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 VI
Oral Proceedings

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

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

(CANADA/ÉTATS-UNIS D'AMÉRIQUE)

VOLUME VI
Procédure orale

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 VI
Oral Proceedings

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

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

(CANADA/ÉTATS-UNIS D'AMÉRIQUE)

VOLUME VI
Procédure orale

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.

Neither the typography nor the presentation may be used for the purpose of interpreting the texts reproduced.

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.

Ni la typographie ni la présentation ne sauraient être utilisées aux fins de l'interprétation des textes reproduits.

CONTENTS – TABLE DES MATIÈRES

ORAL ARGUMENTS

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague,
on 29 January 1982 and from 2 to 19 April 1984,
President of the Chamber, Judge Ago, presiding

PLAIDOIRIES

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au palais de la Paix, à La Haye,
le 29 janvier 1982 et du 2 au 19 avril 1984,
sous la présidence de M. Ago, président de la Chambre

FIRST PUBLIC SITTING (29 I 82, 11 a.m.)

Present: Acting President ELIAS; *The Chamber:* Judge AGO, *President*; Judges GROS, MOSLER, SCHWEBEL, Judge *ad hoc* COHEN; Registrar TORRES BERNÁRDEZ.

Also present:

For the Government of Canada:

Mr. Leonard H. Legault, *as Agent*;

H.E. Mr. Georges H. Blouin, Ambassador of Canada to the Netherlands,
Mr. Franco Pillarella, Counsellor, Embassy of Canada, The Hague,
Mr. L. A. Willis, Department of Justice, Ottawa.

For the Government of the United States of America:

Mr. Davis R. Robinson, *as Agent*;

Mr. David A. Colson, *as Deputy-Agent*;

Mr. Lord Stuart Allan, First Secretary, Embassy of the United States of America, The Hague.

FIRST PUBLIC SITTING OF THE CHAMBER

ACTING PRESIDENT ELIAS: It falls to me, as Acting President of the International Court of Justice, to make this preliminary statement before the first public meeting of the Chamber which the Court has formed, under Article 26, paragraph 2, of its Statute, to deal with a particular case, namely the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*.

Not only is this the first time that a case has ever, in the whole of the present Court's history, been submitted to a chamber, but it is also the first time that such a special chamber has ever been constituted.

It has been formed at the request of the Governments of Canada and the United States of America, which notified a Special Agreement [1] to the Court on 25 November 1981.

Thereupon, it was my duty to ascertain the views of the Parties as to the composition of the Chamber, in accordance with Article 17, paragraph 2, of the Rules of Court. An election was held pursuant to Article 18, paragraph 1, of the Rules, and at a subsequent meeting, on 20 January 1982, an Order [2] was adopted formally declaring the Chamber constituted with the following composition: Judges Gros, Ruda, Mosler, Ago and Schwebel.

According to the Order, it had also been my duty, under Article 17, paragraph 2, of the Rules, to take such steps as might be necessary to give effect to the provisions of Article 31, paragraph 4, of the Statute. In the circumstances, this entailed my having to request one of the judges elected to the Chamber to give place in due course to the person specially chosen by Canada to sit as a judge *ad hoc* in the case. I addressed my request to Judge Ruda who, as the Order recorded, expressed his readiness to step down when the time came.

The Court has since been informed that Canada has chosen a distinguished teacher of international law, Professor Maxwell Cohen, to sit as judge *ad hoc* in the case and, as Judge Ruda has fulfilled his undertaking to withdraw, I have the pleasure to observe today the presence of Professor Cohen among the members of the Chamber.

Just prior to this public occasion, the Chamber held its first private meeting and I am informed that, in accordance with Article 18, paragraph 2, of the Rules it has elected Judge Ago to be its President.

It only remains for me therefore to congratulate Judge Ago and call upon him to address you in the name of the Chamber.

Le PRÉSIDENT DE LA CHAMBRE: Monsieur le Président, je voudrais tout d'abord, au nom de la Chambre de la Cour qui vient d'être constituée et qui tient en ce moment sa première séance publique, vous exprimer notre gratitude d'avoir bien voulu être parmi nous aujourd'hui. Par votre présence, non seulement vous ajoutez à la solennité de cette séance mais encore vous soulignez que la Chambre est la Cour et que la Cour considère la Chambre comme une partie d'elle-même. Nous inaugurons aujourd'hui une nouvelle expérience conçue par quelques juristes très respectés qui ont voulu offrir à la Cour de

[1] I, pp. 3-26.
[2] *I.C.J. Reports 1982*, p. 3.

nouvelles possibilités de développer son œuvre, venant s'ajouter aux possibilités traditionnellement utilisées depuis l'origine dans le cadre de la Cour plénière. Il me plaît de rappeler en particulier les noms de sir Gerald Fitzmaurice, de Philip Jessup, d'André Gros que nous avons le grand honneur de compter parmi nous comme doyen de la Chambre, de Sture Petrén, de Manfred Lachs, d'Eduardo Jiménez de Aréchaga que j'ai le plaisir de saluer dans l'assistance, et tout spécialement de sir Humphrey Waldock, récemment disparu après avoir tant fait pour la constitution de la présente Chambre. Ces hommes généreux ont imaginé la possibilité pour la Cour d'établir des chambres composées d'un nombre limité de ses membres, après consultation des parties intéressées, et ce afin d'œuvrer à la solution de différends juridiques particuliers, répondant en cela aux vœux souvent exprimés par les Etats et par les milieux juridiques internationaux. Nous souhaitons, Monsieur le Président, que cette expérience réussisse pleinement et que nous puissions avoir par là contribué à développer le règlement des conflits internationaux par la voie du droit. Comme je l'ai dit, la Chambre est la Cour. C'est au nom de la Cour que la Chambre agira et rendra son arrêt. C'est à ce titre que sa décision aura un caractère obligatoire. Ce sont là des points fort importants, qu'il convient de ne pas oublier. Représentant au sein de la Cour la tradition du droit romain, je voudrais reprendre la formule de vœux que les anciens Romains prononçaient traditionnellement quand ils abordaient une entreprise nouvelle: *Quod felix faustum fortunatumque sit.* Puisse la chance sourire à cette expérience, puisse le petit vaisseau que nous confions aujourd'hui aux flots de l'océan parvenir paisiblement à bon port.

Je voudrais maintenant rappeler que cette première séance de la Chambre a pour objet de répondre aux dispositions des articles 20 et 31, paragraphe 6, du Statut de la Cour aux termes desquels un juge *ad hoc* doit, avant d'entrer en fonctions, prendre solennellement en public, ainsi que les membres de la Cour l'ont fait avant lui, l'engagement d'exercer ses attributions en pleine impartialité et en toute conscience. En conséquence, j'invite M. Maxwell Cohen à faire sa déclaration solennelle ainsi qu'il est prescrit à l'article 8, paragraphe 2, du Règlement et j'invite toutes les personnes présentes à bien vouloir se lever.

JUDGE COHEN: *I solemnly declare that I will perform my duties and* exercise my powers as judge honourably, faithfully, impartially and conscientiously.

Le PRÉSIDENT DE LA CHAMBRE: Veuillez vous rasseoir. Je prends acte de la déclaration solennelle que vient de prononcer M. Cohen en sa qualité de juge *ad hoc* dument désigné, conformément à l'article 31 du Statut de la Cour, pour être membre de la Chambre constituée en vue de connaître de l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine* entre le Canada et les Etats-Unis d'Amérique. Je suis heureux de saisir cette occasion pour dire à M. Maxwell Cohen combien les membres de la Chambre et de la Cour se réjouissent de voir au sein de la Chambre un collègue si estimé dans les milieux juridiques spécialisés dans le règlement judiciaire des différends internationaux. J'estime inutile de faire ici son éloge et de rappeler en détail la carrière du savant professeur que nous admirons et du collègue si aimable qui vient de nous joindre. Nous le saluons comme membre de cette Chambre, de laquelle il complète si heureusement la composition.

Je constate la présence des représentants des Parties en l'affaire, en particulier de M. Léonard H. Legault, agent du Canada, et de M. Davis R. Robinson, agent des Etats-Unis d'Amérique. La Chambre serait heureuse d'entendre toutes observations qu'ils désireraient formuler en la circonstance.

Mr. LEGAULT: Mr. President of the Court, Mr. President of the Chamber, Honourable Members of the Court and the Chamber. If there is any fault involved in the failure to achieve a negotiated settlement in the Gulf of Maine Boundary dispute, despite the best efforts of Canada and the United States, then it is a happy fault – *felix culpa*. A happy fault because it provides the opportunity for our two countries to appear before the International Court of Justice and so affirm our trust in and support for this great institution and for the rule of law which it has done so much to promote and maintain.

Canada and the United States have a long tradition of peaceful settlement of disputes but this is the first time that we have called upon the Court to help us resolve a problem that is of the greatest importance to both sides and to the future development of international law, and particularly the law of maritime boundaries. I am conscious of the honour done to me by my Government in entrusting me with the carriage of this case. I am also conscious above all of the heavy weight of responsibility that rests upon me. That weight is lightened, however, by the confidence my Government and I place in the wisdom of this Court.

There are many historic "firsts" involved in the present case but I wish to refer to only one more. With Judge Cohen's swearing-in this morning, this is the first time that Canada has been represented on the International Court of Justice since the retirement of Judge Read. Judge Cohen is a distinguished Canadian and a distinguished international jurist. I know he will be worthy of his predecessor and that like Judge Read he will make a noteworthy contribution to the annals of the Court. I offer him my warmest congratulations and best wishes. I suppose too that I must now in effect say goodbye to him for perhaps the next few years.

Finally, I must express my Government's profound gratitude to Judge Elias for his inspired leadership and for the rare quality of human understanding he has displayed throughout the process that has culminated in the formation of the first Chamber in the history of the International Court of Justice. May I add too a word of thanks to our distinguished Registrar, Mr. Torres Bernárdez, for his advice and assistance in bringing us to where we are today. I should also note that my colleague, the Agent for the United States of America, has been unfailingly courteous and co-operative throughout this process and that I look forward to maintaining this same relationship with him as we move forward into another phase of the Gulf of Maine case.

Mr. ROBINSON: Mr. President, Mr. President of the Chamber, distinguished Members of the International Court of Justice, Ambassador Legault, Ambassador Blouin, members of the diplomatic community, ladies and gentlemen. It is an extraordinary honour for me to be here today to represent my country before the International Court of Justice and its duly constituted Chamber established under the Statute and Rules of Court. This is a very important occasion for the Governments of the United States and Canada and for furthering the peaceful resolution of disputes between nations. It is very important for the United States and Canada because the constitution of a Chamber of the International Court of Justice sets in motion a process for deciding a very difficult bilateral dispute between neighbours and close allies and friends. It is also important because today marks the beginning of a significant experiment in international dispute settlement which is being watched closely by the world community.

The establishment by the Court of its first Chamber to hear a particular case is characteristic of this Court's leadership role in the peaceful resolution of

disputes between States. In this regard, we are particularly grateful for the good offices and inspiration of the Acting President. We also thank the Registrar for his guidance. And, we welcome Judge Cohen and the other Members of the Chamber.

As Agent for the United States of America, I am committed to the successful implementation of this procedure established by the Statute and Rules of Court and I can assure you that I and my Government will continue to co-operate with this Court so as to facilitate the operation of the Chamber. Sailing uncharted waters is always difficult, but the Court has demonstrated its courage, inventiveness and leadership in responding to the concerns and interests of the Parties to this case. I firmly believe that the establishment of the Chamber will enhance the role of the Court and will open a new era of recourse to dispute settlement before this body.

Le PRÉSIDENT DE LA CHAMBRE: Avant de lever la séance, je voudrais vous dire, Monsieur le Président, que notre gratitude d'avoir bien voulu nous honorer de votre présence jusqu'au bout à la présente séance est d'autant plus grande que nous savons que vos responsabilités dans une autre importante affaire vous occupent particulièrement en ce moment. Je voudrais aussi adresser nos remerciements au Greffier de la Cour et à ses collègues sans le concours de qui la Chambre n'aurait pu prendre un si heureux départ, ainsi qu'aux représentants des Parties et à tous ceux qui ont bien voulu assister à la séance.

L'audience est levée à 11 h 35

SECOND PUBLIC SITTING (2 IV 84, 3 p.m.)

Present: Judge AGO, *President of the Chamber*; Judges GROS, MOSLER, SCHWEBEL, Judge *ad hoc* COHEN; Registrar TORRES BERNÁRDEZ.

Also present:

For the Government of Canada:

The Hon. Mr. Mark MacGuigan, P.C., Q.C., M.P., Minister of Justice and Attorney-General of Canada,

H.E. Mr. L. H. Legault, Q.C., Ambassador, Legal Adviser, Department of External Affairs, *as Agent and Counsel*;

Mr. Blair Hankey, Department of External Affairs, *as Deputy-Agent and Counsel*;

Mr. L. Alan Willis, Department of Justice, *as Counsel and Special Adviser*;

Mr. W. I. C. Binnie, Q.C., Associate Deputy Minister, Department of Justice,
Professor Derek W. Bowett, Q.C., Whewell Professor of Law, Queens' College, Cambridge,
Professor Ian Brownlie, Q.C., F.B.A., Chichele Professor of International Law, Fellow of All Souls College, Oxford,
Mr. Yves Fortier, Q.C., Member of the Quebec Bar, Past President of the Canadian Bar Association,
Professor Dr. Gunther Jaenicke, Professor of International Law at the University of Frankfurt-am-Main,
Professor Ronald St. J. Macdonald, Q.C., Dalhousie University,
Professor Antonio Malintoppi, University of Rome,
Professor Prosper Weil, Professeur à l'Université de droit, d'économie et de sciences sociales de Paris, *as Counsel*;

Mr. Lawrence Herman, Member of the Ontario and Saskatchewan Bars,
Professor D. M. McRae, University of British Columbia,
Dr. Jan Schneider, Member of the New York and District of Columbia Bars, *as Senior Legal Advisers*;

Commander E. J. Cooper, Consultant in maritime boundary delimitation, Ottawa,
Dr. M. Sinclair, Halifax Fisheries Research Laboratory, Department of Fisheries and Oceans, *as Experts*;

Dr. A. R. Longhurst, Bedford Institute of Oceanography, Dartmouth,
Dr. R. D. W. Macdonald, Department of Fisheries and Oceans, Ottawa,
Dr. M. P. Shepard, Fisheries Consultant, Victoria,
Mr. D. F. Sherwin, Department of Energy, Mines and Resources, Ottawa,
Ms. Patricia Smith, Department of Fisheries and Oceans, Ottawa,
Dr. R. Trites, Bedford Institute of Oceanography, Dartmouth, *as Scientific and Technical Advisers*;

Mr. Ross Hornby, Department of External Affairs,
Ms. Valerie Hughes, Member of the Ontario Bar,
Ms. Sarita Verma, Department of External Affairs, *as Legal Advisers*;

Mr. C. Hanson Dowell, Q.C., Special Adviser, Government of Nova Scotia,
Mr. D. A. MacLean, Deputy Minister, Department of Fisheries, Government of Nova Scotia,
Mr. Henri Légaré, Deputy Minister, Department of Fisheries, Government of New Brunswick, *as Advisers.*

For the Government of the United States of America:

The Hon. Davis R. Robinson, Legal Adviser, United States Department of State, *as Agent and Counsel*;

Mr. David A. Colson, Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs, Office of the Legal Adviser, United States Department of State, *as Deputy-Agent and Counsel*;

Mr. Bruce C. Rashkow, Director of the Office of Canadian Maritime Boundary Adjudication, Office of the Legal Adviser, United States Department of State, *as Special Counsel*;

The Hon. John R. Stevenson, Member of the Bars of New York and the District of Columbia, formerly Legal Adviser, United States Department of State, and formerly United States Ambassador to the Third United Nations Conference on the Law of the Sea,
Mr. Mark B. Feldman, Member of the Bars of New York and the District of Columbia, Adjunct Professor of Law, Georgetown University Law Center, Washington, D.C., and formerly Deputy Legal Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Ralph I. Lancaster, Member of the Bars of Maine and Massachusetts, Regent for Canada and the New England States of the American College of Trial Lawyers, and formerly President of the Maine Bar Association,
Professor John Norton Moore, Member of the Bars of Florida, Illinois, Virginia and the District of Columbia, Walter L. Brown Professor of Law and Director of the Center of Oceans Law and Policy, University of Virginia School of Law, formerly Counselor on International Law, Office of the Legal Adviser, United States Department of State, and formerly United States Ambassador to the Third United Nations Conference on the Law of the Sea,
Professor Stefan Riesenfeld, Member of the Bar of Minnesota, Professor of Law, University of California, School of Law, Berkeley, California and the Hastings College of the Law, San Francisco, California, S.J.D. (Harvard), J.U.D. (Breslau), Dott. in Giur. (Milano), and formerly Counselor on International Law, Office of the Legal Adviser, United States Department of State, *as Counsel*;

Lieutenant-Commander Peter Ward Comfort, Judge Advocate General's Corps, United States Navy, on detail to the Office of Canadian Maritime Boundary Adjudication, Office of the Legal Adviser, United States Department of State,
Mr. Michael John Danaher, Office of the Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs, Office of the Legal Adviser, United States Department of State,
Ms. Mary Wild Ennis, Office of Canadian Maritime Boundary Adjudication, Office of the Legal Adviser, United States Department of State,
Lieutenant Neil F. Gitin, Judge Advocate General's Corps, United States Naval Reserve, on detail to the Office of Canadian Maritime Boundary Adjudication, Office of the Legal Adviser, United States Department of State,
Mr. Ray A. Meyer, Office of Canadian Maritime Boundary Adjudication,

Office of the Legal Adviser, United States Department of State, *as Attorney-Advisers*;

Lieutenant Brian P. Flanagan, United States Coast Guard, on detail to the Office of Canadian Maritime Boundary Adjudication, Office of the Legal Adviser, United States Department of State,

Mr. Richard H. Davis, Supervisory Cartographer, Marine Chart Division, National Ocean Service, National Oceanographic and Atmospheric Administration, United States Department of Commerce,

Mr. William Hezlep, Office of the Geographer, Bureau of Intelligence and Research, United States Department of State,

Dr. Jonathan T. Olsson, Office of the Geographer, Bureau of Intelligence and Research, United States Department of State,

Ms. Sandra Shaw, Chief, Cartography Division, Office of the Geographer, Bureau of Intelligence and Research, United States Department of State,

Dr. Robert W. Smith, Chief, International Boundary and Resource Division, Office of the Geographer, Bureau of Intelligence and Research, United States Department of State, *as Special Advisers*;

Dr. Robert L. Edwards, Special Assistant to the Assistant Administrator of Fisheries, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanographic and Atmospheric Administration, United States Department of Commerce, *as Expert*;

assisted by:

Professor Steven J. Burton, Professor of Law, University of Iowa College of Law, Iowa City, Iowa,

Professor Jonathan Charney, Professor of Law, Vanderbilt University School of Law, Nashville, Tennessee,

Mr. Raph J. Gillis, Member of the Bars of Massachusetts and the District of Columbia, Plymouth, Massachusetts,

Professor Bernard H. Oxman, Professor of Law, University of Miami, School of Law, Miami, Florida,

Professor Ted L. Stein, Professor of Law, University of Washington, School of Law, Seattle, Washington, *as Legal Consultants*;

Dr. Geoffrey Bannister, Dean of the College of Liberal Arts and the Graduate School, Boston University, Boston, Massachusetts,

Dr. Louis DeVorsey, Jr., Professor of Geography, University of Georgia, Athens, Georgia,

Dr. K. O. Emery, Henry Bryant Bigelow Oceanographer, Woods Hole Oceanographic Institution, Woods Hole, Massachusetts,

Mr. Richard C. Hennemuth, Laboratory Director, Woods Hole Laboratory, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanographic and Atmospheric Administration, United States Department of Commerce,

Mr. James Kirkley, Woods Hole Laboratory, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanographic and Atmospheric Administration, United States Department of Commerce,

Dr. Kim D. Klitgord, Geophysicist, United States Geological Survey, United States Department of the Interior,

Dr. Daniel McFadden, James R. Killian Professor of Economics, Massachusetts Institute of Technology, Cambridge, Massachusetts,

Dr. Richard B. Morris, Gouverneur Morris Professor of History, Columbia University, New York, New York,

Lieutenant-Commander Robert Pawlowski, Commissioned Corps, Northeast Fisheries Center, National Marine Fisheries Service, National Oceanographic and Atmospheric Administration, United States Department of Commerce,

Dr. Giulio Pontecorvo, Professor of Economics, Graduate School of Business, Columbia University, New York, New York,

Dr. John S. Schlee, Geologist, United States Geological Survey, United States Department of the Interior,

Mr. William L. Sullivan, Jr., Policy Adviser for International Marine Affairs, National Oceanographic and Atmospheric Administration, United States Department of Commerce,

Dr. Manik Talwani, Geological Consultant, Houston, Texas,

Dr. Elazar Uchupi, Senior Scientist, Geology and Geophysics Department, Woods Hole Oceanographic Institution, Woods Hole, Massachusetts,

Dr. James Wilson, Professor of Economics, University of Maine, Orono, Maine,

Dr. Julian Wolpert, Henry G. Bryant Professor of Geography, Public Affairs, and Urban Planning, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, New Jersey, *as Advisers.*

OUVERTURE DE LA PROCÉDURE ORALE

Le PRÉSIDENT DE LA CHAMBRE: En ma qualité de président de la Chambre constituée par la Cour internationale de Justice pour connaître de l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine*, je déclare ouverte la procédure orale en ladite affaire.

Au moment où les audiences vont commencer je tiens à saluer la présence dans cette salle des représentants des deux Etats parties à l'affaire et en particulier des agents, MM. Legault et Robinson, auxquels j'adresse une cordiale bienvenue.

Par la même occasion, je voudrais souligner que c'est la première fois qu'une affaire est plaidée devant une chambre de la Cour, spécialement constituée à la demande des Parties en application de l'article 26, paragraphe 2, du Statut de la Cour et des articles 17 et 18 de son Règlement, afin de connaître d'une affaire déterminée.

De surcroît, c'est aussi pour la première fois qu'une affaire porte sur la détermination d'une frontière maritime unique et non pas simplement sur la définition des limites de zones de plateau continental ou de zones de pêche.

La Chambre a été créée et l'affaire introduite à la suite de la notification conjointe à la Cour, le 25 novembre 1981, d'un compromis[1] entre le Gouvernement du Canada et le Gouvernement des Etats-Unis d'Amérique, signé à Washington le 29 mars 1979 et entré en vigueur le 20 novembre 1981. En vertu de l'article II du compromis, la chambre de la Cour dont on demandait la constitution était priée de statuer, conformément aux règles et principes du droit international applicable en la matière entre les parties, sur la question suivante:

> «Quel est le tracé de la frontière maritime unique divisant le plateau continental et les zones de pêche du Canada et des Etats-Unis d'Amérique à partir d'un point situé par 44° 11′ 12″ de latitude nord et 67° 16′ 46″ de longitude ouest jusqu'à un point devant être fixé par la chambre à l'intérieur d'une zone délimitée par des lignes droites reliant les coordonnées géographiques suivantes: 40° de latitude nord et 67° de longitude ouest; 40° de latitude nord et 65° de longitude ouest; 42° de latitude nord et 65° de longitude ouest?»

