ressources biologiques de la haute mer souligne l'importance de l'article 6 de cette convention, selon laquelle l'Etat riverain «a un intérêt spécial au maintien de la productivité et des ressources biologiques dans toute partie de la haute mer adjacente à sa mer territoriale». «Le critère suffisant de cet intérêt est la proximité géographique», relève cette étude, puisque «c'est ... l'Etat riverain qui ... sera le mieux qualifié pour assurer la responsabilité de cette conservation» (A. Gros, *Recueil des cours*, t. 97, Académie de droit international de La Haye, 1959, p. 42-43; reproduit dans les annexes au mémoire des Etats-Unis, II, vol. V, annexe 93).

Quant à la nouvelle zone des 200 milles, sa définition même, telle qu'elle figure à l'article 55 de la convention des Nations Unies sur le droit de la mer, incorpore la notion d'adjacence. L'histoire de l'émergence de cette institution du droit international atteste que c'est l'exploration et l'exploitation des ressources naturelles des espaces maritimes adjacents au territoire étatique qui est à l'origine de cette doctrine. Le principe de distance constitue l'expression concrète de cette idée d'adjacence.

Comme l'a écrit, avec l'intuition et la perspicacité qu'on lui connaît, Charles De Visscher, «dans l'ordre des délimitations maritimes, le concept de la contiguïté ou proximité géographique tient une place capitale» (*Problèmes de confins en droit international public*, Paris, Pedone, 1969, p. 105).

* * *

Monsieur le Président, Messieurs les juges, ici s'achève mon intervention. Permettez-moi d'exprimer à la Chambre, ainsi qu'à nos adversaires et amis américains, ma gratitude pour l'attention qu'ils m'ont accordée. Permettez-moi aussi de dire publiquement au Gouvernement et aux agents du Canada, mes amis MM. Legault et Hankey, ma reconnaissance pour la confiance dont ils m'ont honoré en m'associant à cette procédure.

REJOINDER OF PROFESSOR JAENICKE

COUNSEL FOR THE GOVERNMENT OF CANADA

Professor JAENICKE: Mr. President, distinguished Judges, I am deeply honoured to appear before the Chamber today and to have the privilege of participating in the presentation of Canada's case.

Sixteen years ago, I had the high honour and privilege to appear before the International Court of Justice as Agent and counsel for the Government of the Federal Republic of Germany in the *North Sea Continental Shelf* cases. It was in these that the Court established the basic principles and rules for continental shelf delimitation. These principles and rules have since been further developed by the jurisprudence and have become the legal framework for the determination of maritime boundaries.

Canada believes that its boundary claim is firmly grounded in this jurisprudence. It is Canada's opinion, on the other hand, that the case of the United States lacks such foundation. In this context, it has fallen on me to deal with the following issues in the light of the jurisprudence. First, the identification of the extension of the coasts of the Parties into the area of delimitation; second, the alleged cut-off effect by the equidistance boundary of Canada on the United States coast of Maine, and, third, the role of Article 6 of the Continental Shelf Convention in the determination of the single maritime boundary.

It is common ground that the fundamental rule of international law which governs this case is that the maritime boundary must be determined in accordance with equitable principles in order to produce an equitable result. It follows therefrom that the method for determining the boundary remains subordinate to this fundamental rule. However, the United States alleges that by relying on distance and proximity from the coast, Canada wants to reverse this order and to re-establish the theory that the equidistance method is inherently equitable, a theory which has been rejected by the Court (VI, pp. 267-268). This allegation misconstrues Canada's argument. Canada has never taken the position that the equidistance method is *per se* equitable; Canada has always justified its claim to an equidistance boundary by relying on the geographical relationship of the coast to the area of delimitation, by relying on adjacency in terms of distance from the coast as the source of title to the maritime areas off its coast.

Now, both Parties are in agreement that the coasts which abut the Gulf of Maine area are the starting point for the delimitation, and that these coasts are the basis from which their jurisdiction extends over the adjacent maritime areas, irrespective of the nature of title to these areas. This point of departure is consistent with the established jurisprudence of this Court in continental shelf delimitation (*Tunisia/Libya* case, *I.C.J. Reports 1982*, p. 61, paras. 73-74). This point of departure remains valid also for the extension of jurisdiction of the coastal State over the water column under the concepts of the fishery zone or the exclusive economic zone because here, too, adjacency to the coast is the basis of title. The position of Canada that adjacency in terms of distance from the coast is the primary factor in determining the appurtenance of a maritime area, is, consequently, in accordance with the Court's approach to the delimitation of maritime zones. Where the extensions of opposite or adjacent coasts overlap, the degree of adjacency therefore indicates the equitableness of a boundary between them unless other factors render such a boundary inequitable.

While the Parties are in agreement that the extension of their jurisdiction into the area of delimitation is controlled by their respective coasts, they differ profoundly in applying this principle to the geography of the Gulf of Maine area. In particular, they hold divergent views with respect to the direction into which their coasts extend into the area of delimitation. They hold divergent views as well with respect to the weight to be given to each of these coasts in areas where their extensions overlap.

Mr. President, distinguished Judges, we touch here one of the most crucial issues of the dispute. The whole argument of the United States against the Canadian equidistance line, as well as the whole of the United States argument in support of its perpendicular line, rests primarily, if not solely, on the premise that all the coasts abutting the Gulf of Maine area extend, by necessity, only in a single direction, namely perpendicular from the coast of Maine at the back of the Gulf into the Atlantic (VI, pp. 254, 256-258, 292). By allowing coastal front extension only in this one direction, the United States is able to deny the lateral coasts of the Gulf of Maine the right to an extension into the Gulf and, consequently, to downgrade them to so-called "secondary" coasts, ignoring their extensive frontage onto the area of delimitation.

It is Canada's position that this concept of coastal front extension has no foundation, either in the law or in the jurisprudence of this Court (VI, pp. 35-38, 62-66). In support of this proposition, the United States relies heavily on the *North Sea Continental Shelf* cases, the *Tunisia/Libya* case, and the *Bay of Biscay* delimitation as precedents for a delimitation involving a coastal concavity. I fail to see how these delimitations could provide any support for the propositions of the United States. They do not support the proposition that a coast at the back of the concavity determines the direction of the extensions of the other coasts which abut the concavity, and they do not support the proposition that the coast at the back of the concavity must necessarily have an extension into the area outside the concavity. These three cases prove rather the opposite; I shall come back to them later. But a correct assessment of the precedential value of these three delimitations should not overlook the fact that all of them were mainly, if not exclusively, concerned with a delimitation inside a large geographical concavity. In all three cases the area of delimitation was confined to the area between the lateral coasts of the concavity, and the boundaries do not extend substantially outside this area. In contrast, the area of delimitation in the present case extends far beyond the concavity of the Gulf of Maine.

Permit me now to submit some general considerations on the problem of coastal front extension in complex geographical situations such as coastal concavities of the size of the Gulf of Maine. These considerations will address the following points:

First, the relevance of the general geographical configuration of the area of delimitation.

Second, the method used to define the direction into which the coastal fronts abutting the area of delimitation converge and overlap.

Third, the weight to be accorded to each of the coastal fronts which extend into the area of delimitation.

I have deliberately used the expression "coastal front" in this context without however accepting the position of the United States that the extension of jurisdiction of the coastal State over the maritime adjacent area must of necessity be perpendicular to such a coastal front. I use the expression "coastal front" here only to make clear that the extension of a coast into an area of

delimitation must be determined by the general relationship of the coast facing that area, and not by small-scale coastal features which have no relevance in determining the general relationship of a coast to the area of delimitation.

I shall now deal with these three considerations in more detail. My first consideration relates to the necessity of respecting the general configuration of the coasts which abut the area of delimitation. The Court has always clearly distinguished between the coastal geography in general and incidental coastal features which may have a distorting influence on the construction of the equidistance boundary. On the other hand, the existence of extensive coastal fronts around a concavity cannot be ignored and the geography has to be taken as it is; facts of nature which limit the amount of maritime areas which may be attributed to a coast cannot be changed. The law of maritime delimitation which is founded on the geographical interrelation between the land and the adjacent sea cannot remedy facts of nature which might not allow a coast to have a natural prolongation or extension up to the outermost limit of coastal State jurisdiction. It is in the relatively confined area of the concavity that a comparable and equitable treatment of the coasts abutting that maritime area must be effected by the delimitation.

Whether a concavity is more than a mere incidental coastal feature may be an issue in certain geographical situations, and will generally depend on a consideration of configuration and size. The present case, however, presents no difficulty in identifying the several extensive coastal fronts of the Parties which enclose the Gulf of Maine, including the extensive Canadian coasts around the Bay of Fundy and the southwestern part of Nova Scotia. By no stretch of the imagination could they be treated as incidental features. Thus, in order to identify the direction into which the coasts of the Parties extend and overlap within the area of delimitation, one has, by necessity, to start from all the coastal fronts around the Gulf, and not merely from the coast at the back of the Gulf.

My second consideration relates to the method for defining the direction in which the coasts of the Parties extend and converge within the area of delimitation.

In the *North Sea Continental Shelf* cases the particular geographical situation was characterized by three adjoining States in the southeastern concavity of the North Sea. In its Judgment, the Court observed that in the North Sea the natural prolongations of several States converged, met and intercrossed (*I.C.J. Reports 1969*, p. 49, para. 89 *(b)*), and the Court observed further that one possible method to cope with that geographical situation was the construction of equidistance boundaries on the basis of the coastal fronts of the three States (*ibid.*, p. 52, para. 98). Thus, the Court was clearly of the opinion that the natural prolongation of the three States extended from different directions into an area of convergence. I need not remind the Chamber that the boundaries which were later agreed between the parties followed the pattern of convergence.

In the *Tunisia/Libya* case, the Court was faced with a geographical situation where the coasts of the two parties formed a large two-sided concavity of considerable size; this situation is shown here by Figure 118 in your red folder. Here again the Court defined the area where the extensions of the coasts of Libya and Tunisia overlapped, as the area relevant for the delimitation and clearly proceeded from the assumption of converging and overlapping extensions of both coasts. Here again the Court did not recognize any privileged direction of the extension of either of the two parties in spite of the fact that Libya, in her pleadings, had relied on the general northward direction of the natural prolongation of the North African landmass into the Mediterranean Sea (*I.C.J. Reports 1982*, p. 52, para. 57; p. 80, para. 111; p. 85, para. 120). In the

result, the Court indicated a boundary line which, although primarily founded on the conduct of the parties, came very near to an equidistance line between the two mainland coasts of Libya and Tunisia, as shown here by Figure 119, and here at the lightbox (the black line is the boundary indicated by the Court, and the red line is a hypothetical equidistance line constructed from both mainland coasts of Libya and Tunisia).

Now, in both the *North Sea* and the *Libya/Tunisia* cases, the Court did not indicate precisely in which direction the coasts extended into the area of delimitation, or whether there was a focal point upon which the natural prolongations or extensions of the coasts of each of the parties converged. The United States, in putting forward its coastal front extension concept, seems to maintain that the extension of a coast into the area of delimitation, should, by some unexplained necessity, be perpendicular to the general direction of that coast. The Court has not recognized such a rule of perpendicular extension and such a rule would indeed be incompatible with the diversity of geographical configurations.

It is true that the Federal Republic of Germany, in its pleadings in the *North Sea Continental Shelf* cases, submitted among others, a construction of perpendicular extensions from the coastal fronts around the concavity into the area of their convergence (*I.C.J. Pleadings*, Vol. II, p. 189) which is shown here as Figure 120, in your folder and now at the lightbox. Distinguished counsel for the United States has referred to this construction, but did not point to the fact that the extensions of the coastal fronts were shown to converge – a construction which is diametrically opposed to the United States theory of a single perpendicular extension of the one coastal front at the back of the concavity. I have already mentioned that the Court accepted the approach of the Federal Republic of Germany as a possible method of achieving an equitable delimitation (*I.C.J. Reports 1969*, p. 52, para. 98). This was a clear recognition of the convergence of the coastal front extensions in the North Sea and I have already mentioned that the agreed boundaries followed the same pattern of convergence.

It seems to me, that the question of the direction into which a coast extends into the area of delimitation has to be decided in light of the geographical relationship between that coast and the area of delimitation.

Only in this way can the particular geographical situation in each case be adequately reflected. Thus, it may happen that the coastal extensions converge into a focal point as in the southeastern concavity of the North Sea, or intercross as in the area of delimitation between the Libyan and Tunisian coasts, or meet each other along a median line as in the Channel, or extend nearly parallel to each other as the English and French coasts abutting the Atlantic. The Anglo-French Continental Shelf arbitration shows that different perspectives must be taken where different coasts abut the different parts of the area of delimitation.

I shall now turn to my third consideration relating to the weight to be accorded to the extensions of different coastal fronts. Each coastal front that abuts the area of delimitation extends the jurisdiction of the coastal States into this maritime area; it does so regardless of the direction from which the coast faces the area of delimitation. This does not mean that each coastal front could necessarily claim an unlimited reach in any geographical situation; the existence, location and length of other coasts which are equally entitled to extend into the same area of delimitation, restrict, necessarily, the extension of each of them. This is particularly so in a concavity where the relation of the coasts of both States to each other is predominantly one of oppositeness. The fact that each of the coasts that face each other is equally entitled to extend jurisdiction into the area of delimitation is not, as the United States asserts, merely a restatement of

the principle of equidistance; it is rather a necessary consequence of the equal application of the rule that coastal States have jurisdiction over the maritime areas adjacent to their coasts. It is the equal application of this rule to geographical facts of the same order. It does not follow therefrom that an equidistance boundary must necessarily be equitable. Incidental coastal features which do not reflect accurately the position of the coastal fronts in relation to the area of delimitation, might have a distorting effect on the course of the equidistance boundary disproportionate to their size, and may render an equidistance boundary inequitable in the special circumstances of the case. In geographical situations, however, where comparable coasts face each other this Court has clearly recognized the principle that each of the two coasts has an equal right of extension into the area of delimitation between them. It may suffice to refer in this respect to the Judgment in the *North Sea Continental Shelf* cases where the Court pointed out that in cases where the natural prolongations of adjacent States tend to converge and overlap, as in the North Sea, such a situation should be resolved by an equal division of the overlapping areas (*I.C.J. Reports 1959*, p. 52, para. 99). This shows clearly that the Court proceeded from the principle that coasts which abut the same area of delimitation have to be treated equally, regardless of the direction in which they project into the area of delimitation.

In contrast to this established jurisprudence, the United States proposes a new theory of hierarchy of coasts. The United States asserts that its coast at the back of the concavity of the Gulf of Maine has a stronger claim to the maritime area in front of that coast than the other comparable coasts enclosing the Gulf, even though these coasts are situated at an equivalent distance from that maritime area. The United States even asserts that its coast at the back of the Gulf has a stronger claim to the maritime areas outside the Gulf notwithstanding that the coasts abutting this area are much closer. Such a theory of hierarchy of coasts, asserted on the ground that the coast at the back of the Gulf faces the Atlantic while the other coasts do not, has no foundation in the law or in the jurisprudence. The theory that only those coasts of the Parties which face the Atlantic are relevant for the delimitation proceeds from the United States untenable macrogeographical perspective; the United States cannot escape the fact that if one focuses on the area of delimitation, there are other coasts of extensive length that abut that area. Because of their existence these coasts cannot be ignored and in fact they are much closer to a greater part of the area of delimitation and in particular to the area outside the Gulf. All these coasts abut the area of delimitation and because they face and extend into the area of delimitation, they are also relevant for the delimitation.

On the basis of the foregoing considerations we are now able to identify the natural prolongations or extensions of the coasts of the Parties into the Gulf of Maine area in accordance with the actual geography of the area.

(240) I show first the inner area, as demonstrated by Figure 121 in your folder and here in the lightbox. In the inner area where the coasts of the Parties enclose the concavity of the Gulf, the shape and size of the area of delimitation and the position of the coastal fronts of the Parties vis-à-vis each other and the area of delimitation support the view that the extensions starting from their respective coastal fronts converge. This perspective is here demonstrated. Even if one accepts the United States view that a coastal front extends into the adjacent maritime area in a perpendicular direction and if one applies this concept to the coasts of the Parties enclosing the Gulf, it would follow that the coastal fronts of the Parties extend and converge towards an area approximately at the midpoint of the closing line of the Gulf. This supports Canada's position that a boundary

line reaching this point achieves an equal, and at the same time equitable, division of the area of overlap of both coastal fronts which abut this area.

(241) This is the outer area in your folder, Figure 122 now at the lightbox. In the area outside the Gulf, the extensions of the coastal fronts of the Parties which abut this area are more difficult to identify. The area where the delimitation takes place is laterally unbounded and comprises areas which extend well beyond a hypothetical 200-mile limit from the coastal front of Maine, and the area lacks, due to its undefined shape, a focal point into which the coastal extensions converge. The Canadian and United States coasts which are the basis of the extension of jurisdiction into this area – the controlling coasts – are the coasts of Nova Scotia and Massachusetts which extend from inside the Gulf around its lateral entrance points and then face the Atlantic on both sides of the Gulf, here seen in red. They extend into the area of delimitation at different angles. The extensions of these controlling coasts first meet from an opposite direction along the closing line of the Gulf; then their extensions gradually move into a position where they converge and overlap, until finally they extend nearly parallel into the open Atlantic. This appreciation of the geographical situation in the area outside the Gulf is not a mere reflection of the equidistance principle; it rather reflects and takes account of the properties of this particular geographical situation. It is nothing more than the consequence of a geographical fact that the coastal State's jurisdiction extends into the sea without any predetermined direction; it extends, as Canada has termed it, "radially" (V, Canadian Reply, pp. 62-63, paras. 150-153; pp. 233-237, paras. 564-568). It may suffice here to call attention to the situation of an isolated insular coast in the ocean. Nobody would deny, for example, the Hawaian islands a radial seaward projection of their coasts in all directions.

I submit respectfully that this perspective of coastal front extension reflects the geography of the Gulf of Maine more accurately than the portrait given by the United States of a perpendicular extension of the coast of Maine throughout the

(242) Gulf into the open Atlantic. I have illustrated it in Figure 123 of Canada's oral argument. That approach disregards the coasts of Massachusetts and Nova Scotia which are much nearer to most of the area of delimitation outside the Gulf, and it disregards the fact that the coast of Maine would then have to claim areas which are more than 200 miles away from its coastal front (the dotted red

(242) line on Figure 123 here indicates the distance of 200 miles from the coastal front of Maine).

The Chamber adjourned from 11.25 a.m. to 11.40 a.m.

Mr. President, distinguished Judges, I shall now turn to the second issue of my presentation: this is the argument of the United States that the equidistance boundary as proposed by Canada cuts off the eastern coast of Maine from its seaward extension into the Atlantic. The United States uses the expression "seaward extension", but means in fact "extension into the Atlantic". The use of these two expressions is not only a question of different wording, but rather a question of substance. The United States cannot deny that the coast of Maine gets its proper share of extension within the Gulf. The United States attempts, nevertheless, to convey the impression that the coast of Maine at the back of the Gulf must, by necessity, have an extension into the open Atlantic, although the Canadian and United States coasts facing the Atlantic on both sides of the Gulf are the real basis of both States' jurisdiction over the maritime areas outside the Gulf up to the 200-mile limit and beyond. The central issue is therefore the following: does the fact that the lateral coasts prevent the coast at the back of

the Gulf from extending further out into the sea constitute a cut-off that is inequitable within the meaning of the jurisprudence of the Court? Or, is it rather a fact of nature that cannot be ignored and a geographical configuration that has to be taken as it is? I might recall in this respect the dictum of the Court in the *North Sea Continental Shelf* cases where in reviewing the relevant factors of geography the Court pointed out that it did not consider that "markedly pronounced configurations" can be ignored (*I.C.J. Reports 1969*, p. 51, para. 96). They could not be ignored even if they, as one must add, affect the extension of other coasts. Thus, the issue comes down to the following question: Is the confinement of the extension of the coast of Maine to the inner area of the Gulf by the coasts of Massachusetts and Nova Scotia a cut-off which must be qualified as being inequitable? Canada does not believe that it is so.

The geometric models which the distinguished counsel for the United States used in support of his contention that the Canadian line cuts off the coast of Maine cannot prove anything unless the premises on which they are based are correct. But all the geometrical models are built on the premise that coasts abutting a coastal concavity should extend in one direction only and all other coasts which happen to face the area of delimitation within or around the concavity in another direction should not, as of right, be attributed any seaward extension into the maritime areas adjacent to their coasts. As this premise is wrong, the geometrical models do not prove what they are intended to prove. My colleague, Blair Hankey, will be showing that these geometric models have little evidential value.

In the context of my observations, I shall only address the issue whether, and under what conditions, it is inequitable that a coast at the back of a concavity cannot extend further seaward because of the presence of the lateral coasts of the concavity.

Distinguished counsel for the United States has made the point that in all coastal concavities where the terminus of the land boundary is not located at the midpoint of the coast at the back, this would produce a cut-off effect to the disadvantage of that coast (**VI**, pp. 299-300). It is, of course, true that in such a case the lateral coasts will by their very existence and their own extension into the area of delimitation, have an influence on the reach of the extension of the coast at the back. But, whether this is equitable or not cannot be answered *a priori*. It depends essentially on the size and configuration of the concavity. Let me explain this by referring to the situation in the North Sea to which distinguished counsel for the United States has repeatedly referred.

Mr. President, the Chamber is well aware that in the *North Sea Continental Shelf* cases the Court recognized an inequitable cut-off caused by the combined effect of two equidistance lines starting from land boundaries which reached the concavity on both lateral sides. While recognizing this particular effect the Court observed also that neither of the two lines in question, taken by itself, would have produced this effect, but only both of them together (*I.C.J. Reports 1969*, p. 17, para. 7). This can easily be demonstrated by comparing the maps shown at Figure 124 (now on the lightbox). Map A in the left-hand corner shows the hypothetical equidistance boundaries between the maritime zones of the three countries and indicates clearly the cut-off caused by the combined effect of the two equidistance boundaries. Maps B and C, on the right side, show each of the equidistance lines taken by itself, as if there were only two countries bordering the concavity of the North Sea. Neither of the two cases, as depicted on Maps B and C, on the right side, show on their face an inequitable result and they would satisfy a proportionality test based on the ratios of coastal lengths and maritime areas attributed to them.

The delimitation agreed between France and Spain in the *Bay of Biscay*, likewise, does not support the theory put forward by the United States. If you would look at Figure 125 in your folder and now on the lightbox – this figure shows the Bay of Biscay with the agreed boundary line. The coastal front of France immediately north of the land boundary terminus at the corner of the concavity is certainly prevented by the agreed boundary line from extending into the open Atlantic, as it should do so under the United States theory of perpendicular extension of coasts into the area outside the concavity.

Nevertheless, such a boundary was apparently not considered inequitable by the parties to this boundary agreement. Therefore, this precedent, too, does not confirm the assertion that the position of the terminus of the land boundary at any other than at the midpoint of the back of a coastal concavity will necessarily lead to an inequitable cut-off of the coast at the back. Nor do we know of any other precedent involving a delimitation in a coastal concavity of the size of the Gulf of Maine which would confirm such a theory of the United States.

In view of these precedents there is no reason for concluding that an equidistance boundary in a coastal concavity starting from any other than the midpoint of the coast at the back automatically cuts off this coast inequitably. The real effect of such boundaries depends always on an appreciation of all the geographic facts in each particular case.

(31) The United States has, in its pleadings (II, Memorial, Fig. 25, Reply, Fig. 5), referred to a diagram which I used in the pleadings of the Federal Republic of Germany in the *North Sea Continental Shelf* cases in order to show the dimensions of the distorting influence of a small convex protrusion of an (206) otherwise straight coastline on the course of an equidistance boundary (Figs. 32 and 126 of Canada's oral argument); this was a figure which was already Figure 32 in the red folder, now shown again as Figure 126 and here on the lightbox on the left side. The essence of this diagram was to show how a small convex feature of the coast may attract a disproportionately large area if – and this is important – if the projection of that feature is small in comparison to the distance the boundary reaches out into the sea. That such a geographical situation could render the strict application of the equidistance method inequitable has been recognized by the jurisprudence and by State practice, and the method has been adopted of giving reduced effect or no effect at all to such incidental coastal features.

Apart from Cape Cod and Nantucket where the rationale of this diagram is relevant, the geographical configuration in the Gulf of Maine area is quite different from that shown in the diagram; this is so for two reasons: first, we are not confronted with a protrusion of a coastline, but with a concavity; second, we are not confronted with an incidental coastal feature within one coastal front, but with a concavity formed by several large coastal fronts. Let me explain this in more detail.

First: there is an important difference in the effect of convex and concave coastal features. The existence of a concavity in a coastline does not normally have a substantial effect on the course of an equidistance line outside the concavity, no matter whether the coast at the back of the concavity belongs to one or other of the parties. This is so because the coasts abutting the outer area on both sides of the concavity will control the course of the line. This corresponds to the fact that these coasts are the geographical basis of jurisdiction over the maritime areas outside the concavity. To accord a coast at the back of the concavity an influence on the course of the boundary in the area outside the concavity would, therefore, be tantamount to compensating that coast for being disadvantaged by geography, at the expense of those coasts which have clearly a stronger claim to the area.

Mr. President, distinguished Judges, this is indeed a claim for an equitable share which has not been recognized in the jurisprudence. I would like to repeat it: such a compensation for the coast at the back would mean nothing more than a claim for an equitable share which has not been recognized in the jurisprudence.

Second: the size of the concavity and the fact that it is not a mere incidental feature, but a configuration formed by several coastal fronts of considerable length, is a distinguishing element of decisive force. In coastal concavities of the size of the Gulf of Maine the extension of the lateral coasts into the concavity is no less "seaward" than the coast at the back. It would be an inadmissible macrogeographical perspective to assert that only an Atlantic-facing coast could have a "seaward" extension. The waters of the Gulf are part of the sea no less than any part of the Atlantic. The lateral coasts inside a concavity of that size can claim a comparable if not a greater extension into that area as the coast at the back of the concavity. Where a coast lies nearly 100 nautical miles behind the entrance of the concavity, it does not seem to be inequitable that that coast cannot extend into areas outside the concavity where the other coasts are twice as close to that area.

Distinguished counsel for the United States has referred to a number of small-scale diagrams of hypothetical equidistance boundaries in different regions of the world which the Federal Republic of Germany used in its pleadings in the *North Sea Continental Shelf* cases, among them the Gulf of Maine area (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, pp. 43-49). The diagrams are reproduced as Figures 127 and 128 in your folder; 127 is now in the lightbox. These diagrams were meant to show a variety of complex geographical situations where the equidistance method might create problems. They were meant to demonstrate that equidistance is not *per se* equitable in all cases, but each case has to be judged on its merits. None of the geographical situations shown is comparable to the others and no general conclusions can be drawn therefrom. I must stress the fact that the Federal Republic at that time did not pass any judgment on the equitableness of one or the other hypothetical boundary shown; nor did the Court do so when it referred in a general way to them. It may be interesting to repeat what the Federal Republic had to say in introducing these diagrams:

> "Since the rights of coastal States to the continental shelf are based upon geographical contiguity or identity with the non-submerged contiguous coast, it may not seem unreasonable to take propinquity to the coast as a main criterion for delimiting the shares of neighbouring States in the continental shelf. Even this point of view cannot justify that a single point on a salient part of the coast should decide the allocation of extensive sea areas. This would mean promoting a single geographic factor, the importance of which is very questionable, to an absolute determinant, while leaving other factors entirely out of account." (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, p. 42.)

These introductory remarks to the diagrams shown reveal clearly that the Federal Republic of Germany used these diagrams in order to show the effect of incidental coastal features on the equidistance boundary, but not to deny a coast, whatever be its location or direction, its right of extension into the adjacent maritime area. Also the Gulf of Maine area figured as an example where the boundary might be difficult to achieve (Fig. 128, now on the lightbox). If one looks objectively at the diagram of the Gulf of Maine area, it is readily apparent that the perpendicular which was also hypothetically shown in this

diagram does cut off the Nova Scotian coast from its extension into the sea while the equidistance line distributes the impact of the concavity on the extensions of the coasts evenly among all of the coasts surrounding the Gulf.

In concluding this part of my pleading I would respectfully submit that the United States has failed to show that an equidistance boundary would inequitably cut off the eastern part of the coast of Maine from the sea.

I shall now turn to the last part of my presentation which will deal with the place of Article 6 of the Continental Shelf Convention in the determination of a single maritime boundary.

Both Parties are in agreement that Article 6 is still binding law between the Parties (VI, p. 24; p. 284). As Article 6 is treaty law, it takes precedence over the principles and rules of customary or general international law as far as Article 6 governs the determination of the single maritime boundary. The Parties, however, hold divergent views as to the extent to which the single maritime boundary must be delimited in accordance with Article 6.

I shall address first the question of the applicability of Article 6 to the determination of the single maritime boundary under the terms of the Special Agreement.

The United States rejects the application of Article 6 as a matter of treaty obligation in the circumstances of this case because the single maritime boundary does not solely delimit the continental shelf. Thus, according to the United States the equidistance method does not possess an obligatory force in the sense understood by the Court of Arbitration in the Anglo-French Continental Shelf case (VI, p. 284).

The United States has failed to explain why the fact that the Parties have agreed that a single boundary should be delineated for the continental shelf and the fishery zone means that the Continental Shelf Convention does not any more apply to the continental shelf component of their respective maritime zones. Article 2 of the Special Agreement requests the Chamber to decide the course of the single maritime boundary between the continental shelf and fishery zones of Canada and the United States; this does not necessarily imply the different régimes of the continental shelf and of the fishery zone are thereby merged or in some other way extinguished. If the Chamber is requested to fix a boundary common to both jurisdictional régimes, it necessarily implies that the law and the equities which are relevant either to the continental shelf or to the fishery zone, or to both, have to be taken into account, and that the determination of the boundary must be effected in conformity with them.

As Article 6 of the Continental Shelf Convention is therefore relevant in the present case, it is necessary to ascertain its precise legal impact on the choice of methods for achieving an equitable result in the present case. The United States maintains that the equidistance special circumstances rule of Article 6 does not create a presumption in favour of the equidistance method *(ibid.)*. This fails to distinguish between the interpretation of Article 6 given by the Court of Arbitration in the Anglo-French case where the Court applied Article 6 (Award, para. 70), and what this Court had to say in the *Libya/Tunisia* case, where the Continental Shelf Convention was not binding between the parties and where both parties explicitly rejected the application of the equidistance method. Canada does not dispute the interpretation given to Article 6 by the Court of Arbitration, but Canada does not feel able to draw therefrom, as the United States has done, the conclusion that it is only the formal obligatory force as a matter of treaty law which distinguishes Article 6 from the general principles and rules of maritime zone delimitation. Nor does Canada accept that the Court of Arbitration ruled out any presumption in favour of the equidistance method.

The Court of Arbitration was very careful in expressing its views on the interpretation of Article 6. It is true that the Court of Arbitration pointed out that under Article 6 the question whether the use of equidistance or some other method is appropriate for achieving an equitable delimitation will ultimately be decided in the light of the geographical and other circumstances of the particular case and not by some normative quality of the equidistance method (Award, para. 70). Thus, the Court of Arbitration reaffirmed that Article 6 did not endow the equidistance method with superior normative authority. However, the primary object of the Court's interpretation of Article 6 was to preserve for itself the same liberty of appreciating the geographical and other circumstances relevant to the determination of the boundary as it would have in a case where Article 6 does not apply (Award, para. 69). The Court did not want to make it incumbent on a party to invoke and prove the existence of special circumstances. But, by this interpretation, the Court of Arbitration did not eliminate the requirement of Article 6 to consider first the equidistance method in the light of the geographical and other circumstances. The Court expressly stated:

> "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'." (Award, para. 70.)

This is clear language in my view to the effect that under Article 6 the equidistance method is not to be regarded as merely one of the numerous methods which may in certain circumstances be used to produce an equitable delimitation, a view which was expressly rejected by the Court of Arbitration a few paragraphs earlier (Award, para. 67). Consequently, under Article 6 the equidistance method should be the first method to be considered in the light of all the geographical and other circumstances of the case, but subject of course, at the same time, to the consideration of any special circumstances which might require a variation or adjustment of the equidistance boundary or which might even rule out the application of this method altogether in the delineation of the whole or part of the boundary. Even if the equidistance method and the presence of special circumstances have to be considered together in appreciating all of the circumstances of the case, it remains nevertheless true that under Article 6 the application of the equidistance method or the use of some other method because of special circumstances stand in relationship to each other as rule and exception. This logical relationship between equidistance and special circumstances in the intellectual process of finding the boundary which reflects equitably the circumstances of the case, remains true irrespective of whether the party who relies on special circumstances has a burden of invoking and proving such circumstances. That is primarily a matter of procedure and has nothing to do with the appreciation of the facts and circumstances of the case. The Court of Arbitration doubted whether it followed from the equidistance-special circumstances rule that there was an onus of proof on one of the parties (Award, para. 67), but the Court did not decide this question finally; in any event, however, these procedural considerations of the Court did not affect the substance of the equidistance-special circumstances rule.

In the result, it can be maintained that Article 6 presumes that the equidistance method yields an equitable result as long as no special circumstances are apparent which might cast doubt on the equitableness of such a boundary. Article 6 establishes an obligation to take this method as the first method into

consideration as long as special circumstances do not necessitate the search for adjustment or alternatives; and, if there are no such circumstances, Article 6 requires the application of the equidistance method.

Now, does the particular approach embodied in Article 6 have to be taken into account in determining a single maritime boundary for both continental shelf and fishery zone? The answer must be in the affirmative. The determination of the single maritime boundary requires the balancing of all the factors that are relevant to a delimitation of both jurisdictional régimes against each other to find what boundary responds best to the law and the equities in relation to both continental shelf and fishery zone, and Article 6 is part of the law that governs the continental shelf component of the boundary. It has never been doubted that equidistance is a method suited to fisheries or economic zone delimitation because here geography and coasts control the extension of jurisdiction into the waters adjacent to the coast no less than under the continental shelf concept. Therefore, the mere fact that a single boundary is to divide not only the continental shelves, but also the fishery zones of the parties, is not a valid ground for not observing the equidistance-special circumstances rule as part of the applicable law in determining such a boundary. This is particularly so where the geography of the area of delimitation is the primary basis for the claims of both parties. In the result, therefore, the equidistance-special circumstances rule should also guide the determination of a single maritime boundary.

This concludes my observations on Article 6 of the Continental Shelf *Convention*.

Mr. President, distinguished Judges, all of the considerations in the present case have led me to the conclusion that the equidistance method is the appropriate method to achieve an equitable result in the Gulf of Maine area. The attribution of maritime area by application of this method reflects correctly the relationship of the coasts of the Parties to the area of delimitation in accordance with the principles established by the jurisprudence.

REJOINDER OF MR. HANKEY

DEPUTY-AGENT OF THE GOVERNMENT OF CANADA

Mr. HANKEY: Mr. President, distinguished Judges. It is a great honour and privilege to address the Chamber again on the geographical circumstances relevant to the delimitation. The distinguished Deputy-Agent for the United States made it clear in his intervention on 12 April that the essential objection of the United States to the Canadian line is that it allegedly cuts off the coast of eastern Maine from maritime areas that the United States regards as properly appurtenant to it (**VI**, p. 287). My presentation today will be directed primarily to this central issue of the cut-off effect.

The presentation is divided into four parts. First, it treats the two issues which the United States has identified as the most important geographical issues dividing the Parties, namely the significance for the delimitation of the great concavity that is the Gulf of Maine and of the location of the land boundary within that concavity.

My statement will show that the purpose and the effect of the United States legal-geographical thesis is to treat the Gulf of Maine as an incidental, special feature and to eliminate the effect of its general configuration upon the delimitation. Second, as a necessary prelude to any discussion of cut-off, my statement will review the different positions of the Parties on the basis of appurtenance, namely the United States view of perpendicular extensions of so-called "primary" coastal fronts and the Canadian view of geographical adjacency and the radial projection of coasts. Third, my statement will focus specifically on the two principal United States arguments concerning the alleged "cut-off" effect of the Canadian line mentioned a moment ago: the contention that the line extends too far across the coastal front of Maine, and that it denies to eastern Maine an extension into the outer area. From this discussion it will become apparent that the disagreement between the Parties has now centred upon two principal issues concerning the course of the line to be drawn by the Chamber. Fourth, and finally, I shall address these two critical issues, namely, the point at which the line is to be turned toward the open Atlantic and the direction or bearing which the line should follow in the outer area.

Miss Sarita Verma of the Department of External Affairs will assist in my presentation.

I. The Geography of the Gulf of Maine Area: The Significance of the Configuration of the Gulf and the Location of the Land Boundary

Mr. President, distinguished Judges, the first part of the presentation reviews the two issues which the United States has identified as the two most important geographical issues dividing the Parties: first, the existence of the great concavity that is the Gulf of Maine and, second, the location of the land boundary or international boundary terminus within that concavity (**VI**, pp. 287, 289; 333).

In its written pleadings the United States argued, in effect, that Nova Scotia was an incidental special feature. Treating the Nova Scotia coast as "secondary", allowed the United States to ignore that coast and to draw the boundary

perpendicular to the coasts at the back of the concavity – the coasts of Maine and New Brunswick.

The United States seems to have realized that the argument that a feature of the scale and configuration of Nova Scotia is a special circumstance is simply not persuasive, and so has conceded that Nova Scotia is not, in fact, an incidental, special feature (**VI**, p. 333). It now argues instead that the Gulf of Maine itself constitutes an incidental feature or special circumstance (**VI**, pp. 308; 317-318, 321 and 333). This allows the United States to achieve exactly the same result – to ignore the coast of Nova Scotia – by a somewhat different method of reasoning.

A. The Land Boundary Terminus and "The Axis of the Dispute"

Turning now to the question of the land boundary and the international boundary terminus, there is no need to cover again what has already been said so well by Professor Weil during the first round. But the United States now argues in a new and interesting turn of phrase, that the land boundary or the international boundary terminus and "not the Gulf of Maine", "marks the axis of the dispute" (**VI**, p. 291). This argument is said to respond to a purported Canadian contention – and this is supposed to be a direct quotation from Canada's pleading – that "the Gulf forms the axis of the dispute" (**VI**, p. 290). But, unfortunately, this is a misquote. What Canada actually said is that the Gulf itself "forms the axis of the Gulf of Maine area" (**VI**, p. 59), and it is perfectly clear from the context, that Canada was referring to the geographical axis of a geographical region.

It is difficult to understand what is meant by the term "axis of the dispute". How can a dispute have an "axis"? In so far as this dispute may be said to have a centre, it seems to me that it is Georges Bank. That is the central point in contention. But in so far as the geographical point or points may be said to "mark the axis of the dispute", it is surely impossible to define such a point or points except by reference to the Special Agreement (**I**). And what guidance does the Special Agreement give the Chamber on this point? First, the Special Agreement refers in its title and preamble to the Gulf of Maine area, and second, it fixes the starting-point of the single maritime boundary and the triangle in which it is to end. And these two points clearly situate the dispute in the Gulf of Maine itself and in the area seaward of the Gulf.

Let us examine the United States view of the "axis of the dispute" depicted in Figures 3 and 8 of the United States oral proceedings, reproduced as Figures 129
(33) and 130 of the Canadian Reply. For the convenience of the Chamber these figures, which appear as two separate figures, Figures 129 and 130 in the red binders, are shown here together on the lightbox. The purported "axis" consists of lines drawn from the international boundary terminus along one side of the Gulf only, that is, along the Canadian side of the Gulf, at bearings of 151° and 154° respectively. We have added Point A and the triangle to the United States figures, to permit a comparison between the parameters established in the Special Agreement and the so-called "axis" shown here. Comparing these so-called "axis" lines with Point A and the triangle, it is immediately apparent that the effect of the United States notion of the "axis of the dispute" is to take this dispute out of the geographical context established in the Special Agreement, and to situate it in an entirely different context. For the geographical context established in the Special Agreement was based on the history of the dispute and, in particular, upon the claims of the Parties as they stood at the signature of the Special Agreement in 1919. And the dispute was always about the

delimitation of the Gulf of Maine itself – an easily identifiable geographic entity – and of the area seaward of the Gulf.

The purpose of this new "axis of the dispute", of course, is to shift the focus of the dispute and of the relevant area to the northeast, so that the whole of the Gulf of Maine and the whole of the area seaward of the Gulf – the whole of the area actually in dispute – falls on the United States side of the so-called axis. In an effort to make this new geographical framework appear reasonable and balanced, the United States arbitrarily extends the Gulf of Maine area far to the northeast of the Gulf and assigns to Canada a part of this newly discovered geographical region that never was and, given the geographical facts, never could be, in dispute (**VI**, p. 288). And by this contrivance, the United States seeks to compare the coast of Maine lying at the back of a deep coastal concavity, with the coast of Nova Scotia that abuts the open Atlantic (**VI**, pp. 292-293; p. 325).

But the proper comparison, I submit, is between the coasts of the two Parties lying at the back of the Gulf – the coasts of Maine and New Brunswick on either side of the international boundary terminus. The United States admitted as much when it said that the relevant area should extend "on both sides of the international boundary terminus" (**II**, Memorial, para. 25; **VI**, pp. 291, 293; p. 332).

The United States insistence upon the importance of the location of the land boundary and of the international boundary terminus is strikingly inconsistent with its studied disregard of the coast of New Brunswick. Mr. Colson said that the significance of the land boundary and the international boundary terminus is that "they both mark the fact that all of the coast of Maine belongs to the United States" (**VI**, p. 290). True enough, but they equally mark the fact that all the coast of New Brunswick belongs to Canada. And when this coast is taken into account, it turns out that half of the coastline bordering the Gulf belongs to Canada.

B. The General Configuration or General Direction of the Coasts

Turning now to the issue of coastal configuration, the United States during the first round gave the appearance of changing its argument concerning the determination of a single general direction of the coast. In an apparent abandonment of the macrogeographical thesis developed in its written pleadings, the United States now argues that the alleged similarity of the geographical patterns on the east coast of North America and in the Gulf of Maine area is a happy coincidence, and that the United States case does not rely on macrogeographical considerations (**VI**, pp. 275-276, 291-292).

The United States, nevertheless, continues to insist that there is a single general direction of the coast within the Gulf of Maine. Mr. Colson argued "that there is both a general direction of the coast and a concavity of the coast; in this case the back of the concavity and the closing line across its mouth" (**VI**, p. 291).

The curious notion that it is possible to determine a single general direction for all the coasts of a deep concavity is thus one of the most fundamental issues still dividing the Parties. For unless it is possible to determine such a single coastal direction, the United States contention that the seaward extension of the coast at the back of the concavity has primacy over the seaward extensions of the coasts forming its lateral sides must fall to the ground. And with it will fall the whole United States geographical case, because that case rests on the determination of a single general direction of the coast.

Mr. Colson said

> "the Chamber is in a position to decide this question, and in so doing it may wish to note that the hypothetical closing line from Nantucket to Cape Sable runs at a bearing of 56.7°" (**VI**, p. 292).

Mr. President, we fail to see the connection. A closing line is a closing line. It is important in determining the point where the geography is transformed from a semi-enclosed area to the open waters of the Atlantic. But a closing line is not a coast. It bears no relationship to the actual directions of the coasts within the concavity.

And if the closing line is excluded from the process of determining a single coastal direction, it is clear that the United States has taken account of the purported direction only of the coast at the back of the Gulf, the coast of Maine, excluding the opposite coasts of Nova Scotia and of New Hampshire and Massachusetts at the sides of the Gulf, even though by the United States own admission these coasts together are as long as the coast at the back. And what is the reason for taking account of one coast and excluding the others? The reason is said to be the distinction between primary and secondary coasts, the distinction between coasts which are aligned with the single general direction, and those which are not so aligned. So the United States legal-geographical thesis is based on completely circular reasoning.

That thesis has the practical effect of eliminating the concavity that is the Gulf of Maine. It has the effect of filling up the Gulf with United States land and moving the land boundary terminus from Passamaquoddy Bay to Cape Sable. That effect, I submit, is perfectly evident from the United States illustrations (33) shown on the lightbox (Figs. 3 and 8 of the United States oral proceedings). That effect is meant to remedy what the United States now calls an incidental, special feature by the massive refashioning of the geography of the Gulf of Maine area.

II. The Basis of Appurtenance

The central objection of the United States to the equidistance method in the Gulf of Maine area is that it allegedly produces a cut-off effect in violation of the principle of non-encroachment (**VI**, pp. 256, 287). This cut-off argument will be reviewed in depth later in my statement. One point, however, calls for separate treatment. It is that the United States contention of a cut-off effect is misconceived because it assumes a basis of appurtenance which is wrong in law. And it is to this question of the basis of appurtenance that Part II of my statement is devoted.

The application of the principle of non-encroachment by definition assumes a clear understanding of the basis of appurtenance. And the United States demonstration of a cut-off effect – the demonstration made by Mr. Colson on 12 April (**VI**, pp. 296-302), is nothing more and nothing less than a restatement of the basic United States contention that entitlement is based on a scheme of perpendicularity to an assumed single general direction of the coasts. Mr. Colson said that

> "the area of cut-off is the entire area between the equidistant line and the perpendicular to the general direction of the coast at the international boundary terminus" (**VI**, p. 303).

And his maps and diagrams are based on that assumption – both the abstract

(227) demonstration in Figure 12 and its purported application to the Gulf of Maine area in Figure 16 of the United States oral proceedings.

(230) Mr. President, this United States definition of the cut-off effect can be correct only if the following legal propositions are correct: first and foremost that the basis of appurtenance is perpendicularity to an assumed single general direction of the coast; second, that there exists a factual and legal distinction between "primary" and "secondary" coasts, and that in cases of overlapping coastal extensions, the extension of the so-called primary coast is to predominate; and third, that the international boundary terminus must provide the starting-point from which this scheme of appurtenance is applied, no matter how remote it is from the area being delimited and no matter if other coasts actually abut those sea areas and lie substantially closer to them. In our submission, the United States has failed to demonstrate the validity of any of these three propositions.

The United States scheme of perpendicular extension of coastal fronts works well enough in situations where the coasts are straight. For any system of coastal extension will produce the same result in the simple, straightforward situation presented by a straight coastline. But the complete artificiality and unworkability of that system in any situation where the coast changes direction is manifest

(243) in the illustration shown here as Figure 131. Figure A shows that wherever the coasts are convex, the application of a system of perpendicular extensions of coastal fronts will produce major gaps in the sea areas appertaining to that State. Under the United States system these areas lying immediately off the coast would appertain to no State.

If, however, there were a second State lying less than 400 miles from this State, the second State would be able to exercise jurisdiction over areas that lay substantially closer to the coast of the first State. This situation is illustrated in

(243) Figure C. Here it can be seen that State A, whose seaward extensions are coloured blue, would be enabled, under the United States system, to exercise jurisdiction over vast sea areas lying substantially closer to State B, including this area here lying immediately off State B, but almost 200 miles distant from State A.

In Canada's view, the only approach to coastal extension that can work in a geographical situation where the coasts change their general direction, is the

(243) concept of the radial projection of coasts. As can be seen in Figures 131B and D, wherever the coasts are irregular, this radial projection produces a far more reasonable result than does the system of perpendicular extensions. It does not leave vast gaps in the coastal extensions where the coasts change their general direction, but rather ensures that all the areas within 200 miles of the coast fall under the jurisdiction of the coastal State. Moreover, this scheme of appurtenance is consistent with the principle of geographical adjacency measured from the coast; and it is clearly required by the distance principle as the basis of title to a 200-mile zone.

Mr. Colson's only answer to this argument was to accuse Canada of confusing the determination of the outer limit of the 200-mile zone with the question of delimitation (VI, p. 320). But the idea of a radial projection is inherent in any conception of geographical adjacency, although it clearly draws new strength from the distance principle. Further, it is simply not the case that the distance principle is relevant only to the question of the outer limit of coastal State jurisdiction. Of course, it deals with the outer limit. But it also identifies and defines the area within which a State can exercise its jurisdiction and sovereign rights. And it defines that area, not as a species of platform in front of the coast, but in terms of a wide swath of maritime space surrounding the coast, and extending seaward in all directions out to a specified distance.

The United States says that the distance principle only applies when there are no neighbouring States (VI, p. 320). But, Mr. President, how can the whole basis of appurtenance suddenly be changed by the presence of another State? This was certainly not the approach in the *North Sea Continental Shelf* cases, where non-encroachment was defined in terms of natural prolongation precisely because natural prolongation was the general basis of appurtenance under the customary law of the continental shelf (*I.C.J. Reports 1969*, p. 31, para. 43).

Quite obviously, any State's belt of maritime jurisdiction defined by the distance principle has to be reduced when other States are present. For that is the whole substance of the delimitation process: a matter of determining how great the reduction is to be on each side – or, if I may put it this way – the extent of the reciprocal cut-off. But first it is necessary to identify what is being reduced. And what is being reduced is precisely a zone of jurisdiction that extends in every direction from both coasts. The basic implication of the radial projection of coasts is as simple as that.

But there is a second implication that is equally important. No single direction is legally preferred for the seaward extension of the coast. The United States now explicitly asserts that "there is a preferred direction" (VI, p. 320) – that is, the direction which is perpendicular to the so-called primary coast. But we cannot emphasize too strongly that the United States has offered absolutely no legal justification for this assertion. It is simply a restatement of the basic premises of the United States case.

(243) It might be thought that the illustration in Figures 131A and C carries the United States system to a *reductio ad absurdum*. But we would ask the Chamber (37) to examine the favourite illustration of the United States, produced as Figure 31 of its Memorial, Figure 23 of its Counter-Memorial and Figure 30 of the oral proceedings. The Chamber will see that this figure, which appears in the red (37) binders today as Figure 132 – represents an exact application to the Gulf of Maine area of the system of perpendicular extensions represented in Figures (243) 131A and C. As in Figure 131C, the whole of this pink area here, that is, the whole of the eastern half of the outer sector, which is intended to represent the seaward extension of the United States, lies substantially closer to Canada than it does to the United States.

The difference between the United States conception of perpendicular coastal front extensions and the Canadian conception of the radial projection of coasts is not a matter of abstract theory. For the whole of the United States argument that the outer area appertains to the coast of Maine depends exclusively upon this conception. And the whole of Mr. Colson's demonstration that the coast of eastern Maine is "cut off" from extension into this area by an equidistance line is dependent upon this premise of perpendicular coastal front extension and the related doctrine of primary and secondary coasts. For the doctrine of primary and secondary coasts provides the rationale which allows the coastal extension of Maine to leap over the coastal front extension of Nova Scotia and to attach the outer area to the remote coasts at the back of the Gulf.

One consequence of the United States scheme of perpendicular extensions of coasts is the unlimited seaward extension of eastern Maine. The other, of course, is the enormous gap in the seaward extension of Nova Scotia to the south of Cape Sable, precisely in the area where Nova Scotia's extension toward Georges Bank is most pronounced. Indeed, as the Agent of Canada said in his statement on 2 April, unless the seaward extension of Nova Scotia toward Georges Bank were to be abolished as a matter of principle, as the United States suggests, there can be no reason why Nova Scotia should not extend as far in this direction as the corresponding portions of the United States coast (VI, p. 36).

To this, the United States responds that at Cape Sable, the Canadian coast must transform itself from a so-called primary coast into a so-called secondary coast. And "In that transformation, the aspirations of the coastal front of Canada must be reduced" (**VI**, p. 321). The theory, as we understand it, is that the law as seen by the United States does not only provide for primary and secondary coasts (**VI**, pp. 293-295; pp. 330-331). The United States view of the law also provides for zones of transition between these coasts where there is no seaward extension at all. And thus the doctrine of secondary coasts becomes the justification, not only for the radical curtailment of Nova Scotia's entitlement inside the Gulf of Maine, but also for its total abolition seaward of the closing line.

The United States also argues that Nova Scotia cannot project southward because Cape Sable is a single point between two coastal façades that project in different directions (**VI**, p. 321). Here is another crucial flaw in the United States argument. First, of course, it ignores the true projection of the actual coasts in all directions. Secondly, the question is not one of the projection of a single point but of the relationship of an entire coastal configuration to an
(57) offshore area as shown here in Figure 133, depicting the application of the radial projection of coasts to the Gulf of Maine area.

It is for this reason, of course, that the idea that Georges Bank is not in front of Nova Scotia – the litany we have heard countless times since these proceedings have begun – is nothing more than a substitution of form for substance. The idea of constructing an entire legal edifice on a phrase whose casual usage and imprecise character has been underlined by the Court itself (*I.C.J. Reports 1969*, p. 30, para. 41), highlights the artificiality of the United States theory.

Mr. President, the only solution the United States can propose to what it perceives as a cut-off of eastern Maine is a cut-off of Nova Scotia. And this is where the concept of secondary coasts comes into play.

The doctrine of secondary coasts, which is simply an *ad hoc* repeal of the principle of non-encroachment, is absolutely indispensable to the United States case. Mr. Colson said that the basis of the distinction between primary and secondary coasts was not the general direction of the coasts determined on a continental scale, as we were led to believe in the United States written pleadings, but rather a distinction between the coasts which form the lateral sides of a concavity and coasts which face seaward, by which he meant oceanward or parallel to the closing line of the concavity (**VI**, p. 319) – because all the coasts of a concavity face seaward. And in any event, this new criterion proposed by the United States is just another way of imposing a macrogeographical perspective. For instead of assessing the geographical configuration from the perspective of the coasts abutting the Gulf, the geography is assessed from the perspective of the North Atlantic Ocean.

The only legal justification or authority we have been given for this new and far-reaching doctrine of primary and secondary coasts is that the terms may be new but the concepts are not (**VI**, p. 319; see also p. 293). Mr. Colson claimed that this hierarchical concept is drawn directly from the *North Sea Continental Shelf* cases (**VI**, p. 294).

The Judgment in the *North Sea Continental Shelf* cases is the last place the United States should look for support on this issue. There is a core principle at the heart of the 1969 Judgment that is applicable equally to the shelf and to the 200-mile zone: the principle of the legal equality of coasts. In a situation of equality within the same order, comparable coasts must obtain comparable treatment. The principle undoubtedly has its limitations. It cannot justify the

apportioning of shares to overcome the irreducible facts of nature; it cannot, in other words, justify a refashioning of geography. But what it does rule out in its very essence is the United States idea that certain coasts are inflicted by an inferior legal status – that there is, as it were, a caste system of coasts. The facts of nature that place certain coasts closer than others to particular sea areas cannot be overcome by assigning an intrinsic superiority to a comparatively remote coastal area. The realities of geography, Mr. President, distinguished Judges, cannot be reversed by legal fictions.

The Chamber rose at 1 p.m.

TWENTY-FIRST PUBLIC SITTING (4 V 84, 3 p.m.)

Present: [See sitting of 2 IV 84.]

Mr. HANKEY:

III. The Cut-Off Effect

Mr. President, distinguished Judges, Part III of this presentation addresses the United States contention that the Canadian line produces an inequitable cut-off effect. It deals first with the graphic demonstration presented by the United States in support of this argument, which in the Canadian view was based on a seriously flawed geographical frame of reference, and then it turns to a more general discussion of the errors of legal principle that underline the United States objection to the equidistance method.

A. The Graphic Demonstration Presented by the United States in the First Round

With your permission, Mr. President, I will start with an analysis of the diagrams and maps used by the United States to demonstrate its interpretation of the cut-off effect.

Let me begin by recalling a point I made this morning. These maps and diagrams simply restate the basic premises of the United States case in a new and more extreme form. I refer in particular to the abstract demonstration in Figure (227) 12 and to the purported application of this demonstration to the Gulf of Maine (230) area in Figure 16 of the United States oral proceedings. These figures are included as Figures 134 and 135 in the red binders. They depict the United States thesis that the coasts at the back of the concavity are entitled to a perpendicular extension to the limits of coastal State jurisdiction and that, as a consequence, the entitlements of the coastal wings constitute an encroachment upon that seaward extension. This is a view of the cut-off effect that has a very obvious connection with the perpendicular geometry of the United States system and with its doctrine of primary and secondary coasts. But we submit that it has no connection whatever with the notions of cut-off or non-encroachment as these are understood in the international law of maritime delimitation.

There is a second misconception in the United States graphic demonstration that is equally fundamental. The demonstration focuses, not upon the whole configuration, but upon a single stretch of the United States coasts in the deepest recesses of the concavity. I refer, of course, to the 100-mile stretch of eastern (230) Maine from Penobscot Bay to the Canadian border, depicted in Figure 16 and (227) represented conceptually as coast YX in Figure 12 of the United States presentation. We take issue with this whole idea of assessing the equities either in relation to cut-off or to proportionality in terms of a single stretch of coast in the deepest portion of the Gulf. We have to look at the whole picture. Once we start isolating bits and pieces of the coasts, and fragmenting the area into slices, we simply lose sight of the real situation.

But first let us take the United States argument on its own terms. According to the United States argument, it is the coast of eastern Maine that is cut off by southwest Nova Scotia under the equidistance method. There is no suggestion

that the coasts of the western half of the Gulf or of Massachusetts are in any way (227) cut off. Looking at the abstract diagram in United States Figure 12A which now appears as Figure 136A, the allegation is simply that coast YX is cut off from (244) triangles 2, 3 and 4 by the effect of coast XS here at the side.

In fact, Mr. President, all this is completely wrong. It is refuted by the premises of the United States own demonstration, which defines the cut-off as the product of the relationship of these two right-angled coasts, coasts YX and XS. For once we look at that relationship as it would exist without the rest of the configuration – in other words, without coasts WY and WR – it becomes obvious that equidistance can produce no cut-off effect as between these two coasts.

(244) This is self-evident from the diagram now shown as Figure B. The use of equidistance here could hardly be questioned. No one could argue that any of the area on the seaward side of the equidistance line would logically appertain to coast YX. And no one could argue that coast YX is improperly cut off from any part of that area here, either close to shore or far out to sea. And yet, this area on the seaward side of the equidistance line comprises the entire area from which coast YX is said to be cut off according to the United States argument (VI, p. 296) – in other words, this area here comprises the whole of triangles 2, 3 and 4 (227) in Figure 12A. The implication is clear. The area on the seaward side of the equidistance line is not an area from which coast YX is inequitably cut off by coast XS under the equidistance method. And more generally, equidistance applied to a pair of comparable right-angled coasts cannot produce a cut-off effect in the absence of incidental special features causing the line to deviate from its normal course.

Now let us move to a configuration that more closely resembles the Gulf of (227) Maine without the Bay of Fundy – the configuration shown in Figure 12A of the United States oral proceedings which is now shown again as Figure C. We can (244) see in Figure C the effect that forms the burden of the United States complaint – (227) the limited seaward extension of coast YX formed by triangle 1 in Figure 12A. *But here is the really significant point. This limited seaward extension is brought* about by the addition of the coasts of State A itself – the addition of coasts WY and WR. In other words, it is brought about by the coasts of Western Maine, New Hampshire and Massachusetts. It is, in effect, the coasts of the United States itself that limit the seaward extension of eastern Maine.

The straight diagonal line drawn from Point X in the corner of the concavity, and continued in black beyond Point T, is the equidistance line that would exist if coasts YX and XS formed the entire configuration. It is, in other words, the (244) equidistance line shown here in Figure B. And we have seen that this straight diagonal line creates a situation of perfect equity between these two coasts, the coasts upon which the United States analysis of the cut-off effect is focused. Nothing on either side of the straight diagonal line could possibly be considered an area of cut-off in so far as coasts YX and XS are concerned. In particular, nothing seaward of the diagonal line would belong to coast YX if the other coasts of State A did not exist.

A cut-off of this coast – of coast YX – could only arise if it lost something to State B as a result of State B's inclusion in this more complex configuration, but it is clear at a glance that this does not occur.

Now Mr. President, distinguished Judges, this argument can obviously be turned around. We could also say that coast YX would have a much greater seaward extension if coast XS did not exist. And that eastern Maine would have a much greater seaward extension if Nova Scotia did not exist. True enough. And it is precisely this – nothing more – that the United States diagrams have

managed to show. But none of this has any connection with the idea of inequitable cut-off.

Cut-off has to do with an effect of inequitable distortion that deprives a State of an area that properly appertains to it. It makes no sense at all to define an area of cut-off as the whole area that would appertain to a State if its neighbour did not exist. And by the same token, it makes no sense at all to define an area of cut-off as the area that would appertain to a coast if another major landmass did not exist – a major geographical feature like Nova Scotia, which our opponents have admitted cannot be regarded as an incidental feature (**VI**, p. 333). But that is the whole framework of the United States analysis. It may be an interesting intellectual exercise in refashioning geography, but it has nothing to do at all with the idea of inequitable cut-off as that concept is known to the law of delimitation.

The other point this analysis brings out is that the United States demonstration not only involved a refashioning of physical geography; it implies a refashioning of political geography as well. It does this by isolating coast YX – eastern Maine – as if it were a separate sovereign State.

Eastern Maine is not an independent State, contrary to what is implied by the United States diagrams. There is no international boundary at Penobscot Bay. Eastern Maine is not hemmed in by a foreign State on the west. In sum, what we have here is a situation where the coasts of two States border a concavity – not a three-State situation as in the *North Sea Continental Shelf* cases, where one State was shelf-locked because only its coast was concave.

It is true that eastern Maine does attract a smaller maritime area than the more favourably situated coasts of Nova Scotia and Massachusetts. But, as demonstrated in Figure 137 – under the equidistance method, eastern Maine receives an area more than two-and-one-half times larger than does New Brunswick, although the coast of New Brunswick is actually some 16 per cent longer than the coast of eastern Maine when measured according to its general direction.

And so, if three States, why not four? If the United States coast at the back of the concavity is entitled on equitable grounds to consideration separate in part from that of the other United States coasts in the Gulf of Maine area, why not the Canadian coast at the back of the concavity – a coast which is much more severely disadvantaged than the coast of eastern Maine?

The answer, of course, is obvious. The Chamber is no more required to refashion political geography, than it is to refashion physical geography. The law has great power, but it can no more subdivide Canada and the United States into a series of hypothetical nation States, than it can move the coasts of Maine and New Brunswick from the back to the front of the Gulf.

Mr. President, the purpose of the United States cut-off demonstration was to illustrate the operation of a cut-off effect in the Gulf of Maine area. But in fact, they were also used as proportionality models.

The United States was very careful in selecting the coasts to which it applied its new proportionality test and in so doing it failed to compare like with like. It chose the most disadvantaged segment of the United States coast, the coast of eastern Maine. It disregarded both the coast of Massachusetts that attracts the largest sea areas on the United States side, and the disadvantaged segments of the Canadian coast on the Bay of Fundy. But even within this narrow and incorrect frame of reference it appears to us that the test has been misapplied.

Let us turn first, Mr. President, to the abstract proportionality model (227) presented in Figure 12 of Mr. Colson's presentation – now appearing in the (245) lightbox as Figure 138A. A feature similar to the Bay of Fundy is conspicuously

absent from this model, but that is not the problem now being addressed. What is also conspicuous is that the proportions used in this model are those of an area extending to 300 nautical miles from coast YX at the back of the concavity. Since the model is supposed to deal with an area from which coast YX is inequitably cut off, the model should extend only 200 miles from coast YX. The model should therefore be amended to correct this error, as shown in (245) Figure 138B.

A second defect in the model is that it allocates the whole of the area off Point S to the coasts inside the concavity. But why would the delimitation outside the concavity be made dependent exclusively on the coasts behind the closing line? At least some of the delimitation of the outer area must depend upon the outside coasts. The area off Point S should be divided between coast XS and the coast to the right of Point S, which we have labelled coast SO, because if it were a matter of delimiting this area between these two coasts that would clearly be the correct (245) line. This bisector appears as the red line here in Figure 138C; it can be seen that it would allocate to coast SO the whole of the area of triangle 4 in the United States model and half of the area of triangle 3.

Consequently, even if one were to accept the major premises of the United States frame of reference, which we certainly do not, it is obvious that the area designated as cut off from coast YX is greatly exaggerated.

(230) Figure 16 of the United States oral argument, which applies its cut-off demonstration to the Gulf of Maine area, suffers from similar defects. The figures now appearing on the lightbox, appear as separate figures, Figures 139 and 140 in the red binders. This United States figure also depicts an area extending 300 miles from the Maine coast as an area from which Maine is cut off. The first step in correcting it, therefore, would be to eliminate the last 100 miles, as shown in Figure 139. The next step would be to attribute half of the area depicted in yellow to the Atlantic coast of Nova Scotia northeast of Cape Sable. As I explained a moment ago in connection with the abstract demonstration, half of this area would be attributed to the outer coast if it were a matter of dividing it between the coastal fronts of Nova Scotia on either side of Cape Sable. It therefore makes no sense to include it in a comparison of the areas appertaining to the coast to the southwest coast of Nova Scotia and the eastern coast of Maine. This defect is remedied in Figure 140. Finally, I would add, as a (230) footnote, that the so-called area of "cut-off" in the United States Figure 16 is rather obviously tilted towards Canada through the use of a coastal front on the Maine coast that does not in fact correspond to the direction of the Maine coast.

Mr. President, it has been necessary to draw the Chamber's attention to these defects in the United States demonstration. But there are more fundamental difficulties. As already noted, the calculations given by the United States assess only the effects of an equidistance line upon the most recessive part of the United States coast, excluding the entitlements of the western half of the Gulf and especially of Massachusetts, and disregarding the disadvantaged status of the Bay of Fundy coasts. Once the whole configuration is brought into the equation, it becomes apparent, as Professor Malintoppi has already demonstrated, that the United States receives more than a proportionate share of the maritime space in the Gulf of Maine area as a whole. For proportionality is not a principle of appurtenance or a basis of title to be used to determine the sea areas appertaining to each specific segment of the coast. It is rather a test of equity, which must be used to assess the overall result in relation to all the coasts abutting the relevant area.

I have touched upon some of the flaws that in our view deprive the United States cut-off demonstrations of any probative value. But our central objection

to the United States demonstration is that it depicts the natural effect of the geography of the Gulf of Maine area as a form of inequity caused by the use of the equidistance method. For all the United States demonstration really shows, even with its remarkable assumptions, is the virtually axiomatic proposition that a coast that actually borders a broad and open expanse of ocean space can attract a greater zone of jurisdiction than a coast that is located in a deep recess. But this, after all, is geography, not disproportion.

B. The Errors of Principle in the United States Cut-Off Argument

This presentation turns now, Mr. President, to a discussion of the fundamental errors of legal principle underlying the United States cut-off argument. That argument has two distinct components. The first is that the line inside the Gulf is inherently inequitable, not because it achieves a disproportionate result, but because it follows the wrong direction. It allegedly extends too far across the coast of Maine. The second objection is that the effect of the line outside the Gulf is allegedly inequitable, not because its direction is wrong, but because it denies to eastern Maine a seaward extension onto the eastern half of Georges Bank.

1. The direction of the Canadian line within the Gulf

First, then, the direction of the line within the Gulf. Mr. Colson argued that "If the land boundary does not meet the sea at the midpoint of the lengths of coastal fronts forming [a coastal] concavity, the geometrical character of the equidistance method is such that the line will be inclined towards the longer coast and away from the shorter coast" (**VI**, p. 295). Applying this analysis to the Gulf of Maine area, he asserted that "An equidistance line creates inequity because it swings *far* across the coast of Maine before eventually turning seaward at the midpoint of the closing line" (**VI**, p. 317, emphasis added).

It would appear from these remarks that Canada and the United States are in agreement that an inequitable cut-off may occur when a short or shorter coastal front causes an equidistance line to swing out laterally far across a longer coastal front. The implication is that the cut-off is inequitable only when it swings out farther in front of the longer coastal front than it does in front of the shorter
(230) coastal front. And yet, as Mr. Colson demonstrated in Figure 16 of the United States oral argument, the equidistance line swings no farther across the coastal front of the United States than it does across the coastal front of Canada, as those two fronts have been drawn by the United States itself (**VI**, p. 302). The United States assertions about the cut-off effect therefore cannot rest on any argument concerning a disproportion in the length of the respective coastal fronts allegedly cut off.

According to the United States, the problem with equidistance when the line begins inside a concavity, is that wherever the line actually starts, it eventually follows a course that is aligned with the centre of the Gulf (**VI**, pp. 298-299). This is undoubtedly so, but where we fail to follow the United States argument is in its conclusions. The United States suggests that this property of equidistance in the presence of a concavity is inherently inequitable, and that this inequity is more or less self-evident.

But what exactly is the basis of this inherent inequity? Is it inherently inequitable that a line should proceed across the Gulf, staying as far as possible from all the coasts that form its sides? Is it inherently inequitable that the line should leave an equal space off each of its coasts and divide these semi-enclosed

waters within the concavity in proportion to the coastal length? Is it inherently inequitable that a line should eventually reach a point midway between the outer coasts reflecting their proximity and contiguity to the outer area? If so, we find the proposition less than self-evident. We fail to see why equidistance is inherently inequitable when it begins at the back of a concavity with a semi-circular or rectangular configuration and moves gradually out toward the centre point. And, more important, we fail to see that equidistance produces any inequity in the concrete circumstances of this case.

The United States says that a cut-off effect in the Gulf of Maine area begins close to shore and broadens in the seaward area (VI, p. 296). This is because the equidistance line, in proceeding toward the centre, has to extend across the coastal front at the back. But the United States has given only half of the story. The equidistance line leaves an equal amount of space off each of the coastal fronts in the eastern half of the Gulf. And to do this it obviously has to pass in front of both of these coastal fronts. The equidistance line extends across the front at the back of the Gulf – true enough – but it also extends across the coast at the side to an equal extent. For in order to reach the open Atlantic from its starting-point at the back of the Gulf, the line must pass between the coasts of Canada and the United States, and in that sense, in front of both of them. The course followed by an equidistance line on its way to the Atlantic roughly bisects the angle formed by the coasts of eastern Maine and of southwest Nova Scotia. The cut-off is therefore equally shared – it is reciprocal and requires no remedy.

2. Proportionality as a basis of title: the United States objections to the Canadian line in the outer area

Mr. President, I turn now to the second component of the United States argument, which is that the equidistance line improperly denies eastern Maine an extension onto Georges Bank. In the view of the United States, this is an inequitable cut-off. In Canada's view, it is a natural consequence of the geographical position of the coasts of southwestern Nova Scotia and eastern Maine.

The essential geographical facts are simple and uncontroversial. The coastal wings of Nova Scotia and Massachusetts actually border the outer area. The coast at the back of the concavity – whether of Maine or of New Brunswick – is deeply embedded within the concavity, 100 nautical miles landward of the closing line of the Gulf. It is for these very simple reasons of proximity and contiguity that Nova Scotia and Massachusetts – not eastern Maine – control the open spaces of the outer area.

And this, of course, is why the United States is quite wrong in suggesting that the coasts of eastern Maine and Nova Scotia have been given comparable treatment in relation to the outer area. "Comparable treatment by nature", refers not simply to the extent of a coastline, to the length of a coastline, but it also refers to its actual geographical position in relation to the area being delimited.

Our opponents would no doubt say that disproportion is inherent in any situation where two coasts of equivalent length have unequal offshore entitlements. As between eastern Maine and southwest Nova Scotia, however, this argument would involve two errors of principle. First, as already demonstrated by Canada, the equidistance line produces no disproportion in terms of coastal lengths when the entire configuration is taken into account – in other words, when a balanced frame of reference is used. Secondly, proportionality cannot be appreciated in the abstract, in isolation from the consequences inherent in the

actual geographical situation. And the aspect of a geographical situation most relevant to maritime delimitation is the general configuration of the coasts. It is for this reason that the Court of Arbitration in the Anglo-French award stated that proportionality could not be a question of simply assigning to States "areas of the shelf in proportion to the lengths of their coastlines, for to do so would be to substitute for the delimitation of boundaries a distributive apportionment of shares" (Award, para. 101). It is not a requirement of equity or law that a deeply recessed coastline should have as great an offshore area accrue to it as a coast that borders an open expanse of sea.

The plain fact is that any coast at the back of a deep concavity is disadvantaged in comparison with one that borders the open sea in terms of the potential extent of its seaward extension. It is geography, not the method of delimitation, that causes this to be so. Indeed, the coast in the Gulf of Maine area that is most severely damaged by concavity – that is by its geographical situation – is the coastline of the Bay of Fundy. But Canada, unlike the United States, does not ask for a refashioning of geography to compensate for the facts of nature.

The United States objection to the effect of Nova Scotia's position 100 nautical miles seaward of Maine is unfounded because the effect of Nova Scotia on an equidistance line reflects its actual geographical location, and is not disproportionate either in terms of Nova Scotia's scale or its real links with the area being delimited.

Moreover, Mr. President, it is evident from a glance at the map that the Canadian line leaves a broad expanse of maritime space off the United States coast actually abutting the outer area – the coastal wing of Massachusetts.

Canada reaffirms its position that if the Canadian line does not cut off the coast of Maine within the Gulf itself, then it could hardly be said to cut off that same stretch of coast a hundred miles further out to sea. And the absence of any such cut-off effect is evident, first, in the geography of the area, because the line passes substantially closer to the Canadian coast than it does to the coast of Maine. It is evident, secondly, in the history of the dispute, because the Canadian line follows a course much further off the coast of Maine than the lines used by the United States itself to claim jurisdiction prior to 1982. And it is evident, finally, in the logic of the Special Agreement itself, in the location of Point A well to the west of the international boundary terminus "in front of" the coast of Maine – to use the language favoured by the United States.

The distinguished Agent for the United States has suggested that the United States Senate would not have given its advice and consent to the Special Agreement had it realized that the location of Point A implied a southwesterly direction of the single maritime boundary within the Gulf (**VI**, p. 242). This suggestion is hard to reconcile with the facts. Point A was selected by the Parties on the basis of the claims of the Parties as they stood in 1979, at the time of the signature of the Special Agreement. And one of those claims was the so-called Northeast Channel line. *That line was presumably known to the United States* Senate. And that line, like the "lobster line" before it, extends as far across the coastal front of Maine as does the Canadian line, and in fact passes much closer to the Maine coastline (**VI**, pp. 15-16; **V**, Canadian Reply, p. 158, para. 355 and (180) Figure 35). As far as we know, the United States Senate did not complain that that line cut off the coast of Maine.

The United States cut-off argument is based on a failure to apprehend the essential distinction between the role of equity in giving effect to the real geography of an area and the rejected notion of refashioning geography. For the

effects complained of by the United States are the natural consequences of the geography of the Gulf of Maine area, not aberrations in the method proposed by Canada.

IV. An Equitable Result in the Geographical Circumstances of the Gulf of Maine Area

Introduction

Mr. President, distinguished Judges, the fourth and final part of this presentation addresses the question of an equitable result in the particular geographical circumstances of this case. In Canada's view an equitable result will be achieved by a line that reflects the general configuration of the coasts in the Gulf of Maine area.

In his statement on 13 April Mr. Colson defined the principal issue dividing the Parties with respect to the course of the line. He said: "The fundamental difference between the equidistant line and an equitable solution in this case is the location of the point at which the boundary turns seaward." (VI, p. 323.)

This is the first issue I shall address in this final part of my statement. A second important issue still dividing the Parties with respect to the course of the line, which I shall also address, is the direction the line is to take in the outer area. And, the approach of the Parties as to the resolution of these two issues could not be more different. For while the United States has strongly hinted in its written and oral argument that both the location of the turning point and the direction of the line in the outer area are matters to be determined in accordance with the arbitrary objectives of the United States (see, e.g., V, United States Reply, p. 148, para. 256; VI, p. 323), it is Canada's submission that these issues must be determined by the application of legal criteria. This means they must be determined essentially by reference to the general configuration of the relevant coasts.

A. Points of agreement

Let us consider first the points of agreement between the Parties. The Parties agree that the Gulf of Maine area is divided into inner and outer sectors by a hypothetical closing line from Cape Sable to Nantucket Island (II, United States Memorial, p. 19, para. 25 and fn. 2; III, Canadian Counter-Memorial, p. 50, para. 120). This division has important consequences. Within the Gulf itself, behind the closing line, the area is embraced within the coasts of the Parties, but seaward of the closing line the area to be delimited lies in the open expanses of the Atlantic. It lies off, rather than within, the coasts of the Parties. The United States has repeatedly emphasized the distinction between the general direction of the continental coast and the concave configuration of the coasts of the Gulf (see, e.g., VI, pp. 290, 291, 293, 317, 319, 320, 325-326). The transformation of the area to be delimited from *inter fauces terrarum* to open ocean by the radical and reciprocal changes in the general direction of the Canadian and United States coasts at Cape Sable and Nantucket Island respectively, therefore constitutes the single most important geographical circumstance characterizing this area.

The second point of agreement is that the boundary must be drawn in two general segments, one in the area closer to the coast, where the boundary must of necessity pass in front of the coasts of both States, and the other further out to sea. Mr. Colson described the United States view as follows:

"An equitable boundary should divide the closest inshore area, perhaps

generally by dividing the angle between the two coastal fronts with reference to the proportions of their lengths, and then would turn seaward perpendicular to the general direction of the coast." (VI, p. 318.)

Mr. President, distinguished Judges, there can be no objection to the Canadian line on these grounds. As shown in Figure 141, the Canadian line in the inner area roughly bisects the angle formed by the controlling coastal fronts of the Parties. The red line on the illustration is exactly a bisector of the angle formed by these coasts. The Canadian equidistance line bisects the controlling coastal fronts of the Parties, that is, the coast of southwest Nova Scotia between Cape St. Mary's and Cape Sable, and the coast of eastern Maine between Penobscot Bay and the international boundary terminus. I want to emphasize the word "angle", because the United States has tried to suggest that because Canada recognizes that these two coasts are juxtaposed at a right angle, it also accepts the United States position that Canada's coastal front on the Bay of Fundy can be replaced by a closing line across its mouth (United States Reply, p. 93, para. 159; VI, pp. 293-295, 330-331). But the only connection between these two quite distinct ideas – the relationship of the two coasts to each other, and a closing line across the mouth of the Bay of Fundy – is that in order to measure the angle formed by the Nova Scotia and Maine coastal fronts, that is to say, in order to assess mathematically the relationship of these two coasts to each other, one must extend the direction of the two coasts until these directions meet at an apex.

And what of the United States criterion for the second segment of the line? The United States asserts that an equitable boundary should "then turn seaward perpendicular to the general direction of the coasts" (VI, p. 318). Canada can accept that once the line has left behind the concave coastal configuration of the Gulf, it should be roughly perpendicular to the general direction of the coasts abutting the open Atlantic on either side of the entrance points to the Gulf. Canada believes its line meets this criterion.

The questions that remain, then, are first, exactly where the line should change its course and, secondly, exactly what direction it should take in the outer area.

B. The location of the final turning point

First, the question of the turning point. The geography of the innermost area imposes a boundary that runs in a general southwesterly direction. Mr. Colson has conceded as much (VI, pp. 317-318, 322). But if the line is allowed to continue in a southwesterly direction until it leaves the Gulf, and is then turned straight out into the Atlantic, the line cuts through Georges Bank. But this result, the result imposed by the geography, frustrates the aspirations of the United States to obtain as much of the Bank as possible. Therein lies the dilemma with which the United States appears to have been wrestling for some years.

(246) As can be seen in Figure 142, the most recent United States line, its 1982 boundary proposal, turns sharply to the southeast at Point A. But where is the sharp change in the direction of the coasts which causes the United States line to change its direction so sharply at Point A? The United States has never told us, and one can study the maps in vain for the answer. The study of maps is futile, however, because the sharp change in the direction of the United States line at Point A is to be explained, not by any change in the direction of the coasts, but by a marked change in the legal and tactical thinking of the United States some time during the preparation of its Memorial.

The point at which the Canadian line turns towards the open Atlantic is, by

contrast, Mr. President, based on objective geographical and legal criteria, as (247) illustrated in Figure 143. There is a geographical rationale for a change in the direction of the line when it leaves the Gulf of Maine. It is here, near the midpoint of the closing line – not before – that the coastal extensions of a semi-circular gulf converge. It is here – not before – that the geography is transformed. It is here – not before – that the line leaves a semi-enclosed area and ceases to pass between the coasts of the two States. It is here that the line leaves an area situated between two extensive coastal areas which are perfectly opposite and which the United States has conceded to be comparable (Reply, p. 104, para. 179). It is here that the line enters the open spaces of the Atlantic. If a change in the direction of the line is to be dictated by objective geographical criteria, it is here – and not before – that it must take place.

In contrast, there could be no objective geographical rationale for a change in the direction of the line before it leaves the Gulf. Such a change of direction would not respond to any change in the actual configuration of the coasts. It would be prompted only by the objective of achieving a certain apportionment of shares in the outer area – in particular, by the United States objective of obtaining as much of Georges Bank as possible. It would not be based upon legal standards because it would disregard the geography of the abutting coasts. And what is equally important, Mr. President, it would disregard the non-geographical equities that must be satisfied to obtain an equitable result.

As the Chamber can see, the Canadian line proceeds progressively seaward from its point of commencement. But here, at turning point 50, it turns to the southeast and heads straight out into the open Atlantic. This point, turning point 50, is the tripoint equidistant from the last basepoints used by Canada on each of the three sides of the Gulf – that is on the coasts of Nova Scotia, Maine and Massachusetts.

The United States has asserted that the equidistance line crosses the closing line of the Gulf at its midpoint and then becomes a line perpendicular to the closing line (VI, pp. 303, 304, 305, 318). But this is not exactly so. The red (248) line which appears as Figure 144, the next figure in the binders, is a line drawn perpendicular to the closing line at its midpoint. This figure is not shown on the lightbox. However, Figure 145, now shown on the lightbox, depicts in simple (248) close-up form the lines in the area enclosed in the red frame in Figure 144. This grey line here on the left-hand side of the diagram is the Canadian line, and this black line, the strict equidistance line. This red line is a perpendicular to the closing line of the Gulf drawn from its midpoint. As the Chamber can see the Canadian line and the strict equidistance line, which are the same line at this point, the Canadian line and the strict equidistance line intersect the closing line some 5 nautical miles to the northeast of its midpoint.