Dans la lettre conjointe notifiant le compromis[2], le Gouvernement du Canada faisait en outre part de son intention d'exercer la faculté que lui confère l'article 31 du Statut de désigner un juge *ad hoc*. Conformément à l'article 17, paragraphe 2, du Règlement, le Président en exercice de la Cour s'est informé des vues des Parties et a pris toutes dispositions nécessaires pour assurer l'application de l'article 31, paragraphe 4, du Statut.

Ayant procédé, le 15 janvier 1982, à l'élection des membres de la chambre, la Cour, par ordonnance du 20 janvier 1982[3], dont les considérants reproduisent notamment des explications et éclaircissements complémentaires fournis par les Parties, a décidé d'accéder à la demande des deux gouvernements et a déclaré la Chambre dûment constituée pour connaître de l'affaire. L'ordonnance indiquait le nom des juges élus pour siéger à la Chambre, à savoir MM. Gros, Ruda,

---

[1] I, pp. 10-16.
[2] I, p. 3.
[3] *C.I.J. Recueil 1982*, p. 3.

Mosler, Ago et Schwebel, et prenait acte de ce que, dans l'exercice des pouvoirs qu'il tient de l'article 31, paragraphe 4, du Statut, le Président en exercice de la Cour avait prié M. Ruda de céder sa place, le moment venu, au juge *ad hoc* désigné par le Gouvernement du Canada, et que M. Ruda s'était déclaré prêt à le faire.

Par la suite, le Gouvernement du Canada a désigné M. Maxwell Cohen pour siéger comme juge *ad hoc* en l'affaire. M. Ruda s'étant retiré comme il s'y était engagé, M. Cohen a fait la déclaration solennelle prévue et a été officiellement installé dans ses fonctions lors de la première séance publique tenue par la Chambre le 29 janvier 1982. Le même jour, en séance privée, la Chambre, réunie sous la présidence de son doyen M. Gros, m'avait fait l'honneur de me choisir pour président.

En vertu de l'article II, paragraphe 3, du compromis, la Chambre était d'autre part priée de nommer un expert technique, désigné conjointement par les Parties, «pour l'aider dans la considération des questions techniques et notamment dans la préparation de la description de la frontière maritime et des cartes...» Par ordonnance du 30 mars 1984[1], la Chambre a nommé le capitaine de frégate à la retraite Peter Beazley, de la marine britannique, pour remplir les fonctions d'expert technique de la Chambre en la présente affaire. M. Beazley assistera à ce titre à l'ouverture et aux phases saillantes de la procédure orale.

En conformité avec l'article 43, paragraphe 2, du Statut de la Cour, et de l'article 46, paragraphe 1, de son Règlement, le compromis prévoyait le dépôt par les Parties de mémoires et de contre-mémoires[2] et de toute autre pièce de procédure jugée nécessaire par la Chambre. Les mémoires et contre-mémoires ont été dûment déposés dans les délais fixés. Par ordonnance du 27 juillet 1983[3], le président de la Chambre, considérant que les deux gouvernements en cause souhaitaient être autorisés à soumettre une pièce de procédure additionnelle, a fixé au 12 décembre 1983 la date d'expiration d'un délai pour le dépôt des répliques[4]. Les répliques ayant été déposées dans le délai prévu, l'affaire se trouve désormais en état.

Conformément à l'article 53, paragraphe 2, du Règlement de la Cour, la Chambre, après s'être renseignée auprès des Parties, a décidé que les pièces de procédure et documents annexés seront accessibles au public à dater de l'ouverture de la présente procédure orale.

Après consultation des Parties, il a été décidé, conformément à l'article 58, paragraphe 2, du Règlement, que la Chambre entendrait d'abord les représentants du Canada.

---

[1] *C.I.J. Recueil 1983*, p. 165.
[2] **I**, pp. 31-534; **II**, pp. 3-421; **III**, pp. 3-456, et **IV**, pp. 3-482
[3] *C.I.J. Recueil 1983*, p. 6.
[4] **V**, pp. 3-371 et pp. 375-707.

STATEMENT BY MR. LEGAULT

AGENT FOR THE GOVERNMENT OF CANADA

Mr. LEGAULT: Mr. President, distinguished Judges, my first duty today is to present to the Chamber the Attorney-General of Canada, who will open these proceedings on behalf of Canada. Before doing so, however, I wish to extend my respectful greetings to this distinguished Chamber and also to my distinguished friends and colleagues representing the United States. I am happy to salute them on this historic occasion and to emphasize the ties of friendship that link their great country and my own. For it is friendship, Mr. President, and no other factor that has motivated the Parties to bring before this Chamber their difference regarding the placement of the single maritime boundary in the Gulf of Maine area, and I should like to take this opportunity to wish my colleague and friend Davis Robinson very well in these proceedings.

ARGUMENT OF MR. MACGUIGAN

COUNSEL FOR THE GOVERNMENT OF CANADA

Mr. MACGUIGAN: Mr. President, distinguished Judges, I am honoured to open these historic proceedings in the Great Hall of Justice on behalf of Canada. The late Judge John E. Read was one of the early advocates of a flexible chamber system within the International Court of Justice. So it is especially appropriate that Canada's first case before the Court should be the first case heard by a Chamber formed under Article 26, paragraph 2, of the Statute.

C'est également la première fois qu'un tribunal international est appelé à arrêter une frontière maritime unique qui divise à la fois le plateau continental et les zones de pêche de 200 milles d'Etats côtiers voisins. Ainsi donc, il s'agit de la première délimitation internationale judiciaire de la zone économique exclusive depuis l'apparition de ce nouveau concept dans la pratique des Etats et dans la convention des Nations Unies sur le droit de la mer. Nos délibérations ici auront vraisemblablement une influence profonde sur le développement du droit international. Monsieur le Président, le Canada et les Etats-Unis n'ont jamais auparavant soumis une question de frontière ou toute autre question qui a pu se poser entre eux à la Cour internationale de Justice. Pourtant les deux pays dans la conduite de leurs relations bilatérales ont eu l'occasion de se familiariser avec les procédures de règlement par tierce partie. En fait, ils ont choisi de régler leurs litiges par arbitrage, à maintes occasions par le passé, en commençant par le différend frontalier dans la rivière Sainte-Croix en 1798. La présente affaire s'inscrit dans la longue tradition de délimitation pacifique et progressive des frontières du Canada et des Etats-Unis.

Mr. President, I wish to make clear at the outset what it is that brings the Parties before the Chamber on this occasion. In two words, it is Georges Bank. The written pleadings of both Parties leave no room for doubt that the object of their dispute is Georges Bank. More specifically, the dispute centres on the abundant fishery resources and the potential hydrocarbon resources of this large detached bank seaward of the Gulf of Maine, off the coasts of Nova Scotia and Massachusetts.

Canada has claimed less than half of Georges Bank since it first began to issue oil and gas permits in the Gulf of Maine area in 1964. The United States has claimed the whole of the Bank since 1976. This difference in the extent of the claims of Canada and the United States is more than a simple quantitative difference. Whatever may be the outcome of the present proceedings, the United States will not cease to be present on Georges Bank, since the Canadian claim itself leaves more than half of the Bank to the United States. If the Chamber were to accept the United States claim, however, the result would be Canada's eviction from the Bank as a whole. Canadian fishermen would be banished entirely from this traditional fishing ground on which they depend today and have depended for many years. Long-standing Canadian offshore permits would become worthless overnight. The effect on Canada – and especially on Nova Scotia – would be a heavy one. No decision by the Chamber could produce a similar result for the United States.

There is accordingly an essential difference – a qualitative difference – in what is at stake for the Parties in these proceedings. This was already the case in relation to the claims defended by the Parties when they concluded the Special

Agreement in 1979. The United States widened the gap still further in claiming its "adjusted perpendicular line" in 1982. In 1979 as in 1982, however, the United States claim encompassed the whole of Georges Bank. The United States line has advanced further towards Canada but the United States objective remains the same. And it was precisely the extravagance of the United States claim that made prudence and reasonableness seem unnecessary to those United States interests that lobbied against ratification of the 1979 Agreement on East Coast Fishery Resources, which was negotiated and concluded by the Parties at the same time as the Special Agreement.

The 1979 fisheries agreement reflected a long history of co-operation in the fisheries relations of Canada and the United States. Its antecedents can be traced back to the Treaty of Paris of 1783. It was explicitly recognized as a fair deal by both Parties. If it had come into force, the impact of the boundary issue on competing fisheries interests would obviously have been greatly lessened. This approach, however, was rejected by the opponents of the 1979 fisheries agreement in the United States. It was rejected because these opponents considered that the United States could afford a "winner take all" approach, in which the fishing rights of the Parties would be settled exclusively by the boundary line to be fixed by the Chamber. For the United States, of course, no boundary to be fixed by the Chamber could possibly result in a total *loss* of access to Georges Bank. As a result, the United States failed to ratify the 1979 fisheries agreement, although it did not fail to hedge its bets by its later expansion of its claim to the "adjusted perpendicular line".

For Canada, however, the 1979 fisheries agreement represented the single most important bilateral issue in its relations with any country at that time. It was in these terms that I described the agreement to the Canadian public and Parliament as Canada's then Secretary of State for External Affairs. And it was only Canada's profound confidence in the international judicial process that finally led my Government to accept the dissociation of the fisheries agreement from the Special Agreement and to entrust this Chamber with the determination of the single maritime boundary and thereby the disposition of the Parties' fishing interests.

Georges Bank, Mr. President, is more than the object of the dispute now before the Chamber. It is also for both Parties the benchmark, the crucial test of an equitable delimitation in these proceedings. The United States maintains that Canada's claim is inequitable by the very fact that it includes part of Georges Bank and does not leave it all to the United States. Canada, on the other hand, maintains that the United States claim is inequitable, not simply because it comprises the whole of Georges Bank but because it denies to Canada that part of the Bank where Canada has undeniable rights and established interests. Allow me to enquire briefly into these two conflicting notions of equity by which the Parties seek to resolve the fate of Georges Bank.

Surely the most important feature of an equitable result is that it must be not only equitable in the sense of being "fair" but also equitable within the law. The Special Agreement highlights this requirement in the present case by requesting the Chamber to determine the single maritime boundary "in accordance with the principles and rules of international law applicable in the matter as between the Parties" (I, p. 10, Special Agreement, Art. II, para. 1). The Court itself stated the same requirement very clearly in the 1969 *North Sea Continental Shelf* cases when it noted that a judicial decision must find "its objective justification in considerations lying not outside but within the rules" (*I.C.J. Reports 1969*, pp. 48-49, para. 88). While a maritime boundary delimitation must end in equity, it must begin in law. The emphasis on an equitable result cannot be

allowed to obscure the requirement that that result be founded in law. In the words of Frederic William Maitland, equity comes "not to destroy the law but to fulfill it" (*Lectures on Equity*, 1909).

The marriage of equity and law underlies Canada's claim to the eastern part of Georges Bank. This may be seen from Canada's four main arguments in these proceedings:

First, Canada maintains that an equidistance boundary for Georges Bank is required by Article 6 of the 1958 Convention on the Continental Shelf, which represents a binding rule of treaty law for both Parties. Under Article 6, the equidistance method is the first choice and, as the Court of Arbitration stated in the Anglo-French Continental Shelf award, it becomes obligatory if no special circumstances render it inequitable (para. 70). The Court of Arbitration also made clear that Article 6 represents a particular expression of the general norm that maritime boundaries are to be determined on equitable principles *(ibid.)*. The Canadian line established on the basis of equidistance gives appropriate expression to the geographical configuration of the Gulf of Maine area and to the coastal relationships of the Parties.

Second, Canada maintains that an equidistance boundary for Georges Bank is consistent with the distance principle as the legal basis of title to the 200-mile zone. This point is of fundamental importance. From the Court's reasoning with regard to the continental shelf in the 1982 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, it is clear that the principles and rules of international law that may be applied for the delimitation of exclusive economic zones must be derived from the concept of the exclusive economic zone itself, as understood in international law (*I.C.J. Reports 1982*, para. 36). The distance principle figures among the most important elements of this concept, and it provides an essential frame of reference for a truly juridical delimitation of a single maritime boundary.

Third, Canada maintains that its much greater economic dependence on the fisheries of the disputed area of Georges Bank represents a relevant factor and an equitable consideration to be taken into account by the Chamber. The legal relevance of this consideration again flows from the very concept of the exclusive economic zone. Unlike the continental shelf, the exclusive economic zone is not *terra incognita* or *terra deserta*. It is, in a sense, inhabited by the fishermen of the coastal State – and especially by the fishermen of southwest Nova Scotia within the disputed area in the present case. Its resources are known and exploited. They support established patterns of fishing that may be of vital importance to adjacent coastal communities. This is certainly true of the fishery resources of Georges Bank in relation to southwest Nova Scotia, far beyond any comparison with the situation in Massachusetts.

Fourth, Canada maintains that the history of the dispute provides further support for the Canadian claim. International law seeks to uphold stability and good faith in relations between States. It recognizes too that the best indication of an equitable result in a maritime boundary delimitation may come from the conduct of the Parties themselves. And the conduct of the Parties, over many years, in fact demonstrates their acceptance of equidistance as the proper basis for an equitable result. An equidistance boundary for Georges Bank is thus the only boundary that can satisfy these tests of law and equity.

Mr. President, whatever may be the advantages or disadvantages of equidistance, it has never before been described as an *ex aequo et bono* method of delimitation. Yet the United States attempts to present Canada's claim in this light. The reason is clear. The United States seeks to make a virtue of the fact

that its own claim incorporates the whole of Georges Bank, extended of course to the "adjusted perpendicular line" in an effort to provide it with additional tactical protection on the perimeter. For the United States, the non-division of Georges Bank becomes an equitable principle in its own right, clothed in the theories of the "natural boundary" and "single-State management". The measure of equity becomes the length of Georges Bank, as the length of the Lord Chancellor's foot became the measure of equity when the then separate systems of equity and law drew too far apart in England.

Neither equity nor law provides a basis for such an extraordinary view of equitable principles. The theory of a natural boundary defining and dividing both the continental shelf and the exclusive economic zone does not fit within the legal framework of either concept. The duty to conserve resources and the duty to avoid disputes are duties that apply to all neighbouring States. They limit the exercise of a State's rights. But they have nothing to do with the delimitation of the area in which these rights may be exercised. Otherwise, things would really be too easy for the party claiming the whole pie. That party, in effect, would be given a ready-made recipe for a monopolistic claim.

The United States claim to the whole of Georges Bank also relies upon a theory of "complete dominance" over the Gulf of Maine area, constructed on the basis of State activities in no way related to the history of the dispute. The notion of dominance, however, has nothing to do with the legal régime of the continental shelf. It was categorically rejected in the development of the concept of the exclusive economic zone. More important still, it is repugnant to the very idea of equity. "Equality is equity", says the English maxim (Richard Francis, *Maxims of Equity*, 1728), and international law adds only that equality must be reckoned within the same plane and must not imply any refashioning of geography (*I.C.J. Reports 1969*, para. 91).

Mr. President, the notion of dominance is implicit even in the United States view of geography, and the refashioning of geography is *precisely* what follows from the United States doctrine of primary and secondary coasts. For the United States gives the coast of Maine a dominant character because it is allegedly a "primary" coast. And the coast of Nova Scotia must yield to this dominance because it is allegedly a "secondary" coast. Despite the most careful reading of the United States pleadings, we must say that we cannot understand the reasons for this unusual proposition, nor find any legal authority advanced in its support.

The implications of the United States approach go beyond the future development of international law. They touch upon the very possibility of international co-operation in fields that are critical to international order. If it is an equitable principle of maritime boundary delimitation that co-operation in defence or search and rescue activities may prejudice a State's claims of jurisdiction or sovereign rights, then no State will wish to co-operate in these fields unless it is the dominant party in the relationship. If it is an equitable principle of maritime boundary delimitation that the result must exclude any need for co-operation in the management of overlapping fish stocks, then there can be little hope for co-operation in the management of shared natural resources anywhere. And if it is an equitable principle of maritime boundary delimitation that nature or providence draws the lines, then we will have returned to one of the most troublesome doctrines that has ever provoked conflict among States.

All of this, Mr. President, is a step backward, not a step forward – a new form of isolationism, and no form of law. And any kind of isolationism is out of place in the relations of the Parties. Canada and the United States share one of the

longest, most artificial, and so to speak, most porous land boundaries in the world. In the words of President Reagan, it is "A border not which divides us, but a border which joins us" (*Address to Joint Session of the Houses of Parliament*, Ottawa, 11 March 1981). President Kennedy elaborated on the same theme in the following statement:

> "Geography has made us neighbours. History has made us friends. Economics has made us partners. And necessity has made us allies." (*Address to Joint Session of Houses of Parliament*, Ottawa, 17 May 1961.)

The present dispute, of course, has also made us litigants for a time. But it is preposterous to suggest that a buffer zone is required between Canada and the United States in the Gulf of Maine (**II**, United States Memorial, paras. 255 and 256). We have done very well without such buffer zones along the 8,891 kilometres of our common land boundary. The extension of a maritime boundary 200 nautical miles into the sea hardly requires their introduction now. A better view of the situation in the Gulf of Maine area has recently been expressed by a fisherman from Gloucester, Massachusetts:

> "If it were up to the fishermen themselves, we would keep the waters open between the two countries. We get along with the Canadians. Historically we've fished in each other's waters and helped each other out. The only war we've had is who could catch the most fish." (*Compass Point*, National Geographic Society, 28 December 1983.)

Mr. President, the boundary proposed by Canada for the Gulf of Maine area is a reasonable and balanced one whose origins date back to 1964. It results from the application of law to geography. Its equitable character is confirmed by non-geographical relevant circumstances that are rooted in legal principles proper to the zones to be delimited. The conduct of the Parties themselves attests to these facts. And the tradition of co-operation between the Parties is the most solid foundation for the rational management of the variety of resources that will inevitably be divided by any single maritime boundary the Chamber, in its wisdom, may establish.

ARGUMENT OF MR. LEGAULT

AGENT FOR THE GOVERNMENT OF CANADA

Mr. LEGAULT: Mr. President, distinguished Judges.

I. Introduction

As Legal Adviser to Canada's Department of External Affairs, I can conceive of no greater honour than the opportunity to plead before this distinguished forum. And I can conceive of no greater responsibility than the conduct of Canada's first international boundary case since the 1903 Alaska Boundary Award, and Canada's first case ever in the International Court of Justice.

This case, Mr. President, will break new ground in international law. The uniqueness of the legal subject-matter is immediately apparent from the question set out in Article II of the Special Agreement (I, p. 10). It lies in the delimitation of a 200-mile fishing zone. Even more significantly, it lies in the concept of a single maritime boundary that will apply to the 200-mile fishing zone and the continental shelf – in effect, to the exclusive economic zones of the Parties, whether actual or potential.

In a sense, the development of the present dispute mirrors the general development of the law of the sea over the last 20-odd years. In its origins, the dispute bore exclusively upon the continental shelf. In 1964, with the full knowledge and acquiescence of the United States, Canada began to issue oil and gas permits granting exclusive offshore rights in what is now the disputed area. It was in this context that Canada adopted the use of the equidistance method for the administration of the continental shelf in that area, again with the full knowledge and acquiescence of the United States. In November 1969, however, the United States sought to reserve its rights in this matter and the seeds of a dispute were planted.

But the later evolution of the dispute reflected the developments that were then taking place at the Third United Nations Conference on the Law of the Sea. A dispute concerning the continental shelf was gradually expanded into one that involved the future of the Georges Bank fishery as well. The creation of the 200-mile fishing zones by each of the Parties in early 1977 made the settlement of the dispute a matter of urgent necessity. While the exploitation of the sea-bed remained a possibility for the future, the fishery was already an established fact. This new urgency led to the appointment of Ambassadors Cadieux and Cutler as Special Negotiators in 1977. Their efforts were among the most intensive ever undertaken in the bilateral relations of the two countries. The result was a package, comprising both the 1979 Agreement on East Coast Fishery Resources and the Special Agreement now before the Chamber.

Later on, Mr. President, I shall have more to say about the 1979 fisheries agreement. For the moment I only wish to emphasize that the novel features of the Special Agreement can be traced both to the recent development of the law of the sea and to the parallel, concurrent evolution of the present dispute. And so the resulting combination of issues has elements in common with the known law of delimitation, but raises important new considerations as well.

These new considerations of law are matched by new considerations of fact, and indeed by an entirely new dimension in relation to other continental shelf

boundaries that have come before the Court. For the delimitation of the fishing zones of the Parties affects an existing reality, and not a hope for the future. For the first time ever the boundary to be fixed here will have a direct impact on the present livelihood of coastal communities. The Gulf of Maine area identified in the Special Agreement is even today the "situs of relevant resources and activities", in the words of the United States Memorial (p. 145, para. 258 (II)). The coasts we see on the map are not empty, and the neighbouring sea is not a remote frontier awaiting discovery. It is the daily workplace of thousands of fishermen. This human dimension, this human immediacy alone would make the present case quite unlike the continental shelf cases that have long since become familiar.

Mr. President, my task today and tomorrow will be fourfold. *First*, I shall present a very brief summary of Canada's views on the general legal rules and principles that are applicable to this case, including a summary of Canada's approach to the concept of equity within the law. *Second*, I shall outline the specific principles that Canada has advanced as the basis of an equitable result in the particular circumstances of the Gulf of Maine area. *Third*, against this background, I shall provide the Chamber with an overview of the Canadian case from the perspective of certain major legal issues that divide the Parties, namely: the role of Article 6 of the Continental Shelf Convention in the present proceedings; the legal basis of coastal State title, and the criteria for identifying relevant circumstances. *Fourth*, I shall examine the Canadian claim itself, the actual line on the map, and seek to demonstrate its equitable character. The third and fourth branches of my argument will take up the greater part of this statement and will provide the essential setting for the statements to be made by succeeding speakers on the Canadian delegation. For at the oral stage of the proceedings, it becomes more important than ever, in our view, to approach the legal issues in terms of their real bearing on the claims of the Parties.

II. General Legal Rules and Principles

Mr. President, I begin with my brief summary of general legal rules and principles.

There is far more disagreement than agreement between the Parties on the legal rules and principles to be applied in this case. But one rule is so clearly established that there can be no doubt as to its application: the delimitation must produce an equitable result within the law – a result that is equitable in the light of all the relevant circumstances, but a result that also respects and is derived from the applicable law.

The applicable law must be found, of course, in any relevant treaty rule of delimitation that is binding upon the Parties. To the extent that no treaty rule of delimitation is directly applicable, *it is equally clear that the law must be derived from the concept of the jurisdiction to be delimited, as understood in international law*. The Court said as much in 1982 (*I.C.J. Reports 1982*, p. 43, para. 36).

For the boundary must respect this concept of the jurisdiction; must respect the basis of title it embodies, and the purposes for which it was intended and the guidance it provides for the identification of legally relevant circumstances. Without this complement, the fundamental norm of maritime boundary delimitation would be largely devoid of legal content.

This capsule description, Mr. President, sums up the basic legal propositions that Canada developed in its Counter-Memorial and reaffirmed in its Reply (III, Canadian Counter-Memorial, p. 227, para. 545; IV, Canadian Reply, p. 18, para. 42). I shall not go over that whole ground again. Instead, I shall only make

a few observations on the meaning of equity within the law, before going on to outline the specific principles which, in Canada's view, will produce an equitable result in the circumstances of this case.

Equity in the delimitation of maritime boundaries is not a technical notion, Mr. President. It retains its ordinary, common-sense meaning, with all its connotations of reasonableness and fairness. The Court, in fact, has used the terms "reasonable" and "equitable" without distinction (*I.C.J. Reports 1982*, p. 46, para. 72).

The application of equity within the law, within the rules, does not detract in any way from this notion of equity as what is fair and reasonable in a particular case. What it means, in Canada's view, is that the equitable result is a necessary but not a sufficient condition. The equitable result must also conform to the treaty rule of delimitation and – especially to the extent that no treaty rule is directly applicable – to the legal basis of title or appurtenance and to the legal nature of the rights in issue (Canadian Counter-Memorial, pp. 15-18, paras. 41-44; p. 27, para. 546; Canadian Reply, pp. 17-19, paras. 40-43).

There is a striking contrast in the way the Parties view this notion of equity within the rules. The Canadian claim is based upon the application of a legal rule, the equidistance-special circumstances rule embodied in Article 6 of the Continental Shelf Convention. To the extent that the issues are not directly governed by that Convention, moreover, the Canadian claim relies upon the juridical content of the zones to be delimited. And, as I hope to demonstrate, the equity of the result produced by the application of these principles is confirmed in the light of the full range of relevant circumstances, both geographical and non-geographical. The Canadian line, in other words, meets the two conditions involved in the notion of equity within the rules. *First*, its very construction is founded upon legal rules and principles. And *second*, it effects a result that is equitable within the concrete meaning of that term.

How then does the United States claim measure up against this dual standard of equity, but equity within the rules?

Mr. President, the objective of the United States claim is monopoly, and of equity it contains no trace at all. We have used the word "monopoly" advisedly, and not as a matter of rhetoric.

Consider the real effect and the real objective of two of the equitable principles in the United States canon: the idea that the boundary should facilitate the conservation of resources, and the idea that it should minimize disputes (**II**, United States Memorial, p. 3, para. 8; pp. 101-102, para. 167; pp. 142-145, paras. 247-256; **IV**, United States Counter-Memorial, pp. 217-226, paras. 349-373; **V**, United States Reply, pp. 79-88, paras. 133-154). Both of these are seemingly innocent, indeed praiseworthy goals. Both, however, are to be attained by avoiding the division of any resource-rich area between two or more States – in other words, by giving the entire area to a single State, even where the geographical and other circumstances might suggest the division of the area. Is this not monopoly? I suggest that it is. A claim to the whole of a resource-bearing area would necessarily be favoured over a claim to only a portion of that area. Indeed, a claim to the whole of the area would benefit from a legal presumption – a legal presumption over a claim of more modest proportions. Under this approach, the United States claim itself becomes an equitable principle, from the very fact that it embraces the whole of Georges Bank. The logic is somehow evocative of Descartes thinking himself into existence.

What then of the other side of the equation, the requirement that the delimitation be carried out within the rules? Later in this statement I will show that the United States pays lip-service to the 1958 Continental Shelf Convention,

but ignores it completely in its argument and in its claim. I will also show, or attempt to show, that the United States would reject not only the basis of title, but the entire juridical content of the 200-mile zone as a source of law. Yet the Court said very clearly in 1982 that under customary law, the rules for delimitation must be derived from the concept of the continental shelf, the jurisdiction in question on that occasion, as understood in international law (*I.C.J. Reports 1982*, p. 43, para. 36). Otherwise the entire exercise is deprived of a truly legal character. Since the United States gives no practical effect to the treaty law, and since it expressly repudiates the source from which customary law principles must be derived, its entire case is left floating in a legal vacuum.

III. Specific Principles for an Equitable Result in the Gulf of Maine Area

Mr. President, distinguished Judges, I shall now turn to the second part of my task and review the specific principles which, in Canada's estimation, would produce an equitable result in the Gulf of Maine area. These principles arise from the application of Canada's basic legal propositions to the particular circumstances of this case. They summarize the essential elements of Canada's argument and were set out in the Canadian Counter-Memorial (p. 252, para. 608), as follows:

1. *In the geographical and other circumstances of this case, the boundary should leave to each Party the areas that are closest to its coast, provided that due account is taken of the distorting effects of particular geographical features in the relevant area.*
2. *The boundary should allow for the maintenance of established patterns of fishing that are of vital importance to coastal communities within the relevant area.*
3. *The boundary should respect the indicia of equity, the indicia of what the Parties themselves have considered equitable as revealed by their conduct.*

Each of these three principles is grounded in fact – in the relevant circumstances – and in the applicable law as well.

The first principle summarizes Canada's view of the geographical side of this case. The boundary should leave to each Party the areas closest to its coast, except where incidental features would have a disproportionate effect. This is not a general proposition of law. It is a statement about the nature of an equitable result in the Gulf of Maine area. But it has a solid foundation in general legal principles, as I hope to demonstrate.

The geographical aspect of Canada's claim is supported by Article 6 of the Continental Shelf Convention. It is also grounded in the basis of title, and especially the basis of title to a 200-mile zone where no treaty rule of delimitation is directly applicable. For we cannot agree with the extraordinary assertion of the United States that the "juridical content" of a 200-mile zone is unrelated to delimitation (United States Reply, p. 56, para. 86). This assertion, as we shall see, amounts to a repudiation of the reasoning of the Court, not only in 1969 but in 1982 as well.

In discussing proximity in a general sense as one facet of Canada's case, I shall of course deal with the objections our opponents have made to it. And I shall also deal with the radically different scheme of appurtenance the United States has proposed in opposition to Canada's equidistance claim. That scheme is a complex and novel mix of continental macrogeography, "primary" and "secondary" coasts, unidirectional seaward extensions, and "ecological régimes". It will thus be necessary to review it in some detail.

Canada's second principle, Mr. President, deals with the real interests at stake. It seeks to promote a measure of stability through the maintenance of established patterns of fishing that are of vital importance to coastal communities within the relevant area.

This second principle reflects the special nature of this dispute. It centres on the Georges Bank fishery and its importance to nearby coastal communities. I shall leave aside factual issues in this instance, and address only the United States argument that established patterns of fishing are legally irrelevant despite their being at the very heart of the dispute. It will by my submission, *first*, that legal standards for determining what is relevant are implied from the juridical content of the jurisdiction to be delimited; and *second*, that in the light of these criteria the economic interests associated with the Canadian fishery on Georges Bank constitute a relevant circumstance that is entitled to considerable weight.

The third principle I have stated bears on the conduct of the Parties in relation to both the continental shelf and the 200-mile fishing zone. Such conduct represents one of the most important indicia of equity. But I want to make clear that this branch of our case has two distinct and equally important dimensions.

The Court's Judgment in the *Tunisia/Libya* case drew attention to the role of the conduct of the Parties within the framework of equitable principles, as one of the indicia that may provide evidence of the elements of an equitable solution. This is one part of Canada's argument, and it touches equally on the continental shelf and the later history of the 200-mile fishing zone. Of equal importance, however, is Canada's reliance on more general and older principles of international law – the principles of acquiescence and estoppel. We contend that the United States has acquiesced in Canada's exercise of continental shelf jurisdiction up to an equidistance line on Georges Bank and in the Gulf of Maine (**I**, Canadian Memorial, pp. 159-160, paras. 387-390; pp. 172-177, paras. 412-418; **III**, Canadian Counter-Memorial, pp. 143-155, paras. 360-381; **V**, Canadian Reply, pp. 86-98, paras. 206-233). The United States cannot now, under accepted principles of international law, be heard to deny the validity of that jurisdiction. And the single maritime boundary now to be established should be compatible with the rights that have vested in Canada through this pattern of conduct.

That summarizes the basic elements of the Canadian case and the legal rules and principles on which they depend. I shall now turn, with your permission, to the third part of my task, and provide the Court with an overview of the Canadian case, focusing on the differences between the Parties in relation to the role of Article 6 in these proceedings, the basis of title or appurtenance, and the criteria for identifying relevant circumstances. My discussion of these issues will, of course, be informed by the three specific principles I have just reviewed.

IV. The Role of Article 6

Mr. President, I now take up the question of Article 6 of the Continental Shelf Convention and its application in these proceedings. The equidistance-special circumstances rule embodied in this Article is obviously one of the grounds for Canada's principle that the boundary in this case should leave to each Party the areas closest to its coast, except where incidental features would have a distorting effect.

Both Parties agree that Article 6 is binding upon them, and that it applies to the delimitation of the continental shelf of the Gulf of Maine area. The United States Reply asserts unequivocally that the delimitation in this case should be consistent with the principles embodied in Article 6 (United States Reply, pp. 70-71, para. 116). Canada, for its part, has emphasized the importance of

Article 6 as the sole explicit rule of positive law that is applicable in this case. It provides a point of mooring in otherwise unfathomed waters (Canadian Reply, pp. 22-23, paras. 54-56).

We rely on Article 6 in two ways. Thus, Article 6 is directly applicable to the continental shelf as a component of the single maritime boundary. Moreover, according to the Court of Arbitration in the Anglo-French Continental Shelf award, the rule in Article 6 is a "particular expression of a general norm", and in that sense it is relevant to the single maritime boundary as a whole (para. 70). Even if one were to accept the United States view that the single maritime boundary is to be determined exclusively on continental shelf principles – even then, the adherence of the Parties to the 1958 Convention means that Article 6 is the source from which such principles must be taken in this case.

Mr. President, Article 6 has been interpreted and applied so far in a single instance: the Atlantic region in the Anglo-French Continental Shelf award. The Court of Arbitration found, in effect, that Article 6 creates a combined equidistance-special circumstances rule that operates within, and not in opposition to, the fundamental norm of equitable principles. At the same time, the Court of Arbitration held that under Article 6 the equidistance method ultimately possesses an "obligatory force" that it does not have under customary international law (para. 70). What this comes down to, in the Canadian view, is that the equidistance method is to be used in those cases where it produces an equitable result. Where it does not produce an equitable result, a variation of the method should be tried. Finally, if the circumstances require a total abandonment of equidistance, an entirely different method may be used. This is the approach that underlies the Canadian case.

What the United States position amounts to, as we understand it, is that Article 6 applies in principle but that in practice it is wholly meaningless. The United States makes a cursory bow in the direction of the Convention, but ignores its clear requirement that equidistance is to be used "unless another boundary is justified by special circumstances" – and this whether the coasts are opposite or adjacent.

This United States attempt to drain the words of the Convention of any real meaning is inconsistent with the balanced reasoning of the Court of Arbitration in the 1977 award. It is even more inconsistent with the principles of the *North Sea Continental Shelf* cases, where so much of the reasoning was devoted precisely to the question whether the rule in Article 6 was applicable. And the finding that the rule did not apply was obviously treated as important, if not decisive. Later in these proceedings Canada will show that the United States has tried to use the *North Sea Continental Shelf* cases in a way that is based on a misconception of the special nature of the *facts* in those cases. But the United States has also chosen to overlook a crucial distinction in the *law* that was considered and applied in 1969.

Mr. President, I have already touched upon the significance of Article 6 for the Canadian claim. But how does the United States claim measure up when judged in the light of this very same provision? The answer, I suggest, is that there is no discernible connection at all. For the only way in which the United States case can possibly be reconciled with Article 6 is on the premise that Nova Scotia *in its entirety*, is a special circumstance and one that dictates a radical departure from equidistance – in fact, a total abandonment (United States Counter-Memorial, p. 24, para. 31; United States Reply, pp. 101-104, paras. 169-179). The status, scale and extent of the province and the full sweep of its coasts make this a wholly untenable proposition. In Canada's submission, the only special circumstance that justifies a departure from equidistance in this area

is the attenuated configuration of Cape Cod and Nantucket, with its radical departure from the general configuration of the coasts *within* the relevant area.

My final observation on Article 6 is a more general one. It is that not only the boundary proposal of the United States, but the entire structure of its legal argument is at odds with the 1958 Convention.

To begin with, the United States pleadings adopt a position that requires a *total rejection* of proximity as a criterion for an equitable delimitation. In a truly remarkable overstatement, the United States says that the "Court and Arbitral Tribunals have rejected proximity as a basis for delimitation" (United States Reply, p. 53, paras. 78-79). And, it asserts that Canada's reliance on equidistance constitutes an attempt to overturn established law (United States Reply, p. 53, para. 78).

Now, how does this square with the rule in Article 6? The fact is that the United States position amounts to a wholesale repudiation of the equidistance branch of the combined rule. For if it be true that proximity – even proximity measured from an extensive coast – is a "rejected" notion with no place in the law, then the equidistance branch of the rule has simply lost its entire rationale. And this, I submit, is a conclusion that cannot reasonably be read into the jurisprudence or into the Convention.

In addition, Mr. President, the United States has attempted to substitute for the equidistance-special circumstances rule a very particular notion of what it calls "coastal-front extension" – a rigidly geometrical conception based upon perpendicularity to a single, hypothetical general direction of the coast (United States Counter-Memorial, pp. 191-192, paras. 307-311; United States Reply, pp. 145-148, paras. 246-255). Equidistance is ruled out of order in this scheme *regardless* of the presence or absence of special circumstances. Or, to put it another way, special circumstances are deemed to exist in every case where the equidistance line fails to coincide with the perpendicular extension of a "primary" coastal front – that is to say, in every case where the coastal configuration is irregular (United States Reply, p. 148, para. 255). This approach makes a travesty of the rule in Article 6. As was stated in the Canadian Reply, the net result would be the creation of a "perpendicularity-special circumstances" rule to serve in the place of the equidistance-special circumstances rule actually stated in the 1958 Convention (Canadian Reply, p. 31, para. 78).

The United States says of course that regardless of the application of Article 6, equidistance cannot produce an equitable result in this case. It mounts its attack on equidistance largely by misinterpreting the jurisprudence, and especially the findings in the *North Sea Continental Shelf* cases. And I would therefore like to take a few moments to review these findings, because in fact the reservations about equidistance that were expressed in the *North Sea Continental Shelf* Judgment correspond to a *limited* and *specific* range of potential problems. I now propose to deal with these briefly, and to show that not one of them can be associated with the geography of the Gulf of Maine area.

As to the effects of *concavity*, Mr. President, I would suggest that there are two reasons why the analogy the United States has attempted to draw on this basis is misplaced; and both of them are equally conclusive. The first reason is that the Court itself made clear that equidistance would have been perfectly appropriate in the North Sea, *if only two States had been involved.* Referring to the undue curtailment of the German continental shelf, the Court observed "neither of the lines in question, taken by itself, would produce this effect, but only both of them together" (*I.C.J. Reports 1969*, p. 17, para. 7). The second reason why the analogy does not apply is, if anything, more fundamental. It is that when the land boundary meets the coast at the *back* of a deep coastal concavity, the effect

of the concavity is shared by both coastal States – with the consequence that the effect of any "cut-off" resulting from the concavity is also shared. And the effect of the concavity is evidently offset to a much greater degree if both coastal States have convex coasts on either side of the concavity.

Let me demonstrate this point in the light of what the Court actually said in its 1969 Judgment. The Court described the situation where the effect of equidistance was "to pull the line of the boundary inwards, in the *direction* of the concavity" (*I.C.J. Reports 1969*, p. 17, para. 8). How could that effect possibly arise in the Gulf of Maine area, where the line actually *begins* at the back of the concavity? And the Court went on to discuss the inequity that equidistance might impose on one country, where "the coasts of adjacent countries protruded *immediately on either side of it*" (*I.C.J. Reports 1969*, p. 17, para. 8). Again, how could that effect possibly arise in the Gulf of Maine area, where the line outside the concavity is controlled by convex formations on the coasts of *both* Parties and where, of course, only two States are involved? The language actually used by the Court in 1969 shows that the situation in the North Sea and the situation in the Gulf of Maine area could hardly be more different.

(176) These points are much more clearly brought to light by Figure 31D of the Canadian Reply, distributed to the Chamber today and found in the red manuals[1] on the bench as Figure 1 of the oral proceedings. This illustration shows that if the land boundary in the North Sea had met the coast at the back of the concavity formed by the German coast, there would clearly have been no problem – assuming of course a two-State situation. I would ask the Chamber to consider as well the more abstract demonstration of the same point in panel C of (176) the same figure I have just referred to. In the present case, of course, the significant facts are that the boundary *does* meet the coast at the back of the concavity; it *is* a two-State situation; and each State *does* have a convex coast where the sides of the concavity meet the outer area.

Another potential flaw in the equidistance method, in certain situations of *adjacent* coasts, is what I would call the magnification effect. This occurs when a coastal feature of modest proportions first begins to influence the course of an equidistance line in an area close to shore, and then continues to control the line for a great distance out to sea. The effect of such a feature is modest and proportionate at first. But as the line moves out to sea, the effect is progressively magnified until it becomes disproportionate and causes the equidistance line to "swing out laterally" in front of the neighbouring coast. This, of course, is the effect referred to in the Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, pp. 31-32, para. 44). It is the effect illustrated in the graph based (31) upon Professor Jaenicke's argument in that case, as shown in Figure 5 of the United States Reply, distributed to the Chamber today as Figure 2 of the oral proceedings.

All of this is overly familiar, Mr. President. But none of it is applicable to the equidistance line in the geographical situation of the Gulf of Maine area. In the first place, because of the predominant oppositeness of the coasts in this area, a *succession* of basepoints controls much of the line. This is plainly not a situation where the same basepoints control both the inshore portions of the line and those far out to sea. Moreover, the basepoints that control the outer portions of the boundary are situated on *opposite* coasts – each of them well over 100 miles

[1] The folders that were specially prepared for the use of the Chamber by the Parties in order to illustrate their oral arguments have not been reproduced. If a map or illustration included in a folder is reproduced in the maps volume of the present series (VIII), this is indicated in the margin of the text. *[Note by the Registry]*

from the equidistance line where they first come into play. In short, there is simply no element here of a coastal feature first exerting a proportionate effect close to shore, and then a progressively exaggerated effect as the line moves (31) seaward. A mere glance at Professor Jaenicke's diagram shows how totally *inapplicable* it is to the Gulf of Maine area.

Yet another potential pitfall in the use of the equidistance method is this: there may be situations where it fails to take sufficient account of differences in *scale*. A blind application of the method can give the same effect to an incidental feature – for example, an off-lying islet – as to a substantial coast. In the circumstances of the Gulf of Maine area, the abutting coasts of both Parties are extensive and they are backed in each case by a substantial landmass. There is one and only one feature that would exercise an influence upon a strict equidistance line that would be out of proportion to its scale. I refer, of course, to the configuration of Cape Cod and Nantucket.

Finally, there is one more factor that should always be borne in mind in considering the suitability of equidistance in any particular situation. In a sense, that factor is simply another way of stating the point I have just made. Thus, there are situations where the nearest basepoint – the one that would have to be used under a *strict* application of the equidistance method — may not reflect the real configuration of the coast. Or, if I may put it this way, the nearest basepoint may be "aberrant" in terms of the true direction of the coast. In such a case, even though equidistance gives a mathematically precise measurement of proximity, it fails to give a *true* reflection of proximity to the abutting coast as a whole. There is one and only one case in the Gulf of Maine area where the nearest basepoints disregard the coastal configuration as a whole. Again I refer to Cape Cod and Nantucket.

(75) Figure 50B of the Canadian Counter-Memorial, distributed to the Chamber today as Figure 3 of the oral proceedings, demonstrates that *none* of the basepoints used by Canada is inappropriate in terms of the general direction of the abutting coasts. This Figure applies a test inspired by the Court itself in the *North Sea Continental Shelf* cases – that is, instead of using the nearest points of land, an equidistance boundary might be drawn from baselines representing the coastal fronts of the Parties (*I.C.J. Reports 1969*, p. 52, para. 98). The test clearly shows that the basepoints used by Canada are representative of the true configuration of the coasts and do not distort geography.

These, Mr. President, are the potential problems that rule out the use of equidistance in some circumstances, and require that its application be modified in other circumstances. I hope to have shown – though Mr. Hankey and Professor Weil will supplement my remarks – that not one of them is applicable in the Gulf of Maine area, with the exception of the adjustment required to offset the distorting effect of the Cape Cod-Nantucket configuration. There is, in sum, a solid basis in law and in fact for the application of the equidistance method in the Gulf of Maine area, within the framework of the rule of Article 6.

The Chamber adjourned from 4.25 p.m. to 4.40 p.m.

V. The Basis of Appurtenance

With your permission, Mr. President, I shall turn now to the question of the basis of title or appurtenance and its relevance to delimitation. Like Article 6, this question too is fundamental to Canada's principle that the boundary in this case should leave to each Party the areas closest to its coast, except where incidental features would have a distorting effect.

I shall deal with this topic under three subheadings: *first*, in terms of natural prolongation and its relevance to the continental shelf; *second*, in terms of the distance principle – or, if you prefer, geographical adjacency measured in terms of proximity from the coast; and *third*, in terms of the significance of the abutting coasts.

Allow me to sum up Canada's general position on the relevance of the basis of title, before adding some observations on natural prolongation and the distance principle.

A legal delimitation must be based upon legal standards. Where the conventional law provides a specific rule, this requirement is satisfied by the application of the rule in question. To the extent that no conventional rule applies, legal standards must necessarily be derived from the legal content of the jurisdiction – in particular, the basis of title. This general approach, as we have argued in our pleadings, is required by the Court's reasoning in the *North Sea Continental Shelf* cases and was confirmed in the *Tunisia/Libya* case. As we put it in the Canadian Reply, delimitation is a process of defining in exactly what areas each of two opposite or adjacent States may validly assert a title (Canadian Reply, p. 24, para. 58). In the absence of a conventional rule, a delimitation that fails to take account of the basis of title is an apportionment of shares, as the Court put it in 1969, and not a delimitation based upon the law (*I.C.J. Reports 1969*, pp. 21-22, para. 18).

This is not to adopt the view at the other extreme, to the effect that the delimitation is only a matter of finding and applying the basis of title. What the basis of title provides is a twofold standard. It serves to identify the boundary area – the area of potential overlap in which more than one State has a plausible basis of claim. And then, in association with other relevant circumstances and equitable considerations, it provides an objective legal standard for determining which State has the stronger claim within the boundary area.

Against this background I shall now review the traditional concept of natural prolongation as a basis of title to the continental shelf.

1. Natural Prolongation

Natural prolongation remains the general basis of title to the continental shelf, although, according to the observations of the Court in the *Tunisia/Libya* case, it is no longer the sole basis of title within the 200-mile limit (*I.C.J. Reports 1982*, pp. 48-49, paras. 47-48). Its role, moreover, is limited to the shelf. It can provide no basis for the delimitation of the 200-mile fishing zone or the exclusive economic zone. Consequently it cannot be looked to as a *general* doctrine that governs the drawing of a single maritime boundary.