The Chamber can also see here the tripoint of the strict equidistance line, the point equidistant from the nearest land on the three sides of the Gulf. This point, at which the strict equidistance line turns straight out into the Atlantic, is an objective geographical criterion that should be taken into account in achieving an equitable result, especially in the light of the role of Article 6 in the legal framework of this case.

There are other indicia which show that the line must turn at a point near the midpoint of the agreed closing line of the Gulf. The figures now shown together on the lightbox appear in the red binder as separate figures, as Figures 146, 147, (75) (249) (250) 148 and 149. My argument now refers to Figure 147B. One of the principal objections of the United States to the Canadian line is that it is allegedly drawn from "isolated points on a protruding coastline" (United States Reply, p. 6, para. 9; p. 106, para. 185). In paragraph 98 of the *North Sea Continental Shelf*

cases Judgment, the Court stated that the coastal fronts used to measure the coasts according to their general direction for the proportionality test could also "play a useful part in eliminating or diminishing the distortions that might result from the use of (the equidistance) method" (*I.C.J. Reports 1969*, p. 52, para. 98). An equidistance line drawn from the coastal fronts used by Canada in the (75) proportionality test is shown in Figure 147B. As can be seen, the tripoint of this equidistance line, here in red, lying to the northeast of the tripoint of the Canadian line, should be here.

(249) Turning now to Figure 148 the Chamber may wish to note the point at which the extension of the "due north line" (VI, p. 60), intersects the closing line of the Gulf, just one nautical mile northeast of its midpoint. As can be seen in (249) Figure 148, virtually the whole of the area claimed by Canada lies to the east of the due north line; that is, to the east of the segment of the land boundary that establishes the general east-west juxtaposition of the territories of the Parties abutting the Gulf of Maine area.

(250) Finally, turning to Figure 149, Canada asks the Chamber to note carefully the point at which the so-called "Lobster Line to Protect the Lobster of the United States Continental Shelf" intersects the agreed closing line of the Gulf. For this line – which is said to have been "vigorously enforced" by the United States (29) from 1974 to 1976 – (United States Memorial, p. 85, para. 145 and Fig. 16), this (250) line, as the Chamber can see in Figure 149, intersects the agreed closing line of the Gulf some 10 nautical miles northeast of its midpoint.

(251) Turning now to Figure 150, a clear picture emerges when all these points are shown together on a map of the area. Why is it, Mr. President, distinguished Judges, that all these points – Canadian points and United States points, equidistant tripoints drawn from coastal basepoints and equidistance tripoints drawn from coastal fronts, points of intersection on the closing line and the midpoint of the closing line – why is it that all these points are clustered together in the middle of this area here, where the Gulf merges with the open waters of the Atlantic? The answer is clear. The convergence of the coastal extensions of the Parties at a point in this area, near the midpoint of the agreed closing line of the Gulf, clearly reflects, to quote from the separate opinion of Judge Bustamante y Rivero in the *North Sea Continental Shelf* cases Judgment, clearly reflects "an exigency of geography" (see *I.C.J. Reports 1969*, pp. 61-62, para. 6).

C. The direction of the line in the outer area

I now turn to the direction the line should take in the outer area.

(252) As shown in Figure 151, the bearing of the Canadian line in the outer area is 154.6°. The bearing of the United States line – shown in green – is 144°. The United States appears to have suggested that a line drawn perpendicular to the closing line of the Gulf might be an appropriate line in the outer area. Mr. Colson said that the bearing of the closing line is exactly 56.7° (VI, p. 292). Thus a perpendicular to the closing line – shown here in red – would have a bearing of 146.7°. As the Chamber can see, this line perpendicular to the closing line of the Gulf would allocate to the United States some 1,485 square nautical miles of additional ocean space as compared to a line with the same bearing as the Canadian line, drawn from the same point on the closing line.

A line of the same bearing as the United States line, that is 144°, if drawn from the same point on the closing line would allocate to the United States a further 580 square nautical miles of ocean space in the outer area. Thus the total amount of additional ocean space that would accrue to the United States in the outer area, as a result of using a line at the same direction as the United States line,

that is 144°, instead of at the bearing of the Canadian line 154.6°, is the sum of these two areas, that is 2,065 square nautical miles. And I want to emphasize that the allocation of this large sea area of over 2,000 square nautical miles is a function of the direction or bearing of the line, irrespective of the point at which the line is turned toward the open Atlantic.

In Canada's view an appropriate test to determine whether the line in the outer area reflects the relevant geographical circumstances is to compare the direction of the line with the average general direction of the coasts of the Parties abutting the Atlantic on either side of the entrance to the Gulf. The general direction on the Canadian side, measured by a straight line from Cape Sable to
(50) Cape Sambro, as shown in Figure 7 of the Canadian Counter-Memorial, is 54°. On the United States side, the general coastal direction is approximately 79°, whether measured along the mainland coast southwest of Cape Cod or along the outer coasts of Nantucket and Long Island. The average general direction of the Canadian and United States coasts bordering the open Atlantic is therefore 66.5°, or in round figures 67°. Thus, the Canadian line, with its bearing of 154.7° is almost perpendicular to this average general direction. Canada would also note that its line is roughly parallel to the general direction of the opposite coasts of Nova Scotia and Massachusetts, the coasts within the Gulf that are nearest and most closely linked to the outer area. Canada therefore believes that the direction taken by the Canadian line in the outer area is fully compatible with the relevant geographical circumstances.

Responses to Questions Posed by Members of the Chamber

Mr. President, with your permission, I would like at this point, before summing up my statement, to give Canada's answers to certain questions by Judge Mosler and Judge Cohen. To save the time of the Chamber I will refrain from reading the questions themselves, but would request that for the Chamber's convenience, the text of the questions be placed in the verbatim record.

I will first answer Questions 1, 3, 4 and 5 by Judge Mosler.

"Question 1

> What is the geographical significance of the Point A which, according to Article II, paragraph 1, of the Special Agreement, the Chamber has to take as its starting-point in drawing the delimitation line, in relation to the limits of the Parties' territorial waters?" (VI, p. 462.)

Canada's answer is as follows. As shown in Figure 152, Point A is situated 20.25 nautical miles from the nearest point of United States land at a small islet lying off Steele Harbour Island; it is also 20.25 nautical miles from the nearest point of Canadian land at Machias Seal Island. The next nearest point of Canadian land is Murr Ledge which lies off Grand Manan Island some 25 miles from Point A. (Murr Ledge is not shown on this figure.) The limit of Canadian territorial waters is 12 nautical miles; the limit of United States territorial waters is 3 nautical miles. Accordingly, Point A lies well outside the limits of the territorial waters of both Parties. The relationship of Point A to a hypothetical 12-mile limit drawn from both coasts is depicted in Figure 152.

"Question 3

> For what reason have the Parties proposed the line from Nantucket to Cape Sable as the line dividing the inner sector (the Gulf proper) from the outer sector of the Gulf of Maine area *(the 'closing-line of the Gulf')*?" (VI, p. 463.)

Canada has proposed the Nantucket to Cape Sable closing line as the line indicating the geographical distinction between the semi-enclosed waters of the Gulf of Maine and the open waters of the Atlantic Ocean. The line is drawn between the outermost points on Nantucket Island and Cape Sable because these constitute the natural entrance points to the Gulf. Until the boundary reaches the closing line, it may be said to pass between the coasts of the Parties. Seaward of the closing line, this is obviously no longer the case.

"Question 4

> If that line denotes a geographical situation, why do the Parties make use of another line for the purpose of demonstrating that the southeast coast of Nova Scotia and part of the United States coast southwest of Cape Cod are coasts relevant to the decision of the dispute?" (VI, p. 463.)

In Canada's view, the coasts outside the closing line to the northeast of Cape Sable, and to the southwest of Cape Cod and Nantucket, are geographically relevant to the delimitation of the area outside the closing line by virtue of their general proximity to the outer area and the fact that they actually abut this area. The established links between the communities on these coasts and the fishery resources in the area to be delimited provide further evidence of the relevance of that geographical relationship.

As explained in the answer to Question 3, the closing line of the Gulf is relevant because it divides the Gulf of Maine from the outer area. The general direction of the coasts abutting the ocean on either side of the mouth of a coastal concavity is not necessarily aligned with the natural entrance points to the concavity or to the closing line joining these entrance points.

"Question 5

> What is the significance of the 'closing-line' in relation to the line from Seal Island to the northern entrance of Cape Cod Canal whose two extremities constitute basepoints for the equidistance line proposed by Canada?" *(Ibid.)*

In Canada's view, the two lines are not related. A line joining the two basepoints does not constitute either a closing line or a coastal front representing the general direction of a coastline. These basepoints, moreover, do not control the Canadian line until 19 nautical miles outside the Cape Sable to Nantucket closing line. Consequently, while these basepoints do control the line beyond turning point 50, a line joining these two points is not itself an element in the construction of the Canadian line.

With respect to the basepoints used by Canada, Article 6 of the 1958 Continental Shelf Convention provides that a strict equidistance line is to be constructed from the nearest points on the baseline from which the territorial sea is measured. The basepoint on Seal Island conforms to this criterion.

In the construction of the Canadian line, Canada has selected the northern entrance to the Cape Cod Canal as the last basepoint on the United States coast, because in Canada's view this point better reflects the general configuration of the United States coast abutting the area than do the basepoints on the attenuated extremities of Cape Cod and Nantucket Island. The use of basepoints on Cape Cod and Nantucket Island would produce an inequitable distortion in the course of the line.

As explained in the answers to Questions 3 and 4, the closing line to a coastal concavity is drawn between the natural entrance points to the concavity. Neither of the last two basepoints used in the construction of the Canadian equidistance line constitutes a natural entrance point to the Gulf, since both Seal Island and

the northern entrance to the Cape Cod Canal are located well within the confines of the Gulf.

Mr. President, this completes Canada's answers to the Questions 1, 3, 4 and 5 by Judge Mosler.

Answers to Questions 2 and 3 by Judge Cohen

I shall now answer Questions 2 and 3 by Judge Cohen.

"Question 2

> Is the criticism of the equidistant method sufficient if it rests on the cut-off of the adjacent neighbour's coastal share since every equidistant line, if it is not exactly in the centre of the concavity, is bound to swing somewhat over to the other side? 'Perpendicular' and 'equidistant' are very unlikely to be the same or nearly the same in real situations. What degree of cut-off is acceptable?" (VI, p. 464.)

The question "What degree of cut-off is acceptable?" must be posed in relation to the coasts of both parties bordering a concavity, because the result must be equitable for both of them. In Canada's view, this means that a line will be *prima facie* equitable where it extends an equal distance across the coasts of the two States. This is because the "cut-off" is then reciprocal and therefore equitable. It is only where the line extends further across the coast of one State than it does across the coast of the other, that an inequitable cut-off can occur.
(179) This effect is illustrated in Figure 34A of the Canadian Reply.

The question of an inequitable cut-off therefore can only arise when the line extends a greater distance across the coast of one State than it does across the coast of another. Even then, whether such a cut-off is inequitable, and at what point it becomes so, has to be determined in the light of all the relevant circumstances, including, in particular, whether an incidental, special feature has a distorting and disproportionate effect upon the course of the line.

The answer to the question "Is the criticism of the equidistance method sufficient if it rests on the cut-off of an adjacent neighbour's coastal share . . .?" must be that the criticism is sufficient only if it can be shown that the area from which the adjacent State is allegedly cut off is properly appurtenant to that State, rather than to the other. It is, of course, understood that the word "share", in this context, does not imply the apportioning or sharing out of the area in proportion to the lengths of specific segments of the coasts of the two States. For the Court, in statements relied on by both Parties in the present case, has declared that delimitation is not a process of distributive justice or apportionment of shares (*I.C.J. Reports 1969*, pp. 21-23, paras. 18-20; *I.C.J. Reports 1982*, pp. 46-47, para. 44). Canada's submission that a State can only be cut off from sea areas that are legally appurtenant to it, and that the question of whether a cut-off occurs can only be determined in the light of a proper understanding of the basis of appurtenance, is therefore fully consistent with this statement of law.

There is an important distinction between the application of the notion of "cut-off" to two and three State situations. The term "cut-off" originates in the German pleadings in the *North Sea Continental Shelf* cases, where it was used to describe the situation of a "shelf-locked" or "zone-locked" State, cut off from the outer limits of continental shelf jurisdiction when two equidistance lines swing out laterally and converge in front of a third State situated between the two other States. That was the situation which applied in relation to the Netherlands, the Federal Republic of Germany and Denmark in the North Sea. There, the Court found that the two equidistance lines "taken conjointly"

produced an inequitable cut-off effect (*I.C.J. Reports 1969*, pp. 17-18, para. 8). But the Court observed "that neither of the lines in question, taken by itself, would produce that effect, but only both of them taken together" (*ibid.*, para. 7).

That completes Canada's answer to Question 2 by Judge Cohen.

"Question 3

What role in fact and in law does the southern coast of Nova Scotia and the opposite northern coast of Massachusetts play, either with respect to the Gulf or seaward?" (VI, p. 465.)

Canada's answer is as follows. With respect to the outer area, the application of the principle of equality to comparable facts requires that the opposite coasts of Massachusetts and Nova Scotia, which both Parties have recognized have a similar length and configuration, must be accorded equal treatment. As recognized in the jurisprudence, the equidistance or median line generally produces an equitable result where the coasts are in an opposite relationship. An equidistance or median line between the opposite and comparable coasts of Nova Scotia and Massachusetts that geographically abut and dominate the outer area is, therefore, the appropriate means of achieving an equitable delimitation of that area.

In the technical construction of the Canadian equidistance line, a basepoint on the Massachusetts coast at Cape Cod Canal first takes effect at turning point 50, 19 nautical miles outside the Nantucket to Cape Sable closing line. Until that point – that is, throughout the Gulf itself – the line is controlled on the United States side by basepoints situated off the coast of Maine at the back of the Gulf. However, the *general* position of the Canadian line inside the Gulf, where it extends to a point approximately midway between the coasts of Massachusetts and Nova Scotia at the threshold of the outer area, is justified by the opposite relationship of these two coasts.

This completes Canada's answers to Questions 2 and 3 by Judge Cohen.

Conclusion

And now, Mr. President, distinguished Judges, in concluding my presentation I would like to sum up Canada's position on the principal geographical issues still dividing the Parties.

First, the Special Agreement clearly sets the dispute in the Gulf of Maine itself and the area seaward thereof. The effort to move the dispute out of this geographical context by the unilateral invention of a so-called "axis of the dispute" running down one side of the Gulf only is not in accord with the facts and is incompatible with the Special Agreement.

Second, the coastline forming the Gulf of Maine establishes the general configuration of the coasts that must be taken fully into account. This coastal configuration does not constitute an incidental, special feature or special circumstance.

Third, the basis of appurtenance is geographical adjacency measured from the coast in every direction. The notion of perpendicular extensions to a so-called primary coastal direction is incompatible with the law of maritime jurisdiction.

Fourth, a State can only be "cut-off" when the effect of an incidental special feature on the equidistance line denies that State its extension into sea areas properly appurtenant to it. The equidistance line does not produce an inequitable cut-off effect in the Gulf of Maine area because any cut-off in the inner sector is reciprocal and equally shared, and because the eastern half of the outer sector is not appurtenant to the coast of Maine.

Fifth, the question whether an inequitable cut-off occurs must be determined

by reference to the overall configuration of the Gulf of Maine area; it cannot be determined by reference to isolated segments of the coasts.

Sixth, the location of the point at which the line is to be turned straight toward the open Atlantic should be fixed on the basis of objective legal and geographical criteria.

Seventh, only a line which reaches the point of convergence of the coastal extensions of the Parties at or near the midpoint of the closing line of the Gulf will respect the general configuration of the coasts and take account of the relevant geographical circumstances.

Eighth, and finally, the direction of the line in the outer area should take account of the general configuration of the coasts by reflecting the general direction of the coasts abutting the Atlantic on either side of the entrance points to the Gulf, as well as the general direction of the opposite coasts of Nova Scotia and Massachusetts.

The Chamber adjourned from 4.23 p.m. to 4.41 p.m.

REJOINDER OF MR. BINNIE

COUNSEL FOR THE GOVERNMENT OF CANADA

Mr. BINNIE:

ECONOMICS

Mr. President, distinguished Judges, this afternoon I have the privilege to appear for a second time before the Chamber to respond to the arguments made by the United States in the first round of the oral presentation on two matters.

First, the Parties' fishing activities – both historical and contemporary – within the Gulf of Maine area, and

Second, the economic geography issues, to which the United States returned again and again in its oral presentation, rather like a tongue to a sore tooth if I may say so.

The United States position on the applicable law is that the totality of the fishing activities of the Parties is a relevant circumstance, not only the contemporary fishery, but the "entire record", as Mr. Lancaster put it, of 150 years (**VI**, p. 350). But it was suggested that the economic dependence of a coastal population on that same fishery, contemporary or future, raises no equitable considerations, one way or the other (**VI**, pp. 270-271). I will address these legal issues and to the extent the United States raised a number of factual points I will deal with those as well to the extent that time permits.

Counsel for both Canada and the United States have addressed fishing and the economic geography in three steps, and for convenience I will follow the same order:

First, the fishing presence within the Gulf of Maine area during the "relevant period" – under this heading I will deal with the United States argument that historically the United States "dominated" the high seas fishery on Georges Bank, or, as the distinguished Agent for the United States put it, the high seas fishery on Georges Bank was considered by many United States citizens to be "as American as apple pie" (**VI**, p. 231). I will also deal with Mr. Lancaster's efforts to redefine "the relevant area" for fisheries purposes in a way that he apparently considered was more favourable to the United States argument;

Second, the economic dependence, if any, of the coastal population on the fishery. Under this heading I will address Mr. Feldman's submissions on legal relevance, and his suggestion that Nova Scotia has no relevant economic dependence on Georges Bank; and

Third, and finally, the impact on Nova Scotia of loss of access to fishing grounds on Georges Bank. Under this heading I will address the United States contention that Nova Scotia is a land overflowing with alternative economic opportunities, awaiting only the arrival of unemployed fishermen to set the economic miracle in motion.

I. FISHING PRESENCE

As to fishing presence Mr. President, distinguished Judges, Mr. Lancaster's presentation was preoccupied with two matters, time and space. With respect to

time, his apparent objective was to have the Chamber subordinate the contemporary fishery over the past 20 or 25 years to a much longer historical perspective, reaching back 150 years or more to the early 19th century. In his view, what went on in the 19th century on Georges Bank, to the extent that the facts of those distant times can now be ascertained, is entitled to as much weight, year for year, as the most recent 20 or 25 years (**VI**, p. 339).

With respect to space, Mr. Lancaster's apparent objective was to limit consideration of the United States catch to the disputed area, and to enlarge consideration of the Canadian catch to areas as far north as Newfoundland, to attribute great fisheries wealth to these grounds, distant by hundreds of nautical miles from the Gulf of Maine, and to portray New England fishermen as being forced to withdraw from one Canadian fishing ground after another, until at last they have come before this Chamber to take a final stand on the Canadian fishery on the eastern portion of Georges Bank. Mr. Lancaster looked steadily to the northeast towards Newfoundland. He did not look behind him to the fisheries wealth which stretches from the Canadian line south to Florida, equally distant from the Gulf of Maine. Neither did he stop to explain why New Englanders had decided to take their stand on the eastern portion of Georges Bank that, like Newfoundland and the Scotian Shelf, is still closer to Canada than to any part of the United States.

In his treatment of the "relevant period" Mr. Lancaster offered the analogy that fisheries analysis is like a moving picture, and he cautioned the Chamber not to isolate a few frames or scenes (**VI**, p. 342). He said the Chamber must look at the whole film. Of course it must; Canada agrees that the Chamber must look at the whole film. The issue between the Parties is how long a film does the Chamber need to watch in order to get a proper appreciation of the relevant facts. The entire contemporary period for which adequate statistics are available, as Canada has suggested in the first round of these proceedings (**IV**, p. 96), or 150 years as Mr. Lancaster has proposed? Although Canada is of the view that the 10-year period 1969 to 1978 is the most relevant period following, in that respect, in the footsteps of the negotiators of the 1979 fisheries agreement and of the decision of Judge Jessup in the 1969 *North Sea Continental Shelf* cases (**IV**, p. 95), Canada has also made it very clear in the opening round, that if the relevant period is expanded somewhat, it makes no difference to the ultimate result because there is a broad measure of agreement between the Parties that for more than 20 years, since the early 1960s, both Canada and the United States have had a very significant fishery on Georges Bank. That is why the Canadian line, drawn by reference to the coastal geography, achieves an equitable result in terms of the established fisheries of both Parties on Georges Bank as well as of the known resources of the continental shelf.

But the United States puts three arguments against the fairness of the Canadian line: *first*, it is asserted that there is some "distortion" (**VI**, p. 348) in Canada's statistical presentation of the contemporary fishery.

Second, the United States says that the heart of the Georges Bank issue is "dominance" (**VI**, p. 350) and in the view of the United States its fishermen have "dominated" the Georges Bank fishery, and therefore, says the United States – although in Canada's view the conclusion does not follow from the premises, even if the premises were accurate – Canadian fishermen should now be removed from their established fishing grounds on Georges Bank.

Third, the United States argues that historical fishing activities are every bit as important as contemporary fishing activities, if not more so, because year for year the historical period is longer than the contemporary period.

Let me first of all examine the United States allegation of "distortion". This is

a charge which could have serious consequences if it had any merit, and I am therefore obliged to take the time of the Chamber to deal with it. Mr. Lancaster built his argument around the fact that Canada has presented the weight of the scallop catch of both Canada and the United States in the form in which that catch is taken from the sea – shells and all. This, says the United States, is a distortion that goes to the root of Canada's statistical presentation. But is it a distortion? Mr. Lancaster knows perfectly well that it is not a distortion, for he acknowledged that "scallops are of course a relatively high value species. In fact", he says:

> "for the years upon which Canada relies, scallops (meat only) were worth somewhere in the range of 10 times the value of cod and haddock, the primary United States catches . . . when weight is used [for the purpose of catch comparisons] the economic significance of the scallop fishery is understated" (**VI**, p. 347).

And that is Mr. Lancaster's word – "understated". In that passage, Mr. President, the United States recognized that if there is any statistical distortion it lies in its own attempt to equate low value species with high value species, and not in the Canadian presentation, which endeavours to take these important differences of value into account. Although the United States in its written pleadings used round weight as well as meat weight from time to time for the scallop catch (e.g., **IV**, Counter-Memorial, Table A, p. 55; **II**, Memorial, Vol. III, Ann. 47) – there is no consistency of United States practice in that regard – Mr. Lancaster strongly criticized Canadian catch comparisons for employing round weight because, as he says:

> "If the shell weight of the scallops were considered, it would attribute significance to the nearly 90 per cent of the scallop that is thrown overboard at sea and which is of no economic or protein value." (**VI**, p. 348.)

But, putting these two observations of Mr. Lancaster together, it is obvious that there is no distortion in the Canadian weight statistics at all. The United States says that scallop meat accounts for a tenth of its total weight. The United States acknowledges that scallop meat, pound for pound, is worth ten times as much as the primary United States catches of cod and haddock. The logical conclusion from these two observations of the United States – though Mr. Lancaster refrained from saying so – is that scallops in their shells, pound for pound, are worth roughly the same as cod and haddock which have no shells, and that Canada's statistical presentation, using round weight for all products, gives a perfectly fair perspective of the economic value of the Georges Bank fishery.

Mr. President, Mr. Feldman also challenged the Canadian statistics. But the apparent point of Mr. Feldman's attack was contradicted on the face of the very statistical table he complained about. He made the extraordinary allegation that Canada had exaggerated the importance to Nova Scotia of Georges Bank scallops, and in this respect he put before the Chamber Figure 56 of the United States oral presentation – a reproduction of Table 13 to the Canadian Economics Annex – which you now have before you in the red dossier as Figure 153 to the Canadian oral proceedings. Mr. Feldman announced that the United States had ascertained from its analysis of ICNAF data that Table 13 does not accurately depict the total Canadian scallop catch from all sources. Mr. Feldman's objection was made in the following terms: "The Canadian table fails to include on the average 21 per cent of Canada's yearly scallop landings for the period shown." (**VI**, p. 387.) Well, the United States could have spared itself the trouble and expense of analysing the ICNAF data merely by pausing long

enough to read the heading to Table 13 which says, quite clearly, "Nova Scotia Offshore Scallop Landings from NAFO Division 4X and Subdivision 5Ze". Equally, the footnote at page 21 of the Economics Annex, which Mr. Feldman complained about, also related to a discussion of offshore scallop vessels. Why did Canada not include in Table 13 the catch from the inshore scallop grounds and from more distant offshore scallop grounds? Well surely the answer is obvious, Mr. President. Because it is only the Georges Bank catch that is at risk in these proceedings. That is why Canada used only the catch attributable to Georges Bank in its economic calculations. Yet Mr. Feldman says: "The scallop table", referring to Table 13, "is just one example of the liberties which Canada takes with the data in this case." (**VI**, p. 388.) What liberties? Canada quite properly excluded the value of the catch from inshore and distant grounds from its valuation of the economic importance of Georges Bank. Yet Mr. Feldman attempted to use Table 13 as a springboard for his attack on Canada's economic analysis, an attack which was – in the result – without substance or merit. It is appropriate to recall Mr. Feldman's exact words:

> "Since 33 per cent of the scallops landed in southwest Nova Scotia came from other areas under undisputed Canadian jurisdiction, all the figures presented by Canada for employment and income attributable to Georges Bank in 1980 have to be reduced significantly." (**VI**, p. 387.)

But of course scallops landed from areas under undisputed Canadian jurisdiction have nothing to do with employment and income attributable to Georges Bank. In the case of scallops, Canada used exactly the same dollar figure as the United States for the value attributable to Canada's harvesting activity in the disputed area, namely about $Cdn. 34 million (United States Counter-Memorial, Anns., Vol. III, Ann. 4, App. B, Sec. 2, Table 2, 1980, p. 17). With respect to the value generated by the processing activity that same year, the Canadian calculation is derived from Table 10 of the Canadian Economics Annex. For ease of reference, Table 10 is reproduced side by side in Figure 153 with Table 13. It shows that when Canada calculated the income and employment that would be lost to Nova Scotia by reason of being deprived of access to Georges Bank – as the Court will see by the red line which is drawn between the two red squares – Canada based its calculations on the precise weight of fish products – in this case scallops – taken from the disputed portion of Georges Bank, and nothing else. Furthermore, Mr. President, in order to minimize areas of potential disagreement between the Parties, when Canada calculated the indirect and induced employment attributable to Georges Bank Canada used the same multiplier in relation to Nova Scotia as did the United States in relation to Nova Scotia (United States Counter-Memorial, Anns., Vol. III, Ann. 4, App. B, p. 47, para. 16, fn. 2).

In the result, Mr. President, the unfortunate accusation of "distortion" against the statistical record presented by Canada in these proceedings turns out to represent nothing more significant than a careless misreading by the United States counsel of data which are perfectly accurate, clearly labelled, and directly related to Georges Bank.

But these matters of controversy should not distract attention from the broad basis of agreement between the Parties, because whether emphasis should be placed on the fact that in 1981 Georges Bank represented about 97 per cent of Nova Scotia's offshore scallop catch in divisions 5Z and 4X, as Canada points out, or whether the emphasis should be placed on the fact that in 1981 Georges Bank represented 74 per cent of the entire Canadian scallop catch from all sources, as the United States points out (**VI**, p. 387), both figures simply

underline the extraordinary importance of Georges Bank to Nova Scotia. And that is the point.

Mr. Lancaster attempted to develop a theory of dominance as the second element in the United States claim to the whole of Georges Bank (**VI**, p. 350). Canada does not claim dominance. In Canada's view, "dominance" as relied upon by the United States has nothing to do with equity. The Chamber is aware that Canada's fishing activities averaged over the past 20 years or more are *roughly at parity with those of the United States across Georges Bank as a* whole, with, of course, a special interest in the eastern or northeastern portion of the Bank (**VI**, pp. 94-98). I will not repeat my submissions on the contemporary fishery.

(171) But not only did the United States fail to dominate the contemporary fishery on Georges Bank in relation to Canada, as Canada's Figure 46 to the oral proceedings demonstrated, but the fishery of both countries represented merely one element in the larger context of a high seas fishery, where vessels from many nations had a substantial participation. The Chamber will recall the evidence of United States Ambassador Cutler that the 1979 fisheries agreement was based on the catch experience of, on average, about 13 years' duration (**VI**, p. 95). Figure 154 to the oral proceedings contained in your red dossier, puts the combined Canadian and United States fishing activities for this 13-year period throughout the whole of ICNAF subdivision 5Ze, including Georges Bank, into perspective.

Referring to Figure 154, the red line shows the percentage of the catch taken by the combined efforts of the United States and Canada. That is the bottom line up to and including 1976 which is the last complete year before the implementation of the 200-mile zones. The blue line shows the percentage of the catch taken year by year by distant water fleets. In the years leading up to the proclamation of 200-mile zones in 1977 Georges Bank was not even dominated by the combined efforts of the coastal State fisheries of Canada and the United States – much less by the United States alone. So much for dominance by the United States of the contemporary fishery.

The third element in the United States claim to the whole of Georges Bank was the attempt to subordinate the "contemporary" fishery to the "historical" fishery. Mr. Lancaster suggested that the contemporary fishery represents but a short aberration (**VI**, p. 348), in his 150-year-long film. The object of Mr. Lancaster's advocacy apparently was to attempt to escape contemporary realities by appealing to what the United States considers to be the more favourable picture presented by the 19th century.

The sweeping claims of the United States to be the first on Georges Bank and the biggest on Georges Bank and the most caring in relation to Georges Bank and so on are simply not supported by the evidence, and in rejecting the relevance of the United States historical argument Canada must not be understood as accepting as accurate the United States version of the historical facts. Canada has not taken the time of the Chamber to deal extensively with the history of Georges Bank in these oral proceedings because the documentary evidence is self-explanatory. Time is short and in Canada's view – as a matter of law – the ancestral activities of fishermen in a different age afford no equitable basis on which to delimit a 200-mile zone, either in the Gulf of Maine area or elsewhere in the world.

But some of the United States pronouncements on this subject simply cannot go unchallenged. In the course of his submissions, Mr. Lancaster made the following categorical statement: "The hard factual evidence is uncontroverted. Only since the 1950s has Canada fished on Georges Bank." (**VI**, p. 338). The

existence of a Canadian fishery on Georges Bank since the 19th century is carefully documented in the historical Annexes to the Canadian pleadings. In these Annexes, Mr. President, and I do not propose to read from them, there are in the order of 400 pages of detailed references which I urge the Chamber to peruse at your convenience. The evidence is taken from a wide and comprehensive variety of sources including contemporary United States Government records and newspaper accounts. So many independent sources over such a long period of time cannot all be wrong. But the United States has decided to pretend that this evidence before the Chamber simply does not exist.

The United States has also claimed in these oral proceedings to have discovered and undertaken the initial development of every major commercial fishery on Georges Bank (**VI**, p. 350). If, contrary to Canada's submissions, this is regarded as a relevant test of equity, the fact of the matter is that the Basques and the Portuguese discovered and initially developed the commercial fisheries in the Gulf of Maine area. The volume entitled *The Maritime History of Massachusetts*, deposited by the United States, points out that prior to the founding of any colonies in North America:

> "one could find men in any fishing port from Bristol to Bilbao who could tell the bearings of Cape Ann from Cape Cod, and compare the holding-ground in every harbour from Narragansett to Passamaquoddy" (Samuel Eliot Morison, *The Maritime History of Massachusetts*, 1921, p. 8).

And all of that exploration and development took place before there was such a country as the United States. So much for discovery and initial development and so much for the United States claim made by Mr. Lancaster to have been "the sole country exploiting Georges Bank" in the earlier period.

Canada's evidence in support of its historical fishery is based on what is said in hundreds of historical documents and records. The United States case against Canada's historic fishery largely rests on what is not said by selected sources.

First, the United States relies on a few books which concern themselves with the history of the United States fishery. Given the focus of these books it is not surprising that they do not address the importance or extent of the Canadian fishery on Georges Bank.

Second, the United States relies heavily on two reports prepared by the ICNAF secretariat in 1952 (**VI**, pp. 343-344). These reports not only suffer from the acknowledged fact that the Canadian data provided to ICNAF – for reasons already explained to the Chamber – identified Canadian catches by port of landing only, and did not purport to identify any Canadian catch by area of capture, but it must also be pointed out that these ICNAF Reports addressed only groundfish species. No pretence was made by ICNAF in the documents relied upon by the United States to reflect the swordfish fishery, which was a major Canadian Georges Bank fishery, nor Canada's early scallop fishery on the Bank which is well documented elsewhere (**V**, *Canadian Reply*, pp. 135-136, para. 310; *ibid.*, I, Anns., Vol. II, Pt. II, pp. 290-294, paras. 25-31).

In the circumstances it is simply unreasonable to suggest, as the United States does, that a negative inference from what is not said in selected publications should prevent the Chamber from accepting as accurate independent reports from newspapers and other sources and official government documents from both the United States and Canada, all of which leave no doubt that Georges Bank was fished by Canadian fishermen from the early 19th century onwards (**III**, Canadian Counter-Memorial, Anns., Vol. II, Pt. II, pp. 10-14, paras. 15-24). After all, Nova Scotians and New Englanders inhabited the same

part of the world, and their fishermen followed the same stocks of fish in their seasonal concentrations around a similar cycle of offshore banks. If United States fishermen were present in greater numbers on Georges Bank in the earlier years it simply suggests that the United States eastern seaboard had a larger population where fishing activities achieved a degree of maturity – earlier – than its developing Canadian counterpart. But that fact, Mr. President, in Canada's submission has no relevance to the equitable delimitation of a modern 200-mile zone.

Contemporaneous documentary evidence shows that Canadian exploitation of Georges Bank intensified in the early part of the 20th century, particularly during the period of virtual free trade in fish products between Canada and the United States from 1913 to 1922 when Canadian vessels from southwest Nova Scotia participated in the cod, haddock and halibut fisheries on Georges Bank (Canadian Counter-Memorial, Anns., Vol. II, pp. 19-39, paras. 28-58). Official United States statistical reports for the 1918 to 1921 seasons record substantial Georges Bank landings by Canadian vessels at United States ports. These records, prepared by the United States Commissioner of Fisheries, indicate that during the period from 1918 to 1921, to take an illustration, more than one-third of Canadian fishing voyages which made recorded landings in the United States included trips to Georges Bank (*ibid.*, Anns., Vol. II, pp. 25-26, para. 39). These figures, of course, do not include landings of Georges Bank catches in Canadian ports. Mr. Lancaster's statement that "only since the 1950s has Canada fished on Georges Bank" (**VI**, p. 338) is simply not in accordance with all of this evidence.

I do not wish to take the time of the Chamber for more than this brief reference to the historical evidence, because the real issue is what use can the Chamber make of it all? Canada does not claim to have dominated the high seas fishery on Georges Bank in the historical period – or even to have equalled the United States activity for much of that time. Is that relevant? Should Canada be penalized for the fact that its fisheries were slower to develop to a state of maturity than those of the United States? Are States that become biggest first to prevail in matters of maritime delimitation? A number of things should be kept in mind in this connection, in Canada's view:

First, neither Canada nor the United States puts forward any claim to "historical fishing rights" (**VI**, p. 349).

Second, the paramount historical fact about Georges Bank is that it was a high seas fishery. Mr. Robinson's remark that Georges Bank was considered by many to be "as American as apple pie" (**VI**, p. 231) raises the question of "Who thought that?" Perhaps some Americans. Certainly not other nations. Ask the captains of the distant water fleets. Mr. Lancaster said that if Canada obtains jurisdiction over the northeast portion of Georges Bank, it will receive a "windfall" (**VI**, p. 346), but of course it would be no less of a "windfall" for the United States. Mr. Lancaster complained that the Canadian line would retain for Canada winter fishing grounds on the eastern portion of Georges Bank, which Mr. Lancaster said Canada "has never before had exclusively in its control" (**VI**, p. 340). Nor, of course, has the United States ever had exclusive control of these winter fishing grounds. And the Chamber will have noticed that United States counsel like to say, whenever possible, that this proceeding is intended to "confirm" United States jurisdiction over Georges Bank (e.g., **VI**, p. 385), thus treating as predetermined by the United States the very issue which has been referred to the Chamber for its consideration. In Canada's view the United States presentation on these issues is fundamentally flawed by the

misconception that historically the United States in some way owned the high seas fishery on Georges Bank (**VI**, pp. 234, 249, 286), an assertion which is of course without any legal or factual foundation whatsoever.

Third, Mr. President, the 200-mile zone was brought into existence to respond to a widely perceived need for coastal States to be permitted to benefit from and to carefully husband the resources in adjacent waters. The Chamber's acceptance of the United States arguments that an alleged historical "status quo" must prevail would – to say the least – undermine in many parts of the world the very reason why the 200-mile zone was created.

Fourth, the 200-mile zone also responds – as Mr. Stevenson acknowledged (**VI**, p. 263) – to mounting pressures on fishery resources created by advanced harvesting capacity and technology – contemporary conditions which have no counterpart in the historical period which the United States seeks to rely upon. Mounting pressure on resources was also noted as a fisheries consideration of growing importance in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1974*, p. 195, para. 52). It is not a 19th-century problem, and nostalgia for the simpler days of the 19th century is no substitute for analysis of 20th-century problems for, as is perfectly clear, the 200-mile zone has no application except to the present and to the future.

The United States showed a more practical grasp of the modern world, in Canada's view, when it negotiated the 1979 fisheries agreement on the basis of fishing experience over, at most, the previous two decades – 13 years on average.

In short, Canada has no objection to a review of the historical fisheries record – we do not suggest that any part of the moving picture which Mr. Lancaster would like you to see be held back – even if it lasts 150 years – but at some point in these proceedings appropriate criteria of relevance must be imposed and, at that point, in Canada's view, the historical approach advocated by the United States should be firmly rejected.

There is one further point I should add with respect to the "relevant period". The United States pressed the Chamber to observe that its fishing effort on Georges Bank has increased since the Senate's failure to ratify the 1979 fisheries agreement. Mr. Lancaster said it would be wrong to exclude the fisheries of the past five years (**VI**, p. 338). Mr. Feldman used catch statistics up to and including 1983 (**VI**, pp. 386-387). The United States disclaims any particular reliance on these recent figures (**VI**, p. 339). But nevertheless any reliance at all upon post-1979 catches raised legal considerations about the attempted use of evidence arising from the Parties' conduct after the dispute is crystallized. And the law on that aspect of the matter, Mr. President, will be addressed by Professor Bowett. Factually, however, it is not clear why the United States believes that it can take comfort from the post-1979 statistics. Mr. Lancaster said on more than one occasion that the "United States scallop catches on Georges Bank in 1981 surpassed Canadian catches" (**VI**, p. 346). But according to the recent United States data deposited with the Chamber, that is simply not the case. In 1981 Canada took about 60 per cent of the scallop catch on Georges Bank, as a whole, and of course an even higher percentage of the scallop catch in the disputed area (Canadian Reply, Anns., Vol. II, Pt. I, Table 24, p. 52). Figure 44 to the United States oral proceedings purported to show on the basis of an incomplete sample that more United States vessels than Canadian vessels were sighted on the eastern portion of Georges Bank in 1981. But the catch statistics show – perhaps the triumph of skill over numbers – that Canadian vessels nevertheless managed to take home more than 53 per cent of the value of the catch from the whole of Georges Bank in that year (*ibid.*, Anns.,

Vol. II, Pt. I, Table 23, p. 52). Catch statistics since 1981 (**VI**, pp. 386-387) scarcely show the United States scallop catch in the disputed area going from strength to strength, as apparently envisaged by Mr. Lancaster (**VI**, p. 346). From about 40,000 metric tons of scallops in 1981 the United States catch dropped almost 50 per cent to about 21,000 metric tons in 1982 and with further cuts almost in half in 1983 to less than 12,000 metric tons (*United States Total Catch*, deposited with the Chamber, 9 May 1984).

There is a further important point to be made about the post-1978 period. The United States repeatedly spoke in its first round of the so-called "expulsion" of its fishermen from undisputed Canadian waters after proclamation of the Canadian 200-mile zone. As the Chamber is aware, the termination of reciprocal fishing privileges in 1978 was a wound which the United States inflicted upon itself, because reciprocal fishing was meant to resume with the ratification of the 1979 fisheries agreement (**I**, Canadian Memorial, pp. 103-104, paras. 233-238). But now Mr. Lancaster and Mr. Feldman carry this so-called "expulsion" argument a step further, and imply that United States fishermen made their major adjustments in 1978, and that Canadian fishermen ought now to move over to accommodate the United States claim (**VI**, pp. 340, 385). Quite apart, Mr. President, from the fact that this argument overlooks the expulsion in 1978 of Canadian fishermen from undisputed United States waters off Nantucket and Cape Cod, to the south of the disputed area (**VI**, p. 340), the scale of the mutual "expulsion" in 1978 is hardly comparable to what is proposed under the United States claim in these proceedings. The value of the United States catch in undisputed Canadian waters in 1977 – the last full year prior to the implementation of the 200-mile zone – was a mere $1.7 million (Canadian Reply, Anns., Vol. II, Pt. I, Table 26, p. 54 and *ICNAF Statistical Bulletin*, Vol. 27). In the same year the direct value of the Canadian catch in the disputed area alone of Georges Bank was worth more than 26 times that figure – about $45 million (Canadian Memorial, Anns, Vol. IV, Anns. 3 and 4, pp. 49-86). It is quite true that the fishermen of both countries suffered a degree of expulsion and adjustment in 1978 but that fact has no reasonable or rational connection with the United States claim in these proceedings.

I suggested earlier, Mr. President, that Mr. Lancaster was preoccupied by two matters – time and space. I have dealt with his concerns about the relevant period. As to geographic space, Mr. Lancaster's principal objective was to shrink the focus of the Chamber's attention from the whole of Georges Bank to the northeast portion of Georges Bank, so that he could then call Canada a monopolist for seeking exclusive jurisdiction on Canada's side of a single maritime boundary across Georges Bank (**VI**, p. 340). In this connection he (171) criticized Canada's Figure 46 to the oral proceedings as including the catch from all of Georges Bank, instead of merely the northeast portion (**VI**, p. 348).

The notion of monopoly in this case does not relate to the exclusive jurisdiction of either Party on its own side of the eventual boundary; it relates to the monopolistic principles which the United States wishes this Chamber to use to delimit the boundary in the first place so as to give to the United States the whole of Georges Bank.

(171) The reason why Canada's Figure 46 included all of Georges Bank is that Canada fished over all of Georges Bank. At times Mr. Lancaster seemed to suggest that because both Parties fished within the northeast portion the delimitation should in some way divide the northeast portion. But the same could be said of the area south and west of the line – now under United States jurisdiction – where Canadian fishermen used to go to fish. One of the strengths of the Canadian line is that although it is drawn by reference to the coastal

geography it does result in a reasonable accommodation of the fishing interests of the Parties. But it is unreasonable for the United States counsel to attempt to portray the Canadian proposal as a starting-point for a further shifting of the line to Canada's disadvantage.

Mr. Lancaster at times seemed to speak of the northeast or eastern portion of Georges Bank as a separate fishery, quite distinct from the fishery on the rest of the Bank – a separate and distinct fishery from which the United States was threatened with expulsion – a distinct ecological régime in fact, suggestive of the possibility that in Mr. Lancaster's view the Canadian line reflects a natural ecological boundary. In his statement to the Chamber on 16 April 1984, Mr. Lancaster said:

> "The United States fishermen would be cut off by the Canadian line. They would have to stand by and watch while the Canadian fishermen reaped the rich harvest from the stocks on the northeast portion of the Bank, cut off for all time from the fisheries their predecessors established and developed." (**VI**, pp. 340-341.)

But on that point, Mr. President, Mr. Lancaster was flatly contradicted by Dr. Edwards and Mr. Colson, who insisted that the whole of Georges Bank is the area within which commercially valuable fish stocks ought to be considered. Canada of course is of the view that Georges Bank itself is but part of a still larger oceanographic and biological system. But the point is that all of the United States presentations other than that of Mr. Lancaster were at pains to emphasize that the Canadian line would give both the United States and Canadian fishermen generous access to Georges Bank stocks. That indeed was the burden of the United States complaint.

The United States has attempted to attach particular importance to its fishery in the disputed zone in these proceedings. Mr. Lancaster went so far as to say that: "the groundfish fishery on the northeastern portion of the Bank has been the mainstay of the New England fishing industry for over 150 years" (**VI**, p. 342). But the United States administration told the United States Senate in 1979 that, based on recent figures, the fishery resources affected by the 1979 agreement, including Georges Bank, comprised not more than 10 per cent of the fish landed and 10 per cent of the total value of the fisheries in the New England and Mid-Atlantic States (United States *Draft Environmental Impact Study* on the 1979 East Coast Resources Agreement, p. 110). If Georges Bank as a whole does not qualify as "the mainstay" of the New England fishing industry, it must be asked, how can the northeastern portion alone achieve such an inflated status?

Before leaving Mr. Lancaster's presentation on the fishery, it should be noted that while he made references from time to time to fishing activities linking Maine and Georges Bank, he did not pause to refer the Chamber to the relevant evidence. "Today", he said,

> "New England fishermen, including fishermen from my home state of Maine, ... follow the same stocks, on the same Georges Bank fishing grounds, that their predecessors fished many generations ago." (**VI**, p. 339).

(253) Figure 155 to the Canadian oral proceedings shows that the fishermen of Maine and New Hampshire rarely find their way to Georges Bank. The green (253) bars on Figure 155 represent the Canadian catch and the dark green at the top represents the catch of vessels from the Bay of Fundy which in this proceeding the United States regards as virtually non-existent. The blue bars represent the

United States catch and the tiny dark blue strips hugging the bottom of the chart represent the catch by vessels from Maine and New Hampshire for the years in question.

It would appear clear that Georges Bank is of greater interest to the lawyers in Maine than it is to the fishermen in Maine, and this is not surprising. Mr. Lancaster's "home port" of Portland, Maine, is 143 nautical miles from the nearest point on Georges Bank, and its fishermen concentrate on fishing grounds closer to home. Cape Sable, Nova Scotia, is only 78 nautical miles from Georges Bank.

It is not that Canada disagrees with the sentiments expressed by Mr. Lancaster. On the contrary, his sense of priorities parallels those of the fishermen of southwest Nova Scotia. "In some minds", Mr. Lancaster said,

> "the Georges Bank fishery may be of small significance in the overall context of the issues of this case. Please understand that in the minds of the fishermen from Maine and all of New England this is what this case is all about." (**VI**, p. 350.)

The difficulty for Mr. Lancaster, as for other United States counsel who attempted to find economic links between Georges Bank and the Maine coast to support their theory that the one somehow lies "in front of" the other, is the fact – confirmed by United States data – that Maine's fishermen simply do not make the trip out to Georges Bank in any significant numbers.

II. Economic Dependence

If the coastal region of Maine did have a significant fishery on Georges Bank, and could demonstrate a degree of economic dependence on such a fishery equivalent to that of southwest Nova Scotia, Mr. Lancaster might have received a sympathetic hearing from his Canadian neighbours.

A more sympathetic hearing, in fact, than Maine would be likely to get from Mr. Feldman, who took the position that economic dependence is irrelevant. Even if it were relevant, Mr. Feldman argued, Canada has failed to make out a case on the facts (**VI**, p. 380).

Mr. President, the United States does not deny the relevance of economic factors to this delimitation. Indeed, the suggested natural boundary turns out on closer examination to be nothing more than an attempted allocation of stocks of a few commercially important species of fish, and of course fisheries conservation and management is primarily an economic and social function – it concerns people not just fish. The United States sought to show how its line would divide the east coast fisheries all the way from the Great South Channel to Newfoundland, in Mr. Lancaster's view, and thus allocate the relative economic benefits of the 200-mile zone to each Party. The so-called "natural boundary" in short turned out to have very strong elements of an economic boundary.

The United States is thus not against economic considerations as such. It merely opposes the Chamber giving its consideration to all aspects of the economic picture, including the economic dependence of Nova Scotia on the disputed fishing grounds.

Mr. Feldman contended that the *Grisbadarna* Award did not discuss the *economic impact of the loss of the fishery to either Party* (**VI**, *p. 381*). But the Tribunal specifically referred to the "greater importance" of the banks to Sweden than to Denmark. In the words of the Tribunal:

> "Fishing is, generally speaking, of more importance to the inhabitants of Koster than to those of Hvaler, the latter having, at least until compara-

> tively recent times, engaged rather in navigation than fishing." (J. R. Scott, ed., *The Hague Court Reports*, 1916, p. 131.)

With respect to the Anglo-Norwegian *Fisheries* case, the Court specifically addressed the issue of regional economic dependence in a number of important passages which have already been drawn to the attention of the Chamber.

Mr. Feldman tried to dismiss these passages as *obiter dicta* (VI, p. 382), but the Court did not rank its reasons in order of priority, and did not relegate regional economic dependence to an inferior status in its decision. The United States argued that Canada's position is closer to that of the United Kingdom than to that of Norway *(ibid.)*. But of course one of the many points of distinction is that the United Kingdom did not assert any economic dependence on the fisheries in question.

Mr. Feldman sought to contrast the great length of the Norwegian coastline north of the Arctic Circle at issue in 1951 as compared with what he termed the small fraction of the coastline of Canada at issue in this case (VI, p. 384). It is interesting to note that the baseline of the Norwegian coastline in issue in 1951 was about 600 nautical miles in length. It is about 190 nautical miles following the coast from Lunenburg to Digby and it is important Mr. President, in my submission, to keep this sense of geographic scale firmly in mind.

In respect of the 1974 *Fisheries Jurisdiction* case the United States says that the new concept of the 200-mile zone has changed the law and made the concept of "preferential fishing rights" obsolete (VI, p. 382). Canada agrees that the new 200-mile zone has had an enormous impact on the law – indeed that is a major element in Canada's legal argument – but it does not follow that equity has lost its meaning and that economic dependence ought now to be rejected as a "relevant circumstance" within a framework of "equitable principles" as held in the 1974 Judgment of the Court.

Lastly, the United States referred to the 1982 *Tunisia/Libya* Judgment *(ibid.)* where the Court considered the relevance of Tunisia's economic arguments, including its alleged dependence upon fishing resources derived from its claimed "historic rights" and "historic waters" (*I.C.J. Reports 1982*, p. 63, para. 106). The Court held:

> "The Court is, however, of the view that these economic considerations cannot be taken into account for the delimitation of the *continental shelf* areas appertaining to each Party." (Emphasis added.) (*Ibid.*, pp. 63-64, para. 107.)

But the Court adopted a method of delimitation that it said would "undoubtedly leave Tunisia in the full and undisturbed exercise" of its claimed historic rights (*ibid.*, pp. 62-63, para. 105), and, having set to one side historic fishing rights, it is not surprising that fishing activities and other equities associated with the water column were not considered by the Court to be relevant to what was purely a continental shelf delimitation. In so far as counsel for the United States has attempted to take these words out of the continental shelf context and to say that fisheries activities and a related economic dependence are not relevant to delimitation of overlapping fisheries zones, even where such dependence relates to fishing grounds closer to the coasts of the dependent party than to the coasts of any other State, then its legal argument finds no support in the *Tunisia/Libya* decision, and is contrary to the reasoning in the *Grisbadarna* Award, the Anglo-Norwegian *Fisheries* Judgment and in the *Fisheries Jurisdiction* case.

Mr. President, the United States summarized its arguments on this branch of the case with the following assertion by Mr. Feldman:

> "The logic of this position [that is the Canadian position] is that a coastline such as the long coast of Maine could be deprived of a 200-nautical-mile zone if it is not dependent on the resources of that zone." (**VI**, p. 383.)

But on the contrary, the logic of Canada's position is that where a fishing ground is located within the 200-mile economic zone of more than one State, the issue of economic dependence is a relevant circumstance to be included in the balancing up of factors in the delimitation of the area where the claims overlap – a relevant circumstance within a framework of equitable principles, as the Court reaffirmed in 1974.

Counsel for the United States also attacked Canada's facts as well as its interpretation of the law and in respect of the facts that economic dependence which binds southwest Nova Scotia to Georges Bank, the United States made essentially four arguments.

First, Canada has exaggerated the dollar value of Georges Bank to Nova Scotia.

Second, Canada has ignored the large number of jobs available in Nova Scotia's service sector.

Third, the facts in Nova Scotia are different than were the facts in Norway in 1951 and Iceland in 1974.

And, *fourth*, economic dependence must be assessed on a national basis rather than on a regional basis.

With respect to the accuracy of the economic data, the Chamber will appreciate that the income and employment statistics relied upon by Canada are supported by detailed analysis set out in the Economics Index filed with the Canadian Reply. No detailed response has been made to this analysis by the United States. Instead the United States simply claims that the Canadian analysis should be discounted by 33 per cent because, Mr. Feldman says, Canadian economists mixed up inshore and offshore scallop catches (**VI**, p. 386). As I have already explained, the only person who got his scallops mixed up was Mr. Feldman.

Accordingly, the Canadian calculation of $146 million contribution by Georges Bank to the economy of Nova Scotia in 1980 – a dollar figure derived by using the same economic multiplier as was used by the United States in relation to Nova Scotia – stands without serious contradiction, and such contradiction as has been put forward by the United States turned out to be based on a careless United States misreading of the material.

The question before the Chamber thus becomes this: Is an economic dependence of this magnitude in relation to this region a relative circumstance? Is $146 million a major contribution to an economy the size of Nova Scotia? Mr. Feldman says, in relation to Georges Bank, that it is not. Yet elsewhere in his remarks Mr. Feldman characterized the economic impact of an oil and gas discovery off Sable Island as "of major importance to Nova Scotia" (**VI**, p. 383). That is, to the entire province of Nova Scotia. And so it is. During its productive period of 14 to 16 years the Sable Island project, not to be confused with Cape Sable, in southwest Nova Scotia (Sable Island lies some 156 nautical miles southeast of Halifax), the Sable Island development is expected to generate directly and indirectly income of about $41 million annually (1979 dollars), less than a third of the 1980 contribution of Georges Bank (*Socio-Economic Review, The Venture Development Project*, Canada-Nova Scotia Offshore Oil and Gas Board, Halifax, 1984, pp. 20 and 29). Even during its peak construction phase it will not generate the equivalent of Georges Bank's 1980 contribution to Nova

Scotia. Yet if the Sable Island oil and gas field is acknowledged by the United States to be of "major importance" to Nova Scotia, however short lived the benefits, why is the contribution of $146 million a year to be denigrated in the case of Georges Bank, whose benefits may last for ever?

A study sponsored in 1978 by the Office of the Geographer of the United States Department of State, deposited with the Court, contradicts the view now asserted by United States counsel. It says:

> "Oil and mineral development, potentially important to the future of Canada, cannot be counted upon to solve Nova Scotia's economic problems." (*Georges Bank, Gulf of Maine, Cape Cod, Nova Scotia, Perspectives in Economics and History*, Trigom, Portland, Maine, 1978, p. 97.)

The United States second line of attack was to contend that the Canadian analysis ignored Nova Scotia's service sector (VI, p. 388) or, as the United States put it, Nova Scotia's "enormous service sector" *(ibid.)*. The population of southwest Nova Scotia is apparently expected to survive independently of the fishery by taking in each other's laundry and performing other services for one another. But as the same study sponsored by the Office of the Geographer of the United States Department of State pointed out:

> "The Service Sector, including business, personal and financial services is closely dependent upon the product sector." (*Georges Bank, Gulf of Maine, Cape Cod, Nova Scotia, Perspectives in History and Economics*, p. 9.)

In other words, the primary and secondary sectors highlighted by Canada in the first round of the oral proceedings, lead the economy of a region, the service sector follows where the primary and secondary sectors have led. The service sector cannot hold itself up by its own bootstraps. If the primary and secondary sectors collapse, as with a sharp reduction in the fishing industry, and its workers depart, the service sector disappears as well, which is what common sense would anticipate.

The United States third line of attack was to say that the actual circumstances in Norway in 1951 and Iceland in 1974 are different from the facts in Nova Scotia in the 1980s. Mr Feldman spent a good deal of time developing this point. He said, for example, that if Nova Scotia really were locked into an economy based on resources exploitation, "its labour force would be employed principally in the primary sector – that is in the production of raw materials" (VI, p. 389). But that is simply not the case, Mr. President. In 1981 – the year of concern to Mr. Feldman – the majority of jobs in Iceland and Norway were also found in the service sector (Canadian Memorial, Anns., Vol. 4, Anns. 15 and 16). I will not take the time of the Chamber to review the United States critique but I would caution the Chamber to review with scepticism the critique which mixed up the "adult male population" in one case with the "total workforce" in another case; the "affected area" of part of a coastal region in one case and the entire province of Nova Scotia in the other case. Comparisons of this type are likely to generate more heat than light, and I mention them only to put them aside. The earlier international law authorities were cited not for their facts but for their propositions of law.

Fourthly, and finally, the United States says that, well, even if Nova Scotia is now linked with Georges Bank by an economic dependence worth $146 million in 1981, what matters such a figure in the national accounts of Canada? What could it mean in the national accounts of the United States? What did the Grisbadarna Bank contribute to the national accounts of Sweden? The United

States would like the Chamber to lift economics, like geography, to the continental scale, thereby seeking to dwarf the local features of the area to be delimited. There is no doubt that Canada could survive the loss of Georges Bank without a national bankruptcy. Canada has never made any suggestion to the contrary. But there are substantial legal and factual objections to the United States approach which I would summarize as follows:

First, the *Grisbadarna* Award of 1909, the Anglo-Norwegian *Fisheries* case in 1951 and the *Fisheries Jurisdiction* case in 1974, make it clear that as a matter of law the economic dependence of regions or communities is relevant if the facts warrant.

Second, the "relevant area" in this delimitation is the Gulf of Maine area, and, in Canada's view it would not be equitable to brush aside the established economic interests of coastal populations within the relevant area, which would otherwise be regarded as relevant, by reason merely of the fact that in this particular case the landmass stretching out behind the relevant coasts forms part of continental-scale countries.

Third, the economic contribution of Georges Bank is of "major importance" to the entire province of Nova Scotia, to borrow the words applied by Mr. Feldman to the much lesser economic factor of the Sable Island oil and gas development, and, of course, of even greater importance to the five counties of southwest Nova Scotia which is the area where the existing economic dependence is concentrated.

III. Economic Impact

Mr. President, distinguished Judges, I turn finally to the United States submissions on the economic impact of the delimitation of a single maritime boundary. Let me say first of all that Canada does not agree with the United States that economic dependence is merely another expression for relative national wealth (**VI**, p. 381). Neither did the Court in the cases Canada relies upon. A rich economy could well be dependent on a narrow economic sector – wealth and economic diversification are two entirely different and unrelated matters.

As to diversification, the evidence is clear – and the United States does not deny it – that the "productive sector" of southwest Nova Scotia is dependent on the resources of the sea – I addressed this issue in the opening round and I will not repeat it here. Nor is the fishing industry itself capable of absorbing the loss of Georges Bank. Mr. Feldman says that Nova Scotia waters are "teeming with fish" but the fact is that in recent years large parts of Subarea 4 have been closed, either entirely or after an abbreviated season, due to low fishery stocks. It has never been suggested by Canada that southwest Nova Scotia fishes exclusively on Georges Bank. The issue is not exclusivity but economic importance and dependence. To eliminate access to Georges Bank would be to deprive Canada of one of the major pillars which supports the economy of southwest Nova Scotia, and which now links Canada to Georges Bank.

Mr. Feldman referred to the Kirby Report which was a Canadian enquiry into the Atlantic Fisheries, which recommended that the Canadian Government make a substantial investment in east coast fisheries. Mr. President, this is not a sign of a flourishing fishing industry – just the opposite. The private sector in Nova Scotia cannot cope with the problems of the fishing industry. The Canadian pleadings have dealt at considerable length with government assistance to the fishery over the years by both the United States and Canadian

Governments (Canadian Counter-Memorial, pp. 113-114, paras. 280-285; Canadian Reply, p. 126, para. 294 and Anns., Vol. II, Pt. I, App. 6, pp. 155-164, paras. 1-23). One of the few bright spots in Canada's Atlantic fishery identified by the Kirby Report was southwest Nova Scotia – closest to Georges Bank (Canadian Reply, p. 121, para. 283).

The United States told the Chamber that southwest Nova Scotia would quickly adjust to the loss of access to Georges Bank. But as the study relied upon by the United States on this aspect of the argument itself pointed out, the two most important factors that determine the long-term severity of a serious economic dislocation are firstly the proportion (not the actual numbers) of a community's workers who lose their employment and secondly, the economic specialization of the regional – not the national – economy (*Job Losses in Major Industries*, OECD, 1983, p. 13, deposited as Document 114 by the United States, 9 April 1984). These two factors of proportionate size and specialization within the regional economy explain the difference in the relative ability of southwest Nova Scotia and eastern Massachusetts to respond to a serious disruption in the fishery.

If the Chamber is of the view, following the judicial precedents relied upon by Canada, that regional economic dependence is an appropriate frame of reference, as Canada says it is, it would follow that a situation of economic dependence has been made out on the facts of this case.

Most of the service-type jobs in Nova Scotia referred to by Mr. Feldman are concentrated in the capital city, Halifax, which is located outside the region of southwest Nova Scotia. Mr. Feldman attempted to make much of Halifax as the counterpart to Boston. The two centres are hardly comparable in their ability to absorb displaced fishermen. The Boston metropolitan area has about 2.7 million people (Canadian Reply, Anns., Vol. II, doc. App. 5, p. 186). Halifax is a city of about 225,000 people – less than one-tenth of the size. But the reason Canada referred to Boston is not because Boston is big but because Boston, amongst other things, *is the home port for a substantial part of the Massachusetts* Georges Bank fleet. It is not a "one industry" fishing town. Halifax has no vessels which fish Georges Bank. And the communities which send boats to Georges Bank lack the economic depth even of Halifax.

What is the United States answer to Canada's legitimate regional concerns? Mr. Feldman had an answer; he said the unemployed fishermen of Lunenburg could commute 192 kilometres each day to work in service-type jobs in Halifax (**VI**, p. 389). The suggestion is ludicrous even in relation to Lunenburg – but what about Digby, a 466-kilometre round trip by road from Halifax? And if the fishermen of the southwest coast migrate out of the region to find work – to Halifax or to central Canada – or wherever – the very problem which rightly concerned the Court in 1951 and 1974 will have happened.

Mr. President, what is the major underlying problem which concerned the Court in these earlier cases? Is it, as the United States suggest another dimension of "relative national wealth"? Or is it something more fundamental and profound? In Canada's view the larger and more important issue underlying the Court's recognition of regional "economic dependence" as a "relevant circumstance within a framework of equitable principles" is not wealth but the recognized responsibility of a State to maintain the structure and viability of its regions and communities. Mr. Feldman criticized at length Canada's insistence on looking at regional economic dependence, and the importance of maintaining the economic base of southwest Nova Scotia as a region of Canada. Indeed, he attached this aspect of the Canadian presentation in the strongest, I would almost say intemperate, terms:

"All of these distortions are small, however, by comparison with Canada's effort to confine the analysis to five selected counties in southwest Nova Scotia. This narrow focus has no basis in legal principle or in economic reality." (VI, p. 389.)

But, in the cases relied upon by Canada the Court was quite rightly concerned about the economic vulnerability of regions within a country and the importance to States of maintaining the population base of their coastal regions. In the Anglo-Norwegian *Fisheries* case, the Court did not take the view that the inhabitants of the coastal zone in northern Norway should pack up and go to the city of Oslo to seek jobs in the service sector. While it is true that the *Fisheries Jurisdiction* case did not involve a boundary delimitation, the point is that the fishermen of Iceland were not told by the Court simply to make a living at something other than fishing. In each case the Court has taken the economic geography as it found it. The basic activity which holds people in southwest Nova Scotia is the fishery. Service jobs would not remain in southwest Nova Scotia if the region became progressively depopulated, nor would economic developments elsewhere in Canada keep people in southwest Nova Scotia. Nor will oil and gas development off Sable Island keep people in southwest Nova Scotia. Mr. Feldman laid great stress on alleged employment opportunities within southwest Nova Scotia, but on any fair reading of the record before the Chamber, such opportunities do not exist to any significant extent. The forestry and agricultural potential is dealt with at length in the material and is poor. Mr. Feldman spoke sarcastically of an impression of southwest Nova Scotia which emerged from the Canadian pleadings, as "a picturesque but poor region which consists of nothing but small fishing villages and farms with limited economic opportunities" (VI, p. 385).

Mr. President, unfortunately there is more proof than poetry in that parody – it is not the whole picture, but it is a part of the picture.

Mr. President, distinguished Judges, let me conclude on this note. Canada has laid some significant, relevant, economic facts before the Chamber. The United States has put before you other economic considerations including the natural boundary which became the economic boundary. The Chamber can perhaps take some comfort from the apparent agreement of the Parties that their respective claims, rooted in their differing interpretations of the relevant coastal geography, must nevertheless be tested against economic factors to assess the equity of the result. In Canada's view, all the relevant economic factors ought to be looked at – and the relevant economic factors include as an important element, but by no means the only element, the economic dependence of the people of southwest Nova Scotia on Georges Bank. For, as the Chamber was assured by my learned friend Mr. Lancaster, the counsel from Maine who spoke for the fishermen of Massachusetts, in the minds of ordinary people the Georges Bank fishery "is what this case is all about".

The Chamber rose at 6.04 p.m.

TWENTY-SECOND PUBLIC SITTING (5 IV 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

REJOINDER OF PROFESSOR BOWETT

COUNSEL FOR THE GOVERNMENT OF CANADA

Professor BOWETT:

ACQUIESCENCE AND ESTOPPEL

I. The United States Has Failed to Meet Canada's Argument on Acquiescence and Estoppel

Mr. President, distinguished Judges, a significant – but a quite independent – part of Canada's case rests upon the principles of acquiescence and estoppel and Canada's position on these questions has been developed both in the written pleadings (**I**, Memorial, pp. 172-179, paras. 412-426; **III**, Counter-Memorial, pp. 151-155, paras. 377-381; **V**, Reply, pp. 85-98, paras. 201-233) and in the presentation of Professor Brownlie in the first round of these hearings (**IV**, pp. 125-136). Nevertheless, the United States treatment of acquiescence and estoppel, which was characterized by certain idiosyncrasies in the written pleadings (**IV**, Counter-Memorial, pp. 171-179, paras. 265-288; **V**, Reply, pp. 31-32, paras. 48-51) has been compounded by fresh errors introduced in the first round of the oral proceedings, and I would like to comment on aspects of Mr. Rashkow's statement (**VI**, pp. 366-378) and the United States argument on acquiescence and estoppel generally. In doing so I would take this opportunity of acknowledging Professor Brownlie's contribution to my own statement.

The central point can be expressed quite simply: the United States has entirely failed to meet Canada's argument on acquiescence and estoppel. Often the United States has simply put forward irrelevant propositions as if they were an answer to the Canadian position. An example of this style of pleading is first found in the United States Counter-Memorial (pp. 158-162, paras. 243-251; and p. 171, para. 267) where it is stated that "the official upon whose conduct claims of acquiescence and estoppel are made must have the authority to bind the State". This proposition also appears in the United States Reply (p. 31, para. 48), and it was repeated in Mr. Rashkow's presentation (**VI**, p. 373).

As we have pointed out in our Reply (pp. 93-94, paras. 221-222) this is a major misrepresentation of the law governing acquiescence. None of the cases commonly cited by international lawyers on the subject of acquiescence places any significance on the authority of officials to bind. In the *Temple of Preah Vihear* case (*I.C.J. Reports 1962*, pp. 24-25) the Court stated that the acts and words of even minor officials, acting within their mandate, would engage the good faith of their governments and preclude those governments from subsequently changing their positions.

The fact is that the United States wishes to avoid the effect of the correspondence engaged in by the United States Department of the Interior early in 1965, which clearly evidences the explicit knowledge of the United States of the Canadian permit programme and the existence of a median line delimitation on

Georges Bank (Canadian Memorial, Anns., Vol. III, Anns. 1-6). The *Temple of Preah Vihear* case invalidates the United States assertion of an alleged requirement of authority to bind the State, and underlines the irrelevance of the description of Mr. Luther Hoffman as "a mid-level . . . employee of no diplomatic standing" (United States Reply, p. 31, para. 48).

The response of the United States in the first round of the oral proceedings is quite inadequate. The decision in the *Temple of Preah Vihear* case, which is after all the primary authority, is ignored. The only authority cited for the proposition that "the official whose conduct is in question must have either express or implied authority to bind his State" is the United States Counter-Memorial (VI, p. 374; referring to II, United States Memorial, pp. 158-159, para. 243), and with all due respect to my colleagues on the other side, they cannot really expect us to find their own pleadings a sufficient authority for the propositions they make.

In any case the United States is completely begging the question, since the issue is not one of treaty-making or of unilateral declarations, but of knowledge, or the means of knowledge, on the part of the officials concerned. The "authority to bind the State" is not the issue and this has been used by the United States as a vehicle for avoiding the joinder of issues with Canada.

Perhaps the chief characteristic of Mr. Rashkow's presentation was the omission of any reference to certain significant matters of fact which are prominent in the documentary material used by the Parties in relation to acquiescence and estoppel. Two of these omissions are quite remarkable. First, in Mr. Rashkow's lengthy speech there is no single reference, not even an allusion, to the aide-mémoire of 5 November 1969, in which the United States first made a reservation of rights in the context of "the United States-Canada continental shelf boundary in the Gulf of Maine" (Canadian Memorial, Anns., Vol. III, Ann. 13). Second, there was no reference in Mr. Rashkow's statement to the permit maps which Canada sent to the United States officials in response to express requests for such maps. Such permit maps were attached to a letter dated 8 April 1965 from the Canadian Department of Northern Affairs and National Resources and also to the letter of 30 August 1966 from the Canadian Department of External Affairs to the United States Embassy in Ottawa (Canadian Memorial, Anns., Vol. III, Anns. 3 and 8, pp. 10 and 37).

Copies of these permit maps are in your folders as Figures 156 and 157. If I can ask you to just glance at these figures, 156 and 157, you will see that both of these figures show unmistakably a division of Georges Bank on the basis of the exercise of continental shelf rights by Canada up to the strict equidistance line. But on this important evidence Mr. Rashkow maintained an eloquent silence.

It is for these reasons that I have to emphasize that the United States has failed to meet Canada's arguments on acquiescence and estoppel and has really avoided a satisfactory joinder of issues.

II. Reaffirmation of Canada's Case concerning Acquiescence and Estoppel

In the face of this evasive mode of pleading, Canada finds it necessary to reaffirm her position in general. The conduct of the United States from 1964 to 1969 constituted acquiescence in, or recognition of, the use of the equidistance method in the delimitation of the continental shelf in the Gulf of Maine area and the exercise of Canadian jurisdiction over a large part of Georges Bank. The crux of the legal principle of acquiescence is a silence, a failure to protest, when protest, or a reservation of rights, is called for. This aspect of the matter is

persistently ignored both in the United States written pleadings and in Mr. Rashkow's speech.

The essential elements are the existence of a public activity affecting legal rights as between the Parties and an absence of protest or reservation of rights in face of this public activity. Keeping silent in the presence of knowledge, or the means of knowledge, of such public activity constitutes an acquiescence, a tacit acceptance, of the legal position. Mr. Rashkow has failed to rebut Canada's position concerning each and every one of these key elements.

Canada's public activity in respect of continental shelf rights over Georges Bank began in mid-1964 and the issue of oil and gas permits for Georges Bank based upon an equidistance line was actually known to United States officials as early as 1965. This is shown in a number of ways, including Mr. Hoffman's letter of 1 April 1965 (Canadian Memorial, Anns., Vol. III, Ann. 1), and no reservation of rights was forthcoming until 5 November 1969 (*ibid.*, Anns., Vol. III, Ann. 13).

In his oral presentation Mr. Rashkow has attempted to avoid the implications of the evidence adduced by Canada by means of two principal tactics. First, he asserted that, as a matter of law "acquiescence based upon tacit acceptance requires the passage of a substantial period of time" (VI, p. 375). As I shall show in due course, this view of the law is misconceived, though of course it is a misconception helpful to the United States case.

The second principal tactic adopted by Mr. Rashkow is to seek to abbreviate the acquiescence period by resort to two subsidiary devices. The first of these is to push the date of United States actual knowledge forward from 1 April 1965 to 16 August 1966, when in Mr. Rashkow's words, "the matter entered diplomatic channels" (VI, p. 376). The success of this device depends upon the fictitious principle of international law that the official having knowledge of the public activity concerned "must have authority to bind the [acquiescent] State", in combination with the necessary but irrelevant assertion that the official who sent the letter of 1 April 1965 lacked the "authority to bind the United States". Not only is this view based upon a major error of law, about which I will say more later, but it is in striking contradiction to the position taken in the United States Counter-Memorial.

Mr. President, the official in question, Mr. Luther Hoffman, who signed the letter of 1 April 1965 indicating knowledge of Canada's permit programme in respect of Georges Bank, has suffered remarkable vicissitudes of fortune in the course of these proceedings. At the stage of the Counter-Memorial (p. 175, para. 275) it was stated by the United States that Mr. Hoffman's conduct, in writing as he did on 1 April 1965 to the Government of Canada, "constituted a protest" against any claim, which "Canada might be deemed to have made". This view was reiterated in clear terms in the United States Reply (pp. 31-32, para. 49). So Mr. Hoffman was important enough to be able to make a formal protest.

It goes without saying that Canada does not accept that Mr. Hoffman's letter could be interpreted as a protest. It was, quite simply, a request for information against a background of knowledge of the Canadian permit programme affecting areas of Georges Bank (Canadian Reply, p. 91, para. 216). However, the point is that the United States, both in its Counter-Memorial and the Reply, gives an explicit acknowledgement of Mr. Hoffman having a capacity to protest in the context of a dispute about delimitation. And by parity of reasoning, a capacity to protest must, so to speak, include a capacity for acquiescence.

During the first round of the oral proceedings Mr. Hoffman's capacity to

make protests becomes a thing of the past. In his speech the United States Agent describes Mr. Hoffman as a "functionary" engaged in "a routine exchange of correspondence between mid-level bureaucrats concerned with oil and gas matters" (VI, p. 236), and Mr. Rashkow uses similar terms (VI, p. 367). Between the Reply and the oral proceedings it must have been decided that Mr. Hoffman's days of protest were over because if he wasn't important enough to acquiesce, he could not be important enough to protest. But that is bad law. Much important business of governments is conducted by those described by the United States Agent as "mid-level bureaucrats".

So much for Mr. Rashkow's device of seeking to move forward the date of the United States actual knowledge. This device was designed to shorten the period of acquiescence at one end. A second device, not surprisingly, involved an attempt to shorten the period at the other end by bringing the date of the first United States reservation of rights further back. Thus, both the United States Agent and Mr. Rashkow attempted to present the aide-mémoire of 10 May 1968 (Canadian Memorial, Anns., Vol. III, Ann. 11) as constituting the first reservation of rights by the United States (VI, pp. 231 and 376).

With respect, this is simply not the case. This aide-mémoire refers to the need to seek an agreement on the "exact location" – those were the words used: the "exact location" – of the boundary "in the area of the northern half of the Georges Banks" *(sic)*. The validity of the equidistance line is not questioned, and indeed this aide-mémoire confirms the United States assumption of an equidistance line by referring to the boundary "in the area of the northern half of the Georges Banks" *(sic)*.

The documentary record is clear. The first reservation of rights by the United States took place on 5 November 1969 (Canadian Memorial, Anns., Vol. III, Ann. 13). This was recognized in the clearest terms in a United States diplomatic note dated 20 May 1976 (*ibid.*, Anns., Vol. III, Ann. 32). The aide-mémoire of 5 November 1969 was the basis for the publication of a "Notice of Reservation of Exploration and Exploitation Rights of the United States and its Nationals", dated 12 February 1970, in the *Federal Register* (United States Memorial, Anns., Vol. IV, Ann. 57), and its language is unambiguous. It indicates clearly that no previous reservation of rights had taken place. Its importance, I believe, merits citation.

> "The Government of Canada has already issued exploration permits for the northern portion of the Georges Bank continental shelf.
>
> ... Until the exact location of the United States-Canada continental shelf boundary in the Gulf of Maine is agreed upon, the United States cannot acquiesce in any Canadian authorization of exploration or exploitation of the natural resources of the Georges Bank continental shelf. The United States Government, therefore, cannot recognize the validity of Canadian permits for any part of the Georges Bank, reserves its rights and the rights of its nationals to this continental shelf area, and intends to make its position a matter of public record in the Federal Register so that individuals and companies concerned with exploration and exploitation in the area may be aware of this position."

This, Mr. President, was a straightforward reservation of rights, not a renewal of any previous reservation. Mr. Rashkow's attempts to abbreviate the acquiescence period to some 21 months are wholly unconvincing. The facts are that the silence of the United States dates from 1964 and the period of actual knowledge can be dated back to April 1965. The first reservation of rights takes place five years afterwards, in November of 1969.

III. Novel Doctrines concerning Acquiescence and Estoppel

In the course of its treatment of acquiescence and estoppel in these oral proceedings the United States has produced some novel doctrines of international law. I have already referred to the view of the United States that the acts of relatively minor officials could not have legal consequences for governments within the framework of international law (**VI**, p. 374). A perusal of any general treatise on State responsibility demonstrates that the State is an integral unit, legally responsible for the acts of all its officials, even in certain conditions when such acts are *ultra vires*.

A second instance of the United States novel approach to the law in this area concerns the tendency to equate the law relating to acquiescence and the law of acquisitive prescription as a basis of title or sovereignty over territory (**VI**, pp. 375-376). This confusion of two related but distinct areas of international law serves the United States purpose. The cases involving title to territory, such as the *Island of Palmas* case, are cited as an excuse for referring to periods such as 200 years, and in order to lend support to the invented criterion according to which "tacit acceptance requires the passage of a substantial period of time" (**VI**, p. 375).

Incidentally, the *Fisheries* case, referred to by Mr. Rashkow (**VI**, p. 376), was not based upon acquiescence but upon the view that the system of straight baselines was in accordance with general international law. To say that the period of silence or lack of protest in the *Fisheries* case was 60 years is highly misleading. The Court simply pointed out that the British protest of 1935 came too late to protect her position. At the same time the Court in the *Fisheries* case pointed out that a duty to protest could arise even within a narrow time scale (*I.C.J. Reports 1951*, pp. 138-139). And Mr. Rashkow's citation of the *Temple of Preah Vihear* case (**VI**, p. 376) is equally in error, for the Court found Thailand's acquiescence in a failure to react "within a reasonable time" (*I.C.J. Reports 1962*, p. 23). Thus, the reference to a period of 60 years in Mr. Rashkow's speech has no justification. Moreover, the authorities cited by the United States in its Counter-Memorial refer to the doctrine of acquisitive prescription (pp. 162-164, paras. 252-257). None of them actually formulates the condition of a "substantial period of time" in relation to acquiescence and estoppel.

The invocation of the cases relating to title to territory tend to confuse the picture in another respect. It is not Canada's case that her entitlement to continental shelf rights on Georges Bank arises from the doctrine of acquisitive prescription. In the context of the law relating to the continental shelf the basis of title arises *ab initio* and by operation of law. As Article 2 (3) of the Continental Shelf Convention of 1958 provides "the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation". Canada's case on acquiescence and estoppel relates to recognition of the application of the equidistance method in the Gulf of Maine area. It is concerned with delimitation and not with title.

The correct principle is, quite simply, that the existence of acquiescence depends on the evidence in the particular case, and the passage of time is not a necessary condition. That is the critical distinction between acquiescence and estoppel, on the one hand, and the concept of prescription, on the other. Acquiescence depends upon tacit acceptance and not upon prescriptive periods of time.

IV. Detrimental Reliance by Canada

Mr. President, I turn now to look at the question of the detrimental reliance by Canada on this acquiescence. This is another issue which shows that the

United States case is built upon misstatements of law and fact. In its oral argument the United States has contended that "Canada did not rely to its detriment upon the acquiescence of the United States" (**VI**, p. 377). Now, by way of preface, it is to be noted that Mr. Rashkow did not seek to establish that, as a matter of law, detrimental reliance is a necessary condition of estoppel in international law. As far as one can see, the challenge is merely on the facts (**VI**, pp. 377-378).

But this challenge is perfunctory indeed. Mr. Rashkow seems to think that, because most of Canada's permits were issued "before Mr. Hoffman initiated his correspondence" (**VI**, p. 377), this destroys the element of detrimental reliance. Nothing could be further from the facts. The substantial creation of private rights, prior to the radical changes in United States policy which began to emerge in November 1969 and subsequent years, and the subsequent extension of those rights, is an important constituent of the detrimental reliance by Canada. Moreover, once rights were created it was necessary for permittees to conduct significant exploration in order to maintain their permits. Rights were created from 1964 on and they still exist today (Canadian Counter-Memorial, pp. 143-145, paras. 361-364). In fact, this aspect of Canada's detrimental reliance has not been seriously challenged by Mr. Rashkow.

In this connection both the United States Counter-Memorial (pp. 178-179, para. 286) and Mr. Rashkow in his oral presentation (**VI**, pp. 377-378), seek to counter Canada's case on detrimental reliance by asserting that Canada was aware of United States exploration activities "on the northeastern portion of Georges Bank" (**VI**, p. 378) and that in consequence Canada was not "disarmed" or subject to surprise as a result of United States policies. But, as I shall show later, there is no real evidence to support this assertion that the United States did authorize exploration in the northeastern part of Georges Bank, at least prior to 1972.