This leaves us with two basic questions. *First*, as a matter of *law*, how does the concept of natural prolongation fit into the framework of Article 6? And *second*, as a matter of *fact*, does the concept of natural prolongation provide any real guidance in the circumstances of this case?

The relationship of natural prolongation to Article 6 is, I submit, fairly clear. Where two States have coasts that abut on the same continental shelf, factors related to natural prolongation can justify a departure from equidistance only if two closely related requirements are met. The first requirement is that such factors would have to constitute "special circumstances" within the meaning of the Convention. They would, in other words, have to be sufficiently decisive *in themselves* to make the equidistance method inequitable. The second requirement is a corollary of the first. It is that a delimitation under Article 6, like a delimitation under customary law, is always designed to secure an equitable result. And accordingly, an Article 6 delimitation based upon natural prolonga-

tion, and not upon equidistance, would equally have to fulfil the need for an equitable solution – and one that would be clearly *more equitable* than a delimitation based upon equidistance.

The facts are equally clear on this branch of the case. There is a single and continuous continental shelf in the Gulf of Maine area, without any break in the natural prolongation of both Parties. The United States has conceded this point, in its Memorial and more recently in its Reply (United States Memorial, p. 201, para. 315; United States Reply, p. 127, para. 215). The situation resembles the one in the *Tunisia/Libya* case, where the Court found no relevant criteria in the physical structure of the sea-bed. This is a case where, in the words of the *dispositif* of the *Tunisia/Libya* Judgment,

> "the area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both Parties, so that in the present case, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such" (*I.C.J. Reports 1982*, p. 92, para. 133A (2)).

Both the 1982 and 1977 cases show that where two neighbouring States forming part of the same continental landmass abut on the same continental shelf, natural prolongation seldom if ever provides a criterion of delimitation. In a more general sense, however, the jurisprudence suggests that the concept of natural prolongation *can give positive support to proximity* in the delimitation process. This is the case where the natural prolongations of two States, in the words of the 1969 Judgment, "meet and overlap". In these circumstances, the Court said that a median line must be used, because only in this way would an equal division be obtained (*I.C.J. Reports 1969*, p. 36, para. 57). This overlapping of natural prolongations is as much in evidence in situations where the coasts of two States face each other across a gulf as it is when they face each other across a body of water that is open at either end.

The United States, in short, has disregarded the only real implication that natural prolongation can possibly have in this case. It has fastened on an incidental feature on the surface of the sea-bed and has ignored the far more dominant characteristic of its deep-seated overall continuity. The only significance that natural prolongation can have in this case lies in this factor of *continuity*, with its connotation of convergence in the area midway between the two coasts in the central part of the Gulf, and then *off* these same coasts in the area immediately to seaward.

Mr. President, I have been speaking of natural prolongation as that term has traditionally been used – as reflecting, though not necessarily synonymous with, the *physical* factor that links the continental shelf to the land territory of the adjacent coastal State. The United States Reply, however, has taken a new turn in its treatment of natural prolongation. It concedes that the geological and geomorphological aspects of natural prolongation were "clearly subordinated" by the Court in the *Tunisia/Libya* case. Indeed, the Court said, and the United States Reply quotes with approval, that in order to govern a boundary delimitation, geomorphological features must constitute such a marked interruption as to constitute an indisputable indication of the limits of two continental shelves (United States Reply, pp. 63-64, para. 101). So much, then, for the Northeast Channel as a geomorphological feature that can govern a boundary delimitation. So much, in short, for the theory of a natural boundary.

But having abandoned natural prolongation as a basis for its Northeast Channel claim, the United States reintroduces the doctrine in support of its

theory of perpendicularity as the basis of coastal-front extension. Somewhat surprisingly, then, natural prolongation now figures in the United States argument not in support of its theory of a natural boundary, but as the juridical basis of a scheme of perpendicularity intended to serve as a principle of delimitation.

The new United States argument has already been answered in the Canadian Reply (pp. 27-28, paras. 69-70). It is true that natural prolongation stands in a general sense – and not necessarily in a rigorously scientific sense – for the continuation of the land territory under the sea. This is the correct meaning to be attached to the Judgment of the Court in 1969. But the Court nowhere equated this principle with the very particular notion of the perpendicular extension of coastal fronts that we see depicted in the United States pleadings. Nor did it suggest that any single geometrical formulation of the principle would have a general validity, or even be possible.

2. The Distance Principle

I turn now to a discussion of the distance principle.

In a few moments, I shall explain that it is primarily in terms of the 200-mile zone that the basis of title calls for consideration, owing especially to the absence of a treaty rule directly applicable to the delimitation of these zones.

At the same time, however, the distance principle is by no means irrelevant to the delimitation of the *continental shelf*. It was, of course, in the context of the continental shelf that the Court called attention to the distance principle in 1982. The Court said then that distance from the baseline, measured on the surface of the sea, has become in certain circumstances the basis of title; that the new Law of the Sea Convention departs from the principle that natural prolongation is the sole basis of title; and, further, that the legal concept of the continental shelf as a "species of platform" has been modified by this criterion (*I.C.J. Reports 1982*, pp. 48-49, paras. 47-48).

Nor is the distance principle extraneous to the application of Article 6. In the 1977 Anglo-French Continental Shelf award, the Court of Arbitration was faced with the contention that the exclusive economic zone had, in effect, extinguished the régime of the continental shelf and with it the provisions of the 1958 Convention. That argument was rejected. But the Court of Arbitration took the occasion to observe that new developments could be taken into account in the application of Article 6. It held that the application of the Geneva Convention did not debar the Court of Arbitration from taking account of recent developments in customary law: "On the contrary", it said, "the Court has no doubt that it should take due account of the evolution of the law of the sea in so far as this may be relevant in the context of the present case" (para. 48). And the significant thing is that the Court of Arbitration made these observations specifically in the context of the relationship of Article 6 to the emergence of a 200-mile régime in the new law of the sea.

But if the distance principle is relevant to the continental shelf, I suggest that it is an *indispensable* consideration for the 200-mile zone. Because here we have no binding treaty, no authoritative text at hand to give us a ready-made framework. We must search out the applicable law in the legal concept of the jurisdiction and especially in the legal basis of title. And for the 200-mile zone the *sole* basis of title is geographical adjacency measured in terms of distance from the coast – the "distance principle", as the Court has so aptly named it.

The practical consequences we derive from the distance principle have been fully discussed in the Canadian pleadings, Mr. President. The first such

implication is that, if the basis of title is to be respected in delimiting the zone, distance from the coast must be regarded as a central consideration (Canadian Memorial, pp. 125-127, paras. 294-299; Canadian Counter-Memorial, pp. 62-63, paras. 150-153; pp. 231-232, paras. 556-559; Canadian Reply, pp. 25-27, paras. 62-67). The second is that the seaward extension of the coast is generated with equal force in every direction, and no single direction is legally preferred.

Now the idea of distance from the coast as a central consideration clearly gives much weight to the factor of relative proximity. But it does not, on the other hand, revive the unacceptable notion of proximity as a matter of "juristic inevitability", whatever the relevant circumstances of the case. The equitable result is still the paramount consideration. Special circumstances operate within the framework of the distance principle and the 200-mile zone, just as they do within the framework of Article 6. Each case must still be assessed in the light of the geographical and other relevant circumstances. But when geographical adjacency is expressly defined in terms of distance from the coast, the conclusion is inescapable that proximity must rank very high in the legal hierarchy of geographical criteria.

Far from an attempt to overturn the jurisprudence, Canada's view of the distance principle reflects the most basic principles espoused by the Court. The Canadian argument gives pride of place to coastal geography, as the maxim "the land dominates the sea" would suggest. More particularly, it closely reflects the doctrine of the 1982 Judgment that the geographical correlation between the coast and the offshore area to be delimited is the basis of coastal State title.

The United States would have the Chamber believe that a reliance on proximity is always to be mistrusted, both within the framework of the distance principle and under the older law of the continental shelf. In fact, however, the objections to proximity lose most of their force when it is measured from an extensive coast. And that is precisely the situation here.

The United States has misread the *North Sea Continental Shelf* Judgment on the factor of proximity in two distinct ways. In the first place, it has over-generalized the Court's observations by taking them out of context. In fact, the real spirit of the law is hostile to over-generalization. The 1969 Judgment held that proximity should not be regarded as an absolute requirement, or as a matter of juristic inevitability. But it also recognized the role of proximity in a general sense, and as an important test in the right circumstances (*I.C.J. Reports 1969*, p. 30, para. 42). It is on proximity in this broader sense that Canada relies. We consider it to be relevant, not in spite of, but *in the light of* the relevant geographical circumstances of this case. And quite obviously, our insistence on the distorting effects of incidental features shows unmistakably that the Canadian case depends upon proximity in a general sense, and not as a matter of mathematical exactitude.

In the second place, the United States objection is based on an unwarranted confusion between equidistance as a technical method and proximity as a relevant geographical factor. The *North Sea Continental Shelf* cases showed that there are situations where equidistance can produce an inequitable result because it is measured from the nearest points on the coast, and these points sometimes fail to reflect the actual configuration (*ibid.*, pp. 20-21, para. 13). True enough. But I cannot emphasize too strongly that this is not how Canada understands the role of proximity as a *geographical* factor. We rely upon proximity not to single, isolated points on the coast, but to the abutting coasts as
(75) a whole. That is the point of Figure 50B of the Canadian Counter-Memorial, distributed to the Chamber today as Figure 3 (panel B) of the oral proceedings, to which I have referred earlier. This illustration shows that the Canadian

basepoints really do correspond to the overall configuration. And it is the rationale of our adjustment of the line to take account of the distorting effect of Cape Cod and Nantucket.

I submit, then, that our opponent's description of proximity as a "rejected notion" is based on a misreading of the cases. On the one hand, the United States mistakes the exceptions for the rule. And on the other hand, the United States confuses the strengths and weaknesses of a technical method with the more fundamental idea of proximity to extensive stretches of the coastline as a legally relevant factor. And quite apart from its misreading of the past jurisprudence, the United States disregards the new legal framework imposed by the distance principle – the idea of geographical adjacency measured in terms of distance from the coast.

Let me turn then to the second inference that Canada draws from the distance principle – that a seaward extension is generated with equal force in every direction from the coast and that no single direction is legally preferred (Canadian Counter-Memorial, pp. 62-63, paras. 151-152; pp. 233-237, paras. 564-568; Canadian Reply, p. 29, para. 73).

This proposition, of course, is wholly at odds with the special United States conception of a coastal-front extension as the basis of a scheme of perpendicularity. And it therefore goes to the heart of the United States case. Again, I refer here not to perpendicularity as a method of delimitation but to the more general idea of perpendicularity as a principle of appurtenance.

For the essence of the United States position is that the seaward extension of Nova Scotia is to be abolished or cut short in *two distinct senses*. On the one hand, the seaward extension of Nova Scotia's coast within the Gulf of Maine is to be largely nullified under the custom-made doctrine of secondary coasts. I will deal with this branch of the argument in a few moments. On the other hand, the United States version of coastal-front extension creates a *dramatic gap* in the maritime areas appertaining to Nova Scotia *outside* the Gulf of Maine. Here I (37) would ask the Chamber to look at Figure 31 of the United States Memorial, reproduced as Figure 23 in the Counter-Memorial, and distributed to the Chamber today as Figure 4 in the oral proceedings. This Figure purports to show the existence of a vast sweep of ocean space immediately to the south of Nova Scotia where the Canadian coast is said to have no seaward extension whatsoever. There is a sudden and total interruption in the seaward extension or natural prolongation of Nova Scotia – *precisely in the area where in actual fact its projection towards Georges Bank is most pronounced.* This excluded area, as the Chamber can see, is formed by a right angle whose apex is located at Cape Sable, and which opens out into a broad area that just happens to encompass the whole of Georges Bank.

Now all of this is plainly too convenient, too self-serving, to warrant serious consideration. But, Mr. President, this conception of perpendicular coastal-front extensions represents the whole substance of the United States contention that Nova Scotia has no seaward extension on Georges Bank – and this in spite of Nova Scotia's proximity and its very considerable extent.

The Chamber will have noted that this vast area to the south of Cape Sable is not simply excluded from the seaward extension of Nova Scotia in the United States depiction. This entire excluded area is then placed within the "seaward extension" of the United States – even the Canadian territorial sea just off the Nova Scotia coast, at a distance of over 100 nautical miles from the nearest United States territory. The absurdity is manifest. And it is inherent in the United States conception of coastal-front extension when applied to a geographical situation of this kind. As we said in our Reply, the United States view *must*

produce this result if a scheme of perpendicular seaward extensions is to be maintained in this sort of geographical situation. The United States has been forced to this extreme position for one simple reason. Once the Canadian coast is allowed to begin projecting in the direction of Georges Bank, there is no conceivable reason why it should not project as far in that direction as do the corresponding portions of the United States coast (Canadian Reply, p. 29, para. 75).

The artificiality of the United States scheme of perpendicular extensions has been amply demonstrated in the Canadian pleadings. For example, I would ask the Chamber to look at what was distributed today as Figure 5 of the oral (70) proceedings, and was Figure 41A of the Canadian Counter-Memorial. This Figure shows that the United States scheme leaves large gaps in the seaward extension of the coast wherever there are major changes in its direction – in other words, whenever the coast turns a corner. This also shows that the scheme is unworkable in the Gulf of Maine area, where the United States itself has stressed the four-fold changes in direction of the Canadian coast. Figure 6 of the oral (150) proceedings distributed to the Chamber today – which corresponds to Figure 1 of the Canadian Reply – illustrates an even more remarkable effect, where the United States scheme *systematically* attaches maritime areas seaward of a concavity to the most distant coast. These are astonishing results. But we have just seen that they constitute an exact representation of the United States conception of coastal-front extension as applied to the Gulf of Maine area.

The United States scheme, Mr. President, is as inconsistent with the law as it is with common sense. And this is because the law provides for a seaward extension of equal strength in every direction from the coast. We have termed this, in irregular configurations such as the one before the Court, the radial projection of the coasts, as illustrated in Figure 7 of the oral proceedings, (57) distributed to the Chamber today, which corresponds to Figure 15 of the Canadian Counter-Memorial. The distance principle provides for coastal-State jurisdiction throughout all areas lying within 200 miles of the baselines of the territorial sea. It is incompatible with the idea of an extension in a single direction only, and with the idea that a seaward extension in any particular direction is legally preferred.

But there is nothing really novel in this concept of the radial extension of the coasts. It draws new support from the distance principle, but it also reflects an elementary and rather obvious geometrical truth: a truth that necessarily applies under any conception of geographical adjacency. Perpendicularity as a scheme of appurtenance automatically leaves gaps in the seaward extension of the coast in areas where the coast changes direction. And the greater the change in direction the wider the gap. Such gaps are both inexplicable and indefensible, either as a matter of geographical common sense or as a matter of law. Canada's diagrams have shown this to be true as a general proposition. And Figure 4 of (37) the illustrations distributed today – Figure 31 of the United States Memorial – shows even more vividly that the United States scheme of appurtenance is wholly inapplicable to the Gulf of Maine area.

We face a clear-cut choice here. One of the Parties has got badly off the track in interpreting the basis of coastal-State title. Either the United States is right, and the law *does* contemplate these total gaps at various points along the coast – gaps that could put a maritime area under the control of a foreign State more than ten times further away than the adjacent coastal State. Or else the United States scheme is incompatible with the basis of appurtenance in international law. Canada, at least, can see no middle ground on this question.

To recapitulate, Canada draws two practical consequences from the distance principle: *first*, the importance of distance from the coast, and *second*, the idea of

the radial projection of the coast. These practical consequences are as valid for the continental shelf as they are for the 200-mile zone. They place the primary emphasis where it belongs – on geographical adjacency measured from the coast as the common factor linking the régimes of the water column and the continental shelf. They reflect the doctrine of the Court that the geographical correlation of the coast and the sea is the basis of title, and that the coast must be the starting point for delimitation. And they lead to a framework that is plainly in harmony with the principles of Article 6 of the Geneva Convention on the Continental Shelf.

3. The Abutting Coasts

(a) *The abutting coasts* versus *the false hierarchy proposed by the United States*

I turn now, Mr. President, to a closely related aspect of the basis of appurtenance: the identification of the coasts that are legally relevant to the drawing of each portion of the boundary. The question is always important. It becomes critical when the geography is complex. It is especially so when the area exhibits a lack of geographical homogeneity, so that it divides into more than one identifiable sector.

The identification of the legally relevant coasts was addressed in the Anglo-French Continental Shelf award of 1977. The Court of Arbitration was called upon to determine the actual coastal areas that controlled the delimitation in the Atlantic region. It held that the method of delimitation must be one that relates to the coasts of the Parties "actually abutting" on the shelf of the region. And these it held to be the most proximate coasts of Cornwall and Finistère. It rejected the view that the Channel coasts lying *behind* the Atlantic region should affect the outer boundary area, either by virtue of their comparative length or by virtue of their general direction. And it said that this rejected approach would have detached the delimitation "almost completely from the coasts which actually abut on the continental shelf of the Atlantic region" (para. 246).

The same view is implicit in the *Tunisia/Libya* case. North of about the 34th parallel the Court determined that the change in direction of the Tunisian coast had to be taken into account (*I.C.J. Reports 1982*, pp. 88-89, paras. 127-128). The implicit criterion is obvious. *It was the greater proximity* of the northern half of the Gulf of Gabes coastline to the seaward portion of the boundary. This coastal segment was an "abutting coast" in relation to the area north of the 34th parallel. It did not have this property, however, until it moved into a position of relative proximity to the boundary area.

These considerations point up a critical flaw in the United States argument. The central proposition of the United States is that a single coast, located at the back of a deep coastal concavity, must control the boundary in both the inner and outer areas. And it must do so at the expense of the more proximate coastal areas – that is, at the expense of the coastal wings of Nova Scotia and Massachusetts that actually abut the outer area, including Georges Bank (United States Memorial, p. 19, para. 26; p. 20, para. 29; p. 173, paras. 286-287; United States Counter-Memorial, pp. 23-24, paras. 30-32; p. 183, para. 292; pp. 184-193, paras. 296-302; United States Reply, pp. 146-48, paras. 251-255). In the United States canon, the furthest land must dominate the sea. The back controls the front.

How can this be so, Mr. President? Why should the more remote coasts at the back of a deep coastal concavity control the outer area, and not the extensive coastlines of both countries that actually lie closest to the area concerned? This is the fundamental paradox of the United States case.

The United States itself has recognized, and indeed it has *insisted* upon the characterization of the Gulf of Maine as a deep coastal concavity. This is an expression used repeatedly in the United States pleadings (see Canadian Reply, p. 41, note 1). And the description simply reflects the evident fact that the coasts in the deepest portion of the Gulf are further away from Georges Bank than are the coastal wings – the areas on either side of the Gulf. These coastal wings of Nova Scotia and Massachusetts represent extensive coastal areas. They are not incidental or special features. And in view of their greater proximity to Georges Bank, they must control the delimitation of that area. They are, in short, the abutting coasts.

The United States has been forced to extreme measures in order to deny these abutting coasts any role in the delimitation of Georges Bank. It has been forced to invent not one but two arbitrary devices to prop up its artificial claim. One of these has just been discussed. I refer to the scheme of perpendicularity that leaves a gap of enormous dimensions in the seaward extension of Nova Scotia *outside* the Gulf – precisely, as I said, in the area where its projection towards Georges Bank is most pronounced. But that by itself is not enough to meet the requirements of the United States approach. It is equally necessary as a first step to abolish Nova Scotia's seaward extension within the Gulf. And for this an equally arbitrary device must be found. The United States has invented just such a device in its novel doctrine of primary and secondary coasts (United States Counter-Memorial, pp. 23-24, paras. 30-32; United States Reply, pp. 146-148, paras. 251-255).

Permit me to go into a little more detail. The United States scheme quite obviously depends upon a radical curtailment of Nova Scotia's seaward extension within the Gulf. *Only in this way* can there be an uninterrupted perpendicular extension from the coast of Maine, straight through the Gulf and out to eastern Georges Bank. Because a glance at the United States claim makes it obvious that with a perpendicular extension of this kind, most of Nova Scotia's offshore entitlement within the Gulf must simply be wiped off the map.

Now such a result clearly requires that the coast of southwest Nova Scotia must be given a legal status that is inferior to that of the coast of Maine. And this, of course, is exactly what the United States quite boldly asserts. This is the sole object of its novel theory of primary and secondary coasts. This is the false hierarchy that gives the coast of Maine the special status it needs to force its way through Nova Scotia's seaward extension within the Gulf, and then to assert its exclusive dominion over the outer area in its entirety. The maxim is no longer that the land dominates the sea. The maxim is now that *one coast dominates another*.

Canada has attempted to deal with the novel conception of primary and secondary coasts in its pleadings. We have been given no authority for this theory by the United States. We have been given no explanation. We have nothing more than the bare assertion of the United States pleadings. And that, Mr. President, is not good enough.

I do not propose to enter into a detailed legal discussion of the United States concept, because we have been given no argument to answer. I have only two general comments. The first is that 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. It is no more than a pretext for disregarding the principle of non-encroachment, which is thereby repealed for the purposes of these proceedings. Because the essence of the distinction between primary and secondary coasts – its only function – is to legitimize the encroachment of a so-called primary coast upon the seaward extension of a so-called secondary coast.

That is the definition of a secondary coast: a coast that is arbitrarily deprived of the benefit of the principle of non-encroachment.

My second comment on this concept is that it is wholly dependent upon the adoption of a macrogeographical frame of reference. As we understand it, the Gulf coast of Nova Scotia has been defined as a secondary coast because it departs from the general direction of the North American coast on a continental scale (United States Memorial, p. 19, para. 26; p. 173, para. 287; United States Counter-Memorial, pp. 184-189, paras. 296-298; United States Reply, pp. 146-148, paras. 251-255). This approach is legally wrong, as I will explain in greater detail later on. It detaches the delimitation from the relevant area and from the coasts that actually abut the relevant area. At bottom, the object is simply to portray Nova Scotia as an incidental or special feature – a protrusion in the legal sense – by submerging it in the vastness of the entire North American Continent and so obscuring the true dimensions, the true scale of the Nova Scotia landmass. And it is this impressionistic device that underlies the United States theory of primary and secondary coasts.

I recapitulate. Despite the fact that no legal basis for the notion of primary and secondary coasts has even been proposed, it is absolutely indispensable to *the whole United States case*. If our opponents cannot show that the concept of secondary coasts is sound in law, their whole argument simply falls to the ground, and with it their objection to the direction taken by the Canadian line. For if Nova Scotia's coast is *not* a secondary one – if that theory is legally unsound – then Nova Scotia's seaward extension into the Gulf cannot be confined to the inshore waters immediately off its coast. And it follows that the coast of Maine cannot be given an *unlimited* seaward extension that would encroach on the entitlement of Nova Scotia within the Gulf. The boundary must follow a course that leaves as much space off the coast of Nova Scotia as it does off the coast of Maine. *In the configuration of the Gulf of Maine, this translates* into a line that extends diagonally towards the centre of the closing line that defines the outer limit of the Gulf. This configuration is plainly inconsistent with a line that is perpendicular to the coasts at the back of the Gulf, because such a line would automatically deprive Nova Scotia of a normal seaward extension into the Gulf.

The United States case is therefore based, as I suggested a few moments ago, on the *combined* application of two arbitrary devices. One is the notion of primary and secondary coasts. And the other, of course, is the total interruption in the seaward extension of Nova Scotia *outside the Gulf. The first device is* needed to bring the coast of Maine straight out to the threshold of Georges Bank, the real disputed area. And the second device provides the only basis on which the coast of Maine can dominate eastern Georges Bank from its position at the back of the Gulf.

Mr. President, distinguished Judges, the United States would not have had to invent this distinction between primary and secondary coasts if its claim could be defended in any other way. The United States claim cannot be supported under the known and accepted law of maritime boundary delimitation because the notion of primary and secondary coasts is unheard of, unprecedented and contrary to accepted principles of international law, and in the circumstances it is surely not unreasonable to expect that the United States should demonstrate why it should even be considered. *This onus the United States has not even attempted to discharge.*

Let me return, then, to the *real* law of maritime delimitation and to the idea of the abutting coasts as the controlling factor. The Gulf of Maine area is characterized by what the Court in 1982 called a lack of "geographical

homogeneity" (*I.C.J. Reports 1982*, p. 82, para. 114). The Parties have agreed on this basic point. Indeed, they have agreed that the area is composed of inner and outer sectors divided by a closing line from Cape Sable to Nantucket. In this division into two distinct sectors, the situation here closely resembles the areas considered in both the 1977 and 1982 cases. And a central element in both those cases was that in such a situation different segments of the coastline must control different portions of the boundary. I repeat, a central element in both those cases was that in such a situation different segments of coastline must control different portions of the boundary. It is impossible to reconcile this approach with the United States view that a single stretch of coast should control the delimitations of both the inner and outer areas.

The central geographical issue in this case is whether Georges Bank is appurtenant to the coast of Maine or whether it is appurtenant to the more proximate and immediately abutting coasts of Nova Scotia and Massachusetts. In Canada's submission, the disputed area – the area of *eastern* Georges Bank – is appurtenant to the coasts of southwest Nova Scotia for three basic reasons:

- *First*, this portion of the outer area is closer to Nova Scotia than to any other coast apart from the effect of Cape Cod and Nantucket.
- *Second*, this proximity is decisive in the present case because the Nova Scotia coast is extensive and backed by a substantial landmass.
- *Third*, Canada's special interests in eastern Georges Bank, which have been recognized in the conduct of the Parties, confirm the close relationship that links southwest Nova Scotia to this area of the sea.

In sum, the Canadian claim is based on the controlling position of the abutting coasts. The United States disregards the law by subjugating both the inner and outer areas to a single stretch of coast, located in the most remote portion of the inner area, and by nullifying the role of the immediately abutting coasts.

(b) *The abutting coasts and the myth of the natural boundary*

There is one more respect in which the United States has disregarded the maxim that the land dominates the sea, and its corollary that the basis of title lies in the "geographical correlation" of the coast and the offshore areas to be delimited. I refer to the United States theory of the natural boundary (United States Memorial, pp. 144-145, para. 256; pp. 175-176, paras. 292-296; p. 201, para. 315; p. 206, para. 322; United States Counter-Memorial, pp. 198-203, para. 315; United States Reply, p. 88, para. 155; p. 127, para. 215). With your permission, I shall now review this theory from the perspective of the basis of appurtenance and the role of the abutting coasts.

We have already seen that the United States Reply has abandoned any reliance upon geomorphology as an aspect of natural prolongation. Even more broadly, it has stressed the very limited relevance accorded to geomorphology in the jurisprudence. There is nothing equivocal about the United States position on this point (United States Reply, pp. 63-65, paras. 101, 103 and 105).

Canada welcomes this development. It should properly have led to the abandonment of the entire natural boundary argument, *for the Northeast Channel is nothing if not a geomorphological feature* though a superficial one, of course. But the United States has chosen not to follow its reasoning to a logical conclusion. And so I must ask the Chamber to consider whether the United States theory – quite apart from its factual deficiencies – is compatible with the law.

My submission is that the only *possible* sense in which the idea of a natural boundary can have a basis in the law is within the legal framework of natural prolongation. The jurisprudence recognizes a theoretical possibility of identifying two separate shelves. And one can see a certain logical connection between the idea of the physical extension of the land territory and the consideration of major physical discontinuities in determining the limits of that extension. But the United States does not rely on natural prolongation in this sense. It recognizes that it is factually inapplicable in this case – and here at least the Parties are in accord.

Apart from natural prolongation, the idea of a natural boundary determined on the basis of the physical character of the offshore environment has no place in the law. Almost by definition, the whole approach detaches the delimitation from the coastal geography. It therefore disregards the maxim that "the land dominates the sea" and the rule that the geographical correlation with the *coast* is the basis of title.

In 1982, of course, the Court noted the hypothetical possibility that a sea-bed feature might be taken into account as one of the elements leading to an equitable solution (*I.C.J. Reports 1982*, p. 58, para. 68). But what the Court quite clearly had in mind was not a "natural boundary" as such but an equitable boundary, respectful of the coastal geography and of all the relevant circumstances: in short, a boundary that would not detach the delimitation from the abutting coasts. This concept bears little resemblance to the natural boundary theory put forward by the United States. As the Court stressed in 1982, it is the satisfaction of equitable principles that is of "cardinal importance" (*I.C.J. Reports 1982*, pp. 46-47, para. 44).

The requirement that the boundary should be based upon the coastal geography – the abutting coasts – and not upon marine features that are unrelated to the coastal geography, is generally valid for both the continental shelf and the 200-mile zone. Both are equally subject to the principle that the land dominates the sea. But in the case of the 200-mile zone, there is an additional reason why offshore features that are unrelated to the coast must be disregarded. The basis of title to a 200-mile zone, unlike the basis of title to the continental shelf, is entirely unrelated *even in principle* to the physical properties of the offshore environment.

And so we face a paradox here. While physical factors can have at least a theoretical connection with the basis of title to the continental shelf, they have no connection whatever with the basis of title to a zone of jurisdiction in respect of the water column. And yet it is on this latter aspect, on the peculiar notion of almost water-tight ecological régimes, that the United States has placed the main burden of its argument.

In fact, the United States theory of an ecological boundary seems to have arisen out of a doubly false analogy. In the first place, this theory echoes – indeed it parodies – certain aspects of the natural prolongation arguments rejected by the Court in 1982 in relation to a continental shelf boundary. But of course natural prolongation has absolutely no connection with the *water column*, even by analogy. It cannot have, because natural prolongation depends upon the notion of a physical continuity between the land and the sea-bed and subsoil – words "evocative of the land and not of the sea" (*I.C.J. Reports 1969*, pp. 50-51, para. 96). And the whole notion of a physical continuity between the land and the aquatic environment would plainly be a contradiction in terms.

The other branch of the false analogy is this, Mr. President, distinguished Judges. The United States has sought to defend its theory on the ground that natural features have sometimes been used in establishing land boundaries. But here the comparison is even more unfounded, as I hope we demonstrated quite

clearly in Canada's Counter-Memorial (p. 222, para. 531). For the use of natural features on land has generally been based on practical considerations that have no counterpart at sea – defence, communications, ease of demarcation, and so on. Moreover, as I have already said, the use of offshore features as a basis of a maritime boundary would ignore the status of these maritime areas as an adjunct or dependency of the adjacent land – the idea that the land dominates the sea, with its implication that the sea as a physical entity cannot provide its own criteria of delimitation. Finally, contrary to the burden of the United States argument, the use of natural features on land has most often been prompted by the objective of *sharing* the economic benefit of the feature in question. Hence, for example, the division of rivers and lakes that prevails in the land boundaries of Canada and the United States, and in many other parts of the world.

I think I can put all this a little more plainly. Maritime boundaries are not established with the aid of a thermometer, or by salinity tests, or by the imperatives of the spawning season. The whole "ecological régime" approach is foreign to the spirit of the law. It would frustrate or hopelessly confuse the delimitation of maritime boundaries, especially in those parts of the world where the offshore environment is even less perfectly known and understood than is the case in the Gulf of Maine area. And it would transform the doctrine of the equitable result into a chimera.

The Northeast Channel is a simple, incidental fact of nature that is unrelated to coastal geography. It is not the edge of the world, as might be suggested by the almost pre-Columbian description it is given by the United States. Nor does it mark a division between two worlds or two dominions, of the kind once sanctioned by Pope Alexander VI, as might again be suggested by the description it is given by the United States. To accord this superficial depression any importance in its own right would be to disregard the basis of title; to detach the delimitation from the abutting coasts; and to "run counter to the whole tendency of State practice on the continental shelf in recent years", as the Court of Arbitration stated in 1977 (para. 63). And to regard it as one of the elements of an equitable solution would be to stand equity on its head.

For there is nothing inherently equitable or inequitable about the Northeast Channel itself. It cannot confer an equitable character upon an inequitable result. Its only merit or demerit – according to the point of view adopted – is that any boundary that took it into account would give the whole of Georges Bank to the United States. And the equitable or inequitable character of such a result must be judged on quite other grounds.

And those grounds are not provided by the so-called equitable principles that the United States has collectively entitled "single-State management" (United States Memorial, p. 143, para. 250; United States Reply, pp. 81-82, para.138). All this slogan tells us, of course, is that a resource-rich area should never be divided, because division requires co-operation. "Single-State management" is simply another name for single-State ownership, and that surely is simply another name for monopoly. If the natural boundary can cloak itself with no other legal justification than this, then I must suggest, like the child in the fairy tale, that the emperor has no clothes.

Before leaving this topic of the so-called natural boundary, I should like to add a few comments on its relation to the equally untenable theory of coastal-front extension as the basis of a scheme of perpendicularity. For these two theories of the United States are totally contradictory. The theory of the natural boundary cannot logically stand together with the United States version of coastal-front extension in the factual circumstances of the Gulf of Maine area. I say this for the following reasons.

According to the United States scheme, Georges Bank is entirely within the seaward extension of Maine. According to this view, Georges Bank does not appertain physically or legally to the more proximate coasts of Nova Scotia and Massachusetts. Now the fact is that the Gulf of Maine Basin, which lies between the coast of Maine and Georges Bank, is a *deeper and broader* geomorphological feature than the Northeast Channel. A glance at any bathymetric chart of the area immediately shows this to be true.

It follows, I submit, that if the Gulf of Maine Basin fails to interrupt the seaward extension of Maine, there is even less ground for arguing that the shallower depression of the Northeast Channel can interrupt the seaward extension of Nova Scotia. And it follows more generally that geomorphological features on this scale, in the context of a single continental shelf, cannot provide a basis for delimitation. And yet another conclusion is equally inescapable. It is that the geomorphologically-based claim advanced by the United States in 1976 – the claim that confronted Canada throughout the negotiations and that remained the official United States position until 1982 – is now conceded to have had no possible basis in law.

Mr. President, the theory of the Northeast Channel as a natural boundary has been repudiated by the United States itself. The United States admits that geomorphology cannot be decisive. The United States assumes that the seaward extension of the coast of Maine can vault a depression that is more pronounced than the Northeast Channel. The United States assumes as well that the seaward extension of Maine can vault the so-called "ecological régime" of the Gulf of Maine Basin. It remains only for the United States to admit that the coast of Nova Scotia – and not the coast of Maine – should enjoy a "natural" advantage in this game of leapfrog or *saute-mouton*: a natural advantage from the fact of its nearer proximity to Georges Bank.

Mr. President, I have done with my discussion of the basis of the appurtenance and its relevance to delimitation. I shall pause here for a brief review of my principal conclusions on this subject before turning to the criteria for defining legally relevant circumstances which I would propose to pursue tomorrow morning with your permission, Mr. President, after this very brief recapitulation.

My conclusions, then, are as follows. *First*, the natural prolongation in the Gulf of Maine area is continuous and provides no support for the Northeast Channel claim of the United States, and no support for its theory of the perpendicular extension of coastal fronts. *Second*, the distance principle as the basis of title to a 200-mile zone makes distance from the coast a central factor in delimitation and necessarily implies a radial and not a perpendicular seaward extension of the coast. *Third*, the law does not recognize any distinction of primary and secondary coasts. *Fourth*, the maritime boundary in the outer part of the Gulf of Maine area must be controlled by the abutting coasts of Nova Scotia and Massachusetts. And *fifth*, and finally, the natural boundary theory of the United States would detach the delimitation from the abutting coasts and disregard the requirement for an equitable result.

VI. Relevant Circumstances in Law

I will then move to the discussion, Mr. President, of factual circumstances that are legally relevant or irrelevant in law. This is a further area of major disagreement between the Parties on questions of law. The issue here is whether or not there exist legal criteria for determining what is relevant or irrelevant, and for determining the weight to be given to those circumstances that are deemed to

be relevant. This issue bears upon all three principles Canada has advanced as the basis for an equitable delimitation in the Gulf of Maine area.

The notion of relevant circumstances within a framework of equitable principles is a broad one. But it cannot be infinite. The law *does* provide criteria for identifying and weighing the relevant circumstances – not rules of admissibility and exclusion, but guidelines of a more general nature. Thus, the law as applied in the jurisprudence gives us some notion of the relevant geography – the relevant area. Moreover, the legal nature and subject-matter of the jurisdiction gives us a basis for identifying the non-geographical factors that are relevant, and for determining how much weight they should be given. I shall deal first with the relevant area.

The Relevant Area

The geographical frame of reference – the relevant area – is central to the law of maritime boundaries. And on this issue, the differences between the Parties could not be more pronounced.

A wide range of issues divides the Parties on this branch of the case. One, of course, is the definition of the Gulf of Maine area itself. Another is whether it is legitimate to resort to a different relevant area for each category of relevant circumstances, as our opponents have done – that is to change the geographical frame of reference to suit the purposes of each particular argument (Canadian Reply, pp. 45-47, paras. 118-123).

The one question I want to pursue, because it is so central to some of the issues I have already discussed, is the legal relevance of macrogeography. Otherwise stated, the question is whether the legally relevant geographical frame of reference is the Gulf of Maine area referred to in the Special Agreement, or whether it includes the entire North American Continent from Atlantic to Pacific and from Florida to the far north.

Except, of course, Alaska. For the United States has excluded Alaska from the stage-setting it has constructed for this case (United States Memorial, p. 11, para. 20; United States Counter-Memorial, pp. 22-23, para. 29). But if California is to be included, why not Alaska? One might well ask. But the reasons for the banishment of Alaska from the macrogeographic conception of the United States remain shrouded in mystery. I shall be bold enough, however, to hazard my own answer to this riddle. Alaska, like Nova Scotia, is in the wrong place.

The United States, of course, has invoked macrogeography on the vast scale of the North American Continent for a single purpose: to overcome the effect of Nova Scotia, indeed to overcome the *presence* of Nova Scotia.

A number of critical United States arguments depend entirely upon the use of a continental frame of reference. All of these arguments are directed to the same over-riding purpose.

We are told, for instance, that Nova Scotia's coast within the Gulf of Maine is a secondary coast. This is so – again we are told – because this portion of the Nova Scotia coast is "aberrant" to the assumed overall direction of the North American coastline. I have already dealt with the notion of secondary coasts as a matter of law. But the notion is devoid of even a geographical meaning unless the frame of reference is taken far beyond the Gulf of Maine area to encompass the entire Atlantic seaboard.

Again, we are told that the position of the Nova Scotia landmass to the south of either the land boundary terminus or the international boundary terminus should be a decisive factor. But we are not told why the latitude and not the longitude of this terminal point should have any relevance at all.

The answer, of course, lies in a certain vision of the geopolitical order of North America. It is in the very nature of things, we are told, that Canada should be systematically confined to areas that lie north of the United States.

Thus, the position of Nova Scotia is a violation of the natural order of North America, as seen by the United States. No matter that the simplistic view of the continental relationship depends largely on the rectilinear stretch of the boundary that begins in mid-continent – over 2,000 kilometres to the northwest – and governs primarily the *western* half of the continent. No matter that the overall direction of the boundary within the relevant area is clearly north-south, and that the directional principle adopted by the negotiators of 1783 was that of a north-south boundary.

No, for the United States the focal point of the delimitation must be made the international boundary terminus precisely *because* that terminus lies to the north of Nova Scotia and therefore *automatically disregards* the Nova Scotia landmass. And for this, a reliance on continental macrogeography provides the only conceivable rationale.

The United States has come close to parodying its own geographical framework in its complaint that the Canadian claim reaches the latitude of (39) Boulder, Colorado (United States Memorial, p. 192, para. 311 and Fig. 33). Mr. President, Boulder, Colorado is close to 3,000 kilometres from the Gulf of Maine, and less than half that distance from the Pacific Ocean.

The theory of primary and secondary coasts, and the objection to the southern latitude of Nova Scotia, are the specific arguments the United States has drawn from macrogeography. But as I said a few moments ago, the whole approach has a simpler and more fundamental objective. That objective is to make Nova Scotia appear as an incidental, special feature by submerging it in the vastness of a continental frame of reference. In brief, to make Nova Scotia look small in defiance of the real geographical facts. This is why the very first illustration in the pleadings of the United States – and I would invite the Chamber to view this Figure at its leisure, Figure 1 of the United States Memorial – is a map that forms a rectangle of over 9,000 kilometres from north to south, and over 7,000 kilometres from east to west. The area shown extends almost from the North Pole to the deep tropics, and from mid-Atlantic to mid-Pacific. It represents over one-eighth of the entire planet. But even on this enormous scale, of course, Nova Scotia stubbornly insists on appearing as a substantial landmass indeed. Cartographic impressionism has its limitations when it comes to attempts to refashion the inescapable facts of geography.

The jurisprudence on this issue is clear, Mr. President. The delimitation must depend upon the geography of the relevant area. Continental and transcontinental macrogeography are extraneous. The *Tunisia/Libya* case provides a clear example of the rule. The Court did not resort to a continental frame of reference. Instead, the Court expressly confined its frame of reference to the coasts actually abutting upon the area to be delimited. The United States reliance on macrogeography – in brief, its effort to discount the Nova Scotia landmass – is tantamount to a refusal to give effect to the geography of the Gulf of Maine area, as it actually exists. It is an attempt to refashion geography on a grand scale, to make it conform to the United States vision of the North American geopolitical order.

The Chamber rose at 6 p.m.

THIRD PUBLIC SITTING (3 IV 84, 10 p.m.)

Present: [See sitting of 2 IV 84.]

Mr. LEGAULT: Mr. President, distinguished Judges, may I begin by apologizing for the slight delay occasioned by mechanical problems associated with the functioning of my memory.

Before resuming my statement today I should like to correct an error that appears to have crept into the interpretation of my remarks into French yesterday. It seems that "Nova Scotia", on a few occasions, was translated as "Terre-Neuve". Since I may have spoken too rapidly at times perhaps, and since so much of my statement dealt with the refashioning of geography, I can well understand how this error might have crept into the interpretation, but I must stress that all my references yesterday were to "la Nouvelle-Ecosse" and not to "Terre-Neuve". At the same time I must express my very warmest thanks to the interpreters for their assistance and for the very fine job they have been doing.

I must say a few words about the device behind me on my left. This is known as a lightbox, Mr. President. It is an old-fashioned piece of technology, which we have adapted, we hope, to the requirements of the presentation of our case. It is a system we have devised to enable the Court to have a clearer view of certain graphics we wish to use to illustrate our arguments. Each graphic we refer to will continue to be produced in a reduced printed form and distributed to the Chamber and, of course, to the United States side, as was done yesterday, for insertion in the binder whose cover you see illustrated on the lightbox at the moment. In addition, certain major illustrations will also be produced on large transparencies, like the one you see before you now. This system was devised for the convenience of the Court, and I most earnestly hope it will meet that purpose. In the operation of the system today, I shall be assisted by my colleague, Miss Sarita Verma.

Yesterday I had completed my review of the third part of the task I had set for myself, namely the criteria for determining legally relevant geographical circumstances. I had pointed out that the United States has insisted on irrelevant, macrogeographical factors to prop up its theory of primary and secondary coasts, to object to the southern latitude of Nova Scotia, and above all to make Nova Scotia appear as a minor incidental feature in defiance of geographical reality.

Now that the lightbox is available to us, I would like to use it to illustrate the last figure I referred to yesterday – Figure 1 of the United States Memorial, distributed to the Chamber today for insertion in its red book as Figure 8 of the oral proceedings. As I said yesterday, this map forms a rectangle of over 9,000 kilometres from north to south and over 7,000 kilometres from east to west. The area shown extends from the North Pole to the deep tropics, and from mid-Atlantic to mid-Pacific. And again as I said yesterday, it represents over one-eighth of the entire planet. But even so, Mr. President, once again Nova Scotia refuses to be dislocated, to be dislodged, and remains plainly evident even on this vast scale.

I come now to the question of what categories of non-geographical circumstances are relevant to the delimitation of a single maritime boundary on the basis of equitable principles.

The distinction between relevant and irrelevant circumstances is ultimately a

matter of common sense. But common sense with a legal grounding. Because the test we should apply is whether the circumstances relied upon have a sufficiently close connection with the legal nature and content of the rights and jurisdiction in issue.

The need for this kind of scrutiny is made obvious by the strangely inverted priorities given to the relevant – and irrelevant – circumstances in the United States pleadings. We are told that fish are relevant but that fishermen are not. Correction, Mr. President: we are told that 19th-century fishermen are relevant but that today's fishermen are not. We are told that high seas activities long before the modern law of the sea had evolved are relevant, but that Canada's contemporary fishery is not. We are told that the early origins of the fishery are decisive, but again that the reality of the present day has virtually no significance. We are told that bygone co-operative arrangements on matters that even today have nothing to do with the 200-mile zone should prejudice Canada's claim, but that a 1979 agreement directly related to this very dispute and to the fisheries of Georges Bank must be ruled inadmissible, for the sole reason that it is inconsistent with the claim of the United States (V, United States Reply, p. 21, para. 33).

Now all of this, I suggest with great respect, is an affront to common sense. And it is an affront to common sense precisely because it takes no real account of the legal framework.

I shall not discuss the United States theory of "complete dominance" over the Gulf of Maine area. The Attorney-General for Canada has already said all that need be said for the time being on that unfortunate and unfounded view of law and reality. Nor shall I spend long on that vast array of plainly irrelevant activities invoked in the United States pleadings – defence, cartography, aids to navigation and the rest. These activities can be ruled out on every possible count – their legal context, their remoteness in time, and their lack of any connection with the legal content of the jurisdiction even today. What disposes of the issue quite decisively is that the pattern these activities were supposed to disclose has been shown to be factually incorrect. We note, that the arguments in question have largely disappeared from the United States Reply.

(a) *Established Patterns of Fishing*

I turn now to the other end of the spectrum, to a matter of the very highest importance. I refer to the contemporary fishery on Georges Bank. Canada argues that its fishery on Georges Bank and its vital economic importance to the people of the adjacent Nova Scotia coasts are legally relevant factors that are central to the equities of this dispute. The United States, on the other hand, challenges the legal relevance of these factors and asks the Chamber to set them aside.