More to the point, Canada has shown that binding commitments have been entered into, and substantial expenses incurred, by the Canadian Government and by private parties based on the Canadian permits on Georges Bank (212)-(214) (**VI**, p. 148, and Fig. 72A-72C of Canada's first round). Assuming such reliance is necessary, which it is not for acquiescence, or on most views of the estoppel doctrine, it has been established by Canada in its written pleadings (Counter-Memorial, pp. 143-145, paras. 361-364; *ibid.*, Anns., Vol. III, pp. 1-11).

Before concluding this part of my statement dealing with acquiescence and estoppel, Mr. President, I would like to make one further point. The Agent dealt earlier with the Truman Proclamation, and I would like to refer to a connected matter. The United States thesis that the Proclamation involved a boundary claim, of which Canada received notice, is complemented by the thesis that, for acquiescence to occur there must always be a "claim" of which the acquiescing State receives "notice" (**VI**, pp. 367-370, 377). Thus it is said by Mr. Rashkow that "the United States did not have either actual or constructive notice of Canada's purported claim" (**VI**, p. 367), and on this basis he concludes that the United States did not tacitly accept the equidistance delimitation on Georges Bank in the period 1964 to 1969.

The terminology of "claim" and "notice" is foreign to the law of acquiesence and estoppel and is a legal aberration. Its purpose is, no doubt, to foster the erroneous idea that Canada has invoked the concept of acquisitive prescription as a basis of title. In fact, Canada has invoked the principle of acquiescence or recognition to show the tacit acceptance by the United States of the equidistance method of delimitation in respect of continental shelf areas on Georges Bank.

Moreover, the unfounded assertion that the Truman Proclamation constituted a "claim" of which Canada was given "notice" is designed to imply that any subsequent United States acquiescence in an equidistance delimitation on Georges Bank does not count, so to speak, because it merely amounted to a policy, in the words of Mr. Davis Robinson, of "political restraint" (**VI**, p. 237).

The Agent has already discussed this theory of political restraint and I would just add that such restraint could only be of a certain significance subsequent to a reservation of rights: indeed, such significance must remain provisional until the United States has formulated a claim of its own, as opposed to a reservation of rights in general terms.

I stress again that the United States made no reservation of rights prior to the aide-mémoire of 5 November 1969 and the claim to a line in the Northeast Channel was not formulated until 1976. The United States has not rebutted the strong evidence of acquiescence in the use of an equidistance delimitation on Georges Bank in the years 1964 to 1969. During those years the only issue raised by the United States related to the precise location of the median line. In the phrase used in the United States letter of 14 May 1965, the question was that of "the elements positioning a median line" and it was raised in the context of the application of Article 6 of the Continental Shelf Convention of 1958 (Canadian Memorial, Anns., Vol. III, Ann. 4, p. 26).

Mr. President, this concludes my discussion of the question of acquiescence and estoppel.

Conduct of the Parties

I turn now, if I may, to the second part of my statement in which I reply to that part of the oral argument which deals with the conduct of the Parties as indicia of what might be an equitable result in this case. I must emphasize at the outset that this part of my statement stands quite separate from my earlier discussion of the doctrine of acquiescence and estoppel.

I shall endeavour to be as concise as possible. I want to deal, first, with two important preliminary issues on which the Parties remain divided. And then I shall deal successively – as I did in the first round – with ICNAF, with the 1979 agreement and finally with the oil and gas exploration activities of the two Parties. So I begin with the two preliminary issues.

Both Parties agree on the relevance of their fishing activities on Georges Bank. Mr. Lancaster had no doubt that it was a "relevant circumstance" (**VI**, p. 338). There are really two issues dividing the Parties. One is the amount – the intensity – of the fishing activity of each Party. It will be apparent to the Chamber that Canada does not accept the view that the United States fished Georges Bank exclusively until 1950. The clear evidence to the contrary has been set out in the Canadian Counter-Memorial, Annexes, Volume II, and has not been refuted by the United States, and Mr. Binnie has already dealt with that matter. The other issue, which I propose to deal with now, is that of the appropriate period – the time-span – over which the Chamber should assess the significance of the fishing activities of the two Parties. For Canada, the appropriate period is 1969 to 1978; for the United States, it is the whole historical record, right up to the present time.

This issue is obviously going to be critical in all economic zone delimitations. It is an issue of principle, and the Chamber will be conscious that, in deciding this issue, its decision will have far-reaching consequences.

Let me first defend the Canadian ten-year period. It is long enough to afford a reasonable basis for judging the real measure of dependency on the fishery. It is

the length of time proposed by the United States to ICNAF in making allocations (Canadian Reply, Anns., Vol. II, Part IV, Ann. 28, p. 821). It is long enough to ensure that with reasonable conservation and management, the level of fishing can be maintained for the future. I mean by that, that there is every reason to believe that both the United States and Canada could maintain, within their respective areas of the Bank, under an equitable, equidistance delimitation, the same level of fishing as has existed over the ten-year period. Indeed, the United States own Environmental Impact Statement suggests that, once the stocks are allowed to recover, both Parties could increase their catches (*Draft Environmental Impact Statement on East Coast Fishery Resources*, United States Department of State, 1980, p. 127). Taking the United States own figures, Canada's estimate of this potential increase is 83 per cent for Canada, and a 202 per cent increase for the United States (Canadian Reply, Anns., Vol. II, table 2, p. 13). And the other point to be made about the ten-year period is that it covers a period during which the Canadian fishing was on the high seas and unquestionably legitimate. And it is also a period during which the statistics for both Parties are reliable.

But the United States would have the Chamber look at the whole historical record, right back into the 19th century. In my submission, Mr. President, that simply cannot be done, for a number of reasons. First, as a practical matter, the fishery of today – the contemporary fishery – is very different from what it was in the 19th century, or even prior to the Second World War. The techniques are different, the species sought are different, and the foreign, long-distance fishing fleets are now excluded. But more important, the law has changed. There is now an issue of principle, and that is that in order to achieve the basic aims of the contemporary law on exclusive, coastal State jurisdiction, it is necessary to look at contemporary and even potential interests, and not at the historical interests of a past era. It is self-evident that the United States historical argument is designed to perpetuate what was once their claimed dominance of this fishery. Such an aim runs directly counter to the whole purpose of the new régime of the Exclusive Economic Zone. The purpose of this new régime is to confer rights to the economic resources of the 200-mile zone on the coastal State as such. In most parts of the world the beneficiaries will be new States, with little record of long-established fishing practice. The régime is designed to protect coastal States against the continuation of the historical exploitation of their offshore fisheries by other States. And what Canada seeks, essentially, like so many coastal States, is an end to the one-time dominance of her offshore fisheries by foreign States. So, the historical record is inappropriate because it is incompatible with the new régime.

Obviously, when you have two neighbouring coastal States sharing a common fishery, and a boundary between them has to be drawn, a court has to look at the equities of the situation. But these are the equities of the current situation. The court will look to the realities of the current situation, evidenced by the conduct of the parties over a sufficient period – such as ten years – and not to conduct in the distant past, which is either unrelated to the contemporary fishery or else typical of the so-called "dominance" of a powerful neighbour over a less-powerful neighbour.

It is within the same context of the modern law that one has to assess the relevance of the authorities cited by Mr. Lancaster – the *Grisbadarna* case and the Anglo-Norwegian *Fisheries* case (**VI**, pp. 338-339). The duration of a fishing practice really has no relevance in the abstract. It may have relevance in the context of a particular rule of law, for the purposes of that particular rule. But it would clearly be unwise to assume that the long-established fishing practice

which the International Court took note of for the purposes of formulating the rule on straight baselines is equally relevant to the determination of a single maritime boundary. Moreover, even the "stability principle" which emerges from the *Grisbadarna* case cannot be applied without reference to the nature and purpose of the particular legal rule. This was the point made by Mr. Binnie in his oral argument on 4 April (**VI**, p. 92) when he cited Judge Jessup in the 1969 *North Sea Continental Shelf* cases. For Judge Jessup's Judgment demonstrated that the *Grisbadarna* principle of stability had to be applied in the context of the contemporary, developing law. And he noted that habitual exploitation of fisheries, or even so-called "historic rights", was beginning to mean something between five and ten years only (*I.C.J. Reports 1969*, p. 80). If that were true of the evolution of the law in the 1960s, Mr. President, how much more true it must be of the new Exclusive Economic Zone. It is for this reason that Canada believes that its fisheries on Georges Bank are sufficiently long-established to meet all the tests of any "stability principle" which the *Grisbadarna* case might suggest to be relevant in this case. And equally that is why the *Grisbadarna* case does not require this Chamber to give particular – or, indeed, any – weight to the historical evidence which goes back far beyond the period to which contemporary law attaches any importance.

Let me turn to the very recent period between 1977 and the present time. Mr. Lancaster invited the Chamber to regard this most recent period as a "far better indication of things to come" than Canada's earlier ten-year period (**VI**, p. 340). I would say two things about that. First, the Chamber will recall Mr. Lancaster's very frank admission that the increase in United States fishing on Georges Bank in those years was the result of the withdrawal of the United States fishermen from other Canadian waters including Browns Bank and the Scotian Shelf, as a result of Canada's 1977 200-mile fisheries zone *(ibid.)*. I invite the Chamber to consider the implications of that statement very carefully. It means simply this. United States fishermen withdrew from Canadian waters as a temporary measure until the new agreement was accepted, and from a fishery of rather minimal economic significance – at the same time, I may add, that Canadian fishermen were having to withdraw from United States waters. Some of these United States fishermen, together with many other United States fishermen from the south, concentrated in the disputed area on Georges Bank. The reason for this concentration was that the United States authorities had allowed a regulatory and enforcement vacuum – a "free for all" – to develop: it was not because of the termination of reciprocal fishing. But, whatever the reason, why should that strengthen the United States claim in this dispute? If you are in dispute with your neighbour over the ownership of a field, you do not expect a court to be impressed by evidence that, with the dispute pending, you put more of your cattle in the field than usual! That leads me to my second comment on this very recent period. International law knows a concept which we call "the critical date". It was a concept much discussed in the *Ecrehos and Minquiers* case *(I.C.J. Reports 1953)*, though there are other authorities in addition. Stripped to its bare essentials, it means that in disputes over title to territory, a party will not be allowed to improve its position by relying on evidence of its activities after the dispute had "crystallized" – after the "critical date". The concept prevents the use of self-serving conduct as evidence of title. The dispute over the fisheries on Georges Bank had most certainly "crystallized" in 1977: it began with the Canadian and United States publications of their respective 200-mile zones in 1976 (Canadian Memorial, p. 100, para. 224). So it is quite unacceptable for the United States to use this recent evidence of large-scale incursions by United States fishermen into the disputed area as

proof of the pre-existing rights or of the so-called "dominance" of the United States.

A second issue which continues to divide the Parties relates to the kind of conduct, or activities, which might be relevant. Mr. Rashkow placed great emphasis on the hydrographic surveys and charting activities of the United States in the Gulf of Maine (**VI**, pp. 352-353). Canada does not dispute the role of the United States in these activities, and it can be said immediately, that Canada, although she, too, contributed, has never had the resources to match the United States in this endeavour. But why is this sort of activity relevant? Is it seriously suggested that, in any of her maritime boundary settlements with countries like Mexico, Venezuela, Cuba, the Cook Islands and New Zealand, the United States relied on such activities and that the other parties conceded weight to them? This is the type of high seas activity *par excellence* which has traditionally been undertaken all over the world by the great maritime Powers such as Great Britain, France, Italy, the Netherlands and the United States. If it were conceded to be relevant every new developing State would be disadvantaged, because it would have no such activity to rely on. Again, we have here a United States argument totally alien to the new régime of the Exclusive Economic Zone. The same point could equally be made of the United States arguments based on the other irrelevant activities such as the co-operative arrangements for search and rescue, and defence.

I want, now, to turn to the question of Canada's participation in Panel 5 of ICNAF. The Chamber will recall that Canada has made two important points in this connection. The first was that this participation was based on Canada's existing fishery on Georges Bank in 1949 and on Canada's coastal State relationship to the area. The second was that the United States had conceded Canada's right to representation on Panel 5 on both counts (**VI**, p. 140).

Mr. Rashkow, in his oral argument, denied both points. He says, first, that the notion of a "coastal State" was not used in ICNAF until 1969 (**VI**, p. 354). That is a quibble. It is true that the 1949 Convention used the term "contiguity of coast to subarea" rather than "coastal State", but it means exactly the same thing. Then Mr. Rashkow suggests that when the Canadian delegate, Mr. Bates, in 1949 claimed an intensive fishery in Subarea 5, he was probably referring to the inshore fishery along the Maine coast and the Bay of Fundy, and not Georges Bank *(ibid.)*. Now he could not possibly have been referring to the Fundy fishery, because that was in Subarea 4, not 5. I invite the Chamber to examine the record of that meeting on 4 February 1949 – it can be found in the Canadian Memorial, Annexes, Volume II, Annex 15 at page 101 : there is not a word to support Mr. Rashkow's assumption. Similarly, when the United States delegate, Dr. Chapman, acknowledged Canada's claim, Mr. Rashkow suggests he was merely acknowledging the statement about Newfoundland *(ibid.)*. Again, I invite the Chamber to examine the record. It simply does not bear out this interpretation. And Dr. Chapman's statement cited by Mr. Rashkow (**VI**, p. 355) was not that Canada had never fished Georges Bank but only that, to his knowledge in recent years Canadian vessels had seldom fished there – and he was obviously referring only to the ICNAF regulated species of cod, flatfish and redfish – that is all! (Canadian Memorial, Anns., Vol. II, Ann. 12, pp. 58-59.)

The Canadian claims to a substantial fishery related to Georges Bank, not Newfoundland. In the Canadian Counter-Memorial, Annexes, Volume II, we have submitted clear evidence of Canadian fishing for groundfish – for cod, haddock and halibut – on the Bank in the early part of this century. That is the fishery the Canadian delegation was referring to. And we must also remember the Canadian swordfish fishery established after the First World War

(pp. 17-60). My colleague, Mr. Binnie, has already given the Chamber full details of these fisheries.

But the short answer to Mr. Rashkow is simply this. Why was Canada a founder-member of Panel 5? Given that membership of any Panel presupposed either a contiguous coast or an established, substantial fishery, what was Canada doing on the Panel if she met neither criterion?

The fact that after 1972, Canada began to be awarded "coastal State preferences" in Subarea 5, obviously creates difficulties for the United States thesis: indeed, the facts and the thesis are irreconcilable. So Mr. Rashkow would have the Chamber minimize the difficulties in his thesis by suggesting that the United States had more preferences – or coastal State allocations – than Canada; and by saying that Canada either did not fully use, or else traded part of its allocation with the Soviet Union (VI, pp. 355-356).

Mr. President, I would invite the Chamber to keep a number of points in mind. *First*, Canada's interest is in only a small part of Subarea 5, so you would expect Canada's allocations to be smaller. *Second*, the stock that Canada was most interested in, scallops, was never made the subject of these quota allocations. And, *third*, the purpose of the coastal States claiming these preferences was essentially to provide themselves with opportunities for developing their own fisheries. Coastal States can use these quotas in whatever way they deem appropriate to achieve that end, including bargaining. The significant thing is not what Canada did with her quotas, but rather the fact that her status as a coastal State in relation to Georges Bank was recognized by the fact that she received such quotas.

And, finally, in relation to ICNAF, the United States seeks to minimize Canada's contribution to the establishment of ICNAF and her participation in Panel 5 (VI, pp. 95-96). Nothing is said of Canada's proposal in 1943 at the London Conference to establish an international, regulatory body. Nothing is said of Canada's contributions to the programmes of scientific assessment and research within ICNAF; nothing is said of Canada's initiative in developing ICNAF's statistical system (Canadian Counter-Memorial, pp. 164-166, paras. 405-408; pp. 171-177, paras. 416-430). What is said is a rather disparaging remark about Canada's role in the enforcement activities in Subarea 5. The
(138) Chamber will recall Figure 50, displayed by the United States on Monday, 16 April. It showed the location of boardings of fishing vessels, by both the United States and Canadian fishery protection vessels: the Chamber will recall the map, spattered with red dots to denote United States boardings, and then the relatively few green dots in the northeast sector of Georges Bank, to denote the Canadian boardings.

Mr. President, without explanation, that figure is quite misleading. The fact is that the majority of the United States boardings were concerned to enforce the United States own domestic lobster programme, and that is why so many of the red dots are clustered round the 100-fathom contour of the Bank. Canada had no part in that enforcement programme, and no interest either. The enforcement activities which Canada had assumed under ICNAF were mainly in relation to the patrolling of the Closed Area for haddock (Canadian Reply, p. 116, para. 270). But, if the area is a closed area, you should not expect to find vessels fishing there for haddock at all! If everyone played the game, there should be no boardings in a closed area. So the seemingly minimal Canadian activity in boarding vessels is exactly what you would expect.

I feel bound to add, in concluding my remarks on ICNAF, that most of the points I have made are already clearly stated in the Canadian Reply, at paragraphs 263-272. It is a matter for some regret that the United States oral

argument proceeded almost as though the Canadian Reply had never been written. However, since that was the case, I had little choice but to refer the Chamber to these matters.

Mr. President, I turn now to the 1979 fisheries agreement.

A good deal may depend on how the Chamber views this agreement. Obviously, if it was a short-term agreement, pending the resolution of the boundary question, then whatever the "equities" of the allocation of fish stocks, there might be some hesitation in the Chamber in continuing this same allocation over the long term. And that is essentially the United States argument. The Chamber will recall how the United States Agent (**VI**, p. 241) and Mr. Rashkow (**VI**, pp. 358, 363-364) emphasized that what the United States had in mind was a temporary agreement to preserve the status quo. The Chamber will recall Mr. Rashkow's phrase, to the effect that the agreement was designed to maintain what he called "business as usual" (**VI**, p. 358). And let me add, in parenthesis, that it was this same "business as usual" which Mr. Lancaster, in his oral argument, seemed to find so unacceptable (**VI**, p. 339). However, Mr. Rashkow's essential point was that the United States wanted a provisional agreement which would be overtaken by a boundary settlement, and not the permanent agreement desired by Canada.

Mr. President, that view represents a travesty of the record. The United States initiated the discussions on this agreement by two aide-mémoires of 8 and 14 January 1977. Both referred expressly to negotiations on "long-term fisheries arrangements", and that was the end to which Canada negotiated in good faith (Canadian Memorial, Anns., Vol. III, Anns. 48 and 49).

Moreover, look at the terms of the agreement itself (*ibid.*, Anns., Vol. I, pp. 252-326). Is it likely that the Parties would set up the East Coast Fisheries Commission, with its 14 members and its two co-Chairmen appointed for five years, with provision for a headquarters in a place to be agreed, and with a special chapter on arbitration, as a temporary measure? Why make the express provision for lobster (Ann. A (4) and Ann. C (14)) in terms that it was to be transferred to Annex C *after* the boundary was decided, if the assumption was that the whole agreement was to endure only *until* the boundary was decided? Any why make provision for the review of stock entitlements every ten years (Art. IX)?

And what of the terms of the Final Clause on Termination? Let me cite it to you. Article XXV, paragraph 2: "Subject to paragraph 3, this Agreement shall remain in force until terminated by agreement of the Parties" (p. 292). Now the proviso as to paragraph 3 need not detain us, for that merely provided for the situation in which arbitration of the boundary might be frustrated. But termination by agreement is scarcely the hallmark of a temporary agreement. I frankly do not follow Mr. Rashkow's statement (**VI**, p. 339) that Article XIII of the Joint Statement of Principles – the Cadieux-Cutler Report of October 1977 (*Canadian Memorial, Anns., Vol. II, Ann. 36*) – *specifically called for* withdrawal on notice. There was no text: it was simply a heading for an article to be agreed. And if you look at the Joint Report of March 1978 (Ann. 39), there the two negotiators again expressly referred to "a long-term agreement", and the members of the United States Senate took exactly the same view. The *Congressional Record* for 29 June 1978 abounds with references to that effect. Senator Kennedy referred to a "lasting structure for mutual co-operation"; Senator Stevens to a "long-term agreement"; and Senator Brooke to "a permanent mutual co-operative relationship" (*United States Senate Congressional Record*, 29 June 1978, pp. 19623-19624).

And so, Mr. President, Canada is entitled to ask the Chamber to look on this

agreement as clear evidence of what the Parties considered to be a fair and equitable division of the fishery resources of Georges Bank in 1979, and not as a temporary measure, but as a fair and equitable resolution of the dispute for all time. I will not repeat the statements by the President of the United States, and by the United States Negotiator Mr. Cutler, commending the agreement in those terms. But, without doubt, that was the view of the then United States Administration.

If I may say so, I was not impressed with the recital of opposition by Senators Pell and Chafee of Rhode Island, or Senator Javits of New York, or Congressman Studds of Massachusetts (**VI**, pp. 240, 364-366). These were scarcely *disinterested observers, making an objective assessment.* Nor am I impressed by a lecture on the separation of powers in the United States Constitution, and being reminded that the executive branch of government is not the United States (**VI**, pp. 240-241). Canada negotiated in good faith with the proper authorities of the United States, and the result of that negotiation, embodied in the 1979 agreement, was regarded as fair and equitable by Mr. Cutler, by Secretary of State Vance, and by President Carter, and it ill becomes the United States now, to treat the agreement as axiomatically inequitable, and as if the authorities of the United States Government had never accepted its fairness.

Setting that issue aside, I must next comment on the manner in which the agreement was portrayed by Mr. Rashkow. The Chamber will recall that, in the oral argument of the United States, the whole focus was on the management authority for the various stocks. We were told that "the entire management structure of the agreement is based upon the need for single-State management of each stock, wherever possible . . ." (**VI**, p. 359). I began to have doubts, at that stage, over whether I had been looking at the same agreement. For, as I read it, it is for the Commission to reach agreement on the fishing year for each stock, and the Commission is the joint United States/Canadian Commission of 16 members: and in my language that is joint management. True, with Category B stocks the party with primary responsibility makes proposals: but it is the Commission that agrees them, and the same applies to management measures. So I do not believe Canada errs in speaking of joint management. The text of the agreement is really quite clear. But, of course, the United States oral argument seemed not to be concerned about the text of the agreement. Instead, we were (23) given a somewhat lengthy demonstration of Figure 7 from the United States Memorial – the Chamber will recall Mr. Rashkow putting crosses in the boxes beside the bar-graph for each stock (**VI**, pp. 360 and 361-363). And we were told that this demonstration confirmed not only the division of stocks at the Northeast Channel, but also the utility of single-State management (**VI**, p. 363). (23) I found that conclusion extraordinary at the time and still do. Figure 7 is scientifically indefensible – as emerged from Mr. Fortier's cross-examination of Dr. Edwards. But the point I wish to make is that, as a reflection of what the (23) 1979 agreement provided for, as regards stock management, Figure 7 is meaningless. If we are to be told that the agreement endorses the utility of single-State management, then by all means let the United States make such an argument. Yet let us test that argument against the terms of the agreement – not against some self-serving, and scientifically indefensible, figure drawn from the United States own Memorial. We might also test the argument for consistency. In 1948 the United States herself proposed to Canada that there should be joint regulation of the fisheries in the Gulf of Maine (Canadian Counter-Memorial, p. 166, para. 408). That scarcely sounds like an argument for single State management.

But the interesting question, Mr. President, is why did the United States have

so little to say about stock quotas? Why all this concentration on management? The answer, I suggest, is perfectly clear. As I explained in my earlier statement, with the Category A stocks, Canada's share ranged from 40 per cent to 74 per cent. With Category B stocks, depending on the area, Canada's share ranged from 100 per cent to 0. But with scallops, which are the economically significant stock, Canada had primary interest and 73.35 per cent of the catch (**VI**, pp. 144-145). These quotas show, with absolute clarity, that in equity Canada must have a major share in the resources of Georges Bank. And that is precisely why the United States shows such interest in management, and so little interest in stock quotas, under the 1979 agreement.

A final word, if I may, Mr. President, about this renewed argument by the United States that it was Canada's unilateral termination of the 1978 interim reciprocal fishing agreement which caused the new Administration not to press for ratification (**VI**, p. 364). As I indicated in my first statement, none of the opponents of the agreement in the United States gave that as a reason. And if Mr. Rashkow is to label it a "strong-arm tactic" (**VI**, p. 365), then it is best that I make certain things clear. The reciprocal fishing agreement was being abused. So far as the United States fishermen were concerned, Canadian waters were a "free for all", a regulatory vacuum in which they could over-fish without restraint. And that is why reciprocal fishing came to an end.

The Chamber adjourned from 11.02 a.m. to 11.12 a.m.

Mr. President, if I may I would now like to turn to the oil and gas exploration activities of the Parties on Georges Bank.

The first, and most striking, feature of the oral argument by the United States was the repeated assertion that the United States had issued permits covering the northeastern portion of Georges Bank from the mid-1960s onwards. The United States obviously makes this assertion to suggest that it had exercised jurisdiction over the whole of Georges Bank. I must say I find some difficulty in reconciling this with the other, quite different United States argument that it had exercised restraint. But my main difficulty is with the evidence to back up this assertion. Where, and what, is the evidence? Not a single map was shown to demonstrate that this was actually so.

Not a word was said about the aide-mémoire of 5 November 1969, in which the United States gave to Canada formal assurances to the contrary (Canadian Memorial, Anns., Vol. II, Ann. 13).

And scarcely a word was said about the demonstration I had made to the contrary in my first statement. I had made a conscious effort to go through the facts, to illustrate them by various maps, so as to make the record of these activities clear. Obviously I had hoped that if the United States wished to take issue with my account of the record of the activities, they would have done so in Mr. Rashkow's first oral statement. But that was not done – except in the most marginal way. So I find myself in some difficulty in identifying the evidence on which the United States relies to continue to make this assertion about having authorized activities in the northeastern portion of the Bank. I feel bound to say that if the United States produces such evidence in the second round of their oral argument purporting to support this assertion – and at the stage when Canada cannot reply to it – I believe the Chamber should treat such evidence with the utmost reserve.

At this stage, however, I can only deal with the United States evidence, such as it is. There are two permits mentioned by the United States and which, from the oral argument, appear to have some significance for the United States.

The first is E1-65, issued to Shell in the year 1965; and of this permit, Mr. Rashkow says it "specified an area of operation that extended well beyond any median line across Georges Bank" (**VI**, p. 371). Mr. President, you have the map of the permit area submitted with the permit application in your folder: it is (258) Figure 158, and I would invite the Chamber to look briefly at that map. This was deposited with the materials provided by the United States on 20 January 1983. As you will see, the northern limit of the permit area is a rough equidistance line. It goes straight through the middle of the bank. And that is exactly what I said about this permit in my first statement. Incidentally, this permit was cancelled, so no actual activity took place. And that is the first piece of this so-called "evidence".

The second permit is E2-69, granted to Chevron in 1969, and of this Mr. Rashkow told us that it was issued for an area extending from Cape Henlopen in Delaware to Cape Sable in Maine (**VI**, p. 372). I trust the Chamber will not attach any significance to this very loose verbal description of the area. Its importance can be gauged by the fact that it places Cape Sable in the wrong country. Cape Sable is in Nova Scotia, not Maine. Of course, for practical purposes what concerned the permit-granting authority – that is our Mr. Dupont – was the location of the pre-plot lines. It is the pre-plot lines, and only these, that show what work was actually proposed. And when I last spoke to the (218) Chamber I showed the Chamber those lines. It was Figure 74. The Chamber will recall that I pointed out the two lines which, in Mr. Dupont's words, "extend to the Canadian side of the BLM line" (Canadian Reply, Anns., Vol. II, p. 574). Understandably, the permit was subject to a *caveat*, approving the lines only in so far as they "lie within the 'outer Continental Shelf' (as defined in section 2 of the Outer Continental Shelf Lands Act of 7 August 1953)" (*ibid.*, p. 570). Indeed, and this is perhaps important, all the programmes or extensions that crossed the BLM line on Georges Bank were subject to this same jurisdictional caveat from 1968 onwards.

There is one further permit I had best refer to, just to be on the safe side, because the United States might pull it out of the hat at the reply stage. This is permit E3-68B, granted to Shell in 1968. I want to show the Chamber the pre-plot map submitted for this permit, and this is given as Figure 159 in your dossier, and it is also now on the lightbox. The pre-plot map shows the actual survey lines. You will see that all of these actual survey lines respect an equidistance boundary on the Bank.

Mr. President, Canada has no wish – and indeed no need – to conceal any evidence. The Digicon Corporation, a United States company, has prepared four comprehensive shot-point maps in 1975, and these show all the major group (254) seismic surveys. The map now behind me as Figure 160 is simply a composite of those four maps. It shows the 400 series lines, shot in 1969 and 1970, and so on up to and including the 900 series shot in 1974 by the group led by Getty. We have deposited the original maps, with a key which enables the Chamber to identify each line, its mileage, which company shot it, and under which permit. So we would invite the Chamber to have the accuracy of our assertions checked. The picture – as you will clearly see from this figure – is quite clear. The colouring, incidentally, was done by the oil company which provided the maps. We have added the BLM line and the company equidistance line – these two green lines – so that you can see exactly where the majority of the survey lines ended. As I said in my earlier statement (**VI**, p. 152), only in 1972, under permit E2-72, is there any real transgression of the equidistance line. These faint, brown lines here are the lines under the 1972 permit. And even these transgressions go nowhere near the northeastern edge of the Bank. So, I would ask that the

Chamber reject this particular United States assertion as being contrary to all the evidence. The evidence clearly shows a broad adherence to equidistance, whether the company equidistance line or the BLM line.

But I must not forget that we have a problem with this BLM line – or so the United States suggests. In effect, the United States denies that there ever was such a line. Indeed, Mr. Rashkow told the Chamber that the line "was not a line appearing in any document of the Department of the Interior but was constructed by Canada solely for the purposes of this adjudication" (**VI**, p. 373). Those are harsh words, and the Chamber will understand that I must reply to them.

Let me invite the attention of the Chamber to another map (Fig. 161). It is very large and too unwieldy for reproduction, but I thought it best that the Chamber should see it in its original form – to avoid any further accusations of "manufacture" (deposited by Canada on 12 December 1983). What we ask you to note is this line here. Canada did not put that line there. This line was put on the map by the oil company which provided the map and applied to the United States Government for permits[1]. And the company treated that line as the boundary between the continental shelves of Canada and the United States. In fact on the original you can see the words written on the line, "Canada" and the "United States". The line is a strict equidistance line, and it fits exactly with the description of the Bureau of Land Management line in Mr. Hoffman's letter of 14 May 1965 (Canadian Memorial, Anns., Vol. III, Ann. 4, p. 26).

So, Mr. President, there *was* a line, and it was an equidistance line, being used for United States permits. We don't much mind what it is called. It was Mr. Dupont who used the term BLM line. His version, as you will recall, was that his *reference to this line and his pencilled annotations on the map, served only to* remind him that the Bureau of Land Management had told him that, beyond that line, there were Canadian permits. In his affidavit Mr. Dupont said that he marked two points on this BLM line on a map for permit E3-69 to mark the edge of the Canadian permits. Well, we have plotted those two points, taken from the map provided by the United States and they do *not* correspond with the edge of any Canadian permits. So we simply cannot accept that explanation. Actually, the two points don't seem to correspond with anything very much. One is on the BLM line, but the other is just nowhere in particular. In our view, Mr. Dupont's BLM line was an equidistance line but its purpose was to mark the limit of the original United States claim to a shelf on Georges Bank.

Of course, Mr. Dupont says that he never considered the equidistance line as a boundary – he always assumed that the United States claim went to the Northeast Channel. And this unlikely story was supported by Mr. Rashkow on two grounds (**VI**, p. 373). First, that on 10 May 1968 – that is prior to Mr. Dupont's annotations in 1969 – the United States had put Canada on notice of its objections to Canadian permit activities on the Bank. But, that notice said nothing about any Northeast Channel line, so that cannot have been the basis of Mr. Dupont's knowledge (Canadian Memorial, Anns., Vol. III, Ann. 11, p. 63). Then we are given a second ground, namely that Mr. Dupont was familiar with the sea-bed in the Gulf of Maine area "as a working geological technician". But I am afraid Mr. Dupont would need to be much more than a working geological technician to display that degree of foresight, for he was way ahead of the State Department. He would have needed perhaps to understand the *dictum* of the International Court of Justice in paragraph 45 of its Judgment in the *North Sea Continental Shelf* cases, relating to the Norwegian Trough *(I.C.J. Reports*

[1] See Correspondence, No. 120, *infra*.

1969). And he would also have had to be something of a marine ecologist, for the Northeast Channel was presented as an ecological, more than a geomorphological boundary. As I said before, Mr. Dupont is a remarkable man. Yet if he really did assume the boundary was the Northeast Channel, consistently with the Truman Proclamation, why insert the jurisdictional caveats in all these trespassing permits and extensions from 1968 onwards? Frankly, Mr. President, all this makes no more sense to me than the first time I heard it; so I must repeat my request to the Chamber that Mr. Dupont's affidavit be disregarded.

I want to emphasize that Canada's view that an equidistance line did exist does find support in the maps and material provided by the United States. So let me ask the Chamber to look at this map on the lightbox – you also have it in your folders as Figure 162. This is the copy of Digicon's map for the 1975 group survey under permit E3-75 which was provided to Canada by the United States on 29 March 1984. So this is in the materials formally lodged by the United States.

The Chamber will recall that when I described this survey in my first statement in detail, I pointed to the difference between the original area, here – that was the Northeast Area, but lying to the southwest of the equidistance line – and the so-called "Extension Programme", on the Canadian side. Now the Chamber will see, here, this line running through the Bank, marked as a "lateral line". Now Canada did not invent that line: that line was on the map used by Digicon for its survey under United States permit E3-75. The Chamber will also note another line, here, running round the northeast edge of the Bank and labelled "alternate line". Remember, the year is 1975. So what we have here, beyond any shadow of doubt, is the original equidistance line and then a line to show the new, alternative United States claim line down the Northeast Channel. That this "lateral line" is an equidistance line can scarcely be questioned. I can show the Chamber the location of that same line on the map now behind me – it is the map you have in your folder as Figure 163. Now this is the "lateral line" – this broken, red line is the same "lateral line" – and you can compare its location with the strict equidistance line, there, with the Canadian claim line, here, with the BLM line, there, and the company equidistance line, there. So there can be no doubt that that was an equidistance line. As I said before, depending on what basepoints were used, there were differences in the various lines. But what is absolutely clear is that they all purported to be an application of the equidistance method.

I turn now to a different feature of the United States oral argument. That argument deals indiscriminately with United States permits and Canadian permits, as if they were the same thing. I must emphasize yet again that they are not the same thing.

The United States has attempted to minimize the evidence presented by Canada concerning Canadian continental shelf activities by dismissing the Canadian permit programme on the ground that no drilling has been conducted on Georges Bank pursuant to those permits (**VI**, p. 236 and p. 366). And since no drilling has been conducted pursuant to United States authority in the disputed area, the United States Agent has suggested that the distinction between Canadian and United States continental shelf activities is one "of form rather than substance" (**VI**, p. 236). As explained in my statement to the Chamber on 5 April, the United States permits conferred no proprietary rights whatsoever, and moreover, they have all expired (**VI**, p. 155). All of the Canadian permits, on the other hand, are in force today and most have been for the past 20 years. The permits cover a specific area of approximately 10 by 11 nautical miles: quite unlike the United States geophysical survey permits which

allow surveys over very large areas. And the Canadian permit holders have exclusive rights over the areas described in their permits and continue to have the right to convert them to production leases once a commercial oil or gas field is found. But this objective, and the drilling it requires, of course cannot be achieved until a delimitation has been made in the area. So in the meantime, the permit holders have complied with the regulatory requirements in order to maintain these rights and the Canadian Government has issued special executive orders protecting these rights. Thus the true comparison is between the United States leases and the Canadian permits. If I may recall to the Chamber the picture which that comparison presents, then it is best illustrated by the United States official *Data Atlas*, published by NOAA in 1980; you have seen it before but it may assist you to have it illustrated once again on the lightbox. The picture (67) speaks for itself (Fig. 164). The divisions of responsibilities and of activities is there on the basis of equidistance and it was this that led me to suggest, in my first statement, that the Parties had in effect established a *de facto* boundary. Mr. Rashkow disputes that, understandably enough (**VI**, pp. 378-379). But I do not understand his reasoning.

He says, first, that the line perpendicular to the coast in the *Tunisia/Libya* case had been operated for a long time without protest. Certainly. But what of the equidistance line, or principle, on Georges Bank? Professor Brownlie has shown in his statement that we have five years – from 1964 to the protest of 5 November 1969 – during which both Parties acted on the basis of an equidistance division of their shelf activities.

Then Mr. Rashkow identifies in the *Tunisia/Libya* case the "critical fact" that *both parties had used the 26° line as the limit of their oil and gas concessions.* But, Mr. President, if that is the "critical fact" what about the fact that, at least until 1972, both Parties in this case observed the equidistance principle? Why is that not equally "critical"?

And then he notes that the Libyan/Tunisian perpendicular line "was neither arbitrary nor without precedent" (**VI**, p. 378). That may be, but surely in relation to continental shelf delimitations the equidistance method is even less arbitrary, and even more soundly based on precedent?

And finally, Mr. Rashkow would have us treat the Canadian equidistance line as a "purely internal administrative act" – to be disregarded, like the Libyan "due north line" based on the 1955 petroleum decree in the *Tunisia/Libya* case (**VI**, p. 379). That is a truly extraordinary comparison. Far from being a "purely internal administrative act", the Canadian equidistance line was based on the 1958 Convention, it was acted upon by Canada as the basis of its jurisdictional competence, and it was known to and acquiesced in by the United States over several years. To describe this as an internal administrative act is a misdescription which almost – I say "almost" – leaves me speechless.

So, with such speech as is left to me, I can conclude quite briefly.

In its oral argument the United States has so far failed to grapple with any of the essential issues relating to the conduct of the Parties. They may yet attempt to do so, but this, alas, will be at a stage when Canada can make no further comment.

The conclusion therefore remains, that both in relation to fisheries and in relation to oil and gas exploration, the Parties have for many years acted on the assumption that a boundary based on equidistance would give them both a fair deal. But not just a "fair deal" in the sense of a fair bargain. By "fair deal" I mean a result based on legal principle and taking full account of all the circumstances of the present case so as to reach an equitable result.

RÉPLIQUE DE M. FORTIER

CONSEIL DU GOUVERNEMENT CANADIEN

M. FORTIER: Monsieur le Président, Messieurs les juges, tout d'abord je vous présente de nouveau mon collègue, M^e^ Ross Hornby, du barreau de l'Ontario, qui va me donner un coup de main durant ma présentation ce matin.

J'ai l'insigne honneur de revenir au prétoire aujourd'hui pour vous adresser la parole à nouveau au nom du Canada. Encore une fois, je dois vous parler du milieu marin dans la région du golfe du Maine.

Même s'il est patent selon nous, comme l'agent du Canada l'a déjà noté, que la théorie de la frontière naturelle au chenal Nord-Est a beaucoup perdu de son lustre depuis les premières écritures américaines, nos adversaires voudraient néanmoins toujours lui voir conférer le statut de circonstance pertinente dans la région du golfe du Maine (**VI**, p. 457).

Je me propose donc aujourd'hui de démontrer que cette théorie reste sans fondement sous quelque guise qu'elle puisse être présentée. Je procéderai comme suit:

En premier lieu, je donnerai une brève vue d'ensemble de la thèse de la frontière naturelle telle qu'elle nous apparaît après le premier tour de la procédure orale. En second lieu, j'exposerai la totale absence de fondement, en droit ou dans les faits, de la théorie américaine des trois régimes écologiques séparés, distincts et identifiables dans la région du golfe du Maine et de la prétendue frontière naturelle au chenal Nord-Est. En troisième lieu, je démontrerai que les Etats-Unis font erreur lorsqu'ils veulent voir dans le banc de Georges un fond commun pour la plupart des stocks de poisson d'importance commerciale. En quatrième lieu, je parlerai de la nécessité de coopérer au regard de la gestion des pêches dans la région du golfe du Maine, quelle que soit la localisation de la frontière maritime unique que la Chambre est appelée à déterminer. En cinquième lieu, je me pencherai sur la question des risques relatifs que l'exploitation des hydrocarbures en quelque point que ce soit du banc de Georges présente pour les zones de pêche et les côtes respectives des Parties. Enfin, je conclurai en homme de loi en commentant la contribution réelle de la science à la solution de cette importante affaire.

I. Vue d'ensemble

Dans ses écritures, le Canada a, sans ambages, qualifié de mythe la thèse américaine des trois régimes écologiques étanches et de la frontière naturelle au chenal Nord-Est (**V**, réplique du Canada, par. 162). Aujourd'hui, après avoir entendu les plaidoiries américaines consacrées à cette thèse, et après avoir entendu le témoignage de l'expert américain, le docteur Robert L. Edwards, le Canada n'a aucune hésitation à la qualifier à nouveau de mythe, mais cette fois avec encore plus d'énergie et plus de conviction.

Qu'il me soit permis tout d'abord, Monsieur le Président, de rappeler l'évidence même à nos contradicteurs. Ce sont eux, les Etats-Unis, qui postulent devant cette Chambre cette thèse inouïe de la frontière naturelle dans une mer dont nous savons – et dont nous voyons – qu'elle est en mouvement perpétuel. *Ce sont donc eux qui ont le lourd fardeau de prouver leur thèse à la satisfaction*

de la Chambre. Le Canada prétend que ses adversaires ne se sont pas déchargés de ce fardeau et que la thèse américaine d'une frontière naturelle comme telle, ou encore comme circonstance pertinente, demeure un mythe sans fondement aucun. Elle n'est nullement reconnue dans le monde scientifique, et certainement pas dans les ouvrages qui font autorité.

Depuis que la thèse inédite de la frontière naturelle au chenal Nord-Est a fait son apparition, si je peux m'exprimer ainsi, dans le mémoire de nos contradicteurs, les juristes canadiens ont consulté les scientifiques les plus réputés afin de la vérifier. Le résultat de ces recherches, le résultat de ces études approfondies, on le trouve dans l'affirmation catégorique du Canada au paragraphe 195 de sa réplique, que je me permets de citer en partie:

> «les Etats-Unis n'ont pas été en mesure de citer le moindre ouvrage scientifique sur la région du golfe du Maine qui a été publié antérieurement à l'ouverture de la présente instance et qui décrit trois «écosystèmes distincts et reconnaissables» dans cette région ou qui décrit le chenal Nord-Est comme «frontière naturelle».

La Chambre se souviendra que, le mercredi 18 avril, mon collègue et ami M[e] Ralph Lancaster a demandé au témoin américain, le docteur Robert Edwards, de commenter cette affirmation du Canada dont je viens de vous donner lecture. La réponse du témoin américain est à la fois très candide et très révélatrice. Je me dois de la reprendre en partie ici car elle situe dans une juste perspective la position du Canada sur cet élément de l'argumentation des États-Unis. Tout d'abord, le témoin américain admet candidement que le Canada a raison. Il dit: «I think it is correct to say that no scientific work on the Gulf of Maine area explicitly labels the three areas we have discussed as régimes.» (**VI**, p. 421.)

Quelques instants plus tard, le docteur Edwards ajoute, dans un passage éminemment révélateur, que la thèse américaine des trois régimes écologiques distincts et de la frontière naturelle au chenal Nord-Est est tellement connue qu'elle constitue un fait acquis et qu'il n'a donc jamais été nécessaire pour aucun scientifique d'en faire l'objet d'un article dans une revue. Ecoutons, Monsieur le Président, Messieurs les juges, les paroles mêmes du témoin des Etats-Unis:

> «if a general fact is well known and accepted, individuals do not feel the need to state it in writing, although acceptance of that fact, and what it implies, may underlie other work that they do» (**VI**, p. 422).

Voici, ce que l'on nous offre pour preuve de l'existence d'une frontière naturelle au chenal Nord-Est: la simple assertion, par le premier responsable des écritures américaines dans ce dossier, qu'il s'agit d'un fait général, connu et accepté, bien qu'il n'en ait jamais été fait mention dans aucun ouvrage scientifique traitant de la région du golfe du Maine. Monsieur le Président, permettez-moi de douter de la valeur scientifique de cette assertion. Quant à sa valeur juridique, le Canada affirme qu'elle n'en a aucune.

II. La théorie américaine à la recherche d'un fondement en droit et dans les faits

Je m'engage maintenant dans mon premier argument. Je le résume: ni le droit ni la science ne reconnaissent la notion de frontières naturelles fixes dans la colonne d'eau. Quoi qu'il en soit, les données factuelles disponibles ne permettent pas d'affirmer avec certitude qu'il existe une frontière unique, prétendument naturelle, dans les circonstances de l'espèce.

Ce premier de mes arguments comprend trois volets. Je traiterai en premier lieu du droit; en second lieu, je reviendrai brièvement sur la géologie du milieu marin et, enfin, je montrerai que d'importants écrits scientifiques américains n'appuient aucunement la thèse de nos contradicteurs dans cette affaire.

1. La théorie de la frontière naturelle n'est pas fondée en droit

Abstraction faite des données scientifiques, il se pose évidemment la question plus fondamentale de savoir si le simple fait de prétendre qu'il existe une frontière naturelle dispense de la nécessité d'aboutir à un résultat équitable fondé sur des principes équitables selon le droit (réplique du Canada, par. 28). Les Etats-Unis ont refusé ou négligé de lier contestation avec le Canada sur cette question absolument fondamentale. M[e] Stevenson a soutenu:

> «If a natural boundary exists ... then such a boundary can *bolster and confirm* a delimitation reached by the application of equitable geographic principles.» (VI, p. 276.)

Mais, Monsieur le Président, cet argument suppose à la fois qu'il existe une frontière naturelle – ce qui n'est pas le cas – et que la frontière proposée par les Etats-Unis est le résultat de l'application de principes équitables – ce qui selon nous n'est pas non plus le cas. M[e] Stevenson a fait valoir que la prise en considération de frontières naturelles trouve un «fondement solide» dans la jurisprudence. Bien respectueusement, M[e] Stevenson est dans l'erreur. En effet, il suffit de lire attentivement les décisions pertinentes pour se rendre compte que, bien au contraire, la prise en considération de caractéristiques naturelles dans la mer aux fins du droit repose en réalité «sur le sable».

Je n'ai pas l'intention de m'attarder longuement sur ce point, mais je dois tout de même donner la réplique à M[e] Stevenson:

Premièrement, l'affaire des *Grisbadarna* ne présente sûrement pas un précédent pour ce qui est de la théorie de la frontière naturelle. Il est évident que le point à retenir dans cette affaire est que le tribunal arbitral a tenu compte expressément dans sa sentence du désir des Parties elles-mêmes, qui avaient convenu que les petits bancs de pêche des Grisbadarna ne devaient pas être divisés (**III**, contre-mémoire du Canada, par. 45, et notes 30 et 31, p. 19).

Deuxièmement, il est étonnant que M[e] Stevenson ait invoqué l'arrêt de la Cour dans l'affaire des *Pêcheries* (**VI**, p. 277). En effet, cette affaire n'avait absolument rien à voir avec des frontières prétendument naturelles. Ce qui était en cause, comme vous le savez mieux que moi, c'était le système norvégien de lignes de base droites. Or, ces lignes de base avaient été tirées entre des points fixes situés sur la terre ferme, sur des îles ou sur des rochers, et non en fonction de caractéristiques du fond de la mer ou d'autres phénomènes océaniques.

Troisièmement, et avec le plus grand respect pour l'opinion contraire, nous ne saurions prendre au sérieux la référence de M[e] Stevenson à la convergence antarctique *(ibid.)*. En effet, cette convergence est un phénomène extrêmement étendu qui ressemble à la convergence observée entre les eaux du front plateau-talus et les eaux du Gulf Stream au large de la côte est de l'Amérique du Nord et que le Canada a décrite dans ses écritures (contre-mémoire du Canada, par. 184). Sa localisation varie sur des centaines de milles marins en l'espace d'à peine quelques semaines. Et c'est justement à cause de son étendue et de sa variabilité géographique que les Parties à la convention sur la conservation de la faune et de la flore marines de l'Antarctique ont prévu que la convergence serait réputée se situer le long d'une ligne précise aux fins de la convention. Cette

convention n'apporte donc aucun appui, encore moins un fondement solide à la thèse américaine de la frontière naturelle.

A notre avis, il est très significatif que Me Stevenson, lorsqu'il a parlé droit dans ce domaine, se soit limité à ces trois références. Il semble au Canada qu'il aurait pu donner lecture à la Chambre de certains passages de la décision arbitrale de 1977 qui traitent abondamment de l'argument du Royaume-Uni fondé sur une caractéristique géomorphologique du fond marin de la Manche. Dans l'affaire du plateau continental franco-britannique, tout comme dans la présente espèce, les parties étaient d'accord à reconnaître «la continuité géologique fondamentale du plateau continental» (sentence, par. 106). Et il ne fait pas de doute que, dans l'esprit des parties et du tribunal arbitral, cette continuité s'appliquait tout autant à la *géologie* qu'à la *géomorphologie*. Il est dès lors intéressant, Monsieur le Président, Messieurs les juges, de relever deux conclusions importantes du tribunal arbitral:

Premièrement, attacher une signification déterminante à un élément physique tel que la fosse centrale et la zone de failles de la fosse centrale serait aller à l'encontre de la tendance générale manifestée par la pratique des Etats concernant le plateau continental pendant les dernières années (sentence, par. 107).

Deuxièmement, compte tenu de la continuité fondamentale du plateau continental, il n'y avait aucun motif juridique d'écarter la méthode de l'équidistance ou toute autre méthode de délimitation pour lui préférer simplement un accident tel que la fosse centrale et la zone de faille de la fosse centrale (sentence, par. 108).

Essentiellement, le tribunal arbitral a jugé que l'axe de la fosse centrale et de la zone de failles de la fosse centrale n'était qu'un «simple accident de la nature» et qu'il ne constituait pas un facteur utile pour arrêter la délimitation. Il ne s'agissait par conséquent ni d'une circonstance spéciale ni d'un facteur pertinent susceptible de se substituer aux caractéristiques géographiques essentielles de l'espèce (sentence, par. 108).

Monsieur le Président, Messieurs les juges, c'est précisément là le point de vue du Canada quant à la pertinence des caractéristiques naturelles du milieu marin dans la présente affaire. Les Etats-Unis, par contre, proposent que la frontière maritime unique respecte une prétendue frontière naturelle dans la colonne d'eau et sur le fond de la mer. Ce faisant, ils invitent la Chambre à faire abstraction du fait, pourtant évident et reconnu par les deux Parties, que le plateau continental dans la région du golfe du Maine est caractérisé par son unité essentielle (**VI**, p. 278). J'ai déjà traité de cette contradiction dans l'argumentation des Etats-Unis au premier tour de la procédure orale (**VI**, p. 108). Je voudrais aujourd'hui rappeler très brièvement comment, dans le contexte de son examen de la jurisprudence qu'il juge pertinente, Me Stevenson a traité de la géologie.

2. La théorie de la frontière naturelle appliquée au sous-sol du plateau continental dans la région du golfe du Maine

Me Stevenson a fait état de l'arrêt de la Cour dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* de 1982. Or il est clair que les circonstances géologiques invoquées par les Parties dans cette affaire étaient d'un tout autre ordre que les références aux données géologiques actuelles faites par le Canada en l'espèce. Les paragraphes pertinents de l'arrêt de 1982 (*C.I.J. Recueil 1982*, par. 51-61) ne laissent aucun doute sur le fait que les Parties avaient articulé leurs thèses géologiques autour d'événements et de processus de l'évolution dont elles considéraient qu'ils avaient déterminé la direction ou la

«projection» de leurs prolongements naturels respectifs. Et en déclarant que «c'est le résultat qui importe, et non l'évolution qui s'est produite dans un passé lointain» (*C.I.J. Recueil 1982*, par. 61), la Cour a indiqué sa préférence pour les faits tels qu'ils se présentent aujourd'hui.

C'est donc avec raison que Me Stevenson a invoqué le rejet par la Cour en 1982 des thèses fondées sur des événements remontant à un million d'années, sur «les processus et les événements qui sont à l'origine des faits ... sur et sous la surface terrestre» (VI, p. 277-278). Bien sûr, je n'ai fait aucune référence dans mon exposé du 4 avril à la pertinence des processus de la géologie historique. Par contre, j'ai effectivement fait état de certains faits actuels concernant la structure géologique de la marge continentale dans la région du golfe du Maine. Et je soutiens que faire état de ces faits est parfaitement en accord avec l'idée que la Cour se faisait de son rôle dans l'affaire de 1982, un rôle qui consiste «à ne recourir à la géologie que dans la mesure où l'application du droit international l'exige» (*C.I.J. Recueil 1982*, par. 61). Le Canada n'en demande pas plus.

Permettez-moi, Monsieur le Président, Messieurs les juges, de vous rappeler très brièvement l'une des thèses fondamentales du Canada concernant certaines caractéristiques clés du sous-sol de la région du golfe du Maine. Je le fais parce que cette thèse n'a fait l'objet d'aucune critique de la part des Etats-Unis dans leurs plaidoiries orales.

S'il est vrai que les Parties sont d'accord à reconnaître que le plateau continental de la région du golfe du Maine se caractérise par son unité essentielle, nous avons cependant démontré le 4 avril dernier qu'il existe deux bassins sédimentaires profonds dans la région, à savoir le bassin Scotian et le bassin du banc de Georges, et que ces deux bassins sont partiellement séparés par l'arche de Yarmouth, qui se situe un peu à l'est du centre du banc de Georges. Par conséquent, les discontinuités géologiques dans la région ne se (58) produisent pas au chenal Nord-Est. (Je vous rappelle à cet égard les figures 52 et 53 de la procédure orale du Canada que vous trouvez dans votre livre rouge.) (181)

Ces deux bassins sédimentaires sur lesquels tant de travaux ont été effectués sont potentiellement très riches en hydrocarbures, cette ressource du plateau continental qui a pu sembler être reléguée au second plan dans cette affaire en faveur des ressources halieutiques de la colonne d'eau; non parce que le Canada n'attache pas un grand intérêt aux ressources du plateau continental, mais parce que l'importance connue des ressources halieutiques et la dépendance du sud-ouest de la Nouvelle-Ecosse à l'égard de ces ressources confèrent à la question de la pêche une immédiateté particulière sur le plan humain. Il est donc impossible de décrire le banc de Georges comme un gisement unique de ressources en hydrocarbures. Si l'on veut parler de frontière naturelle en ce qui concerne le sous-sol, eh bien, ce n'est pas au chenal Nord-Est qu'il faut la chercher.

C'est une frontière maritime unique que le compromis invite la Chambre à délimiter. Et même si la ligne américaine peut prétendre zigzaguer sur le plan horizontal, il va de soi qu'une frontière naturelle ne peut, elle, zigzaguer sur le plan vertical, autrement dit entre les trois étages, entre les trois paliers du milieu marin.

Je vous rappelle, Monsieur le Président, Messieurs les juges, mes paroles du 4 avril:

> «si la thèse américaine de la frontière naturelle était même reconnue en droit, pour triompher, elle devrait forcément valoir pour chacun des étages. Elle ne peut subir une seule exception à quelque palier que ce soit, sinon elle s'effondre» (VI, p. 108).

Il est manifeste qu'à l'étage important de la géologie la thèse américaine de la

frontière naturelle s'écroule irrémédiablement comme un château de cartes. J'arrive à mon troisième volet.

3. Les études officielles des Etats-Unis et la théorie des trois régimes écologiques et de la prétendue frontière naturelle

En ce qui concerne les ouvrages scientifiques traitant de cette question – des trois régimes écologiques et de la prétendue frontière naturelle – nous avons déjà montré que le docteur Edwards a admis qu'il n'en existe pas. La thèse américaine est donc dénuée de tout fondement scientifique.

Mais, nous avons cherché à découvrir s'il n'existait pas d'autres textes faisant état d'études approfondies du milieu marin dans la région du golfe du Maine dans un contexte autre que la présente affaire. Si ces textes existaient, corroboraient-ils la thèse américaine ou plutôt la thèse canadienne, qui postule, elle, que le banc de Georges présente beaucoup d'affinités avec d'autres zones canadiennes au nord-est, à la fois sur les plans géologique, géophysique, océanographique et biologique?

Monsieur le Président, Messieurs les juges, nous avons effectivement mis la main sur plusieurs rapports publiés par le Gouvernement des Etats-Unis lui-même, depuis 1977, et qui avaient tous comme objet premier l'étude du milieu marin dans certains secteurs de la région du golfe du Maine. Il s'agit des bilans des effets sur l'environment (« Environmental Impact Statements ») préparés aux fins de l'octroi de permis de forage américains et dont il a déjà été question devant la Chambre les 18 et 19 avril dernier (**VI**, p. 454).

Nulle part dans ces documents officiels nous ne trouvons la moindre mention de l'existence de trois régimes écologiques identifiables dans la région ou d'une barrière naturelle au chenal Nord-Est. Il nous semble fort pertinent de commenter brièvement certains de ces importants rapports qui sont tous déjà déposés auprès de la Chambre.

Le bilan des effets sur l'environnement préparé en 1979 par le Gouvernement des Etats-Unis ne fait aucune mention ni de trois régimes distincts ni d'une frontière naturelle. Nous tenons ces omissions pour extrêmement significatives. En effet, non seulement cette étude renferme-t-elle une description détaillée du milieu marin de l'ensemble de la région du golfe du Maine, mais elle a aussi donné lieu à d'importantes consultations publiques et fait l'objet d'un examen par la National Oceanic and Atmospheric Administration dont fait partie le docteur Edwards.

Un autre bilan des effets sur l'environnement, établi en prévision d'une adjudication ultérieure de concessions sur la partie américaine du banc de Georges, a été publié par le Gouvernement des Etats-Unis en avril 1982, il y a deux ans. Ce document a donné lieu au même processus d'audiences publiques et d'examen gouvernemental. Or, il ne fait lui non plus aucune mention d'une frontière océanographique ou biologique qui se situerait au chenal Nord-Est.

Ces deux études font par contre ressortir un autre point, à savoir l'importance de la zone de transition cap Cod-hauts-fonds de Nantucket-grand chenal Sud. Ces documents ne laissent aucun doute sur le fait que la zone de transition la plus significative sur les plans biologique et océanographique se situe non pas au chenal Nord-Est, mais bien au sud-ouest du banc de Georges comme le Canada l'a fait valoir dans ses écritures.

Ainsi ces ouvrages scientifiques n'étayent pas la théorie américaine mais confirment plutôt la thèse du Canada selon laquelle le banc de Georges est de nature boréale ou nordique et fait partie d'une série bien définie de bancs s'étendant vers le sud-ouest à partir du plateau Scotian.

III. Le banc de Georges et la notion de communauté distincte et indivisible appliquée à toutes les ressources halieutiques

Permettez-moi, Monsieur le Président, Messieurs les juges, d'aborder maintenant le deuxième point qu'entend faire valoir le Canada aujourd'hui en ce qui a trait au milieu marin. Le banc de Georges n'est pas une entité autonome, comme le prétendent les Etats-Unis. Ces derniers mésinterprètent les faits en identifiant les ressources halieutiques du banc de Georges comme une communauté distincte et indivisible.

Le 19 avril, les Etats-Unis ont soutenu que le banc de Georges est un banc de pêche cohérent et autonome («internally coherent and self contained»), qu'on y retrouve une communauté de ressources distincte et que la division du banc par une frontière entraînerait de graves problèmes de conservation (**VI**, p. 438). Laissons de côté pour l'instant la question de la pertinence juridique de ces arguments et arrêtons-nous à l'hypothèse de l'enclavement total des ressources du banc de Georges, que l'on doit imaginer entièrement isolé des zones contiguës. Même si le Canada croit avoir démontré que cette hypothèse n'est que pure chimère, nous devons aujourd'hui répliquer à des arguments qui ont fait leur première apparition dans le mémoire des Etats-Unis en septembre 1982 et qui refont surface, maintenant, sous un emballage différent, dans les plaidoiries américaines.

Contrairement aux affirmations des Etats-Unis, le Canada n'a jamais attaqué la notion de stocks comme telle. A cet égard, je rappelle à la Chambre les propos que j'ai tenus à ce sujet lors de ma première intervention (**VI**, p. 116-117). A la différence des Etats-Unis, nous ne croyons pas que les stocks se cantonnent dans des limites rigides coïncidant avec les bancs de pêche. Tout au contraire, le Canada conclut de son analyse de la structure des stocks dans la région du golfe du Maine que le banc de Georges constitue un milieu qui n'est pas une communauté de ressources cohérente et autonome («internally coherent and self contained»). Même les poissons qui font partie des stocks qu'on dit «stocks du banc de Georges» sont entièrement mobiles et aucunement confinés à l'intérieur de murs infranchissables qui entoureraient le banc de Georges. A l'intérieur même du banc, les groupements et les concentrations de poissons sont variables et irréguliers. Certaines espèces s'apparentent davantage par leur comportement au banc de Brown tandis que d'autres montrent plus d'affinités avec le grand chenal Sud.

Monsieur le Président, Messieurs les juges, la pierre angulaire sur laquelle repose la thèse américaine d'une frontière naturelle au chenal Nord-Est est la division très nette («sharp stock division») que marquerait ce chenal entre des stocks distincts de douze des seize espèces de poissons que les Etats-Unis considèrent être d'importance commerciale (**II**, mémoire des Etats-Unis, par. 57). Or, nous croyons avoir démontré de façon concluante, lors de notre contre-interrogatoire du témoin des Etats-Unis, la contradiction flagrante qui entache la position de nos adversaires en ce qui concerne au moins quatre de ces douze espèces. Le chenal Nord-Est n'est pas et n'a jamais été une frontière biologique naturelle divisant le banc de Georges et le plateau Scotian avec, de part et d'autre, des stocks prétendument distincts de calmars à nageoires longues, de brosmes, de sébastes et de merluches blanches. L'agent du Canada, mon ami M[e] Legault, a déjà montré jeudi comment le homard ne cadre pas non plus avec le modèle américain (ci-dessus, **VI**, p. 21).

Cela est extrêmement sérieux. Si nous avons raison de trouver dans le témoignage du docteur Edwards et dans les écrits auxquels nous l'avons

confronté la confirmation que seules subsistent sept des douze espèces mentionnées à l'origine dans la figure 7 du mémoire américain, quelle est donc l'importance réelle de cette impénétrable frontière naturelle du chenal Nord-Est?

N'est-il pas permis d'affirmer que cette barrière perd quelque peu de l'étanchéité juridique que nous adversaires américains veulent lui conférer? N'est-il par permis également d'affirmer que le banc de Georges perd quelque peu de sa prétendue intégrité biologique?

Monsieur le Président, Messieurs les juges, le Canada n'accepte évidemment pas que Me Colson infère, comme il l'a fait le 19 avril, que si nous n'avons contre-interrogé le témoin des Etats-Unis que sur quatre des douze espèces de poissons mentionnées à la figure 7 du mémoire américain, c'est que nous étions *disposés à concéder les autres* (**VI**, p. 440). Nous pourrions rendre la monnaie de sa pièce à Me Colson. En effet, Me Lancaster n'a interrogé le docteur Edwards que sur six espèces. Faut-il en conclure que les Etats-Unis concèdent que leur figure 7 n'aurait pas dû renfermer les autres?

Pour démontrer une fois de plus que la thèse que soutiennent toujours nos adversaires américains, que la thèse de la frontière naturelle au chenal Nord-Est et de l'intégrité biologique du banc de Georges n'est que pure chimère, nous commenterons aujourd'hui, très brièvement, à titre d'exemple deux autres espèces dites commercialement très importantes, soit la morue et le hareng.

Nous avons choisi la morue parce que cette espèce illustre de façon saisissante qu'il n'existe pas de communauté autonome confinée au banc de Georges et aussi parce que l'utilisation qu'en ont faite les Etats-Unis met en relief, encore une fois, le manque de rigueur scientifique de l'analyse américaine. Nous avons choisi le hareng parce qu'il illustre éloquemment les mouvements de stocks à travers des régimes écologiques et des frontières naturelles dont les Etats-Unis nous ont affirmé l'existence.

1. La morue

Selon le Canada, le chenal Nord-Est n'est pas une barrière de stocks de morue comme le prétendent les Etats-Unis. De fait, les stocks de morue associés à la partie nord-est du banc de Georges ont des affinités étroites avec les stocks de morue qu'on retrouve sur le banc de Brown (**I**, mémoire du Canada, par. 106). Messieurs les juges, vous pouvez voir maintenant sur la boîte à images la figure 165, que vous retrouvez aussi dans votre cahier rouge. Ces concentrations de morue sur le banc de Brown et sur le banc de Georges sont clairement distinctes du stock de morue au large de la côte de la Nouvelle-Angleterre. Dans son contre-mémoire (**III**, par. 215), le Canada a cité à l'appui de cette proposition une étude de marquage réalisée par un scientifique américain, le docteur Wise. Vous voyez maintenant sur la boîte à images, sur cette illustration 165, la barrière migratoire de la morue selon le docteur Wise. Elle se situe au soixante-huitième méridien. Mais, évidemment, les conclusions de cette étude ne concordent pas avec la thèse américaine, alors les Etats-Unis ont critiqué les travaux de cet éminent scientifique sous le prétexte qu'ils reposaient sur un nombre trop restreint d'individus récupérés (**V**, réplique des Etats-Unis, vol. II, annexe 21, par. 3).

Pour jeter le discrédit sur les travaux du docteur Wise, les Etats-Unis ont cité six documents dans l'une des annexes à leur contre-mémoire (**IV**, vol. I, Part A, par. 96, notes 2-4). Des scientifiques canadiens ont examiné ces documents. Sur la base de cet examen, le Canada affirme aujourd'hui que deux d'entre eux ne traitent même pas des bancs au large de la région du golfe du Maine; trois autres ne font ressortir aucune différence dans les caractéristiques biologiques impor-

tantes de la morue sur le banc de Brown et sur le banc de Georges et le sixième ne renferme que des assertions non étayées. Monsieur le Président, Messieurs les juges, vous vous souviendrez que nous avons mis en relief dans notre contre-interrogatoire du témoin américain l'utilisation également moins que scientifiquement rigoureuse, je choisis mes mots avec soin, utilisation également moins que *scientifiquement rigoureuse* que les Etats-Unis ont faite de Dice dans leurs écritures pour étayer leur vision biogéographique de la région (**VI**, p. 425-427).

Outre les travaux de Wise, les seules autres données de marquage pertinentes concernant la morue mises à la disposition de la Chambre ont été fournies par le Canada dans un document déposé, qui avait été préparé par le scientifique canadien, le docteur R. G. Halliday. Celui-ci a établi qu'en 1973 un tiers des morues qui avaient été marquées sur le banc de Brown ont été effectivement reprises sur le banc de Georges de l'autre côté du chenal Nord-Est (*ICNAF Research Document* 73/71, p. 11).

Dans son étude, Wise en arrive à la conclusion suivante: «A line drawn along the 68th meridian separates the offshore and southern Nova Scotia fish from the more inshore groups.» («Cod Groups in the New England Area», *Fishery Bulletin*, vol. 63, p. 201.)

Quelle est donc, je vous pose la question, quelle est donc l'aire commune de la morue que l'on retrouve dans la partie nord-est du banc de Georges? Ce n'est certainement pas la totalité du banc. Compte tenu des migrations de part et d'autre du chenal Nord-Est, le Canada est d'avis que c'est la région comprenant la partie nord-est du banc de Georges et le banc de Brown. En tout état de cause, l'aire commune se limiterait à la partie du banc de Georges située à l'est de la barrière établie par Wise au méridien de 68° ouest.

2. Le hareng

Parlons maintenant du hareng. Il n'existe pas de communauté distincte et indivisible de hareng sur le banc de Georges. Tout d'abord, le hareng est un grand migrateur et, en second lieu, les harengs de différents stocks reproducteurs se mélangent durant l'année en dehors des périodes de frai.

Le New England Fisheries Management Council lui-même a reconnu ces caractéristiques du hareng. En 1979, dans un projet de bilan des effets sur l'environnement à l'appui de son plan de gestion du hareng, le conseil s'est prononcé en faveur d'une approche globale de l'évaluation «of the various adult herring fisheries in the Gulf of Maine and Georges Bank/Southern New England region» (p. 1). En 1980, le département d'Etat en vient à la même conclusion dans le projet de bilan des effets sur l'environnement qu'il a préparé dans le contexte de l'accord sur les ressources halieutiques de la côte est. Je cite en partie:

> «At various times of the year, fish from all three stocks [from the Georges Bank, *Gulf of Maine and southwest* Nova Scotia], may be expected to overlap *geographically in varying proportions and become seasonally* subject to capture in the various fisheries...» (Appendices, p. 103.)

Encore ici, Monsieur le Président, le témoin des Etats-Unis, à qui j'ai donné lecture de ce passage, n'accepte évidemment pas ces conclusions puisqu'elles ne coïncident pas avec sa vision compartimentée du milieu. Néanmoins, il nous semble patent que l'aire commune du hareng est bel et bien la région tout entière du golfe du Maine.

Par conséquent, j'estime qu'il est justifié de conclure, car je vous avais dit que je serai bref en traitant de ces deux espèces, dans les limites des connaissances que nous avons (tout aussi imprécises soient-elles dans de nombreux cas), que les

communautés de ressources halieutiques dans la région du golfe du Maine varient beaucoup d'une espèce à l'autre et qu'elles cadrent dans très peu de cas avec l'entité totalement indépendante et indivisible que constitue, de l'avis des Etats-Unis, le banc de Georges. Dans ses écritures, le Canada a montré que des vingt-huit espèces de valeur commerciale dans la région du golfe du Maine seulement deux répondaient aux critères de communauté distincte du banc de Georges (contre-mémoire du Canada, par. 212). Il se dégage donc une fausse (23) impression de la figure 7 du mémoire américain. Il n'existe tout simplement pas de phalanges de stocks distincts qui manœuvrent avec une précision militaire de part et d'autre du chenal Nord-Est. La frontière naturelle au chenal Nord-Est tient donc toujours du mythe. Toute ligne de délimitation dans la région du golfe du Maine, comme l'ont d'ailleurs reconnu les Etats-Unis, divisera des ressources biologiques et entraînera la nécessité de coopérer sur les plans de la conservation et de la gestion.

Monsieur le Président, Messieurs les juges, avant d'en venir à mon troisième point concernant la conservation et la gestion des ressources du banc de Georges, je dois traiter d'un autre argument américain fondé celui-ci sur la ligne qui sépare les sous-zones 4 et 5 de la CIPAN.

Nous croyons avoir démontré que l'aire de distribution d'un stock n'est pas limitée pendant tout le cycle vital à la zone située à l'ouest de la ligne séparant les sous-zones 4 et 5, pas plus d'ailleurs qu'au banc de Georges ou à la subdivision 5 Ze, du seul fait de sa désignation comme «stock du banc de Georges» ou, aux fins de la CIPAN, comme stock de la subdivision 5 Ze. Ainsi, les arguments américains, que vous avez entendus le 19 avril dernier, liés à l'utilisation de telles désignations par la CIPAN restent à côté de la question de rapport entre la distribution des stocks et les régimes prétendument écologiques. La ligne de séparation des sous-zones 4 et 5, établie en 1931 pour ventiler les données de capture de l'aiglefin, était une ligne statistique. Quand est venu le temps, quelque quarante ans plus tard, de mettre en place un régime de contingentement des captures, on a choisi cette ligne, parmi tant d'autres, pour des raisons de commodité administrative qui tenaient essentiellement au fait qu'elle existait depuis longtemps. Est-il besoin de le rappeler, elle n'avait pas été destinée à représenter une barrière universelle séparant les stocks. Enfin, comme l'a démontré M^e^ Legault, à l'audience du 3 mai 1984, il va de soi qu'on n'a jamais donné à cette ligne de dimension juridictionnelle (ci-dessus p. 16-17).

Mais voyons plutôt une autre ligne statistique – une ligne qui avait été établie par le conseil nord-américain des recherches sur les pêches pour séparer des unités statistiques – des «concentrations naturelles de pêche» – sur le banc de Georges. Cette ligne, que le Canada a illustrée dans sa réplique (par. 93), a été utilisée par le docteur Edwards lui-même dans son exposé sur l'écologie du banc de Georges (**VI**, p. 419-420). Le Canada et les Etats-Unis continuent tous deux d'utiliser aujourd'hui ces unités pour leurs statistiques nationales de capture.

Regardons à nouveau les données américaines concernant la morue et l'aiglefin, mais en y ajoutant cette fois la ligne séparant les unités statistiques (255) 5 Zej et 5 Zem de la partie ouest du banc de Georges. Il s'agit de la figure 166 dans votre cahier rouge, que vous voyez maintenant, Monsieur le Président, Messieurs les juges, sur la boîte à images. Je ne prétends pas que cette ligne statistique constitue une frontière naturelle. Ce n'est pas là la position du Canada. Nous croyons qu'il est impossible de tracer une ligne dans la région du golfe sans diviser les ressources et sans, par voie de conséquence, commander une forme quelconque de coopération bilatérale. Pourtant, il est clair que cette ligne statistique ne divise pas les concentrations de frai de la morue et de l'aiglefin. Sur la boîte à images, vous voyez les lettres A, B, C, en regard de

chacune de ces petites cartes; malheureusement, elles n'ont pas été reproduites sur l'illustration que vous retrouvez dans votre cahier. Je vous prierai, s'il vous plaît, de les ajouter en regard de chacune de ces illustrations.

Monsieur le Président, vous avez pu constater que cette ligne statistique ne divise pas les concentrations de frai de la morue sur la petite carte A, pas plus que les concentrations de frai de l'aiglefin sur la petite carte B. Regardons maintenant la carte C. On voit très bien que la ligne de division des unités statistiques se situe également entre les plus importantes concentrations de pétoncles sur le banc de Georges. Une fois fixés, nous savons, ceci nous a été indiqué par le docteur Edwards (**VI**, p. 415), que les pétoncles ne migrent pas. Par conséquent, même si une concentration de pétoncles était divisée par une ligne, la pêche menée d'un côté de cette ligne n'influerait pas directement sur la pêche menée de l'autre côté.

Il ressort de ces figures, Monsieur le Président, Messieurs les juges, interprétées selon le critère appliqué par les Etats-Unis aux concentrations de frai, qu'une ligne statistique très proche de la ligne canadienne ne divise pas les frayères du banc de Georges. Toutefois, le fait que ni la ligne canadienne ni la ligne américaine ne divisent de concentrations de frai n'est pas réellement pertinent en l'espèce. Nous demeurons convaincus que si l'on prend en compte l'ensemble du cycle vital et la distribution globale des stocks au stade où ils peuvent être capturés, le schéma bien ordonné des concentrations de frai se transforme en un écheveau complexe de parcours qui rayonnent à partir des frayères en un lacis que ne sauraient reproduire aucune construction de lignes ni aucune frontière prétendument naturelle.

Dans son mémoire (par. 140), le Canada a fait valoir que la partie non contestée du banc de Georges fournit aux Etats-Unis une ample base de ressources pour maintenir la vigueur de son industrie de pêche et lui donner des possibilités de se développer. Les Etats-Unis ont cherché à réfuter cette affirmation en présentant un tableau récapitulatif des expériences de chalutage d'une seule année, en 1980, année atypique dois-je souligner (**VI**, p. 444-445, et **IV**, contre-mémoire des Etats-Unis, par. 354).

Ce tableau montre, exprimée en pourcentages, une très forte concentration de morue, d'aiglefin et de limande à queue jaune dans la partie nord-est du banc de Georges durant la presque totalité de l'année 1980. Ces résultats sont cependant tout à l'opposé des données comparables fournies par les Etats-Unis eux-mêmes pour les deux années précédentes (contre-mémoire des Etats-Unis, vol. V, annexe 38). En effet, l'estimation des proportions de ces trois espèces dans la partie nord-est du banc de Georges est environ le double des chiffres de 1978 et de 1979. C'est donc dire que les Etats-Unis font de nouveau un usage très sélectif des données, créant de la sorte une image tout à fait inexacte.

En réalité, à l'examen des données pour toutes les espèces étudiées, on constate qu'environ 70 pour cent de la biomasse se trouve dans la partie américaine non contestée du banc de Georges. Comme l'a démontré mon collègue, le professeur Bowett, la position de la ligne canadienne reflète la division des ressources que les Parties jugeaient équitables dans l'accord de 1979 (**VI**, p. 146).

IV. Les ressources du banc de Georges: leur conservation et leur gestion

J'en viens maintenant à mon troisième et dernier point: les ressources du banc de Georges, aussi bien biologiques que non biologiques, peuvent faire l'objet d'une conservation efficace par deux Etats travaillant en collaboration de part et d'autre d'une frontière établie selon des principes équitables.

Monsieur le Président, les Etats-Unis ont dressé un inventaire de l'histoire des commissions de pêche internationales et ont conclu à l'échec de la gestion conjointe ou coopérative. Ils ont établi le même constat à la suite de leur examen du bilan de la gestion conjointe des pêches par le Canada et les Etats-Unis. L'agent du Canada a déjà répliqué à cet argument américain (ci-dessus p. 15-16).

Mais pour répondre précisément à la quatrième question posée par M. le juge Cohen (**VI**, p. 465), nous prétendons, contrairement à nos adversaires, que le Canada et les Etats-Unis ont une longue tradition de gestion bilatérale des ressources, aussi bien dans le domaine des pêches que dans d'autres secteurs. Le Canada a reproduit dans le premier livre des annexes à son mémoire le texte des accords bilatéraux que les Parties ont conclus relativement à la gestion des pêcheries sur la côte est de l'Amérique du Nord. Le contre-mémoire du Canada renferme également nombre d'exemples de la coopération canado-américaine dans le domaine de la gestion des pêches, au sein d'organismes tant bilatéraux que multilatéraux. Je cite, à titre d'exemple, la commission mixte internationale, la commission des pêcheries des Grands Lacs et la commission internationale des pêcheries du Pacifique Nord (contre-mémoire du Canada, par. 234-242).

Au fil des ans, les deux pays ont développé au niveau régional un régime efficace d'exploitation et de gestion conjointes de leurs ressources halieutiques communes. D'ailleurs, les accords conjoints portant sur les ressources communes couvrent, outre les pêches, une vaste gamme de domaines et ont constitué la règle plutôt que l'exception depuis deux cents ans. Le Canada ne sous-estime pas l'effort qu'il faudra consentir pour en venir à un accord sur la gestion des ressources. Par ailleurs, nous ne croyons pas que les arrangements coopératifs ajoutent aux risques de différends. Tout au contraire, nous réitérons qu'aucune frontière unique dans la région du golfe du Maine ne peut obvier à l'impératif de la coopération. Les Parties ne tireront donc pleinement avantage de leurs zones de pêche élargies que si elles arrivent à coopérer dans l'ensemble de la région du golfe du Maine. Lorsque seuls deux Etats sont en présence, il est invariablement dans l'intérêt de l'un et de l'autre de conserver et de gérer leurs ressources communes d'une façon rationnelle.

V. Les risques que présente l'exploitation des hydrocarbures sur le banc de Georges

Avant de conclure, je voudrais traiter de la question de la pollution par le pétrole. Le 19 avril, M. Colson a présenté divers arguments qui visaient à démontrer que si la ligne canadienne était retenue par la Chambre et que les hydrocarbures de la partie est du banc de Georges étaient mis en valeur, les *ressources et les côtes des Etats-Unis seraient exposées à un plus grand risque* que les ressources et les côtes du Canada (**VI**, p. 450).

En premier lieu, je soumets que l'argument de M. Colson est gravement vicié. Il suppose en effet que toutes les ressources du banc de Georges appartiennent aux Etats-Unis. Eh bien, quant au Canada, il va attendre que la Chambre ait fixé la frontière pour savoir à qui appartiennent les ressources qui risquent d'être compromises sur le banc de Georges.

En second lieu, il me faut réfuter l'argument des Etats-Unis selon lequel le pétrole qui atteindrait les côtes du Canada à la suite d'un déversement sur la partie est du banc de Georges n'aurait que des effets négligeables sur ces côtes, qui sont pourtant les plus proches du banc de Georges. C'est là une affirmation dénuée de tout fondement, et qui est en contradiction flagrante avec l'expérience *malheureusement acquise lors de déversements effectifs, tel l'accident du pétro-*

lier *Kurdistan* survenue en mars 1979 (contre-mémoire du Canada, annexes, livre I, par. 100).

Monsieur le Président, les Etats-Unis prétendent en outre qu'il n'y a qu'une faible probabilité que du pétrole déversé sur le banc de Georges atteigne le (163) littoral canadien. Evidemment, M. Colson s'est contenté de regarder la figure 16 de la réplique du Canada, qui illustre la trajectoire que suivrait du pétrole déversé sur la partie nord-est du banc de Georges. S'il avait consulté l'étude d'où cette figure est tirée, il y aurait trouvé des données supplémentaires indiquant que du pétrole déversé à l'extrémité ouest du banc de Georges, soit au point A près du grand chenal Sud, pourrait atteindre le littoral de la Nouvelle-Ecosse au bout de vingt jours à peine. Sur la figure que vous avez devant vous (la figure 167), la trajectoire vingt jours est indiquée en vert et la trajectoire quarante jours est indiquée en rouge. Cette figure montre à l'évidence que la mise en valeur des hydrocarbures, en quelque point que ce soit du banc de Georges, comporterait des risques pour les zones de pêche et les côtes du Canada, et que les Etats-Unis sont dans l'erreur lorsqu'ils prétendent le contraire.