I submit that the contemporary fishery and its economic importance are relevant for essentially one basic reason. They represent the heart of the case, the real object of the dispute. The practical impact of the decision to be given by the Chamber is very largely a matter of the future status of the fishery on eastern Georges Bank.

Let me say first that, despite appearances, the differences between the Parties on this issue are really quite narrow. The United States agrees with Canada that the fishing activities are among the factors that "are at the heart of the facts of this case". I quote from the overall Conclusions of the United States Reply at paragraph 287 (p. 163). The difference is that for the United States, fishing activities can only be relevant if they are purely historical. The United States is

seeking, in effect, to backdate its 200-mile exclusive economic zone by a century or more. And because the economic interests of long ago can have no practical relevance today, the United States is obliged to argue that the dependence of adjacent communities on the contemporary fishery must not be taken into account (**IV**, United States Counter-Memorial, pp. 125-137, paras. 159-191; **V**, United States Reply, pp. 67-70, paras. 108-114).

Canada has demonstrated in its Counter-Memorial (**III**) that the fishery and its importance to coastal communities are factors that are rooted in the object and purpose of the zones being delimited (pp. 242-246, paras. 579-587). The origin and history of the exclusive economic zone show that nothing is more central to the whole concept than the economic dependence of coastal populations upon the living resources off their shores. It follows that these considerations are not only relevant; they are entitled to considerable weight in the final balancing up.

The fishery is a relevant circumstance, and its economic importance is a valid equitable consideration, not *apart* from the legal basis of title but in the light of it. No one would contend that an interest in the fishery can support a claim that has no reasonable basis in the coastal geography. Nor for that matter could any *other* non-geographical factor serve as a substitute for a geographical basis of claim. And that obviously has never been Canada's contention.

What Canada argues is in fact quite different. It is that a claim with a basis in geography can find confirming support, and potentially decisive support, in the existence of an established fishery in the disputed area, and in the economic dependence of the coastal population on that fishery. And we submit that this conclusion is virtually inescapable in law. The jurisprudence clearly demonstrates that non-geographical factors are eligible for consideration as relevant circumstances. Both Parties have relied upon non-geographical factors in the present case. And once this principle is conceded it must surely follow that the single factor most closely linked with the subject-matter of the jurisdiction, with its object and purpose, can and indeed must be taken into account. Equitable principles surely must rule out a conception so narrow that it would exclude from consideration a factual circumstance at the very heart of the dispute.

Mr. President, I have been discussing the Georges Bank fishery and its economic importance as if it were a *non-geographical* factor. But this is not entirely the case. Canada's fishery takes place squarely within the disputed area and is conducted from the geographically adjacent coasts. And it highlights the reality of the connection between these coasts and the disputed area. The connection is anything but fortuitous. The fishery conducted from the adjacent coasts is an expression and a consequence of physical geography. It is a living demonstration of the practical significance of geographical adjacency.

This of course is the first judicial delimitation of a 200-mile zone and in that sense the Canadian argument is, as our opponents have said, "unprecedented" (see United States Counter-Memorial, pp. 125-137, paras. 161-191). But at the same time, the Canadian argument has solid roots in international law. Two of the Judgments that helped to develop the doctrine of "equitable principles" – the *Fisheries* case and the *Fisheries Jurisdiction* case – both give unequivocal recognition to economic dependence as an equitable consideration of legal significance. And even the *Grisbadarna* case, whose attraction for our opponents has seemingly faded, supplies yet another instance of the recognized role of this factor.

Common sense alone requires that the delimitation of a fishing zone on the basis of equitable principles should take account of the fishery and related economic factors. But the United States has raised a variety of arguments against this proposition. I shall now deal with these arguments.

The United States Reply contends that "geography alone" determines the right of a coastal State to a 200-mile zone (pp. 67-68, paras. 108-109). Now this does not tell the whole story. In fact, it is an incorrect statement of the law. In boundary areas between opposite or adjacent States, the law clearly does accord a role to non-geographical factors. The 1977 award referred to the "geographical and *other* circumstances" (para. 239). Indeed, of the four so-called equitable principles laid down by the United States, only the *first* is primarily geographical in character. But the main point is one I have already made. Canada does not rely upon the Georges Bank fishery and southwest Nova Scotia's dependence upon that fishery in derogation from the coastal geography or even in isolation from it. Instead, these factors serve to confirm and reinforce the geographical aspect of Canada's claim. And, once more, these factors are a practical consequence of the geography of the relevant area.

The United States goes on to argue that States are entitled to a 200-mile zone whether or not their residents have exploited or even intend to exploit its resources (United States Reply, p. 68, para. 110). True enough, but then where does this leave the United States argument that only historical fisheries are relevant to the delimitation?

The United States also argues that States are entitled to a 200-mile zone whether or not they are economically dependent on its resources (*ibid.*, para. 111). True enough, but essentially beside the point. The fact that economic dependence is not a *precondition* of title is in no way inconsistent with the idea that it may be a *relevant circumstance* in the delimitation. And to hold, as Canada does, that the basis of title is a relevant factor in the boundary area hardly goes to prove that it has to be considered the *only* relevant factor.

The United States also relies upon the Court's observation in 1982, to the effect that considerations of national wealth and poverty, in the context of future oil and gas discoveries, are extraneous (United States Reply, p. 69, para. 112). Here the nature of the Canadian argument is so radically different from these rejected considerations that we find it almost impossible to grasp the United States objection to Canada's position. Relative national wealth has no place in Canada's argument. The issue is not the potential impact of hypothetical discoveries of hypothetical resources. We are dealing here with established fishing patterns, linking the coastal communities of the geographically adjacent coasts to the disputed area. We are dealing here with an existing activity that is a direct consequence of the geographical relationship. And finally, we are dealing here with the resources that form the very object of the dispute. These are hardly speculative considerations. They are everyday facts of life for the fishermen of southwest Nova Scotia.

(b) *The 1979 Agreement on East Coast Fishery Resources*

There is one further aspect of the evidence where the Parties are deeply divided, not on the facts themselves but on the question of relevance. I refer to the history of the dispute and the indicia of equity it provides. More specifically, of course, I refer to the 1979 Agreement on East Coast Fishery Resources.

The United States Reply deals with the 1979 fisheries agreement only to give a selective account of the political objections it encountered among some New England interests after it had been concluded and submitted for ratification (pp. 21-23, paras. 33-37). That account is wholly irrelevant to the real issue – the equities as seen by the two Governments and their authorized representatives. It does not come to grips at all with the question whether the 1979 agreement can

be taken into account as a central element of the negotiating history, as one of the indicia of equity provided by the history of the dispute.

Canada's position therefore remains as stated in its Reply (pp. 37-38, paras. 94-96; pp. 105-107, paras. 248-253 – V). The United States objection to consideration of the 1979 fisheries agreement amounts to a contention that the Chamber must disregard the history of the dispute – and indeed the *crucial phase* of the history of the dispute as it relates to fisheries. This position is plainly inconsistent with the jurisprudence, and especially the 1982 Judgment of the Court, which looked to the conduct of the Parties for indicia of equity (p. 84, para. 118). It is also at odds with the terms of the Special Agreement, which excludes one – and only one – aspect of the history of the dispute from the consideration of the Court: namely, proposals directed to a maritime boundary settlement or responses thereto (Art. V, para. 1).

Mr. President, the 1979 fisheries agreement was elaborated in conjunction with the boundary negotiations. It was signed by the Secretary of State of the United States simultaneously with the Special Agreement. It was strongly endorsed and commended by the President of the United States as "fair to both Parties" (I, Canadian Memorial, p. 135, para. 323). It called for the joint management of Georges Bank and the sharing of its fishery resources in a manner consistent with the Canadian boundary claim. That it was ultimately withdrawn by a subsequent Administration in no way detracts from its value as evidence of the equities as seen by the Parties in the crucial phase of the dispute.

The 1979 fisheries agreement is a relevant circumstance in several distinct respects. First of all, it constitutes *evidence* recognized by the United States of Canada's economic interest and traditional participation in the fisheries of Georges Bank. The essential object of the agreement was the sharing and management of the Georges Bank fisheries by Canada and the United States, and the Chamber will recall Ambassador Cutler's testimony that the agreed shares, viewed in historical perspective, were fair and equitable. Secondly, the agreement forms part of a *pattern of conduct*, that must be considered together with the record of the continental shelf. For just as the record shows that the United States accepted Canada's jurisdiction with respect to the continental shelf of eastern Georges Bank, the 1979 agreement shows that it equally recognized Canada's equitable interest in the fisheries of that very same area. Finally, the 1979 agreement also constitutes evidence that the United States Administration of the time also recognized that established fishing patterns would indeed be a relevant circumstance in the boundary delimitation, *if the agreement were not ratified and failed to come into force.* This point was made on several occasions by Ambassador Cutler in his testimony in favour of ratification of the agreement – and the references to Ambassador Cutler's testimony are given in my written statement (*Hearings before the Committee on Foreign Relations*, United States Senate, Ninety-Sixth Congress, Second Session, 15 April 1980, p. 25).

I must add a word, but only a word, on the unfortunate introduction into these proceedings of irrelevant foreign policy differences between the Parties in the field of the law of the sea. I refer, of course, to the entire theme of Chapter I of the United States Reply. I cannot take the time, nor would it be appropriate, to answer the substance of this generalized attack on Canada's record over the past 20-odd years. Accordingly, I shall do no more than point out – with great regret – that this excursion into irrelevance is both unfair and inaccurate in the inferences it seeks to draw from Canada's actions in defence of its vital coastal interests.

Perhaps the most extraordinary inference the United States has attempted to

draw is that the oil and gas permits issued by Canada for Georges Bank beginning in 1964 were part of a "broader onslaught" on United States maritime interests (United States Reply, p. 15, para. 20). These permits were issued in accordance with a straightforward application of the principles of Article 6 of the Geneva Convention on the Continental Shelf. It is one thing to disagree with Canada's use of the equidistance method, but to characterize it as an onslaught on the interests of a neighbouring State goes rather beyond the bounds of reasonable argument. And the really striking thing is this: the nature of the so-called onslaught was known to and fully accepted by the Government of the United States and yet failed to provoke even so much as a reservation, much less a protest, until the end of 1969.

VII. The Canadian Line as the Equitable Result in the Gulf of Maine Area

I have completed my review of the main legal issues dividing the Parties in this case. I turn now to the fourth and final part of my task – that is, an examination of the Canadian claim itself, the actual line on the map now illustrated on the (205) lightbox and distributed to the Chamber as Figure 9 of the oral proceedings. For it is this claim that we hold to represent the equitable result within the law in the present case.

My examination of the Canadian claim will be brief and necessarily incomplete. Professor Weil will pursue this topic in greater depth a few days hence.

I would ask the Chamber to look first at the innermost segment of the line, as it moves seaward from Point A. The first thing that will be noted is that the coasts of Maine and Nova Scotia that control most of this segment of the line have a right-angled juxtaposition. In other words, they face each other not directly but at an angle of approximately 90°. And the second thing the Chamber will notice is that the Canadian line very roughly bisects the angle so formed by the general direction of the two coasts. In this way – and this is the really important point, Mr. President – in this way the Canadian line provides the same kind of equal division of maritime space between the two coasts as does a perpendicular line when the coasts are perfectly straight.

I say the Canadian line *roughly* bisects the area because in fact it diverges somewhat from this principle, in favour of the United States. The equidistance line in this sector uses basepoints on the United States side that are situated on off-lying rocks – some at a considerable distance from the United States mainland: I shall point them out – Mount Desert Rock and Matinicus Rock for instance. The net result is that the Canadian line here follows a course much closer to the Canadian *mainland* than to that of the United States.

There is, in fact, a coastal area in the Gulf of Maine that is seriously disfavoured by geography, but by no stretch of the imagination is it the coast of the United States. It is the coastline of the Bay of Fundy. 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. It is this coastline alone that is disadvantaged by concavity in the geographical situation of the Gulf of Maine.

The logic of this inner segment of the Canadian line is also apparent in its general direction. Contrary to the false doctrine of primary and secondary coasts, the seaward extensions of both Canada and the United States are entitled in law to equal weight. The coasts have equal generating power. In the inner portion of the Gulf, the seaward extensions of Maine and Nova Scotia meet and overlap. But they meet, not head-on, as it were, but at an angle – an angle of

roughly 90°. In this type of coastal relationship it is difficult to conceive of a dividing line other than one that cuts *diagonally* through the zone of convergence created by these overlapping extensions. A line, in other words, that bisects the angle created by the coastal relationship. Only a line that proceeds in such a direction can respect the equal generating power of the coasts.

Further seaward, in the *central* part of the Gulf, the geography is, if anything, more decisive and clear-cut. The coasts of Nova Scotia and Massachusetts face each other in a perfectly opposite relationship, as the boundary approaches the Cape Sable-Nantucket closing line which the Parties have agreed represents the seaward limit of the Gulf (**II**, United States Memorial, p. 12, para. 25, fn. 2; **V**, Canadian Reply, pp. 41-42, para. 108). Two extensive and perfectly opposite coasts: this represents an almost classic situation for the application of the equidistance method, and we shall see in a moment that the Parties are agreed on the characterization of the geography I have just given.

The overall effect of the Canadian line within the Gulf of Maine itself is to allocate the lion's share of the area to the United States. The United States coastline bordering the Gulf is extensive, true enough. But the point is that its extent is fully reflected in the area the United States obtains through the operation of the Canadian line. And this for two reasons. One is Canada's use of off-lying basepoints on the United States side, which I have just discussed. But the second is more fundamental. It is that the equidistance method as applied in this type of configuration divides only the northeastern portion of the Gulf, and automatically leaves the entire southwestern portion totally unaffected by the Canadian coast. This is because the coasts of the southwestern half of the Gulf are entirely American, while those of the northeastern half are divided between Canada and the United States. And the increasing convexity of the coast of southern New England as it curves outward to form the southwestern entrance point to the Gulf *prevents* the Canadian coast from exerting any effect beyond the central area of the Gulf.

In the outer area – the area that includes Georges Bank – the Canadian pleadings have demonstrated that a predominant opposite relationship of the coasts is maintained (Canadian Counter-Memorial, pp. 45-48, paras. 107-113; Canadian Reply, pp. 48-52, paras. 127-131). And here again the even-handedness of the Canadian line is its dominant characteristic.

The Canadian line crosses the closing line of the Gulf – the agreed closing line of the Gulf – roughly midway between Nova Scotia and Massachusetts, as may be seen from the illustration on the lightbox, which was also distributed to the Chamber today as Figure 10 of the oral proceedings. The position of the Canadian line at this point is justified by two factors. The first factor is that the abutting coasts of Nova Scotia and Massachusetts, each of them comparable in configuration and extent, face each other across the Gulf in a perfectly opposite relationship in this area. And these are unquestionably the legally relevant and controlling coasts – their proximity to the boundary area, combined with their extent, puts the question beyond all doubt. And the second factor is that an adjustment in the equidistance line is required by the distorting effect of the Cape Cod-Nantucket configuration, whose implications I shall discuss in a moment.

But what of the *direction* of the Canadian line beyond the agreed closing line of the Gulf of Maine and across Georges Bank?

Mr. President, distinguished Judges, the Canadian line changes direction quite markedly, as may easily be seen, as it enters the outer area. It turns back towards the east in the direction of the Canadian coast. This change of direction is caused by the convexity of the New England coast – the bulge on the coast of Massachusetts where it curves outward to form the southwestern entrance to the

Gulf. The convexity of the Massachusetts coast creates an overall balance in the geography and it places the United States in a favourable position with respect to the use of the equidistance method in the outer area.

But the geographical balance would be destroyed if the Cape Cod-Nantucket configuration were superadded to this convexity. Cape Cod and Nantucket form an attenuated projection of the United States mainland towards the Canadian coast, and their effect on a strict equidistance line would clearly be disproportionate. The Cape Cod-Nantucket configuration provides virtually a textbook example of the kind of incidental, special feature that requires an adjustment of the equidistance line. And the effect of this configuration is especially marked because of its strategic location at a point where it would control the entire course of the equidistance line across Georges Bank. These considerations require the use of a basepoint on the principal landmass of Massachusetts and southern New England. And it is from such a basepoint, at the Cape Cod Canal, that the Canadian line has been constructed (Canadian Memorial, pp. 105-106, paras. 240-241; pp. 143-146, paras. 346-351; Canadian Counter-Memorial, p. 55, para. 132; pp. 288-289, paras. 687-688; p. 296, paras. 708-710; Canadian Reply, pp. 53-54, paras. 134-138; pp. 158-159, para. 356).

Mr. President, I have two additional remarks on the direction of the Canadian line as it proceeds into the outer area and across Georges Bank. They concern the relationship of the Canadian line to the abutting coasts that form the "coastal wings" around the entrance to the Gulf. I would first point out that the Canadian line enters the outer area on a course that is roughly parallel to the two opposite coasts inside the Gulf. In so doing it avoids any effect of "veering" towards one side or the other. Secondly, I would point out that – once the area of the Gulf has been left behind – the direction of the Canadian line is confirmed by its relation to the coasts outside the Gulf. Its course is roughly perpendicular to the average general direction of the Atlantic-facing coasts of Massachusetts and Nova Scotia. And in this way the Canadian line effects an equal and equitable division of the area involved, as required by the geographical balance of the abutting coasts.

I should like to look again at the United States objections to the use of equidistance in the outer area, in the light of what I have just been saying. The Chamber will recall that in discussing the operation of Article 6, I reviewed each of the recognized objections that can be made to the equidistance method in certain geographical situations. And my submission was that not one of these recognized objections has any application to the geography of the Gulf of Maine area.

The United States has in fact *agreed* with Canada that a decisive portion of the coastal relationship is characterized by comparable coasts in an almost perfectly opposite relationship. Thus, the United States Reply emphasizes that the Parties "have approximately equal lengths of coastal front *facing each other* across the interior of the Gulf of Maine" (United States Reply, p. 104, para. 179). Now we do not agree with the way the United States has defined the "coastal front" on the Canadian side. But the basic principle remains. The United States description of the geography shows a typical situation calling for the application of the equidistance method. And what is equally significant is that in these circumstances the United States objection to equidistance has become *wholly dependent* on the characterization of these extensive, opposite *and* comparable coasts as "secondary" coasts.

And that of course identifies the principal ground on which the United States bases its objection to equidistance. Its complaint, in effect, is that the geographical position of Nova Scotia prevents Maine from having an *unlimited* seaward

extension in front of its coast – an extension that would obviously include vast areas that are closer to Nova Scotia than to any other land area. The United States attempts to justify this complaint by putting it under the legal rubric of non-encroachment and the cut-off effect.

I propose to examine this objection largely by focusing on the effect of the Canadian line within the Gulf of Maine itself – the inner area. Because even though Georges Bank is the crux of this dispute, it seems to me that the United States objection depends entirely upon a demonstration that the direction taken by the Canadian line within the Gulf itself is unacceptable. Because if the Canadian line does not improperly block the seaward extension of Maine within the Gulf, then *a fortiori* it cannot produce this effect further out to sea. In other words, *if there is no encroachment or cut-off effect in an area that is comparatively close to the coast, there cannot be any such effect in an area much further out to sea, at a considerably greater distance from the same coast.* Moreover, if there is nothing wrong with the Canadian line in this inner area, there can hardly be anything wrong with its direction further out to sea, where Massachusetts turns the line further to the east, and back towards the Canadian coast.

Now I suggest that there are *three* separate reasons why the United States objection to the Canadian line is unfounded. The first, and the most important, is the geography of the area. The second lies in the history of the dispute and the indicia of equity it provides. And the third lies in the Special Agreement itself.

First, the geography. The United States says (United States Reply, p. 77, para. 128) there is a cut-off of the seaward extension of Maine (see *I.C.J. Reports 1969*, pp. 31-32, para. 44). But at no point are the controlling coasts within the Gulf of Maine *laterally aligned* so as to create the conditions in which a cut-off effect as described in the jurisprudence can take place. We have just seen that the Canadian line approximately bisects the angle formed by the juxtaposition of the controlling coasts within the inner portion of the Gulf. In the Canadian view, a cut-off effect is almost never present in these circumstances, because in bisecting the angle the line provides an equal division of maritime space off the two coasts. And that is the situation here.

Second, the indicia of equity provided by the history of the dispute. The Chamber is aware of the 1976 United States claim – the official claim of the United States during the main phases of the negotiations and at the time of the Special Agreement: in fact, until the middle of 1982. Now it is significant to the entire cut-off/encroachment argument of the United States that throughout most of the Gulf of Maine proper, the United States claim of 1976 followed a course that took it much *closer* to the Maine coast, and in a *more southerly direction*, than does the Canadian equidistance line. This is evident from the illustration on the lightbox, (180) which was distributed to the Chamber today as Figure 11 of the oral proceedings. And it is evident that the so-called United States "lobster line" of 1975 provides an even more dramatic illustration of the same point (United States Memorial, (29) pp. 84-85, paras. 144-145; p. 87, Fig. 16). In other words, the United States line until 1982 cut off the coast of Maine to a far greater extent than does the Canadian line. Consequently, if the Parties' own view of the equities is to be relevant, if what was equitable in their own common view is to have any significance, it must be conceded that the Canadian line in reality effects *no cut-off* of the seaward extension of the coast of Maine. And it must equally be conceded that the entire cut-off/encroachment argument now espoused by the United States is an *ex post facto* rationalization of its ambition to bring all of Georges Bank under its exclusive control.

Third, the Special Agreement itself. The position of Point A alone is enough to settle the non-encroachment debate quite conclusively. For the position of Point

A shows that a line at that distance from the coast, from the coast of Maine, and in that kind of spatial juxtaposition with that same coast, was deemed to be equitable by the Parties themselves; and by a necessary implication, was also deemed to create no unacceptable encroachment on either Party. And what confirms this point beyond any doubt is the southwesterly direction implied by the alignment of Point A with the international boundary terminus, and the further necessary implication that the boundary beyond Point A will continue on a consistent course. In short, the logic inherent in the Special Agreement itself is totally incompatible with the idea of a wrongful cut-off of the Maine coast by the Canadian line.

Mr. President, distinguished Judges, I conclude that the fundamental United States objection to Canada's equidistance line – that it cuts off the seaward extension of the coast of Maine – is unfounded. It is unfounded in the inner area that lies closest to the coast of Maine. And it is unfounded, *a fortiori*, in the area of Georges Bank.

An interesting question arises here. Why is it the United States and not Canada that has asked the Chamber to suspend the operation of the principle of non-encroachment within the Gulf of Maine itself? Why is it the United States and not Canada that seeks to deprive one of the coasts of the benefit of the principle within this area? Because, as I have said, that is the whole object and effect of the new theory of primary and secondary coasts, nothing more and nothing less. The implication is clear. It is the United States claim, not Canada's, that violates the principle of non-encroachment.

And the Canadian claim is a proportionate one, as the United States claim is not. The Canadian claim takes account of the element of proportionality in both of the geographical senses in which the jurisprudence has applied this concept.

The Anglo-French Continental Shelf award held that proportionality may appear in the form of a ratio between coastal lengths and the maritime areas to be allotted to each Party. "But", as the Court stated,

> "it may also appear, and more usually does, as a factor for determining the reasonable or unreasonable – the equitable or inequitable – effects of particular geographical features or configurations upon the course of an equidistance-line boundary" (para. 100).