Il me reste un dernier point à faire valoir pour dissiper la confusion créée par les Etats-Unis en ce qui concerne les déversements de pétrole. Le Canada convient qu'il est important de distinguer entre le pétrole qui pénètre dans la colonne d'eau et la nappe de surface. Mais, en réalité, la plus grande partie – environ 90 pour cent – du pétrole déversé dans le milieu marin demeure à la surface (réplique du Canada, par. 178). Et c'est cette masse de pétrole à la dérive qui souille le littoral, les plages et les engins de pêche, et qui ne peut être nettoyée qu'au prix d'efforts et de dépenses énormes.

A quoi tout cela nous conduit-il, Monsieur le Président? Tout simplement à conclure que les Etats-Unis ne sauraient plausiblement prétendre qu'ils seraient seuls à subir les conséquences d'un déversement de pétrole sur le banc de Georges. Ils ne sauraient soutenir comme ils le font que leurs ressources sur le banc de Georges seraient en danger si le Canada entreprenait d'exploiter les hydrocarbures de la partie est du banc, alors que le Canada ne serait pas exposé à des risques semblables si cette même région était mise en valeur par les Etats-Unis. Cet argument est tout simplement indéfendable. Le risque est partagé par les deux Parties. D'ailleurs, elles ont déjà adopté un plan d'urgence en vue de coordonner leurs actions pour le nettoiement et le contrôle de la pollution en cas d'accident pétrolier (réplique du Canada, par. 177-178). Et elles doivent continuer de coopérer en vue de réduire ce risque, quelle que soit la localisation de la frontière que fixera la Chambre.

VI. Conclusion

Le Canada n'a pas jugé nécessaire, Monsieur le Président, Messieurs les juges, de présenter un témoin pour répliquer au docteur Edwards. Cependant, la Chambre a effectivement entendu un témoin pour le Canada durant la procédure orale. Je m'explique. Le docteur Edwards lui-même a reconnu, dans un article publié en 1978 dans *Second Special Symposium of the American Society of Limnology and Oceanography* (p. 306) et auquel je l'ai confronté le 18 avril dernier, que tous les régimes écologiques sont en mouvement perpétuel. Je reprends ses propres mots: «All ecosystems change continuously...» Le docteur Edwards est aussi l'auteur de cette phrase qui porte le coup de grâce à la cause américaine sur ce point: «In the ocean, boundaries and distribution of ecosystems change constantly.» Je répète, *dixit* le docteur Edwards.

Le témoin du Canada, qui réfute de façon définitive la thèse américaine dans

le domaine du milieu marin, c'est le réputé biologiste américain, le docteur Robert L. Edwards lui-même, dans son incarnation de 1978 et non dans sa métamorphose de 1984.

Monsieur le Président, Messieurs les juges, homme de loi, j'ai abordé le monde de la science avec le vif sentiment des limites du droit. Je le quitte aujourd'hui avec une certaine perception des limites de la science. Einstein a d'ailleurs parfaitement exprimé cette idée lorsqu'il a dit : « Man seeks to form for himself, in whatever manner is suitable for him, a simplified and lucid image of the world, *and so to overcome the world of experience by striving to replace it to some* extent with this image. » (Cité dans Gerald Holton, *The Scientific Imagination*, Cambridge, Cambridge University Press, 1978, p. 213.)

Dans les circonstances de l'espèce, le milieu marin de la région du golfe du Maine doit être considéré du point de vue du « monde de l'expérience » et non envisagé du point de vue d'une « image simplifiée » formée de manière à convenir à l'une des Parties. Il doit être considéré à la lumière de la diversité, de la pluralité, de la complexité et de la mobilité qui font toute sa richesse. Et aussi, paradoxalement peut-être, à la lumière de son unité et de sa continuité fondamentale.

Mais ce n'est ni dans les paradoxes de la nature ni dans les perpétuelles controverses de la science que nous devons chercher le fil conducteur qui nous guidera dans la délimitation des frontières que les Etats tracent entre eux sur la terre ferme ou dans la mer. Ce fil conducteur, c'est dans les règles et les principes du droit, imparfaits certes mais indispensables – dans nos notions, imparfaites certes mais indispensables, de l'équité ou du raisonnable – que nous devons le trouver. La science ne peut espérer se substituer au droit, pas plus que le droit ne peut espérer se substituer à la science.

Monsieur le Président, Messieurs les juges, je vous remercie infiniment de votre généreuse patience. Ce fut un grand honneur pour moi que de comparaître devant cette chambre de la Cour internationale de Justice et je vous en remercie.

Le PRÉSIDENT : Monsieur Fortier, je vous remercie et je me permets seulement de vous demander si, au moment que vous estimerez le plus opportun, vous trouverez le moyen vous-même ou quelqu'un de la délégation canadienne de satisfaire à une petite curiosité qui me reste. Vous avez mentionné et vos *écritures ont mentionné un phénomène dont j'ignore s'il est géologique ou géo*morphologique que vous avez appelé l'« arche de Yarmouth ». Est-ce que vous pourrez nous préciser très rapidement de quoi il s'agit ?

M. FORTIER : Sûrement, Monsieur le Président, nous le ferons.

L'audience est levée à 13 h 5

VINGT-TROISIÈME AUDIENCE PUBLIQUE (5 V 84, 15 h)

Présents: [Voir audience du 2 IV 84.]

RÉPLIQUE DE M. MALINTOPPI

CONSEIL DU GOUVERNEMENT CANADIEN

M. MALINTOPPI: Monsieur le Président, Messieurs les juges, la concentration du débat, exigée par l'esprit qui régit les répliques orales, nous impose de rechercher les points essentiels qui opposent les Parties en ce qui concerne le critère ou *test* de la proportionnalité. Ces points, à mon avis, sont au nombre de six.

En ce qui concerne *d'abord* le droit, et en dehors de quelques divergences d'ordre secondaire, il y a opposition entre le Canada et les Etats-Unis quant à la nature et à la fonction de la proportionnalité, quoique les trois conseils qui ont apporté leur contribution à ce sujet de l'autre côté de la barre ne se soient pas tous exprimés de la même manière.

En *deuxième lieu*, il faut souligner le caractère totalement arbitraire du modèle proposé par les Etats-Unis pour le *test* de la proportionnalité, même dans sa version que j'avais appelée «maquillée», pour laquelle la Partie adverse semble maintenant avoir une certaine préférence, et même dans une sorte de modèle nouveau «panaché» bâti en remaniant quelques éléments de l'un des modèles canadiens.

Troisièmement, il convient de considérer la position dogmatique adoptée par nos adversaires en ce qui concerne le rôle de la baie de Fundy, dont l'exclusion est l'une – *mais certes pas la seule* – *des raisons de fond du caractère arbitraire* des modèles de proportionnalité proposés par les Etats-Unis.

En *quatrième lieu*, nous verrons pourquoi la Partie adverse affecte de n'attribuer aucun rôle au triangle à l'intérieur duquel la frontière à établir par la Chambre doit nécessairement se terminer: ici encore la position de la Partie adverse se traduit par une tentative de s'éloigner des termes du compromis lorsque ceux-ci ne lui conviennent plus.

Cinquième point. La Partie adverse persiste à ne pas admettre que la portion extérieure de la région à délimiter possède des caractères objectifs qui en font une zone «ouverte» dans le sens et aux effets des considérations pertinentes énoncées par le tribunal arbitral de 1977 dans des conditions assurément comparables.

Finalement, nos adversaires feignent de ne pas comprendre la valeur à reconnaître à la flexibilité du critère de la proportionnalité par la jurisprudence internationale: cette flexibilité a par contre un caractère essentiel, non seulement d'un point de vue intrinsèque, mais aussi – et surtout – dans la coordination entre ledit critère et les autres *tests* de l'équité d'une délimitation maritime déterminée.

Voilà, Messieurs de la Chambre, les points qui nous paraissent essentiels. Il y a évidemment aussi d'autres questions sur lesquelles les Parties ne sont pas d'accord, mais, dans un souci de brièveté, il faut se reporter à ce propos soit à la procédure écrite soit à ma première intervention. Point n'est-il besoin d'ajouter que je ne me rallie à aucune des thèses de nos adversaires du seul fait de ne plus en parler à ce stade final de la procédure orale.

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Ainsi qu'on l'a vu, le premier point sur lequel les Parties ne sont pas d'accord est un point de droit. Il a trait à la nature et à la fonction du critère de la proportionnalité. A vrai dire, le désaccord à ce sujet est surtout dans les positions divergentes des trois conseils des Etats-Unis qui se sont prononcés là-dessus. La position canadienne, quant à elle, est très simple, mais en même temps très précise, dans son aspect positif tout autant que dans ses aspects négatifs. La proportionnalité est pour nous un critère d'appréciation du résultat; elle n'est, par contre, ni *un principe équitable en soi ni un titre juridique. Et voilà que M. Stevenson, dont* j'ai une fois de plus admiré la probité intellectuelle, prend pour sa part la position diamétralement opposée. Pour lui, la proportionnalité est un «subsidiary delimitation principle», dérivé du premier principe équitable invoqué par les Etats-Unis, à savoir celui: «that the boundary must respect the relationship between the coasts of the Parties and the maritime areas in front of these coasts» (**VI**, p. 259). Il y a plus. Sans se soucier de la contradiction, M. Stevenson, le jour suivant, lui a accordé la valeur d'un «test to determine the equity or disproportion of the result» (**VI**, p. 261). En somme, la proportionnalité est presque bonne à tout faire. Elle pourrait jouer indifféremment le rôle d'un principe de délimitation et celui d'un critère d'appréciation de l'équité du résultat.

L'erreur qui entache ce raisonnement est simple. La fonction des tests de l'équité est d'apprécier que le résultat découlant de l'application de certains principes n'est pas inéquitable du fait qu'il est déraisonnable. Dans ces conditions, la proportionnalité ne peut pas être en même temps un principe équitable amenant à un résultat déterminé et un critère pour apprécier l'équité de ce même résultat. Mais la contradiction qui frappe le raisonnement de mon honorable contradicteur est révélatrice. Elle montre que dans son esprit – tout comme dans celui de ses collègues de la défense des Etats-Unis – la proportionnalité apparaît comme un principe équitable parce que ce que nos adversaires demandent en réalité à la Chambre, c'est qu'elle se prononce *ex aequo et bono*, utilisant n'importe quelles motivations pour attribuer à la Partie adverse la totalité du banc de Georges, et non pas un jugement de droit, conduisant à un résultat équitable par le biais de l'équité *infra legem*.

Le même vice, d'ailleurs, apparaît au grand jour dans les arguments développés par M. Colson, qui est un contradicteur habile et sagace. En se posant la question de savoir si la baie de Fundy doit être prise en considération dans le test de la proportionnalité – question sur laquelle je reviendrai sous peu – M. Colson affirme que:

> «As a preliminary matter, however, we [les Etats-Unis] think that the answer to this question initially lies in a basic and self-evident rule of law: a body of water cannot command more maritime jurisdiction than can an identically-situated body of land.» (**VI**, p. 293-294.)

Nous verrons quelle importance l'on peut attacher à des apophtegmes d'une telle nature. Ce que, par contre, il faut souligner ici c'est que pareille proposition revient à affirmer que la proportionnalité est un titre juridique. En effet, elle implique que ce serait la proportion découlant de terres et/ou d'eaux équivalentes qui déterminerait l'appartenance des espaces maritimes. Mais, une fois encore, la proportionnalité ne peut pas être en même temps la règle conférant un droit et le critère pour apprécier si l'application d'une telle prétendue règle aboutit à un résultat équitable.

M. Feldman, qui a l'esprit subtil, quant à lui n'est pas formellement tombé dans de telles erreurs. Il a demandé expressément à la Chambre d'appliquer la

> «proportionality in this case, as a test of the boundary line proposed by

Canada and of the boundary line proposed by the United States, to determine which line produces a disproportionate result and which produces a result that is a fair reflection [of the relationship] of the coasts to the area in front of those coasts» (**VI**, p. 325).

Mais immédiatement après, il affirme aussi, avec une assurance totale, que:

«We [les Etats-Unis] are convinced that an equidistant line, or any other boundary that would divide Georges Bank, cannot pass the proportionality test for the simple reason that any boundary that does not respect the coastal fronts of the Parties in the Gulf of Maine area will produce a significantly disproportionate result.» *(Ibid.)*

Bien qu'avec beaucoup plus de précaution que ses collègues, M. Feldman implique donc lui aussi que ce que l'on demande en réalité à la Chambre c'est de se prononcer *ex aequo et bono*. En effet, le point de départ demeure toujours l'idée fixe de l'attribution exclusive du banc de Georges aux Etats-Unis, en faisant plier règles, principes et autres critères d'appréciation à cette finalité si essentielle pour la Partie adverse.

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D'ailleurs, et j'en viens ainsi au deuxième point de ma réplique, toute l'argumentation dévelopée par la Partie adverse sur la question des modèles de la proportionnalité vise le même procédé et la même méthode.

Qu'il me soit permis de rappeler à la Chambre l'opinion du Gouvernement canadien en ce qui concerne les conditions d'application du critère de la proportionnalité dans la présente affaire. Cette position peut bien se résumer en deux propositions qui sont d'ailleurs très simples:

a) Le Gouvernement canadien estime d'abord qu'il y a lieu de distinguer, dans la zone à délimiter, entre la portion interne du golfe proprement dit et la partie extérieure qui s'ouvre sur les vastes étendues de l'Atlantique. En d'autres termes, le Canada est d'avis que, en ce qui concerne la zone extérieure, l'on est en présence d'une situation analogue à celle qui caractérisait l'objet de la sentence arbitrale de 1977 en ce qui concerne la partie de la frontière du plateau entre la France et le Royaume-Uni s'ouvrant au-delà des eaux cernées directement par les côtes des deux Etats intéressés.

b) Nonobstant cela, le Canada n'a pas la moindre difficulté à ce que le critère de la proportionnalité soit appliqué de manière à viser conjointement les deux parties de la zone à délimiter. La condition essentielle nécessaire pour ce faire est cependant que la Chambre établisse un ou plusieurs cadres de référence qui aient, bien entendu, des liens bien précis avec la situation objective des lieux aussi bien qu'avec les termes du compromis. Le Canada estime avoir suggéré à cet égard à la Chambre deux cadres possibles de référence et que ces cadres, ainsi que nous le verrons plus avant, n'ont nullement été atteints par les critiques de la partie adverse.

Que nous répond-on de l'autre côté de la barre? La Partie adverse n'admet pas que l'on puisse considérer la portion extérieure du golfe comme étant *open-ended* dans le sens retenu par la sentence arbitrale de 1977. Je laisse, avec votre permission, Monsieur le Président, pour le moment cette question de côté, en renversant ainsi l'ordre de présentation de nos arguments. En effet, ce qu'il nous intéresse de souligner ici c'est que la position de la Partie adverse sur les modèles globaux a considérablement évolué à cet égard au cours des discussions orales.

D'un côté, elle a concentré ses efforts sur ce que j'avais appelé la «variante maquillée» de son modèle de proportionnalité. De l'autre, elle a introduit une sorte de version «panachée» du modèle en question en essayant de plier à ses besoins l'un des modèles canadiens. Mais voyons d'abord le modèle américain «maquillé». Ce modèle présente à nos yeux deux défauts fondamentaux qui le rendent totalement arbitraire.

Vous voyez maintenant ce modèle à côté de moi et vous remarquerez d'abord qu'une très longue partie de la côte atlantique de la Nouvelle-Ecosse y est incluse, alors qu'en revanche aucune côte au sud de l'île de Nantucket n'est prise en considération du côté américain. Il s'agit donc d'un modèle axé autour de la frontière demandée par les Etats-Unis sans la moindre référence aux données géographiques.

Pour mieux dire, M. Colson et M. Feldman vous ont donné une explication de ce procédé qui ne manque pas de piquant. A leurs yeux, les côtes de la baie de Fundy ne devraient pas rentrer dans les calculs de la proportionnalité, mais en revanche la côte de la baie de Fundy relevant du Nouveau-Brunswick devrait *être pour ainsi dire «transférée» sur la côte atlantique de la Nouvelle-Ecosse* de manière à fournir la partie septentrionale du modèle pour le calcul de la proportionnalité. Donc, le point de repère n'est pas en réalité la côte de la Nouvelle-Ecosse, mais plutôt la côte du Nouveau-Brunswick transférée à la place de la côte de la Nouvelle-Ecosse. C'est un exemple parfait de remise en cause de la géographie.

L'autre défaut du modèle des Etats-Unis est que celui-ci s'arrête en amont du triangle à l'intérieur duquel la frontière entre les deux Etats doit nécessairement se terminer. La Partie adverse glisse sur le triangle comme chat sur braise. Tout ce que M. Feldman a dit à ce propos c'est que les Etats-Unis considèrent que les lignes utilisées par le Canada pour rattacher le triangle aux côtes des deux Parties sont «arbitrary and unreasonable». La Chambre comprendra que je ne peux pas considérer ces simples affirmations non prouvées comme une critique ou un argument quelconque. Il n'y a pas un seul mot de démonstration de la part de M. Feldman: *«ipse dixit»*. Mais il est significatif que le modèle des Etats-Unis n'arrive pas au triangle et que, par conséquent, ce modèle est arbitraire également du fait de ne pas couvrir toute la ligne de délimitation que la Chambre est appelée à tracer.

Il en suit, Monsieur le Président, Messieurs les juges, que la Partie adverse n'a pas en réalité présenté un seul modèle de proportionnalité valable. M. Feldman en est tellement conscient qu'il les a pratiquement jetés par-dessus bord en affirmant:

> «As the United States sees this problem, . . . the Chamber is in a position to construct a proportionality test which incorporates substantial elements which have been used by both Parties.» (**VI**, p. 329.)

Ainsi la Partie adverse se déclare disposée à considérer en particulier le premier des deux modèles suggérés par le Canada, celui qui s'appuie sur une portion comparable des côtes des deux pays à l'extérieur du golfe, les ailes latérales, respectivement au nord-est et au sud-ouest. C'est une concession importante sur laquelle j'attire l'attention de la Chambre.

Ce qui est particulièrement important, dans cette concession, c'est que la Partie adverse semble avoir reconnu que l'on ne saurait prétendre que la Chambre adopte un modèle singulièrement dépourvu de symétrie.

Cependant, pareille concession n'a pas été faite à titre gratuit. La Partie adverse cherche en effet à obtenir un résultat plus favorable à ses prétentions en modifiant l'orientation des limites latérales du modèle vers l'Atlantique. Il s'agit,

la Chambre le sait, de lignes qui, de l'avis du Canada, doivent être perpendiculaires à la direction générale moyenne des côtes réelles, de la Nouvelle-Ecosse d'un côté et des Etats-Unis au sud du cap Cod de l'autre.

Quant à la Partie adverse, ses perpendiculaires sont basées sur une cascade de lignes arbitraires. L'orientation de 54° environ, qui constituerait d'après les Etats-Unis la direction générale de la côte, figure déjà dans la première pièce américaine de la procédure écrite comme le résultat combiné de quatre lignes tracées au mépris de la géographie de la zone à délimiter (**II**, mémoire des Etats-
(32) Unis, par. 282-283 et fig. 26). La première, et la plus proche aux terres, est celle qui va du cap Ann au fond de l'isthme de Chignectou. Elle se traduit, par conséquent, par une nouvelle tentative de «transférer» la côte du Nouveau-Brunswick pour remplacer la côte orientale de la Nouvelle-Ecosse. La deuxième ligne, qui rattache l'île de Nantucket au cap de Sable, n'a évidemment rien à voir avec la direction des côtes du Massachusetts et de la Nouvelle-Ecosse qui marquent les «ailes» latérales de ce modèle de proportionnalité. Les autres deux lignes – celles du cap Charles au cap Canso, et du cap Hatteras au cap Saint Marie – relèvent de la macrogéographie au sens le plus large de l'expression. C'est donc grâce à cette superposition de lignes arbitraires, et seulement à un tel prix, que la Partie adverse peut arriver à vous suggérer des perpendiculaires qui sont affectées par des vices qui frappent leur base mais qui, finalement, suivent un alignement plus favorable aux Etats-Unis. Sans doute, la Partie adverse a déclaré que ces données sont, bien entendu, à prendre avec «some flexibility» (**VI**, p. 329). A mon avis, une simple flexibilité ne suffirait nullement. La construction suggérée par les Etats-Unis n'est pas basée sur des éléments géographiques susceptibles d'être «ajustés», mais sur une série d'artifices qui nous empêche de considérer sérieusement la suggestion avancée par la Partie adverse.

D'ailleurs, en quoi se traduirait-elle cette «flexibilité» de la Partie adverse et du modèle américain, panaché avec le modèle canadien et modifié, bien entendu, dans les lignes latérales dans l'intérêt des Etats-Unis? Selon M. Feldman:

> «We [les Etats-Unis] respectfully suggest that, in formulating the Chamber's approach on this particular issue, you could use the perpendicular to the azimuth of the closing line across the mouth of the Gulf of Maine from Nantucket to Cape Sable . . . The closing line runs at an azimuth of about 56.7°. Thus, the perpendicular lines would extend seaward at 146.7°.» *(Ibid.)*

Cette ligne, on l'a vu, est arbitraire au point de vue de la construction des perpendiculaires qui délimitent latéralement le cadre de référence. Néanmoins, nous avons fait un petit exercice de cartographie. Il en ressort que même si, par pure hypothèse, l'on devait prendre en considération un cadre de référence comme celui-ci avec des lignes perpendiculaires latérales à 146,7° d'inclinaison, eh bien, même dans ce cas la frontière proposée par le Canada satisferait au *test* de l'équité. Vous pouvez le voir clairement dans la figure 170 qui est entre vos mains et qui contient tous les calculs pertinents.

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Monsieur le Président, Messieurs les juges, ces calculs n'oublient pas l'existence de la baie de Fundy. J'en viens ainsi à mon troisième point qui concerne précisément la place à reconnaître à la baie de Fundy dans le *test* de la proportionnalité. La Partie adverse qui, ainsi que je l'avais relevé au cours de ma première intervention, aimerait prendre en considération la baie de Fundy à toutes fins utiles sauf une, repousse avec acharnement l'idée même qu'elle puisse

compter dans les *tests* de la proportionnalité autrement que par la longueur d'une ligne droite tracée à son embouchure. L'acharnement est tel que l'on est vraiment en droit de se demander ici qui a réellement peur de la baie de Fundy.

M. Colson, on l'a vu, est parmi ceux qui voudraient la considérer comme terre ferme: comme une espèce de *polder* gigantesque qui ferait le rêve des Hollandais. Quelle aubaine, pour Moïse, si M. Colson avait été à ses côtés lors du passage de la mer Rouge! Il aurait pu épargner au bon Dieu un miracle et se baser, tout simplement, sur la notion de terre ferme au sens juridique.

Mais laissons tout cela de côté, pour en venir à l'erreur logique et juridique qui affecte toute argumentation de ce genre. Messieurs de la Chambre, lorsqu'une baie est fermée par une ligne droite dans un *test* de la proportionnalité, on ne transforme pas les eaux en terre et on n'annule pas le poids de la baie dans le *test*. Ce qu'on fait au point de vue juridique, c'est qu'on reconnaît à l'ensemble des côtes de la baie un poids limité et correspondant à la longueur de la ligne droite tracée en travers de l'entrée de la baie. En d'autres termes, on reconnaît aux côtes de la baie un effet partiel. Tout cela me paraît tout à fait légitime, mais à la condition, bien entendu, que l'attribution d'un effet limité à la baie soit elle aussi soumise à un *test* de raisonnabilité. Pour ma part, j'avais indiqué dans ma première intervention que, si l'on devait suivre la conception de la Partie adverse, l'on aurait fini par reconnaître à la baie de Fundy seulement un «cinquième d'effet», ce qui me paraît impensable dans les circonstances de l'espèce et tout à fait contraire à l'essence même d'un *test* de la proportionnalité d'une délimitation maritime par rapport à une baie de l'étendue de celle de Fundy.

Mais, Monsieur le Président, Messieurs les juges, j'ai dû constater que je *m'étais trompé, car M. Feldman a bien voulu me corriger. M. Feldman vient en* effet de remarquer que: «The Canadian coasts all round the Bay of Fundy measure approximately 200 nautical miles, which is over six times the distance across the mouth of the Bay.» (VI, p. 330.)

Six times. Donc, pour M. Feldman, l'on ne devrait accorder à la baie de Fundy qu'un «sixième d'effet» et même pas un cinquième, ce qui rend la thèse américaine encore moins admissible dans notre cas.

Les autres arguments formulés par la Partie adverse contre la baie de Fundy demeurent toujours les mêmes et je me suis imposé de ne pas être répétitif et de renvoyer autant que possible aux réponses déjà données par le Canada à cet égard. Je fais cependant quelques exceptions, d'abord pour mettre en lumière un sophisme.

Le sophisme est simple. D'après la Partie adverse, et l'argument est maintenant repris par M. Feldman: «The waters and sea-bed of the Bay of Fundy are not being delimited in [the present case].» (VI, p. 331.)

Cet argument porte à faux. S'il en était ainsi et si l'on devait exclure du *test* de la proportionnalité les eaux et les sols et sous-sols qui ne sont pas soumis à délimitation, l'on devrait exclure de tout modèle de proportionnalité les espaces marins et sous-marins situés, respectivement, au nord-est de la perpendiculaire ajustée demandée par les Etats-Unis et au sud-ouest de la ligne d'équidistance ajustée proposée par le Canada. L'argument prouve donc trop et il se traduit par un sophisme classique.

Je voudrai considérer maintenant l'arrêt de la Cour de 1982. Les Etats-Unis tentent de tirer argument du passage de l'affaire du *Plateau continental (Tunisie/ Jamahiriya arabe libyenne)* dans lequel la Cour cherche à définir la région à prendre en compte pour la délimitation (par. 75). Or, la Cour conclut, bien entendu dans les circonstances de cette espèce:

> «Les cartes mettent en évidence, sur la côte de chacune des deux Parties, l'existence d'un point au-delà duquel ladite côte ne peut plus avoir de lien

avec les côtes de l'autre Partie aux fins de la délimitation des fonds marins. Au-delà de ce point, les fonds marins au large de la côte ne peuvent donc pas constituer une zone de chevauchement des extensions du territoire des deux Parties et, de ce fait, n'ont aucun rôle à jouer dans la délimitation.» (*C.I.J. Recueil 1982*, p. 61-62, par. 75.)

Les Etats-Unis prétendent-ils par là que seules doivent être prises en compte les côtes qui présentent un certain degré d'opposition, parce qu'elles seules «font face» au territoire de l'autre Partie et donc à la région frontalière? S'il en est ainsi, la Partie adverse tombe immédiatement en contradiction avec la position adoptée dans ses modèles pour le *test* de la proportionnalité, où les côtes à l'extérieur du golfe et faisant face à l'Atlantique seulement sont bel et bien prises en considération. Cet argument est dépourvu de cohérence interne parce qu'il est incompatible avec le modèle même proposé par les Etats-Unis. Il revient à exclure de tout *test* de la proportionnalité les côtes situées latéralement les unes par rapport aux autres, et dans les cas où la frontière aboutit à une partie convexe du littoral aucune côte ne pourrait être prise en compte puisque aucune côte ne ferait face à l'autre Partie ni à la région à délimiter.

Mais supposons, par pure hypothèse, que l'argument de la Partie adverse ait un fondement quelconque. Il y a en tout cas une portion des côtes du Nouveau-Brunswick qui fait face à la zone à délimiter et qui par conséquent devrait être prise en considération selon la propre thèse de nos adversaires. Eh bien, même dans ce cas, rapporté sur le premier modèle de proportionnalité canadien, le compte est bon pour nous et la frontière que nous demandons passe sans aucune difficulté le *test* de la proportionnalité.

Le raisonnement des Etats-Unis est également en contradiction avec l'approche adoptée par la Cour en 1982 dans l'affaire *Tunisie/Libye*. L'illustration qui a accompagné l'exposé de M. Feldman avait évidemment pour but de rappeler l'une des thèses tunisiennes pour la comparer avec notre thèse sur la baie de Fundy. J'avoue ne pas comprendre le sens de l'argument. Il est bien vrai que la Tunisie avait essayé d'exclure du *test* de la proportionnalité des zones d'eaux – et non pas des côtes – sur lesquelles elle estimait avoir des titres historiques. La fermeture du golfe de Gabès avait donc le but d'éliminer ses eaux – et non pas ses côtes – des calculs de la proportionnalité. Mais ce qui est certain, c'est que la Cour n'a pas retenu l'argument tunisien et que, par conséquent, elle a maintenu dans le cadre de référence de la proportionnalité les eaux tout autant que les côtes du golfe de Gabès.

Sans doute – et cela n'est pas sans intérêt – il est possible, *cum grano salis*, d'établir certains parallèles au point de vue juridique entre la baie de Fundy et le golfe de Gabès, sans oublier pour autant que l'étendue de la première dépasse largement celle du second. En tout cas, vous voyez en ce moment, sur la boîte à images, la baie et le golfe et aussi, au niveau latéral, la reproduction de la figure 34 qui a accompagné, bien que pour un temps quelque peu fuyant, l'exposé de M. Feldman. J'attire l'attention de la Chambre sur la ligne tirée par la Partie adverse de Ras Kapoudia en travers du golfe de Gabès pour rejoindre la côte tunisienne à l'est de l'île de Djerba. Cette ligne présente à nos yeux un intérêt particulier car elle montre l'opération que la Partie adverse aimerait faire dans la baie de Fundy. Faut-il encore rappeler que la Cour n'a pas tiré pareille ligne dans l'affaire *Tunisie/Libye*, et qu'elle a pris en compte toute la longueur du littoral aussi bien que les eaux du golfe de Gabès? La Cour a rejeté la thèse tunisienne et je ne vois pas pourquoi il n'en devrait pas être de même avec la thèse des Etats-Unis aujourd'hui.

La baie de Fundy est géographiquement désavantagée de par sa nature même,

en ce sens que sa concavité lui interdit de commander une grande étendue de juridiction maritime. Mais il reste que sa côte fait partie du littoral canadien dans la région du golfe du Maine, et rien ne justifie qu'elle soit ignorée ou réduite au sixième de sa longueur pour l'appréciation de l'équité du résultat d'ensemble. Rien ne justifie, en d'autres termes, que la Partie adverse, après avoir vainement essayé d'établir une hiérarchie inadmissible entre côtes primaires et côtes secondaires, veuille maintenant y ajouter la catégorie des côtes «tertiaires» qui n'entreraient en ligne de compte en aucun cas, ou, si l'on préfère, seulement avec l'autorisation préalable des Etats-Unis.

Monsieur le Président, Messieurs les juges, avant de laisser de côté la baie de Fundy, je dois cependant ajouter quelques mots pour répondre à la question que M. Schwebel a bien voulu nous adresser à son égard (VI, p. 464). Je me bornerai, bien entendu, à traiter des aspects relatifs au statut juridique de la baie au point de vue du *test* de la proportionnalité. Ce qui me paraît constituer le noyau de la question.

Le Canada maintient pour des raisons historiques son droit de traiter les eaux de la baie de Fundy comme des eaux intérieures. Il n'a cependant jamais adopté des lignes de base droites pour délimiter la baie de Fundy à cet effet. Dans ce contexte, le Canada a tiré, en ce qui concerne la pêche, en 1970 une ligne de fermeture en travers de l'entrée de la baie de Fundy et a depuis exercé à l'intérieur de la baie une juridiction exclusive sur les pêches. Il s'ensuit que la nature et le contenu de pareille juridiction sont exactement les mêmes que ceux de la juridiction applicable à la zone de pêche de 200 milles à partir de 1977. Les eaux de la baie de Fundy ont donc en ce qui concerne la ligne de fermeture le même statut juridique que les eaux relevant de la zone de pêche de 200 milles, et ce tant pour le droit interne canadien que pour le droit international[1].

D'ailleurs, le statut juridique des eaux situées devant les côtes considérées n'est pas un facteur pertinent au moment de décider si ces côtes doivent être incluses dans le calcul des rapports côtiers aux fins du *test* de la proportionnalité. L'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* est claire sur ce point. Selon la Tunisie, les étendues maritimes du golfe de Gabès devaient être exclues du calcul de la proportionnalité parce qu'il s'agissait d'eaux intérieures ou historiques. La Cour a rejeté cet argument et compris tant les étendues maritimes à l'intérieur du golfe que les côtes de ce dernier dans le calcul de la proportionnalité. Dans son arrêt, la Cour a précisé qu'elle

> «n'est pas convaincue par l'argument de la Tunisie qui voudrait que les zones d'eaux intérieures et d'eaux territoriales ne fussent pas prises en considération; ... mais le problème n'est pas un problème de définition: c'est un problème de proportionnalité en tant qu'aspect de l'équité ... En outre, la proportionnalité se rapporte à la longueur des côtes des Etats en cause et non à des lignes de base droites tracées le long de ces côtes.» (*C.I.J. Recueil 1982*, p. 76, par. 104.)

Il s'ensuit que la condition juridique des eaux n'a aucun effet sur la prise en considération des côtes de la baie de Fundy au point de vue du *test* de la proportionnalité.

J'ajoute que, contrairement à ce que nos adversaires voudraient nous attribuer, nous avons fait tout au long de la procédure un usage assez discret de la baie de Fundy en comparaison avec son étendue qui en fait, dans la région en discussion, une «baie dans la baie», ou, si vous le préférez, un «golfe dans le golfe». Non seulement nous avons toujours mesuré les côtes par la méthode des

[1] Voir correspondance, n° 120, ci-après.

lignes de base droites, mais nous avons carrément coupé les deux bassins situés à l'extrémité de la baie, la baie de Chignectou et le bassin des Mines, alors que pour le transfert des côtes du Nouveau-Brunswick, aux lieu et place de la côte de la Nouvelle-Ecosse, les Etats-Unis sont allés tout au bout de la baie de Chignectou. Nous avons en réalité veillé à ramener, lorsqu'il le fallait, des côtes très irrégulières à leurs proportions plus réelles. Mais cela est évidemment tout autre chose que d'éliminer tout simplement de longues étendues des côtes du calcul de la proportionnalité. Cela est notamment tout autre chose que de réduire à un sixième l'effet reconnu à une baie d'une telle importance.

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J'en viens, Monsieur le Président, Messieurs les juges, au quatrième point de mon exposé, qui a trait au rôle du triangle visé par le compromis et à l'intérieur duquel la frontière doit nécessairement se terminer. Je ne reviens évidemment pas sur les divers problèmes soulevés par ce triangle, dont certains ont fait aussi l'objet de questions posées par la Chambre. Je me bornerai à le considérer dans l'optique de la proportionnalité et surtout à répondre aux arguments d'une portée à vrai dire bien limitée, développés à cet égard par M. Feldman.

Qu'il me soit permis de rappeler à la Chambre que le triangle a été utilisé par le Canada dans ce contexte pour bâtir son deuxième modèle de proportionnalité que vous voyez de nouveau ici à côté de moi. Il nous a semblé en effet que le triangle constitue un point fixe du processus de délimitation de la frontière maritime, dont il s'agit d'apprécier le rapport de proportionnalité. Et ma première observation est bien simple. M. Feldman a affirmé ne pas comprendre pourquoi, dans cet exercice, nous nous sommes servis de l'hypoténuse du triangle. Je pensais avoir été pourtant assez clair à ce sujet. Les prétentions maximales des Parties ne vont pas au-delà de l'hypoténuse, et la ligne perpendiculaire ajustée des Etats-Unis subit en réalité ici un ajustement supplémentaire pour toucher de justesse au-delà de l'hypoténuse à son extrémité septentrionale. Voilà pourquoi nous avons adopté dans nos calculs ce côté du triangle comme base du modèle.

Que la Partie adverse ait des difficultés à saisir la logique d'une telle construction, cela se comprend vu que le résultat d'un *test* de la proportionnalité sur cette base n'est pas de nature à lui donner une satisfaction particulière. Mais les difficultés de la Partie adverse produisent même des erreurs matérielles, dont la Chambre me permettra de souligner celle qui s'est glissée dans la plaidoirie de M. Feldman. Mon honorable contradicteur a affirmé (**VI**, p. 336) que le Canada, dans la note 66 qui figure au bas de la page 162 de sa réplique (**V**), «construes its own test to meet what it calls the "parameters" accepted by the Court» dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* en incluant les côtes de la baie de Fundy. Mais la note 66 ne traite pas de l'application canadienne du *test* de la proportionnalité; elle traite de l'application qu'en font les Etats-Unis en excluant la baie de Fundy, et elle vise à démontrer que, même lorsque la ligne canadienne est soumise au *test* selon le modèle américain qui s'étend jusqu'à l'isobathe des 1000 brasses, le résultat n'en demeure pas moins proportionné à l'intérieur des paramètres adoptés dans l'affaire *Tunisie/Libye*.

D'ailleurs, la critique de la Partie adverse porterait à faux même si la note 66 faisait référence au modèle de proportionnalité canadien établi selon la méthode utilisée dans l'affaire *Tunisie/Libye*, c'est-à-dire en faisant appel à des méridiens et des parallèles pour borner la région soumise au *test* (modèle de proportionnalité B du Canada). Car il est tout à fait clair que la proportionnalité de la ligne

canadienne est démontrée même si l'on accepte par hypothèse l'argument américain et si l'on exclut la baie de Fundy (voir la figure qui apparaît en ce moment sur la boîte à images).

Finalement, j'ai déjà pris acte du fait que M. Feldman s'est borné à rejeter sans la moindre explication le bien-fondé des lignes que, partant du triangle, nous avons tracées pour cerner ce modèle de proportionnalité. Il les a qualifiées d'arbitraires sans aucune démonstration. J'espère avoir montré pour ma part à la Chambre que ces lignes sont les plus objectives si le triangle a un sens dans le test de la proportionnalité. Pour épargner le temps de la Chambre je dresse donc un procès-verbal de carence à cet égard et je renvoie, pour autant que de besoin, aux données de la procédure écrite sur ce point.

Monsieur le Président, Messieurs les juges, je m'excuse auprès de la Chambre du temps que j'ai fini par consacrer à la question des modèles. Mais il n'était pas sans intérêt de montrer qu'en fin de compte l'insistance de nos adversaires sur la nécessité d'appliquer le *test* de la proportionnalité dans la présente affaire d'une manière globale ne leur a pas rendu le moindre service. Après tout, je pense que le Canada a démontré en tous points que les modèles alternatifs qu'il a soumis à l'intention de la Chambre n'ont nullement été affectés par les critiques de la Partie adverse. En revanche, ce sont les Etats-Unis qui n'ont pas pu se soustraire à l'effet négatif du défaut de symétrie de leurs modèles et ce n'est donc pas par pur hasard ou dans un esprit de conciliation de dernière minute qu'ils ont fini par demander à la Chambre de bâtir un tout nouveau modèle basé sur les éléments communs à certains modèles des Parties mais rectifié, bien entendu, de manière à réaliser la distorsion nécessaire pour que les frontières demandées par les Etats-Unis passent le *test* de la proportionnalité. On a vu que cette tentative porte également à faux, mais elle est assez significative pour montrer que si quelqu'un a peur, dans cette affaire, du *test* de la proportionnalité, ce n'est pas du côté du Canada qu'on devrait le chercher.

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M. Feldman n'a pas beaucoup apprécié que le Canada ait utilisé, dans le contexte de la proportionnalité, le concept de «flexibilité». Il y a vu une sorte de signe de faiblesse de notre part. Je m'excuse de devoir le décevoir, mais la flexibilité qui dans notre esprit est inhérente au *test* de la proportionnalité signifie tout simplement que l'on ne saurait jamais faire abstraction, dans ce contexte, des données objectives du cas d'espèce. Voilà pourquoi – et j'en viens ainsi au cinquième point de mon exposé – nos adversaires ont cru pouvoir nous prêter l'intention de nous soustraire au *test* de la proportionnalité, là où nous nous sommes interrogés tout simplement sur la question de savoir si le *test* de la proportionnalité est applicable de la même manière dans la partie interne du golfe du Maine et dans la partie qui s'ouvre à l'extérieur vers l'Atlantique. Qu'on nous comprenne bien. Le Canada laisse volontiers à la Chambre le soin de choisir entre deux modèles globaux et la répartition en deux parties, aux fins de la proportionnalité, de la zone à délimiter. Le Canada n'a pas renoncé pour autant à attirer l'attention de la Chambre sur le fait que, si l'on considère les trois affaires dans lesquelles il a été question de *tests* de la proportionnalité, ce critère d'appréciation de l'équité n'a pas été appliqué de la même manière eu égard à l'état des lieux dans lequel chaque affaire se situait.

La Chambre sait bien que lorsque le problème se posa pour la première fois à l'occasion des arrêts de 1969 la Cour était en présence d'une zone aux contours bien délimités où la proportion entre côtes et plateau pouvait se faire sans la moindre difficulté.

La situation est déjà quelque peu différente dans l'affaire la plus récente, celle tranchée par la Cour en 1982 entre la Tunisie et la Libye. Ici, et ainsi qu'on l'a vu même dans ces débats, le cadre de référence ne ressortait pas des côtes en jeu aussi nettement que dans les affaires du *Plateau continental de la mer du Nord*. La Cour a quand même établi son cadre de référence en le rattachant à la situation des lieux, mais ce cadre est assurément lié d'une façon moins précise aux données géographiques que celui de 1969. C'est pourquoi la Cour en 1982 a adopté une certaine latitude – et donc une certaine flexibilité – dans les calculs de la proportionnalité du résultat final. Si l'on passe maintenant à l'affaire arbitrale anglo-française de 1977, l'on constate aisément que, tout au moins en ce qui concerne la partie du tracé de la frontière qui s'ouvre vers l'Atlantique et qui est par conséquent de plus en plus éloignée des points de repère naturels sur les côtes des Etats intéressés, le *test* de la proportionnalité a été appliqué d'une façon différente.

C'est précisément dans ce contexte que le tribunal arbitral de 1977 a apporté sa contribution particulière à la théorie de la proportionnalité en soulignant que dans certaines circonstances c'est plutôt son aspect négatif qui entre en ligne de compte: à savoir, les disproportions ou effets disproportionnés qui peuvent être produits par certains facteurs géographiques sur le tracé d'une ligne d'équidistance. Ainsi, le tribunal arbitral, dans cette partie de la frontière du plateau, limita la prise en considération de la proportionnalité, sous la forme de la disproportion, aux effets des îles sur le tracé de la frontière.

Voilà pourquoi, et toujours dans cet esprit de flexibilité dont le *test* de la proportionnalité doit s'inspirer, nous avons attiré l'attention de la Chambre sur les analogies frappantes entre la situation envisagée par la sentence arbitrale de 1977 et celle de la présente affaire. Ici aussi il y a un point du tracé de la frontière à partir duquel ce tracé n'est plus directement cerné par des côtes. Ici aussi il y a en réalité deux sections de la zone à délimiter caractérisées par des cadres géographiques différents. Ici aussi, à partir de la section extérieure au golfe, l'espace à délimiter est ouvert, *open-ended*, mais susceptible d'être affecté par les effets disproportionnés de certains facteurs naturels, tels que l'île de Nantucket ou le cap Cod. Ici aussi, par conséquent, il y a une section de la zone à délimiter où le problème de la proportionnalité est plutôt celui de la disproportion que celui d'une relation stricte entre côtes et espaces marins.

Il est donc tout à fait gratuit d'affirmer que «Canada raises so many doubts about the application of the proportionality test in this case, particularly as regards the area seaward of the Gulf of Maine.» (**VI**, p. 325.) Une fois de plus, la position de la Partie adverse consiste à nous prêter des intentions que nous n'avons jamais eues et à ne pas comprendre ce que j'ai appelé la flexibilité du *test* de la proportionnalité, c'est-à-dire, les conditions spécifiques de son application dans chaque cas en fonction de la situation des lieux ainsi que la jurisprudence internationale l'a dûment mis en lumière. La flexibilité, ce n'est donc pas le refus du *test*; c'est tout simplement que le *test* doit lui aussi s'appliquer de manière raisonnable, non seulement sans refaire la nature mais aussi sans la forcer dans des schémas ou cadres artificiels et sans traduire la proportionnalité par des petits calculs. Aucun doute, de notre part, sur le sens et la portée du *test* de la proportionnalité. Tout ce que le Canada demande, c'est le respect de la géographie, le respect de la raison.

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Le dernier point de mon exposé a trait à la question de savoir si la proportionnalité est le seul *test* de l'équité ou l'un parmi d'autres. La Chambre

connaît notre position à cet égard. Nous estimons que le droit est encore ici en évolution mais qu'en principe l'on peut d'ores et déjà affirmer que la proportionnalité n'est pas le seul *test* de l'équité. La Partie adverse l'a d'ailleurs reconnu elle-même en déclarant que:

> «The United States submits that the most reliable test is the proportionality test, which was formulated by the International Court of Justice in its historic Judgment in the *North Sea Continental Shelf* cases» (**VI**, p. 324),

et en reconnaissant, par conséquent, que si un *test* est le plus «reliable», il y en a évidemment d'autres aussi. Mais, une fois de plus, la Partie adverse s'arrête pourtant à mi-chemin, sans préciser davantage sa pensée et sans indiquer quels autres *tests* pourraient à son avis être utilisés.

Mon honorable contradicteur, M. Feldman, ne prend pas non plus en considération la thèse canadienne quant au rôle que l'on peut attribuer à la conduite des Parties en tant que *test* de l'équité dans la présente affaire. Et pourtant, ici encore notre position est très simple. Elle vise à faire reconnaître que la conduite des Parties joue un rôle fondamental dans l'ensemble de la présente affaire et que, par conséquent, elle pourrait entrer en ligne de compte parmi les *tests* de l'équité.

Sans doute, Messieurs les juges, il faut mettre les choses bien au point. Dans mon premier exposé, j'ai essayé de montrer le rôle des parties dans toute délimitation d'espaces maritimes. J'ai notamment souligné que le droit des délimitations des nouvelles formes de juridictions sur la mer s'est développé précisément en fonction du rôle de la conduite des parties, qu'il s'agisse de leur volonté ou d'activités au sens étroit de l'expression. Ce rôle est plus directement perceptible lorsque la délimitation est faite par voie d'accord, mais il n'est jamais absent même lorsque la tâche de délimiter la frontière est confiée aux juges.

Dans ce dernier cas, la conduite des parties peut entrer en jeu sous deux aspects différents. Elle peut ainsi être prise en considération en tant que contenu d'un principe équitable et notamment d'un principe équitable dit d'«intégration», dans le sens qu'il peut être appelé à intégrer d'autres principes pour déterminer la solution du différend. C'est d'abord dans ce sens que j'estime que l'on pourrait faire appel à la conduite des parties. Dans pareil cas, la conduite des parties rentrerait dans le cadre des principes équitables. Elle resterait par contre hors des *tests* de l'équité, parce qu'un principe équitable, ainsi qu'on l'a vu à propos de certaines thèses de M. Stevenson au sujet de la nature de la proportionnalité, ne peut pas se constituer en contrôleur de soi-même et donc en critère de l'équité de la solution qu'il a contribué à déterminer.

Cependant, hors l'hypothèse que je viens de considérer, et par conséquent chaque fois que la conduite des parties n'entre pas en ligne de compte dans le cadre des principes équitables, c'est bien dans les *tests* de l'équité qu'elle a encore à jouer son rôle. La conduite des parties, dans un processus qui suppose des principes équitables et qui doit aboutir à un résultat équitable, est l'indice révélateur, le papier à tournesol de ce qu'elles considèrent équitable dans la démarcation de leurs juridictions maritimes. Dans cette optique, la mesure dans laquelle la conduite des parties s'est concrétisée, au point de vue historique, autour d'une certaine solution montre que cette solution était à leurs yeux une solution équitable et donc appropriée.

Voilà donc deux aspects sous lesquels la conduite des parties peut alternativement entrer en ligne de compte dans la présente affaire. Il y en a évidemment d'autres encore, et vous avez pu apprécier à cet égard nos arguments en matière d'acquiescement et d'*estoppel*. Mais en ce qui conerne directement les deux aspects que je viens de considérer ici il est loin de nous de suggérer le choix final

qui peut dépendre d'une série complexe de facteurs. Nous avons, en d'autres termes, Monsieur le Président, Messieurs les juges, une conception que j'oserais appeler très classique du rôle des parties dans le procès international. Nous sommes ici, bien entendu, pour appuyer des demandes que nous estimons fondées, en fait comme en droit. Mais nous sommes aussi ici – et surtout – pour assister en toute humilité les juges avec nos arguments, et avec nos doutes aussi, toujours dans un effort sincère de rechercher cette harmonie entre le fait et le droit, qui rend si difficile l'œuvre du juge, mais qui est l'essence même de la justice.

Je remercie la Cour de la patience avec laquelle elle a bien voulu suivre mon exposé et je vous prie, Monsier le Président, si vous le voulez bien, de donner la parole, après l'interruption, à l'agent du Gouvernement du Canada pour sa déclaration finale.

L'audience, suspendue à 16 h 5, est reprise à 16 h 20

STATEMENT BY MR. LEGAULT

AGENT OF THE GOVERNMENT OF CANADA

Mr. LEGAULT: Mr. President, distinguished Judges, it is with a certain emotion that I address the Chamber on this last occasion I shall have to speak on behalf of Canada in these proceedings. There are three facts I wish to leave with you.

1. Eastern Georges Bank is closer to Canada than to the United States.
2. The economy of southwest Nova Scotia depends in large measure upon Canada's established fishery on Georges Bank.
3. The conduct of the Parties, over a period of many years, points to a common view that Canada has undeniable rights and established interests in respect of Georges Bank. Indeed, it points to United States acquiescence in and recognition of Canada's equidistance claim.

As to the legal consequences of these facts, there are six points I wish to leave with you.

1. In the circumstances of this case, an equidistance boundary across Georges Bank is required by Article 6 of the Continental Shelf Convention.
2. Article 6 represents a particular expression of the general norm that governs the determination of the single maritime boundary now under consideration.
3. An equidistance boundary across Georges Bank is consistent with the distance principle as the legal basis of title for the 200-mile zone.
4. The Canadian line produces an equitable result by leaving to each Party the areas closest to its coast, except where incidental features would have a disproportionate and distorting effect.
5. The dependence of Nova Scotia on the fishery of Georges Bank finds its legal significance in the economic nature and purpose of the new 200-mile régime, and in the weight traditionally given to established economic interests in the general international law of maritime jurisdiction. These considerations provide further support for an equidistance boundary on Georges Bank.
6. The conduct of the Parties provides an objective measure of an equitable result and responds to the imperative need to uphold stability and good faith in relations between States. An equidistance boundary across Georges Bank will best satisfy this measure and this need.

In these statements of fact and law I have outlined once more the skeleton of Canada's case. The flesh is found in Canada's written pleadings and in the statements made by counsel for Canada in the first and second round of the oral proceedings. And the heart and soul of Canada's case is found in the conclusion that an equitable boundary in the Gulf of Maine area would leave the eastern part of Georges Bank to Canada, and leave to the United States the larger part of the Bank to the west of the Canadian line.

Against this background, Mr. President, I shall now provide Canada's reply to the question you have addressed to both Parties. The question reads:

> "In the event that one particular method, or set of methods, should appear appropriate for the delimitation of the continental shelf, and another for that of the exclusive fishery zones, what do the Parties consider to be the

legal grounds that might be invoked for preferring one or the other in seeking to determine a single line?" (**VI**, p. 461.)

This question proceeds from the hypothesis that different methods might be deemed appropriate for the delimitation of the shelf and the exclusive fishery zones of the Parties. On that hypothesis, Canada's view is that the preference as to method would be dictated by the relevant circumstances that relate to any particular sector of the single line to be fixed by the Chamber.

Canada believes that the appropriate legal approach to this question must stem from a recognition of the role of Article 6 of the 1958 Continental Shelf Convention. Article 6, once again, is the only clear treaty provision that is applicable to this case, and it is binding upon the Parties. Its application, moreover, is required by Article II, paragraph 1, of the Special Agreement (**I**, p. 10), which requests a decision "in accordance with the principles and rules of international law applicable in the matter as between the Parties".

It must also be recalled that this dispute originated in the context of the continental shelf. In this context, private rights were created and continental shelf rights vested in Canada by virtue of the doctrines of acquiescence and estoppel. The single maritime boundary should be compatible with the rights that vested in Canada in the context of the continental shelf régime.

Although the 1958 Convention, as a matter of treaty law, is directly applicable only to the continental shelf, Canada believes that the principle of delimitation embodied in Article 6 has a wider application for several reasons. *First*, the equidistance-special circumstances rule of Article 6 has been authoritatively described as a "particular expression of a more general norm" (Anglo-French Continental Shelf Award, 1977, para. 70 (**I**, Canadian Memorial, p. 120, paras. 281-282). *Secondly*, when the Parties took the first steps toward the establishment of their 200-mile fishery zones in 1976, they both took the position that the lateral limits of these zones in the Gulf of Maine area should be the same as those applicable to the continental shelf[1] (Canadian Memorial, pp. 100-101, paras. 225-226). This parallel course of action indicates a shared assumption that the principles of Article 6 would apply to the delimitation of the 200-mile fishery zone.

Turning now to the legally relevant factual circumstances, Canada recognizes that the circumstances pertaining to a continental shelf delimitation might, in certain instances, differ from those pertaining to a fishery zone delimitation. In principle, these different circumstances might produce different lines of delimitation, or different forms or degrees of adjustment of the method identified in Article 6. In that event, the preference for one method or another would have to depend on the degree of relevance to be attached to any given factor, either for the boundary as a whole or for any portion thereof. Such a determination could not be made in the abstract. It would have to be guided by the objective of achieving an equitable result within the law in the light of the particular circumstances of each case. As the Court held in 1969, "[t]he problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case" (*I.C.J. Reports 1969*, p. 50, para. 93).

In the present case, the degree of relevance to be attached to various factors may differ in each of the two areas under consideration: the Gulf of Maine itself, and the outer area that includes Georges Bank.

In the Gulf of Maine itself, as far seaward as the closing line from Cape Sable to Nantucket, it seems clear that the geographical configuration is by far the

[1] See Correspondence, No. 120, *infra*.

most relevant circumstance. Neither Party has relied upon other circumstances with respect to this area, such as fishing interests or the conduct of the Parties, and so their importance would appear to be minimal. Accordingly, in this inner area, preference should be given to the method that most depends on the configuration of the relevant coasts. In Canada's view, this would clearly be the equidistance method. This method respects the basic principle of the legal equality of the coasts that abut the inner area. No incidental, special features cause an inequitable distortion in the course of the equidistance line. That line takes full account of the coast of Maine. As the closing line of the Gulf is approached, it reflects the perfectly opposite relationship of Nova Scotia and Massachusetts. And it achieves a result whose proportionate character can be objectively verified.

In the outer area, beyond the closing line from Cape Sable to Nantucket, the geographical context remains fundamental. But here, and especially in the area of Georges Bank, the non-geographical circumstances have assumed a high degree of prominence in the pleadings of both Parties. If the Chamber were of the view that these non-geographical circumstances do not all point in the same direction, and might therefore lead to different results, it would be necessary to determine which of them should be given the greatest weight.

In that event, Canada's view would be that two categories of relevant circumstances would provide both the most reliable indication of an equitable result and the legal basis upon which a preference as to method should be determined. These are the conduct of the Parties and an established dependence upon the fishery resources of the area.

A number of considerations would support giving effect to the conduct of the Parties, especially if the other relevant circumstances were considered indecisive or pointed toward different results. This approach would be consistent with the jurisprudence (*I.C.J. Reports 1982*, p. 84, para. 118; p. 93, para. 133 (dispositif), subpara. B (4)). It would also be consistent with the emphasis on the consensual element in both the 1958 Continental Shelf Convention and the 1982 Law of the Sea Convention. It would respect the rights vested in the Parties through the operation of general principles of international law. And it would serve as what Professor Malintoppi has just described as a "principle of integration", by pointing up the factors that should be decisive, and by providing an indication of how the Parties themselves would have approached the balancing-up.

The conduct of the Parties may not indicate the exact course the line should follow, but it does establish what Professor Bowett called the "parameters" of an equitable solution. In the present case, it points unequivocally towards a boundary in the vicinity of the equidistance line. This is as true of the entitlements set out in the 1979 Agreement on East Coast Fishery Resources as it is of the circumstances surrounding the issuance of oil and gas permits or geophysical survey permits. Here, Canada would refer the Chamber to Canada's illustrations of various lines across central Georges Bank, reflecting the conduct of the Parties with respect to both the continental shelf and the fisheries (Counter-Memorial, Figs. 53 and 54; Figs. 71, 76 and 163).

(78) (79) (217)

Canada's pleadings have set out in full the legal reasons why an established dependence on the known and exploited fishery resources of the area should be given significant weight (see, e.g., **I**, Memorial, pp. 128-129, para. 302; pp. 131-134, paras. 311-319; **III**, Counter-Memorial, p. 211, para. 511; p. 230, paras. 553-554; pp. 242-246, paras. 579-587; **V**, Reply, pp. 34-36, paras. 86-92; pp. 119-120, paras. 277-280; **VI**, pp. 87-94). This factor is central to the immediate interests at stake in the particular circumstances of this case, and in Canada's submission, that alone confirms the importance it should be given in

the balancing-up. Here again, Canada's submission is that a boundary in the vicinity of the Canadian equidistance line will accommodate the interests of the Parties.

Accordingly, Canada's view is that on the hypothesis stated in the question, preference should be given to the method that most fully reflects the greater relevance of these circumstances in the outer portion of the Gulf of Maine area.

Mr. President, Canada has answered your question in the full recognition that the dilemma you have identified might well arise in certain cases. We feel confident, however, that all the relevant circumstances in the present case converge toward the same result.

The Chamber, we believe, is not confronted with a case where important factual considerations might point toward substantially different methods. The Canadian line is based upon unreconstructed coastal geography, and has been adjusted only to discount the disproportionate effects of Cape Cod and Nantucket as incidental, special features that are aberrant to the coastal configuration. The Canadian line respects the equality of the coasts of both the Parties. It leaves to each Party as much as possible of its natural prolongation and 200-mile zone, without encroachment upon the corresponding entitlement of the other Party. In so doing, it respects the most fundamental precept of the Judgment of the Court in the *North Sea Continental Shelf* cases, as adapted to a single maritime boundary. It accommodates the fisheries interests of both Parties on Georges Bank and takes account of the vital importance of this fishery to adjacent Canadian coastal communities. It respects the indicia of equity revealed by the conduct of the Parties, and it is compatible with the rights that have vested in them under general rules of international law.

And finally, the boundary proposed by Canada is proportionate; it is reasonable; it is balanced; and it is moderate. It neither enclaves any part of the United States coast, nor does it come too close to any part of that coast. We respectfully and confidently commend it to the judgment of this Chamber. In doing so, I reaffirm the arguments made in our written and oral proceedings as a whole and, in particular, the summary of general conclusions set out at pages 173 to 176 of Canada's Reply.

Mr. President, distinguished Judges, the time has come for me to confirm Canada's final Submission:

In view of the facts and arguments set out in the Canadian Memorial, Counter-Memorial and Reply, and by Canada in these oral proceedings,

May it please the Court, rejecting all contrary claims and Submissions set forth in the United States Memorial (II), Counter-Memorial (IV), and Reply (V), and by the United States in these oral proceedings,

To declare and adjudge that:

The course of the single maritime boundary referred to in the Special Agreement concluded by Canada and the United States on 29 March 1979 is defined by geodetic lines connecting the geographical co-ordinates of points described in the Submission appended to Canada's Memorial, Counter-Memorial and Reply.

Mr. President, copies of this final Submission, signed by me as Agent for Canada, are being transmitted to the Registry and to the Agent for the United States.

Mr. President, distinguished Judges, I cannot leave the Bar without adding some deeply felt words of gratitude. I thank my delegation for its unstinting efforts and its spirit of dedication. I thank our distinguished counsel and legal

advisers; our experts, consultants and graphic artists; and I especially thank our administrative and support staff for their contribution, which has been no less invaluable for all that it has been silent and unseen in this Great Hall of Justice. My thanks go, as well, to the Registry and other staff of the Court for their impartial but nevertheless precious advice and assistance.

To my colleagues on the other side of the aisle, may I say how pleased I have been by the spirit of fair play and the spirit of vigorous but friendly give and take that has marked – and I fear will continue to mark! – these proceedings. Together we have been part of this ripple in the relations of Canada and the United States; together we shall return to the enduring stream whose untroubled flow transcends this dispute and remains our common concern. And we shall do so linked by the special bonds of the unique experience we have shared here in The Hague.

And finally, Mr. President, distinguished Judges, on behalf of the Government and the people of Canada who have entrusted me with the grave responsibility and the unique honour of representing them before this Chamber of the International Court of Justice, I thank you for the patient and attentive hearing you have given us. *Dieu sauve la Cour.*

The Chamber rose at 4.45 p.m.

TWENTY-FOURTH PUBLIC SITTING (9 V 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

REJOINDER OF MR. ROBINSON

AGENT OF THE UNITED STATES OF AMERICA

Mr. ROBINSON:

I. INTRODUCTION

Mr. President, distinguished Judges. May it please the Chamber. On 11 April, almost one month ago, it was my great honour and privilege to appear before the Chamber for the first time as the Agent of the United States of America. It is with great pleasure that I return to this podium to open the second round of the United States oral presentations.

On 11 April, the United States emphasized that it seeks a just decision that is, in the words of the Special Agreement, "in accordance with the principles and rules of international law applicable in the matter as between the Parties". As the United States said then, we are confident that a decision in this case that is in accordance with law and that is not a compromise or split-the-difference judgment will reinforce the longstanding commitment of the United States to the International Court of Justice and will serve the broader interests of the community of nations at large.

The United States should add that the United States and Canada share a common legal tradition. Under this tradition, lawyers and governments, having rejected the types of compromises that in our countries are associated with the political process, press in a judicial forum for a definite decision, on the merits, in accordance with the law. The Special Agreement (**I**) in this case is very clear as to the expectations of the Parties in this regard.

The United States continues to believe that by every rule and principle of law applicable to this case, Georges Bank appertains in its entirety to the United States.

On 11 April, the United States respectfully asked the Chamber to reaffirm the principles and rules of law that, as applicable to the delimitation of maritime boundaries, have consistently been recognized by the International Court of Justice and reinforced by the developing law of the sea. On 11 April, the United States explained its perception that Canada is attempting to resurrect under a new name the rejected notion of proximity. According to that discarded notion, each State is to attract the area of the sea closest to its coast, even if such a result cuts off the coastal extension of a neighbouring State, and no matter how extraordinary, how unreasonable, how unnatural, or how disproportionate that cut-off may be. This Canadian objective first became apparent in Canada's Counter-Memorial (**III**) where it asked the Chamber to reconsider "the essential rationale" of the Court's conclusions in the *North Sea Continental Shelf* cases, a rationale, that according to Canada, "no longer holds true" (para. 561). As set forth in the United States Reply (**V**), we regarded this approach as a barely disguised attack on the Fundamental Rule of maritime delimitations which both

Parties then said they supported (paras. 73 and 74). As we said in the Reply with regard to the Fundamental Rule,

> "Canada urges the Court to set all this aside and to promulgate a radically new law of maritime boundary delimitation based upon previously rejected notions ... In brief, Canada asks the Court to overturn its jurisprudence ... and instead to enunciate a new law, based upon rejected notions that will serve Canada's interests in this case."

In our view, Canada adopted this radical course because there is no basis in the existing and established law to justify cutting off the extension of the coast of Maine from the area which lies in front of that coast, including all of Georges Bank.

We have now heard the Canadian argument developed to its logical conclusion in its closing oral round. The Chamber is in a position to judge for itself the accuracy of the United States analysis. In its last round, Canada rarely, if ever, invoked or referred to the Fundamental Rule that maritime boundary delimitation is to be based upon the application of equitable principles, taking account of the relevant circumstances, so as to produce an equitable solution. Rather, as Mr. Stevenson will describe in due course, Canada introduced a new vocabulary which it presumably considers to be better fitted to Canada's objectives in this case.

At this point, the United States will do no more than call the Chamber's attention to the statement of Canada's most distinguished Agent in his eloquent closing address. My friend, Ambassador Legault, opened his statement with the argument that "eastern Georges Bank is closer to Canada than to the United States". He proceeded to the assertion that "the Canadian line produces an equitable result by leaving to each Party the areas closest to its coast ...". Those may be statements of fact or opinion, but they are not statements of the law.

Throughout the proceedings, Canada has been attacking straw men invented by Canada and not the United States case. For example, the Agent for Canada discussed at length what he described as an incompatibility between the theory of coastal-front extension and the theory of the natural boundary.

Canada consistently has mischaracterized the United States arguments concerning the natural boundary. For example, the Agent for Canada stated that the natural boundary theory and the coastal-front theory "rest on totally different conceptions of how the coastal geography relates to the area of Georges Bank. They reflect two conflicting versions of appurtenance" (p. 5, *supra*).

But, the natural boundary theory was never a theory of coastal geography, never a theory of appurtenance, never a theory of natural prolongation. Instead, the United States has demonstrated that the Northeast Channel and the fishing banks are relevant circumstances in this case. The Northeast Channel separates most of the important fishery stocks on Georges Bank from the fishery stocks on the Scotian Shelf. In our view, the boundary in this case should take advantage of this separation in order to facilitate fishery conservation and management and in order to minimize the potential for international disputes. This issue deserves consideration, in our view, independent of geography. If it is so considered, rather than being inconsistent with the results called for by geography and the extension of the respective coastal fronts of the Parties, the circumstances of the marine environment independently confirm those very results in this case. Thus, while the two theories are independent, they are mutually supportive of each other in the particular circumstances of this case.

The United States coastal front theory has never espoused that Maine is entitled, in the circumstances of this delimitation, to the entire area in front of Maine. This is evident not only in the statements of law in the United States

case, including statements about the proportionality test, but also in the United States claim itself, which leaves to southwest Nova Scotia a large area lying in front of the coast of Maine.

In this final round of its oral presentation, the United States will concentrate on the real issues that separate the Parties and will address the questions posed by the distinguished Judges of the Chamber, including the President. Silence on any particular issue does not signal agreement.

Mr. President, the United States would now like to say a word about the fisheries dimension of this case. As the Chamber appreciates, in recent years fisheries and environmental issues have increasingly troubled relations between the United States and Canada. Mutual frustration and recrimination are more and more evident. Reciprocal fishing by nationals of one country off the coast of the other has been terminated. This practice has continued in one form or another from the earliest days of settlement of the New World.

The Deputy-Agent of the United States explained to the Chamber on 19 April some of the problems that have consistently frustrated effective international conservation and management of the fisheries of Georges Bank under the old régime of the law of the sea and under the new régime. In this connection, with your permission, I will quote the words of a high Canadian official at the recent Law of the Sea Conference:

> "The application of different management philosophies to a single stock inevitably results in a level of harvesting from the whole stock approaching the less conservative management level. If catch quotas are also divided, control on a continuous basis becomes almost impossible, particularly when the area of fishing is close to the limits of national fisheries jurisdiction." (1980 Argentina/Canada Working Paper on fish stocks which occur both within the exclusive economic zone and in an area beyond and immediately adjacent to it. UNCLOS, Ninth Session, II, United States Memorial, Ann. 91.)

That was from a Canadian official, not an American official.

The United States would only respectfully add that any judgment by the Chamber that would divide Georges Bank would force the Parties into permanent political conflict over the management of the fisheries and hydrocarbon resources of Georges Bank. In our view, such a result would not be consistent with international law. It would not be consistent with the law because it would disregard the extension of the coastal fronts of the Parties into the sea, because it would frustrate the conservation and management of the resources, and because it would not take account of other circumstances relevant to this delimitation. We recognize that a division of Georges Bank would be popular in Canada, but it is certain to cause difficulties that, in our opinion, will be contrary to the long-term interests of both the United States and Canada.

(84) The Figure behind me depicts the claims of the Parties before the Chamber. We have emphasized in our oral argument that, contrary to the assertions contained in many of Canada's oral presentations, there is more at stake in this case than simply the resources of the northeast portion of Georges Bank. Under Article III of the Special Agreement, the boundary as determined by the Chamber will delimit all sovereign rights and jurisdictions that are currently or may in the future become recognized in international law. As distinguished counsel for Canada, Professor Weil, so well put it in his oral presentation of 6 April 1984:

> "the single boundary is required to divide certain jurisdictions which are not directly linked either to the continental shelf or to the fisheries zones: there is more to this single maritime boundary than that." (VI, p. 175.)

The United States completely agrees.

Mr. President, it would be appropriate at this time for the United States to respond to the second part of Judge Gros's third question (**VI**, p. 461).

In order to avoid taking the time of the Chamber, if it is agreeable to you, Mr. President, the United States would request that the text of the second part of Judge Gros's third question be inserted in the transcript of these remarks at this point.

> "In the view of the United States Government, what construction is to be placed in relation to the present case on:
>
> *(a)* the statement made by the President of the United States of America on 9 July 1982:
>
> 'We have now completed a review of that convention and recognize that it contains many positive and very significant accomplishments. Those extensive parts dealing with navigation and overflight and most other provisions of the convention are consistent with United States interests and, in our view, serve well the interests of all nations.' (**IV**, United States Counter-Memorial, Ann. 28, para. 4.)
>
> *(b)* the proclamation made by the President of the United States on 10 March 1983:
>
> 'Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, *(a)* sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and *(b)* jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.' (*Ibid.*, Ann. 28, para. 6.)
>
> What is the precise meaning in this text of the formula 'to the extent permitted by international law'? Would it be right to read this formula in the light of the 'guidelines reflected in the 1982 Law of the Sea Convention' mentioned during the hearing by the United States? (**VI**, p. 279.)
>
> *(c)* the statement made by the President of the United States on 10 March 1983:
>
> 'Third, I am proclaiming today an Exclusive Economic Zone in which the United States will exercise sovereign rights in living and non-living resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.' (United States Counter-Memorial, Ann. 28, para. 8.)"

Permit me to begin with a general observation. It is the opinion of the United States that, in so far as the Proclamation and statements of the President of the United States referred to by Judge Gros are concerned, Canada and the United States are relying on similar principles and sources of customary international law in this case, and that our differences relate to their interpretation and

application with respect to the establishment of a single maritime boundary in the Gulf of Maine area.

First, with respect to point 2 *(a)* of Judge Gros's third question, the statement by the President of the United States of 9 July 1982 announced and gave the reasons for the decision by the United States not to sign the 1982 Convention on the Law of the Sea.

The portion of that statement cited by Judge Gros indicates that this decision was not motivated by the "extensive parts dealing with navigation and overflight and most other provisions of the Convention". The statement indicates the United States position that these provisions represent positive and significant accomplishments, which signify the benefits of working together and effectively balancing numerous interests. Elsewhere in the statement the President stated that the reason the United States would not sign the Convention was taken because "the deep sea-bed mining part of the Convention does not meet United States objectives". The latter reference is to the part of the Convention that deals with the mining of sea-bed resources beyond the limits of the 200-nautical-mile exclusive economic zone and the continental shelf.

Whatever the views of the Government of Canada regarding the Convention, the decision by the President of the United States means that the 1982 Convention cannot be regarded as a treaty to which both States involved in this case intend to become Party.

With respect to 2 *(b)*: In the Proclamation of 10 March 1983, the President of the United States proclaimed an exclusive economic zone of the United States in which it has the sovereign rights and jurisdiction described in the passage cited by Judge Gros. The purpose of the qualifying words "to the extent permitted by international law", referred to by Judge Gros, was to make clear, without the need to list in detail all the applicable limitations, that, in exercising its sovereign rights and jurisdiction, the United States would respect its obligations to other States under international law. An example would be the duty of the coastal State to respect and have due regard for freedom of navigation in the zone.

The extract from the Proclamation contained in Judge Gros's question reveals that the Proclamation was guided by the texts of the 1982 Convention regarding the exclusive economic zone. The language of the Proclamation regarding delimitation of the zone between the United States and other States is identical to corresponding language in the 1945 Truman Proclamation, and, in the view of the United States, it reflects the content of the references to international law in Articles 74 and 83 of the Convention.

The relationship between the Proclamation and the 1982 Convention is further clarified by the President's statement of the same date. After observing that the United States would not sign the Convention because of "major problems in the Convention's deep sea-bed mining provisions", the President noted that "the Convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States".

The President then announced three decisions "to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law". *First*, "The United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention", subject to their recognition of the rights and freedoms of the United States. *Second*, "the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention". The *third* decision was the proclamation of an exclusive economic zone.

As the text of the Proclamation and the President's statement reveal, the Proclamation was prepared in the light of the guidelines reflected in the 1982 Convention regarding coastal-State rights in the exclusive economic zone and the duty to respect navigation and other high seas freedoms therein. Our response is accordingly affirmative to Judge Gros's enquiry as to whether it would be right to read the language he cited in the light of the guidelines reflected in the Convention.

With regard to point 2 *(c)* of Judge Gros's question:

The statement of 10 March 1983 points out that the Proclamation "does not change existing United States policies concerning the continental shelf, marine mammals and fisheries" including the 200-nautical-mile fisheries conservation zone established by the United States Fishery Conservation and Management Act of 1976. Accordingly, its major effect with respect to natural resources concerns the sea-bed of the economic zone in areas where that economic zone extends seaward of the continental shelf. The purpose of the last two sentences of the paragraph cited by Judge Gros was to emphasize this point. The first sentence is, of course, a general cross-reference to the Proclamation of the same date, and should be read in the light of our comments on points 2 *(a)* and 2 *(b)* of Judge Gros's third question. We note that in the Gulf of Maine area it is the view of both Parties that the continental shelf extends beyond 200 nautical miles from the coast.

The United States hopes that Judge Gros finds these remarks a satisfactory response to the question addressed.

In this closing round, the United States will endeavour to address the remaining issues and not repeat the points we have previously made. We will, as already indicated, adopt Canada's approach and address orally the questions which the distinguished Judges of the Chamber have posed to the Parties. First, it will be my privilege to address certain issues concerning the conduct of the Parties. Later, the United States will ask, Mr. President, that you call upon my colleagues, Mr. Lancaster, Mr. Rashkow and Mr. Feldman, who will briefly address this morning a few remaining points on the facts relating to fishing activities, continental shelf activities and socio-economics. We would then ask, this afternoon, that you call upon Mr. Stevenson, who will address the remaining legal issues. Following his presentation, we would ask that you call upon our very distinguished colleague Professor Riesenfeld who will briefly address the law of acquiescence and estoppel. Thereafter, tomorrow, we would request that you invite Mr. Colson to speak, who will address first geography, and then finally, conservation. Then, at the end, it will be my honour to have the privilege of concluding the United States oral presentation.

II. Conduct of the Parties

Mr. President, distinguished Judges, it is my honour and duty to respond to Canada's arguments concerning the conduct of the Parties.

The United States will not burden the Chamber with a recapitulation of all the details. Rather, we would ask that the Chamber view these issues from an historical perspective – one that appreciates the time and the circumstances in which these issues arose. We will address first Canada's acquiescence and estoppel argument; second, Canada's argument that the continental shelf activities of the United States, while possibly not rising to the level of acquiescence and estoppel, nonetheless support Canada's position that the United States adopted Canada's equidistant line; and third, Canada's argument in relation to the failed 1979 fisheries agreement.

First, let us examine Canada's acquiescence and estoppel argument. In light of the most basic rule of maritime boundary delimitation that requires that boundaries be determined by agreement of the Parties, Canada's acquiescence and estoppel argument must, in order to succeed, overcome this fundamental legal tenet. This tenet was an indispensable element in the very inception of continental shelf doctrine as set forth in the Truman Proclamation of 1945 and was endorsed by the International Court of Justice in the *North Sea Continental Shelf* cases in 1969, the very year cited by Canada as the end of a purported period of acquiescence by the United States. United States conduct would have to indicate acceptance of Canada's unilateral permit programme clearly and convincingly for a substantial period of time in order for the law of acquiescence and estoppel to take precedence over this fundamental rule of delimitation. The rule requiring agreement is also important because it is helpful in appreciating the respective conduct of the Parties in this case.

The United States believes that Canada has long ignored the fundamental rule of law requiring agreement and has sought to avoid its consequences through unilateral action.

Paragraph 19 of the United States Reply described in the candid words of a Canadian, not an American, the background and objective of the policy of unilateralism that Canada had purposefully adopted by 1970 with regard to maritime matters. When we examine tha Parties' conduct in the context of the rule of international law requiring agreement, it is clear that there can be no question of acquiescence or estoppel in this case, regardless of whether, as a matter of policy, Canada chose to disregard that fundamental rule. As the Court reaffirmed only recently at paragraph 87 of the *Tunisia/Libya* Judgment,

> "The Court would therefore observe at the outset that an attempt by a unilateral act to establish international maritime boundary lines regardless of the legal position of other States is contrary to recognized principles of international law ... which provide that maritime boundaries should be determined by agreement between the Parties."

My first-round opening statement recalled that Canada was consulted in advance of the 1945 Truman Proclamation. For twenty years, notwithstanding its obvious interest as a neighbouring State, Canada raised no objections and made no protest. If the law of acquiescence and estoppel is to have any bearing in this case, then clearly it is Canada that acquiesced in the Truman Proclamation's requirement that delimitation be by agreement in accordance with equitable principles. In any event, the requirement of delimitation by agreement already had become part of customary international law when Canada began its unilateral actions in the mid-1960s. It is Canada's burden to show that the United States deliberately, consciously and manifestly decided to overturn its own presidential Proclamation by accepting, through omission or commission, Canada's permits on Georges Bank. As one could expect, Canada has totally failed in meeting this burden.

Moreover, apart from this point of international law, the long-established bilateral practice of the United States and Canada, beginning with the Treaty of Peace in 1783, had been to delimit all their mutual boundaries by agreement, or, as in this case, by judicial resolution pursuant to agreement. Almost always, these agreements have taken the form of treaties, requiring on the part of the United States the advice and consent of the United States Senate to ratification.

In view of this well-established practice, as well as the controlling principle of international law, the United States could only have expected in the mid-1960s that any continental shelf boundaries with Canada would be determined by

agreement, as necessary. Yet Canada shirked its responsibilities in this regard. Canada did not propose discussions or propose an agreement, as it should have done if it wished to establish the boundary. Nor did Canada accept the United States invitations for boundary discussions. In retrospect it is clear that, for whatever reason, Canada was reluctant to negotiate the boundary. With hindsight, we now see that, by the mid-1960s, Canada had unfortunately embarked on a new course in maritime matters. At the time, however, the United States had no reason whatsoever to expect that its neighbour and ally would try to establish a boundary unilaterally, without agreement.

In 1964, without consultation, without notice to the United States, and indeed apparently without clear authority under its own domestic law, Canada began issuing continental shelf permits, thereby placing itself in the vanguard of coastal States. For example, the first test drillings in the North Sea did not begin until 1963 (*I.C.J. Pleadings*, 1968, Vol. I, p. 17). Canada proceeded to issue permits for virtually its entire continental shelf, notwithstanding the lack of the necessary technology and the need for extensive environmental studies. The United States, for its part, adopted a more conservative approach, as described in our first oral round.

However, Canada never had much more than a paper programme for Georges Bank. One might recall that Canada received a total of $26,000 in fees and some $400,000 in deposits, for its permits on Georges Bank, as compared to the $816 million received by the United States in connection with its lease sales on the undisputed part of Georges Bank (United States Counter-Memorial, para. 119). And, in light of the strong United States objections, Canada waived the work requirements under its permits and no drilling has ever taken place.

When Mr. Hoffman learned of Canada's permit programme in 1965, not because of any notice from Canada, but for reasons that remain unknown to us, the United States Government had not yet begun to focus on the delimitation of precise continental shelf boundaries with its neighbours. The United States had every reason to expect, certainly as regards to Canada, that any such boundaries would be delimited only as the need arose and pursuant to agreement.

Mr. President, I must confess that even today the Department of State is not fully and immediately aware of all that goes on with other departments of our Government and their many thousands, indeed millions, of employees. This is so even with regard to all issues of international consequence for which the Department of State may have responsibility. The distinguished Agent for Canada also has the honour of serving as the Legal Adviser to his Government's Foreign Ministry. I suspect that he knows well from his own personal experience the problems involved in keeping track of the many activities of the other Ministries of his Government. It is for this very practical reason that the United States and Canada have both insisted for many years that issues of diplomatic consequence be formally discussed only in diplomatic channels. Certainly, the State Department well understands that Canada would be extremely disturbed if ever significant matters were handled outside those diplomatic channels.

Twenty months after the first Canadian diplomatic notice of its permit programme to the United States of 30 August 1966, following both discussions in the United States Government and informal communications with Canada, the United States Department of State presented on 10 May 1968 an aide-mémoire on the subject of the continental shelf boundary.

Let us pause for a moment to consider the significance of the time period involved. Only 20 months passed between 30 August 1966 and 10 May 1968, although prior to that latter date the United States had already communicated informally its desire to negotiate the boundary. Oil and gas exploration on

Georges Bank was still in its early stages and there was no perceived urgent need either to develop this area, to guard against Canadian assertions, or to delimit boundaries.

Moreover, governments respond to new issues, especially those of a diplomatic character, with reasoned diliberation, all the more so when they arise between good neighbours and allies. The slow pace of diplomacy is sometimes frustrating, but 20 months is but a speck of time when the relevant case law and the common sense conduct of bilateral relations in international affairs between friendly States are considered. Accordingly, it was inconceivable at that time that the United States would expect that Canada, its friend, neighbour and ally, would ever seek to interpret the normal pace of diplomacy as an act of legal acquiescence.

Let us look at the content of the United States aide-mémoire of 10 May 1968 (United States Memorial, Anns., Vol. IV, Ann. 55). There are three points to be noted. First, the aide-mémoire confirmed that there already had been informal communications between the Parties concerning the delimitation of the boundary. Second, in complete consonance with the Truman Proclamation, the aide-mémoire suggested that discussions be held to seek agreement on the delimitation of a continental shelf boundary in the Gulf of Maine area. Third, the aide-mémoire suggested that, pending agreement, there be a temporary suspension of continental shelf activities in the northern half of Georges Bank. I now quote from that aide-mémoire:

> "As the Government of Canada is aware, the United States Government has been considering the desirability of delineating the boundary between the United States and Canada on the continental shelf in the Gulf of Maine."

Thus, there had already been informal communications reminding Canada of the need for a boundary agreement. The aide-mémoire continues:

> "It appears to the United States highly desirable that early discussions be undertaken with a view to reaching agreement on the location of these dividing lines . . . In this connection, in order that some reassurance can be given to the fishing interests involved, it appears to the United States that particular urgency attaches to the question [of continental shelf activities, that is] with regard to the fishing resources now being exploited by a number of nations on the Georges Bank . . . The United States . . . suggests that in the meantime there be a temporary suspension of exploration and exploitation activities with regard to mineral resources in the area of the *northern half of the Georges Bank to permit consultation to take place and* to provide time to seek an agreement on the exact location of the boundary in this area."

This language does not set forth a precise boundary claim, but we fail to see how the aide-mémoire cound be understood as anything but an assertion of the interest of the United States in seeing to it that all Canadian oil and gas activity on Georges Bank, of whatever form and substance, be terminated. That assertion – couched in correct diplomatic language – is in direct contradiction to Canada's allegation of continental shelf jurisdiction on Georges Bank arising from a unilateral permit programme.

Distinguished counsel for Canada argued that the words "the exact location of the boundary in this area" meant that the United States accepted generally that the boundary would cross Georges Bank, and, in his view, follow the equidistant line (p. 97, *supra*). With all due respect, this aide-mémoire does not

permit such a conclusion. If, as Canada has suggested, the United States already had accepted in principle the use of the median line, then it is logical to assume that the aide-mémoire would have referred to that fact.

If all that remained to be discussed was the exact location of the median line, as Canada has suggested, then the aide-mémoire also would have referred to that fact. But the aide-mémoire made no statements consistent with the conclusion suggested by Canada. The aide-mémoire referred, for example, to concern for fishing on Georges Bank as an entity. The aide-mémoire cited the northern half of that bank as the area of concern, not just some narrow strip in the middle portion of Georges Bank.

The aide-mémoire of 10 May 1968 thus put Canada on notice that sovereignty to all of Georges Bank was at issue, and not just the location of some median line proposed by Canada. The aide-mémoire of 10 May 1968 dispels any doubt, if indeed the law and the conduct of the Parties would have permitted any, that the boundary in the Gulf of Maine area was to be determined by agreement, as first enunciated by the Truman Proclamation of fully 23 years earlier, not 23 months but 23 years. Canada was officially aware, at least by 10 May 1968, that the United States had neither accepted nor acquiesced in any purported Canadian claim to any part of Georges Bank. The United States repeats: Canada was officially aware, at least by 10 May 1968, that the United States had neither accepted nor acquiesced in any purported Canadian claim to any part of Georges Bank.

To illustrate the slow pace of diplomacy between the Parties on this matter at that time, Canada had not responded formally to the 10 May 1968 aide-mémoire when the United States more forcefully set forth its position by diplomatic note in November 1969 (United States Memorial, Anns., Vol. IV, Ann. 56). This note restated the points in the 1968 aide-mémoire, but in stronger diplomatic language.

There are several points about the 1969 note that deserve comment. *First*, distinguished counsel for Canada has admitted that the 1969 note reserved all United States rights in regard to Georges Bank (p. 97, *supra*). Clearly there could be no question of acquiescence in the period after this note was received. Thus, regardless of Canada's view of the 10 May 1968 aide-mémoire, it has admitted that by 1969 it understood that the United States did not intend to let Canada get away with its unilateral permit programme on Georges Bank.

Second, distinguished counsel for Canada argued that the 1969 note indicates that the United States had made no previous reservation of rights *(ibid.)*. This argument does not withstand scrutiny. The 1968 aide-mémoire reminded Canada that the boundary would have to be determined by agreement. The very first sentence of the 1969 note recalled this fact,

> "The Department of State refers to the aide-mémoire given to the Canadian Embassy on 10 May 1968, suggesting the suspension by Canada of exploration and exploitation activities on the Georges Bank until agreement could be reached on the exact location of the United States-Canada Atlantic continental shelf boundary . . . The United States Government . . . cannot recognize the validity of Canadian permits for any part of Georges Bank . . ."

Note, here, that in 1969 the United States Government clearly reaffirmed that the 1968 aide-mémoire referred to all of Georges Bank.

Third, the 1969 note encouraged Canada to act with restraint with respect to exploratory activities and explained why the United States continued to pursue such a policy,

> "The United States is concerned that, pending settlement of the boundary question, substantial investment in exploration and exploitation of the area could greatly increase the difficulty of negotiating a satisfactory boundary. For this reason, the United States has refrained from authorizing mineral exploration or exploitation in the area."

The note makes clear that the United States Government then had the impression that on an informal basis Canada had agreed not to proceed to oil exploitation, but had refused to agree to suspend oil exploration, that is exploratory drilling.

Fourth, the 1969 note emphasized the United States interest in protecting the valuable fisheries of Georges Bank. It called for "a complete moratorium on all mineral exploration and exploitation in the entire Gulf of Maine" in light of pollution concerns, continued uncertainty regarding the United States-Canada continental shelf boundaries, and "*the importance of the fishery resources of the Georges Bank*" (emphasis added). The United States interest in controlling the exercise of continental shelf rights so as to protect Georges Bank fisheries could not be more evident than in the following sentence from the 1969 United States diplomatic note:

> "Until mineral exploration and exploitation are suspended in the Gulf of Maine and mutually acceptable regulations safeguarding the fisheries of the area are adopted, the United States will hold the Government of Canada completely liable for any and all damages for pollution of the Gulf and the Georges Bank resulting from such activities authorized by Canada."

Fifth, at the time of this 1969 note, both Canada and the United States already were participating actively in planning a new conference on the law of the sea to negotiate, *inter alia*, a maximum breadth of the territorial sea at 12 nautical miles on acceptable terms to the maritime powers and an extension of fisheries rights of coastal States well beyond that limit. Indeed, the United States and Canada began discussions on this matter with each other and third States several years earlier, and, despite differences over details, never disagreed on the underlying premise that extensive coastal-State fisheries rights would be necessary to achieve a global consensus. In 1969, the United Nations General Assembly took the formal step of canvassing the views of member States on convening a new comprehensive conference on the law of the sea; it decided to convene the conference one year later.

Accordingly, there is no substance to the assertion by Canada that the Parties were concerned with the continental shelf alone at the time of the United States 1969 note. That proposition is refuted by the very terms of the note itself, by the private discussions of both Governments, and by the public documents of the United Nations General Assembly, its Seabed Committee, and the Third Conference on the Law of the Sea. Indeed, if one examines the 10 May 1968 United States aide-mémoire, it becomes clear that the protection of the fisheries of Georges Bank underlay our concerns even then. Although no specific fisheries claims were made at that time, it stretches credulity to imply that, by 1969, the Governments of the United States and Canada were unaware that the continental shelf boundary was relevant to the protection of the environment of Georges Bank fisheries or to the eventual allocation of Canadian and American rights to those fisheries.

To sum up the Canadian acquiescence and estoppel argument, during this period of the 1960s, the United States acted with the normal, deliberate pace of diplomacy. Perhaps we were not as much on our guard as by hindsight we might

have been. Perhaps our diplomatic communications were not as blunt as they might have been. But, after all, we had no reason then to expect our friend and neighbour to seek advantage in unilateral action, contrary to international law and contrary to Canada's own past conduct. All in all, the United States communications to Canada were appropriate, timely and on point.

Even had Canada ever conceived that the continental shelf boundary in the Gulf of Maine area would be determined on the basis of a unilateral programme that disregarded "international legal precedents and procedures" (United States Reply, para. 19), the aide-mémoire of 10 May 1968 was sufficient to correct any such misconception. In brief, Canada's acquiescence and estoppel argument is contrary to law, is contrary to practice and is contrary to the common-sense manner in which friendly governments conduct their business.

The United States now turns to Canada's second argument which seems to be a fall-back position from its acquiescence and estoppel argument. Canada's second argument sometimes appears as the assertion that the conduct of the United States, not only in the 1960s, but in the 1970s as well, indicates that the United States itself accepted an equidistant line boundary for the continental shelf on Georges Bank. At other times this argument appears as the Canadian assertion that the conduct of the United States is evidence that the United States considered the equidistant line to be an equitable boundary.

This argument, in either form that Canada has advanced it, is unfounded and is an *ill*-conceived substitute for acquiescence. These comments that I shall make are equally applicable to Canada's allegations concerning continental shelf conduct and the 1979 fisheries agreement. Canada's goal is to bind the United States to a pattern of alleged conduct and Canada seeks to attribute to that alleged conduct the same consequences that would follow from a pattern of acquiescence and estoppel or, as Canada's distinguished counsel called it, "acquisitive prescription" (p. 98, *supra*). Thus, the consequences of Canada's theory are extreme indeed. Yet the theory is not hedged in any way with the caveats or protections that apply to the doctrine of acquiescence.

Canada's theory has no relationship to the Court's decision in the *Tunisia/Libya* case, which was based upon four decades, without protest, of mutual observance of a *de facto* fishery enforcement limit, and upon the failure of one of the Parties to protest actual oil drilling by the other. The Chamber will recognize that Canada's theory has no basis in law or in logic.

Canada first argues that the seismic permits issued by the United States from 1965 into the 1970s respected a median line. From there, Canada proceeds to put forth maps on which appears what it insists on calling a "BLM line" and even the "United States BLM line". We wish it understood that the Chamber will find no map in the evidence of this case on which any United States official drew any such line. The depiction of such a line has been invented by Canada. I regret to say that, in our view, it is particularly outrageous that most of Canada's illustrations of its so-called BLM line omit to mention that the line was invented and constructed by Canada. The Chamber might, for example, refer to (218) (254) Canadian Figures 76, 77, 160 and 163 of the oral proceedings in this regard. (167) Only in its Figure 63 did Canada see fit to explain by way of legend that, according to the evidence, this so-called "BLM line" was only drawn by Canada, and not by the United States or any official thereof.

Second, Canada argues that the seismic exploration authorized by the United States Government did not encompass all of Georges Bank. This is wrong. The United States Department of the Interior approved all permit applications submitted to it, whether the applications did or did not include northeast Georges Bank. As Mr. Rashkow will discuss again, as early as 1965, the United

States authorized permit activity that went well to the northeast of any purported equidistant line across the Bank – and in some cases included all the Bank. In no case, I repeat, in no case, did the United States ever decline a permit request that extended beyond any such equidistant line. Thus, it is preposterous to suggest that the United States was operating on the basis of some equidistance line.

Third, Canada argues that the oil companies respected the equidistant line prior to the time that official claims were made by the United States. This is false, but even if it were true, it would prove nothing relative to this case.

By 1969, the Parties knew there was a full-blown dispute brewing. In such situations formal diplomatic notes were and are a cornerstone of diplomatic practice. They allow a State to put its position on record and to reserve its rights peacefully with the written word. Within the law, they make it possible to avoid contentious – even dangerous – conduct. The implication of Canada's argument is that such devices do not have this effect. That would be a dangerous doctrine indeed. It would require nations to protect their rights not by words but by deeds. In this case, the United States position was stated clearly and forcefully in diplomatic correspondence and, since 1970, in many meetings between high officials of both Governments. The United States Government reserved its rights in the matter on several occasions, beginning, in fact, with the Truman Proclamation of 1945.

American and Canadian companies have both conducted seismic exploration in the disputed area during the pendency of this dispute, just as the fishermen of both sides have fished in the disputed area since fisheries jurisdiction was extended in 1977. The seismic activity that has occurred does not pose the same issues as actual exploratory drilling. Indeed, it is a relatively benign activity in this respect, as opposed to drilling, which violates the shelf itself, risks danger to fishery resources, and requires installations. Notably, there had been wells drilled and even oil pumped in the Tunisian and Libyan concessions considered in the *Tunisia/Libya* case. Notably, there have been no wells drilled by either Party in the disputed area in this case. This is a crucial distinction. The United States believes it has acted responsibly during this dispute and it also believes it has done so in a manner that is not prejudicial to its interests. The United States reserved its position in diplomatic correspondence when Canada and its nationals engaged in relatively benign activity on Georges Bank. Does anyone seriously believe we would have been content to stand by, without interference or protest, had Canada begun drilling on a portion of the continental shelf claimed by the United States, or that Canada would stand by if we started drilling on continental shelf that was claimed by Canada?

Canada observed that the United States has not sold any oil and gas leases for the northeast half of Georges Bank. The observation is correct, but, frankly, we are angered that Canada has attempted to take advantage of this restraint in these proceedings. The United States chose not to issue long-term leases pending the resolution of this dispute.

The United States continues to believe that it would be irresponsible to authorize private parties to drill in a disputed area. Therefore, the United States has withdrawn the tracts on northeast Georges Bank at an appropriate point in time from every proposed United States lease sale in the general area. Each such withdrawal has been accompanied by a statement reaffirming the United States claim.

The question for the Chamber is whether such restraint may be mischaracterized as evidence, despite the diplomatic record to the contrary, that the United States believed Canada's purported claim to be equitable. The United States

submits that Canada's characterization of the conduct of these continental shelf activities is unfounded and inconsistent with the clear requirements of international law as set forth by the Court. We trust that the Chamber will reach the same conclusion.

Mr. President, the United States has three other maritime boundaries to be delimited with Canada, and in each of those areas the United States is exercising restraint, as it has shown in the Gulf of Maine area. The United States has other boundary questions around the world, including not only with Mexico, the Bahamas, and Caribbean and Pacific States, but also, it appears, with the Soviet Union. In these areas, too, the United States has acted and wishes to continue to act with restraint. Equally important, there are several hundred unresolved maritime boundaries around the world that do not involve the United States, but that could lead to confrontation if not delimited by agreement or adjudication. If the parties to these disputes cannot rely on the written diplomatic record to protect their interests then lack of restraint, and even serious confrontation that could lead to conflict, are inevitable. The United States wishes to encourage all nations to act with restraint in boundary matters and not to seek to gain advantage through unilateral acts.

Were Canada's arguments to be accepted and its unilateral actions sanctioned by the Chamber, what could I, as Legal Adviser, tell my Government? I could only say that continued restraint in boundary regions will prejudice the legal rights of the United States. I could only say that timely diplomatic correspondence attempting to reserve rights would appear to be useless. I could only say that the United States must sell leases to protect its rights and must encourage exploration and development, whatever environmental or other concerns may be present. In our view, the Chamber must assure that such things need not be said. We respectfully submit that the Chamber must assure the nations of the world and their respective legal advisers that the law encourages moderation, restraint and diplomacy. The Chamber must thus confirm that delimitation by agreement, and not unilateralism, remains the law.

The United States now turns to another issue involving the conduct of the Parties of which Canada has sought to make much in this case. We refer to the 1979 Agreement on East Coast Fishery Resources. Canada recognizes, albeit reluctantly, that the agreement was never ratified and never entered into force. Canada likewise concedes that the agreement never created any obligations between the Parties. Canada argues instead that the failed 1979 agreement is evidence that the United States, in some fashion, recognized Canada's claim to a share of the fishery resources of Georges Bank.

There is a fatal factual flaw in the Canadian argument. Canada seeks to use the rejected 1979 agreement as evidence of legal entitlement. However, it was never the object and purpose of the 1979 agreement to identify or reflect what the Parties were entitled to under law. Conclusions of legal entitlement are seldom the product of negotiated agreements. Legal entitlement is an issue for judges, not politicians. The 1979 agreement was rejected by the Congress of the United States precisely because, when measured against its view of what the United States was entitled to under the law of the new extended fishery jurisdiction, it was not a fair agreement.

It is a self-evident but important proposition that negotiated agreements are not confined to principles and rules of law. The negotiations of the 1979 agreement involved many meetings. Compromise came only with difficulty, but it eventually emerged. Directly contradictory interests were compromised, conciliated, or simply swept under the rug, so to speak. For political expediency, these conflicting non-legal interests were assembled into a package consisting of

25 articles and 4 annexes. In the annex to the Canadian Memorial (I), the English and French text of the agreement and its annexes take up 76 pages (Anns., Vol. I, pp. 251-327).

The most significant concession on the side of the Executive Branch of the United States was that the final proposed agreement, contrary to the original concept set forth in the 15 October 1977 Statement of Agreed Principles, turned what originally had been billed as an agreement for a limited term of years, from which each side could withdraw upon notice, into an agreement that was likely to be permanent because the mutual consent of both Parties was required for its termination.

The second most significant concession by the United States Executive Branch came in negotiating shares based upon a limited and recent time frame, so that the allocations under the agreement fundamentally represented the status quo to the advantage of Canada. During the negotiating process that status quo changed. Mr. Binnie as much as conceded that the expulsion of the United States fishermen from Canadian waters on 2 June 1978 was a negotiating tactic, designed to encourage ratification of the agreement by the United States. He said:

> "the termination of reciprocal fishing privileges in 1978 was a wound which the United States inflicted upon itself, because reciprocal fishing was meant to resume with the ratification of the 1979 fisheries agreement" (p. 85, *supra*).

Other counsel for Canada profess not to understand the point about Canada's having upset the political applecart, but those were the words of Mr. Binnie.

Distinguished Counsel for Canada also seeks to parse words from the United States *Congressional Record* to advance the view that there was support in the United States Congress for the long-term agreement that ultimately was accepted by the United States Executive Branch. However, Counsel for Canada quickly passed over the date of that *Congressional Record*, from which he quoted. That date was 29 June 1978, more than eight months before the agreement was signed.

In June of 1978, Canada had just terminated reciprocal fishing, but the United States went nonetheless forward and passed a law allowing such fishing to resume in order to create a favourable atmosphere for the ongoing negotiations. The Senators and Congressmen quoted by counsel for Canada thus exposed themselves to political risks in June 1978 to sustain those ongoing negotiations.

Senator Kennedy of Massachusetts sponsored the Bill. I will read, with your permission, parts of this *Congressional Record* that Professor Bowett did not read. In speaking of the then envisaged long-term agreement, Senator Kennedy said (*Congressional Record*, 29 June 1978, pp. 19623-19624 deposited by Canada in connection with its second round of oral presentation):

> "As a Senator from New England I have long been an advocate of close and friendly relations with Canada. But, as a New England Senator, I am also aware that the halt in reciprocal fishing has deeply concerned the fishermen of New England and has increased mistrust and resentment of the other country's fishermen on both sides of the border. I am informed that mutual tension between Canadian and American fishermen on the Pacific coast is equally high. US fishermen experienced further frustration after the recent decision not to impose countervailing duties on Canadian subsidized fish products exported to this country. Under these circumstances the atmosphere for negotiating a mutually satisfactory long-term agreement

has worsened. Should each side withdraw behind a wall of distrust and make the painful readjustments necessary to fish in its own waters, an amicable long-term relationship based on the tradition of reciprocal fishing and on joint management of the coastal fish stocks will be exceedingly difficult."

Senator Kennedy went on to say in June of 1978:

"I hope that our action today in ratifying the 1978 Interim Agreement – despite the Canadian decision not to continue its provisional implementation – will be correctly perceived in Canada as a beau geste, put forward to *demonstrate the continuing interest of the United States in forging cooperative* maritime relationship with Canada. I hope that Canada will take some comparable step toward resumption of reciprocal fishing, in order to reduce the present level of tension and permit the special negotiators to finish their task."

But reciprocal fishing did not resume.

By the time the negotiations concluded in March of 1979, the record makes clear that the major preoccupation of the Executive Branch of the United States Government related to the overall relationship between the United States and Canada, embracing innumerable and incalculable factors and differences. As Senator Javits made clear in a passage that I quoted in my opening statement in the first round, the fundamental issue was whether the United States should concede substantially greater rights to Canada than we believed Canada was legally entitled to, in order to promote the general overall bilateral relationship between the United States and Canada. Senator Javits concluded, along with virtually every United States Senator and every member of the House of Representatives, that Canada should not expect the United States to accept an unfair agreement any more than we would expect Canada to accept one. That issue of fairness is the question on which Special Negotiator Cutler and the Senate of the United States ultimately disagreed.

In recognition of the fact that the proposed agreement was not intended to reflect and in fact did not reflect the legal rights of the Parties, but instead was a negotiated conciliation of competing interests, Article 24 of the agreement provided:

"Nothing in this agreement shall affect the position of either Party with respect to the legal nature and seaward extent of internal waters, of the territorial sea, of the continental shelf, of fisheries jurisdiction, or of sovereign rights or jurisdiction for any other purpose under international law."

Thus, had the 1979 agreement been in force today, the Chamber could not take cognizance of its terms and conditions to support the views of either Party concerning its legal entitlement to a boundary line in the Gulf of Maine area. *Such a provision was considered necessary to ensure that political compromises* accepted for one purpose would not prejudice a judicial decision to be based upon legal entitlement rather than upon political settlement.

As Professor Weil stated on 6 April, governments are "free to ignore all legal considerations" in negotiating a boundary agreement (VI, p. 168). We agree. In this respect, negotiations are closely akin to a decision *ex aequo et bono* in that in neither case is the result necessarily determined by principles and rules of law.

The failed agreement was never intended to reflect what each Party was entitled to as a matter of law. Indeed, the Parties disagreed vehemently

concerning what it was that the law required. That the United States strongly maintained its right to Georges Bank, while Canada continued to assert its own claim that the fishery agreement and the boundary treaty, including the Special Agreement, were signed the same day, is further evidence that the Parties had not agreed upon the underlying legal questions and upon their legal entitlements in the boundary area.

In one sense, the proposed 1979 agreement sought to avoid the law, that is, to avoid the extension of exclusive coastal-State fishery jurisdiction which involved the expulsion of foreign fishermen from the 200-nautical-mile zone. The agreement sought to avoid the natural legal consequence of extended coastal-State jurisdiction by instead proposing the maintenance of the status quo as between the fishermen of Canada and the United States, that is, by proposing reciprocal fishing rights for existing fisheries as far north as Newfoundland and as far south as North Carolina.

Throughout the course of the written and oral proceedings, the United States has insisted that the terms and provisions of the 1979 agreement are irrelevant as a matter of law, because that agreement failed, and because those terms and provisions may therefore not be used to the prejudice of the United States. Canada's efforts to use selected terms of the failed agreement is another example of the fact that, when all is said and done, Canada is requesting this Chamber to render a decision *ex aequo et bono* – a decision that this Chamber may not render under Article 38 of the Statute of the Court.

A decision *ex aequo et bono* would involve compromise, expediency, conciliation, and evaluation of conflicting non-legal interests of the type that normally are handled by politicians, rather than by judges. The Canadian economic dependence argument also falls well inside the category of non-legal interests that Canada is pressing upon this Chamber.

Hersch Lauterpacht, in his work *The Development of International Law by the International Court*, stated:

> "Adjudication *ex aequo et bono* is a species of legislative activity ... adjudication *ex aequo et bono* amounts to an avowed creation of new legal relations between the parties." (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, p. 391.)

Thus, a decision *ex aequo et bono* contemplates an adjustment of interests without deference to rules of law. The failed 1979 agreement was an effort to accommodate the interests of the Parties through quasi-legislative activity. It was an effort to create a new legal relationship between the Parties – and one that was other than that provided by the new 200-nautical-mile jurisdiction. Those negotiations involved considerable compromise, entered into for the sake of expediency. The process was similar to what the Chamber might do if it were permitted to render an *ex aequo et bono* decision. But the Parties have not asked the Chamber to render such a decision and the Chamber is therefore not permitted to do so under the Statute of the Court.

My distinguished colleague, Mr. Lancaster, has noted that Canada asks for more in its legal claim in these proceedings than it would have attained under the failed 1979 agreement. The United States also seeks more from this Chamber than it would have received under the rejected 1979 agreement. Nevertheless, the fact that the 1979 agreement marks one failed effort of the Parties to reconcile competing interests is no signpost for the Chamber in identifying what the law requires in ascertaining an equitable solution in this case.

With this background, the United States is now honoured to address Judge Mosler's question number 7, which concerns the 1979 fisheries agreement. We

would request that the transcript set forth the full text. The basic question of Judge Mosler is as follows:

> "If the Chamber had had to decide in the circumstances originally envisaged, the Fisheries Resources Agreement being in force, it could not have taken into account the management of fisheries resources dealt with therein. Has the fact that the agreement did not enter into force the effect that the matters dealt with in that agreement are now excluded from the consideration as relevant circumstances, or, on the contrary, should they be taken into account in that sense by the Chamber?" (VI, p. 463.)

Our answer is respectfully as follows (also *infra*, p. 263):

1. the 1979 agreement is a failed effort at political compromise;
2. the 1979 agreement made no pretext of identifying the boundary between the Parties;
3. because of the compromises reflected in the agreement, Article 24 makes clear that the provisions of the 1979 agreement could not be used to support the arguments of one side or the other in the subsequent adjudication of the maritime boundary;
4. the classic definition of *ex aequo et bono* is that it is a quasi-legislative act involving compromise between competing interests; and
5. the provisions of the failed 1979 agreement are compromises between competing interests and to now take account of these provisions in reaching its judgment would bring the Chamber into the forbidden realm of *ex aequo et bono*.

Mr. President, distinguished Judges, that concludes my introductory presentation.

The Chamber adjourned from 11.25 a.m. to 11.45 a.m.

QUESTION BY JUDGE MOSLER

The PRESIDENT: Mr. Robinson, I think Judge Mosler would like to make a little commentary on your reply to his question.

Judge MOSLER: The distinguished Agent of the United States of America's answer to my question under 7 concerning the 1979 agreement was clear and precise, but I regret it did not meet all my points, and I would be grateful if an additional answer could be given. Certainly, the provisions of the 1979 agreement cannot in any way be taken into account by the Chamber and, furthermore, any decision based on *ex aequo et bono* considerations would be contrary to the jurisprudence of the Court, as pointed out recently again in the Judgment in the *Tunisia/Libya* case. The last sentence of the third paragraph of my question 7 relates to *the matters* dealt with in the 1979 agreement, *not to its provisions*, which we cannot of course rely on. The question is therefore whether these matters can be taken into account by the Chamber as relevant circumstances in this case. Both Parties referred in their pleadings to matters of management and conservation of fisheries which were dealt with in the 1979 agreement. Of course, the Chamber can only consider them in the context of the delimitation of the boundary line, not under any other aspect. Part of these matters were to be settled by compromise in the agreement of 1979 which, however, did not enter into force. I think that the Chamber must include, in its considerations, any matter raised before it by the Parties. This concludes my question, which I think is easily to be answered.

Mr. ROBINSON: Yes, Sir, I would propose with your permission that we will answer that in a subsequent presentation if that is satisfactory to Judge Mosler.

REJOINDER OF MR. LANCASTER

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. LANCASTER: May it please the Chamber.

We began, Mr. President, distinguished Judges, some 38 days ago with the flat charge by the distinguished Agent for Canada that the United States had argued that "established patterns of fishing are legally irrelevant despite their being at the heart of the dispute" (**VI**, p. 24). Fourteen days later the United States set the record straight (**VI**, p. 338). We said, as we had said all along, that the United States invited the Chamber to consider *all* of the fishing activities of *both* Parties *as relevant circumstances, giving to them such weight as the Chamber thought* justified in the context of all relevant circumstances. For some reason, which I at least cannot fathom, this rather reasonable proposition has inspired a somewhat vituperative and barbed response.

It would, of course, be possible to line up and blow away each of the straw men which Canada has so cleverly crafted to attempt again to shift the Chamber's focus from the facts. It would be possible to do so, but it would be terribly wasteful of precious time. For there is no longer a dispute on this approach. Canada, which originally condemned historical fisheries to total banishment, has yielded. Canada now concedes that "Canada has no objection to a review of the historical fisheries record . . ." (p. 84, *supra*). It took us a while to get here, Mr. President, but we are here – agreed that this Chamber should indeed consider all fishing activities of both Parties as relevant circumstances.

The United States is pleased to have Canada's concurrence. In agreeing to this approach, Canada has invited you to review the annexes to its Counter-Memorial (**III**), and so do we. Together with the United States annexes (**IV**, Counter-Memorial, Ann. 7, Vol. IV; **V**, Reply, Anns. 28 and 29, Vol. II), for they show more clearly than anything else that we could point to, exactly what we have said from the start: Canadian fishing activity on Georges Bank prior to 1950 was spotty, sporadic, insubstantial, and insufficient. And all – *all* – of the evidence which Canada has been able to muster by its extensive research establishes, at best, an occasional visit to Georges Bank by an occasional Canadian craft on widely scattered occasions during this historic period. Thus, as pointed out in the United States reply, Canada's extended and extensive search has unearthed only approximately 85 Canadian vessels which visited Georges Bank during the first half of this century – and not all of them came to fish (para. 229).

Canada has been consistent in its inconsistency. First it labelled historical fishing activities irrelevant – not to be considered by this Chamber – and now it concedes that this Chamber can consider them.

But all the while that it was vacillating between these two approaches, Canada was trying desperately to convince you (and perhaps itself) that it had an historical fishery which it could use to balance that of the United States. If, indeed, Canada really believes that an historical fishery is irrelevant – of no consequence – something which will not weigh at all – why has Canada made such an enormous effort to create some semblance of an historic fishery for itself? Never mind that that effort failed. The very fact that Canada would attempt to do so has obvious significance.

And that significance is grounded in the sure knowledge that the United States

does have an impressive and fully documented historic fishery on Georges Bank which indeed is relevant to your deliberations.

Mr. President, distinguished Judges, let me briefly and quickly refresh the (97) recollection of the Chamber. Figure 85 (which you previously saw as Fig. 40) shows conclusively that Canada dominated (despite its obvious distaste for that word), dominated the historical fishery off its coast and the United States dominated the historical fishery off the coast of New England, including Georges Bank.

(98) Figure 86 (which was previously displayed as Fig. 42) shows overwhelming dominance by the United States in the Georges Bank groundfish fishery from (99) 1904 to 1981 – including Canada's "contemporary" period. Figure 87 (which was Fig. 43 in the first round) shows scallop statistics on Georges Bank and includes the undisputed fact that Canadian landings briefly surpassed those of the United States and the United States scallopers moved their operations south to the mid-Atlantic scallop beds. It also shows, however, that that situation no longer continues.

The historical fisheries facts remain as uncontroverted now as at the beginning of this case. They speak for themselves and they clearly and conclusively establish who did what, when, and where on Georges Bank. We said before; we say again; we are very comfortable resting on that record as reflected in the pleadings and the documents submitted by *both* Parties in this case.

But because of internal inconsistencies in Canada's pleadings, and faint rumblings yet of a claimed priority for a "contemporary fishery" (whatever that term may now mean) we must briefly address some of the current fisheries facts against the background of some of Canada's claims.

First, it is important to realize what Canada has attempted to do by this forced focus on the 1969 and 1978 period. It wants you to take this single, aberrational frame of reference and – either by ignoring history or by relegating historical fact to insignificance – to conclude that Canada has at least an equality of fishery activity with the United States on Georges Bank. How seductively simple. For if that is the fact, the argument goes, this relevant circumstance is neutralized. And that, Mr. President, has been the target on which Canada has drawn its bead from the start – not to prevail on fishing activities but to so confuse the facts as to suggest equilibrium and irrelevance. It does not work. We need only take a step back and put it in perspective to see why.

What we really have – when all the smoke has cleared – is an unbroken track of substantial activity by the United States on Georges Bank for over 150 years. There are parallel tracks for portions of that period to be sure. But those other tracks are aberrational. The Canadian parallel, for example, is faint and spotty until it begins to solidify in the 1950s and become sustained in the 1960s. And it is again beginning to diminish. Other third-party States are represented by a sudden, single, heavy thick track starting in the 1960s and all but disappearing in the 1970s. True, both Canada's and the United States tracks were overshadowed by that nearly devastating intrusion. But against the long, uninterrupted United States record, it also is an aberration.

What are the facts about the current situation which Canada has either ignored or perhaps presented somewhat less than impartially? Let us quickly tick them off in the context of:

1. The true current United States fishery; and
2. The diminishing Canadian fishing on Georges Bank.

What does the evidence show us about them?

First, the United States current fishery. We showed you Figure 88 before

(Fig. 44 in Round 1). We show it again because it is unrebutted. It shows greater numbers of United States vessels on the eastern portion of Georges Bank in every month but one in 1981. Canada, of course, has its own record of sightings. It chose not to contest this figure by using its own data and therefore the figure remains unchallenged. Instead, Canada chose again to quarrel with United States catch measurements.

In Round 1 Canada accused the United States of "misleading" (**VI**, p. 97), by using meat weight for scallops. We responded by noting that Canada had itself admitted that the current statistical system uses meat weight and had itself used meat weight to present catch data until it wanted to improve the appearance of its position and switched to round weight and a "value" yardstick (**VI**, pp. 347-348). Canada's only reply in the second round was to point out that when the weight of the catches are compared using shell weight for scallops, the result looks very similar to comparison of the economic values of the catches. Canada thus reasons that its weight comparison is correct because it "gives a perfectly fair perspective of the economic value of the Georges Bank fishery" (p. 80, *supra*). Once again Canada has created its own foil and successfully destroyed it. The point may be correct but it is irrelevant. The United States was not trying to compare the "economic value" of the fishing, as Canada perfectly well knows. The United States was comparing the amount of food protein that is harvested from the fishing, because, in the opinion of the United States, that is the only appropriate measure of fishing activity and fishing activity is what we have been talking about.

The point remains as valid as when originally made: use of round or shell weight for scallops distorts the catch picture when the catch is being measured by weight as opposed to value because it includes the weight of the shells which are of neither economic nor protein value. One simple example will suffice.

In 1976, at the peak of Canada's scallop fishery, the United States caught 27,728 metric tons of fish on Georges Bank, and Canada caught 14,749 metric tons. These figures include the scallop catch in meat weight. If these figures are compared, the United States took 65 per cent of the combined catch by weight in that year. Now, if the catch were recomputed with scallops in shell weight, the figures would be drastically different. The Canadian catch would be shown to have increased more than five fold to 78,792 metric tons, while the United States catch would barely increase to only 30,009 metric tons. The unfairness in the comparison is obvious. Using shell weight for scallops would attribute to Canada 72 per cent of the combined catch instead of 35 per cent, even though 81 per cent of the total Canadian catch was represented by the part of the scallop that was thrown overboard at sea. That can hardly be considered an appropriate, much less fair, method of measuring fishing activity.

(139) (170) (257) In the same vein, the Chamber will recall Canada's criticism of Figure 1 in Annex 4 of the United States Counter-Memorial and Canada's use of round weight in Figure 25 of its Reply (**IV**, United States Counter-Memorial, Ann. 4, Vol. 3; and **V**, Canadian Reply, Fig. 25). To set the record straight once and for all, Figure 89 now shows the Parties' relative share of total catch on Georges Bank from 1969 through 1982. The "contemporary" or "current" (or whatever it is called) fishery shows continued United States predominance, and, when considered together with the historical fishery facts, confirms the same story that was presented to you with the very first Pleading.

But lest there be any lingering doubt, let us take one last look at the current picture.

What of the much vaunted Canadian "contemporary" fishery?

In our opening round, we said of it:

> "Not only have current Canadian catches for Georges Bank fallen generally but their decline has been paralleled by an increase in the catch of the United States scallop fishermen. Canadian scallop fishermen have begun to take a large share of their catch from other scallop grounds, located in Canadian waters off Nova Scotia or Newfoundland. Indeed, both the Canadian offshore scallop fishing industry and, more generally, the Canadian offshore fishing industry, unlike their American counterparts, have undergone a decline rather than an expansion, since the extension of United States jurisdiction in 1977." (VI, p. 346.)

If ever there was a gauntlet, Mr. President, that was it. Yet Canada chose not to pick it up. Canada chose not to reply. Not one word. You may, therefore, accept it as unchallenged. For it is true and, by silence, admitted to be true.

These are the true current, or contemporary if you will, fishery facts. Like their historical counterparts, they also speak volumes. But again, as we said before, it would be unfair to take them in isolation even though they arguably presage the future.

We submit now, respectfully, as we did before, that you should consider these current facts in context: in the context of all fishing activities as relevant circumstances; and in the context of fishing activities as one of the several relevant circumstances.

The relative weight to be given to the fish activities has been and will be discussed by my colleagues. But whatever that weight, all of those activities should be laid on justice's scale if justice is to be done. We are confident that if that measure is made, the balance will tip substantially in favour of the United States.

Finally, in Canada's second presentation, I was described as "the counsel from Maine who spoke for the fishermen of Massachusetts" (p. 93, *supra*). If learned counsel for Canada were acquainted with those fishermen, they would realize that they have done me an honour and that I am grateful. I think that I said earlier, and I repeat now, that I do speak, however haltingly, for the fishermen of the United States, those fishermen who daily risk their lives and fortunes on Georges Bank and who have confidently and trustingly laid their hopes before you, and I am proud to acknowledge that role.

REJOINDER OF MR. RASHKOW

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. RASHKOW: Mr. President, distinguished Judges, this presentation will address the activities of the United States in relation to geophysical exploration of the continental shelf in the Gulf of Maine area. The United States regrets that it must burden the Chamber with further argument on this issue. In the view of the United States, however, the extreme and unfounded contentions of Canada regarding this issue require a response.

I will be assisted in this presentation today by Dr. Jonathon Olsson of the Office of the Geographer of the Department of State as well as by Mr. Ray Meyer of the Office of the Legal Adviser of the Department of State. I would also like to express my appreciation to Lt. Commander Peter Ward Comfort, of the Judge Advocate General's Corps of the United States Navy, who assisted me in the preparation of this presentation.

Mr. President, Canada asserts that prior to 1972 no exploration was either authorized or conducted on the northeastern portion of Georges Bank pursuant to the United States geophysical exploration permits. Indeed, Canada asserts that, during the years prior to 1972, and afterwards, United States oil companies and the United States Department of the Interior assumed the existence of an equidistant boundary on Georges Bank. Canada is incorrect.

The United States has identified and analysed the permits that the United States Government issued prior to 1972 and afterwards, that authorized exploration on the northeastern portion of Georges Bank. We are referring, in particular, to the United States correspondence with the Registrar of the Court over the last several months and the attachments thereto (letter from Davis R. Robinson, Agent of the United States of America, to the Registrar, dated 27 February 1984, enclosure 1, pp. 5-9, attachments 1 and 2).

Canada purports to have reviewed this material but continues, nonetheless, to insist that no such exploration was either authorized by the United States or conducted by private companies; (**VI**, pp. 130, 135, 149-150, 152, 154, 156). The fact is that Canada's review of this material, in polite terms, was incomplete and the conclusion that Canada would have this Chamber draw from that review is contradicted by the facts.

We regret that Canada has forced us to dwell upon a subject that we believe Canada is using to divert the Chamber's attention from significant issues in this case. Nevertheless, in view of Canada's insistence on this point, we will discuss the exploration authorized by the United States northeast of any of the purported equidistant lines identified by Canada.

In this regard, the United States wishes to stress that it is the authorization by the United States Government, not the conduct of exploration by private companies under that authorization, that is relevant as a matter of international law. The United States Government authorizes geophysical exploration in areas of the United States continental shelf within the limits applied for by private companies. Whether or not those private companies conduct exploration that has been officially authorized is, under United States law, entirely subject to the discretion of those companies.

But those companies cannot by their decisions diminish or in any way affect the significance of the governmental authorization as an exercise by the United States of its rights regarding the continental shelf. Nevertheless, in order fully to

respond to Canada's contentions, the United States will demonstrate that, notwithstanding its irrelevance to these proceedings, exploration by private companies was conducted pursuant to United States permits northeast of any of the equidistant lines that Canada has identified on Georges Bank.

Lest Canada be concerned, let me hasten to confirm that there is no information in this presentation that Canada has not had in its possession for some time. In making this presentation, we rely entirely upon information previously provided to Canada and to the Registry, including detailed maps (letter from Davis R. Robinson, Agent of the United States of America, to the Registrar, dated 20 January 1982; letter from Davis R. Robinson, Agent of the United States of America, to the Registrar, dated 9 April 1984 (hereinafter letter of 9 April 1984)). The information already provided to Canada by the United States demonstrates, in direct contradiction to Canada's assertion, that exploration northeast of the purported equidistant lines that Canada has sought to identify on Georges Bank, was both authorized by the United States Government and conducted by private companies, both prior to 1972 and afterwards.

We first would distinguish between the strict equidistant line and the two other purported equidistant lines that Canada has identified, that is, the so-called "BLM line" and the so-called "company equidistant line". As for the "BLM line", there is no evidence that it ever existed as an actual line on any United States Government map. As for the so-called "company line", if it existed, it represented the views of oil companies – not of the United States. We shall return to these points in the course of our presentation.

I will now turn to a discussion of United States permit activity.

In 1965, the United States issued Permit E1-65, authorizing the Shell Oil Company to conduct seismic surveys in the area of the continental shelf from North Carolina to Maine. Attached to the application for that permit was a map of the area in which Shell proposed to conduct exploration operations (letter of 9 April 1984, doc. 46, letter of 4 May 1965; *ibid.*, letter of 19 April 1965). Counsel (258) for Canada showed you a reproduction of one copy of this map, at Figure 158 of the Canadian oral presentation, and described the area depicted on that map as one that "appears to be bounded by some sort of equidistant line" (**VI**, p. 154).

(258) Displayed to my right, as Figure 90, is a reproduction of another copy of that map (letter of 9 April 1984, doc. 46, Map No. 4027-A). Displayed alongside (259) Figure 90 is Figure 91, which, for the convenience of the Chamber, depicts the same northeastern limit of the area of exploration proposed by Shell Oil (259) Company on a more standard map of the area. Also depicted on Figure 91 is a strict equidistant line.

As is clear from Figure 91, the limits of permit E1-65 extend well to the northeast of that strict equidistant line. Indeed, the northeastern limit, approved by the United States Government, as requested by Shell Oil Company, extended almost 40 nautical miles beyond the strict equidistant line, and encompassed an area on Georges Bank of more than 1,600 square nautical miles beyond that line.

During its review of United States permit activity, Canada discussed permit E2-68, issued to Exploration Surveys, Inc., on 23 April 1968. Exploration Surveys requested authorization to conduct geophysical exploration on the continental shelf off the northeastern United States and included with its request a map depicting its proposed area of operations.

Displayed to my right is Figure 92, which is a reproduction of that map. We would ask the Chamber to note that all of Georges Bank is blanketed by a grid of five- and ten-nautical-mile segments that were to form the basis of the geophysical studies that Exploration Surveys proposed to conduct (letter of 9 April 1984, doc. 7, letter dated 3 April 1968; letter dated 23 April 1968). In

granting this permit, the United States Government authorized exploration throughout the entire area, as requested by the Company.

Canada has characterized the exploration conducted under permit E2-68 as "a few tentative forays into the Canadian zone" (**III**, Counter-Memorial, para. 370). However, the exploration by that private company extended across the northeastern portion of Georges Bank to the Northeast Channel (letter of 9 April 1984, doc. 60, post-plot maps).

Displayed to my right as Figure 93 is an illustration that reproduces on a more standard chart the exploration actually conducted by Exploration Surveys under that United States Government authorization. That exploration consisted of some 450 line miles (letter of 9 April 1984, Attachment 1), and encompassed an area on Georges Bank of approximately 5,000 square nautical miles beyond the strict equidistant line.

The next permit to be discussed, also issued in 1968, is permit E3-68, issued to (260) Shell Oil Company. Displayed to my right, as Figure 94, is a reproduction of the map that accompanied Shell's original request for permit E3-68 which depicts the limits of Shell's proposed exploration. It may be observed that the northeastern limit is shown as a shallow arc emanating from the United States-Canadian international boundary terminus.

(261) Displayed alongside Figure 94 is Figure 95, which depicts the northeastern limit in the original map submitted by Shell Oil Company on a more standard chart. It may be observed that Shell included all of Georges Bank within the proposed area of exploration. The United States Government approved Shell's application as submitted and as reflected in Figure 95 (letter of 9 April 1984, doc. 8, letters of 20 May 1968, 27 May 1968 and 5 June 1968; doc. 61, (261) Map 4027C).

Counsel for Canada foreshadowed that we would show the Chamber this map, stating: "There is one further permit I had best refer to, just to be on the safe side, because the United States might pull it out of the hat at the reply stage" (p. 108, *supra*). But then, counsel for Canada, in discussing this map, confused pre-plot maps with post-plot maps. As the Chamber will recall, pre-plot maps are maps which depict the exploration which is proposed to be conducted; post-plot maps illustrate the exploration that was actually conducted by the company. Now, counsel for Canada showed you Figure 159 of the Canadian presentation, which depicted a few survey lines on the middle of Georges Bank. He states: "I want to show the Chamber the pre-plot map submitted for this permit" *(ibid.)*. But he did not show you the pre-plot map. (260) (261) Figures 94 and 95, to my right, illustrate the pre-plot map. Counsel for Canada, in effect, showed you the post-plot map, mistakenly asserting that "the pre-plot map shows the actual survey lines" *(ibid.)*.

(260) (261) As Figures 94 and 95 demonstrate, the area for which Shell Oil originally requested authorization to conduct operations and for which a permit was granted by the United States Government, in fact included all of Georges Bank. The fact that Shell did not conduct exploration throughout the entire area is not relevant.

(262) Displayed to my right is Figure 96, which depicts the area covered by a subsequent work plan that Shell Oil Company filed with the Department of the Interior in relation to permit E3-68. The area of proposed operations under that work plan extended well beyond a strict equidistant line (letter of 9 April 1984, doc. 61, pre-plot). Indeed, the northeastern limit of that area extended more than 20 nautical miles beyond a strict equidistant line, and encompassed an area on Georges Bank of about 1,200 square nautical miles beyond the strict equidistant line.

In its summary review of the United States permit activity, Canada did not discuss permit E3-69, issued to Chevron Oil Company as Agent for Digicon, Incorported, on behalf of a number of oil companies (letter of 9 April 1984, doc. (263) 51, letters dated 26 May 1969, 11 July 1969). Displayed to my right is Figure 97, which depicts the exploration Chevron proposed to conduct (letter of 9 April 1984, doc. 100, pre-plot). As you will observe, that exploration extended far beyond the strict equidistant line, which we have imposed on this Figure 97. Indeed, the area of proposed operations extended almost 60 nautical miles beyond a strict equidistant line, and encompassed more than 2,900 square nautical miles beyond that line. Once again, the United States Government approved the private company's application as submitted.

For the information of the Chamber, the United States has also depicted on (263) Figure 97 two notations, "Pt. on BLM line", that appear on the copy of the map submitted by Chevron with its permit application describing its proposed operations. The United States uncovered these two notations and disclosed them to Canada in connection with its response to Canada's repeated extraordinary requests for information.

These two notations, and the two points they identified, were made on the map by Mr. Dupont of the United States Geological Survey of the Department of the Interior and are two of the three isolated references that constitute the entire evidence of this so-called "BLM line" – the third being a reference in an attachment to a memorandum in a permit file that Canada discovered in a document provided by the United States. Canada had itself unsuccessfully searched United States records, not only in Washington, but in other cities as well, for evidence of this purported "BLM line". Canada, however, apparently dismissed these two notations – two of the three isolated references that constitute the entire evidence of the so-called "BLM line" – when distinguished counsel for Canada stated: "actually, the two points don't seem to correspond with anything much" (pp. 109, 111, *supra*). The United States agrees. In fact, in the view of the United States, Canada's entire argument concerning any "BLM line" does not seem to correspond to anything very much.

To the best of our knowledge, these three isolated references to a "BLM line", two of which Canada itself discounts, were based upon information that was provided informally to the United States Geological Survey by the Bureau of Land Management, for the purpose of describing the limits of Canada's permits on Georges Bank.

Mr. President, distinguished Judges, that is all there is; no map, no line, only information from the Bureau of Land Management, some time in 1968 or 1969 – the date is unclear – as to the limits of Canada's permits on Georges Bank.

As the Agent for the United States has stressed, the United States has been unable to discover in the original records of the Department of the Interior any map actually depicting the so-called "BLM line". Nonetheless, Canada has repeatedly displayed the so-called "BLM line", occasionally even labelling it "the United States BLM line", and thereby implying that Canada was reproducing an official existing line from an official United States map. However, as the Agent for the United States has just noted, there is no evidence of any such line on any such map.

Canada attempts to establish the existence of such a "BLM line" by reference to an exploration company map that Canada theatrically produced before this Chamber on 5 May. As the Chamber will recall, this map that Canada produced, was a very large post-plot map and it was the only figure that Canada has produced that has been mounted on a board for viewing, rather than projected on Canada's lightbox. Canada contends, in the words of Canadian

counsel, that the line on this company map fits exactly with the description of the Bureau of Land Management line in Mr. Hoffman's letter of 14 May 1965 (p. 109, *supra*).

Mr. President, with all respect, Mr. Hoffman's letter of 14 May 1965 upon *which Canada relies contains no reference to any Bureau of Land Management* line at all. We invite your attention to that letter, which appears at Annex 53, Volume IV, of the United States Memorial. There is a reference in Mr. Hoffman's letter to the term "median line" in relation to the Continental Shelf Convention, but nowhere do the words "Bureau of Land Management" or "BLM line" appear in relation to any line, as Professor Bowett would suggest. Professor Bowett's characterization of Mr. Hoffman's letter is thus completely unfounded.

We turn now to the company map upon which Canada relies and which was introduced so dramatically during a session of 5 May. That map was prepared in relation to permit E2-72, under which exploration beyond the strict equidistant line was not only authorized by the United States Government, but actually conducted by the private company as well.

In view of this broad authorization extending over large parts of the northeastern portion of Georges Bank, and in view of the exploration actually conducted over those large areas of the northeastern portion of Georges Bank, it is incomprehensible to the United States how Canada can, in good faith, contend that this map, which depicts that actual exploration under United States Government authorization, supports Canada's contention that the United States Government recognized an equidistant boundary on Georges Bank when, in fact, the map directly contradicts those contentions.

I regret that I must digress momentarily to comment upon the circumstances surrounding the production of this exploration post-plot map. In the view of the United States, Canada has played a bit fast and loose with this wholly irrelevant map – not only in the use it seeks to make of the map, but in the manner it was produced. As we understand, neither the Chamber nor the United States was provided with a copy of this map in advance of the session at which it was displayed, as is customary. It is just such surprises that the Rules of Court were intended to avoid.

We are confident that Canada's production of this map will only serve as a reminder of Canada's utter failure to demonstrate the application of any so-*called "BLM line" by the United States Government in its authorization of* geophysical exploration permits. Indeed, it will also serve to remind the Chamber that Canada has failed to produce any evidence that the United States recognized, or otherwise acted upon, an equidistant line.

The United States will next discuss permit E4-69, which Canada neglected to discuss. This permit, issued to Exploration Surveys Incorporated on 16 July 1969, was a continuation of the programme initiated the previous year under permit E2-68, which I have previously discussed (letter of 9 April 1984, doc. 9, letter of 29 July 1969).

(284) Figure 98, displayed to my right, illustrates that the company conducted exploration under this permit well beyond the strict equidistant line (letter of 9 April 1984, doc. 9, letter dated 5 Nov. 1969, doc. 62, Exhibit A). At its most northeasterly point, this exploration extended approximately 30 nautical miles beyond that strict equidistant line.

As the Chamber is aware, the United States notified Canada of the unacceptability of Canada's permits on Georges Bank, first, by an aide-mémoire of 10 May 1968 and, subsequently, by a diplomatic Note of Protest of 5 November 1969. Despite these protests of Canadian activities, Canada relies upon the

permit activities of the Parties subsequent to 1969 to support its contention that United States permit activity in some fashion affirmatively recognized Canada's permits. Canada's contention is, however, contradicted by Canada's own presentation.

Thus, Canada has acknowledged that exploration was both authorized by the United States Government and conducted by private applicants on the northeastern portion of Georges Bank under permit E2-72, issued to Digicon, Incorporated, in May of 1972 (VI, pp. 152; p. 108, *supra*).

(218) Displayed to my right is Figure 99, a reproduction of Figure 77 from Canada's first oral presentation. Figure 77 illustrated the scope of the exploration conducted by the private company under United States permit E2-72. As the Chamber will recall, it was the post-plot map relating to this particular permit that Canada theatrically produced before the Chamber on 5 May; yet all the exploration shown in Canada's Figure 77 was conducted under United States Government authorization, including the exploration depicted by the red-dashed lines that extend into the northeast portion of Georges Bank.

Exploration beyond any of the equidistant lines identified by Canada was also authorized by the United States Government and conducted by the private applicant under permit E3-72, issued in August of 1972, to Shell Oil Company (letter of 9 April 1984, doc. 14, letters of 10 August 1972 and 18 August 1972, doc. 67, items 73 and 74-77). Displayed on my right, as Figure 100, is an illustration of the area covered by Shell's request for authorization to conduct exploration. The area of proposed exploration is shaded in pink, with the exploration subsequently conducted under that permit represented by the black lines. The United States Government once again approved the private company's application as submitted and, in fact, exploration was conducted by the private firm as proposed.

(219) Figure 79 from Canada's oral presentation, which purported to depict the areas surveyed under United States permits E1-74 and E3-75, also contradicts Canada's assertion that United States permit activities after 1972 somehow recognized Canadian permits on Georges Bank. Displayed to my right, as Figure 101, is a reproduction of Canada's Figure 79. However, we have modified Canada's Figure 79 so as to show the exploration actually conducted by the private companies under United States permits E1-74 and E3-75, in addition to the three lines of exploration that Canada depicted in its original Figure 79 (letter of 9 April 1984, docs. 70, 72). As the Chamber will observe, substantial geophysical exploration, far in excess of that depicted by Canada, was conducted on the entire northeastern portion of Georges Bank under these permits.

In sum, the record of United States permit activity on Georges Bank contradicts Canada's contentions that the United States assumed the existence of an equidistant boundary in administering its geophysical exploration programme on Georges Bank. The most that can be said, from Canada's point of view, is that private companies, in both the United States and in Canada, recognized that a dispute existed and obtained authorizations from both countries. This is once again demonstrated by Canada's own presentation.

In Figure 162, that Canada produced at oral presentation, Canada reproduced a map submitted by Digicon in connection with United States permit E3-75. As counsel for Canada noted, the company map reproduced in Canada's Figure 162 depicts both "a lateral line", which counsel for Canada described as the strict equidistance line, and an "alternate line", which counsel for Canada described as the United States claim line in 1975, going down the Northeast Channel (p. 110, *supra*). Thus, Figure 162 is a striking example of a private

compamy conducting exploration on the northeastern portion of Georges Bank that recognized the existence of the dispute between the United States and Canada.

It is also an example of an instance where such a company has played it safe. As you will recall, Digicon requested and obtained authorization under both United States and Canadian permits to conduct exploration throughout the entire northeastern portion of Georges Bank. This permit was granted by the United States without restriction. Once again, Canada purports to rely upon evidence that, rather than supporting its contentions, flatly contradicts them.

The essential fact is that private companies applied for authorization to conduct exploration beyond any equidistant line on Georges Bank and that the United States Government granted every single application to the full extent requested and never limited any such authorization because of any purported Canadian claim to the northeastern portion of Georges Bank.

REJOINDER OF MR. FELDMAN

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. FELDMAN: Mr. President, distinguished Judges, the United States now turns to Canada's arguments regarding economic dependence.

Throughout these proceedings, Canada has attempted to persuade the Chamber that an equitable delimitation requires the division of Georges Bank because the Georges Bank fishery is important to several communities in southwest Nova Scotia. Canada has formulated this argument in different ways at different times. In its pleadings Canada emphasized the "vital" need of southwest Nova Scotia – excluding Halifax – as compared with eastern Massachusetts – including Boston. In the first round of the oral proceedings, Canada asserted "a special economic dependence" of southwest Nova Scotia in attempted analogy with the unique situation of Iceland at the time of the *Fisheries Jurisdiction* case where preferential shares of high seas fisheries rather than exclusive rights were at stake.

In the final round of its oral presentation, Canada has been a bit more restrained as to the facts. The distinguished Agent of Canada states that "the economy of southwest Nova Scotia depends in large measure upon Canada's established fishery on Georges Bank". The United States believes, however, this, too, is a considerable overstatement. Moreover, the legal rationale now put forward by Canada has become even more radical. Canadian counsel told the Chamber that:

> "the larger and more important issue underlying the Court's recognition of regional 'economic dependence' as a 'relevant circumstance within a framework of equitable principles' is not wealth but the recognized responsibility of a State to maintain the structure and viability of its regions and communities." (P. 92, *supra.*)

We will comment on this point later.

The United States has demonstrated in its pleadings and in these proceedings, that Canada's claim of economic dependence is not consistent with the law and is not supported by the facts. We have shown that fishing activities of the Parties are relevant where delimitation of the water column is at issue, but that alleged dependence is not relevant, because dependence means the absence of economic alternatives which, in the words of the Court in the *Tunisia/Libya* case, "are variables which unpredictable national fortune . . . might at any time cause to tilt the scale one way or another".

In cases such as the *Grisbadarna* and the Anglo-Norwegian *Fisheries* case, the law has given weight to the predominant fishing interest of the party which has fished for a longer time and more extensively, and has cut off the less lengthy established fishing interests of the other State. We also demonstrated that the allocation of the high seas fisheries in the *Fisheries Jurisdiction* case is not relevant to the delimitation of maritime boundaries, and that the concept of preferential rights has been overtaken by the recognition of 200-nautical-mile exclusive fishery zones.

The United States has further shown that the Canadian claim of economic dependence has been greatly overstated by exaggerating employment and income attributable to Georges Bank; by confusing Canada's fishery on Georges

Bank with the much larger fisheries of Nova Scotia (see, e.g., VI, p. 99); by ignoring the predominant economic activities in Nova Scotia, particularly services; by confining the analysis to a small subregion of one province of Canada; and by minimizing the opportunities for adjustment within the larger fishing industry and other economic sectors of Nova Scotia and eastern Canada.

Canada's latest response to the United States analysis of this issue consists essentially of three points:

1. the United States criticism of Canada's factual argument is unfounded;
2. the holding of the Court in the *Tunisia/Libya* case does not apply to economic dependence on fisheries resources where fisheries jurisdiction is at issue; and
3. international law recognizes, or should recognize, a State's responsibility for the viability of its "regions and communities" as a relevant circumstance in the delimitation of a single maritime boundary.

We will discuss each of these points in turn.

First, distinguished counsel for Canada says United States counsel has "made the extraordinary allegation that Canada has exaggerated the importance to Nova Scotia of Georges Bank scallops" (p. 79, *supra*), and he attributes that position to a careless misreading of Canadian documents (p. 80, *supra*). The United States will respond to that criticism in a moment, but first we want to explain the importance of the data concerning scallops to Canada's entire argument of economic dependence.

Canada claims that its fisheries on Georges Bank are of major importance to southwest Nova Scotia even if they are not important to Canada as a whole or to the province of Nova Scotia as a whole. Canada measures the Georges Bank fishery as involving 3,600 jobs and 146 million Canadian dollars of gross domestic product in 1980. The Chamber will recall that the United States estimates are much lower. Canada claims that 2,206 jobs, and 96 million Canadian dollars of GDP relate to Georges Bank scallops. In other words, Canada claims that 67 per cent of the jobs and 66 per cent of the income Canada attributes to Georges Bank relate to scallops. Thus if the scallop figures developed by Canada are not accurate, its entire economic argument is in doubt.

In this connection, the United States would like to remind the Chamber that Canada argued in its pleadings that the Georges Bank fishery is essential to the well-being of hundreds of fishermen operating small vessels out of numerous villages in far southwest Nova Scotia (I, Memorial, paras. 143-148). The United States thoroughly rebutted this argument in detail in Annex 32 of the United States Reply (V). As pointed out in that Annex, the evidence clearly establishes that groundfish landed from Georges Bank are of trivial importance to the small vessels of southwest Nova Scotia. That fleet may be important to Nova Scotia, but Georges Bank is not important to that fleet.

Mr. President, it is striking that Canada has made no effort in these oral proceedings to respond to that analysis by the United States.

Canada's major economic interest in the fisheries of Georges Bank is scallops, and those scallops have been taken by no more than 77 large vessels, of which about two-thirds are over 20 years old (based on Peart, T., p. 75, deposited by the United States on 8 May 1984). Most of those vessels are owned by a handful of firms. Forty-five of them operate from just two ports, Lunenburg and Riverport (Jamieson, *et al.*, Table 5, deposited by the United States on 8 May 1984). These ports are located close to metropolitan Halifax, and over 150 nautical miles from the tip of Georges Bank.

With that background, let us consider whether the scallop data presented by

Canada to the Chamber are consistent with the facts, and whether the United States was justified in pointing out that Canada has "exaggerated the importance to Nova Scotia of Georges Bank scallops".

The United States made two basic points: First, that Canada made an incorrect assumption about the dependence of the Nova Scotia scallop fleet on Georges Bank in 1980 that distorted its calculations as to the importance of Georges Bank to the economy of southwest Nova Scotia. The second point was that a table presented by Canada in support of a related assertion concerning 1981 did not in fact support either the assumption or the assertion. Both of these points are valid, and both are important (**VI**, pp. 386-387).

The incorrect assumption that underlies much of Canada's economic analysis is the assumption that all 77 licensed offshore scallop vessels in southwest Nova Scotia fished exclusively and full-time on Georges Bank in 1980. As noted in our last presentation, that assumption appears in footnote 2 of table 8 in Volume II of the Annexes to Canada's Reply. As a result of that assumption, Canada calculates that the Georges Bank scallop fishery provided full employment for 1,309 fishermen in 1980. Unfortunately, that assumption is not correct.

If it were correct, 100 per cent of the scallops taken by the Nova Scotia offshore scallop fleet in 1980 would have had to come from Georges Bank. However, as pointed out in our last presentation on this issue, only 67 per cent of the scallops landed in Nova Scotia by offshore vessels in 1980 came from Georges Bank. Thirty-three per cent, that is 21,340 metric tons (shell weight), came from other areas, for a total offshore catch in 1980 of 64,674 metric tons (shell weight) (doc. 124, deposited by the United States on 28 June 1983).

Therefore, the Canadian figure of 1,309 fishermen employed in the Georges Bank scallop fishery is inflated by roughly one-third. Because of the way Canada calculates indirect employment, this overstatement is reflected in Canada's estimate of indirect employment, as well. We now calculate this one overstatement to represent 691 jobs.

The United States also pointed out in our last presentation on scallop data that Canada was incorrect in asserting that "in 1981, 97 per cent of Canadian scallop landings came from Georges Bank" (**VI**, p. 387). We do not believe we are misreading that statement, which appears at footnote 38, page 21 of Volume II of the Annexes to Canada's Reply.

We drew the Chamber's attention to Table 13 at page 43 of that same Canadian Annex, because that table of Canadian scallop catches was the sole authority cited by Canada for the incorrect assumption for 1980 and the incorrect assertion for 1981 that I have just described. The United States told the Chamber that Table 13 does not support the conclusions for which it was cited, and we stand by that statement.

Indeed, there is no question that both the assumption with respect to 1980 and the assertion with respect to 1981 are incorrect. The issue is whether these are harmless errors.

Distinguished counsel for Canada says that Canada excluded the value of scallop catches from other areas from its valuation of the economic importance of Georges Bank. However, the fact remains that Canada used the wrong figure for harvesting employment related to Georges Bank scallops. In this connection, the Chamber should note that Table 10 presented by Canada in Figure 153 to rebut the United States relates to gross domestic product, not to employment. That table has no bearing on Canada's miscalculation of harvesting employment in the Georges Bank scallop fishery.

For the record, the United States points out that its objections to Canada's calculations of GDP are based on other dubious assumptions made by Canada.

The figure given in Table 10 for value added in processing of scallops in Canada, almost $89 per man-hour, is more than double the figure we have obtained for value added in processing scallops in New England. Certain key parameters used by Canada in this complex calculation cannot be reconciled with the available data. We estimate the value added in processing scallops in Canada at about $38 per man-hour.

Distinguished counsel for Canada has suggested that the United States has not presented a detailed response to all of Canada's calculations. Part of the answer is that Canada did not provide this data until its Reply. Consequently, we had no opportunity to respond in writing, and we have not had the time to cover every issue in these oral proceedings. The other part of the response, as we said on 16 April, is that even if the Chamber accepted all of Canada's figures, the facts do not support the claim of economic dependence on Georges Bank, even for the small area of southwest Nova Scotia.

Canada has argued that the economy of southwest Nova Scotia is dependent upon the Georges Bank fishery. In this connection, Canada emphasizes the importance of what it calls the "basic" sector, by which it means that part of the economy which generates exports from the province of Nova Scotia.

Figure 102, which is now before you, shows the United States analysis of employment in the basic and non-basic sectors in southwest Nova Scotia in 1980. (Basic, non-basic and total employment (1981) in southwest Nova Scotia were drawn from the Canadian Reply, Anns., Vol. II, Pt. 1, App. 2, Table A.2A. Employment in basic (harvesting and processing) and non-basic (indirect) sectors attributable to the Canadian Georges Bank fishery (1984) were drawn from the United States Counter-Memorial (IV), Anns., Vol. III, App. B, Introduction, Table 1.) The data confirm that the basic sector is substantial in this part of the province, but that Georges Bank is not very important to employment in the basic sector, and even less important to employment in the non-basic sector. This graph uses the United States figures for employment related to Georges Bank. If Canada's figures were used, the ratio would be a bit higher, but the difference would not affect the conclusion. Georges Bank is simply not as important to southwest Nova Scotia as Canada would have the Chamber believe.

Unfortunately, the United States has no time to deal with other factual matters where we disagree with Canada's presentation on this issue, particularly the important matter of the many possibilities for adjustment that are available in Nova Scotia. We have tried to point out that the bleak future foreseen by Canadian counsel in this case is not supported by the documents deposited with the Chamber, which reflect the views of other Canadian officials.

We must say a few words about two points of law. First, Canada argues that the *Tunisia/Libya* case should not apply to the delimitation of fishery zones, in so far as it excludes consideration of economic dependence. We do not see the logic of this distinction. If dependence on resources of the continental shelf is not relevant to delimitation of the shelf, why should dependence on fisheries resources be relevant to delimitation of fisheries jurisdiction. The objection in both cases is the same – that a change in economic fortunes can totally change the dependence on the particular resource, whatever it may be.

Canada also urges the Chamber to establish a new principle that recognizes a State's responsibility to maintain its regions and communities. Apparently, Canada believes that international law cannot accept the possibility that some fishermen now living in Lunenburg might have to move to other nearby communities to continue fishing or to find other employment. The United States respectfully submits that this question is a matter of national policy for Canada

to deal with, and not a question of international law that this Chamber should appropriately consider. Indeed, if Canada is going to sustain all its communities, it will do so with national resources – all the more reason that the proper frame of reference for assessing economic dependence is the national economy.

Regional policy is not a universal value. It varies from country to country and from time to time. There is no guarantee that Ottawa will continue to pump money into the fisheries of Nova Scotia or southwest Nova Scotia, even if Canada has its way in these proceedings. The Government of Canada is free to maintain its present regional policy, but it has no right under international law to do so at the expense of the United States of America. The United States respectfully submits that this Canadian line of argument is entirely irrelevant to the judicial duty of this Chamber.

The Chamber rose at 1.05 p.m.

TWENTY-FIFTH PUBLIC SITTING (9 V 84, 3 p.m.)

Present: [See sitting of 2 IV 84.]

REJOINDER OF MR. STEVENSON

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. STEVENSON: Mr. President, distinguished Judges. May it please the Chamber.

I am honoured to have this opportunity to appear again before this Chamber. My purpose is not to repeat prior statements on the legal issues that divide the Parties, but rather to clarify some of the major legal issues. In the course of these remarks, the United States will respond to several of the questions of the Chamber which relate principally to legal matters.

My remarks today will be divided into the following general topics:

First, the law applicable to the determination of the single maritime boundary. Under this general heading the United States will deal with Judge Mosler's second question, with Judge Gros's first, second and fourth questions, with Judge Cohen's first question, and with the President's question.

My second topic will be the effect of the adoption by the Third United Nations Conference on the Law of the Sea of treaty texts with reference to the continental shelf and the exclusive economic zone. Under this heading the United States will respond to the first part of Judge Gros's third question.

My third topic will be Canada's positions on the law applicable to the single maritime boundary.

Fourth, I will give you a critique of the asserted legal basis for Canada's positions.

Fifth, I will deal with certain misunderstandings regarding the United States position.

Sixth, I will summarize certain other Canadian-United States legal differences.

That, Mr. President, will bring me to my conclusion.

I. The Law Applicable to the Determination of the Single Maritime Boundary

The function of this Chamber of the International Court of Justice, under the terms of Article 38 of the Court's Statute, is to decide in accordance with international law such disputes as are submitted to it. The Chamber shall apply in the first instance international conventions and customary international law. The Parties have agreed in Article II of the Special Agreement (I, p. 10) submitting this dispute to the Chamber that the determination of the single maritime boundary is to be made "in accordance with the principles and rules of international law applicable in this matter as between the Parties".

The international conventions in force between the Parties potentially relevant to the delimitation of a single maritime boundary in this case are the Special Agreement and the 1958 Convention on the Continental Shelf.

A. The Special Agreement

There is, of course, no question that the Special Agreement is applicable. But what is its role as far as the substantive law is concerned?

It is the position of the United States that, in submitting this dispute to the Chamber, the Parties in the Special Agreement in no way *implied* the applicability of any particular substantive rules. Thus, all of the arguments of distinguished counsel for Canada based upon any such implication must necessarily fail (**VI**, pp. 167-170, and pp. 36-39, *supra*).

Certainly the United States did not intend to provide for the law applicable to this delimitation by implication. It was, in part, because the Parties could not reach an agreement on the agreed principles of law that this dispute was submitted to the Chamber for resolution by an impartial tribunal in accordance with international law. The Special Agreement does include an express provision providing for the application of the principles and rules of international law. Moreover, it is quite specific in its provisions applicable to the substance of the dispute, that is, in the case of the point of departure and the area of arrival of the line.

Thus, we come to Judge Mosler's second question:

> "In the Parties' view, can the fact that point A is located at the place defined by Article II of the Special Agreement have any bearing on the method for the delimitation of the single maritime boundary in the inner sector of the Gulf of Maine area?" (**VI**, p. 462.)

In our view, the Special Agreement was not intended to "have any bearing on the method for the delimitation of the single maritime boundary" *(ibid.)*. The Special Agreement did not identify any method. To find that it has a "bearing on the method" would increase the scope of the Parties' obligations under the Special Agreement beyond what was clearly intended.

On the other hand, where the Parties expressly and specifically dealt with a substantive matter relating to the location of the single maritime boundary – as they did in the case of the point of departure and area of arrival of the boundary to be determined in this case – the Parties have definitely agreed and they are bound.

This brings us then to our answer to the introductory paragraph of Judge Gros's first question:

> "Are point A and the triangle elements definitively agreed upon by the Parties in the Special Agreement as, respectively, the point of departure and area of arrival of the line, delimiting the maritime zones appertaining to their jurisdiction in the Gulf of Maine area, which the Chamber is requested to determine?" (**VI**, p. 461.)

Our response is that the Parties in the Special Agreement definitively agreed upon the point of departure and the area of arrival of the line which the Chamber is requested to determine.

We will now respond to the first paragraph of Judge Gros's first question:

> "With regard to point A, do the Parties recognize that the point of departure of the single delimitation line requested of the Chamber could not be modified by any agreement they may conclude as to the limit of their territorial waters beyond the present international maritime boundary?" *(Ibid.)*

The United States is of the view that the agreed starting-point would not be modified by any agreement that may be concluded by the Parties as to the limit of their territorial waters beyond the present international maritime boundary.

We will also respond to the second paragraph of Judge Gros's first question:

> "The same question arises in connection with the reservation made in the event of arbitration as to sovereignty over Machias Seal Island and North Rock (cf., where the United States is concerned, its Reply (V), para. 238 and fn. 4)." (VI, p. 461.)

The United States is of the view that any arbitration as to sovereignty over Machias Seal Island and North Rock would not modify the agreed point of departure.

In order to give a complete response to the previous two questions, I should note a slight nuance. Subsequent ratified agreements between the Parties, having the effect of a treaty under the laws of the United States, could of course change the legal relationship between the Parties on these matters if they expressly so provided, just as they could on virtually any other matter. However, we do not contemplate any such agreement.

We will now respond to Judge Gros's second question:

> "Where the triangle is concerned, what is the legal position of the Parties in regard to the effect of their choosing this device in the Special Agreement on the jurisdiction of the Chamber, which has to find in accordance with the rules and principles of law that are applicable to the case?" *(Ibid.)*

The United States is of the view that Article II of the Special Agreement requires that the single maritime boundary to be delimited must end in the triangle even if the application of the principles and rules of international law otherwise applicable would cause the line to miss the triangle. The Special Agreement is a particular international convention within the meaning of Article 38, paragraph 1 *(a)*, of the Court's Statute, establishing in this respect a rule "expressly recognized by the contesting States". Thus, in our view, to repeat our answer to Judge Gros, the single maritime boundary must end in the triangle, even if the application of the principles and rules of international law otherwise applicable, would cause the boundary to miss the triangle.

B. The Convention on the Continental Shelf

The other convention (that is the convention in addition to the Special Agreement between the Parties) potentially relating to the subject-matter of this dispute is the 1958 Convention on the Continental Shelf.

This brings us to Judge Gros's fourth question.

Judge Gros requests us to explain the precise meaning of the following sentence from the United States Reply:

> "The United States and Canada are Parties to the 1958 Convention on the Continental Shelf, and Article 6 of that Convention is relevant to this proceeding as a source of principles and rules for delimitation of the continental shelf; however, the Continental Shelf Convention is not determinative in the delimitation of a single maritime boundary." (VI, p. 462.)

Judge Gros requests us to explain the meaning of that statement. As its name indicates and as Article 6 expressly states, the Convention applies only to the delimitation of the continental shelf. It does not apply to 200-nautical-mile fishery zones, nor does it apply to other maritime zones relating to the exercise of sovereign rights or jurisdiction for any purpose over the waters or sea-bed and soil to which, according to Article III of the Special Agreement, the single

maritime boundary will apply. Thus, we would respond to Judge Gros's question as follows:

In this case, the Chamber has been requested to apply the law that relates to the single maritime boundary. It has not been requested to delimit the continental shelf, fisheries, and other potential rights separately. Article 6 would, of course, govern a delimitation between the Parties to that Convention if the delimitation related only to the continental shelf. But because the law relating to a single maritime boundary that also delimits fisheries or economic zones must be identified and applied in this case, the Continental Shelf Convention is not binding as a matter of treaty law.

In this case, since Article 6 of that Convention is not applicable as a matter of treaty law, the equidistance method does not "ultimately possess" in respect of the single maritime boundary that "obligatory force" of which the Anglo-French Tribunal spoke (para. 70).

We, frankly, do not understand distinguished counsel for Canada's statement that the United States has failed to explain why the Continental Shelf Convention does not apply as a matter of treaty law (p. 50, *supra*). The Convention does not apply, by its terms, as a matter of treaty-law obligation, to the single maritime boundary of which the continental shelf is but one component.

We will now take up the matter of the relationship of Article 6 to the customary law relating to fisheries and other matters.

The decision in the Anglo-French arbitration established a number of points; among these are the following:

1. "The combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, *failing agreement*, the boundary between States abutting the same continental shelf is to be determined on equitable principles." (Para. 70; emphasis added.)
2. "The role of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation." *(Ibid.)*
3. The special circumstances feature of Article 6 "underlines the full liberty of the Court in appreciating the geographical and other circumstances relevant to the determination of the . . . Boundary" (para. 69).
4. There is no onus, or burden of proof, upon the Party claiming special circumstances (para. 68).
5. "Under Article 6 it is the geographical circumstances of any given case which indicate and justify the use of the equidistance method as the means for achieving an equitable solution rather than the inherent quality of the method as a legal norm of delimitation." (Para. 70).
6. Finally, the "rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6" (para. 75).

The six points I have just listed are by and large direct quotations from the Opinion, rather than my own words.

As a result of developments in the jurisprudence, as manifested particularly in this Anglo-French arbitration decision, the customary international law relating to delimitation of boundaries has so evolved that essentially there is now a single unified customary law rule applying to the continental shelf, to fisheries, and to the economic zone. This Fundamental Rule embodies concepts that have developed in the continental shelf cases, both where the Convention was applicable and where it was not, but also taking into account the jurisprudence arising from the fisheries delimitation cases.

Thus, in the United States view, it today makes very little difference whether

Article 6 of the Convention is applicable as a matter of treaty law or merely as a source of customary law as reflected in the Fundamental Rule. In our view, and we believe this also was the view of the Anglo-French Tribunal, the "equidistance-special circumstance" rule and the Fundamental Rule are substantively the same. The only difference is that, if Article 6 applies as a matter of treaty law, the equidistance rule must be considered, but without any priority or presumption in its favour, with the tribunal free to consider concurrently another method or methods.

Distinguished counsel for Canada has attempted to explain the language of the Anglo-French Tribunal, indicating that there was no burden of proof on the party urging the existence of "special circumstances" as being "primarily a matter of procedure" and "having nothing to do with the appreciation of the facts and circumstances of the case" (p. 51, *supra*). However, we find this explanation completely unconvincing. The Tribunal found that it is no longer necessary for a party to have the "legal burden of proof in regard to the existence of 'special circumstances'" (para. 68). Thus, what we have is no longer a two-step rule in which the first issue is whether or not there are special circumstances, with a party having the burden of establishing "special circumstances" as a preliminary requirement for not using the equidistance rule.

But the Tribunal went further. It held that it must consider, as a matter of law, what boundary will be in accordance with equitable principles, taking into account the relevant circumstances. In the Tribunal's own words –

> "Even under Article 6, the question of whether the use of the equidistance method 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." (Para. 70.)

I am again repeating the language of the Tribunal, not my own words.

In the United States view, this language expressly reflects the Fundamental Rule into which "the old continental shelf" law has evolved.

Thus, in our view, there is no duty first to consider the equidistance method, then to determine if it may be adjusted to satisfy the applicable equitable principles, taking into account the relevant circumstances, and only then to turn to another method or methods.

We believe that distinguished counsel for Canada was mistaken, as a matter of law, in suggesting that "the application of the equidistance method or the use of some other method because of special circumstances stand in relationship to each other as rule and exception" or that there is any requirement that "under Article 6 the equidistance method should be the first method to be considered" and only rejected if there are "special circumstances" requiring adjustment or ruling it out (p. 51, *supra*).

Counsel for Canada has, in our view, made a very lawyer-like attempt to bring in by the back door an old – and even then disputed – view of continental shelf doctrine, namely, that equidistance applies unless special circumstances are established. The language in the Anglo-French case does not support any such revival of what some may have considered the old doctrine to provide. In fact, in our view, the Tribunal said precisely the opposite. This attempted revivication of a doctrine must fail in the light of the development of a single unified Fundamental Rule in the jurisprudence, particularly the Anglo-French arbitration, as confirmed by the 1982 Law of the Sea Convention.

What remains, in our view, of the treaty obligation under Article 6, where applicable (and we do not think it is applicable in this case), is to consider the equidistance method under the Fundamental Rule, but without any presumption or priority. Thus, even if Article 6 applies as treaty law in this case, which we do not think it does, equidistance need not be considered first, but it may be considered concurrently with other methods in determining what method or methods best satisfy the substantive requirements of the Fundamental Rule, that is, that the boundary is to be determined in accordance with the applicable equitable principles, taking into account the relevant circumstances in the area.

Accordingly, in the United States view, even if Article 6 were applicable as a matter of treaty law in this case, the combined "equidistance-special circumstance" rule would require concurrent consideration of the equidistance method, but would accord it no primacy. The determination of whether or not there are "special circumstances" is just another expression of the conclusion whether the equidistance method would produce an equitable result in light of the applicable principles and relevant circumstances.

However, even if the inapplicability of the equidistance method depended on an express finding of "special circumstances", the essential geographic circumstances in this case – most particularly the coastal configuration and the location of the land boundary – would constitute such special circumstances.

We believe that, even under the old continental shelf doctrine, the Canadian view of "special circumstances" under Article 6 is altogether too limited. Our view is in keeping with the law as it has developed and in fact is more in line with an analysis set forth in a Memorial of the Federal Republic of Germany in the *North Sea Continental Shelf* cases. We would like to quote a passage from paragraph 70 of that Memorial, wherein the Federal Republic set forth its position on Article 6:

> "'Special circumstances' are always present should the situation display not inconsiderable divergencies from the normal case. The normal case, in which the application of the equidistance method leads to a just and equitable apportionment, is a more or less straight coastline, so that the areas of the shelf apportioned through the equidistance boundary more or less correspond to the shorelines *(façades)* of the adjacent States. Should this not be the case, and should therefore no equitable and appropriate solution result, the clause of 'special circumstances' applies . . . In addition to special situations of a technical nature – such as navigable channels, cables, safety or defence requirements, protection of fisheries (fish banks), indivisible deposits of mineral oil or natural gas – special geographical situations such as special coastal configurations have, above all, been regarded as 'special circumstances' within the meaning of Article 6." (*I.C.J. Pleadings*, Vol. I, pp. 68-69.)

Thereafter, the German Memorial contains quotations from the works of Sir Hersch Lauterpacht, Mouton, Colombos, de Ferron, Padwa, Shalowitz, and McDougal and Burke, which point out that the general geographic features or configuration of the area constitute special circumstances under Article 6.

The distinguished Agent for the Federal Republic of Germany summed up Article 6 in another way:

> "It depends on the specific situation, on the geography, on the land frontiers, on the extension of the continental shelf, etc., whether the combination of all these factors gives the situation such a special characterization that the application of the equidistance line would produce an inequitable result." (*Ibid.*, Vol. II, p. 49.)

He went on to state in the same connection:

> "This cutting off of extensive areas of the continental shelf can only be regarded as special circumstance, because it cuts off extensive areas of continental shelf which should be regarded as a continuation of German territory . . ." (*Ibid.*, p. 51.)