And in the open-ended and indeterminate circumstances of the outer portion of the Gulf of Maine area – which resembles in this respect the Atlantic region in the 1977 award – it is undoubtedly this aspect of proportionality that is primarily relevant to the present case. The Canadian claim, of course, has been specifically constructed on the basis of proportionality in this sense of the term, by eliminating the disproportionate effect of Cape Cod and Nantucket upon the course of the equidistance line.

What then of proportionality as a matter of ratios between coastal lengths and offshore areas? Professor Malintoppi will be reviewing our position on this point and on other tests of equity in depth. But the Canadian pleadings have already set out our basic views. We have shown, I think conclusively, that Canada's claim more than meets any such test in the Gulf of Maine itself, where the area is sufficiently defined to allow the test to be applied with a reasonable degree of certainty. We have expressed reservations as to whether this aspect of proportionality can be applied to the open-ended indeterminate circumstances of the outer area. We have shown that the inconsistency and the arbitrary character of the United States proportionality models actually *demonstrate* the soundness of Canada's reservations. But at the same time, we have shown that any reasonable proportionality model applied to the outer area, or to the Gulf of Maine area as

a whole, confirms the equity of the Canadian claim, and by the same token demonstrates as well the quite disproportionate nature of the United States claim.

So far, of course, I have been speaking of the Canadian line in purely geographical terms. And that indeed is the logical place to start, for the Canadian line has been constructed on the basis of the coastal geography of the relevant area. But the other relevant circumstances have their own independent importance. They are relevant circumstances in their own right, and they provide confirming support for a line that is the product of legal rules applied on the basis of the relevant geography. And finally, they provide a test against which the equity of the line can be measured.

Apart from physical geography, there are two categories of relevant circumstances on which we rely in support of the equitable character of the Canadian claim. They are summarized in two of the three basic principles that I advanced at the beginning of this statement. One is the fishery of eastern Georges Bank and its economic importance to the coastal communities of southwest Nova Scotia. The other is the conduct of the Parties and the indicia of equity so provided.

I have already dealt with the legal basis for our reliance on the Georges Bank fishery as a relevant circumstance. And the Canadian pleadings have dealt with the factual basis of our contentions. My colleague, Mr. Binnie, will be reviewing the highlights of our evidence. I shall only touch upon a few points here. What this evidence shows, in the simplest possible terms, has a number of distinct dimensions.

First, there is Canada's *presence* in the fishery of Georges Bank – a presence whose importance was recognized in the conclusion of the 1979 Agreement on East Coast Fishery Resources. Next, there is the special economic *dependence* of southwest Nova Scotia on this fishery – a dependence that is largely the product of geographical forces. And finally, as a corollary of the last consideration, there is the question of the relative degree of *impact* that the boundary could have on the economic life of each Party.

We have demonstrated that the Canadian claim would respect the stability of existing situations of fact to the greatest extent possible under the 200-mile régime. By leaving over half of Georges Bank to the United States the Canadian line would minimize disturbance to the existing fisheries of that Party. The United States line, on the other hand, would wipe out Canada's fishery on the Bank; it would severely damage the fishing industry of southwest Nova Scotia, and with it the entire economic fabric of that region. Yet even so, it would secure only marginal benefits to the diversified economy of New England.

In sum, Mr. President, the Canadian line is consistent with the established presence and the established interests of both Parties in the fishery resources of Georges Bank. And moreover, if the great disparity in the economic dependence of the Parties on these resources were fully taken into account, the Canadian claim would be altogether too moderate.

The final consideration that confirms the equity of the Canadian claim lies in the indicia of equity provided by the conduct of the Parties: the evidence, in other words, that their own actions can provide of the elements of an equitable result.

The jurisprudence recognizes the relevance, and in fact the potentially decisive importance, of the conduct of the Parties as one of the indicia of equity. In a certain sense, this reflects an order of priority established by the law itself. The law of maritime boundaries looks first to the agreement of the Parties as a basis of delimitation, both in Article 6 and in the delimitation provisions of the new

Law of the Sea Convention. And in a legal context where the agreement of the Parties is given a privileged status, the evidence of what the Parties themselves have viewed as equitable takes on a special significance. Moreover, equity inevitably has a subjective element, an irreducible element of appreciation and judgment. And there can be no better touchstone of equity than how the Parties themselves actually perceived the issues in fact and law, and what appeared to them to be fair and reasonable, as the case developed.

The factual and legal elements of the conduct of the Parties that we consider important will be discussed by Professors Bowett and Brownlie. We rely on the history of this dispute both in its earlier phases, when the continental shelf alone was at issue, and in its later phases, when it encompassed the offshore fishery as well. The sequence of events we consider decisive with respect to the continental shelf has been left uncontradicted in its essentials. The facts can be summarized with a brevity that matches their basic simplicity:

- Canada publicly issued oil and gas permits on Georges Bank using the equidistance method from 1964 onward.
- These permits granted long-term, exclusive resource rights with respect to specific tracts on Georges Bank.
- The United States had knowledge of these permits at the time they were issued, and the permits were the subject of correspondence between the Parties through both administrative and diplomatic channels.
- The United States not only failed to protest Canada's permits; it plainly acquiesced in Canada's use of the equidistance method.
- What is more, even the limited evidentiary materials disclosed by the United States in these proceedings clearly indicate that the United States authorities themselves were assuming a boundary based on the equidistance method during the crucial period – and even perhaps on a specific equidistance line known as the so-called "BLM line" (Canadian Reply, pp. 85-105, paras. 201-247).

Mr. President, the United States acquiescence in Canada's use of equidistance during the 1960s, and its own assumption of an equidistance method, show that the United States not only accepted the equitable character of this method in the Gulf of Maine area, but also recognized it as a proper application of a legal principle.

The conduct of the Parties with respect to the fisheries of Georges Bank provides equally compelling evidence (Canadian Reply, pp. 105-137, paras. 278-313). I have already discussed the legal relevance of the 1979 fisheries agreement. Nothing is more central to the history of the dispute. Nothing provides more unequivocal evidence of the real extent and importance of each Party's interest in the fisheries of Georges Bank. Nothing shows more eloquently how the Parties viewed the real equities at stake.

And the 1979 fisheries agreement is virtually a mirror-image of the Canadian line. That agreement is dead, of course. It binds no-one today. But the *corpus* of the agreement remains as eloquent evidence – incontrovertible evidence – of an equitable result as seen by the severest judges of them all: the Parties themselves. For the Parties before the Court today are the *same Parties* that concluded the 1979 agreement. The United States, of course, does its best to avoid this fact. But, Mr. President, Canada did not negotiate and conclude the 1979 fisheries agreement with a third party. The United States, of course, is entitled to change its mind, but it is not entitled to split its legal personality or to exclude evidence that it now considers unfavourable.

And so the record is clear on both sides of the ledger. The Canadian claim is

consistent with the rights that have vested through the conduct of the Parties in relation to the continental shelf. And it respects the indicia of equity shown in a pattern of conduct that has encompassed both the continental shelf and the fishery of Georges Bank.

VIII. Conclusion

I have only a few more remarks to make by way of conclusion. I hope I have been able to convince the Chamber that the Canadian line is not only reasonable and proportionate but *conservative*. For this is the result one would expect from the careful application of a legal rule anchored in geography. The application of a legally recognized method, of a general rule, has a built-in tendency to moderation. It has this quality precisely because it is designed to achieve an objectively equitable result in the broadest possible range of circumstances – not to achieve a special result in a particular case.

Equidistance itself, to the extent that no special circumstances interfere, has an inherent property of equality. One cannot readily apply a legal rule, or a legal method, and expect to come up with an extreme claim – a claim that can be cut back without real sacrifice in order to produce a result that has an appearance of compromise. It is clearly otherwise with a claim that has been pieced together on the basis of a series of so-called principles, invented and combined in a special way for this case alone – not for the *circumstances* of this case, but for the United States *objectives* in this case.

In brief, the present case is not just a contest between a claim that is founded in law and one that is not so founded, though that is clearly the most important point. This is also a contest between a claim that has a built-in property of moderation *because* it is based on the law, and a claim that, in Canada's submission, is so excessive and so arbitrary that it can only be described as a "split the difference" approach that has been carefully designed to avoid "splitting" Georges Bank.

Canada's approach is quite different. For dividing Georges Bank is *not* splitting the difference. It is a result that stems from the application of law, whose equitable character has been confirmed by all the relevant circumstances, and especially by the conduct of the Parties themselves over a period of 20 years.

The Parties have come to this Great Hall of Justice as friends and litigants. At the end of these proceedings we will leave as friends, with the litigation behind us, to return to the normal pattern of co-operation in our shared concerns as co-tenants of the North American Continent. For this litigation is simply a ripple on the broad, untroubled stream of friendly relations between Canada and the United States. The ripple vanishes, the stream endures. It has endured from colonial times to the present, surviving every vicissitude, overcoming every obstacle, and resolving every dispute. In the few cases where their interests have made them opponents for some brief time, the Parties have been vigorous in upholding their point of view. Their shared legal tradition makes them stout adversaries in the judicial process, but it also makes them staunch defenders of the result of that process. The ripple vanishes, the stream endures.

Mr. President, distinguished Judges, I thank you for your patience and your courtesy throughout this long statement. And I should also like to thank my distinguished opponents on the other side for their patience and courtesy as well. I look forward with interest, with great interest, to hearing their views on the matters I have raised.

The Chamber adjourned from 11.16 a.m. to 11.32 a.m.

ARGUMENT OF MR. HANKEY

DEPUTY-AGENT OF THE GOVERNMENT OF CANADA

Mr. HANKEY: Mr. President, distinguished Judges. It falls to me to address the geographical circumstances relevant to the delimitation. Permit me first to say that I am deeply honoured by this opportunity to represent Canada before the highest judicial organ of the international community.

INTRODUCTION

My presentation will be divided into four parts. I will begin this morning by defining the appropriate geographical framework. I shall then move on to discuss the general configuration of the coasts. After that, I propose to examine the presence of incidental features or special circumstances. And finally, the decisive geographical issue in this case, the relationship of Georges Bank to the relevant coasts of the Parties. This structure follows the order of the relevant geographical circumstances set out in the *dispositif* of the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 93, para. 133 B). It responds to the logical imperative of fixing the framework and scale before distinguishing between the general and the particular.

I. THE DEFINITION OF THE APPROPRIATE GEOGRAPHICAL FRAMEWORK

The first issue that must be addressed then, is the definition of the appropriate geographical framework. It is a deceptively simple, yet unfortunately divisive issue. After all, the Special Agreement **(I)** itself names the region in which the delimitation is to take place. It is the Gulf of Maine area.

By comparison, the companion agreement signed on the same day was entitled the Agreement on East Coast Fishery Resources. But the Chamber has not been asked by the Parties to draw a boundary on the east coast or on the Atlantic seaboard. The Parties have directed the Court's attention to the Gulf of Maine area. In so doing, the Parties themselves have established the particular geographical framework in which the relevant circumstances are to be identified. At the same time, they have set the scale against which the Court may assess the relative importance of particular geographical features, their relationship to each other, and their proportionate or disproportionate effect upon the delimitation.

One might reasonably expect that the geographical framework for the case is the one identified in the Special Agreement. The United States Memorial in fact admits that the Gulf of Maine area is "the 'relevant area' for determining the relevant circumstances of this case" (**II**, United States Memorial, p. 3, para. 10; p. 19, fn. 2; p. 169, para. 278; **IV**, United States Counter-Memorial, p. 13, para. 16 and fn. 2).

But this agreement is more apparent than real. For while the United States pays lip-service to the area identified in the Special Agreement, its real view of the geographical framework is disclosed in the first substantive sentence of its Memorial, which states that the Parties "have asked this Court to resolve a dispute over the location of their maritime boundary *off the east coast of North America*" (United States Memorial, p. 3, para. 6). This formulation stands in sharp contrast with the corresponding sentence in the Canadian Memorial **(I)**, which reads: "The subject of this dispute is the course of the single maritime

boundary dividing the continental shelf and fishing zones of Canada and the United States *in the Gulf of Maine area*" (p. 9, para. 2).

And so, Mr. President, the most fundamental geographical issue dividing the Parties is identified at the beginning of the two Memorials. In essence, *the United States rests its case not on the geography of the relevant area, but on the geography of the North American Continent.*

The United States confirms this position when it sets out its view of the "relevant geographical circumstances that must be taken into account". These are said to be *first*, the *transcontinental* north-south relationship of the two *States*; *second*, the northeastern trend of the east coast of *North America*; *third*, the reduction of Nova Scotia to a "protrusion" on the ground that it *offends* the transcontinental north-south relationship; and *fourth*, the relegation of the Nova Scotian coast to "*secondary*" status because it is said to *violate* the northeastern trend of the continental coast (United States Memorial, pp. 3-4, para. 11).

These same allegedly "relevant circumstances" reappear in the United States Submissions as "the relevant geographical circumstances *in the area*" (United States Memorial, pp. 213-214, Submissions, (B) (1) *(a)*, *(b)*, *(d)*, and *(e)*). "What area?", the Court may ask. One would suppose the "relevant area", the Gulf of Maine area. But the first two circumstances the United States claims as relevant are continental relationships, and the relevance of the third and fourth circumstances depends upon their alleged deviation from these continental relationships.

For the United States, the definition of the relevant area is essentially a *formal* exercise, *unrelated* to the identification of the relevant geographical circumstances. There is, none the less, a considerable measure of agreement between the Parties as to what actually constitutes the Gulf of Maine area. *First*, they agree that the whole of the concavity behind a hypothetical closing line from Cape Sable to Nantucket Island forms part of the relevant area. I emphasize *the whole of the sea area behind the closing line*, because the United States, while admitting that the Bay of Fundy forms part of the Gulf of Maine *area* (United States Memorial, p. 19, para. 25), denies that it is part of the Gulf of Maine (*ibid.*, p. 19, fn. 2). However, numerous geographic and scientific works, as well as many official United States publications, specifically include the Bay of Fundy as part of the Gulf of Maine area (**III**, Canadian Counter-Memorial, p. 53, fn. 70).

In any case, the important point is not the largely semantic question as to whether the Bay of Fundy can be distinguished geographically from the rest of the Gulf, but rather the common position of the Parties that the Bay of Fundy forms part of the relevant area. For the Gulf of Maine area clearly extends beyond the limits of the geographical feature that is the Gulf of Maine.

The Parties agree that the southern rim or sill of the Gulf, which lies here beyond *the closing line of the Gulf (that is, seaward of the Cape Sable to Nantucket closing line)*, forms part of the relevant area. They also agree that some part of the coasts abutting the Atlantic outside the Gulf *forms part of the relevant area.* The only issue dividing the Parties on the definition of the Gulf of Maine area is the *extent* of the relevant coasts abutting the outer area.

In the absence of geographical features that enclose or indicate the limits of the outer area, other criteria may be used to determine the extent of the relevant coasts. It is clear that these coasts must be defined by reference to the region *actually* identified in the Special Agreement, and that *any* definition of the Gulf of Maine area must take as its *point of departure* the feature that incontestably forms its heart – the *Gulf of Maine itself.* Because the Gulf forms the axis of the Gulf of Maine area, the coasts *relevant* to the delimitation outside the Gulf must

extend a *comparable* distance on *both* sides of the entrance to the Gulf – that is, northeast from Cape Sable and southwest from Nantucket Island.

In the absence of natural geographical features serving to indicate the *precise extent* of these outer coasts, Canada has identified them by reference to the ports that actually exploit the fishery resources of the Gulf of Maine and of its seaward rim. Many of the most important ports fishing on Georges Bank are situated on the coasts abutting the outer area. On the basis of this criterion, the relevant coasts extend from Lunenburg, Nova Scotia, at least to Newport, Rhode Island (Canadian Counter-Memorial, p. 29, para. 66).

The United States objects to the use of this criterion. In arguments that will be rebutted by my colleague, Mr. Binnie, the United States argues that *economic* geography is *irrelevant* to the delimitation of *economic* zones, that a pattern of *fishery* exploitation is *irrelevant* to the delimitation of *fishery* zones. How, then, does the United States define the Gulf of Maine area?

The United States says that the Gulf of Maine area is: "the coasts and geographical features from Nantucket Island to Cape Canso, on both sides of the international boundary terminus . . ." (United States Memorial, p. 19, para. 25). It is not easy to understand why, on its southwestern side, the lateral extent of the Gulf of Maine area should be co-terminus with the entrance point of the Gulf itself – *that is*, Nantucket Island – while on its northeastern side, the limits of the area are said to be at Cape Canso, some 430 kilometres northeast of the limit of the Gulf. The United States, Mr. President, has yet to provide a single word of explanation or justification as to how it arrived at this apparently lopsided definition of the Gulf of Maine area. One can only assume that the objective is to push the relevant area northeastwards, so that any boundary lying at the eastern end of the Gulf will appear to be in the middle of the relevant area.

As I have already said, for the United States, the definition of the relevant area seems to be an essentially formal exercise that has at best a marginal connection with the relevant geographical circumstances. What counts for the United States is the so-called "broad geographical relationship" of the two countries, by which it means their continental relationship. It defines this relationship in simplistic terms as north-south, on the basis of the east-west direction of the boundary west of the Great Lakes – on the western half of the continent (United States Memorial, p. 11, para. 20; p. 20, paras. 28-29; United States Counter-Memorial, (47) p. 14, para. 19; pp. 22-23, para. 29). But as you can see here in Figure 13, the geographical situation on the eastern half of the continent is more complex. More than 30 per cent of the United States landmass, excluding Alaska, lies to the north of parts of Canada. Large areas of Canada, including some 70 per cent of its population, lie to the south of parts of the United States. Whole regions of Canada and the United States are aligned in an east-west, rather than a north-south, juxtaposition. The whole of southern Ontario and Quebec, including the cities of Toronto, Ottawa and Montreal, lie directly to the east of Wisconsin and Michigan. And more to the point, the maritime provinces lie directly to the east of the New England states.

Canada's approach to the relationship of the Parties is based on the actual relationship of their *coasts* in the area to be delimited, not on the "broad relationship" of the two States. In so far as the relationship of territories, as opposed to coasts, may be relevant at all, it must be, as the United States itself acknowledges "the general geographical relationship of the two States in the area to be delimited" (V, United States Reply, p. 56, para. 85), or "the geographical balance between the Parties in the relevant area" (United States Memorial, p. 209, para. 328). Because the Parties have agreed that the area to be delimited is not the North American Continent nor the whole Atlantic seaboard,

but the Gulf of Maine area, the relevant general geographical relationship must be that of the two regions actually abutting the Gulf of Maine area, namely the maritime provinces and the New England states.

We can demonstrate the very considerable extent of the area involved simply by comparing the maritime provinces and New England to the western (151) Mediterranean as shown here in Figure 14. We can see that the area shown here on the map, is equivalent to an area from Spain in the west, to Yugoslavia in the east, and from the Balearic Islands in the south, almost to Germany in the north. The coasts that Canada considers to be relevant – the coasts from Newport to Lunenburg – are the equivalent of an area from Majorca to a point on the Italian peninsula near Elba. And the part of the land boundary that Canada considers to be relevant – the Maine/New Brunswick boundary – is equivalent to the combined length of the Franco-Italian and Franco-Swiss boundaries from the Ligurian Sea to Geneva.

After focusing its attention on the land boundary west of the Great Lakes in order to establish the north-south relationship of the two countries, the United States suddenly shifts its attention to the land boundary terminus, or to the terminus of the existing maritime boundary. There appears to be some confusion in the United States pleadings as to which of these two points is relevant to its argument, and both are used in an apparently indiscriminate *fashion*. As can be (160) seen here in Figure 15, the two points – the land boundary terminus and the international boundary terminus – are quite distinct, and separated by almost 20 nautical miles of the existing maritime boundary. The land boundary terminus here at the mouth of the St. Croix River was fixed in 1798 by the St. Croix River Commission, which was in effect the very first Canada-United States boundary arbitration. The terminus of the existing maritime boundary in the Grand Manan Channel was only fixed in 1925 by a bilateral commission established under the Treaty of Washington.

Transposing to the Gulf of Maine area the north-south relationship that prevails on the western half of the continent, the United States repeatedly asserts that the area of Nova Scotia that lies *south* of the land boundary is "aberrant" or "deviant" to the general geographical relationship (United States Memorial, p. 4, para. 11; p. 173, para. 286; p. 174, para. 289; United States Counter-Memorial, p. 4, para. 7; p. 14, para. 18; p. 24, para. 31; p. 193, para. 301; p. 265, para. 401*(b)*; United States Reply, p. 94, para. 161). That area of Nova Scotia, shown here in Figure 16 in red, covers some 26,000 square kilometres and is larger than the land area of Sicily. I submit, Mr. President, that that area is not "aberrant" or "deviant".

The only *direction* mentioned in either the 1621 Charter that first established the boundaries of Nova Scotia, or in the boundaries established with the United States in the Treaty of Paris of 1783, is the line drawn "northward" (1621 Charter), or "due north" (Treaty of Paris) from the source of the St. Croix River. What James I proposed in his 1621 Charter, and what Great Britain and the United States agreed to in the Treaty of Paris, was a north-south land boundary and an east-west division of the maritime provinces and the New England states along the "due north" line at 67° 47′ West longitude, as shown here in Figure 17 (Canadian Memorial, pp. 29-31, paras. 36-43).

We can test the contentions of the Parties on the juxtaposition of their territories by comparing the areas on either side of the latitude and longitude that each of them suggests represents the geographical axis in the area.

The area of the United States that lies to the *east* of the "due north" line – that is the diagonally striped shaded area *east* of longitude 67° 47′ West shown in Figure 17 – is less than one-fifth of the area of Nova Scotia that the United

States claims violates the north-south relationship of the Parties by lying south of the land boundary terminus, as shown in Figure 16. Moreover, the area of Maine that under the United States thesis violates the north-south relationship of the Parties by lying north of the land boundary terminus, is more than ten times larger than the area of Maine that lies to the *east* of the "due north" line. But the United States does not call that area of Maine north of the land boundary terminus "aberrant" or "deviant".

These comparisons demonstrate that the alignment of the maritime provinces and the New England states along the "due north" line incontestably establishes an east-west juxtaposition of the *territories* of the Parties abutting the Gulf of Maine area. This east-west alignment is particularly evident in the inner area, because this area lies within the territory so aligned. As shown in Figure 18, the extension of the due north line intersects the hypothetical closing line of the Gulf that divides the inner and outer areas only one nautical mile northeast of its midpoint.

We have already noted that there are no natural features in the outer area that serve to indicate the extent of the relevant coasts. The Atlantic coasts of both Parties extend indefinitely to the northeast and to the southwest. However, if what the United States calls "the general geographical relationship of the Parties" is taken as the point of departure or axis for determining the extent of the relevant coastlines in the outer area, these coastlines should be measured an equal distance on either side of the due north line. Because this line intersects the closing line of the Gulf *just one nautical mile off* its midpoint, *these relevant coasts must extend* an equal distance northeastward from Cape Sable and southwestward from Nantucket Island, as shown here in Figure 19. If one takes this approach for determining the extent of the relevant coasts in the outer area, one arrives at virtually the same result as by proceeding an equal distance on either side of the entrance points of the Gulf, because as one can see, the arrows in Figure 19 extend approximately to Lunenburg in the northeast and to just beyond Newport towards the head of Long Island in the southwest.