He then concluded that "a 'cut-off effect' invariably is the special circumstance which justifies another boundary" *(ibid.)*.

May I repeat the concluding statement: "A 'cut-off effect' invariably is the special circumstance which justifies another boundary."

The United States has shown that the equidistance line produces an inequitable cut-off in the geographic circumstances of this case. Thus, the equidistance line should not be applied in this case. The cut-off effect must be abated and the relevant circumstances – or, if you will, under the old continental shelf doctrine, the "special circumstances" – in the area must be taken into account.

I turn now, Mr. President, to the Fundamental Rule.

C. The Fundamental Rule

The Fundamental Rule applicable to the delimitation of a single maritime boundary, expressly confirmed by both Parties in their written pleadings – by the United States in its submissions and substantially by Canada in its Memorial and in the conclusions to its Counter-Memorial and Reply (**I**, Memorial, para. 278; **III**, Counter-Memorial, para. 729; and **V**, Reply, para. 375) – is as follows:

> "The delimitation of a single maritime boundary requires the application of equitable principles, taking into account the relevant circumstances in the area, to produce an equitable solution."

In this light, the United States will proceed to respond to Judge Cohen's first question:

> "Is there a unifying, dominant, legal principle that is to provide the basis for the location of a single maritime boundary that unites the old Continental Shelf Doctrine and the old Coastal Fisheries Doctrine to the new 200-mile zone?" (**VI**, p. 464.)

The Fundamental Rule which I have just cited is the "unifying, dominant, legal principle that is to provide the basis for the location of a single maritime boundary". Moreover, to use Judge Cohen's own words, it "unites the old Continental Shelf Doctrine and the old Coastal Fisheries Doctrine to the new 200-mile zone" *(ibid.)*.

This Fundamental Rule was developed by the Court in cases delimiting the continental shelf under customary international law (*North Sea Continental Shelf*, para. 101 (C) (1); *Tunisia/Libya*, para. 37). The Court of Arbitration interpreted and applied Article 6 of the Continental Shelf Convention consistently with the Fundamental Rule for delimitation of maritime areas generally.

The objective of applying the Fundamental Rule is an equitable solution within the law, that is, a solution arrived at by an application of the applicable equitable principles, which are legal rules, in the light of the relevant circumstances. Thus, this rule provides the flexibility necessary to deal with differing fact situations through the selection of the appropriate equitable principles and the determination and balancing-up of the relevant circumstances. Thus, the rule is able to embrace factual situations other than those involving the continental

shelf or only fisheries. This has been the view expressed and applied by the United States from the outset of this case. The repeated insistence of the Agent for Canada in characterizing the United States position as a "legal vacuum" is, in our view, unfounded (pp. 3, 24, *supra*).

The Fundamental Rule does not contemplate that the Chamber would consider different methods as linked to different circumstances. For example, one method for the continental shelf, under Article 6, and some other method for the exclusive fisheries zone. Nor would the Chamber then decide which method or methods to apply in view of whether the continental shelf or fisheries facts are entitled to greater weight.

In this respect, the Fundamental Rule may be said to contemplate what counsel for Canada has described as "one single global operation" to delimit the "single polyvalent line", rather than the identification and fusion of multiple lines designed for specific purposes (VI, p. 168). The Fundamental Rule contemplates that the relevant circumstances will be weighed in the light of the applicable principles so as to arrive at a single method or combination of methods that will give an equitable solution in the particular case.

This brings us to the President's very basic question:

> "In the event that one particular method, or set of methods, should appear appropriate for the delimitation of the continental shelf, and another for that of the exclusive fishery zones, what legal grounds might be invoked for preferring one or the other in seeking to determine a single line?" (VI, p. 461.)

In response to the President's question, we note that, where one method appears under the Fundamental Rule to be the appropriate method for delimitation of the continental shelf, and another method appears appropriate for the exclusive fisheries zone, there appear to be no legal grounds that may be invoked *a priori* for preferring one or the other method in seeking to determine a single line.

Rather, when two methods are called for, the applicable principles and relevant circumstances from which the appropriateness of the respective methods for the delimitation of the continental shelf or the exclusive fisheries zones would follow individually should be considered as an integrated whole.

Due regard should be given to all the relevant circumstances relating to the jurisdictional rights affected by the single boundary, allocating to such circumstances the proper weight in the light of the objective of an equitable solution and the determination of an appropriate method or combination of methods.

Thus, Mr. President, in our view, the objective should be an equitable solution determined in the light of the applicable equitable principles and the identification and balancing up of the relevant circumstances in the particular case. This, of course, means that any express linkage of a particular method with a particular aspect of the single maritime boundary, such as the continental shelf or the fisheries zone, would, in our view, inhibit the Chamber's ability to arrive at the most equitable solution in the light of all the applicable principles and relevant circumstances. It could require the Chamber to apply a method considered to be linked to either the continental shelf or the fisheries zone when, in fact, the most equitable overall solution might well involve neither method nor some combination of the two.

In our view the Chamber should not, and is not required, first to characterize the facts as relating predominantly to either fisheries or the continental shelf, and then to apply a method considered to be linked to one or the other. Such a procedure would, in our view, not be consonant with the transcending principle

of taking into account the uniqueness or individuality of the facts in the particular case before the Chamber.

Thus, to summarize, in our view, under the Fundamental Rule, the Chamber's responsibility is: first, to identify the applicable equitable principles; second, to identify and balance-up the relevant circumstances; and, then, third, to determine what method or methods will meet these substantive requirements of law to produce an equitable solution.

The choice among methods should be an informed choice within the law, not just the selection of any method or methods that will produce an equitable solution. Thus, the method or methods selected must give effect to the applicable equitable principles in the light of the relevant circumstances. However, the Chamber's right and, indeed, its responsibility to find an equitable solution should not be arbitrarily restricted by any presumption in favour of one method or the other.

Such a result would be in keeping with the work of the International Law Commission on maritime boundaries prior to the first Law of the Sea Conference in 1958. The Commission considered four delimitation methods, including the perpendicular to the general direction of the coast and the equidistance method. Ultimately, the Commission chose the equidistance method. In doing so, however, it was concerned, even in the narrow context of the territorial sea, that one method could not equitably be applied in all situations. Thus, the "equidistance-special circumstances rule" was born, and was introduced into Article 6 of the 1958 Continental Shelf Convention. This was done because, as the Anglo-French Tribunal put it, "Application of the equidistance method might not infrequently result in an unreasonable or inequitable delimitation of the continental shelf" (para. 70).

Mr. President, distinguished Judges, this Chamber has the right to select one or more methods, including the perpendicular to the general direction of the coast (which, indeed, has a basis in State practice), without any presumption in favour of equidistance. This is all the more evident in the delimitation provisions relating to the continental shelf and exclusive economic zones of the 1982 Law of the Sea Convention. They do not even refer to equidistance (Arts. 83 and 74, respectively).

So much for general theory. In practice, the concrete circumstances before this Chamber involve both continental shelf and fisheries facts. How in these circumstances may this Chamber find legal grounds, in President Ago's language, "for preferring one or the other method in seeking to determine a single line?"

For the reasons set forth in the United States written pleadings, and in the first round of the oral statements, the United States regards the applicable equitable principles to include:

first, the fundamental principle of respecting the relationship between the coasts of the Parties and the maritime areas in front of these coasts, including the subsidiary principles of non-encroachment, proportionality, and natural prolongation in the geographic sense, that is, coastal-front extension;

the second principle is the principle of facilitating conservation and management of the natural resources of the area;

the third, is the principle of dispute minimization; and

finally, the principle of considering such other circumstances the Chamber regards as relevant in this particular case.

In balancing up the relevant circumstances in the light of these principles, the United States has suggested that the Chamber give more weight to those

circumstances that relate to substantive articulated principles, such as the first three equitable principles identified by the United States. This, in our view, would reflect the importance of articulated equitable principles in achieving an equitable boundary solution, either through negotiation between the Parties or in international adjudication. Moreover – and this consideration responds specifically to the President's question – circumstances relevant to the functional effectiveness of a boundary relating to both the water column and the sea-bed should be given greater weight than circumstances relating to only one of them.

Thus, it is the position of the United States that the relevant circumstances entitled to the most weight in this case are geographic. They relate to the expressly articulated principle of respect for the relationship of the coasts to the sea and to both fisheries and the sea-bed. Mr. Colson discussed these geographic circumstances in the opening round. He will return to his discussion of them later in this round. Natural prolongation in the geological sense, which applies only to the continental shelf, is not a relevant circumstance in this case since the Parties are agreed that there is only one continuous shelf. However, natural prolongation in the geographic sense, that is, coastal-front projection, does apply here. It applies with equal force to fisheries and the continental shelf.

Moreover, coastal front projection will respect the natural boundary at the Northeast Channel and the integrity of Georges Bank. Thus, the circumstances in this case relating to the marine environment reinforce the geographic circumstances. Fisheries generally are associated with particular fishing banks. In this case, commercially important stocks of fish associated with those banks are divided at the Northeast Channel. Moreover, the Northeast Channel is a relevant geomorphological feature in a location where it marks and helps to create a natural boundary. The necessity, in the interests of both conservation and dispute minimization, for single-State management of both the fish stocks and the potential hydrocarbon resources of Georges Bank was set forth by Mr. Colson in some detail in his second presentation in the opening round.

Finally, Mr. President, with respect to the activities of the Parties and their nationals in this area, the predominant interest of the United States in a large number of both resource-related and other activities clearly outweighs Canada's recent development of a single scallop fishery and its claim to as yet unconfirmed hydrocarbon resources. Canada's challenges to the United States predominant interest have been both relatively limited and recent.

Now what does all this mean with respect to the method or methods to be used and the President's basic question? It means, in our opinion, that the Chamber, in selecting a method or methods to achieve an equitable solution, should consider the relative weight of these various circumstances in the light of the applicable equitable principles. This is how equity within the law is to be achieved.

With respect to specific methods, the United States, in its pleadings, considered at some length the use in this case of the strict equidistance method as well as the adjustment of that method proposed by Canada that would give no effect to Cape Cod or Nantucket. Neither method would, in our opinion, satisfy the substantive requirements of the Fundamental Rule in that neither would give effect to the applicable equitable principles taking into account the relevant circumstances in the area.

The two Canadian lines as well as the proposed United States line are shown
(224) on the map before the Chamber and are set forth as Figure 103 in the blue folder which you have – the United States line, the initial Canadian line of strict equidistance, and the actual Canadian line.

It is the position of the United States that the line proposed by the United

States would meet the requirements of the Fundamental Rule. This is not to say, however, that the United States believes or suggests that the Chamber is precluded from using another method or combination of methods to meet the substantive requirements of the Fundamental Rule – this the strict equidistance line or the adjusted Canadian equidistance line cannot do. This, in our view, is nothing more than the word implies – a means – in this case, a means of achieving an equitable result within the law. What is required is to satisfy the substantive demands of the Fundamental Rule, not to use a predetermined method.

Mr. President, that concludes our response to your question.

II. Effect of the Adoption by the Third United Nations Conference on the Law of the Sea of Treaty Texts with Reference to the Continental Shelf and the Exclusive Economic Zone

This brings us to the first paragraph of Judge Gros's third question:

> "Have the texts adopted by the third United Nations Conference on the Law of the Sea, with reference to the continental shelf and exclusive economic zone, any legal effects on the 1958 Continental Shelf Convention and the present state of customary law?" (VI, p. 461.)

We will be a bit expansive in our answer to this question because we believe it is most important to have a clear understanding of the relationship of these three sources of law, that is the 1982 texts, the 1958 Continental Shelf Convention, and customary international law.

These texts in large measure, in our view, either reflect existing State practice or have had a substantial impact on State practice. Although they are in many respects consistent with the 1958 Convention, Article 311 of the 1982 Convention provides that it prevails over the 1958 Convention as between States Parties.

Neither Canada nor the United States is a party to the 1982 Convention, and the United States has not signed the Convention. The relevance of these texts to this case is that, with respect to customary international law, the adoption of these texts in some cases has confirmed existing law; it has also so influenced the behaviour of States that other provisions may now reflect customary international law.

The provisions most relevant to this delimitation reflect existing customary law – neither delimitation article (Article 74, relating to the exclusive economic zone, or Article 83, relating to the continental shelf) includes any specific reference to the equidistance method. Rather, they provide that delimitation shall be effected "on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice". In the United States view, this means on the basis of any relevant treaty between the Parties and on the basis of the customary international law of maritime boundary delimitation. Given the extensive discussion of the decision of the Court in the *North Sea Continental Shelf* cases at the conference, which had widespread support, we believe the specific, and legally unnecessary, reference to the Statute of the Court is a specific indication that the conference was aware of the important role of that decision as a source of law.

An important underlying question that has arisen in these proceedings concerns the relationship between the development of customary international law, the principles relevant to delimitation, and the factors relevant to the application of those principles.

This question principally concerns the relationship between the continental shelf and fisheries or exclusive economic zones.

The continental shelf concept originated with the Truman Proclamation and was rapidly embraced by widespread State practice, and ultimately was reflected in the 1958 Convention on the Continental Shelf and the Opinion of the Court in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 3, para. 47).

The idea of fishery zones of limited breadth has a long history, antedating that of the continental shelf principle. However, it is only recently that the concept of fisheries jurisdiction differing by an order of magnitude from the breadth of the territorial sea has come to be accepted. The Third United Nations Conference on the Law of the Sea had a major impact on this new development in State practice. Even before the conclusion of the Conference, a large number of States that previously had claimed fisheries jurisdiction, at most to 12 miles, established fishing zones or economic zones generally modelled on the negotiating texts before the Conference. This process has continued since the end of the Conference.

The first question that arises in this connection is whether the basis of title for the fisheries or economic zones differs from that for the continental shelf, as Canada has asserted. We submit that there is no difference. In each case, it is the sovereignty of the State over the coast that is the basis of title, not distance, not economic dependence. In each case, the fundamental premise is that of appurtenance to the land, not proximity. This is true not only of the continental shelf but of the exclusive economic zone as well.

Article 55 of the 1982 Law of the Sea Convention defines the economic zone as an area adjacent to the territorial sea, subject to a special régime that allocates competences between the coastal State and all States. It makes no mention whatsoever of a 200-mile limit. In fact, this limit is set forth in a separate Article – Article 57 on "the breadth of the exclusive economic zone".

In stressing the importance of the 200-nautical-mile limit, our Canadian colleagues regrettably confuse the question of the basis of title and the content of the zone with the maximum seaward limits of jurisdiction. Those limits were designed to create a reasonable balance between coastal and international interests, not to define the basis of title or the nature of jurisdiction, and certainly not to affect bilateral delimitation. We will proceed now to identify certain other factors that indicate that Canada's reliance upon the 200-nautical-mile limit as the basis of title is misplaced.

As to fisheries, the nature of the zone is clear. Thus, the United States originally proposed that, with respect to fisheries jurisdiction, management responsibility be based on the migratory characteristics of different species, allocating such responsibility to the coastal States for coastal species, to the State of origin for anadromous species, and to competent organizations of States with respect to highly migratory species (UN doc. A/AC.138/SC.II/L.9). These principles were, in fact, similar to those consistently enunciated by Canada (**II**, United States Memorial, Ann. 91). These principles were merged into the economic zone articles by the Law of the Sea Conference, initially through means of a fisheries proposal made by Canada and others (UN doc. A/AC.183/SC.II/L.38).

Since most coastal species in most parts of the world do not migrate seaward of 200 nautical miles, a 200-nautical-mile limit was considered a satisfactory basis for dealing with such species, and had the virtues of ease of identification for enforcement purposes and political appeal to States that already had made 200-nautical-mile claims. However, the Conference also adopted special rules for anadromous, catadromous, and highly migratory species, and even for coastal

species that migrate seaward of 200 nautical miles. Thus, the 200-nautical-mile line is by no means a description of the nature of the fisheries régime in the economic zone.

Like the 1958 Conference, the Third United Nations Conference on the Law of the Sea adopted a pragmatic rather than a legal conceptual approach to the issue of the seaward limits of jurisdiction on the sea-bed. The object of Article 76 was: (1) to place virtually all potential hydrocarbons of the sea-bed, including the continental rise, under coastal-State jurisdiction, thereby accommodating the economic and environmental interests of broad-margin States and avoiding further complications in the negotiations regarding the sea-bed beyond national jurisdiction; (2) to accommodate the political demands of States that had made 200-mile claims; (3) to resolve an issue that already plagued the International Law Commission and the First Conference, namely, the apparent discrimination among coastal States caused by seaward limits dependent solely on the variable geography of the sea-bed; and (4) to establish permanent, reasonably identifiable arbitrary lines dividing the areas of coastal-State jurisdiction from the sea-bed beyond. The fact that an international commission of non-lawyers was proposed to review the lines (Ann. II and Art. 76, para. 8) is itself evidence of an emphasis on administrative concerns relevant to geography, rather than legal principles.

If there could be any doubt that the addition of a 200-mile alternative to the definition of the continental shelf was not intended to have any effect on bilateral delimitation, Article 76 completely dispels that doubt. It makes entirely clear that Article 76 is without prejudice to the question of delimitation.

In brief, Mr. President, the maximum seaward limits of coastal-State jurisdiction have nothing whatsoever to do with the basis of title but were merely pragmatic accommodations of a variety of political, economic and administrative concerns.

The Chamber adjourned from 4.15 p.m. to 4.35 p.m.

When we adjourned I was discussing the effect of the adoption by the Third United Nations Conference on the Law of the Sea of treaty texts with respect to the continental shelf and the exclusive economic zone.

The next question which I would like to address in this connection is whether the advent of the new jurisdiction, namely, the exclusive economic zone, created by one of these treaty texts, affects the circumstances relevant to this delimitation.

With regard to the geography of the coastline, my answer to this question is no. The configuration of the coast will have the same effect on delimitation of fisheries or economic zones as it has on the continental shelf. It will produce the same distortions if an equidistance line is used. It will result in roughly the same geographic calculations on coastal proportionality.

With respect to other relevant circumstances, the answer is yes. The advent of new forms of jurisdiction affects, either in kind or in degree, the relevant circumstances other than those related to the geography of the coastline.

The most important of these additional relevant circumstances is the nature and distribution of fish stocks. The reason for this is that the primary motivation in creating these new forms of jurisdiction was to facilitate the conservation and management of fish stocks. It was a direct response to the failure of international fisheries organizations to deal adequately with the problem of over-fishing. Indeed, the very first extended jurisdiction claims of the South American States were justified in part as a response to indiscriminate whaling. The very text of the

1952 Santiago Declaration of Chile, Ecuador and Peru reveals an overriding concern with conservation of fisheries (Declaration on the Maritime Zone, 18 August 1952, United States Memorial, Ann. 79).

Thus, the basis of the management and the conservation model set forth by the Third Law of the Sea Conference is quite clear. It rests upon two principles: first, discrete stocks of fish should be managed as a whole throughout their migratory range. Second, primary responsibility for management of those stocks should reside in a single interested State wherever possible, be it the coastal State in the case of coastal stocks, or the State of origin in the case of anadromous and catadromous stocks.

The underlying premise is, of course, that such States will be most likely to ensure effective conservation. That premise is not limited to conservation itself, but to the maintenance of an environment that protects the stock. Thus, for example, one of the reasons for vesting primary authority over anadromous stocks in the State of origin was to encourage that State to control industrial uses of the streams in which they spawn.

A similar consideration is applicable to the continental shelf. The effect of extended coastal-State fisheries jurisdiction is to increase the interest of the coastal State in regulating uses of the continental shelf that would interfere with the conservation of fish stocks. This development will reinforce the obligation under Article 5, paragraph 1, of the Convention on the Continental Shelf to avoid unjustifiable interference with conservation of the living resources of the sea, as well as the newer environmental obligations of the coastal State with respect to the continental shelf, reflected in Articles 208 and 210 of the 1982 Convention.

Thus, the delimitation of both fishing jurisdiction and continental shelf jurisdiction should take into account, as a relevant circumstance, the extent to which that delimitation reflects the values of the new customary law of fisheries. That is, the delimitation should avoid the pitfalls of dividing the interest in conserving a stock of fish, as well as the danger of separating the interest in protection of the habitat of fisheries from the interest in alternative industrial uses of the area. In brief, delimitation should avoid the "common pool" problem wherever possible.

In some respects, customary law as reflected in the 1982 Convention has altered the meaning or assumptions of the Continental Shelf Convention.

To the extent that Article 6 of the Continental Shelf Convention is consistent with the Fundamental Rule of customary international law and its application produces the same result under the Fundamental Rule – which we believe to be the case here – no difficulty will arise. However, in light of the interpretation of Article 6 proferred by our Canadian colleagues, giving primacy to proximity and equidistance, we are compelled to note that these interpretations – if they ever were plausible – have been superseded by the developing customary law.

Our position, moreover, on this issue is supported by the nature and purpose of the 1958 Conventions. They were not mere exchanges of promises altering the obligations of the Parties under customary law. They were intended to be statements of universally applicable principles of law, whether by virtue of universal ratification or by their influence on State practice. One of the greatest impediments to the achievement of such universality in the case of the 1958 Continental Shelf Convention was Article 6 itself, as was made clear in the *North Sea Continental Shelf* cases, precisely because States were not prepared to accept the kind of implications that Canada now reads into that text. Accordingly, an interpretation of Article 6 that varies from customary international law clearly defeats the underlying purpose of the Convention, namely to establish univer-

sally respected rules, and it is therefore at variance with the fundamental rules of treaty interpretation. In our opinion, such an interpretation would also complicate the delimitation task that will now face most States and Tribunals, namely, the simultaneous delimitation of the continental shelf and the economic zone in the vast areas where they overlap.

In brief, the 1958 Conventions should not be construed so that they become a barrier to universality by isolating their parties from other States, as that was not their intent, but rather should be construed in a manner that promotes universal respect for the rule of law. This was precisely what was done by the Tribunal in the Anglo-French arbitration.

This concludes, Mr. President, a rather lengthy response by the United States to the first part of Judge Gros's third question.

III. Canada's Positions on the Law Applicable to the Single Maritime Boundary

A. In General

At the outset of my previous discussion of the legal issues, I mentioned the difficulty in presenting these issues as a result of Canada's presentation, in many different guises, of what was basically the same argument in favour of the use of the equidistance method in this case.

That problem persists. In fact, it has been exacerbated by the Canadian oral presentations, which rely essentially upon previously unarticulated approaches in sustaining the central Canadian thesis that equidistance should, as a matter of law, be applied in this case. These new Canadian approaches to the fundamental legal problem of deciding what is the applicable law in determining a single maritime boundary complicate immeasurably the task of Canada's adversary in complying with the prescription of Article 60 of the Rules of Court to present succinctly the legal issues that divide the Parties. How and where have the Parties joined issue on legal matters?

We disagree very sharply with the distinguished Agent for Canada's statement that Canada "has committed itself to a clearly defined and integrated set of principles and to a method and line" (p. 4, *supra*). Canada has, of course, adhered steadfastly to one method – equidistance – and to one line – the adjusted equidistance line – adjusted to give no effect to Cape Cod and Nantucket. But its principles have, on their face, varied from the Fundamental Rule, to equidistance as a legal requirement of Article 6, to proximity as a legal requirement of either the distance principle or the so-called "overriding general principle of geographical adjacency measured from the coast" (VI, p. 227), and back again to a mélange of these so-called legal requirements and the Fundamental Rule, which has been reduced beyond recognition to a mere test of equity.

The problem of joining issue with Canada can best be met by describing briefly for this Chamber the United States understanding of Canada's diverse approaches in its written pleadings and in its oral presentations. The United States then will attempt to identify for the Chamber the recurrent themes, illuminate what is fundamental to Canada's case and what is not, and show the major legal areas of disagreement between Canada and the United States.

B. As Stated in Canada's Written Pleadings

The position of Canada as stated in its written pleadings is essentially the approach to which the United States responded in its first oral statement.

Canada's position was that a single maritime boundary must be achieved on the basis of the application of equitable principles in the light of the relevant circumstances to achieve an equitable solution. This was the Fundamental Rule to which both Parties have agreed and attributed central importance until Canada chose greatly to play down its role in the oral proceedings.

Recognition of the fundamental norm in single maritime boundary delimitations is common ground in all the Canadian written pleadings. I refer the Chamber to paragraph 278 of the Canadian Memorial and to the conclusions of its Counter-Memorial and Reply (Memorial, para. 278; Counter-Memorial, para. 279; and Reply, para. 375).

Apparently in response to United States criticism of Canada for setting forth this Fundamental Rule in its Memorial without identifying the applicable equitable principles, Canada did propose in its Counter-Memorial and Reply the specific equitable principles referred to in the United States Reply and oral statement (Counter-Memorial, para. 729, and Reply, para. 375 (3)).

Nevertheless, although Canada expressly endorsed the Fundamental Rule in its written pleadings, the purported equitable principles it identified demonstrated Canada's reliance upon two notions that previously and firmly had been rejected by the Court – proximity and economic dependence (United States Reply, paras. 4-11).

Thus, our greatest difficulty in responding to Canada's application of the Fundamental Rule was that the specific equitable principles set forth by Canada were not equitable principles at all. They were merely a way of supporting the equidistance method by, in effect, treating that method as if it were the first equitable principle. Canada sought support for application of this artificial principle in its second asserted equitable principle – economic dependence – which, as the United States demonstrated in its opening legal statement and in Mr. Feldman's two statements, is not a relevant circumstance, much less a principle. Finally, equidistance is also deemed by Canada to be supported by the conduct of the Parties as indicia of what the Parties themselves have considered equitable. The United States views this so-called principle only as a circumstance to be weighed with other circumstances. Moreover, in the United States view, it supports the United States boundary line, not the Canadian.

C. As Stated in the Oral Proceedings

When it came to the oral proceedings, Canada adopted quite a different approach. In neither his opening nor his closing statement in the first round did the distinguished Agent for Canada reaffirm the role of the Fundamental Rule as previously stated. Rather, in his opening statement, he referred to "equity within the law" as the governing concept. The applicable law, according to Canada, is to be found first in any relevant treaty, and, if no treaty rule of delimitation is directly applicable, then in the law derived from the jurisdiction to be delimited (VI, p. 21). He stated the Fundamental Rule then is to be applied to determine the equitableness of the results.

In other words, the Fundamental Rule by itself is now viewed by Canada as essentially a test of equity with little or no legal content – and not alone fulfilling the law component of "equity within the law". In this respect, the Canadian and United States positions are diametrically opposed. Under the United States view, the equitable principles are legal rules and the Fundamental Rule provides both the law and the equity of "equity within the law".

In his concluding statement of the first round, the Agent for Canada described the "two overriding general principles that provide the legal foundation for a

single maritime boundary beyond the limits of the territorial sea: equity within the rules, and geographical adjacency measured from the coast as the basis of coastal State title" (VI, p. 227).

His treatment of "equity within the rules" is similar to that in his opening statement. However, he then added this new concept, "geographical adjacency measured from the coast" as one of the "twin pillars" for determining a single maritime boundary (VI, pp. 227-228). This new concept is not clearly described, but is stated to be "inherent in the equidistance-special circumstance rule" of Article 6 and manifested in the so-called distance principle (VI, p. 228). We can only conclude that the Agent for Canada is suggesting still another variant of proximity to support the use of the equidistance method.

In conclusion of this point, the new Canadian position, in effect, denies that the Fundamental Rule has any more than incidental legal content. It is regarded simply as a means of testing the equity of a line previously drawn in accordance with the law-dictated equidistance method.

IV. Critique of Legal Basis for Canadian Position

Canada's position makes the task of a responsible adversary attempting to join issue comparable to that of a marksman attempting to hit a randomly moving target. Nonetheless, in order to assist the Chamber in focusing upon the principal legal issues dividing the Parties, the United States will here re-state what it understands to be the present Canadian position as synthesized from the statements of the Canadian Agent and distinguished counsel. We will then indicate the reasons why the United States disagrees with the Canadian position as we understand it.

A. Equity within the Law

First, a point of general agreement. The United States does agree with the general objective of achieving equity within the law. In the United States view, it is not merely a question of achieving an equitable solution, but an equitable solution resulting from the application of specific equitable principles, which are legal principles in the light of the relevant circumstances in accordance with the Fundamental Rule.

B. Treaty Law

With respect to the conventional law, Canada relies on two treaties – the Special Agreement and the 1958 Convention on the Continental Shelf. It is the United States position that the Special Agreement, although clearly applicable, has only a limited substantive law function, namely, as indicated in our response to Judge Gros's first question – to require that the boundary to be delimited is to begin at the agreed starting-point and is to terminate within the triangle.

Thus, the United States must strongly disagree with the contention of distinguished counsel for Canada that other substantive law inferences may be drawn from the Special Agreement (VI, pp. 165-169). To imply substantive law consequences from procedural terms of the Special Agreement would, in the view of the United States, be contrary to the intention of the Parties in entering into the Special Agreement to submit this dispute to adjudication.

As to Canada's contention that Article 6 of the 1958 Convention on the Continental Shelf is applicable as Treaty Law to the determination of the single

maritime boundary, the United States disagrees for the reasons set forth earlier in our response to Judge Gros.

C. Customary Law – the So-Called Distance Principle

I now turn at somewhat greater length to the question of customary law, particularly Canada's assertion of a new so-called distance principle.

Canada's position is that, if Article 6 of the 1958 Convention is not legally binding as a matter of treaty law or does not encompass all aspects of the delimitation of the single maritime boundary, then, as a matter of customary international law, the Chamber in determining a single maritime boundary must give effect to new developments in the law, that is the so-called "distance principle". This Canadian proposition requires an assumption that the 1982 Convention on the Law of the Sea established the "distance principle" as the applicable law to be applied through the equidistance method.

Canada, in fact, has used this so-called distance principle in at least three different ways. Initially, the distance principle was used to support Canada's allegation of its first specific equitable principle – that of proximity. Secondly, it was urged by the Agent for Canada as an applicable legal principle that might be applied in fulfilment of the law component of the concept of equity within the law. More recently, in his concluding statement in the first round, the Agent for Canada again urged its independent application as the principle of geographic adjacency measured from the coast (**VI**, pp. 227-228).

In the end, Mr. President, it is important for the Chamber to recognize that what Canada is really urging is that there is a legal obligation to apply the equidistance method as the method of implementing the distance principle.

The United States disagrees that there is a so-called distance principle for reasons set forth at some length in its written proceedings, in the initial oral presentation and in our response to Judge Gros's third question. But Canada's continued emphasis upon it requires a further reply.

Canada's distance principle confuses three concepts. These are: (1) the source of jurisdiction; (2) the outer limit of jurisdiction; and (3) the delimitation of areas of disputed jurisdiction between neighbouring States.

In the United States view, the source of jurisdiction, the basis of title, is not, as Canada contends, the distance from the coast, but rather sovereignty over coastal land. As the Court stated in the *North Sea Continental Shelf* cases, "the land is the legal source of the power which a State may exercise over territorial extensions to seaward" (para. 96). It is because maritime jurisdiction extends from the coastal land that the relationship of the coast and the maritime area in front of that coast is so important to boundary delimitations. The definitions of the exclusive economic zone and the continental shelf found in the 1982 United Nations Convention on the Law of the Sea both recognize this link of the maritime area to the sovereignty over the land from which they extend. Thus, as I have already noted, Article 55 defines the exclusive economic zone as "the area beyond and adjacent to the territorial sea"; while Article 76 defines the continental shelf as "the sea-bed and subsoil in the submarine area that extends beyond [the coastal State's] territorial sea throughout the prolongation of its land frontier . . .".

Canada ignores the distinction between land as the source of sovereign rights, and thus, the basis of title, and the 200-nautical-mile distance as the seaward limit of these rights. These distances are merely the seaward limits to which such jurisdiction may extend.

I turn now for a moment to distinguished counsel for Canada's criticism of the

United States for not accepting the "correlation between the legal basis of the entitlement to the marine area in question and the method of delimitation which is legally appropriate" (VI, p. 176). He asserts the United States fall-back defence is "to minimize . . . the extent of the development of the Law of the Sea in the direction of the exclusive economic zone". By this, he apparently means our refusal to accept the distance principle and our reliance upon the gradual customary evolution of the relevant principles found in the continental shelf and fisheries cases. However, he asserts that the United States concentrates its efforts on its "frontline defence" – the claim "that the question of delimitation of the economic zone has no connection with the question of entitlement to that zone" *(ibid.)*.

Mr. President, this goes beyond what the United States had asserted. The closest approximation in the written pleadings is the statement in the United States Reply indicating that the "reasons underlying the adoption of an outer limit of 200 nautical miles had nothing to do with delimitation" (para. 89).

This is quite a different matter, since it is entirely clear that the 200-mile limit was established, among other reasons, to obtain a political consensus on an economic zone, while at the same time protecting navigational rights, and to include the seaward migratory range of most species of fish. Delimitation was not a consideration.

The United States position is straightforward and unambiguous. The United States does not agree that the distance principle is the fundamental basis of title. Furthermore, even were the distance principle the legal basis of title, it would not require the application of the equidistance method or a principle of proximity in delimitation.

In his oral statement, distinguished counsel for Canada has been at some pains to state his awareness that legal title and delimitation "are not synonymous or identical concepts" (VI, p. 177). He could hardly do otherwise in view of the express finding of the Court in the *North Sea Continental Shelf* cases (para. 46) that "the appurtenance of a given area . . . in no way governs the precise delimitation of its boundaries . . .".

Let me reiterate once again that the two Law of the Sea delimitation Articles (Article 74 on the Exclusive Economic Zone and Article 83 on the Continental Shelf), which reflect customary international law, contain not one word about the applicability of the distance principle or the equidistance method of delimitation.

D. Proximity

Closely related to Canada's reliance upon the distance principle is its reliance upon the proximity concept.

The distinguished Agent for Canada, in his eloquent concluding statement, squarely rooted the Canadian case on the law of delimitation in the concept of proximity. Subject, in his view, to only what he regards as the most minor deviations, his conclusion is indistinguishable from that of Denmark and the Netherlands in the *North Sea Continental Shelf* cases, where it is stated "hence, delimitation must be effected by a method which will leave to each one of the States concerned all those areas that are nearest to its own coast" (para. 39).

In rejecting that contention with respect to delimitation, the Court observed that

> "this situation may only serve to obscure the real issue, which is whether it follows that every part of the area concerned must be placed in this way,

> and that it should be as it were prohibited that any part should not be so placed. The Court does not consider that it does follow, *either from the notion of proximity itself*, or from the more fundamental concept of the continental shelf as being the natural prolongation of the land domain." (Para. 40; emphasis added.)

In our view, the maxim that "the land dominates the sea" is another way of saying that sovereignty over the coast generates the relevant offshore jurisdiction. That being the case, the longer the coastline of any given State from which jurisdiction over any given point at sea can be measured, the greater the underlying basis of its jurisdiction over that point as compared with another State that has a shorter coastline generating jurisdiction over the same point.

Mr. President, this is the legal analogue of examining the extent of activities of the contesting States – the strength of their contacts with the area – where title over land territory is generated by conflicting claims of effective occupation.

In this regard, in our view, the Agent for Canada ignores the most important aspect of any principle of proximity, namely, that whatever its applicability to *terra nullius*, or an isolated island, it has no applicability where the area is a physical extension of the territory of two States.

The proximity arguments made by Canada in effect ignore these basic facts. Rather, counsel for Canada contend that the jurisdictional claim of the coastal State over fisheries and the continental shelf automatically weakens as the area moves farther out to sea. This premise is expressly contradicted by the fact that very broad limits of coastal-State jurisdiction now have emerged in international law. Their very essence is that they are not proximate to the coast.

The outer limit of the continental shelf was extended in the 1982 Convention to the outer edge of the continental margin, rather than being fixed at the 200-metre isobath or even the foot of the continental slope, precisely because it is the continental rise, seaward of the continental slope, that is of greatest concern to many coastal States as a potential source of hydrocarbons. Similarly, a limit of 200 miles was considered appropriate for coastal species of fish precisely because it was considered important to give the coastal State control over these species to the very seaward limit of their migratory range, particularly where spawning grounds are at the seaward end of their migratory range, as on Georges Bank.

In brief, no point on the continental shelf or in the economic zone is *a priori* of lesser interest to the coastal State than any other. Each coastal State has a full, independent, and inherent right to exercise jurisdiction to the seaward limits permitted by international law, irrespective of proximity.

Where those rights of two coastal States conflict, there can be no assumption that the greater interest or the greater right is the more proximate one. The question is which parts of the area more appropriately are regarded as the extension of one coast rather than that of the other, and not which parts of the area are closer to one coast than to the other.

Accordingly, our position is that the 200-mile distance limit is irrelevant to bilateral delimitation, but even were it relevant, its implications would be precisely the reverse of those suggested by Canada. The 200-mile limit, by virtue of its enormous breadth, in and of itself contradicts any implication of proximity as the basis of the rights of the coastal State.

It is of course correct that an isolated point of land facing an uninterrupted expanse of the open sea will generate a so-called "radial projection" of jurisdiction to the limits permitted by international law, but we fail to see the relevance of this point to the equitable resolution of the problems posed by the cut-off by such a radial projection of another State's coastal projection seaward.

It is this so-called radial projection that gives rise to the problems of cut-off; it does not resolve them. It is the so-called radial projection that makes any principle of proximity, and its companion, the equidistance method, inequitable where a short inward-facing coast of one State is perpendicular to a long seaward-facing coast of another, as well as in many other situations. It is the shortcomings of the so-called radial projection that created the difficulties in the *North Sea Continental Shelf* cases, in the *Tunisia/Libya* case, and in the Anglo-French arbitration, and that required the tribunal in each case to resort to the equitable principles of delimitation contained in international law, taking into account the coastal configuration, the relative proportionality of the coasts, and other relevant factors in resolving the case. It is unyielding insistence on the so-called radial projection that has caused most of the delimitation disputes between States, including those that recently have been brought before this Court. And it is these facts that should lead this Chamber to seek the means to resolve the problems Canada's claimed radial projection poses in cutting off the seaward extension of the coast of Maine.

Thus, in this case, the basic question is the extent to which, if any, areas that are extensions of long seaward-facing segments of the coast of the United States – indeed, that are within 200 miles of those long seaward-facing segments of the United States coast – can be cut off by the shorter inward-facing coast of Nova Scotia.

Learned counsel for Canada suggests that the solution to the cut-off problem posed by the so-called radial projection is equidistance. This conclusion rests on the premise so often repeated by Canada, namely, that proximity is the basis for delimitation. Canada argues that this result is equitable because it leaves to each State the area closest to its coast.

Mr. President, there are other fallacies in this argument. First, it presumes that the so-called radial projection of jurisdiction establishes a hierarchy or jurisdiction extending seaward from the coast. There is nothing in the law of the continental shelf, in the law of fisheries jurisdiction, or in the law of the exclusive economic zone to support such a proposition. One will search the text of the 1982 Convention in vain for such a proposition.

Second, the radial projection theory presumes that the interests of the coastal State in fact decrease as one moves further out to sea. Here we believe learned counsel for Canada gravely confuses the nature and purposes of the territorial sea, and perhaps the 24-mile contiguous zone referred to in Article 33 of the 1982 Convention, with the nature and purposes of the continental shelf and exclusive economic zone.

The fundamental distinction between the territorial sea and jurisdictional zones seaward of the territorial sea is that, in the territorial sea, the coastal State has control not only over resource-related and other economic uses of the area, but over virtually all activities. Aside from straits, aircraft and submerged submarines may not enter the territorial sea without consent, and surface ships may only navigate in innocent passage, namely, passage that is not prejudicial to the peace, good order, or security of the coastal State, and even then subject to coastal-State suspension and regulation. It is evident that the security of the land territory of the coastal State is the interest protected by such additional jurisdiction.

This being the case, we can well understand that, all other things being equal, proximity would be an important factor in effecting an equitable accommodation of the interests of two coastal States in an area where narrow territorial seas overlap. Nevertheless, even in the case of the territorial sea, the very existence of control regarding navigation and overflight still would require that the naviga-

tion interests of the two States be examined in effecting an appropriate delimitation. This, in our view, explains why the rules of delimitation in Article 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and Article 15 of the 1982 Convention on the Law of the Sea emphasize equidistance, but nevertheless not without significant qualification.

On the other hand, Article 2 of the 1958 Convention on the Continental Shelf, and Articles 56 and 77 of the 1982 Convention on the Law of the Sea, make clear that the sovereign rights and jurisdiction of the coastal State over the continental shelf and the exclusive economic zone are for limited purposes relating to resources. Articles 3 and 5 of the Convention on the Continental Shelf, and Articles 58 and 77 of the 1982 Convention, make clear that navigation and other activities continue to be governed by high-seas principles. Thus, neither the continental shelf nor the economic zone are buffer zones designed to enable the coastal State to prevent foreigners from posing a security threat to the coast.

Thus, although the purpose of the jurisdiction over virtually all activities in the narrow territorial sea is to accommodate the interest of the coastal State in keeping foreigners from approaching too close to the coast – which inherently suggests considerations of proximity – the purpose of the jurisdiction over the broad continental shelf and economic zone is to accommodate the interests of the coastal State in controlling the uses of the resources located at sea – which has no inherent relationship with proximity to the coast.

Mr. President, although we do not concede the points made by our Canadian colleagues in regard to the radial projection, we would note that, even were one to take into account all of the coast of Nova Scotia facing the open Atlantic, as well as that facing the Gulf of Maine, the Northeast Channel off Georges Bank would be within 200 nautical miles of approximately equal lengths of coastline of the United States and Canada. The points to the northeast of the Channel, that is, those on the Scotian Shelf, generally lie within 200 nautical miles of longer segments of the Canadian coastline than of the United States coastline. Conversely, the points to the southwest of that Channel, that is, on Georges Bank, generally lie within 200 nautical miles of longer segments of the United States coast than of the Canadian coast. In that respect, therefore, the Canadian proposals contradict the very premise upon which they purport to rest, namely, the basis of title of the coastal State: since, in the United States view, sovereignty over the coastline is the basis of title, the longer the segments of its coastline that generate jurisdiction over any given area, the stronger a coastal State's claim over that area as against another coastal State.

Accordingly, it is the opinion of the United States that Canada's emphasis upon proximity has no foundation in the law of the continental shelf, and the exclusive economic zone does not take into account the special and limited nature of the jurisdiction of the coastal State in such areas, and if pressed to its logical conclusion, would confuse the economic zone with the territorial sea.

That, Mr. President, concludes my critique of the Canadian legal theory.

I now turn to certain misunderstandings with regard to the United States legal position.

V. Misunderstandings as to the United States Legal Position

As I indicated at the outset, the United States would like to take this opportunity to clarify any misunderstandings that may have been created in the course of the oral statements as to the United States position on a number of legal questions.

A. Method

In many ways, the most serious misunderstanding of the United States position relates to the role of a method or methods. The distinguished counsel for Canada has argued that, in the United States view, any method may be applied providing the method is equitable. He states that we "concede that the choice of method is a matter of indifference to the law and is governed solely by the equity of the result" (**VI**, p. 170). This is not the United States position. As indicated expressly in both the written pleadings and its oral statements, the United States recognizes and has stated unequivocally that a method must be appropriate in meeting the legal requirements of the Fundamental Rule to produce an equitable solution (**VI**, pp. 254, 283-284; **II**, Memorial, paras. 237-238; **IV**, Counter-Memorial, paras. 136-139). Thus, under the Fundamental Rule, the applicable equitable principles must be identified and applied in the light of the relevant circumstances. This we, but not Canada, have done.

In the United States view, moreover, it is an inaccurate characterization of the United States position to remove from its context a statement relating solely to the equitable solution resulting from the use of a method, and to allege that, in the United States view, this is the only delimitation requirement.

This is inaccurate because the Fundamental Rule that the United States consistently has supported and applied requires conformity with the applicable equitable principles – principles of international law – in the light of the relevant circumstances.

There may also be another explanation of this Canadian misunderstanding of the United States position. In the Canadian oral statements, the role of the Fundamental Rule has, in fact, been reduced to that of determining the equity of a method otherwise determined in accordance with the applicable law. Thus, in this view, if only the Fundamental Rule were applied, there would be no legal content to the decision to apply one method or another. This illuminates the present very basic difference between the Canadian and United States approaches to the governing law in delimiting a single maritime boundary.

The United States (and Canada, as well, until the oral proceedings) have viewed the Fundamental Rule as providing equity within the law by requiring a solution in accordance with the applicable equitable principles, which are legal rules, in the light of the identification and the balancing up of the relevant circumstances. In the United States view, this allows the Chamber the choice of a method or combination of methods to produce an equitable solution that meets these legal requirements.

Distinguished counsel for Canada states that, under the United States view, "many lines in the mansion of law" may be considered (**VI**, p. 180). This criticism reflects what the United States Agent, in his concluding statement of the first round, indicated was perhaps the fundamental philosophical difference between Canada and the United States: the reversal by Canada of what the United States views as the proper hierarchy of principles and method.

Our view is that the substantive legal requirements of a solution in keeping with the applicable equitable principles, taking into account the identification and balancing up of relevant circumstances, must be met and then an appropriate method or methods selected to achieve an equitable solution consistent with these substantive requirements. Canada, in effect, seeks to reverse the hierarchy and first apply a method, namely, the equidistance method, which it asserts is required by the applicable law. Canada then would determine the equitableness of this line and, only if this line is inequitable, pass on to any adjustments in this line necessary to do equity. Only then would Canada have

the Chamber, if such adjustments were insufficient to meet the test of equity, turn to any other method alone or in combination.

The United States believes that Canada, by considering first the method and then the principles and relevant circumstances has, to use a colloquial American expression from the frontier days, "put the cart before the horse".

B. Complete Rejection of the Equidistance Method

The second misunderstanding of the United States position relates to its asserted complete rejection of the equidistance method. The United States has been challenged by Canada for "over-kill" in attacking the equidistance method across the board (VI, p. 187). Indeed, counsel for Canada has gone so far as to accuse the United States of embarking on "a crusade against equidistance", in which we are alleged to portray the concept of equidistance itself as "evil incarnate where maritime delimitation is concerned" (p. 8, *supra*).

Mr. President, this is not the United States position. We certainly agree that, in relevant circumstances, the equidistance method may be an appropriate method. In the relevant circumstances of this case, however, particularly the geographic circumstances, the United States does not believe equidistance produces an equitable solution within the law. Our concern is the same as that of the Court in its 1969 and 1982 Decisions (*North Sea Continental Shelf*, para. 83; *Tunisia/Libya*, para. 110), that the equidistance method not be treated as inherently equitable, but rather be considered along with another method or methods in reaching an equitable solution substantively determined by the application of equitable principles, considered in the light of the identification and balancing up of the relevant circumstances.

C. The United States Alleged Desire to Turn Back the Legal Clock and Not to Recognize Any Changes in the Law of Delimitation

The basis for this Canadian allegation is, apparently, the refusal of the United States to recognize the novel Canadian "distance principle" as the basis of title to the 200-mile zone (p. 9, *supra*). It also rests upon Canada's contention that the 1982 Law of the Sea Convention, completely unbeknownst to its negotiators, who would be and are completely astounded by this Canadian assertion, adopted a distance principle that institutionalized the equidistance method of delimitation.

The United States certainly does not accept, for reasons set forth herein and in its written and prior oral pleadings, these Canadian contentions. However, the fact that the United States does not agree to a complete over-turning of the customary international law of delimitation in favour of enshrining the equidistance method, does not mean that it is opposed to any development in the law.

On the contrary, this case, involving as it does the first delimitation of a single maritime boundary, requires the development of applicable delimitation principles. In doing so, in the view of the United States, the Chamber should, just as many tribunals before it have done when faced with new circumstances, be guided by the relevant legal principles applied in related if not the same circumstances. It should not adopt a completely new philosophical approach. As indicated at the outset, the United States believes that the Fundamental Rule provides an appropriate vehicle for reflecting in a single maritime boundary delimitation the relevant principles drawn from prior delimitations of both the sea-bed and the water column, in the light of the identification and balancing up of the relevant circumstances. This will afford the Chamber, as well as future

tribunals, the opportunity to take into account the individual circumstances of each individual case.

We find Canada's most recent statements that the United States is not applying or is misapplying existing law – in particular, the *North Sea Continental Shelf* cases – most surprising, particularly so in light of Canada's assertion in its Counter-Memorial that a "reconsideration of . . . the essential rationale of the conclusions reached by the Court in the *North Sea Continental Shelf* cases" (para. 561) is necessary.

VI. Other Legal Issues Separating the Parties

I now turn to other legal issues separating the Parties. Most of these issues have already been dealt with at some length in both the written pleadings and oral statements, and I will merely summarize them most briefly.

A. The Role of Economic Dependence

The first such issue relates to the role of economic dependence. The United States has expressed in its written pleadings, its earlier statement of the law, and in Mr. Feldman's oral statements, its profound disagreement with Canada's view on the subject of so-called economic dependence. Canada's position is summarized in its second alleged equitable principle referring to the vital importance to Canadian coastal communities in the relevant area of the fishery resources of Georges Bank.

It is the view of the United States that economic dependence on the resources of the area is neither an equitable principle nor a relevant circumstance. The facts simply do not support the argument by Canada that development of the 200-nautical-mile zone was based upon a recognition of the special dependence of coastal States upon the resources of their coasts. Some coastal States supported the extension of fisheries jurisdiction in order to claim for themselves more resources, and certainly some of these coastal States were dependent upon fisheries. The rule of law that emerged, however, was not that every State was entitled to claim offshore jurisdiction in accordance with its degree of economic dependence. Rather, it was that each coastal State was entitled to fisheries jurisdiction within 200 nautical miles regardless of whether it was dependent upon the resources in the area off its coast and regardless of whether it exploited these resources. A determination by the Chamber motivated by relative economic dependence would not be an application of recognized legal principles, but rather an exercise in distributive justice, an *ex aequo et bono* determination to which the Parties have not agreed.

B. The Role of Human Geography

Mr. President, the United States also disagrees with Canada's attempt to supplant, or at least to influence physical geography by the consideration of human geography. What is important in maritime delimitation is the land, not what the nationals of States do on land.

C. Development of Articulated Equitable Principles

A third legal consideration the United States wishes to emphasize is that of the development of articulated equitable principles. Canada apparently has ignored the United States suggestion of the desirability that equitable principles applic-

able to maritime delimitation, particularly of a single maritime boundary, be articulated. Such articulation of the applicable principles will, in our view, both promote negotiated settlements based on law and give assurance to parties resorting to adjudication.

D. Possible Expansion of Coastal-State Jurisdiction

Finally, with respect to miscellaneous legal differences, let me urge the Chamber to take into account the possible expansion of coastal States jurisdiction in the Gulf of Maine area.

Distinguished counsel for Canada, in discussing the necessity of determining a single maritime boundary for all purposes – he calls it a "single polyvalent line" (VI, p. 168) – points out the probability that the jurisdiction of the coastal State may expand beyond fisheries and continental shelf jurisdiction.

The United States, in its prior oral statement on the law, referred expressly to the provisions in the Special Agreement that the single boundary will limit all rights and jurisdictions now recognized and to be recognized. We stated that, accordingly, it would be most unwise to limit arbitrarily the interests and activities that the Chamber may consider relevant.

At this point, the United States wishes to reassert its concern that the boundary established by the Chamber eventually could effect rights and jurisdictions not now at issue, including, in particular, navigational rights with which the United States was so very much concerned in the Law of the Sea Conference and is concerned today. It is appropriate for the Chamber to consider the probable future expansion of the jurisdictions to be delimited by the single boundary, particularly in view of Canada's emphasis upon the "polyvalent" line.

These concerns are not merely hypothetical. Canada has signed the 1982 Convention. As Canada's Arctic Waters Pollution Prevention Act of 1970 made clear, it has taken an expansive view of coastal-State rights to control vessel source pollution in waters off its coast. Canada's interpretation of the 1982 Convention is likely to be no less expansive. Under Canada's views of its rights under international law, it can be expected, as a minimum, to enforce in its 200-nautical-mile zone what Canada, in the first instance, regards as generally accepted international pollution standards and it may also enforce special pollution standards it alone proposes if they are approved by the competent international organization.

Mr. President, distinguished Judges, at this juncture, I will resort once again to what my Canadian colleagues have deprecated as "cartographic impressionism". I would invite your attention to the two Canadian lines on the map before you and ask you to share my concern, one that I am sure the American people will share; that concern is that if either one of these lines were to become the single maritime boundary, we may well be put in a position of arguing with Canada about our rights to navigate through and overfly the area northeast of this line.

VII. Conclusion

I come now to my conclusion. The rule of law governing delimitation urged on this Chamber by the distinguished Agent for Canada can, we believe, be summarized as follows:

> "The delimitation of the exclusive economic zone and continental shelf between adjacent or opposite States shall be effected by agreement employ-

ing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified."

The language I have just read is a direct quotation from an informal suggestion co-sponsored by Canada at the Third United Nations Conference on the Law of the Sea (doc. NG7/2, 20 April 1978). Nothing like this proposition ever appeared in any decision of the International Court of Justice or in any of the negotiating texts issued by the leadership of the Conference. All of these decisions and texts represented a movement away from the role attributed by Canada to equidistance in its interpretation of the 1958 Convention on the Continental Shelf and customary international law. In the end, with full knowledge of the Court's teaching on this subject, the Third Law of the Sea Conference settled upon a cross-reference to international law, including a specific reference to the Statute of the Court.

And yet, Canada persists. A proposition whose legal validity others could not persuade the Court to accept, a proposition whose utility and fairness Canada could not persuade the assembled representatives of all the States in the world to accept, Canada now urges upon this Chamber.

Canada argues before this Chamber that the same conference that rejected its delimitation proposals, is the conference whose work, directly and through its influence on State practice, compels exactly the same rejected result by virtue of the adoption of a 200-mile seaward limit for the exclusive economic zone. In our view this conclusion is untenable as a matter of history, as a matter of logic, and as a matter of law.

Finally, the United States wishes to reiterate its views that the Chamber, in discharging its responsibility to delimit a single maritime boundary, should base itself squarely on the Fundamental Rule expressly recognized by the Court.

This is the best means of achieving equity within the law. Thus, in our view, the Chamber should apply equitable principles in the light of the identification, weighing, and balancing up of the relevant circumstances regarding the continental shelf, fisheries, and other matters that have been, are presently, or may in the future be subject to coastal-State jurisdiction.

In concluding, the United States reiterates its hope that, in applying this Fundamental Rule, the Chamber will reject the equidistance method as applied by Canada, and instead use such method or methods as will produce an equitable solution in the light of the applicable equitable principles and the identification and balancing up of the circumstances relevant to those principles.

Permit me, Mr. President and distinguished Judges, to thank this Chamber for its patience and attention, and reiterate how pleased I personally have been to have the opportunity to participate in these proceedings.

QUESTION BY JUDGE COHEN

Judge COHEN: I was interested in your reply to my Question No. 1 and I am concerned to better understand. Do you mean to say that the continental shelf doctrine, as we have known it, and the coastal fisheries law, as we have understood it, now have a unified replacement in what you call the "fundamental rule"; and if that is so, would you be perhaps more specific as to what are the concrete substantive elements that are to be used by the Court as guidelines in determining what are these elements of the fundamental rule? Because it is difficult to piece together in the rather circular argument that follows, how one moves from the basic idea of a fundamental rule, to then, the relevant circumstances, then to equitable principles or vice versa, and eventually to an equitable result. Nowhere along that road do I get a sense of concreteness on which I can then build a specific substantive argument for myself, and did you mean that to be the answer to my question?

Mr. STEVENSON: Yes, I did, Judge Cohen, and in accordance with the procedure of this Court I will reply more fully later (*infra*, p. 266), but I think I should just point out that in all our written proceedings plus the oral statements we have very carefully delineated the applicable equitable principles and the relevant circumstances in this case. The equitable principles are respect for the coast, respect for the interest of peaceful settlement of disputes, facilitation of conservation and management of resources, and taking into account other factors which the Tribunal considers important. Just to give you an example, I most recently referred to the fact that the Tribunal should take into account as a relevant circumstance the future possibilities with respect to this not only being a jurisdiction for economic purposes, but for certain other purposes. But if I may, Mr. President, I would like to confirm this answer in writing.

REJOINDER OF PROFESSOR RIESENFELD

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Professor RIESENFELD: Mr. President, distinguished Judges, may it please the Chamber. This is a distinct honour and privilege for me to address the Chamber in this great case and I am grateful to the authorities of the United States, my adopted, or perhaps more accurately, my adopting country, for giving me this opportunity so cherished by any member of the legal profession.

My presentation will be very brief – about 15 minutes – and will deal with the subject of acquiescence and estoppel and, in particular, with Canada's contention that the United States has failed to meet its arguments on that subject.

As the Chamber will recall, Canada in its oral presentation on 5 May 1984 faulted the United States for having "entirely failed to meet Canada's argument on acquiescence and estoppel" (p. 94, *supra*) both during the stages of written pleadings and during the first round of the oral arguments. Among other charges, Canada has blamed the United States, first, for ignoring the *Temple of Preah Vihear* case, which in the view of Canada's learned counsel "is after all the primary authority" (p. 95, *supra*) and, secondly, for the tendency of the United States "to equate the law relating to acquiescence and the law of acquisitive prescription as a basis of title or sovereignty over territory" (p. 98, *supra*). In connection with this second criticism by Canada, its oral argument terms the reliance of the United States on the Anglo-Norwegian *Fisheries* case as "highly misleading".

Let me discuss these two contentions of Canada in the order brought up in Canada's arguments in the last round.

Canada alleges that the *Temple of Preah Vihear* case "stated":

> "that the acts and words of even minor officials, acting within their mandate, would engage the good faith of their governments and preclude those governments from subsequently changing their positions." (P. 94, *supra*.)

Canada's counsel referred to pages 24 and 25 of the Judgment in the *Temple of Preah Vihear* case for the proposition quoted. However, no such statement can be found on the pages cited nor can that statement serve as an appropriate paraphrase of what the Court actually did say. In order to interpret properly the Court's reasoning, the issue and the facts of the case must be recalled. The issue was, as the Chamber may remember, the effect upon Thailand of the publication and distribution of a map showing the temple as falling within the sovereignty of Cambodia, the rival claimant. The map was prepared in connection with the work of a Mixed Commission established in 1904 to delimit the boundary between Thailand and what was then French Indo-China, in the region (the eastern sector of the Dangrek Range) where the temple was located. The map was produced by French Government topographical experts, in response to a request made by Thailand authorities, but was printed only after the Mixed Commission had ceased to operate. In the words of the Court:

> "The publication and communication of the . . . maps . . . was something of an occasion. This was no mere interchange between the French and Siamese Governments . . . On the contrary, the maps were given wide publicity . . . by being also communicated to the Siamese legations accred-

> ited to the British, German, Russian and United States Governments; and to all the members of the Mixed Commission, French and Siamese.
>
> It is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map . . . they did not do so, either then or for many years, and thereby must be held to have acquiesced." (*I.C.J. Reports 1962*, pp. 22-23.)

The effect of the conduct of minor officials was only commented upon in connection with Thailand's claim that "the maps received from Paris were only seen by minor officials who had no expertise in cartography, and would know nothing about the Temple . . .". The Court rejected these contentions "either on the facts or the law", stating:

> "If the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk, and the claim of Thailand could not, on the international plane, derive any assistance from that fact. But the history of the matter, as set out above, clearly shows that the maps were seen by . . . the Foreign Minister, . . . the Minister of the Interior, the Siamese members of the First Mixed Commission and [other high ranking officials]." (*I.C.J. Reports 1962*, p. 25.)

These are the officials who were listed by the Court. Note that it says that the Siamese authorities did show these maps only to minor officials. Obviously nothing in the facts of the case or the language of the Court supports the citation of the Judgment in the *Temple of Preah Vihear* case as authority for the proposition which Canada seeks to deduce therefrom.

Similarly misplaced is Canada's reproach that the United States ignores a "critical distinction between acquiescence and estoppel, on the one hand, and the concept of prescription, on the other" (p. 98, *supra*). Acquiescence, according to Canada's distinguished counsel, "depends upon tacit acceptance and not upon prescriptive periods of time" *(ibid.)*. But tacit acceptance likewise involves the passage of time. As Professor Sperduti in his magisterial article *Prescrizione, Consuetudine e Acquiescenza in Diritto Internazionale* (which the Chamber may find in Vol. V of our Documentary Annexes to the Counter-Memorial (**IV**), Ann. 33), has pointed out, international law requires also a duration of the behaviour *(atteggiamento)* which produces the character of acquiescence. Although no single rule governing all situations can be formulated, the generally valid criterion is found in "the passivity maintained with regard to a situation by a person or persons who had been entitled to object to it" (Sperduti, p. 14, quoted in *I.C.J. Reports 1982*, p. 97). Mr. President, you may recognize that phrase because you quoted it in your separate opinion in the *Tunisia/Libya* case.

The duration of the time span during which inaction does not amount to acquiescence is not capable of being expressed in terms of a fixed period. It is governed by the principle of good faith in the conduct of foreign relations. It depends on the length of the time during which a protest or disclaimer by the persons entitled to make it can legitimately be expected. The length will thus depend both on the time when the proper authorities may be expected to have gained knowledge of the situation and, in addition, when they can be expected to react. This period, as Professor Sperduti has shown, will be considerably longer when the issue concerns jurisdictional or sovereign rights than other matters such as police measures. There is no such thing as "instant passivity" as Canada's counsel seems to assert.

Canada blames the United States for relying on inapposite authorities such as the Anglo-Norwegian *Fisheries* case. While it is true that the Judgment in that case rests also on other legal bases, its authority for the issue at hand is recognized not only by the author just mentioned, Professor Sperduti, but – most of all – by the separate opinion of Vice-President Alfaro in the *Temple of Preah Vihear* case itself. It is perhaps not without irony that Canada's distinguished counsel himself before his "metamorphosis of 1984" – to borrow a phrase from Canada's allegation regarding our own expert witness – cited the Anglo-Norwegian *Fisheries* case as a precedent for the effect of acquiescence based on absence of protest against Norwegian claims (1957 *BYBIL*, p. 199). In no case has the Court ever found acquiescence to a claim of territorial rights, except by failure to protest over a period of many years. In no case is "reasonable" tantamount to "immediate". Any such assertion is not borne out by the governing case-law. In the *Temple of Preah Vihear* case, for instance, Thailand did not object for more than 50 years.

Canada's counsel tries to overcome the lack of acquiescence due to the brevity of the period during which the United States is claimed to have remained silent, by contending that the tacit acceptance related only to a method of delimitation rather than to a claim of jurisdiction. But with due respect, this distinction is one without difference. As the *Temple of Preah Vihear* case shows, claims to sovereignty are not foreign to the law of acquiescence. The method of delimitation connotes the extent of such claim. Hence, although the concepts of prescription and acquiescence must not be confused, nevertheless – as Professor Sperduti likewise emphasizes – both are tied to a lapse of time and both have a legitimizing function: ". . . L'una e l'altra si colleghino al decorso del tempo e l'una a l'altra abbiano funzione legittimatrice" (Sperduti, p. 7). The lapse of time required in both types of situations does not differ substantially where sovereignty is involved.

Because of other unfounded claims by Canada based on alleged estoppel by positive conduct we would like to add that such conduct – other than a promise made publicly by a high-ranking official – also must be reiterated or maintained over a lengthy period, if relinquishment of sovereign rights or claims is to be implied. Although such conduct may perhaps be characterized more accurately as recognition rather than acquiescence, that is recognition understood "in its broadest aspects" – to use a term coined by Anzilotti – it is hardly debatable that it likewise must extend over a long-term interval, the same as in the case of acquiescence.

As a concluding observation I would like to point out that the contention "that acts and words of even minor officials, acting within their mandate" would bind the State on an international level cannot possibly be based on the principles governing international responsibility, as is claimed by Canada's counsel (p. 98, *supra*). True, a State may be responsible for injuries inflicted on aliens by a police officer, even if acting *ultra vires*. But I venture to think that no one could claim that a sale of the Brooklyn Bridge by such an officer to a foreign trade mission would have any legal consequences whatsoever.

The Chamber rose at 6.05 p.m.

TWENTY-SIXTH PUBLIC SITTING (10 V 84, 3 p.m.)

Present: [See sitting of 2 IV 84.]

REJOINDER OF MR. COLSON

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. COLSON: Mr. President, distinguished Judges. May it please the Chamber.

It is once again my honour to appear before you and to present to you the position of my country concerning the application of delimitation methods to the geographical facts of this case.

The presentation has three parts.

In Part I the United States will address several remaining preliminary issues of geographical significance, which must be dealt with before we can go to a fuller discussion of the application of delimitation methods in the geographical circumstances of the Gulf of Maine area. These issues include the following: the relevant area or areas; the matter of macrogeography and questions of scale; the Bay of Fundy; and the matter of the so-called grey area.

In Part II the United States will address again the nature of the cut-off effect created by the equidistant line in the Gulf of Maine area. It strikes us that the issue is joined. Does the cut-off begin close to the coast, and continue further out, as the United States maintains? Or does the cut-off effect only occur once the line has extended seaward of the headlands of the concavity – that is, does the cut-off effect only begin at the midpoint of the closing line across the mouth of the concavity, as Canada contends? With all respect to Canadian counsel, we will demonstrate that Canada's perspective on this point is not a correct analysis of the cut-off effect and the inequities that it creates in delimitation situations such as the one now before this Chamber.

In Part III we will address the question of how to abate the cut-off effect once it has been identified. Or, to put the issue as Judge Cohen did in a question posed to the Parties: "What degree of cut-off is acceptable?" (**VI**, p. 464.) We will demonstrate that there are at least three conceptual approaches for dealing with the cut-off effect in this case. Each abates the cut-off effect and brings about a proportional delimitation – one adopts a two-sector approach; another adopts a one-sector approach; and the third adopts a two-method approach.

During the course of this presentation it will be my honour to answer questions 1, 3, 4 and 6 addressed to us by Judge Mosler, and questions 2 and 3 addressed to us by Judge Cohen (**VI**, pp. 462, 463; pp. 464, 465).

I would like to acknowledge the assistance of Dr. Robert Smith of the Office of the Geographer of the Department of State, and Lt. Neil Gitin who will be assisting in the movement of the charts, and I would also like to acknowledge the assistance of Michael Danaher of the Legal Adviser's office of the Department of State who has been of great assistance in preparing this presentation.

I. Remaining Preliminary Issues of Geographical Significance

A. Relevant Areas

The first issue of preliminary geographical significance concerns a further examination of the relevant area.

In this discussion we do not propose to restate what we have said before on this subject except to note that the United States has examined the relevant circumstances, and applied equitable principles, in three different areas for different purposes. The first area – what we have called the relevant area – extends, in our view, from Nantucket to Cape Canso. It includes all the coasts within those limits and the maritime area seaward of those coasts to the limit of coastal-State jurisdiction. The second area we have referred to is the area in which the delimitation takes place: the Gulf of Maine and the area immediately seaward of the Gulf. It does not include the Bay of Fundy, nor the Canadian coast and marine areas northeast of Cape Sable. The third area we have referred to in our pleadings is the proportionality test area – in this case defined by geographical features marking major changes in the direction of the coast – at Nantucket and the point northeast of Halifax on the Nova Scotia coast identified by reference to the Chignecto Isthmus.

Canada has included coasts southwest of Nantucket and northeast of Cape Sable in its definitions of relevant areas. Its reasons have not been geographical. Canada has argued that the coasts that bear some measure of economic links to the area in dispute should be included. There is no legal basis for this assertion. Moreover, there are a number of factual problems with such a definition – one such problem is where do you stop. For example, fishing vessels from as far away as Florida and Newfoundland periodically visit Georges Bank. Thus, Canada's limits at Lunenburg and somewhere in Rhode Island or Connecticut are artificial and imprecise even in the economic sense that Canada argues.

The areas the United States has chosen are based upon our analysis of what the Court said at paragraphs 72-75, and 103 and 104, of its Judgment in the *Tunisia/Libya* case. In particular, the United States relies on paragraph 104 of the Judgment where the Court states that, in regard to the proportionality test area, "the only absolute requirement of equity is that one should compare like with like". In that case, the coastal concavity was basically two-sided. Here it is three-sided; and to compare like with like one must identify a fourth coastal front. The lateral coasts of the concavity may be compared. To what may the Maine and New Hampshire coast be compared?

In our view, the Canadian coast that is like the United States coast at Maine and New Hampshire is the coast of Canada northeast of Cape Sable to Cape Canso. These coasts are about the same length; they each run from southwest to northeast in the same general direction; and their relationship to the Atlantic Ocean is the same – that is, they both face it. Accordingly, we have included all of this Canadian coast in our analysis of the relevant area, and part of it in the proportionality test area we have consistently advanced. In order to compare like with like, it is not necessary or appropriate to include United States coasts southwest of Nantucket; therefore, we have not done so.

Judge Mosler's fourth question asks:

> "If [the Nantucket to Cape Sable] line denotes a geographical situation, why do the Parties make use of another line for the purpose of demonstrating that the southeast coast of Nova Scotia and part of the United States coast southwest of Cape Cod are coasts relevant to the decision of the dispute?" (VI, p. 463.)

Our answer is that while we recognize that the closing line of the concavity from Nantucket to Cape Sable marks a "geographical situation", we believe that the Canadian coast northeast of Cape Sable is relevant to the decision of the dispute, for the purpose of comparing the United States coast of Maine and New Hampshire with a like Canadian coast – the like Canadian coast which faces the

Atlantic Ocean is that from Cape Sable to Cape Canso. We do not believe that this Canadian coast which faces the Atlantic Ocean may be said to extend its jurisdiction to any area within or directly seaward of the Gulf of Maine. Nonetheless, a comparison of this coast with the like United States coast shows the inequity that exists in this geographical situation: that, whereas Canada enjoys a full extension into the Atlantic from its Nova Scotia coast, the Atlantic-facing Maine Coast is cut off and does not receive comparable treatment.

Judge Mosler's sixth question asks:

> "What is the justification, in the view of the United States, for prolonging that line beyond Lunenburg (a point accepted, it appears, also by Canada) as far as Cape Canso even though the United States has not proposed any similar prolongation of that line beyond Rhode Island, the end-point which appears to correspond in the southwest to the situation of Lunenburg in the northeast?" (VI, p. 463.)

In response, we have prolonged this coast beyond Lunenburg to Cape Canso so that like coasts of equal length will be compared to like coasts of equal length. We have not included in our analysis the United States coast southwest of Nantucket because, in our view, it is not necessary to do so in comparing like with like – taking account of the location of the land boundary. To take account of the United States coast southwest of Nantucket frames the Gulf of Maine and puts it, as Canada would, at the centre of the dispute. To do so, in our view, disregards the location of the land boundary. It is the location of the land boundary that we believe should be the centre of the Chamber's consideration. The relevant coastal fronts identified by the United States on either side of the land boundary are of approximately equal length and thus provide a balanced geographical framework in which to consider this case.

That concludes our response to these two questions.

The United States recognizes, however, that the Court's Judgment in the *Tunisia/Libya* case can be interpreted differently. A different interpretation would lead to a result where the relevant area and the proportionality test area would more closely correspond to what we have termed the area in which the delimitation takes place.

In this connection, we note paragraph 75 of the Court's Judgment. The Court stated:

> "The submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court."

On its face, this statement, if made applicable to the Gulf of Maine area, excludes the Bay of Fundy, the Canadian coast northeast of Cape Sable, and the United States coast southwest of Nantucket. The Court also stated:

> "It 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. In the view of the Court, in the present context that point on the Tunisian coast is Ras Kaboudia; on the Libyan coast it is Ras Tajoura." *(Ibid.)*

By defining the area of overlap in the *Tunisia/Libya* case as including the entire coast and maritime area seaward of the coast from Ras Kaboudia to Ras

Tajoura, the Court gave the term "overlap" a broad meaning. It included in the area of overlap areas in which the claim of one or the other of the parties was not subject to serious challenge. Also included in the area of overlap were all the coasts that faced the delimitation area. In our view, the Court's area of overlap in the *Tunisia/Libya* case is analogous to the area we have called the area in which the delimitation takes place – that is, the Gulf of Maine and the area seaward of the coastal concavity. We can accept that the map may show that within this area from Nantucket to Cape Sable the Parties' coasts have a relationship – as the Court said – a relationship that is "relevant for submarine delimitation" *(ibid.)*.

The United States has based its proportionality tests on a broader area that includes an appropriate portion of the Canadian Atlantic-facing coast from Cape Sable to Cape Canso so as to compare like with like. That United States analysis is already before the Chamber. The United States continues to believe that its chosen area is the appropriate one for the purposes of the proportionality test. For the remainder of this presentation we will analyse the case, including the proportionality test, on the basis that one might interpret the *Tunisia/Libya* case as considering this smaller area – defined by the coastal fronts of the Parties facing the Gulf of Maine, and including the Gulf itself and the waters and seabed seaward of the Gulf. We do this so that the Chamber will have our analyses of such an interpretation before it.

B. Macrogeography

We now turn briefly to the issue of macrogeography and scale. In our opening presentation, we showed that the United States geographical analysis of this case can be made in relation to even Canadian illustrations depicting only the Gulf of Maine Area (VI, p. 291; Fig. 7 of United States oral arguments). We do not rely on macrogeography to make our points. It is not an inappropriate geographic assessment to note that the Gulf of Maine is a large coastal concavity in the North American coastline, that the coast outside that concavity also extends from southwest to northeast, and that the closing line across the mouth of the concavity is at a southwest-to-northeast direction, as is the concavity. We have merely indicated that the general direction of the coast of the Gulf of Maine area is consistent with and confirmed by the general direction of the east coast of North America as a whole. This is no more than what the Federal Republic of Germany did when it pointed out the relationship of its coasts to the general configuration of the North Sea.

Furthermore, we note that what is or is not an inappropriate geographical assessment is a question of scale. It may be inappropriate to consider coasts several hundred miles in length when considering the delimitation of the narrow territorial sea. But where the issue becomes the delimitation of a 200-nautical-mile zone off the coast of two States sharing a continent, certainly the law is not limited in its evaluation of relevant geographical circumstances to a limited area that is hardly wider than the breadth of the zone itself. The boundary to be established by this Chamber will appear on detailed nautical charts, but it will also clearly appear on generalized charts of the North American Continent. It is entirely appropriate that the law takes into account the geographical circumstances and framework in which the boundary will be viewed.

Canada's objection relates primarily to determining and confirming the general direction of the coast. The Deputy-Agent for Canada stated:

> "The curious notion that it is possible to determine a single general direction for all the coasts of a deep concavity is thus one of the most

fundamental issues still dividing the Parties. For unless it is possible to determine such a single coastal direction, the United States contention that the seaward extension of the coast at the back of the concavity has primacy over the seaward extensions of the coasts forming its lateral sides must fall to the ground. And with it will fall the whole United States geographical case, because that case rests on the determination of a single general direction of the coast." (P. 55, *supra*.)

The Court has dealt with Canada's "curious notion" and determined the general direction of the coast – even where coastal concavities were concerned. Before you as Figure 104 is a composite of three charts appearing in the Norwegian pleadings in the Anglo-Norwegian *Fisheries* case. That case, as the Chamber will recall, involved the delimitation of the territorial sea by reference to baselines drawn in the general direction of the coast. A contentious issue was the baseline in the Lopphavet Basin. It is shown here on this composite of charts which, unfortunately, are not as clear as might be desired. Nonetheless, you can see the Lopphavet Basin in the centre.

The course of the baseline or baselines between Point 21 (on the left) and Point 20 (on the right) was in issue. The United Kingdom urged a line connecting points in the inner portion of the perimeter of the Basin. The Court upheld Norway's position that a straight line connecting Points 21 and 20 denoted the general direction of the coast. The Court stated in relation to its determination of the general direction of the coast:

"In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the general direction of the coast. Therefore one cannot confine oneself to examining one sector of the coast alone. . . ." (*I.C.J. Reports 1951*, p. 142.)

With all respect, we believe Canada's reference to macrogeography is, to use a term used by Canada, a "smokescreen strategy" (VI, p. 193) of the first order designed to obscure the major issues in this case.

C. The Bay of Fundy

The third issue of preliminary geographical significance relates to what has recently been said by Canada concerning the geographical relevance of the
(256) Bay of Fundy. On the basis of Figures 171 and 173 of the Canadian oral presentation, it would seem that, if we were to go on a bit longer, Canada might finally concede that the Bay of Fundy cannot be included in a properly constructed proportionality test.

To begin with, through no stretch of the imagination can the Bay of Fundy be regarded as part of the area in which the delimitation takes place. The Bay of Fundy lies behind the starting point. Indeed, it lies behind the international boundary terminus. It is not part of the area of overlap as the Court used that term in the *Tunisia/Libya* case. To once again quote the Agent for Canada:

"The concave configuration of the Bay of Fundy means that its coasts cannot, even under an application of equitable principles, be granted a *significant seaward extension of their own*." (VI, p. 49.)

One needs only to ask why Canada should argue that those coasts be included in a proportionality test when the Court in 1969 said the proportionality test should measure coasts according to their truer proportions (*I.C.J. Reports 1969*, para. 98).

In its oral pleadings, Canada repeated most of the arguments it previously had made, which we believe we have dealt with. It made two new arguments. First, Canada sought to bolster its argument about the relative size of the Bay of Fundy, compared to other bodies of water the world around, by quoting from portions of an 1853 decision of an umpire in the *Washington* case (**VI**, p. 216). Second, it made an interesting but incorrect comparison to the Gulf of Gabes (p. 132, *supra*).

Let us take up the first new argument. The *Washington* case is consistently criticized by Canadian legal scholars. The case concerned the seizure of a United States fishing vessel in the Bay of Fundy in the middle of the 19th century. The umpire, who found for the United States, obviously had some of his facts wrong – notably the same facts that Professor Malintoppi quoted.

Professor Malintoppi quoted the following language from the decision in that 1853 case.

> "The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long. *It has several bays on its coast. Thus, the word bay, as applied to this great* body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty." (**VI**, p. 219.)

We have deposited with the Registry, under Article 56 of the Rules of Court, an article from the 1963 edition of the *Canadian Yearbook of International Law* by G. V. LaForest. That article contains the following statement: "The decision in the *Washington* case was wrong." ("Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident", the *Canadian Yearbook of International Law*, 1963, pp. 149, 162.) The author goes on to criticize the decision on virtually every ground imaginable – including the factual assumptions of the umpire – which are, in fact, wrong: the bay is only about half as wide as the umpire imagined. Canadian authorities normally are quite vehement in their rejection of the *Washington* case, because it is contrary to Canada's historic bay case, which we note Canada reserved in these proceedings last week in response to Judge Schwebel's question (p. 133, *supra*). We find it ironic that it is upon this particular case that Canada relies for the proposition that the Bay of Fundy should be included in the proportionality test area.

The second argument Canada made was the following: since the Gulf of Gabes – the coastline and the maritime area enclosed – were included in the proportionality test in the *Tunisia/Libya* case, why should not the Bay of Fundy be included in a proportionality test constructed for the Gulf of Maine area?

There are four answers to this question which show why the Bay of Fundy should not be included. *First*, the coasts of the Gulf of Gabes faced the area to be delimited; the coasts of the Bay of Fundy do not. Canada proposed proportionality models in its last round based upon the proposition that part of the coast of Nova Scotia in the Bay of Fundy faces the Atlantic ocean. This may be rebutted by the words of the Agent for Canada just quoted.

Second, the coasts of the Gulf of Gabes lay to the side or seaward of the point where the land boundary meets the sea and where the delimitation was to begin; here the coasts of the Bay of Fundy lie behind the international boundary terminus and landward of the starting-point.

Third, the change in direction of the coast of the Gulf of Gabes marked a crucial aspect of the Court's analysis of the two delimitation sectors it there identified and evaluated; here, it is difficult to see how the coasts of the Bay of Fundy could play such a role.

Fourth, and this point is telling, in the geographical circumstances of the

Tunisia/Libya case it really did not matter whether the Gulf of Gabes was or was not included in the proportionality test.

Figure 105 of our presentation shows the geographical situation of the *Tunisia/Libya* case, together with the equidistant line and boundary determined by the Court. As you may imagine, if the Gulf of Gabes is removed from the proportionality test the Tunisian coastline will be reduced in length. But so also is the amount of marine area Tunisia would receive reduced. Use or non-use of the Gulf of Gabes will not distort the ultimate proportionality test in this area.

You may recall that in the *Tunisia/Libya* case the Court found that, using the Gulf of Gabes, the lengths of coastal fronts was in a Tunisia-to-Libya ratio of 64 to 36. The area delimited was in a ratio of 60 to 40. If the Gulf of Gabes would have been removed from consideration in the proportionality test by, for instance, drawing a line from Ras Kaboudia south to a point near Jerba, the proportionality test would then show a Tunisia-to-Libya coastline ratio of 61 to 39 – a three point ratio swing which in actuality makes a 27 per cent reduction in the Tunisian coastline, while the area ratio would become 53 to 47, a six point ratio swing or, in actual terms, a 25 per cent reduction in Tunisian area. Since the percentage reduction of the coastal front and the maritime area is nearly the same, it made no material difference whether the coast and marine areas of the Gulf of Gabes were included in the proportionality test in that case.

(76) We have made the point several times in our written pleadings that adding the Bay of Fundy to Canada's proportionality models (Fig. 51A of the Canadian Counter-Memorial) increases the amount of area appertaining to Canada in the test by about 7 per cent. Yet inclusion of the coast of the Bay of Fundy increases the Canadian coastline length by about 100 per cent. Thus, in respect of the Bay of Fundy, the increase in length of coastline is not balanced by the additional water area included in the calculation, as it is in the Gulf of Gabes. This proves that the analogy Canada draws is faulty.

In our first round we showed that if the Bay of Fundy is treated as a body of land, which is basically how Canadian law treats the Bay of Fundy in its domestic and international practice, then we will be treating it at least as favourably as it deserves. For analytical purposes, a line across the mouth of the bay should be used to represent the Canadian coastline for the purpose of the proportionality test.

(225) The equity of using such a closing line is easily demonstrated in Figure 106 which we showed as Figure 9 of our first round presentation. We do not believe that Canada answered the question we posed with respect to this graphic. Canada referred you to Moses, Canada referred you to the Dutchman's dreams (p. 131, *supra*), and Canada made the popular charge that Canada uses to avoid the issue – that we were refashioning nature with this graphic. Permit me to pose the question again: should the deletion of that land territory in State B cause the boundary to deviate in the direction of State A, to the advantage of State B? The answer in our view is no. We believe that it is a fundamental proposition that the absence of land territory cannot entitle a Party to more maritime area beyond the closing line at the mouth of the bay than would the presence of land territory.

The use of a straight line across the mouth of the Bay of Fundy to represent Canada's coastal front in the Gulf of Maine is consistent also with the Court's Judgment in the *North Sea Continental Shelf* cases. In paragraph 98 of the Court's Judgment, the Court stated that, in applying the proportionality test, the Parties should measure their coasts according to their general direction. This was necessary in order "to reduce very irregular coastlines to their truer proportions". In response to Canada's new version of a truncated Bay of Fundy

(258) (Canada, Fig. 171 of its oral presentation) we need only state that there is no legal or geographical basis to include even this smaller area of the Bay in the proportionality test. Here, the true measure of Canada's coastal front facing the Gulf of Maine is 100 nautical miles long as measured from the international boundary terminus, across the mouth of the Bay of Fundy, to Cape Sable.

D. The Grey Area

The final preliminary issue of geographical significance with which we will deal – and then set aside – is the matter of the so-called grey area.

This is a matter upon which Canada professes to be solicitous of our interests. Canada advances the view, most clearly set forth by Professor Weil in the first round, that the United States and Canada should not have "difficulties pile up" for the future (VI, p. 164); and, thus, in Canada's view, the Chamber should "avoid creating an over-large 'grey area'" *(ibid.)*, presumably because the Parties may have difficulties in resolving this matter in the future.

We find this an inconsistent position for Canada to take in light of the fact that it has repeatedly suggested that the Chamber should not be concerned about the serious difficulties that will arise in resource conservation and management, on a daily basis, if Georges Bank is split. But we do not rely on Canada's inconsistency in this connection. There are four specific reasons why the Chamber need not be concerned about any grey area problem. We will present these four reasons in a moment.

But, first, let us be clear on what we are talking about. The issue of the grey area is relevant only where a fixed distance, such as 200 nautical miles from the coast, alone determines the extent of coastal State jurisdiction. It is not, therefore, relevant to the continental shelf, as its outer limits are not determined by a fixed distance from the coast where the relevant sea-bed areas comprise part of the natural continental shelf.

Canada rightly has pointed out that if the boundary of the 200-nautical-mile zones of the two neighbouring States does not *end*, and we would emphasize this word – end – precisely at a point 200 nautical miles from both coasts, by strict application of the equidistance method, then a grey area will be created. Thus, any such lateral delimitation of 200-nautical-mile zones will create an area – the grey area – that is within 200 nautical miles of the coast of one Party, and beyond 200 nautical miles of the coast of the other. The same effects occur in any other zones of standard breadth, such as the narrower territorial sea.

(220) Figure 107 of our presentation is Figure 89 of the Canadian first round oral presentation. It shows the grey area created by the Canadian line. This shaded area is beyond 200 nautical miles of Canada. It is within 200 nautical miles of the United States. A boundary that followed the Canadian line out to 200 nautical miles would leave the legal status of this area uncertain. Would the United States 200-nautical-mile zone be allowed to wrap around the Canadian zone? Or would the fisheries jurisdiction in this area go unexercised, and thus, in concept, remain an area beyond the fisheries jurisdiction of any country? Or, might the Parties reach some agreement upon fisheries management in this area? What would the continental shelf régime be? We submit that such questions are for the future. As we stated, they exist in each instance that a boundary does not end at an equidistant point 200 nautical miles from neighbouring coasts.

Let us turn now to the four reasons we would give to suggest that the grey area is not a matter that should concern the Chamber in this case.

First, the grey area issue has been known for some time and to our knowledge it has never deterred States from applying a method or methods other than the

equidistance method when it was equitable to do so. *Second*, the three United Nations Law of the Sea Conferences have paid no heed to the grey area issue. *Third*, State practice has not been concerned with this issue. And, *fourth*, the Parties have provided a means for dealing with the issue in the Special Agreement.

Let us turn to the first point. The international community long has recognized the existence of the grey area. But so far as we are aware, the creation of a grey area has never deterred countries from using delimitation methods other than equidistance when such other methods were called for to produce an equitable solution.

Early in this century, the same argument that Canada has advanced in this case was raised by Norway in the *Grisbadarna* case. There it was rejected by the Arbitral Tribunal.

Before you is Figure 108 of our presentation showing the Grisbadarna boundary area. The Chamber will recall that Norway argued for an equidistant line, the line shown here in red (Norwegian Memorial (German version), pp. 12 and 13). Norway argued that, by using the equidistance method, the terminal point of the line of division, the boundary it proposed, would coincide with the point of intersection of the two arcs that it claimed formed the southernmost limit of the Norwegian territorial sea and the northernmost limit of the Swedish territorial sea. These arcs intersect at point XXI. They are shown on your chart. In other words, no grey area would be created. Norway also argued that the course of a dividing line different from the equidistant line would leave an area of the open sea – the grey area – not belonging to either State.

Sweden put forward the green line shown here and replied to the Norwegian grey area argument (German text, p. 311). It pointed out that the Arbitral Tribunal had to decide the course of the boundary between the two States, and not the extent of the respective territorial seas or the end points for the outer limits of such territorial seas (*ibid.*, p. 312). (For full citations to the pleadings in the *Grisbadarna* decision, see **II**, United States Memorial, p. 104, fn. 2).

Thus, even in this early case, Norway made an argument comparable, if not identical, to the argument made here by Canada. The Arbitral Tribunal in the *Grisbadarna* case evidently was not impressed with the Norwegian argument. The boundary it established, shown here as the black line, left the Grisbadarna Bank to Sweden and the Skjottegrunde Bank to Norway, creating a grey area of relatively large size (10.8 sq. km.), about one-fifth of the area in dispute, beyond the four-nautical-mile territorial sea of Sweden, and south of the Tribunal's line.

We note that the Parties' continental shelf boundary, which came into force in 1969, begins where the Grisbadarna Award left off, at Point A of this Figure 108. It leaves this grey area under the continental shelf jurisdiction of Sweden.

(72) Canada has shown at Figure 44 of its Counter-Memorial, that S. W. Boggs, a former Geographer of the United States Department of State, was fully aware of the grey area issue in connection with his early work on the use of the equidistance method in the delimitation of the territorial sea. It was not enough to deter Boggs, or others that followed him, from concluding that application of the equidistance method is inequitable in some cases. It was his conclusion, and those that followed him, that if the application of the equidistance method achieves an inequitable result, a different delimitation method must be employed and any grey area dealt with separately by the Parties.

We have searched the work of the International Law Commission on the subject of maritime boundaries; in particular, its work on the delimitation of the territorial sea, a zone measured by the distance limit. We have found no reference to the concept which in this case has been given the label grey area. In

the light of the fact that the equidistant line was not accepted as an absolute requirement by the Commission, clearly the early work of the Commission must be seen as a denial that delimitations must avoid – even in the narrow limits of the territorial sea – creating a grey area.

The second reason that we give to set aside concern for creating a grey area is that the Third United Nations Conference on the Law of the Sea, which negotiated the breadth of the 200-nautical-mile zone, its juridical content, and established rules for its delimitation, never once, to our knowledge, took up the grey area issue in all the debates about the 200-nautical-mile zone, and its delimitation between neighbouring States; no one ever suggested that equidistance had to be used in delimitation so as to avoid the grey area. We can only conclude that in light of the fact that the grey area issue did not concern the Conference, in fact did not even come up at the Conference, so far as we are aware, and in light of the reluctance of the Conference to even use the word equidistance in the delimitation formula for the continental shelf and for the 200-nautical-mile zone, it need not be a matter of concern here.

Third, we note that the practice of States clearly does not regard the creation of a grey area as a problem to be avoided in the negotiation of maritime boundaries out to 200 nautical miles. For instance, we find it noteworthy that the States that claimed the first 200-nautical-mile zones – Chile, Ecuador and Peru – indeed the theoreticians of the 200-nautical-mile zone – do not seem to have been bothered by the grey area issue.

(265) Figure 109 of our presentation shows two charts – one of the Chile-Peru maritime boundary and the other of the Peru-Ecuador maritime boundary. These boundaries were established in the trilateral Declaration on the Maritime Zone of 18 August 1952, by these three States. The Chamber may note that these two charts are not on the same scale. But each shows the coastal region in the vicinity of the maritime boundary, the boundary established in the Declaration, and the 200-nautical-mile limit that these States first declared (United States Memorial, Anns. 79 and 80, Vol. IV).

As you can see, Chile, Ecuador and Peru were not concerned about grey areas. In the case of the boundary between Chile and Peru, the grey area created by the boundary measures approximately 7,800 square nautical miles. In the case of the boundary between Peru and Ecuador it is smaller, measuring about 400 square nautical miles.

In this case, the United States has relied upon the North Sea and the Bay of Biscay as relevant State practice examples having geographical similarities to the Gulf of Maine area. Let us examine those two situations. First, we see that one may not encounter a grey area in a semi-enclosed sea, such as the North Sea, where the extended jurisdiction of the other States prevents the extension of full 200-nautical-mile zones. Thus, there is no grey area in the North Sea.

Also, since the Parties in the Bay of Biscay boundary have not yet established the boundary out to 200 nautical miles from the coast, we can only speculate about the grey area that might ultimately exist in that case. We hesitate to do so and only note that if the same principles of delimitation are used in the extension beyond Point T of the final segment of the agreed boundary to 200 nautical miles, a large grey area will be created.

We would also point out that grey areas of various sizes exist worldwide, including such negotiated delimitations as those between Kenya-Tanzania, Colombia-Ecuador, The Gambia-Senegal, Guinea-Bissau-Senegal, the northern boundary between Portugal and Spain, and Brazil-Uruguay.

Accordingly, the fact that a grey area would exist were the United States line or others through the Northeast Channel to prevail, is not an unusual

circumstance such as to warrant the Chamber's concern. The grey area in this case, which would be created by the United States line, is approximately 5,700 square nautical miles. The grey area created by the 1976 United States line was somewhat less – about 4,400 square nautical miles. These areas lie seaward of Georges Bank and are not significant fishing areas. The grey area that could result in our case is smaller than that created by even the first 200-nautical-mile zone boundary between Chile and Peru. Canada's line, of course, also creates a grey area, albeit one of smaller area.

A fourth, and final reason we would give for the Chamber to set aside the grey area as part of its consideration, is the fact that the Parties have provided a means in the Special Agreement for dealing with the grey area, as well as with other issues that may arise in extending the boundary seaward of the point in the triangle where the Chamber terminates the boundary it will delimit. All relevant issues may be addressed in such negotiations, and are not foreclosed in any way.

Canada has noted only two possible alternative resolutions of this question. One was that the continental shelf would be subject to the jurisdiction of one State, and the water column subject to the jurisdiction of the other (VI, p. 163). Such a result, we submit, may be contrary to Article III, paragraph 1, of the Special Agreement (I).

The other alternative that was suggested was that the establishment of any line that does not coincide with an equidistant line at its outer limit would create an area that would in effect be a windfall for third States *(ibid.)*. This conclusion rests on an unarticulated premise that is not before the Chamber in this case, namely, that coastal States have no alternative to creating a windfall for third States if they deviate from an equidistant line at the 200-nautical-mile limit.

We submit that another premise is at least equally plausible. That premise rests on the assumption that all third States are subject to the jurisdiction of either Canada or the United States in all relevant areas within 200 nautical miles of the Atlantic coast of North America – setting aside, for the moment, the St. Pierre/Miquelon situation. Canada and the United States are free to share the zone, as has been done in the European community; they are also free to divide the zone in any way they please, by agreement or by judicial settlement. Accordingly, third States have no legal complaint so long as it is either the United States or Canada exercising fisheries jurisdiction.

This Chamber should not proceed on the basis of Canada's assumptions, nor are we asking that it accept the alternative assumptions we have discussed. The United States is merely asking the Chamber to recognize that the issue of the grey area is not relevant to the continental shelf since the shelf may extend beyond 200 nautical miles, and that a grey area in the water column does not necessarily imply any one of the alternatives identified by Canada.

There is, accordingly, no reason for the Chamber to consider the relative size of a grey area as a restraining factor in effecting an otherwise equitable delimitation. The existence of grey areas is a fact of international life. Its minimization is not a delimitation principle. From what we have seen, its minimization is not a valid concern. The Parties have provided a means for dealing with it. The argument made by Canada is simply another way of urging a preference for equidistance.

II. The Cut-Off Effect

In this part of our presentation we will deal with a simple question: where does the cut-off effect begin? Does it begin only at the midpoint of the closing line of the concavity as Canada has argued? Or, does it begin close to the coast

and continue to increase as the line moves further out to sea, as we have stated?

To address this question we will divide our discussion into four sections. *First*, we will address some differences in geographical perspective between the Parties.

Second, we will examine the cut-off effect outside the coastal concavity.

Third, we will address the beginning of the cut-off within the concavity. In this discussion we will demonstrate that the cut-off effect does begin at the coast. And, we will demonstrate that the degree of cut-off, what is now being called the diversion effect, is greatest near the coast, while the amount of cut-off may be greatest furthest from the coast.

Fourth, we will examine the consideration given to the recessive coast in delimitation situations.

A

Let us begin by an examination of the Parties' differences in geographical perspective.

In our view, the area of cut-off is simply that area that is in front of the coast and that is cut off from the extension of the coastal front by a proposed boundary. The principle of non-encroachment arising out of the primary delimitation principle that the land dominates the sea, requires that the area of cut-off be abated to produce an equitable delimitation.

All of Georges Bank is within 200 nautical miles of the coast of Maine. That (266) simple fact is shown on this chart, Figure 110 of our oral presentation. The coast of the United States that marks the 200-nautical-mile point on the United States line claimed in this case, as was true of the 1976 United States line, is the Maine coast. Under international law there is no theory which holds that a State is less entitled to an area 199 nautical miles from the coast than an area closer to the coast. As Mr. Stevenson said yesterday, no point on the continental shelf or within the 200-nautical-mile zone is *a priori* of lesser interest to the coastal State than any other point. Each coastal State has a full, independent and inherent right to exercise jurisdiction to the seaward limits permitted by international law, irrespective of proximity.

In our view, the United States is appurtenant to all of the area shown here within 200 nautical miles of the coast of Maine and New Hampshire – just by virtue of the existence of that coast – not to mention the coast of Massachusetts. Of course, the southwestern-facing coast of Nova Scotia faces the area and is entitled to some part of it as well. And, thus, we have a delimitation problem.

We have analysed this problem in the light of our understanding of international law, particularly the *North Sea Continental Shelf* cases.

The views put forward there related to the perpendicular extension of the coastal front of States situated within a two-sided coastal concavity. The Federal Republic of Germany described the coastal front as "the breadth of contact of the coast with the sea" (*I.C.J. Pleadings*, Vol. I, p. 77). It also said:

> "It is not the distance from a single point of the coast, but the connection with the coast at large measured by the *breadth of the "coastal frontage"* of the State, that would be an appropriate criterion for determining what parts of the continental shelf before the coast must be regarded as the continuation of the State's territory into the sea." (*I.C.J. Pleadings*, Vol. I, p. 426.) (Emphasis in original.)

Before you is Figure 111 of our presentation, which is a reproduction of page 427 of Volume I of the *I.C.J. Pleadings* for 1968. In the oral argument in that case it was stated with respect to these two figures:

> "If you look at these figures you will see that if you face the sea from the coast the natural continuation of the coast into the sea will be naturally defined by a line perpendicular on the coastal front and it is, of course, the purpose of the concept of the coastal front to judge from which basis the territory extends into the sea." (*I.C.J. Pleadings*, Vol. II, p. 40.)

In respect of this Figure it was said "the direction of the continental shelf extending into the sea could not possibly be determined by the changing direction of a curving coast" (*I.C.J. Pleadings*, Vol. II, p. 188). Instead, the general direction of the coast was determined by the straight coastal front.

Shown next is this chart from the German pleadings (*ibid.*, p. 189), Figure 112 of our presentation. Distinguished counsel for Canada, Professor Jaenicke, acknowledged in his presentation last week that this chart showed "perpendicular extensions from the coastal front around the concavity" (p. 44, *supra*). He said that the Court "accepted the approach of the Federal Republic of Germany as a possible method of achieving an equitable delimitation" *(ibid.)*. The distinction he drew was that he said that the purpose of this chart was to show that the coastal fronts converged *(ibid.)*. Maybe so, but this was not because of any inherent theory of convergence. As can be seen, all three coastal fronts faced the area of delimitation, and their extensions did converge. This was because the coastal fronts were at obtuse angles to one another, and because the area being delimited was an enclosed sea.

In the Gulf of Maine area, there is no such convergence. The area being delimited is the concavity and the seaward area, which is not hemmed in by the jurisdictions of other States. The coasts of Maine and southwestern Nova Scotia are at a right angle to one another. No coast of Canada that faces the Gulf of Maine also faces the mouth of the coastal concavity and the sea beyond.

The geographical issue in this case has boiled down to the question whether the coast of Maine is entitled to an extension outside the hypothetical closing line of the Gulf of Maine proper.

Canada has contended – in many different formulations, but all arriving at the same conclusion – that the width of the maritime area to which the entire coast of Maine is entitled decreases progressively until it reaches zero at the centre of the hypothetical closing line.

In the words of Professor Jaenicke last week, "the lateral coasts prevent the coast at the back of the Gulf from extending further out into the sea" (pp. 46-47, *supra*).

That barrier is, so Canada claims, the result of a variety of ways of viewing the situation, phrased differently by different speakers for Canada:

(1) the convergence of the maritime extension of the coasts within the Gulf;
(2) the result of the radial projection of the coasts;
(3) the requirements of the equidistance approach.

Actually, all these approaches are identical. The intersection of the radii around the coastal points from which they are drawn simply marks the progress of the equidistance line. Canada's argument about points of convergence of the maritime extensions within the Gulf is result oriented, based upon the reorientation of the coastal fronts to produce an equidistant line. Canada's postulate that ultimately the most seaward base points of the coasts of the two countries must control the delimitation in the outer area, states the same thesis in yet another form.

Canada ignores over and over again the distinction between geography and method. It is accurate to say that Canada's entire rebuttal to the United States

geography presentation is based upon a failure to make this distinction. Canada argues that Maine is "confined" by Massachusetts and Nova Scotia, and that "the lateral coasts prevent the coast at the back from extending" (pp. 46, 47, *supra*). The coasts do no such thing. All that lies in front of Maine and New Hampshire is the open ocean. There is no coast "in the way". What prevents the coast of Maine from extending is not other coasts, but the equidistance method, whose characteristic is to swing the line across the coast at the back. By contrast, it is geography that prevents the coast of New Brunswick from extending seaward, because Nova Scotia lies in front of New Brunswick. This, of course, is the critical distinction, also ignored by Canada, between the coast of Maine and the coast of New Brunswick.

Canada's contentions rest upon an assumption which we consider fallacious, namely that Canada's desired result is dictated by the nature of the process of delimitation and that any other result can only be justified on an idea of sharing out. This is wrong. Canada assumes that the coasts in an area of delimitation can only have directional relations *inter se*, and that the directions of the coasts within the area of delimitation are totally isolated from the relation of the coasts adjoining the area of delimitation, namely, the general direction of the coast. While this view is of strategic necessity for Canada's case, it is not anchored in the law. The general direction of the coast is a relevant circumstance which must be considered in the process of delimitation. It is a circumstance which is entitled to great weight.

In the view of the United States, the coastal front of the coast of Maine cannot be cut off by the extension of the Canadian coastal front which faces the Gulf but not the Atlantic Ocean. Any other rule would ignore the fact that the coasts of Maine and New Hampshire run in the general direction of the Atlantic coasts of the two countries and the fact that the location of the terminus of the land boundary between the Parties is in the northern corner of the Gulf of Maine. It would deprive these indisputable and unalterable facts of the weight to which they are entitled by equitable principles. We note again that in the Anglo-Norwegian *Fisheries* case, speaking of the general direction of the coast, the Court stated, "one cannot confine oneself to examining one sector of the coast alone" (*I.C.J. Reports 1951, Judgment*, p. 142). Canada would prefer the Chamber to forget that the area of delimitation is part of a larger area and that the law of delimitation contains no proscription of a consideration of that fact.

To obscure its true intentions, Canada has invented the coastal wing theory to diguise the fact that it is really only two protruding points that control Canada's proposed boundary seaward of the Gulf, not the lateral coasts. Canada makes several arguments in this regard but the most illogical is its argument that the lateral coasts control the delimitation on the outside – because they fit Canada's definition of "abut". Distinguished counsel for Canada stated: "The Canadian and United States coasts which are the basis of the extension of jurisdiction into this area, [speaking of the outer area] – the controlling coasts – are the coasts of Nova Scotia and Massachusetts which extend from inside the Gulf around its lateral entrance points and then face the Atlantic on both sides of the Gulf" (p. 46, *supra*). Evidently, the coast at the back of the concavity does not "abut" in Canada's view, so it has no role to play in the delimitation seaward of the Gulf. But, if the lateral coast somehow has the facility to swing around and extend itself into the outer area, we fail to see why the coast of Maine is incapable of extending directly into that area.

Throughout the case Canada has misinterpreted our positions in this respect. We do not advocate a scheme of perpendicularity as described by Canada. It would not be correct to assert that one direction is to be legally preferred to the

complete exclusion of the other, to the point that only a perpendicular projection is admitted. There are no gaps in our analysis. All coasts are entitled to a projection seaward. But it will be a novel reordering of the law if the projection from the lateral coast within the concavity is found to be entitled to block, or cut off, the extension of the recessive coast at the back of the concavity, just because the lateral coast is closer to the area.

Mr. President, Canada argues that you should ignore coastal fronts and their extensions into the sea and simply measure 200-nautical-mile jurisdiction from the coast in all directions. We do not agree. But even if we did agree, let us examine how such a proposition should be applied in a delimitation situation.

(267) Before you is Figure 113 of our presentation. If each part of the coast generates jurisdiction in all directions, if each part of the coast is entitled to a 200-nautical-mile zone in principle, then a relevant question is: how much of the coast of any given State is entitled to claim jurisdiction over any given point at sea?

The logical effect of Canada's argument is that the Chamber must simply ignore the fact that a given point at sea is within 200 nautical miles of substantially greater length of coast of one party than another. Instead, in Canada's view, everything must turn on the nearest coastal promontory.

That cannot be. If 300 nautical miles of one State's coast and only 100 nautical miles of another State's coast are within 200 nautical miles of the same point at sea, Canada's very theory of radial projection should require a summing-up of the relative extent of coastline generating jurisdiction over the same point at sea. Let me repeat that. If 300 nautical miles of one State's coast and only 100 nautical miles of another State's coast are within 200 nautical miles of the same point at sea, Canada's very theory of radial projection should require a summing-up of the relative extent of coastline generating jurisdiction over the same point at sea.

(267) Figure 113 makes this point graphically. This is the geometrical diagram we have been working with where coast WX is twice as long as coast XS. Imagine that coast WX is 200 nautical miles long. Let us apply Canada's theory that each segment of the coast generates 200-nautical-mile jurisdiction in all directions.

Our object is to ascertain whether any given point is within 200 nautical miles of more of the coast of one State than the other. To do this, all we need to do is describe a 200-nautical-mile arc from that point at sea, and then measure the length of the respective segments of coast that are intersected by the arcs.

(267) That is exactly what we have done on this Figure 113. Arcs of the same length as coast WX – 200 nautical miles – were swung from each point in the grid. The length of the respective segments of the coast intersected by the arc was measured.

The result is that all the parts of the grid in the colour red are within 200 nautical miles of more of the coast of State A than of State B. All of the parts of the grid in the colour green are within 200 nautical miles of more of the coast of State B than State A.

The curved line on the grid represents all points that are within 200 nautical miles of as much of the coast of State A as of State B. Of course, this analysis does not take account of the continental shelf beyond 200 nautical miles. In so far as that is concerned, the curvature toward State A would be more gradual than is shown here.

Another important fact emerges from this Figure. Point T, the midpoint of the closing line across the Gulf, is within 200 nautical miles of twice as much of the coast of State A as State B.

(208) We are placing before you Figure 114 of our presentation which Canada used

to show that areas of the landmass of Nova Scotia are within certain distances of points on Georges Bank. If you were to draw 200-nautical-mile arcs from either X, or Y, or Z, more United States coastal front – shown on that graphic – than Canadian coastal front would be intersected by that 200-nautical-mile arc. Approximately 320 nautical miles of United States coastal front is within 200 nautical miles of Point Z, whereas only 230 nautical miles of Canadian coastal front is within 200 nautical miles of that point. If 200-nautical-mile arcs are to be drawn, let them, then, be drawn from all points on the coast. There is much more United States coastal front within 200 nautical miles of Georges Bank than Canadian coastal front. If that is what Canada means by geographical adjacency, we are prepared to accept it.

Canada's radial proposals contradict the very premise upon which they purport to rest, namely the basis of title of the coastal State: since sovereignty over the coastline is the basis of title, the longer the segment of its coastline that generates jurisdiction over any given area, the stronger a coastal State's claim over that area should be as against another coastal State. Canada, of course, would object. It would say the protruding points on coasts control the delimitation. We submit that is based upon an incorrect understanding of the law. It is incorrect in its understanding of the 200-nautical-mile zone, and it is an utter misconception of the geographic facts in this case.

The Chamber adjourned from 4.20 p.m. to 4.40 p.m.

B

Mr. President, distinguished Judges, may it please the Chamber. This brings me to the second section of this part on the cut-off effect. We will now take up the question of the cut-off effect outside the concavity.

In the *North Sea Continental Shelf* cases the Court examined the cut-off effect in two paragraphs of its Judgment.

At paragraph 8, the Court made the following statement:

> "The effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two such lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelf area they enclose to take the form approximately of a triangle with its apex to seaward and, as it was put on behalf of the Federal Republic, 'cutting off' the coastal State from the further areas of the continental shelf outside of and beyond this triangle." (*I.C.J. Reports 1969*, para. 8.)

Two specific points should be noted about this statement.

First, the Court used the words "relatively short distance from the coast" to refer to a point that is in fact some 100 nautical miles offshore. (The exact mileage from the coast to this point in the North Sea situation is given in V, United States Reply, p. 76, fn. 4.)

In our discussion in the Reply on the subject of non-encroachment, which is but another means of addressing the cut-off effect, we showed that the distances involved in the North Sea are comparable to those in the Gulf of Maine area (p. 76, fn. 4; p. 77, fn. 1). That is, the meeting point of any two equidistant lines – not the convergence of the extensions of coastal fronts in the Gulf of Maine – occurs approximately at the midpoint of the closing line across the mouth of the

concavity, at about the same distance from the coast as the meeting point of the equidistant lines in the North Sea situation.

Before you is Figure 115 of our presentation. It is made up of Figure 28 of our Counter-Memorial together with Figure 30A of Canada's first-round oral presentation. It shows the comparability of the North Sea and the Gulf of Maine area, both in terms of actual equidistant lines, and in terms of the geometric model that Canada has produced. We would ask that you consider this chart carefully in light of what Canadian counsel said last week. Referring to the North Sea as well as the Bay of Biscay and the *Tunisia/Libya* case, Canadian counsel said: "In all three cases the area of delimitation was confined to the area between the lateral coasts of the concavity, and the boundaries do not extend substantially outside this area" (p. 42, *supra*). With all respect, there may be something to that statement as one views the *Tunisia/Libya* case, but we do not believe that it is so in regard to the other two mentioned. The boundaries in the North Sea extended well seaward of the concavity, as it will in the Bay of Biscay.

(112) In the top chart on the left of the North Sea from Figure 28 of our Counter-Memorial, the German complaint that it was cut off from the areas seaward of the point where the two equidistant lines met is illustrated. It is this complaint that the Court noted at paragraph 8 of its 1969 Judgment. In order to highlight the resemblance between the German coast at the back of the concavity and the Maine-New Hampshire coast, also at the back of the concavity, we depicted, as shown on the lower left-hand chart, equidistant lines as if Maine and New Hampshire were a third State located between Massachusetts and Canada.

As may be seen, a similar complaint may be lodged here. Canada's geometric figure makes our same point in geometrical terms.

It is clear then that the cut-off exists seaward of this point where the equidistant lines meet – in other words, in our case the midpoint of the closing line across the mouth of the concavity. Does it matter, in this case, that two States are involved, rather than three? In other words, does it matter that here, in this case, in fact, there are not two equidistant lines, but only one?

The answer is no, for at least four related reasons. The cut-off exists even when only one equidistant line is involved.

First, we have just seen in Figure 111 that the German pleadings illustrated the cut-off effect in a two-State situation, and we believe that it is in that light that the *North Sea Continental Shelf* cases must be understood (Vol. I, p. 427). It is interesting to note what the German pleadings said in respect of that chart:

> "If such configurations would have the effect to apportion parts of the continental shelf which appear to an unbiased observer as a continuation of one State's territory, to another State, such an effect has to be regarded as a circumstance – or a 'special circumstance' in the meaning of Article 6, paragraph 2, of the Continental Shelf Convention if it were applicable – which excludes the application of the equidistance method for the determination of the boundary between these States as inequitable." (*I.C.J. Pleadings*, Vol. I, p. 426.)

Second, the Court of Arbitration in the Anglo-French Arbitration stated the matter clearly:

> "The International Court of Justice also singled out an aspect of lateral boundary situations which tend 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." (Para. 86.)

Third, the answer remains no when we consider that it is the land that dominates the sea. We submit that the relationship of the land to the sea is the same whether it is a third State that lies at the back of the concavity, or whether that coastline belongs to one of the States on the side of the concavity.

Fourth, the German complaint in the *North Sea Continental Shelf* cases was *that it suffered not only a cut-off effect but a cumulative cut-off effect.* The argument in that case was that the equidistant lines cut off Germany on both sides and thus it got a double dose of inequity, so to speak.

Figure 116 of our presentation, which is being placed before you, is a reproduction of pages 72 and 73 from Volume I of the pleadings in the *North Sea Continental Shelf* cases. We would like to quote to you the language from page 72 and the following language on page 74. It makes it quite clear that Germany believed that inequity occurred when just one headland was in play and that Germany suffered a double injustice in its geographic circumstances.

> "If in the case of gulfs, bays, or other major indentations of the coastline, one or even both seaward sides belong to a neighbour State, the geographical situation corresponds to the problem of islands which lie before the coast, but belong to another State. In both cases the drawing of a boundary line in application of the equidistance method must, by geometrical necessity, cut off the State from the sea. As shown above (*supra* paras. 43 et seq.) projecting parts of the coastline of the neighbour State affect the direction of the equidistance line considerably; the further the equidistance line is drawn into the sea, the greater is the effect of this deviation upon the allocation of submarine areas before the coast. The following diagram (figure 16) illustrates how markedly a projecting part of the coast of the neighbour State influences the course of an equidistance line drawn into the sea even at a greater distance from the coast.
>
> The enclosure of the coast of a State by projected parts of the coasts of the two neighbour States to the left and to the right has a cumulative geometric effect; at a relatively short distance from the coast the two equidistance lines intersect, thereby cutting off the inside coast from the high sea." (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, pp. 72-74.)

Canada would respond, we suppose, that since it is a United States coast that is on the side of the concavity, the United States has no complaint of cut-off in this outer area, since the United States, in effect, gets everything on its side of the perpendicular to the closing line of the concavity drawn from its midpoint.

But that is only true for one side of this concavity and its seaward area. That side of the concavity is made up of only United States coasts. What of the other side? United States coast forms one half of the coast on the northern side of the Gulf of Maine concavity. Canadian coast forms the other half. Surely the division of this northern half of the concavity, and the area seaward of that half of the concavity, should reflect that very fundamental fact.

The Federal Republic of Germany was cut off by equidistant lines drawn from both lateral coasts – on one side by Denmark and on the other side by the Netherlands. The final negotiated lines of delimitation between the Federal Republic and the Netherlands, and the Federal Republic and Denmark, abate the cut-off of the German coastal front on both sides. Neither boundary uses the equidistant line in the outer area.

Thus, the approximately 100-nautical-mile Maine coast from the land boundary southwestward to Penobscot Bay, is cut off in the seaward area by the lateral extension of the southwestern Nova Scotia coast. The principle of non-encroachment enunciated by the Court in the *North Sea Continental Shelf* cases is not limited to areas close to the coast, nor to three-State situations. It applies as well to areas lying further out, and to two-State situations. In other words, the cut-off effect exists beyond the Gulf of Maine concavity and the principle of non-encroachment requires its abatement.

C

Now, let us examine how the cut-off effect begins within the concavity. We said that there were two points to note in regard to the words of paragraph 8 of the Court's 1969 Judgment.

The second point to consider is: what of the fact that, in paragraph 8 of the Judgment, the Court referred to the cut-off only in relation to the German complaint that it was cut off from the area beyond the apex of the triangle created by the meeting of the two equidistant lines? Can this be taken to mean, as Canada suggests, that the cut-off does not begin within the concavity?

Notwithstanding all of the references to "close to" in connection with application of the principle of non-encroachment, can it be that the cut-off only begins outside the concavity? The answer is no. The cut-off begins as soon as the equidistant line leaves the land frontier.

At paragraph 44 of the Court's Judgment, the Court addressed the cut-off effect in language we have often quoted. This language is different from that in paragraph 8 and can only be understood in respect of the cut-off effect within the concavity. We will quote that language again:

> "As regards equidistance, it clearly cannot be identified with the notion of natural prolongation or extension, since, as has already been stated (paragraph 8), the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's coastal front, cutting it off from areas situated directly before that front." (*I.C.J. Reports 1969*, para. 44.)

This statement by the Court is a general truth. It does not rely for its validity upon the three-State situation at issue in 1969. It addresses the matter of the extension of the coastal front and, of course, that extension begins at the coast.

It is also necessary to consider the reference to swinging out. The only swinging out of equidistant lines across the German coastal front in that case were those that swung out from the German-Dutch land frontier and the German-Danish land frontier, and which both continued to swing across the German coastal front until the equidistant lines met – at approximately the midpoint of the closing line across the mouth of the concavity. Thereafter, the equidistant line extended as a perpendicular to the closing line from its midpoint. It no longer swung out across the coastal front.

Thus, the swing out across the coastal front, which is so much a part of the cut-off effect, is a characteristic of the equidistant line within the concavity and begins as soon as the equidistant line leaves the international frontier. Where the equidistance method is used and lateral coasts ultimately come into play at the headlands of the concavity, the equidistant line will stop swinging out across the coastal front at the back of the concavity. It simply goes straight out to sea.

But, as it goes straight out to sea, the effect of cut-off of the coast at the back of the concavity continues. The damage has been done, so to speak.

The inherent characteristic of the equidistant line in a coastal concavity, such as the Gulf of Maine, is to swing out within the concavity to reach the midpoint of the closing line across the mouth of the concavity. When the land boundary meets the sea away from the midpoint of the coastal fronts forming the concavity, *the equidistant line must swing across the front of one coast or* another to reach the midpoint of the closing line. When it does so, the cut-off begins immediately, as soon as the equidistant line leaves the international frontier. The point at which the equidistant line makes its final turn seaward as the perpendicular to the closing line of the concavity defines only the maximum lateral extent of the cut-off effect, but not the full amount of area that is cut off.

We would like to address the Canadian argument on this point.

(206) Being placed before you is Figure 117 of our presentation which is Figure 32 of the Canadian first round oral presentation. Canada correctly points out that the words used in the German pleadings to describe this Chart A, the chart on the left, which we have shown several times in our pleadings, was the "diversion effect". *Rather than trying to paraphrase, let the words before the Court in 1968* speak for themselves:

> "I might call it in short the 'diversion effect' of the projecting part of the coast of the neighbouring State, so that you might judge how much even a small projecting point diverts the equidistant line before the coast of the other State. The farther you go into the sea the more the boundary is diverted from the coast and, more important, the more area is included in this diversion effect." (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. II, p. 27.)

We believe that it should be stressed that Professor Jaenicke at that time referred to two geometrical matters – the course of the line and the amount of area involved as the line extends seaward. In fact, he stressed that the more important was the amount of area added to the cut-off as the boundary extended further into the sea. In this connection, Professor Jaenicke then discussed the two hypotheses upon which the graph was made. One "hypothesis is that the coastline is quite straight and the general direction of the coast is like this" (*ibid.*, p. 30). We can only assume that he referred the Court to the line labelled coastline at the bottom of this chart. The second hypothesis he made was that the neighbouring coast projected towards the sea.

There is an important mathematical point we would like to make before we go further. It is not entirely clear from this chart, but it is true, that each of these lines does its greatest diverting – its greatest swinging out – in its first segment as it leaves the international frontier. At first, the equidistant line is the bisector of the right angle formed by two coasts – what the chart shows as the headland further seaward, and the recessive coast. The equidistant line will continue as the straight line bisector of this right angle for a defined distance, depending upon the distance the headland projects seaward from the coastline. Then its effect will begin to lessen as the equidistant line coincides with a segment of a parabola, mathematically defined by the relationship of the seaward-most point on the headland to the recessive coastline. The defined distance that the equidistant line will continue as a straight line on this chart is related to the length of the lateral coastal front of the headland. The equidistant line will swing out in a straight line in front of the recessive coastline until it reaches the corner of a square, formed by the length of the lateral coastal front of the headland, and a length of coast of comparable length on the neighbouring coast.

(207) This may be seen in Figure 33 of Canada's first round oral presentation, which is now before you as Figure 118 of this presentation. If you look closely, you can see that the dashed line represents the 5-mile headland in the chart. The corresponding equidistant line has a straight dashed line to the other corner of this square that Canada has produced on this close-up of the chart. This link represents the 5-mile coastline and this heavy line is a straight line in front of the chart.

Thus, a headland of a given length will drive the equidistant line across the coastal front of the other State with the recessive coastline for a distance of exactly the same length. You may recall that in mathematics we refer to this line as having a certain slope, in this case a slope of 1. For every step the line goes up the chart, it takes a step across the chart.

(206) Let us refer back to the previous chart, Figure 117. Once one is past the headland, the slope of the line begins to increase. In other words, we can say that, as the line takes one step up the chart, it will not take a full step across the chart. At first, once the line leaves the parallel of the headland, the step across the chart will be almost a full step. Then, if you examine the 5-mile line on this chart, at about the 8-mile point, the slope of the line becomes about 2, meaning that for every step up the chart, the line takes only one-half step across the chart; further seaward, the slope continues to increase so that by the top of the chart, virtually no lateral move is made at all.

Thus, the diversion effect – the swinging out effect – is most dramatic close to the coast inside the headland, inside the concavity – it lessens as it leaves the coast behind. Applying this mathematical knowledge to our case, since the 100-nautical-mile southwestern coastal front of Nova Scotia represents the headland in these charts, we know that the equidistant line swings out across 100 nautical miles of United States coastal front – the recessive coastal front – from the international boundary terminus southwestward almost to Penobscot Bay.

But this point that the diversion effect is strongest close to the coast must not obscure the major point, which is: while the diversion effect may lessen after the equidistant line passes the headland, the area of cut-off keeps increasing. For each step up the chart, more area in front of the coast is being cut off by the extension of the equidistant line. Of course, once another headland comes into play, the equidistant line stops its lateral extension – its lateral swinging out. But the area of cut-off keeps increasing, even as the equidistant line extends seaward as a perpendicular to the closing line of the concavity.

Thus, we say, as we said in the first round of these oral proceedings, that when Canada puts into the chart another headland as it does here on Figure B, it has (206) told us nothing we did not know before (Fig. 32 of Canada's oral proceedings). Of course, the diversion effect is stopped by the neighbouring headland. The equidistant line is now a perpendicular to the midpoint of the closing line across the mouth of the concavity. But the diversion effect has already had its opportunity to engage in its most substantial lateral moves – taking a step in front of the coast at the back of the concavity for every step it takes seaward to leave the concavity. Thus, the imperative of the equidistant line to reach the midpoint of the closing line of the concavity is achieved.

But, to repeat again, while the diversion effect is stopped by the establishment of the opposing headland, the cut-off continues. Every bit of area between this vertical line and this dashed line representing the equidistant line, is an area that is cut off from the recessive coast at the back of the concavity. As the boundary extends seaward, the area of cut-off becomes greater and greater. It grows and it grows. It would have been larger had it not been for the new headland, but in relative terms, it remains enormous.

D

We now turn to the fourth section of this part on the cut-off effect in which we propose to examine the role of the recessive coast.

Canada's argument that the recessive coast has no role to play beyond the headlands of the concavity has no place in the law and no place in State practice. It is ironic to note that after all, it is Canada that is the proponent of a theory of unequal treatment for coasts – it is Canada that promotes a caste system among coasts. For, in Canada's view, the most proximate coast dominates and cuts off the recessive coast.

We believe it is necessary to dwell on this matter for a moment. Canada has stated:

> "As for the external segment, challenged by our United States friends, it is quite normal that it should be determined by basepoints situated on the exterior wings of the Gulf. What would be abnormal, on the contrary, would be for the external segment to be determined as far as its extreme seaward limit solely by the terminus of the land boundary situated at the back of the Gulf, or by points situated on either side of this boundary but much further from this segment than the points situated on the coastal wings." (**VI**, p. 197.)

And moments later:

> "There appears to be no reason why, in the case of a deep concavity – and just look at the stress the United States is placing on the depth of concavity of the Gulf of Maine – the same basepoints located at the back of the concavity should govern the line from one end to the other, *instead of giving way to other governing points as the line advances*. Over each segment of its course, the boundary must reflect the actual coasts which border the area in question." (**VI**, pp. 197-198.) (Emphasis added.)

That is a good description of the equidistant line. Why should the course of a boundary outside of the concavity start at the midpoint of the closing line and follow a course depending solely on equidistance from the two protruding coastal points? Canada's argument amounts to the assertion that outside the concavity, the existence of a concavity and the location of the terminus of the land boundary therein must be ignored and that the boundary in the outer area must follow a course that would be appropriate if the terminus of the land boundary were located at the midpoint of the closing line.

In effect, Canada suggests a method which would require the filling of the Gulf of Maine with land and moving the international boundary straight south to the midpoint of the closing line of the concavity. If Canada wants to re-fashion nature and fill in the Gulf of Maine with land, it would make much more sense to follow the last segment of the existing land boundary – the St. Croix river – in its natural extension to the sea by way of the Northeast Channel.

No such rule in favour of the more proximate coast can be deduced from the cases decided by international tribunals, or can be demonstrated in State practice. The *North Sea Continental Shelf* cases certainly make clear the right of the German recessive coast to be prolonged throughout its natural prolongation. Both the decision of the Court of Arbitration in the Anglo-French Arbitration and the Judgment of the Court in the *Tunisia/Libya* case adjusted the lines, otherwise constructed by the chosen method, so as to abate the cut-off of the distant portions of those lines. The Bay of Biscay delimitation shows that the practice of States respects the extension of the recessive coast.

In the *North Sea Continental Shelf* cases, the German coast at the back of the concavity was the recessive coast. The Court found that it was entitled to its extension into the sea well beyond the closing line of the concavity. The Court found that it could not be cut off by equidistant lines drawn from coasts more proximate to the area being delimited. For purposes of the proportionality test, the Court made no distinction between inner and outer segments or coasts that were more recessive. All coasts that had a coastal front that faced the area were treated equally in relation to their length.

We understand the Bay of Biscay delimitation to treat the recessive coast equally in relation to the lateral coast. In this connection we would note that France's reservation to Article 6 of the Continental Shelf Convention and the line it negotiated with another State party to that Convention, would seem to indicate its view that special circumstances of Article 6 are not simply insignificant rocks or promontories but may be major geographical features such as coastal concavities. In the delimitation to date, the location of Point T on the closing line of the concavity in the Bay of Biscay reflects the coastal proportionality of all the coastal fronts within the concavity facing the area to be delimited. All coastal fronts are projected proportionally onto the Bay of Biscay closing line. Thus, the recessive coast was treated as well as the lateral coasts. We will avoid speculating on what that means for the delimitation in that situation in its outer area.

We are placing before you Figure 119 of our presentation showing a geometric model of the geography in the *Tunisia/Libya* case. In the *Tunisia/Libya* case, where the Court began its delimitation with the perpendicular method, the Court abated the cut-off effect suffered by the extension of both coasts in the outer segment of the area of delimitation, which the Court defined as being north of 34° 10′ 30″ N latitude. Any extension of the perpendicular would have cut off the extension laterally of the Tunisian coast that existed in the outer area, the Tunisian coast including the Kerkennah Islands north of 34° 10′ 30″ N latitude. In that segment Tunisia had a coastline, while Libya had none.

Thus, the perpendicular had to be modified in this outer sector and is the reason for the Court's statement at paragraph 125 of its Judgment that "a line drawn perpendicular to the coast becomes, generally speaking, the less suitable as a line of delimitation the further it extends from the coast" (*I.C.J. Reports 1982*, para. 125). We believe that statement must be understood as limited to the facts of that case where there was a coastline in the outer sector.

On the other hand, the Court was not prepared to modify the line to the full extent indicated by the existence of that coast in the outer area. Such a line would have been a line parallel to the 62 degree azimuth of the general direction of the coast in the vicinity of the Kerkennah Islands. To protect the extension of the Libyan coast, a recessive coast that had been the influential indicator of the course of the line, the Court modified the course of the line in the outer area to abate the cut-off that would have been suffered by the extension of the recessive Libyan coast. Moreover, in application of the proportionality test the Court used the entire area of delimitation and it did not distinguish the two sectors in the test that it applied. Thus, for purposes of the proportionality test, the recessive coast was treated equally with the other coastal fronts in the relevant area.

The Court thus carefully used a technique employed to minimize the cut-off effect of the boundary line in the outer segment on the extension of the recessive coast. Canada's line, of course, takes no account of these facts in our case and seeks to maximize rather than minimize the cut-off effect.

In the Anglo-French Arbitration, the recessive coast also was taken into account in the outer sector. Before you is Figure 120 of our presentation. It shows a diagram of the construction of the final segment in that case – the segment extending into the Atlantic ocean. We emphasize that this chart is not drawn to scale. It has been drawn in a way that emphasizes the techniques used in that case. A diagram more to scale is found at Figure 120B in your map folio. This exaggerated diagram before you is in keeping with the example set forth in an article by Canada's distinguished counsel, Professor Bowett, in the 1978 *British Year Book of International Law*, page 23.

In the Anglo-French case, both States had substantial coasts abutting the outer segment, but the course of the equidistant line in that segment would have been determined, exclusively and in its entirety, by two points, Point A and Point B (Wingletang, Scilly Isles and Le Crom, Ushant). It would have started at the midpoint of the line connecting these two points, line AB. The cut-off effect caused by the equidistant line was due to the protrusion and change of direction of the controlling portions of the English coast in relation to the ultimate base-point on the French coast, Point B. The strict equidistant line terminates at the 1,000-fathom contour at the parallel of latitude of the French coast on the northern shores of the Bay of Biscay. Because of the cut-off effect of the equidistant line on the more recessive coast of France, the Court of Arbitration devised a method which abated the cut-off effect of the more distant section of the line.

The line perpendicular to line AB represents the equidistant line, B representing Ushant, A representing the Scilly Isles, and C and D representing points on the British mainland. In this case, the Court of Arbitration abated the cut-off effect of the extension of the French coast by moving the starting-point of the final segment of the boundary line inwards inside of the line AB to point L, Point L being equidistant from Points B, A and D. From Point L, the Court of Arbitration changed the course of the line twice, at segment LM and segment MN. Point M is the point of intersection of the perpendicular bisectors of lines BA and BC. The effect was that the boundary crossed the line AB not in its centre but away from the recessive coast (closer to A than to B) and to tilt the angle away from that cut-off coast.

In the opinion of the United States, these examples alone, in geographical circumstances in some cases similar to, and in other cases considerably different from, our case, suffice to refute Canada's assertion that ultimately the wings of the concavity must control the line – that in the outer segment these points must control. In no case do the "wings" govern these lines. Therefore our position is not novel. It is rooted in law.

It has been before the Court in other cases and the issue will no doubt continue to arise in future cases. To date, the law has found that the recessive coast is entitled to its extension into the area to be delimited, whether it is the coast at the back of a concavity as in our case, whether it is a mainland coast blocked from its extension by the use of the equidistance method from offshore islands, or whether other geographical circumstances make equidistance lines cut off the recessive coast from an equitable seaward extension.

III. The Means for Abating the Cut-Off Effect

We now come to the third part of our geography presentation – that dealing with the abatement of the cut-off effect required by the principle of non-encroachment. Or, to put it in the words of Question 2 of Judge Cohen: "What degree of cut-off is acceptable?" (**VI**, p. 464.) The remainder of our presentation

today will be our attempt to answer Judge Cohen's second question. In doing so we will also address Judge Cohen's third question and Judge Mosler's first and third questions (**VI**, p. 465; pp. 462, 463).

The cut-off which occurs in this case relates to the fact that the extension of the coast of Maine is cut off by the lateral extension of the coast of southwestern Nova Scotia. It is also true that there is some mutuality of cut-off in that the extension of the southwestern coast of Nova Scotia into the Gulf of Maine is cut off by the extension of the coast of Maine. Surely, no equitable boundary would allow one coast or the other to suffer the full measure of each respective cut-off effect. Thus, the question becomes: what is the most appropriate means for abating the cut-off effect created by the overlapping extensions of these two coasts and how best to test whether a proposed solution is equitable?

To take the latter question first, our answer is that in most cases a properly constructed and applied proportionality test will, taking account of relevant circumstances, test whether a proposed method of abating the cut-off is an equitable solution. As Professor Malintoppi stated in the first round, "proportionality is not the only test of equity, though it is by far the most important" (**VI**, p. 209).

Before going on, we would like to respond to the six points concerning proportionality argued by Canadian counsel during the last round.

First, Canada argued that the United States uses proportionality as a method, not a test. That is not correct. In the next few minutes we will show how more than one line adopted by more than one method can meet the same test.

Second, Canadian counsel finds flexibility in our view where there is none. In the first round, Mr. Feldman indicated that there was common ground on three points: the use of coastal fronts to define the length of coasts; the use of perpendiculars to the general direction of the coast to mark the lateral limits of the test area; and the 200-nautical-mile limit as the outer limit of the test area (**VI**, p. 329). He said the Parties were not in agreement on three points: the bearing of the perpendicular lines defining the lateral limits; the treatment of the Bay of Fundy; and "The particular coasts and areas to be included" *(ibid.)*. And yet, Canadian counsel finds somewhere in this what he calls "an important concession to which I would draw the attention of the Chamber" (p. 129, *supra*) – that concession being to use Canada's coastal wings to make the lateral limits of the relevant coasts for a proportionality test. There is no such concession in the record of this case.

Third, despite the valiant effort, Canada had no success in presenting a convincing argument why the Bay of Fundy should be included in the proportionality test in this case. We have already addressed the new arguments brought forward during the oral proceedings. But we would note that the most incredible new Canadian argument in this respect is the Canadian admission that the "Bay of Fundy is geographically disadvantaged by its very nature" (p. 132, *supra*), yet on that basis Canada argues for treatment for the coasts of the Bay of Fundy comparable to that given the coasts marking the coastal fronts of the Gulf of Maine concavity. That, Mr. President, distinguished Judges, is refashioning geography, pure and simple.

Fourth, Canada's argument about the role of the triangle in the proportionality tests is another Canadian effort to find substantive concessions on the part of the United States in the Special Agreement. We have stated again and again that the triangle was agreed upon as a neutral device to mark the limit within which the Chamber is to end its delimitation. Use of the lines of latitude and longitude marking legs of the triangle as outer limits of the proportionality test pushes the

whole test area toward the United States and could even make a Canadian claim to the Great South Channel look equitable.

Fifth, Canada's lingering doubts about the application of the proportionality test to the outer area are overshadowed by its acknowledgement that the test can be applied there, and its repeated efforts to do so. Canada has taken a step forward in indicating Canada's recognition that the Chamber will be considering a single proportionality test for the entire area (p. 128, *supra*). But the most
256 recent models shown by Canada are not realistic. Figure 171 of Canada's oral presentation continues to use the coast of the Bay of Fundy rather than the closing line; the lateral limits are oriented unfairly towards the United States; and, the United States coast and area southwest of Nantucket are included in the test without regard to the fact that they neither reflect the like with like criteria, or area of overlap criteria set out by the *Tunisia/Libya* case. Figure 173 of the Canadian oral presentation has the defect of the triangle previously mentioned.

Sixth, Canada speaks of flexibility in the application of the test. We have shown our flexibility in this regard. But we do not believe that the proportionality test has anything to do with coasts defined by economic factors, or areas defined by the conduct of the Parties. The proportionality test is a test of geographic equity and Canada's efforts to contest that is just one of the numerous ways that Canada seeks to overturn the jurisprudence.

We would like to make one further point about proportionality.

The assessment by the Court in the *Tunisia/Libya* case that a difference of six percentage points between the proportion of the relevant coastlines and the proportion of the seaward areas extended from those coastlines was equitable would not be justifiable in the test we are about to apply. Where in the *Tunisia/Libya* case, the ratio of the coastal front was under 2:1 (in fact, somewhere around 1.96:1), the ratio of coastal fronts in the Gulf of Maine is 3:1.

A discrepancy between the proportion of delimited maritime areas and the proportion of the coastal fronts themselves is magnified as the ratios increase. For example, a 50 per cent to 50 per cent proportion corresponds to a ratio of 1:1; a proportion of 80 per cent to 20 per cent corresponds to a ratio of 4:1. When the ratio is relatively low, as was the 1.96:1 ratio in the *Tunisia/Libya* case, a difference of a few percentage points has much less effect than when the ratio is greater, such as the 3:1 coastal-front ratio in the Gulf of Maine.

Let us now return to the abatement of the cut-off effect and the appropriate means for abating any cut-off effect. We believe that there are three basic approaches for abating the cut-off effect in this case: one is a two-sector approach; another is a one-sector approach; and the third is a two-method approach.

Earlier in this presentation we said that we would analyse, in this round of argument, the geographical equities in this case within and seaward of the area formed by the coastal fronts between Nantucket and Cape Sable.

So let us examine these three approaches for abating the cut-off effect in this case in an area that some might argue is analogous to the area of overlap to which the Court referred in the *Tunisia/Libya* decision. Coupled with our earlier analysis in which we employed a larger area, the relevant area from Nantucket to Cape Canso, we believe this new analysis will give you a full appreciation of the equitable nature of the United States position.

We would like to begin our discussion by responding to Judge Mosler's first question:

"What is the geographical significance of the Point A which, according to

> Article II, paragraph 1, of the Special Agreement, the Chamber has to take as its starting point in drawing the delimitation line, in relation to the limits of the Parties' territorial waters?" (VI, p. 462.)

Our answer is that, in respect of the Parties' territorial waters, regardless of the answer to the question of sovereignty over Machias Seal Island and North Rock, there is no geographical significance to Point A. As the Deputy-Agent for Canada noted, "Point A lies well outside the limits of the territorial waters of both Parties" (p. 72, *supra*). We would note in this connection, however, that while the United States, as we have indicated here many times, does not ascribe substantive meaning to the terms of the Special Agreement in respect to the course of the line the Chamber will delimit from the starting-point under the Special Agreement, the general geographical significance of Point A is that the delimitation begins at a point that already concedes to Canada a substantial amount of area in front of the southwestern-facing coast of Nova Scotia. That completes the answer to Judge Mosler's first question.

A. The Two-Sector Approach

We would now like to begin our discussion of the two-sector approach by responding to Judge Mosler's third question:

> "For what reason have the Parties proposed the line from Nantucket to Cape Sable as the line dividing the inner sector (the Gulf proper) from the outer sector of the Gulf of Maine area (the 'closing-line of the Gulf')?" (VI, p. 463.)

Our answer begins with a general caveat which is that the United States has not proposed that the boundary to be determined by the Chamber necessarily take account of the fact that there are two sectors, or components, to the Gulf of Maine area. The United States has spoken of the hypothetical closing line between Nantucket and Cape Sable only as a means to assist our analysis and understanding of the issues in this case. Nantucket and Cape Sable are the natural headlands of the concavity that is the Gulf of Maine. The United States and Canada agree upon the location of the hypothetical closing line across the mouth of the concavity. But the United States does not advocate a two-sector approach to the delimitation. We do not, in particular, believe that the closing line acts as a barrier to the extension of all the coastal fronts inside the concavity. We have only spoken of the inner and the outer components for analytical purposes. That is our answer to Judge Mosler's third question.

Canada has been pressing a two-sector approach in the hope of convincing the Chamber on two points. The first goal of Canada is to argue that in the outer sector the coasts forming the concavity have no influence on the delimitation. In Canada's view, only the projecting points or parts of the coast should have influence over the delimitation in the outer sector. The second Canadian goal is to cast doubt on the application of the proportionality test in the outer segment. Both of these Canadian points are faulty, and we note with some appreciation that Canada, at least according to Professor Malintoppi, now "has no difficulty in the proportionality test being applied in such a way as to involve simultaneously both parts of the area to be delimited" (p. 128, *supra*).

We have no particular objection to a two-sector analysis of this case, but any boundary line in the outer sector must respect the coastal front of the United States as it extends through the Gulf of Maine into the open sea. Further, the delimitation of the outer sector must fairly reflect the 3 to 1 ratio of the coasts of the Parties that face the Gulf of Maine and thereby achieve that reasonable

degree of proportionality which is a critical test of an equitable delimitation. The Court stated at paragraph 114 of its Judgment in the *Tunisia/Libya* case in connection with the two-sector approach that the primordial requirement was to achieve an overall equitable result.

Accordingly, we do not believe that the two-sector approach means application of two proportionality tests, something which has never been done to our knowledge. The issue for the Chamber here is what coasts and areas are to be included in one, overall test.

Here we would like to take up Judge Cohen's third question, which asks: "What role in fact and in law does the southern coast of Nova Scotia and the opposite northern coast of Massachusetts play, either with respect to the Gulf or seaward?" (**VI**, p. 465.)

Our answer is that these lateral coasts may not cut off the coast at the back of the concavity from its seaward extension; but they do have an extension of their own. There has been much said in this case about a hierarchy of coasts, and what we have, in fact, seen is that it is characteristic of proximity, or of the equidistance method, to create a caste system in favour of the most proximate coast. In our view, all the coastal fronts facing the area to be delimited are entitled to be extended throughout the delimitation area regardless of proximity. In fact, and in law, the coastal front of southwestern Nova Scotia and the coastal front of northern Massachusetts are entitled to an extension throughout the delimitation area, but so, too, is the coastal front of the United States at Maine and New Hampshire. Whether or not a boundary fairly – equitably – respects that extension of all the coastal fronts facing the area to be delimited may be tested by proper application of the proportionality test.

That concludes our answer to Judge Cohen's third question.

But the Canadian approach has been to distinguish two sectors and to compare the outer sector to the Atlantic approaches to the English Channel, which extend beyond the coasts of the Parties into the open sea. Canada argues that the Chamber should apply proportionality as a test of distortion caused by a special feature and not in terms of the relationship between coasts and maritime areas.

There is a certain analogy to be drawn from the Anglo-French situation in that the outer sector of the Gulf of Maine coast is off the coast of the two Parties. However, there is an important difference since the Gulf of Maine involves one continuous boundary through a continuous area, beginning at the international land boundary terminus. Thus, the better analogies are the *North Sea Continental Shelf* cases and the Bay of Biscay, where the area to be delimited and the boundary extend (or will extend) from within the concavity into the area off the coasts of the Parties.

The fundamental purpose of the proportionality test is to ensure that the line being tested does not result in a distribution of area that is not in reasonable proportion to the length of the coasts. In the Anglo-French Arbitration the problem was to determine whether the Scilly Islands, considered together with the Cornish Peninsula, because of their further offshore location, deflected the equidistant boundary proposed by the United Kingdom so far as to produce an equitable result. There is no implication in that case that the Court of Arbitration would have accepted a delimitation which produced a distribution of areas out of proportion to the relative length of the relevant coasts.

Having made these points, we are prepared to put forward an analysis for the Chamber's consideration of how the cut-off effect could be abated if one were to adopt the two-sector approach urged by Canada. There is no question in our view that if a two-sector approach is used, the law requires that all the coastal

fronts that form the Gulf of Maine be considered and be reflected in both sectors.

(228) We have placed before you Figure 121 of our presentation, which we viewed during our first round as Figure 10. In Figure A, at the top, we saw that the coast of State A and State B comprise one continuous straight coast. The red line is the equidistant line, or the perpendicular line, both being the same in this case. Here, each State's coast receives the entire maritime area in front of it, seaward to the limits of coastal-State jurisdiction.

In Figure B, at the bottom, we placed into the coast a rectangular concavity of roughly the shape and proportion of the Gulf of Maine. The red line is the equidistant line. The red shaded area is the area of cut-off of State A – that is, the area that the equidistant line leaves to coast XS at the expense of coast XY.

You will recall that one argument that Canada makes is that the equidistant line is fair within the concavity, because it divides into two equal portions the square defined by Points X, Y, T and S. Canada's contention being, we suppose, that if the triangular-shaped area between Points T, Y and X is left to the coast YX, why should not coast XS be left with the triangular-shaped area shaded in red and defined by connecting Points X, T and S.

If this is all there was to it, we would probably find ourselves in agreement with Canada. If one is going to deal with the cut-off in two sectors, one may say that this is a fair way of treating the matter in the inner sector. As a matter of strict proportion the total area within the concavity formed by the coastal fronts would be divided into precisely the 3 to 1 coastline ratio.

Our problem with this approach is the leap in logic that takes place in Canada's analysis. Canada states, time and again, that if the equidistant line is fair within the inner area, it cannot help being fair in the exterior (**VI**, p. 52).

Here lies the problem with the two-sector approach – actually it is not a problem with the two-sector approach, but with the consistent use of equidistance in both sectors. Within the inner area, the equidistant line has swung across the coastal front of State A and has reached Point T, the midpoint of the closing line across the mouth of the concavity. From there it extends seaward as a perpendicular to the closing line. Thus, it divides the outer area seaward of the concavity in half between the two States, a 50-50 split – despite the fact that the coastal front of State A and State B forming the concavity are in a ratio of 3 to 1. The equidistant line leaves all the area seaward of line TS to the lateral coast of State B, even though coast XY of State A faces that area. Thus, while Canada takes us to task for creating a caste system of coasts, it is Canada that, in fact, places coast XY into solitary confinement as far as its relationship to the outer area is concerned. Canada thus has a hierarchy of its own. The question, in fact, is how equitably to share the cut-off.

The delimitation of the equidistant line within the inner area may be an equitable solution and proportional if one examines that sector only, but the proposed delimitation in the outer sector is not equitable and is not proportional. As a result, the overall solution is not equitable and proportional.

For the line in the outer sector to achieve an equitable result, it must leave part of the area seaward of line TS to State A. That means that if the equidistant line were to be drawn as far as Point T, then from Point T the line must turn back towards Point S – the headland of State B. To properly abate the cut-off effect it should turn back half the distance to Point S, before turning seaward as a perpendicular to the closing line.

(268) This possible solution is shown in Figure 122 of our presentation. This solution divides the inner area in a precise 3 to 1 ratio. It divides the outer area in the same 3 to 1 ratio. Thus, the overall result is proportional as well,

proportional to the lengths of the coastal fronts of State A and State B forming the coastal concavity. The coasts of equal length, XY and YS, are left with the same amount of marine area, and, thus, neither coast can complain that this abatement of the cut-off effect does not treat it equitably.

On first glance, the technique of turning the line back toward State B is not appealing – shall we say, for aesthetic reasons. But if one stops to think about it for a moment, one will soon realize that this, in fact, is a common practice in regard to lines that the Parties have used in this area.

(25) For example, we are placing before you again the ICNAF line between Subarea 4 and Subarea 5, as Figure 123 of this presentation. We believe that an examination of the geographical characteristics of this line may prove interesting. The first three segments of the line extend due south from the international boundary terminus, then, due west, and then due south again – south, west and south.

The point where the fourth segment begins in an eastward direction, is about six nautical miles from the midpoint of the hypothetical closing line from Nantucket to Cape Sable. Thus, up to that point, the ICNAF line within the inner sector acts almost like an equidistant line.

But once it reaches that point – near the closing line – the ICNAF line departs from Canada's proposed course for the outer sector. Instead, the ICNAF line does what we have seen an equitable solution will do, it turns back towards Canada – not precisely along the closing line of the concavity – but back towards Canada nonetheless. It extends back about halfway toward Canada – to the Northeast Channel, where it turns southeastward and seaward.

You will note that the ICNAF line turns south again after it extends through the Channel. Thus, if the ICNAF line was considered as a proposed delimitation it would disadvantage the United States in this regard. Its final segment would not be a perpendicular to the general direction of the coast, as even the equidistant line would be. By turning south, the ICNAF line loses the opportunity to abate the cut-off effect entirely, and to produce a proportional delimitation.

For purposes of analysis, it is interesting to consider the result which could be achieved if the next-to-last segment of the ICNAF line that runs through the Northeast Channel, at an azimuth of 143.5 degrees, which is basically perpendicular to the general direction of the coast that we have established, were to be extended seaward.

(269) On this next figure, Figure 124 of our presentation, we have run a proportionality test on such a modified ICNAF line. As you can see, the coastline ratio is 3 to 1, or 75 to 25. The outer limit is the 200-nautical-mile zone. The grey area is shown. The area ratio in this test is 70:30, slightly in Canada's favour in comparison to the coastline ratio that actually exists.

It should be pointed out that this approach of extending a line generally southward from the international boundary terminus to Georges Bank and then turning the line back toward Canada to avoid splitting the Bank, and then extending the line seaward through the Northeast Channel, is not only the pattern that has been used in ICNAF, NACFI and NAFO for more than 50 years.

(27) The Chamber may wish to recall Figure 13 of the United States Memorial, which shows a search and rescue line used by the Parties which adopts this (28) general approach; Figure 14 of our Memorial shows the Second World War CHOP line, which is a variation of the same pattern. The United States lobster (29) line of the early 1970s also adopted this approach, shown at Figure 16 of the United States Memorial. Thus, this type of line has been used by one or both of the Parties for several different purposes.

The 1976 United States line also adopted an approach similar to that required to produce an equitable solution if the two-sector approach is to be used to abate the cut-off effect and to produce a proportionate delimitation in this case. The Agent of the United States will address Judge Schwebel's question of the legal basis for the 1976 line in his concluding remarks. Here we only wish to mention that the 1976 United States line basically followed the two-sector approach we have outlined: movement from the international boundary terminus toward the midpoint of the closing line in the inner sector, although it did not extend so far; a movement back toward Canada to the Northeast Channel; and a movement in the outer sector through the Channel so as to effect an equitable delimitation in the outer area and thereby meet the proportionality test as well.

(270) Figure 125 of our presentation shows here the 1976 United States line, together with the proportionality test that we are employing. As you can see, with the coastal ratio of 3 to 1, or 75 to 25, the United States line was modest, modest in the extreme. It left to the United States only 62 per cent of the area. Under strict proportionality, the United States should have received 75 per cent of the area. The 1976 United States line left Canada almost 50 per cent more area than it would have been entitled to if proportionality was a strict criterion for delimitation methods. The reason for that, as Mr. Robinson will explain, is that the line was based upon the United States interpretation at that time that the geological and geomorphological features of the sea-bed were entitled to great weight. Accordingly, those circumstances were taken into account to Canada's advantage, and the 1976 line followed the line of deepest water through the Gulf of Maine Basin and seaward through the Northeast Channel. Thus, the line more than abated the cut-off effect in Canada's favour.

We would like to point out here that the 1976 Canadian equidistant line did not adopt a fair two-sector approach. While it divides the inner area, basically proportionately, it makes no effort to meet the proportionality test in the outer area; and hence the overall delimitation is not equitable.

Figure 126 of our presentation applies the proportionality test to the 1976 Canadian equidistant line. Despite the 3 to 1 coastal-front ratio in favour of the United States, the equidistant line shown here leaves 46 per cent of the entire area for Canada, leaving only 54 per cent to the United States.

The foregoing illustrations show that there are ways that a two-sector approach can abate the cut-off effect and result in a proportional delimitation. But there is a key to it, and that is that the line must turn back toward Canada as it reaches or approaches the midpoint of the closing line of the mouth of the concavity. Such a line must skirt Georges Bank before extending seaward through the Northeast Channel. The equidistant lines and the Canadian line do not do that. Other lines used by the Parties for other purposes, particularly the ICNAF line, have had this characteristic of heading back toward Canada as the midpoint of the closing line was approached. The 1976 United States line had that very characteristic as well.

B. The One-Sector Approach

The second means of abating the cut-off effect is to adopt a one-sector approach. Thus, one method would be chosen and used throughout the boundary. This, in fact, is what the Parties have done. Canada has chosen an equidistant method and used it throughout, modifying it to take account of its view of the relevant circumstances in the area – namely the existence, or possibly lack of existence, of Cape Cod and Nantucket. The United States has also used one method, the perpendicular to the general direction of the coast method, and

has modified it to take account of certain of the relevant circumstances in the area, namely the existence of the fishing banks and the need for boundaries to protect their integrity and not arbitrarily to split the banks if an equitable boundary can be devised which otherwise goes round the banks.

Since the Chamber is quite familiar with the Canadian line and the United States line, we do not propose to review them at this time. Instead we will examine another possibility, applying one method throughout the entire region.

The Chamber will recall that the difference between the Parties concerning the general direction of the coast is between 64 degrees now proposed by Canada, based upon an assessment of the nature of a geodetic line between Long Island and Newfoundland – that is macrogeography if anything is – and the 54 degrees proposed by the United States. This 10 degree difference produces a significantly large area when projected over 200 nautical miles.

(271) Shown on the next figure – Figure 127 of the presentation – is a line bearing 154 degrees from the starting point – a perpendicular to the 64 degree general direction of the coast that Canada has identified. This line has been modified once, to avoid crossing Browns Bank.

Such a line would abate the cut-off effect and would produce a proportionate delimitation. The Canadian coastal front at southwestern Nova Scotia extends within the concavity that is the Gulf of Maine. Moreover, a broad area is left to Canada seaward of the mouth of the concavity. The line leaves to the United States 74 per cent of the area and Canada 26 per cent of the area. Thus, the line achieves a proportionate overall delimitation in light of the 3 to 1, 75 to 25, coastline ratio.

C. The Two-Method Approach

The third concept for abating the cut-off effect and producing a proportionate delimitation may be termed the two-method approach.

The Parties have respectively proposed the equidistance method and the perpendicular method. The two-method approach for abating the cut-off effect would combine the two delimitation methods.

The United States believes that should this approach for abating the cut-off effect be followed, it would be reasonable to use the equidistant method closer inshore, and the perpendicular method further seaward. If the equidistant line is allowed to extend too far seaward in the inner area, specifically to the midpoint of the closing line across the mouth of the concavity, it has already swung too far across the coast of the United States to produce a proportionate delimitation when the perpendicular method is used further out.

For the two-method approach to produce a delimitation that abates the cut-off effect, and which produces a proportionate delimitation, the equidistant line – as it leaves the coastal frontier – must turn seaward well before it reaches the midpoint of the closing line; then the line must extend as a perpendicular to the general direction of the coast.

Thus, as we said in the first round of these oral hearings (**VI**, p. 323), the essential question is where does the final perpendicular begin within the concavity? Where, then, is the proper turning point?

(272) We are placing before you a new chart, Figure 128 of our presentation, which is based upon the standard geometrical model we have been using in our presentation.

This chart demonstrates that the point to stop the equidistant line is, in geometrical terms, at a point which we have called and labelled here Point Q of this diagram. Here the equidistant line is stopped half-way between the land

frontier in the corner of the concavity and the midpoint of the closing line across the mouth of the concavity.

Thus, the equidistant line is stopped as it reaches the middle of the square formed by Points T, X, S and Y on the hypothetical line connecting the end points of those two coasts of equal length – coast XS and coast YS.

If the equidistant line is stopped at Point Q, and the perpendicular begins there within the concavity, the perpendicular line will cross the closing line of the concavity at a point three-fourths of the way between the headlands of the concavity. Thus, the closing line will be divided in the 3 to 1 ratio of the relative lengths of the coastal fronts forming the concavity. The red area of cut-off, shown here, will then be equally shared between State A and State B. This is not a caste system or hierarchy of coasts, but an equality of treatment of coasts.

We note that this technique of stopping the use of the equidistant line well within the coastal concavity in relation to coasts of equal length on either side of the land boundary is comparable to the technique that is set out in Annex 10 of our Counter-Memorial (**IV**), which is our interpretation of how France and Spain stopped the equidistant line well within the Bay of Biscay coastal concavity – well before the equidistant line reached the midpoint of the closing line across the mouth of the concavity. In that case it is also true that Point T on the closing line is located at a point that reflects the lengths of the coastal fronts of France and Spain forming the concavity.

(114) (117) Figure 129 of our presentation, which we have shown before, depicts by direct analogy to the Bay of Biscay delimitation and the North Sea delimitation the point at which the equidistant line would be stopped in this case were the Chamber to follow the approach adopted in those three situations. Canada has not rebutted these direct analogies.

How could this approach of abating the cut-off effect be used in the actual geography of the Gulf of Maine area?

(273) Before you is Figure 130 of our presentation. It shows a line perpendicular to the general direction of the coast crossing the closing line at its three-quarters point. That perpendicular line extends landward to its intersection with the equidistant line. Such a line abates the cut-off effect. The southwestern coast of Nova Scotia is treated fairly. It is left an area within the coastal concavity, and an area outside the concavity – as is the coast of comparable length of the United States from Penobscot Bay to the international boundary terminus.

As you can see, this means of abating the cut-off effect produces a proportionate delimitation as well. Such a line produces a delimitation that leaves 75 per cent of the area to the United States and 25 per cent of the area to Canada. Thus, on the basis of a coastal-front ratio of 75 : 25, the area delimited exactly reflects that ratio.

The point at which the equidistant line ends, and the perpendicular line begins, on the basis of this approach, is more generous to Canada than the direct analogies to the North Sea and Bay of Biscay situations that we just examined on the previous Figure, and which were never contested as proper analogies. The point of intersection of the equidistant line and perpendicular line shown on this chart is about 38 nautical miles further seaward of the analogous point in the German-Danish boundary; and 14 nautical miles further seaward than the analogous point from the German-Dutch boundary, and the analogous point

(273) from the Bay of Biscay boundary. Thus, this line, shown here on Figure 130, is more generous to Canada in the use of equidistance than was the case in either the North Sea or the Bay of Biscay.

Accordingly, there is this third means for abating the cut-off effect so that it is equitably shared and so that the boundary produces a proportionate

delimitation – that is, by combining the two methods which the Parties have proposed.

Mr. President, distinguished Judges, that brings to a close this presentation of the application of delimitation methods within the geography of the Gulf of Maine area. It has been my distinct honour to appear before you.

QUESTION BY JUDGE COHEN

Judge COHEN: I simply would like to relate what you have said to Mr. Stevenson's very comprehensive examination of the law, and if I understood Mr. Stevenson he put to us that there is a new fundamental law governing this whole sequence of developments in recent years, affecting both the fisheries problem and the continental shelf problem. There were four components he put before us, if I understood him. The four components were: to recognize the importance of the coastal front; to understand that they would be governed by relevant circumstances; the relevant circumstances were to be understood or interpreted by equitable principles; and the whole would, or should, lead to an equitable result. I hope that is a fair summary of the context of Mr. Stevenson's approach. Would you tell me how you fit the very careful analysis you have made today, which rests it seems to me very heavily on the proportionality theory, into Mr. Stevenson's more general conception of the legal framework within which we are to make our decision?

Mr. COLSON: Mr. President, we will be happy to respond to that in the normal procedures of the Court (*infra*, p. 267).

The Chamber rose at 6.05 p.m.

TWENTY-SEVENTH PUBLIC SITTING (11 V 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

Mr. COLSON:

CONSERVATION

Mr. President, distinguished Judges. May it please the Chamber. It is an honour for me, once again, to represent my country before this Chamber.

The purpose of this presentation is to address four closely related subjects that concern the conservation and management of the fisheries resources of the Gulf of Maine area. The United States has no intention of reiterating the many points we have already made on this subject. We believe that, for the most part, during Canada's second round of oral presentation, Canada made no arguments on this subject that call for a response.

Part I of this presentation will address Canada's recent comments about the biological underpinnings of the ICNAF line dividing Subarea 4 and Subarea 5.

In Part II, it will be my honour to respond to question number 8 posed by Judge Mosler regarding the ecological régime of the Gulf of Maine Basin.

(23) In Part III, we will address Canada's attack on Figure 7 of the United States Memorial. That Figure shows that ranges of stocks of 12 of 16 commercially important species in the Gulf of Maine area are limited or divided by the Northeast Channel.

In Part IV, it will be my honour to respond to the fourth question put to us by Judge Cohen which concerns the basic problems associated with joint management of transboundary resources. In this connection, we will also add to our response to Judge Mosler's seventh question.

I. THE ICNAF LINE

Today I will be assisted by Dr. Jonathan Olsson and Mr. Richard Davis, and I would also like to express my appreciation to Miss Mary Wild Ennis and Lieutenant Brian Flanagan.

Let us begin with an examination of the ICNAF line dividing Subarea 4, designated by NACFI – as long ago as 1931 – as being "off Nova Scotia", from Subarea 5, designated – at that same time – as being "off New England".

The division of fish stocks in the Gulf of Maine area has been the subject of much discussion in this case. The pleadings of the United States have outlined the existence of three separate and identifiable ecological régimes in the Gulf of Maine area. We have stated what we consider to be an uncontroverted scientific conclusion: that separate stocks of fish are associated with Georges Bank and the Scotian shelf régimes. Canada has responded by attempting to disparage the evidence and by ignoring its own practice. It may be remembered that most fishermen are of consummate good sense in earning a livelihood. They know where to fish year in and year out, as did even the Basques and the Portuguese to whom Mr. Binnie referred several days ago (p. 82, *supra*). Stock divisions may be new to some attorneys representing Canada in these proceedings, but they are not new to the fishermen themselves.

In particular, Canada has sought to question the significance of the ICNAF

(25) line, shown here as Figure 131 of this presentation. We are told that it is a line of "convenience", and that it has no biological basis (VI, p. 143). We are told that it "never had anything to do with the bilateral relations of Canada and the United States . . ." (p. 16, *supra*). We are told that, notwithstanding that the United States and Canada have respected the line for purposes of fisheries conservation and management for over 50 years, the Chamber should consider the line irrelevant to a delimitation of jurisdiction over those very same resources (p. 17, *supra*).

As we near the end of these proceedings, the United States believes that it would be useful for the Chamber to have brought to its attention a few facts about the ICNAF line. We do not argue that the ICNAF line constitutes a boundary, or that Canada has ever accepted it for a jurisdictional purpose in international law. The line does, however, represent some fundamental truths about the marine environment of the Gulf of Maine area that Canada has sought repeatedly to obscure in this case. The line represents an aspect of the United States and Canadian fisheries management in this area for more than 50 years, which Canada now asks you to ignore.

We will address three points in this regard: the origin of this line in NACFI; its evolution in ICNAF; and its continued use today by NAFO.

The ICNAF line separating Subareas 4 and 5 was based upon a line established by the North American Council on Fisheries Investigations (NACFI) in 1931.

NACFI sought to subdivide the northwest Atlantic Ocean for purposes of developing an orderly and functional framework within which to gather statistics and conduct fisheries research. Before NACFI, fisheries statistics in the northwest Atlantic Ocean were compiled by fishing grounds.

The lines originally developed in NACFI were, in large part, based upon the growing understanding of fishery biologists, oceanographers, cartographers, and mariners, including fishermen, of the nature of the continental shelf, the waters found thereon, and the fishes and other living marine resources of the area. These biological realities were incorporated deliberately into the development of International Area boundaries – Area XXI, "off Nova Scotia", and Area XXII, "off New England", in NACFI.

NACFI made its statistical system conform to that which had first been used in Europe by the International Council for the Study of the Sea, known as ICES, to facilitate uniform reporting of catches by various countries. This was done by extending to the northwest Atlantic Ocean the system of International Areas that had been put to good use in the northeast Atlantic Ocean (Rounsefell, G. A., *Development of Fishery Statistics in the North Atlantic*, U.S. Department of the Interior, Special Scientific Report No. 47, pp. 8-9. Deposited by Canada pursuant to Art. 50 (2) of the Rules of Court on 28 June 1983; hereinafter "Rounsefell").

Rounsefell, whose report, written in 1948, is the only comprehensive study of the development of the statistical and fishery management lines in the Gulf of Maine area, points out, in regard to the overall development of the NACFI statistical system, that it took into account what was then known about the stock divisions in the area. He wrote:

> "The sea can be regarded as a vast water-ranch populated with various kinds of livestock (or fish). The areas covered by the fishing fleets comprise waters of various depths, temperatures, and salinities. Each species of fish is normally most abundant on the banks most suitable to it. Different stocks of the same species may inhabit two neighbouring banks, yet be separated

by waters of such depth or temperature, or by such unsuitable bottom, that the two stocks mingle slightly or not at all." (Rounsefell, p. 1.)

Thus, the NACFI divisions were not based simply upon considerations of administrative convenience. They were based upon the best scientific data available at the time. They were the product of a deliberate effort to develop an efficient and reliable system of catch statistics based upon the activities of fishermen, and the contemporary understanding of the marine environment, including the sea-bed features and the characteristics of fish stocks.

The International Area boundaries that NACFI established in 1931 were adopted by ICNAF in 1949. With the founding of ICNAF, a new dimension was thereby added to the governmental involvement in fisheries – namely, conservation and management of the resource. For the entire 28-year period of ICNAF, the division between Subarea 4 and Subarea 5 was recognized and respected by both Parties for the conservation and management of the fishery resources of the Gulf of Maine area.

In his presentation in the first round, Professor Bowett stated that the credibility of the thesis that this line marks a natural boundary between fishing banks could be tested against the records of the 1949 ICNAF Conference (**VI**, p. 142). He then quoted, from that record, the words of the chairman of the Conference, Dr. Wilburt Chapman of the United States.

If the Chamber will bear with me, we are compelled to quote the same passage from the record before this Chamber. In explaining, at an early negotiating session, the proposed subareas in relation to their efficient management, Dr. Chapman stated:

> "We have thought that this would be achieved best by splitting the overall area [speaking of the overall Convention area] into smaller areas [speaking of the proposed ICNAF subareas], which smaller areas have a degree of homogeneity from a biological standpoint and also from a political standpoint. To the best of our knowledge the stocks of fish in which we are particularly interested do not move in any large way from one area to another. If that assumption proves to be correct, then regulations in one area simply would have little or no effect on fish stocks in one of the other areas. . . ." (ICNAF, *Minutes of the Negotiating Conference*, Second Session, para. 32. Cited at **VI**, pp. 142-143.)

I would note that he spoke from a biological standpoint and also from a political standpoint.

Dr. Chapman went on to state:

> "From the biological standpoint it is realized that the presently proposed areas may not be the proper ones. It might be quite necessary, as more evidence comes in, to change the boundaries of the areas." (*Ibid.* para. 34; **VI**, p. 143.)

Professor Bowett stated, without supporting evidence: "the assumption of biological homogeneity, of the separation of stocks, has proved inaccurate as the Chairman intimated might happen" (**VI**, p. 143). If Professor Bowett is correct, why has the line not been changed, as Dr. Chapman suggested might be necessary in the light of new evidence? If, as Canada asserts, referring to Browns Bank and Georges Bank, "scientific knowledge later destroyed any assumption of the separation of stocks on those banks" *(ibid.)*, why did ICNAF not change the line, or NAFO, or Canada in its domestic practice? Why has the line not been changed if it has no credible basis in biology?

Professor Bowett refers to Dr. Chapman's statement as a concession in regard to the ICNAF line (VI, p. 143). He makes this statement presumably because Dr. Chapman said that the areas might turn out not to reflect biological realities. But Dr. Chapman also said that, as new biological evidence was identified, changes in the subarea boundaries might be called for.

We simply note that the division between Subareas 4 and 5 has proved to be biologically correct. No major changes have occurred in this line. As new evidence has come forward, it has only confirmed this division.

We invite the Chamber's attention to the fact that these sweeping scientific conclusions by Canada about biological separation and biological homogeneity, such as, "scientific knowledge later destroyed any assumption of the separation of stocks on those banks", are provided without any benefit of citations in their support. The cold, hard fact is that the biological foundations of the ICNAF subarea boundaries are well established by Canadian and United States fisheries scientists.

This conclusion is strongly supported by the fact that the only modification of the ICNAF subarea boundaries has been in response to firm scientific evidence. The enduring nature of the ICNAF boundaries, in light of the vast increase in knowledge of the marine biology in the region since the establishment of those boundaries, is evidence that the original line between Subarea 4 and Subarea 5 reflected in the past, and continues to do so today, scientific realities and not considerations of administrative convenience alone.

If, in fact, as Canada suggests, scientific knowledge later had destroyed the assumption that the boundaries reflected biological division, the ICNAF subarea boundaries would have been altered to conform to the division indicated by such data. The truth of that statement is illustrated by the fact that, when ICNAF's negotiators were confronted by such new scientific data, they readily altered the proposed subarea boundaries.

The early drafts of the ICNAF Convention proposed to the Conference that were prepared by the United States proposed that the Convention area be divided into four subareas. The reason that the Convention ended up with five subareas is that, during the Conference, Danish fisheries scientists provided the delegates with a detailed scientific presentation that demonstrated that the currents and cod stocks off West Greenland were associated closely with those off Iceland, whereas the stocks of cod off Labrador on the Labrador side of the proposed Subarea 1 were associated with the stocks off Newfoundland. After Denmark's presentation, it was agreed that the stocks off West Greenland should not be managed together with those off Labrador, and that the West Greenland side should form a separate subarea (ICNAF, *Minutes of the Negotiating Conference*, 9th Session, para. 40).

With that agreed, the question at the ICNAF Conference arose as to whether the Labrador side of Subarea 1 should be made into a separate subarea, or whether it should be included in the originally proposed Subarea 2, which contained the Grand Banks of Newfoundland. At that time, Canada objected to the latter course of action, arguing that combining the two areas would create difficult management problems, and, on that ground, the Conference elected to make the Labrador side of the old Subarea 1 a separate subarea. Thus, the Labrador area was labelled Subarea 2, and the proposed Subareas 2, 3 and 4 were relabelled Subareas 3, 4 and 5, respectively.

The negotiating history of the ICNAF Convention proves two points about this line. First, the subarea boundaries had a biological foundation. Biological arguments could have altered and did alter the proposed boundaries. No such argument was brought forward, however, in connection with the division

between Subarea 4 and Subarea 5 dividing Browns Bank and Georges Bank at the Northeast Channel. Second, there was a fisheries management element to the subarea boundaries. Canada's desire to manage the Labrador stocks differently from those off Newfoundland was based upon the recognition of the political problems of managing a high-seas (common-pool) resource. Canada therein recognized that management authority, shared among nations over too large an area, would lead to political problems (ICNAF, *Minutes of the Negotiating Conference*, pp. 3 and 6). To have combined the Labrador area with the Newfoundland area in one management unit would have meant that several nations that ordinarily would not have been concerned with the fishery off Labrador would have been involved in its management due to their fishery on the Grand Banks. The possibility of making trade-offs between the two areas for conservation and management purposes was not acceptable to Canada at that time.

In subsequent years, ICNAF reviewed its subarea boundaries and divisions to determine if any modification should be made based upon new information. For example, in 1975, ICNAF changed the management structure for herring in part of ICNAF Subarea 4. Based upon the advice of scientists on ICNAF's Assessment Committee, two herring management units within Subarea 4 were altered. Also, you may recall the modification of the closed groundfish spawning areas, which we discussed during our first round presentation. These areas were changed as new scientific evidence came to light. There does not appear ever to have been, however, any question regarding the validity of the line dividing Subarea 4 from Subarea 5. We would like to point out, in this connection, that the ICNAF Convention did not require formal amendment to change the subarea boundaries. The ICNAF Commission had that power to make such changes under the Convention, but it did not.

As is well established by our ICNAF Annex (IV, United States Counter-Memorial, Ann. 3, Vol. II), and our Marine Environment Annex (*ibid.*, Ann. 1, Vol. IA, Appendices A-H), ICNAF respected the stock divisions represented by ICNAF's Subarea 4 and Subarea 5 and the dividing line between Subarea 4 and Subarea 5. For 28 years, the stocks of Subdivision 5Ze, Georges Bank, were managed independently from those in Subarea 4. There was never a change in this line.

Even in 1978, with the dissolution of ICNAF and the formation of NAFO, the exact same line was preserved (*Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries*, Ottawa, 24 October 1978, entered into force 1 January 1979, Ann. III, I, Canadian Memorial, Ann. 9, Vol. I). Considering the circumstances, and Canadian leadership in forming NAFO, it is noteworthy that this would have been an ideal time for Canada to take steps to change the line if there were any rational basis for doing so. The line was not changed. Today, it is used by both the United States and Canada in their domestic fishery management programmes.

(255) We must digress for a moment. At Figure 166 of the Canadian oral presentation, we were shown a chart with lines – called ICNAF lines – that followed a southward course across Georges Bank. In the Canadian Reply, at (164) Figure 18, the same line or lines were shown. We would point out, for the record, that these lines represent a composite of borders of various small statistical units. These composite lines have never been used for fishery management purposes.

To conclude this discussion of the ICNAF line, we would like to quote a passage from the eminent Canadian scientist M. L. Sinclair, identified by Canada as an expert witness it proposed to call in this case and notified to the Registry by a letter from the Agent for Canada to the Registrar of 19 March

1984. Mr. Sinclair was present during all relevant portions of the first round of oral proceedings, but he never was called upon by Canada. As co-author of an article published in the 1982 edition of *Science* magazine, deposited with the Registry by the United States on 16 April 1984, entitled "Atlantic Herring: Stock Discreteness and Abundance", Dr. Sinclair stated the following with respect to this line:

> "The *Proceedings of the North American Council on Fisheries Investigations* (1931-33 (No. 2), Ottawa (1935)) record an early attempt to subdivide the northwest Atlantic into smaller areas. The distinguished group of fisheries biologists and hydrographers that were involved agreed on boundaries that later became the basis for the subdivision of the Convention area of the International Commission for the Northwest Atlantic Fisheries (ICNAF) into management areas. The general correspondence between the biological units of species such as cod, for example, and the ICNAF subareas allowed the development of the sophisticated International Management Scheme set up in the 1970's. The divisions demonstrated the group's understanding of the dual nature of the factors that underlie the structure of marine ecosystems. It is this dual nature, resulting from an interaction of the biological and physical factors, that we are stressing." (At No. 1.)

It is unfortunate that Dr. Sinclair was not called before us so that he could have explained how this statement squares with the arguments of Canadian counsel before this Chamber.

One last word about ICNAF. Distinguished counsel for Canada said that the ICNAF Conference delegates would have been "amazed and shocked" by the weight we attach to the meaning of the line dividing Subarea 4 from Subarea 5, extending to the sea through the Northeast Channel (VI, p. 143). We submit that what those negotiators would have been amazed and shocked about was that, less than 30 years after the ICNAF Conference, Canada would make a claim to half of Georges Bank notwithstanding the traditional, almost exclusive, fishing activity by United States fishermen on Georges Bank and the longstanding recognition of divisions of stocks at the Northeast Channel.

II

We now turn to the second part of this presentation, which will address Judge Mosler's question number 8 posed to the United States. That question is as follows:

> "According to the pleadings there exist three régimes in the Gulf of Maine area, and Dr. Edwards also referred to them in his testimony on 18 April 1984. They are said to be:
>
> (i) Georges Bank
> (ii) Scotian Shelf
> (iii) Gulf of Maine Basin
>
> To the best of my recollection, the Gulf of Maine Basin has not yet played a prominent role in the oral proceedings. Looking at the map, my impression is that this area is not such a coherent unit as the other two seem to be. Would the United States please explain what are the characteristic features of the Gulf of Maine Basin distinguishing it from the other two régimes." (VI, p. 463.)

In response, we will demonstrate two points. First, the ecological régime of the

Gulf of Maine Basin is, in fact, a coherent unit. Second, we will explain that the reason why the United States has not focused upon the ecology of the Gulf of Maine Basin régime is that the nature of the régime is such that neither of the lines proposed by the Parties divides the Basin in such a manner that would create serious conservation and management problems.

The United States in its pleadings, and Dr. Edwards in his testimony on 18 April 1984, described the three major oceanographic and ecological régimes in the Gulf of Maine area, identified respectively with the Scotian Shelf, with the Gulf of Maine Basin, and with Georges Bank. In this respect, it is important to note that the "Gulf of Maine Basin" régime does not include the portion of the Scotian Shelf régime that wraps around the southwestern tip of Nova Scotia, inside the coastal concavity of the Gulf of Maine.

This is the definition of the Gulf of Maine Basin régime consistently used in our pleadings (**II**, United States Memorial, para. 25, fn. 2; **IV**, Counter-Memorial, para. 16, fn. 2; and *ibid.*, Ann. 1, para. 1, fn. 1). Thus, the Gulf of Maine Basin régime is bordered to the south and southeast by Georges Bank and to the northeast by the Scotian Shelf régime. It is a coherent oceanographic and ecological régime, distinct from the other two régimes (see, generally, *United States Counter-Memorial, Ann. 1*). Permit me to give three examples.

On the geomorphological level, the Gulf of Maine Basin is like a large bowl. It has an average depth of approximately 150 metres, and contains three deeper basins, Georges, Jordan and Wilkinson. These are not labelled, but are shown here on the ICNAF chart. The fact that the Gulf of Maine Basin is shallow only in the immediate coastal area, and punctuated by a few peaks and ridges between relatively deep basins, distinguishes its geomorphology from that of Georges Bank, which is a broad shallow bank (with an average depth of 75 metres), and from that of the Scotian Shelf (with an average depth of 110 metres), which is a combination of banks and basins (see, generally, Counter-Memorial, Ann. 1, paras. 5-8).

The second example is that the Gulf of Maine Basin régime is distinct from the other two by virtue of its water circulation pattern. You may wish to note that the Parties do not disagree on the water circulation patterns in the Gulf of Maine area. The water in the Gulf of Maine Basin circulates in a large, unifying,
(22) counter-clockwise gyre. In this regard, you may recall Figure 5 of the United States Memorial and Figure 64 of our oral presentation. This counter-clockwise gyre distinguishes the Gulf of Maine Basin régime from that of the Scotian Shelf. The Scotian Shelf régime is best characterized as a "flow-through" current system, with weak, isolated gyres, whereas that of Georges Bank has a consistent, central counter-clockwise gyre (see, generally, Counter-Memorial, Ann. 1, paras. 9-17).

The third example relates to the characteristics of the water in terms of temperature, salinity and vertical mixing. Because the majority of the water in the Gulf of Maine Basin is slope water that enters through the Northeast Channel, it is more saline and of a different (seasonally consistent) temperature from the water over the adjacent Scotian Shelf. The water in the Gulf of Maine Basin also differs from that of the Scotian Shelf in terms of temperature and salinity (see, generally, *ibid., Ann. 1, paras. 18-28*). Also, because it is a deep basin, the water in the Gulf of Maine Basin is more stratified than the shallower water over Georges Bank and over the banks on the Scotian Shelf (see, generally, *ibid.*, Ann. 1, paras. 29-33).

The differences in bottom temperatures between the régimes were seen in
(120) Figure 10 of the United States Counter-Memorial, Annex I, which was also Figure 66 of the United States oral presentations. This illustration showed,

among other things, that there is considerably less seasonal variability in the temperature of the bottom water in the Gulf of Maine Basin than in the bottom temperatures on the Scotian Shelf and Georges Bank.

(121) Before you is Figure 132 of our presentation, which appeared as Figure 11C of the United States Counter-Memorial, Annex I, and Figure 65 of the United States oral presentations, except that, in this instance, the United States line has been superimposed on the chart. This is a satellite image of the surface temperatures and temperature gradients in the Gulf of Maine area on 14 June 1979. This reveals the differences in the surface temperatures between the three régimes, as do satellite images of most other months of the year.

The temperature gradients – seen as dark lines on this chart – mark the places where surface temperatures change significantly over a short distance. The green colour marks the Scotian Shelf régime. You can also see the yellow and red colour marking the Gulf of Maine Basin and the gradients marking the outline of Georges Bank. Such gradients occur where the Scotian Shelf and the Gulf of Maine Basin régimes meet, as well as where the Georges Bank and Gulf of Maine Basin régimes meet. Such gradients also separate the Georges Bank and Scotian Shelf régimes from each other. The surface temperature gradients reflect, in turn, changes that occur in the water column below.

In summary, the Gulf of Maine Basin oceanographic régime is a coherent régime, distinct from the other two régimes associated respectively with the Scotian Shelf and Georges Bank. The boundary between the Gulf of Maine Basin régime and the Scotian Shelf régime and that between the Georges Bank régime and the Scotian Shelf régime is essentially along the lines of temperature gradients shown here. As you can see, the United States line approximates those lines of temperature gradients.

The United States already has explained the management and conservation headache that would result from a boundary that cuts across the Georges Bank régime. This is because the stocks on Georges Bank, to a large extent, roam over both the disputed and undisputed portions of the Bank.

In the written and oral proceedings to date, the focus of the debate has been upon comparing the management consequences of a line that follows the Northeast Channel with that of a line that cuts across Georges Bank. In other words, the focus has been on the optimal location of a boundary outside the *geographic closing line from Nantucket to Cape Sable.*

The question that has not yet been addressed specifically is whether some boundary positions inside the geographic closing line are more preferable from a conservation and management perspective to others. In fact, analysis of the Gulf of Maine Basin régime and its fisheries resources shows that the establishment of the boundary inside the closing line presents less of a management problem than it does outside the closing line.

As described above, the United States line closely approximates the natural division between the Scotian Shelf régime, on the one hand, and the régimes of the Gulf of Maine Basin and Georges Bank, on the other. Such a boundary would be optimal from a fisheries management point of view.

Because of the particular nature of the fishery resources of the Gulf of Maine Basin, however, which for the most part avoid the deepest waters of the Basin, a boundary that instead followed the line of the deepest water, a line like the ICNAF line, would not create serious management problems like those created by a boundary crossing Georges Bank.

The reason for this is that many of the commercially important species of the Gulf of Maine area are groundfish, that is to say, they live near the sea-bed. Such fish frequently are limited in their distribution by variations in sea-bed topo-

graphy and avoid deep water habitats (see, for example, V, United States Reply, Ann. 21, para. 6; VI, pp. 412-413).

Thus, in the Gulf of Maine Basin, many of the commercially important species are represented by stocks that are identified with the coastal periphery of the Basin and avoid the deeper centre of the Basin.

(124) For instance, shown here as Figure 133, is Figure 32 of Annex I of our Counter-Memorial, showing the distribution of cod in the Gulf of Maine area and beyond. You can see the cod associated with Georges Bank, the Scotian Shelf, and the coastal area of the Gulf of Maine Basin. The deeper water in the centre of the Basin is not depicted as an area of cod abundance.

This pattern is particularly true for the Gulf of Maine Basin stocks of cod, (126) herring (United States Counter-Memorial, Ann. 1, Fig. 35), haddock (*ibid.*, (127) (128) Ann. 1, Fig. 37), silver hake (*ibid.*, Ann. 1, Fig. 38), yellow-tail flounder (*ibid.*, (131) (129) Ann. 1, Fig. 42), scallops (*ibid.*, Ann. 1, Fig. 43) and red hake (*ibid.*, Ann. 1, Fig. 39).

Although white hake prefers deeper water than does red hake, it concentrates around the edges of the Basin, and does not aggregate in the deepest parts of the Basin. Longfin squid, belonging to the stock of squid that are found on Georges Bank and further south along the southern New England shelf, are also found in the southwestern part of the Basin, but not in the deeper centre of the Basin (134) (*ibid.*, Ann. 1, Fig. 46).

Cusk prefer intermediate depths, and, as a result, they cluster around the (133) edges of the Basin, avoiding the deepest water (*ibid.*, Ann. 1, Fig. 45). Lobster in the Gulf of Maine Basin migrate seasonally from the shallower areas onto the slopes and back again to the shallower areas, but tend not to cross the deepest (132) waters (*ibid.*, Ann. 1, Fig. 44).

If I may be permitted to digress for a brief moment while I am on the subject of lobster: for all that the distinguished Agent for Canada made light of the "saga of the two 'adventurous lobsters'" (p. 21, *supra*), he failed to demonstrate that any of their lobster brethren from Canadian waters had joined them on Georges Bank (see discussion of this matter in United States Reply, para. 225; Ann. 21, paras. 20-22; and VI, pp. 244-245).

(23) In summary, 11 of the 12 species listed in Figure 7 of the United States Memorial as divided or limited in their range over the continental shelf between Rhode Island and LaHave Bank at the Northeast Channel are associated with the coastal areas of the Gulf of Maine Basin. By contrast, the twelfth species, the redfish, avoids the shallower coastal areas of the Gulf of Maine Basin and concentrates in the deeper areas of the Basin, although, even here, redfish avoid the very deepest areas because these are relatively flat and silty and do not present the topographic relief preferred by redfish (Counter-Memorial, Ann. 1, (130) Fig. 40).

In brief, for the 12 species for which the optimal boundary outside the closing line is through the Northeast Channel, the optimal boundary inside the closing line would be a boundary that passed between the Scotian Shelf régime and the Gulf of Maine Basin régime, as does the United States line. A boundary that passed through the deepest parts of the Basin, as do the ICNAF line and the 1976 United States line, and, for that matter, as does the equidistant line within the Gulf of Maine Basin, would not split the stocks of 11 of these 12 commercially important species.

That ends our response to Judge Mosler's eighth question.

Before passing on to the third part of this presentation, while the cod distribution chart is up, we would like to digress for a moment. At Figure 165 of its oral presentation, Canada showed a chart entitled "Atlantic Cod Migration

Barrier". The chart purported to show a barrier to cod migration along a vertical line at 68°W longitude, and stock interchanges across the Northeast Channel. You may recall that there were bright red lines going between the northeast tip of Georges Bank and Browns Bank. The United States already addressed the problems with that Canadian figure, at paragraphs 3-6 of Annex 21 to the United States Reply.

Canada's oral presentations do nothing to rehabilitate this figure, which is contradicted by the bulk of the scientific literature, including by Canadians, on this subject. For example, Canada's expert, in the article we previously quoted, said that there is "general correspondence between the biological units of species such as cod, for example, and the ICNAF subareas" (T. D. Iles and M. Sinclair, *Science*, No. 1). In other words it would seem that the expert identified by Canada in this case believes that stocks of cod on Georges Bank and in the Gulf of Maine Basin are separate from the stocks of cod on the Scotian Shelf. While we are on this subject, we would also like to emphasize a fact that Canada persists in overlooking. Stocks that are associated with Georges Bank are not just associated with it during the spawning season – they migrate around the Bank, and can be found at different locations, at different times of the year (pp. 416-417).

The United States does not wish to take the Chamber's time addressing each and every one of the similar arguments Canada has attempted to raise against the United States description of the marine environment and the location of separate stocks of commercially important species. The United States believes that all of Canada's arguments on these subjects are as groundless as Canada's arguments regarding cod. We regard Figure 165 of Canada's oral presentation as a good example of the liberties that Canada has taken with the weight of evidence of fisheries science. (For the major portions of the United States pleadings and oral presentations dealing with the facts of the marine environment of the Gulf of Maine area, see Memorial, paras. 38-58; *ibid.*, Ann. 44; Counter-Memorial, paras. 45-57; *ibid.*, Anns. 1 and 2; Reply, paras. 215-227; *ibid.*, Anns. 20-25; and hearings of 18 April 1984.)

III

We now turn to the third part of this presentation which will address Canada's (23) attacks on Figure 7 of the United States Memorial, a figure which Canadian (23) counsel characterized as "scientifically indefensible" (p. 107, *supra*). Figure 7 is before you now as Figure 134 of this presentation.

Canada's attack on this chart is an oblique way of attacking the credibility of the ICNAF line. Moreover, it is a direct attack on the United States line, which, in the area seaward of the Gulf of Maine closing line, divides Georges Bank from Browns Bank at the Northeast Channel, just as have the NACFI, ICNAF and NAFO lines for over 50 years. That United States line reflects and respects the equitable principle of resource conservation and management.

(23) This bar chart, now Figure 134 before you, was developed to illustrate but one point. That point is that the Northeast Channel marks a division or limit for stocks of 12 out of 16 commercially important species in the Gulf of Maine area. It does not purport to deal with stock distribution in the Gulf of Maine Basin.

Canada has attempted to sow seeds of confusion about the information shown in this figure, but, if the chart is fully understood, Canada's attack can be seen for what it is, an effort to obscure the fundamental factual existence of the stock divisions at the Northeast Channel. Accordingly, we would like to explain to you how this chart was developed.

The fact that this Figure conveys two-dimensional information on a one-dimensional level provides Canada with the opportunity to confuse the matter. The chart only shows one-dimensional bars to represent stock concentrations over a large area extending from the southwest at Rhode Island to the northeast to LaHave Bank on the Scotian Shelf. The chart was not developed to depict stock concentrations from the perspective of the continental slope landward.

By noting that some of the stocks represented by the one-dimensional bars in the Georges Bank area do not aggregate on the shallower parts of Georges Bank, but in fact aggregate along the northern slope of the Bank, Canada has attempted to discredit this Figure.

The Figure is no substitute for general stock distribution charts. Individual charts showing the two-dimensional distribution of major commercial fish stocks in the Gulf of Maine area may be found in Annex 1 to the United States Counter-Memorial.

To clarify the meaning of this Figure, it is helpful to identify the breadth, if you will, of the area represented by the bars in the Figure. Canada's obfuscation evaporates once the construction of the chart is understood.

(23) To assist in the understanding of Figure 7 of the United States Memorial, we have prepared Figure 135 of this presentation. This is a chart showing the length and the breadth of the zone represented by the bars in Figure 7 of the Memorial. This zone extends from the western boundary of ICNAF and NAFO Division 5Zw to the northeastern part of Division 4X, or, in other words, from Block Island (Rhode Island) to LaHave Bank on the Scotian Shelf. As you can see from Figure 135, the zone covers the continental shelf banks. You can also see that it goes slightly beyond, incorporating some area both seaward and landward of the 100-fathom (200-metre) depth contour.

In order to make it possible to depict the stock distribution pattern on a one-dimensional plane, the zone on the chart was marked with diagonals at 45 degrees, numbered, west to east, from 1 to 64. These diagonals and their corresponding numbers are shown in Figure 135. From the northern end, an axis bisecting the 45-degree diagonals was drawn, running southwest from LaHave Bank, through Browns Bank, across the Northeast Channel, through Georges Bank to about 40° 35′ north latitude, 69° west longitude, and then, due west to off Rhode Island. This axis in red is shown on this Figure. The axis corresponds

(23) to the bars in Figure 7 of the Memorial, which run from Block Island, Rhode Island, to LaHave Bank; the bars in Figure 7 represent this red line.

The ranges of the stocks portrayed in Figure 7 of the United States Memorial are shown in relation to the intersection of the numbered diagonals with the bisecting axis. If a stock occurs in fishable quantities at some point along a

(23) numbered diagonal line, it is shown in the segment of the Figure 7 bar that corresponds to the same numbered diagonal. Figure 7 of the United States Memorial is reproduced as Figure 136 of this presentation, with one addition: a cross reference to the numbered diagonals has been added to the bottom of the Figure. We will not put up a large board of Figure 136, but, at your leisure, you may wish to compare the numbered diagonals on Figure 135 with the numbers on the bottom of Figure 136, and you will understand the relationship we have sought to depict.

The limitations of using one-dimensional bars to convey two-dimensional information are clear if one compares, for example, the Georges Bank bar for cusk with that for yellowtail flounder. Yellowtail flounder concentrate on Georges Bank proper, whereas cusk concentrate on the lower slopes of Georges Bank. Because of the one-dimensional nature of the bar chart, that distinction is lost in Figure 7 of the Memorial and both fish are simply represented by a

"Georges Bank" bar on the Georges Bank side of the Northeast Channel. Likewise, redfish, which congregate along the northern slope of the Bank, appear on the chart as if they were found in the middle of the Bank, which they are not.

What Figure 7 of the Memorial does convey is that there is a break at the Northeast Channel between the yellowtail flounder and cusk on the Scotian Shelf side of the Channel, and the yellowtail flounder and cusk on the Georges Bank side of the Channel. It also shows that there is a break at the Northeast Channel between the redfish stock that occurs in deep water along the northern edge of Georges Bank and the stock associated with the basin of the Scotian Shelf. This break, which appears in the distribution patterns of 12 of the 16 stocks we have identified, is associated with the diagonal lines numbered 44 and 45 on this chart. Along with those diagonal lines, representing the Northeast Channel, stocks of the 12 species about which we have been talking do not appear in fishable quantities.

As we have seen, there are 16 commercially important species in the Gulf of Maine area, 12 of which have separate stocks associated with Georges Bank. *These 12 stocks would be divided by an equidistant line. Similarly, the Canadian* line, or any other line crossing Georges Bank, would cut through these 12 stocks. By contrast, these stocks would not be divided by the line proposed by the United States. The other four species, namely, mackerel, pollock, argentine and illex squid, would be divided regardless of where the boundary is drawn in the Gulf of Maine area.

(93) At Figure 59 of its oral presentation, which is from its Counter-Memorial, Canada has added another 12 species in an effort to muddy the water, so to speak. Seven of the twelve species Canada adds migrate throughout the area. Fish such as the bluefin tuna, swordfish and the Atlantic salmon, for example, are clearly transboundary resources. The tuna and salmon are already managed by multilateral agreements. None of these species will be affected by the delimitation in this case. The remaining five of Canada's proposed additional species divide naturally at the Northeast Channel, whereas concentrations of these five species would be transected by a delimitation that cuts across Georges Bank. Annex 22 of the United States Reply provides further analysis of the 12 additional species proposed by Canada to be of commercial importance in the Gulf of Maine area. In summary, the only stocks divided by the line proposed by the United States are stocks of wide-ranging species that will be divided by any boundary in the area. By contrast, all resident stocks on Georges Bank, as well as the stocks of wide-ranging species, would be divided by the Canadian line.

The ranges of stocks that were translated onto the bar chart are based upon a combination of accepted scientific data: the results of bottom-trawl surveys conducted by the United States Northeast Fisheries Center between 1965 and 1978, and the stock units and limits accepted by ICNAF and NAFO and in United States and Canadian scientific literature.

(23) The United States stands behind the information contained in Figure 7 of the United States Memorial.

Mr. President, distinguished Judges, Canada's attitude towards science in these proceedings has been remarkable. In fishery management fora, Canada takes the position that science has an important role to play, but in this case, Canada would deny the results and relevance of science. By feigning difficulty with science, by discrediting the very science that is has acted upon in the past, Canada has made the task of the Chamber more difficult.

In his closing remarks, Mr. Fortier pounced upon a point that Canada seemingly has been unable to comprehend from the start: the point being that

the oceans change continuously – a fact that we have repeatedly acknowledged. Every day we have been in The Hague, the weather has been different, but no one would suggest that this locale does not have its own climate. We have shown the characteristics that occur in the oceans on a month-to-month basis. Canada grapples with this and pretends not to understand how such change is compatible with the existence of three separate and identifiable ecological régimes in the Gulf of Maine area. Of course, what Canada seemingly fails to grasp is that, although the systems change – yes, constantly – as Dr. Edwards noted in the passage Mr. Fortier read to you (p. 124, *supra*), there is an obvious method in the oceans' madness. As the United States has pointed out repeatedly, and as Dr. Edwards' testimony confirmed, oceans do move continuously but in patterns well known to Canada, among others (see, generally, United States Counter-Memorial, Ann. 1; and hearing of 18 April 1984, including **VI**, p. 399).

As Mr. Fortier noted, Dr. Edwards wrote in 1976 that "In the ocean, boundaries and distribution of ecosystems change constantly" (*Middle Atlantic Fisheries: Recent Changes in Populations and Outlook*, 1976, p. 306). The question is whether this statement was inconsistent with Dr. Edwards' testimony that there are three oceanographic and ecological boundaries in the sea and, in particular, in the Gulf of Maine area. The answer is no.

The Chamber did not have the benefit of hearing the rest of the article, which was deposited by the United States with its Counter-Memorial (Vol. 1, doc. 10). The paragraph from which this sentence was lifted was contrasting a particular aspect of terrestrial and oceanic vegetation. It dealt specifically with the environmental consequences that stem from the obvious differences between a forest on land, and plants in the ocean. Dr. Edwards, in that paragraph, was contrasting the "beech-maple forest" with "oceanic plants" (p. 306). It is true that there is no vegetation in the ocean that compares with forests on land. Plants in the ocean are microscopic and planktonic, floating at the surface of the water and unattached to the sea-bed. The United States never has contended to the contrary.

On land, animals respond to the conditions provided by the forest, which in turn responds to climate. In the ocean, the intermediate level, the forest, does not exist. Fish do not orient to plankton the way animals respond to forests. As Dr. Edwards explained, quoting Canadian sources (**VI**, p. 414), fish orient directly to climatic features such as oceanic fronts, like those found along the northern edge of Georges Bank or between the Gulf of Maine Basin and the Scotian Shelf régimes. The Northeast Channel repeatedly has been referred to as a "barrier", including by Canadian scientists (**VI**, pp. 412 and 413). The Northeast Channel does not move, and the fronts that form between the three oceanographic régimes of the Gulf of Maine area are consistent features. In short, there is nothing in the article quoted by Canada, nor in any other article by Dr. Edwards, that is inconsistent with his testimony in this case.

Mr. Fortier noted on behalf of Canada that Einstein said:

> "Man seeks to form for himself, in whatever manner is suitable for him, a simplified and lucid image of the world, and so to overcome the world of experience by striving to replace it to some extent with this image." (P. 125, *supra*.)

Canada certainly has taken up where Einstein's observation left off. Canada certainly has constructed for itself a simplified image of the world to overcome the experience of science in the Gulf of Maine area.

Mr. President, distinguished Judges, allow me to leave this part of our

discussion with another observation by Einstein: "The only thing incomprehensible about nature is the fact that nature is comprehensible."

The Chamber adjourned from 11.10 a.m. to 11.35 a.m.

IV

Mr. President, distinguished Judges. May it please the Chamber.

We now come to the fourth part of this presentation, in which we shall endeavour to respond to the fourth question put to us by Judge Cohen.

That question is as follows:

> "Why have both Parties underplayed the role of joint management for all mobile transboundary fisheries? In view of the long record of co-operative 'management' and common fact-finding in the carrying out of both Parties' obligations under the Boundary Waters Treaty of 1909 and by the International Joint Commission, would there not have been a credible opportunity to examine joint management of offshore migratory fisheries and related biological/environmental matters in the Gulf of Maine area – and conversely, why must it therefore be assumed that such co-operative or joint management of biological resources would create more opportunities for disputes rather than avoid them, given the record of both countries on similar matters under the International Joint Commission, the Great Lakes Fisheries Commission, etc.?" (**VI**, p. 465.)

Our answer to this question will not be brief or simple, because we feel compelled to describe to the Chamber why it is that recourse to international co-operation – indeed co-operation between two close neighbours, allies and friends – provides no solution to the delimitation question before this Chamber.

The United States-Canada International Joint Commission, known as IJC, and the Great Lakes Fishery Commission have accomplished a great deal within the scope of their mandates. Because of the circumscribed nature of those mandates, however, those bodies do not provide models for addressing ongoing political, economic and technical questions of the magnitude and complexity associated with joint management of Georges Bank.

The International Joint Commission was established pursuant to the Boundary Water Treaty of 1909 (36 Stat. 2448, *T.S.* No. 548). Since that time, it has been justly celebrated as an effective mechanism for sometimes regulating, and sometimes resolving, transborder problems between the United States and Canada that principally involve water resources.

The International Joint Commission has been touted, rightly, as a model for binational co-operation. Pages could be, and have been, written about its successes.

The Treaty authorizes three functions to be performed by the International Joint Commission: (1) approving certain uses, obstructions, or diversions of waters related to the boundary (Articles III, IV and VIII); (2) examining, reporting, and making advisory recommendations with respect to matters of difference along the border that have been referred by the Governments to the International Joint Commission, under Article IX of the Treaty; and (3) resolution by arbitration of any other matter on the terms under which it has been presented by the two Governments to the International Joint Commission, under Article X of the Treaty. The International Joint Commission never has been called upon to render a decision pursuant to Article X, but it has received over 100 applications for approval and references requesting advisory recommendations under Article IX.

The International Joint Commission typically begins its work on a problem by establishing a scientific or technical board of experts from each nation. The Commission frames a solution to the problem on the basis of the facts as established by the experts. This works best in matters that do not involve deeply held conflicting views, or that are not of major political importance to the Parties. Thus, it works best in matters that are relatively narrow or technical in nature.

The International Joint Commission has examined factual questions, made effective recommendations, and provided valuable follow-up advice on numerous matters throughout its existence. It never has, however, been called upon to exercise ongoing management responsibilities in relation to scarce fisheries resources, requiring allocations between the fishermen of the two countries on at least an annual basis – the type of joint management that would be required for Georges Bank.

Several of the passages I will refer to in the next few minutes are from a recent book, entitled *The International Joint Commission Seventy Years On*, 1981. It has been deposited with the Registry in accordance with Article 56 of the Rules of Court. It was published by the Center for International Studies of the University of Toronto, following a conference held in 1979 on the subject of the International Joint Commission. Each chapter is by a different author, and the book includes, among others, a chapter by the distinguished author of the question to which we are responding.

As the late Professor Willoughby of the University of New Brunswick wrote of the International Joint Commission:

> "At times both governments have seemed reluctant to ask the IJC to tackle difficult issues. On one note-worthy occasion they removed a controversial matter – the Colombia River development proposal – from the Commission's jurisdiction and gave it to the diplomats."

He notes that:

> "Issues which have become highly politicized and controversial may better be left to the politicians and the diplomats . . . As for pushing the implementation of its own recommendations, there are obvious limits beyond which the IJC should not go. If these are not observed, the Commission may find itself involved in the internal politics of one or both countries." (*Ibid.*, pp. 38-39.)

Indeed, it is a generally accepted view that, had the powers of the IJC not been restricted in the first place, it never would have come into being, or, had it come into being, it quickly would have been destroyed. Thus, Professor Dreiszinger of the Royal Military College, Kingston, Ontario, wrote:

> "A commission with power to interfere in American (or Canadian) domestic affairs would have been an easy target for nationalists, states-rightists, and the various regional lobbies, and would, in all probability, have soon been destroyed. In this event, the experiment of 1909 would have bequeathed to Canada and the United States nothing but bitterness and a legacy of failure, which would have been difficult to overcome at a later date." (*Ibid.*, p. 21.)

Lastly, as the distinguished author of the question to which we are responding noted in 1981, regarding the International Joint Commission, "In all likelihood neither country, in its present nationalist or sectionalist mood, would approve or ratify the Boundary Waters Treaty" (*ibid.*, p. 122).

Applying these thoughts to the question of fisheries management in the Gulf of

Maine area, one must question whether an institution modelled along the limited lines of the International Joint Commission could succeed in the management, including allocation, of the fisheries of Georges Bank. In our view, it could not.

To succeed, it would have to have supernational regulatory authority to manage the daily activities of United States and Canadian fishermen. We seriously doubt that either side would place its fisheries interests in the hands of such an independent regulatory institution.

The questions raised by potential division between the United States and Canada of the groundfish and scallop resources on Georges Bank would be highly charged, because of the competing interests of the fishermen of the two States. The rejection of the 1979 East Coast Fisheries Agreement and the presence of the Parties before this Chamber today, are all one needs to note in order to understand that fisheries allocation decisions are far beyond the ordinary.

Like the International Joint Commission, the Great Lakes Fishery Commission also has a commendable record, but its broad mandate falls short of comprehensive fisheries management of the order required on Georges Bank. The Commission was established pursuant to the Convention on Great Lakes Fisheries, signed at Washington, 10 September 1954 (6 *UST* 2837, *TIAS* 3326 (entered into force 11 October 1955), as amended 5 April 1966 and 19 May 1967, 18 *UST* 1402, *TIAS* 6297). It has two primary undertakings: the eradication of sea lampreys to permit development of a fishery and the conduct of research and formulation of recommendations for Great Lakes Fisheries (Art. IV). Neither programme represents a commitment of either the character or the magnitude that would be required for comprehensive fisheries management.

In summary, neither institution has been involved in anything comparable to the complex and recurring decisions that need to be made regarding fisheries allocations between fishermen of two countries.

We are tempted to insert here, as an example, a short discussion of the problems that the Parties are experiencing in the management of the salmon resources on the west coast of North America. The competing interests of the two sides, with respect to this resource, have contributed to the decline of the stocks and threaten to destroy the commercial fishery for at least one species – the Chinook or King Salmon. That is not an overstatement. We have been negotiating with Canada toward a common management system for the west coast salmon stocks for more than 20 years. We have not agreed, and the resource has suffered. Canada has even told us it is considering withdrawing from the one applicable treaty that we have. We will not dwell on this example, in order not to fan the flame. We are not casting blame on anyone. Canada has negotiated in good faith and with great effort and so has the United States. But this only confirms the problems that are faced in joint resource fisheries management situations.

Rather than trying to elaborate further upon fisheries allocation problems in terms of the experiences of the United States and Canada, permit me to examine for a moment the efforts within the European Economic Community to establish a common fisheries policy.

The European Economic Community's effort to establish a common fisheries policy demonstrates the difficulties of bilateral or multilateral management of a common fisheries resource. The EEC experience has been fraught with complex problems with both scientific and political dimensions, and provides an excellent example of the problems that arise from joint management of a common-pool resource.

The Community experience between 1977 and 1983 was illustrative of the wide range of problems that can arise from joint fisheries management. These problems involved the full range of political, scientific, economic and social

considerations that inevitably confront fishery managers. They are not overcome by resolutions or new organizational frameworks. The allocation of scarce and vulnerable resources is a difficult task. Let me quote from one well-informed observer of the EEC's problem, in a recently published book that has been deposited with the Court under Article 56 of the Rules of Court:

> "The Hague Agreements made the Community potentially the world's most effective fisheries conservation organization. Unlike NEAFC, the North East Atlantic Fisheries Commission, ICNAF and other intergovernmental fisheries commissions, the Community possessed the authority to adopt regulations which were directly applicable in the member States and enforced through the Courts. But the Community was faced with the same problem as the old fisheries Commission: competing claims to scarce resources. Stocks which had been subject to regulation by NEAFC now fell within the Community's fishery zone. The transfer of the debate over the distribution of these resources to a Community framework did not in itself make solutions easier to reach. The Common Fisheries Policy debate was to continue for six years before an agreement was reached about access to the Community's fish resources and their distribution between member States. Only then could the Community assume fully its role of manager of the 200 mile fishery zone it had created by concerted action in 1977." (Leigh, M., *European Integration and the Common Fisheries Policy*, pp. 76 and 77. Deposited by the United States pursuant to Art. 56 of the Rules of Court; hereinafter cited as Leigh.)

The period from 1977 to 1983, during which the EEC worked out the Common Fisheries Policy, provides some interesting examples of the problems of joint management.

In particular, there is a long and hard-fought debate over the allocation of quotas between member governments. It would seem to an objective observer that, given the previous regulation of many of the fisheries of the Community area by the North East Atlantic Fisheries Commission, the development of catch quotas and national allocations for stocks in Community waters would have been a relatively simple matter. This was not the case, however, and ensuing problems, over even the most minor technical measures, at times proved insurmountable.

The situation was summed up as follows:

> "The reason for the long delay in reaching agreement is not hard to discover. For the apparently technical rubric of 'total allowable catch and quotas' disguises a political problem of resource distribution between member States. The sum of the member States' demands added up to more than the total amount of fish available. In the bad old days when this situation arose in the fishery commissions, it led to the inflating of the 'total allowable catch', followed by overfishing – in the Community the excess of demand over supply led to a prolonged debate about the criteria for distribution, quotas among member States and about the sharing out of specific stocks." (Leigh, p. 90.)

The difficulties of joint management encountered by the Community were not limited to the setting of catch quotas and national allocations. Those problems constantly spilled over into the more technical aspects of the regulatory régime, such as mesh regulations, minimum fish sizes, by-catch limits, closed areas and seasons, and other gear restrictions. Between 1976 and 1983, the EEC tried repeatedly to implement a comprehensive set of such regulations. The EEC was only able to adopt partial measures pending resolution of disputes over quotas

and national allocations, due to the conflicting management philosophies and objectives of the various member States.

The fact that a common fishery policy was finally adopted only means that, after six years of negotiation, the EEC finally was able to agree upon fisheries management for a single year – that is, in January 1983, it agreed upon 1982 quotas – after the fact. Those quotas do not apply prospectively, and will have to be renegotiated annually. To conclude the EEC experience in joint fisheries management between 1976 and 1983, I would like to make one other quote from this book to best sum it up:

> "The [Common Fisheries Policy] is also a good case study because fisheries is an intensely political subject, according to Harold Laswell's definition of politics as 'who gets what, when and how'. Despite the many technical issues involved the [Common Fisheries Policy] is ultimately about resource allocation between member States. The sum of national demands adds up to more than the total resources available so that the compromises, trade-offs and side-payments are necessary. Compromise solutions are particularly hard to reach because of the intense feelings associated with fishing, man's last economically significant hunting activity. It is difficult to persuade those directly involved in the industry of the need to limit catches and to share fishing grounds with vessels from member States." (Leigh, p. 5; citations omitted.)

To return to the case of Georges Bank, were the Georges Bank stocks to be transboundary, the United States and Canada would be faced with problems that are similar to those of the EEC. The inescapable goal of resource conservation and management is to balance the needs of conservation with the desire to allow each State its fair share of the stocks.

Herein lies the difficulty. How does one determine fair share? Do you consider need, or historical catch? Perhaps a formula that is based upon the amount of time that each stock spends in each State's waters as it makes its annual migration around the Bank is most equitable, or, to use an extreme example, perhaps each State will ignore the activities of the other and take as much of the fish as it can while the stock is within its jurisdiction.

The last example is not as far-fetched as it would seem. Economic variables often have complicated attempts at joint resource management between the United States and Canada. We often have disagreed upon management of particular stocks because we often have different social and economic goals. Reconciliation of those human goals is in almost all cases done at the expense of the fishery resource.

(136) Let us look at Figure 137. This Figure appeared as Figure 7 of the United States Counter-Memorial, Annex 2. The arrows relate to our pollution arguments and are not relevant to our comments today. The underlying chart – a chart of the distribution of herring larvae in the Gulf of Maine area – shows what happens under joint management of a common-pool resource when competing interests are at stake. The herring fishery began in earnest on Georges Bank in the 1960s, during the time of ICNAF's responsibility. You can see that, in 1973, there was still an abundance of herring larvae in the distribution pattern. You can also see the demise of the herring in 1974. There was no herring larvae to be found on Georges Bank in 1980, and there is none today (**VI**, p. 416). A fishery was destroyed.

The United States has referred to this fact before (Counter-Memorial, Ann. 1, para. 82; **VI**, pp. 416-417). It is evidence of the separateness of the Georges Bank and Scotian Shelf stocks of herring. The latter were not affected by the

devastation of the Georges Bank stock. If Georges Bank is not divided by a boundary, the management, or lack thereof, of the Georges Bank stocks will not affect the management, or lack thereof, of the Scotian Shelf stocks, and vice-versa. By contrast, if the Georges Bank stocks are rendered transboundary by the delimitation in this case, the actions of one Party could have equally drastic consequences for the resources of the other.

Here I would like briefly to pause to expand our answer (*supra*, p. 161) to Judge Mosler's seventh question (**VI**, p. 463).

The United States believes that fishing activities and resource conservation and management – matters dealt with in the failed 1979 Fisheries Agreement – may be taken into account by the Chamber. Our reason is that the legal relevance of fishing activities is well recognized in the jurisprudence. Furthermore, in respect of resource conservation and management, it is a recognized objective of international law, and, in our view, an equitable principle applicable to the delimitation of the single maritime boundary. Thus, these matters arise out of customary law – the principles and rules of international law referred to in Article II, paragraph 1, of the Special Agreement – and thus are not founded upon the failed 1979 agreement; nor has the Parties' failed effort to compromise put these matters beyond the reach of the Chamber.

That is our answer to Judge Mosler's seventh question.

In the view of the United States, international law requires that the Chamber take into account, as a circumstance relevant to the delimitation, the fact that the boundary could pass between stocks, that is, along the lines of stock divisions in the area, rather than through stocks. A boundary that took advantage, in the inner area, of the line dividing the Scotian Shelf ecological régime from that of the Gulf of Maine Basin, or, indeed, a boundary that followed the deeper waters of the Basin, would minimize the extent to which unit stocks would be bisected by a boundary. *In the outer area, a line that follows the* course of the Northeast Channel would minimize the extent to which unit stocks become transboundary. By contrast, a line that traverses and thereby divides Georges Bank would render transboundary all of the Georges Bank stocks of commercially important fish and shellfish.

We hope that the Chamber understands the problems of the joint management of the Georges Bank fisheries, and realizes the exaggerations that Canada has employed in attempting to confuse this issue.

The United States does not reject the concept of joint management when such management is necessary. We do, however, recognize and have a healthy respect for its inherent difficulties. It would be naive to suggest that joint management of the Georges Bank fisheries would be a simple matter. Canada perfectly well knows this. In addition to the unique ecosystem of Georges Bank, there are myriad social, economic, and political factors that become variables in the management equation.

By asking the Chamber to draw a boundary line that will divide management authority for the fewest number of commercially important stocks, we are not asking the Chamber to reject the concept of international co-operation. Quite to the contrary, we are asking the Chamber to recognize the inherent difficulties in international management of a shared resource, and to draw a boundary line based upon all the applicable equitable principles and relevant circumstances, that will reduce those difficulties. In so many words, we are asking the Chamber to lay the foundation for a future system of resource, conservation, and management in the Gulf of Maine area that will be effective.

STATEMENT BY MR. ROBINSON

AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. ROBINSON: Mr. President, distinguished Judges. May it please the Chamber.

This morning, it is my great honour to conclude the oral presentation of the United States of America. After almost two-and-one-half years of sustained effort by many, many talented men and women on both sides of the aisle, it is, as the distinguished Agent for Canada said in his closing remarks, with some emotion that the Parties now realize that their role in the proceedings in the Gulf of Maine case is drawing to a close. While the Parties are nearing the end of their labours, the most important work of the Chamber and its distinguished Judges still lies ahead.

The Parties have presented the Chamber with thousands of pages of words, with hundreds of figures and with many hours of oral argument in this historic case. It is now for the Chamber to consider what has been written and said here and to prepare its judgment.

In connection with my presentation today I would like to recognize the special contribution of Michael Danaher.

The Chamber has two distinct but closely related tasks: First, to determine the principles and rules of international law that apply as between the Parties in this matter, and second, from those principles and rules, taking account of the relevant circumstances, to derive the course of the single maritime boundary that will divide the present and future maritime jurisdiction of the Parties in the Gulf of Maine area.

In so doing, the Chamber will provide important guidance for the resolution of other disputed maritime boundaries around the world. The scope of maritime boundary delimitation has dramatically increased with the advent of the 200-nautical-mile zone as a fact of life in international law. This expansion in coastal-State jurisdiction is presenting the community of nations at large, and now this Chamber, with a special challenge in seeking to further the goal of the peaceful resolution of disputes between States.

The Judgment in this case will write a major new chapter in a judicial history that begins with the 1969 *North Sea Continental Shelf* cases. In that case, the Court examined the general principles of international law that apply to the delimitation of the continental shelf. It determined that the continental shelf boundary between neighbouring States is not based on the concept of a just and equitable share of the area to be delimited, nor on any principle of proximity to the nearest coasts of the Parties. Rather, the Court determined that shelf boundaries are to be determined in accordance with equitable principles, taking account of all the relevant circumstances, and with respect for the natural prolongation of the coast of each State into and under the sea.

In the 1977 Anglo-French case, the Court of Arbitration examined the delimitation provisions of the 1958 Continental Shelf Convention and the relationship of Article 6 of that Convention to both customary law and the developing law of the sea. The Court of Arbitration offered new perspectives on natural prolongation, proportionality and the equidistance-special circumstances rule of Article 6. In so doing, the Court of Arbitration contributed to the harmoniza-

tion of the conventional and customary international law of maritime boundary delimitation.

The International Court of Justice took this development a step further in the 1982 *Tunisia/Libya* case, first, by clarifying the relationship between equitable principles and natural prolongation, and, second, by emphasizing not only the importance of geography as compared with geology, but also the significance of proportionality as a test of geographic equity in the law.

It remains for the Chamber in this case to affirm the unity of this jurisprudence with the law governing the delimitation of a single maritime boundary. The question is, will the law, as it has evolved through the 1969, 1977 and 1982 decisions, continue in a smooth stream, or will there be a sharp break with the past?

The Chamber's decision will affect the role of international law in the settlement of maritime boundary disputes and will thereby concern the international community as a whole. The United States believes that these global interests will best be served by a judgment of the Chamber that affirms the basic continuity of the law of maritime boundary delimitation. Such a judgment, in our view, will recognize and affirm a unified theory of maritime boundary delimitation.

The United States believes that the law is unified by the concept that the land dominates the sea. That concept is enshrined in the first equitable principle identified by the United States that has been the hallmark of all the case law, the principle that the boundary should respect the relationship between the coasts of the Parties and the maritime areas in front of those coasts. This overarching principle of maritime boundary delimitation includes the subsidiary principles of non-encroachment, proportionality and natural prolongation in its geographic sense or coastal-front extension. The relevant case law has consistently confirmed that the common basis for all maritime jurisdiction is the sovereignty of the coastal State over its land territory.

There can be no doubt that the Chamber's resolution of this dispute will have a major impact on how States think, not only about the law of delimitation, but also about their relationships with their neighbours. The reality is that most future delimitations will not be just continental shelf delimitations, but rather single maritime boundary delimitations such as the one presented here.

Until this case, delimitation adjudications concerned either narrow areas off the coast or sea-bed areas that man has barely begun to use. Now, for the first time, the Chamber will be delimiting a huge zone in the water column, as well as on the sea-bed, that on a world-wide basis represents a very substantial part of the ocean. The exclusive economic zones will surround all the great seas and gulfs of the world. These zones will affect activities that are as old as man's use of the sea itself.

With regard to these age-old activities, we invite the Chamber to consider that the maritime tradition of New England is deeply rooted in United States history, tradition and identity. The coast of the Gulf of Maine is the principal coast of New England, facing the Atlantic Ocean and the outside world. Under the United States proposal, the maritime boundary will proceed in a southeasterly direction perpendicular to the general direction of the coast. Yet Canada persists in advocating a boundary that moves still further south across the front of the United States east coast, claiming nearly half of the last great fishing bank in the northwest Atlantic Ocean to which United States fishermen have access. If Canada's line is adopted, the entire Atlantic coast north of Philadelphia – where one-quarter of the entire population of the United States lives – would face not Europe, not the high seas of the open Atlantic, but Canadian waters.

This issue of cut-off of which the United States has made so much in this case, will be replicated in maritime boundary disputes around the world. This issue raises the most fundamental questions of sovereignty. The question of cut-off posed in this case, not only in a geographic sense, but in a political sense as well, affects the interests of all States. For all our hopes that the customary law of coastal-State rights will now stabilize, no State knows with any certainty what the future of the economic zone régime will hold.

Mr. President, in this context, the United States, with great respect, affirms the response to your question, given by Ambassador Stevenson on 9 May. The United States would emphasize that, in weighing the factors relevant to delimitation, under the Fundamental Rule first enunciated in the *North Sea Continental Shelf* cases, the Chamber should consider carefully the problem of protecting the extensions of coastal fronts out to the open sea. As Agent of the United States I also take this opportunity to confirm all the responses given by my colleagues to all the other questions of the distinguished Judges.

Mr. President, good fences do indeed make good neighbours, even if those fences be reflective of nature as well as of geography. What the world needs and is entitled to expect from the Chamber is flexible but principled guidance, rooted in the established law, on what to do in the many situations, like the one presented here, where a good fence has been requested. The approach suggested by the United States, if confirmed by the Chamber, would provide such guidance and thereby help point the way to stability, not just in the Gulf of Maine area, but around the world as well.

It is against this background that the United States would now like to respond to the questions posed by Judge Cohen at the end of Ambassador Stevenson's presentation on 9 May and at the end of Mr. Colson's presentation on 10 May (pp. 206, 244, *supra*).

Judge Cohen requests the United States to confirm and explain its view that the Fundamental Rule is the "unifying, dominant, legal principle that is to provide the basis for the location of a single maritime boundary that unites the continental shelf doctrine and old coastal fisheries doctrine to the new 200-mile zone". We do confirm this position of the United States. In explanation, we would begin by noting that the Memorial of Canada contains the following statement (para. 278):

> "What then are the legal principles governing the determination of a single maritime boundary? In Canada's submission, the answer to this question is as follows: There is an underlying and fundamental norm or rule of law to be applied in all maritime delimitations and therefore to the single maritime boundary in the Gulf of Maine area. This single rule of law is that maritime boundaries are to be determined in accordance with equitable principles, taking account of all the relevant circumstances, in order to achieve an equitable result."

Canada has since confirmed this "fundamental norm" (**III**, Counter-Memorial, para. 729; **V**, Reply, para. 375; hearing of 5 May 1984).

Canada's formulation is thus substantially the same as the United States statement of the Fundamental Rule in all its Submissions. Moreover, the Fundamental Rule has been expressly endorsed by the Court in the *Tunisia/Libya* case (para. A (1) of the *dispositif*): "the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances".

At the end of the oral hearing on 9 May, Judge Cohen raised the issue of what "guidelines" the Fundamental Rule would give in this case. In Mr. Stevenson's oral reply to Judge Cohen, he pointed out the four equitable principles

consistently identified by the United States in all its written pleadings and in these oral presentations in this case.

Moreover, the developments at the Third United Nations Conference on the Law of the Sea were in keeping with these principles. The Conference built upon the older jurisprudence and, by referring to Article 38 of the Court's Statute, in respect of the delimitation of the 200-nautical-mile exclusive economic zone and continental shelf, confirmed existing international law, rejecting any express reference to the equidistance method. The major concern of the Law of the Sea Conference in effective conservation and management of natural resources is expressly reflected in the second equitable principle identified by the United States.

That the Fundamental Rule calls for taking into account the relevant circumstances in each case provides a tribunal with the flexibility to consider not only different factual patterns, but also the relative importance of different equitable principles as applied to these particular circumstances. Every case has its own unique circumstances, whether geographical, environmental or historical, and this case especially so. In a moment the United States will list the specific considerations important to this case. These will illustrate the application of the Fundamental Rule to this case in the view of the United States.

At the conclusion of the Deputy-Agent's geography presentation on 10 May, Judge Cohen asked about the relationship between Mr. Stevenson's statement on the law and Mr. Colson's treatment of the cut-off effect and proportionality. In response, the United States recalls the well-developed principle of non-encroachment, which requires the avoidance or abatement of a cut-off.

The law of delimitation begins with the coasts and with the principle that the boundary must respect the relationship of the coasts and the sea. Within this principle of law is a concept of equity – of geographical equity – that comparable coasts deserve comparable treatment. The proportionality test is an expression of this concept of equity in the law.

In this case, the concavity of the Gulf of Maine is an incidental, special feature that, if the equidistance method were used, would cause the boundary to cut off the coast of Maine from the area in front of it and to deny that coast comparable or proportionate treatment. An equitable boundary must abate that cut-off. The proportionality test demonstrates whether a boundary abates the cut-off to the extent that all the coasts receive comparable treatment. The proportionality test, therefore, applies the law to the facts of a given case in a concrete way.

I hope this answers satisfactorily Judge Cohen's question about the proportionality test.

That concludes the United States response to the questions raised by Judge Cohen on 9 and 10 May.

Mr. President, the United States would now like to turn to the specific factual considerations which we believe are important to the delimitation of the single maritime boundary in the Gulf of Maine area: first, the coastal geography; second, the marine environment; and, third, the activities of the Parties and their nationals in the area.

The essential considerations relating to coastal geography are four in number.

First, the general direction of the coasts of the Parties in the Gulf of Maine area, including the general direction of the coast at the back of the Gulf of Maine, is from southwest to northeast.

Second, the land boundary and the international boundary terminus are located in the northern corner of the coastal concavity that is the Gulf of Maine.

Third, the overall ratio of the length of United States to Canadian coastal front in the Gulf of Maine is three to one.

Fourth, the United States coast at Maine and New Hampshire extends seaward so as to embrace all of Georges Bank.

We believe that these geographical considerations mean that the boundary should proceed seaward, through the Gulf of Maine and beyond, perpendicular to the general direction of the coast. A boundary such as that proposed by the United States will leave to each Party as much as possible of the area in front of its coast. Such a boundary will accord each coast comparable and balanced treatment, and will achieve a reasonable degree of proportionality between the lengths of the respective coastal fronts and the area being delimited.

A boundary that swings far across the front of the United States coast and approaches the midpoint of the closing line of the Gulf of Maine before turning seaward would not reflect the general direction of the coast and would not respect the location of the land boundary and the international boundary terminus in the northern corner of the concavity that is the Gulf of Maine. Such a boundary would deny the United States coast at the back of the Gulf its rightful extension through the Gulf of Maine and beyond. Such a boundary would produce a disproportionate and inequitable result.

Such a result could be contemplated only if the coast of Maine and New Hampshire at the back of the Gulf of Maine did not exist, or if Canada's lateral coast were entitled to receive preferential treatment. However, the law does not contemplate such preferential rights. As stated by Canada: "the notion of first-class and second-class coasts with unequal offshore entitlements is simply unknown to the law. Indeed, it goes against the law." (**VI**, p. 36.)

The essential considerations relating to the marine environment are six.

First, fish stocks are single biological units and must be managed as such. Canada agrees (United States Memorial, Ann. 91).

Second, most of the important fish stocks associated with Georges Bank are separate from the important fish stocks associated with the Scotian Shelf. Canada has recognized the stock separation at the Northeast Channel, relied upon it for fishery management purposes for decades, and continues to do so. There may be the occasional adventurous lobster or stray flounder, but, for practical, fishery management purposes, the stocks are separate the whole year round.

Third, single-State conservation and management of fish stocks is far more effective and reliable than joint conservation and management by more than one State. This is a political reality recognized and given legal effect by the 1982 *Convention on the Law of the Sea*, with the strong encouragement of Canada at the Conference. The root of the problem of joint fishery conservation is the difficulty that States have in reaching agreement on the allocation of a scarce resource.

The many bonds of friendship between the United States and Canada should not obscure the unfortunate reality that our nations have enormous difficulty in agreeing upon the allocation of fishery resources. Our experience in the Gulf of Maine area and in the Pacific salmon fishery provide recent examples of how intractable this problem may be. Dividing Georges Bank between us would create difficult problems of joint fishery conservation and management, problems that would persist and fester.

Fourth, the boundary delimitation should facilitate fishery conservation and management where possible. This principle is rooted in the law of the sea relating to fisheries, which has been driven by the quest for effective fishery conservation régimes. Indeed, Canada has long been a forceful advocate of the need for the law of the sea to promote effective fishery conservation and management (United States Memorial, Ann. 91).

Fifth, development of continental shelf oil and gas on the northeastern part of Georges Bank could endanger the fish stocks that extend southwest onto the rest of the Bank. The United States thus has an important interest in controlling the development of the continental shelf on all of Georges Bank in order to protect its fisheries.

Sixth, the boundary should minimize the potential for disputes. This principle is rooted in the nature and function of international law generally and in the Charter of the United Nations.

In our opinion, it is not good for Canada and the United States to devote so much of their relationship to the nagging and hotly contested problems of managing the fishery resources for which their constituents compete. There are too many other ripples in the stream. The agenda is too full. A boundary across Georges Bank would only add more to the agenda. Such a boundary would merely perpetuate this dispute in another form. We believe that a boundary that avoids dividing Georges Bank will, in the long run, strengthen, not weaken, the underlying bonds between us.

These marine environment considerations call for the single maritime boundary in this case to take advantage of the natural boundary and the separation of important fish stocks at the Northeast Channel. These marine environment considerations are independent of the geographic considerations, but in the particular circumstances of this case they both support the same equitable solution.

The essential considerations relating to the activities of the Parties and their nationals are:

First, the United States has strong established interests in all activities relating to all of Georges Bank, including but not limited to the fisheries.

Second, the United States fisheries embrace all important fish stocks and all of Georges Bank, including but not limited to scallops.

Third, United States interests in all of Georges Bank are both historical and contemporary.

Fourth, Canada has similar multi-faceted and historical interests, not on Georges Bank, but on the Scotian Shelf.

Geography, the marine environment, and the activities of the Parties and their nationals, taken together, provide the factual and legal basis for the boundary claimed by the United States in 1976 and for the boundary proposed by the United States in this case.

Before passing to the method of delimitation, the United States would like to comment on the process of maritime boundary delimitation. There are, in our view, four steps to this process.

First, one must identify the pertinent equitable principles and the relevant circumstances. This is one step and not two. The facts and the law must be examined together, for the facts are only relevant when the law makes them relevant, and the principles of law are applicable only when they are implicated by the facts.

Second, one must weigh the circumstances which are found to be relevant and balance them up in order to ascertain the nature of an equitable solution.

Third, one must select the method or methods appropriate to the circumstances of the case. This is not possible until one has gained an appreciation of the relevant circumstances and the applicable equitable principles. As we have said before, the method is but the servant, not the master.

Fourth, one must adjust the line as necessary to take account of the relevant circumstances.

And, *fifth*, one must test whether the line produces a proportionate result.

The United States would now like to turn to the question posed by Judge Schwebel. Judge Schwebel requested that the United States explain "the legal basis for the Northeast Channel line which it maintained (until the filing of its Memorial in this case) was the line at which the maritime boundary should be drawn in the Gulf of Maine" (VI, p. 464).

The original legal basis for the Northeast Channel line was stated in 1976 and 1977 in three Department of State memoranda. These memoranda were distributed publicly at the time and have been deposited under Article 56 of the Rules of Court. The memorandum of 17 May 1977 states as follows:

> "The United States maintains that a maritime boundary in the Gulf of Maine area should reflect the special circumstances of that area, and, specifically, that a maritime boundary in accordance with equitable principles should recognize that all of Georges Bank appertains to the United States. In the view of the United States, the concavity of the New England coastline and the convexity of the Nova Scotian coastline cause an equidistant line to be 'pulled' toward the United States coastline, thereby creating a boundary that is not in accordance with equitable principles. Also, the United States believes that the geological, geomorphological, and ecological nature of Georges Bank indicates that it is physically and legally the natural prolongation of the United States and that a boundary in accordance with equitable principles should reflect this fact. An important point of the United States argument is that the proportional relationship between the lengths of the relevant coastlines should be reflected in the area to be delimited. The United States coastline is much longer than the Canadian coastline in this area."

The 1976 and 1977 memoranda are fully consistent with the position proposed by the United States in this case, with one exception. In 1976 the United States believed that the law placed much more emphasis on the role of geology and geomorphology in determining natural prolongation. Accordingly, the 1976 boundary followed the line of deepest water from the international boundary terminus to the Atlantic Ocean. In this way, the United States gave effect to geology and geomorphology even though to do so caused the boundary to swing across the United States coast and then move back again. That line left proportionately a much greater area to Canada than the coastal-length ratios would justify, as explained by the Deputy-Agent of the United States in his presentation yesterday on 10 May.

The 1982 Judgment in the *Tunisia/Libya* case clarified that the concept of natural prolongation in its geological and geomorphological sense applied only where there were distinct and separate continental shelves. As a result of this Judgment, the United States no longer felt compelled to give the same effect to the geological and geomorphological circumstances of the Gulf of Maine area and revised its position accordingly. The United States and Canada agree that there is one continuous continental shelf in the Gulf of Maine area. Particular features of the subsurface geology are discussed in Chapter II to Annex 5, Volume IV of the United States Counter-Memorial (**IV**). The Northeast Channel remains an important and relevant circumstance in this case with respect to both the marine environment and the continental shelf.

The process by which the United States determined the 1976 line was consistent with that described a moment ago. The United States identified the

applicable equitable principles and relevant circumstances, weighed and balanced them, identified an appropriate method, and applied the proportionality test to the result.

That completes the answer of the United States to Judge Schwebel's question.

In 1982, the United States proposed a new line based on the method of drawing a line perpendicular to the general direction of the coast. This line was adjusted to assure Canada its proper share of the area and to respect the circumstances of the marine environment. The United States recognizes that there are other approaches and methods, alone or in combination, that could produce a similar result in accordance with the law.

The United States believes that the perpendicular method has advantages in the particular circumstances of this case. The perpendicular method is well recognized in law, as evidenced by the *Grisbadarna* case, by early scholarly writings, by the earliest delimitations of 200-nautical-mile zones, by the work of the International Law Commission, and, most recently, by the *Tunisia/Libya* case.

The boundary proposed by the United States reflects the geographical relationship of the Parties because the perpendicular line drawn from the starting-point assures each State a reasonable seaward extension of its coast and a proportionate share of the area.

The adjusted perpendicular line gives effect to both the United States and Canadian coasts, including the Atlantic-facing United States coast at the back of the Gulf and the United States and Canadian coasts on the sides of the Gulf. The United States line does not refashion geography; it respects geography.

The United States adjustments in the perpendicular line give effect to the major relevant circumstance in the marine environment, that is, the separation at the Northeast Channel of the Georges Bank and the Scotian Shelf fish stocks.

The adjusted perpendicular line leaves to each of the Parties the area in which it has the predominant interest, that is, to the United States, Georges Bank, and to Canada, the Scotian Shelf, including Browns Bank and German Bank. That, Mr. President, concludes this portion of my presentation.

Mr. President, distinguished Judges, as Agent of the United States, I wish to share with those who are present here today, and to express for the record, the deep gratitude of my Government to all those Americans who have made so many personal sacrifices in making their significant contributions to the United States case. It has been a great privilege to be associated with all who have been connected with the preparation of the United States case, including those who are members of our delegation and those who are not. We owe so much to so many, including the distinguished Deputy-Agent, our able special counsel, our learned and most dedicated counsel, and all the outstanding attorneys, advisers and experts who have shared this arduous and challenging experience with us. Special thanks are due to our geographers and cartographic professionals for their endurance among so many attorneys. Of signal importance, we wish to acknowledge the indispensable contribution of our administrative and support personnel. They have been extraordinarily dedicated, and patient. In this regard, the secretaries especially have had to put up with the most extreme of demands, to say nothing of terrible penmanship, until all hours of the day and night. We are the first to admit that the preparation of our case has proven for once and for all that attorneys are helpless and hopeless without the excellent clerical support that has been so evident throughout this case.

With great personal pride, I wish to single out the Deputy-Agent of the United States, my friend and my colleague, David Colson. He has spent much of the last ten years addressing the delimitation of the maritime boundary in the Gulf of

Maine area. In the last three years there has been much to learn and to decide as the Agent of the United States in this great case. Thanks, in this regard, goes especially to David for his consistent good counsel and his persistent good humour however sorely taxed by the Agent of the United States. He deserves special praise for his enormous contribution to the presentation of the United States case.

The United States also wishes to congratulate the entire Canadian delegation on their outstanding efforts. It has been my personal privilege over the past three years to develop a strong working relationship with the Agent and the Deputy-Agent for Canada. For that I will always be grateful. I especially want to express my appreciation to my friend, Ambassador Legault, for all the many courtesies which he has consistently shown. We have shared quite an experience together and it is with personal pleasure that I offer a special salute to him.

Mr. President, the United States also wishes to thank the Registry and its outstanding staff who have been courteous and helpful from start to finish and to the interpreters and translators upon whom we have made so many unreasonable demands.

And, finally Mr. President, distinguished Judges, we especially want to express our appreciation to the Chamber for having listened to us with such patience and attention. The Government and people of the United States are grateful to the Court and we are grateful to each of you for having undertaken the important task before the Chamber.

It was 30 months ago, in Ottawa, that the United States and Canada exchanged the instruments of ratification that brought the Special Agreement into force. On that occasion, senior officials of both Governments seemed to breathe a collective sigh of relief.

A major bilateral problem has been passed to the lawyers and their colleagues. Today, the Delegation of the United States and the Delegation of Canada will also breathe a sigh of relief, for our work is over. But there will be a sigh of nostalgia, also, because participating in this case on behalf of our respective countries has been a privilege of the highest magnitude for us all and we are grateful to our Governments for this rare opportunity.

As provided in Rule 60 of the Rules of Court, it is my last act as Agent of the United States in these oral proceedings to read the Submissions of the United States. In so doing, the United States reaffirms its arguments in its written pleadings and in these oral proceedings. The Submissions of the United States are the same as those contained at pages 213 to 215 of the United States Memorial (**II**), *and restated at pages 269 to 271 of the United States Counter-Memorial* (**IV**) and pages 165 to 167 of the United States Reply (**V**), with three modifications to reflect its argument more precisely. Submission A (2) (A) now refers to natural prolongation in its geographic sense. Submission A (3) now clarifies the connection between the method of delimitation and the equitable principles and relevant circumstances. And a new paragraph B (1) (A) has been inserted to include as a specifically identified relevant circumstance the seaward extension of the coastal front of Maine and New Hampshire through the Gulf of Maine and beyond.

I now read the Final Submissions.

In view of the facts, the statement of the law, and the application of the law to the facts set forth in the United States Memorial, Counter-Memorial, Reply, and the oral presentations by United States Counsel;

Considering that the Special Agreement between the Parties requests the Chamber, in accordance with the principles and rules of international law applicable in the matter as between the Parties, to decide the course of the single

maritime boundary that divides the continental shelf and fisheries zones of the United States of America and Canada from a point in latitude 44° 11′ 12″ N, longitude 67° 16′ 46″ W to a point to be determined by this Chamber within an area bounded by straight lines connecting the following sets of co-ordinates: latitude 40° N, longitude 67° W; latitude 40° N, longitude 65° W; latitude 42° N, longitude 65° W;

May it please the Chamber, on behalf of the United States of America, to adjudge and declare:

A. Concerning the applicable law

1. That delimitation of a single maritime boundary requires the application of equitable principles, taking into account the relevant circumstances in the area, to produce an equitable solution.

2. That the equitable principles to be applied in this case include:

(a) the principle that the delimitation respect the relationship between the relevant coasts of the Parties and the maritime areas lying in front of those coasts, including non-encroachment; proportionality; and natural prolongation in its geographic sense, or coastal-front extension;
(b) the principle that the delimitation facilitate conservation and management of the natural resources of the area;
(c) the principle that the delimitation minimize the potential for disputes between the Parties; and
(d) the principle that the delimitation take account of the relevant circumstances in the area.

3. That the equidistance method is not obligatory on the Parties or preferred, either by treaty or as a rule of customary international law, and that any method or combination of methods of delimitation may be used that produces an equitable solution in application of these principles, taking account of the relevant circumstances.

B. Concerning the relevant circumstances to be taken into account

1. That the relevant geographical circumstances in the area include:

(a) the extension of the coastal front of Maine and New Hampshire through the Gulf of Maine and beyond;
(b) the broad geographical relationship of the Parties as adjacent States;
(c) the general northeastern direction of the east coast of North America, both within the Gulf of Maine and seaward of the Gulf;
(d) the location of the international boundary terminus in the northern corner of the Gulf of Maine;
(e) the radical changes in the direction of the Canadian coast beginning at the Chignecto Isthmus, 147 miles northeast of the international boundary terminus;
(f) the protrusion of the Nova Scotia peninsula 100 nautical miles southeast of the international boundary terminus, creating a short Canadian coastline perpendicular to the general direction of the coast, and across from the international boundary terminus;
(g) the concavity in the coast created by the combination of the protrusion of the Nova Scotia peninsula and the curvature of the New England coast;
(h) the relative length of the relevant coastlines of the Parties; and
(i) the Northeast Channel, Georges Bank, and Browns Bank and German Bank on the Scotian Shelf, as special features.

2. That the relevant environmental circumstances in the area include:

(a) the three separate and identifiable ecological régimes associated, respectively, with the Gulf of Maine Basin, Georges Bank, and the Scotian Shelf; and

(b) the Northeast Channel as the natural boundary dividing not only separate and identifiable ecological régimes of Georges Bank and the Scotian Shelf, but also most of the commercially important fish stocks associated with each such régime.

3. That the relevant circumstances in the area relating to the predominant interest of the United States as evidenced by the activities of the Parties and their nationals include:

(a) the longer and larger extent of fishing by United States fishermen since before the United States became an independent country;

(b) the sole development, and, until recently, the almost exclusive domination of the Georges Bank fisheries by United States fishermen; and

(c) the exercise by the United States and its nationals for more than 200 years of the responsibility for aids to navigation, search and rescue, defence, scientific research, and fisheries conservation and management.

C. Concerning the delimitation

1. That the application of equitable principles taking into account the relevant circumstances in the area to produce an equitable solution is best accomplished by a single maritime boundary that is perpendicular to the general direction of the coast in the Gulf of Maine area, commencing at the starting-point for delimitation specified in Article II of the Special Agreement and proceeding into the triangle described in that Article, but adjusted during its course to avoid dividing German Bank and Browns Bank, both of which would be left in their entirety to Canada.

2. That the boundary should consist of geodetic lines connecting the following geographic co-ordinates:

	Latitude (North)	*Longitude (West)*
(a)	44° 11′ 12″	67° 16′ 46″
(b)	43° 29′ 06″	66° 34′ 30″
(c)	43° 19′ 30″	66° 52′ 45″
(d)	43° 00′ 00″	66° 33′ 21″
(e)	42° 57′ 13″	66° 38′ 36″
(f)	42° 28′ 48″	66° 10′ 25″
(g)	42° 34′ 24″	66° 00′ 00″
(h)	42° 15′ 45″	65° 41′ 33″
(i)	42° 22′ 23″	65° 29′ 12″
(j)	41° 56′ 21″	65° 03′ 48″
(k)	41° 58′ 24″	65° 00′ 00″

A signed copy of these Submissions will be communicated to the Chamber and transmitted to Canada as required by Rule 60.

CLÔTURE DE LA PROCÉDURE ORALE

Le PRÉSIDENT DE LA CHAMBRE: Votre exposé met fin à la réplique orale des Etats-Unis d'Amérique et avec elle à toute cette phase de la procédure en la présente affaire. Je tiens en ce moment à exprimer aux Parties, à leurs agents et agents adjoints, à leurs conseils et à leurs collaborateurs la gratitude de la Chambre pour l'assistance qu'ils lui ont fournie par la présentation claire et approfondie de leurs thèses respectives. Je voudrais en même temps les féliciter de l'atmosphère toujours sereine et même cordiale qui a été maintenue pendant tous les débats. Les deux Parties ont dûment déposé leurs conclusions finales. Je serais reconnaissant aux agents des Parties de bien vouloir se tenir à la disposition de la Chambre au cas où celle-ci aurait besoin d'un complément d'information. Les Parties seront convoquées en temps utile pour connaître la décision finale. Je déclare close la procédure orale en l'affaire de la délimitation de la frontière maritime dans la région du golfe du Maine.

L'audience est levée à 12 h 55

VINGT-HUITIÈME AUDIENCE PUBLIQUE (12 X 84, 10 h)

Présents: [Voir audience du 2 IV 84.]

LECTURE DE L'ARRÊT

Le PRÉSIDENT DE LA CHAMBRE: La Chambre constituée pour connaître de l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine* se réunit aujourd'hui pour donner lecture en séance publique, conformément à l'article 58 du Statut de la Cour et à l'article 93 de son Règlement, de son arrêt dans cette affaire, qui lui a été soumise en exécution d'un compromis entre le Gouvernement du Canada et le Gouvernement des Etats-Unis d'Amérique notifié à la Cour le 25 novembre 1981. Je rappelle qu'en vertu de l'article 27 du Statut tout arrêt rendu par une chambre est considéré comme rendu par la Cour.

Avant d'entamer la lecture de l'arrêt il m'incombe un pénible devoir: celui de rendre hommage à la mémoire de M. Koretsky, membre de la Cour de 1961 à 1970 et Vice-Président de 1967 à 1970, dont nous venons d'apprendre le décès à l'âge de quatre-vingt-quatorze ans. Tous ceux qui ont connu M. Koretsky auront gardé le souvenir d'un juriste éminent et scrupuleux ainsi que d'une personnalité extrêmement humaine et chaleureuse. Je voudrais aussi évoquer une image qui, j'en suis sûr, est présente à l'esprit de toutes les personnes réunies aujourd'hui dans ce prétoire, celle du regretté professeur Antonio Malintoppi qui, le 5 mai 1984, bien que très affaibli déjà par la maladie qui devait l'emporter moins d'un mois plus tard, prononçait ici même sa dernière plaidoirie au nom du Canada, donnant ainsi un exemple émouvant de courage et de conscience professionnelle qui a laissé à tous une impression profonde. Je voudrais présenter une nouvelle fois les condoléances de la Chambre et les miennes à l'agent du Canada, et aux proches du disparu. Je prie tous les présents de bien vouloir se lever pour observer une minute de silence à la mémoire de M. Koretsky et à celle de M. Malintoppi.

[Les personnes présentes se lèvent.]

Veuillez vous rasseoir.

Je voudrais maintenant, sur une note toute différente, rappeler que nous nous trouvons réunis aujourd'hui pour rendre la décision de la Chambre en cette affaire opposant deux grands Etats d'Amérique du Nord, précisément *on Columbus Day*, c'est-à-dire sous des auspices particulièrement opportuns et, je l'espère, favorables. Je ne saurais donc faire moins que de saisir cette occasion pour adresser aux délégations du Canada et des Etats-Unis d'Amérique mes félicitations et mes vœux les plus chaleureux, auxquels s'associent les autres membres de la Chambre.

Je vais maintenant commencer la lecture de l'arrêt. J'omettrai de cette lecture les qualités, c'est-à-dire les paragraphes rappelant les diverses étapes de la procédure, les conclusions des Parties, etc., les passages concernant l'origine et l'évolution du différend et ceux qui consistent en une description et une analyse des lignes de délimitation proposées par les Parties. J'entamerai donc ma lecture par les paragraphes relatifs au compromis entre les Parties.

[Le président de la Chambre lit les paragraphes 14 à 243 de l'arrêt [1].]

J'invite maintenant le Greffier à donner lecture du dispositif de l'arrêt en anglais.

[The Registrar reads the operative clause in English [2].]

M. Schwebel joint à l'arrêt l'exposé de son opinion individuelle. M. Gros joint à l'arrêt l'exposé de son opinion dissidente.

L'audience est levée à 12 h 15

Le président de la Chambre,
(Signé) Roberto AGO.

Le Greffier,
(Signé) Santiago TORRES BERNÁRDEZ.

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[1] *C.I.J. Recueil 1984*, p. 263-345.
[2] *I.C.J. Reports 1984*, p. 345.