To sum up this part of my presentation, the area relevant to the delimitation is the Gulf of Maine area and only the Gulf of Maine area. The territories of the Parties abutting this area have a general east-west juxtaposition. The area encompasses the *whole* of the Gulf of Maine itself, that is, the whole of the area landward of the agreed closing line between Cape Sable and Nantucket Island. It also includes the seaward rim of the Gulf, and comparable portions of the coastlines abutting the Atlantic on either side of the Gulf. In the absence of natural features serving to indicate the precise extent of the relevant coasts, we may, on the basis of criteria directly related to the purpose of the zones being delimited, regard the relevant coasts as extending from Lunenburg, Nova Scotia, to Newport, Rhode Island.

II. The General Configuration of the Coasts

Mr. President, distinguished Judges, the second issue I propose to address this morning is the general configuration of the coasts. Before doing so, however, we have first to consider, and I trust dispose of, the United States novel approach to the relevant geographical circumstances based on the general direction of the east coast of North America. This method refashions the geography of the Gulf of Maine area through the imposition of generalized continental scale trends. The purpose of this macrogeographical approach is quite simply to eliminate the effect upon the delimitation of a certain part of the Canadian coast.

The United States approach is based on the following set of premises:

first, the macrogeographical framework;
second, the substitution of the notion of "direction" for the notion of "configuration";
third, the proposition that there is a legal requirement to determine a single general direction of the coasts throughout the relevant area;
fourth, the determination of the general direction of the coast of the continent, and then the superimposition of this continental direction onto the geography of the relevant area;
fifth, the distinction between primary and secondary coasts on the basis of their alignment to this single continental direction, and
finally, the proposition that where the extensions of these so-called primary and secondary coasts overlap, the extensions of the primary coasts are to prevail, at the expense of any extension of the secondary coast.

The whole United States argument with respect to the relevant geographical circumstances rests upon the reduction of the actual configuration of the coasts to a hypothetical single direction, and on the consequential distinction between "primary" and "secondary" coasts. Because neither of these notions is known to the law of maritime delimitation, and because they are given no justification in the United States pleadings, it is necessary carefully to analyse the United States argument before turning to an examination of the actual configuration of the coasts in the relevant area.

A. The False Hierarchy of Coasts

"The general configuration of the coasts of the Parties, as well as the presence of any special or unusual features" (*I.C.J. Reports 1969*, p. 54, para. 101 *(d)* (1), *dispositif*), was identified as the first of the factors to be taken into account by the Court in the *North Sea Continental Shelf* cases and the *Tunisia/Libya* case, as well as by the Court of Arbitration in the Anglo-French case. The Court, and the Court of Arbitration, saw a clear distinction between the *general* configuration of the coasts and the presence of incidental, special or unusual features. The delimitation must respect the general configuration – the effect of incidental, special features may have to be discounted or abated where they would produce a result inconsistent with the general coastal configuration, and therefore lead to an unreasonable result (see *I.C.J. Reports 1969*, pp. 49-51, paras. 89, 91 and 95).

It is significant that in all three judgments just cited, the same terminology "general configuration of the coasts" is used. The word "configuration" reflects the incontestable fact that, in nature, no single form is more normal than any other. In nature, coasts are frequently irregular, and have multiple forms and shapes. No coastal configuration is, so to speak, geographically preferred.

In its pleadings, Canada has adhered to the terminology found in the jurisprudence. However, as far as I have been able to discover, apart from a single reference to the *North Sea Continental Shelf* Judgment (United States Memorial, pp. 145-146, para. 259; see also p. 192, para. 310), the United States pleadings never use the term "general configuration of the coasts". Everywhere, the term is replaced by the formulation "general direction of the coasts" (United States Memorial, p. 3, para. 11; pp. 169-170, paras. 282-283; p. 170, fn. 7; p. 174, para. 288; p. 179, paras. 301-302; p. 185, para. 304; p. 201, para. 315; p. 209, para. 326; p. 214, Submission C (1); United States Counter-Memorial, p. 4, para. 7; p. 14, paras. 17 and 19; p. 17, paras. 20-22; p. 18, fn. 2; p. 184, para. 293; p. 193, paras. 301-302; p. 197, fn. 2; p. 198, para. 314; pp. 255-256, para. 396; p. 261, fn. 1; p. 265, para. 410 *(b)*; p. 267, para. 411; p. 271,

Submission C (1); United States Reply, p. 41, para. 64; p. 91, para. 156; p. 94, para. 160; pp. 94-97, para. 162; p. 141, paras. 234-236; pp. 145-146, paras. 246-250; p. 148, para. 256; p. 160, paras. 281-282 and fn. 2; p. 164, para. 289; p. 167, Submission C (1)). This formulation also has its place in the jurisprudence, but not as a substitute for the notion of general configuration. For in the jurisprudence, it is clear that the general direction of any part of the coastline is simply one aspect of its overall configuration.

In the *North Sea Continental Shelf* cases, the only reference to "the general *direction* of the coasts" relates to the method of calculating their length for the proportionality test (*I.C.J. Reports 1969*, p. 52, para. 98). The use of the term direction of the coasts in the *Tunisia/Libya* case clearly implies no presumption that coastal configurations can generally be characterized as having a *single* direction. On the contrary, the constant association of the term "general direction" with the notion of a "major" or "radical" *change* in the direction of the coasts, is inconsistent with any legal requirement to determine a single general direction of the coast for the whole of the relevant area.

Mr. President, it is not difficult to discern why our opponents have seen fit to abandon the word "*configuration*", that encompasses the complexity of the forms found in nature, in favour of the word "direction", that reflects the perfect symmetry of geometry.

For while the term "configuration" can describe any number of forms – linear, rectangular, circular, semicircular, concave, convex, oval, and so on – the term "direction" implies a purely linear concept. However, when coasts form the sides of a semicircular or rectangular concavity, there is necessarily an element of oppositeness that renders the linear concept clearly inapplicable. This contrasts with the situation where two coasts are aligned along a single general direction – that is, along a straight line – and thus are necessarily in an adjacent relationship. By creating, so to speak, a linguistic presumption that coasts are normally aligned along a single general direction, the United States seeks to relegate to an inferior status all coasts not so aligned, including, by definition, all coasts displaying any element of oppositeness.

The United States alleges that the Canadian line ignores the concavity that is the Gulf of Maine (United States Reply, p. 97, paras. 163, 164; see also *ibid.*, p. 94, para. 161; United States Counter-Memorial, p. 183, para. 292; p. 262, para. 407; p. 265, para. 410 *(a)*; United States Memorial, p. 192, para. 310; p. 209, para. 328). But, in fact, it is the United States line that ignores the concavity. Indeed, the very purpose of the United States thesis is to eliminate the vast concavity of the Gulf of Maine together with the extensive landmasses of Nova Scotia and Massachusetts that form its lateral wings.

As we have just seen, the first step in the development of this new legal-geographical thesis is the subtle, but significant, change the United States brings to the terminology used in the jurisprudence; that is the consistent substitution of the phrase "general *direction* of the coast" for the conventional phrase "general configuration of the coasts".

The United States then argues that:

> "Although it may be difficult in certain situations to define the general direction of a particular coastline, the law has not hesitated to make such *determinations*." (United States Memorial, p. 169, para. 282.)

It is clear from the United States pleadings that it is referring here to the determination of a *single* general direction of the coastline for the *whole* of the relevant area. The United States cites in support of this assertion the *Grisbadarna* award, the provisions for drawing straight baselines in the 1958 Territorial

Sea Convention and in the 1982 Convention on the Law of the Sea, and, finally, the Judgments of the Court in the *North Sea Continental Shelf* cases and in the *Tunisia/Libya case* (United States Memorial, pp. 169-170, para. 282).

What was involved in determining the general direction of the coasts in the authorities just cited by the United States? First, the *Grisbadarna* award. A reproduction of the map of the Grisbadarna area as shown in the United States
(74) Memorial is depicted here in Figure 20. This Grisbadarna map covers an area 7.5 nautical miles by 10 nautical miles. If we superimpose this map onto a map of the Gulf of Maine area, we see that the whole of the Grisbadarna arbitration area very nearly fits into Grand Manan Channel. So this is the micro-geographical scale that the Grisbadarna Tribunal had in mind in determining a single coastal direction. It should be noted in passing that a perpendicular to the general direction of the coast in the *Grisbadarna* case was used only for determining the boundary where it proceeded seaward of the islands fringing the coast. In the inner area, between those islands and the mainland coast, an equidistance line was used.

The next authority cited by the United States pleadings is the provision on straight baselines found in the 1958 and 1982 Conventions to which I have already referred. There, the criterion of the general direction of the coasts is directly and exclusively related to the requirement that the sea areas lying within straight baselines "must be sufficiently closely linked to the land domain to be subject to the régime of internal waters". The notion of the general direction in this context is clearly limited to a single specific purpose. Moreover, the *length* of the coastline to which the notion may apply is also severely limited by the very doctrine of the straight baseline method. Thus, neither of these Conventions provides even the remotest support by way of analogy for the United States notion of a single general direction of the coast for the Gulf of Maine area as a whole.

The next authority cited in the United States Memorial is the *North Sea Continental Shelf* Judgment. The only time the term "general direction" was used in that Judgment was in applying the proportionality test (*I.C.J. Reports 1969*, p. 52, para. 98). The Court stated that "one method" of measuring the coast was drawing a "*series*" of straight baselines on the relevant coasts. This can hardly be interpreted as authority for the proposition that the coasts should be artificially reduced to a single general direction. Moreover, the Court stated explicitly that the general *configuration* of the North Sea coasts was oval or semicircular (*I.C.J. Reports 1969*, p. 13, para. 3). It was this general configuration that it considered to be legally relevant for determining an equitable boundary. A circular configuration, far from having a single general direction, is by definition characterized by a *constantly changing* direction.

The next step in the construction of the United States geographical-legal thesis is the determination of the single general direction of the coast in this case. The United States Memorial states that:

> "The general direction of the coast in the relevant area, like the general direction of the east coast of North America, is northeastward, both within and beyond the Gulf of Maine." (United States Memorial, p. 170, para. 283.)

I respectfully refer the Court to pages 38 to 42 of the Canadian Counter-Memorial, where the United States method for determining a single coastal direction is analysed in detail. The important point is that the United States methodology is absolutely dependent upon a continental scale and the super-imposition of macrogeographical generalizations upon the actual geography of the relevant area.

All of the maps used by the United States to illustrate this so-called general direction extend either from Labrador to Florida (United States Reply, Fig. 3) or, as shown here in a reproduction of Figure 27 of the United States Memorial, which is Figure 21 of the Canadian oral argument, from Newfoundland to the Carolinas (United States Memorial, Figs. 26 and 27). The series of parallel lines used by the United States to determine the general direction of the coast is never once shown on a map of the Gulf of Maine area. That these lines have nothing whatever to do with the general direction of the coasts in the Gulf of Maine area can be demonstrated simply by showing them on a map of the area. It is immediately apparent from Figure 22 that these lines do not follow the coast at all, but, on the contrary, run away from it.

The issue dividing the Parties is whether the general *direction* of the east coast of North America, or the general *configuration* of the coasts of the Gulf of Maine area, is relevant to the determination of the boundary in this case. The real position of the United States is stated with masterful subtlety in its submissions. There, it includes among the relevant circumstances to be taken into account "the general northeastern direction of the east coast of North America, both within the Gulf of Maine and seaward of the Gulf" (United States Reply, p. 166, para. B 1 *(b)*). I repeat, "the northeastern direction of the east coast of North America, both within the Gulf of Maine and seaward of the Gulf". So according to the United States, it is not the general configuration of the coasts of the Gulf of Maine area that is to be taken into account, but the general direction of the east coast of North America superimposed onto the Gulf of Maine area.

The next step in the construction of the United States geographical thesis is to categorize as "primary" coasts the coasts that run parallel to the continentally determined general direction, and to categorize as "secondary" coasts those coasts that do not run parallel to that general direction. These terms are first introduced to the literature of maritime jurisdiction in paragraph 11 of the United States Memorial. There it is asserted that a relevant geographical circumstance to be taken into account is:

> "the radical changes in the direction of the coastline of Canada creating . . . the short secondary Canadian coastline at a right angle to the east coast of North America" (*United States Memorial, pp. 3-4, para. 11; pp. 19-20,* paras. 26 and 29; also see p. 173, para. 287).

I repeat, "at a right angle to the east coast of North America". So it is clear that the only rationale for the categorization of the coast of southwest Nova Scotia as "secondary" is that it is not parallel to the general direction of the east coast of the continent.

The fifth and final step in the construction of the United States geographical-legal thesis is to establish the consequences for maritime delimitation of this hierarchical categorization of coasts. The United States argues that because the coast of southwest Nova Scotia allegedly "deviates from the broad geographical relationship of the Parties" it "should not . . . deprive the United States of the extension of the primary coast [of Maine]" (United States Memorial, p. 191, para. 309). For when the extensions of the so-called primary and secondary coasts overlap, the caste system of coasts requires that the extension of the primary coast must prevail at the expense of the secondary coast. Indeed, the United States at one point goes so far as to suggest that Canada is not entitled to any continental shelf or fishing zone in the Gulf of Maine, but only to a 12-mile territorial sea (United States Memorial, p. 179, para. 302).

If the Court had adopted an equivalent approach in the *Tunisia/Libya* case, it would surely have concluded, on the basis of a macrogeographical perspective,

that the general direction of the north coast of Africa was east-west. And by parity of reasoning, the whole of the coastline of Tunisia from Ras Ajdir to Cap Bon ought to have been categorized as a "secondary coast" and allocated only a territorial sea, since it clearly "deviates" from the east-west general direction of the north coast of Africa.

This, Mr. President, is the United States view of the coastal geography and its consequences for delimitation. I hope I have demonstrated that none of the pillars underlying the United States system – the macrogeographical framework, the substitution of the notion of *direction* for the notion of *configuration*, and the caste system of coasts – none of these finds any support in legal reasoning or authority. For the purpose of all of them is to substitute an artificial construct for geographical fact. Having disposed of this novel system, we can now turn to the actual configuration of the coasts in the Gulf of Maine area.

B. The General Configuration of the Coasts of the Gulf of Maine Area

The Parties are agreed that a fact of fundamental importance in this case is that part of the area to be delimited lies inside a deep coastal concavity (see Canadian Reply, p. 61, para. 154 and fn. 62). The area of the concavity lying seaward of the Bay of Fundy is twice as wide as it is deep. It is also agreed that part of the area to be delimited lies in the open waters of the Atlantic, outside the concavity. Finally, the Parties are agreed that these inner and outer components or sectors are divided by a hypothetical closing line between Cape Sable and Nantucket Island, as shown here in Figure 23 (United States Memorial, p. 19, fn. 2; p. 173, para. 285; United States Counter-Memorial, p. 13, fn. 2; p. 21, (108) (117) fn. 2; p. 22, fn. 1; p. 184, para. 294; Figs. 21, 36 and 38; United States Reply, p. 119, para. 204).

As both Parties have noted, the division of the relevant area into two sectors, one lying within the territories of the Parties, and the other extending seaward from their coasts into the open waters of the Atlantic Ocean, evokes an analogy to the delimitation area in the Anglo-French Arbitration. An essential element of the Court of Arbitration's legal and geographical reasoning was the delimitation of each area by reference to the coasts that actually abut the area in question. In the *Tunisia/Libya* case, the Court also divided the delimitation area into two sectors, and drew the boundary in each sector by reference to different coasts.

The Parties have described the Gulf of Maine in several ways. Canada has described it as anvil-shaped (Canadian Memorial, p. 21, para. 20). The United States has depicted it variously as having a rectangular or semicircular configu- (108) ration, as for example in Figure 21 of the United States Counter-Memorial, reproduced here as Figure 24 of the Canadian oral proceedings.

The sea appertaining to concave coasts having the general configuration of a circle or semicircle will necessarily overlap and converge in the centre or axis of the circle or semicircle. It is not without interest that in an analogous situation in the North Sea, the Court accepted that the natural prolongations of the abutting coasts overlapped and converged. This conception of the coastal geography of the North Sea and of the consequent convergence of the continental shelves of the littoral States at a central point was illustrated in Figure 21[1] of the German Memorial, distributed this morning as Figure 25 of the Canadian oral proceedings. Elaborating on this conception, Judge Bustamante y Rivero stated that

[1] *I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, p. 85.

such a configuration, "demands that the concept of 'prolongation' be adapted to the exigencies of the geography". For:

> "In this kind of configuration, the natural prolongation of the territory of each State, starting from the shore, moves in a seaward direction towards the central area of the sea under consideration . . . The natural convergence of the lateral delimitation lines of adjacent shelves belonging to such seas in fact precludes the possibility of giving to those lines parallel directions and, in consequence, of obtaining shelves of a rectangular shape. This convergence therefore introduces a new factor, one which the necessity of avoiding all overlapping or encroachment renders practically inevitable, i.e., the progressive narrowing of the shelf as it approaches the central apex; the shelf then takes on approximately the form of a trapezium or triangle . . ." (*I.C.J. Reports 1969*, p. 61, para. 6.)

These were the precise words of Judge Bustamante y Rivero.

He regarded this convergence as "an aspect of the principle of the natural prolongation of the land territory". It is, in fact, a necessary consequence of the application of the fundamental principle of equality within the same order to a (108) particular coastal configuration. As shown earlier in Figure 21 of the United States Counter-Memorial, distributed this morning as Figure 24 of the oral proceedings, the application of the equidistance method to such a configuration results in the division of the area into sectors, which are automatically proportional to the length of the coasts forming the circumference of the circle. Judge Bustamante y Rivero was of the view that the apexes of such converging natural prolongations had to be determined by reference to a median point or line between opposite coasts, since the continental shelf of one State, and again I quote from his separate opinion, "must not be prolonged beyond the . . . apex of the shelf of the opposite State" (p. 62, para. 6 *(d)*).

In its Counter-Memorial, the United States observed that in a geographical situation such as the North Sea, where, "the continental shelves of the surrounding States tend to converge in the centre of the seabed, it is impossible to accord each State the entire area in front of its coast". The United States pointed out that "the sector lines proposed by the Federal Republic were intended to avoid the cut-off effect that would have been caused by drawing equidistant lines from the concave coast" (United States Counter-Memorial, pp. 237-238, para. 385). It further noted that the negotiated boundaries "closely approximate" the sector lines proposed by the Federal Republic. The United States thus recognizes *first* that the Gulf of Maine area seaward of the Bay of (108) Fundy has a semicircular general configuration as shown in Figure 21 of the United States Counter-Memorial, and *second* that in such a configuration the continental shelves of the surrounding States tend to converge at the centre of the semicircle, as shown in Figure 21 of the German pleadings which the United States has specifically approved.

Returning to the Gulf of Maine area, the point where the apexes of the converging maritime zones meet should be determined by reference to the median line between the opposite coasts of Nova Scotia and Massachusetts. (108) Figure 21 of the United States Counter-Memorial shows that, in a semicircular gulf the midpoint of the closing line is approximately equidistant from all the surrounding coasts. But the convergence of the respective zones at the midpoint of the closing line is not dependent upon any particular method of delimitation. It is rather, as Judge Bustamante y Rivero put it, "an exigency of geography". In such a configuration, radial lines from the coast to the centre of the semicircle divide the sea area into sectors that are perfectly proportionate to the length of

the coasts forming its circumference, as shown here in Figure 26B. However, as shown in Figure 26C, a line such as the United States boundary proposal drawn perpendicular to an alleged general *direction* of *continental* coasts produces a result incompatible with that indicated by the general configuration of the *relevant* coasts. Such a result would be necessarily *disproportionate* to the length of the coasts abutting the concavity. As shown in Figure 26D, a line drawn perpendicular to the alleged general direction of the east coast of the continent, as proposed by the United States, would allocate to the United States the sea areas between the black and green lines that are naturally appurtenant to the Canadian coasts abutting the Gulf of Maine.

(37) The United States has also visualized the Gulf of Maine as having a rectangular general configuration (United States Memorial, Fig. 31; United (37) (110) States Counter-Memorial, Figs. 23, 24 and 25; United States Reply, Figs. 2, 3 (111) (184) and 8). This conception of the Gulf is most clearly depicted in Figure 8B of the United States Reply which was distributed to the Court this morning as (185) (188) Figure 27 of the oral proceedings.

According to this conception, the coasts of Nova Scotia and Massachusetts form the lateral sides of the rectangle while the coast of Maine forms its "back". Because the Gulf is twice as wide as it is deep, this rectangle can be divided into two squares, one on the eastern, and the other on the western side of the Gulf. (37) As shown in Figure 31 of the United States Memorial and Figure 23 of the Counter-Memorial, distributed to the Court this morning as Figure 28 of the oral proceedings, the square on the eastern side of the Gulf is characterized by an overlapping of the natural prolongations of the Canadian and United States coastal fronts.

The options for drawing a boundary in such a situation were clearly set out by the Court in the *North Sea Continental Shelf* cases. To use the words of the Court:

> "[S]uch a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation . . ." (*I.C.J. Reports 1969*, p. 52, para. 99.)

There has been no agreed division or arrangement for the joint exploitation of overlapping zones in the Gulf of Maine area. Thus, at a minimum, this area here, which even the United States recognizes as an area of overlapping extensions, must be divided equally between the Parties. Where the area of overlap has roughly the configuration of a square, and where the coasts of the Parties fronting the area of overlap are aligned approximately at a right angle, the appropriate method of dividing this area equally is by means of a diagonal line. As shown in Figure 29 such a line divides the square into two equal triangles.

This partition of the eastern part of the Gulf into two equal triangles is logical and effects an equitable division of a concavity such as the Gulf of Maine. It is obvious that a rectangular gulf, twice as wide as it is deep, can be divided into two equal squares, and that these squares can be subdivided into two equal triangles. The Gulf may then be regarded as comprised of four triangles, with one triangle appertaining to each of the coasts forming the lateral sides of the Gulf and two triangles appertaining to the longer coast at its back. If the dimensions of the rectangle are fixed by reference to the agreed closing line of the Gulf, then the apexes of the four triangles will meet at the midpoint of the closing line, as shown here in Figure 30A.

Figure 30 shows that the division of the part of the Gulf lying seaward of the Bay of Fundy into four equal triangles divides it in a manner that is

proportionate to the relative length of the abutting coasts. The division of this part of the Gulf by means of a perpendicular to *only one* of its three sides, as shown here in Figure 30C, would, however, produce a disproportionate result. For, as shown in Figure 30D, it would allocate to the United States this sea area between the green and black lines that is naturally appurtenant to the coast of Canada.

Of course the Gulf is not a rectangle or a semicircle, but an anvil-shaped concavity. As the United States points out, however, jurisdiction over the head or point of the anvil, the Bay of Fundy, is not in contention. But, for that matter, neither is jurisdiction over the western half of the Gulf of Maine at issue in this case. Thus, while the coasts of the Bay of Fundy, and the western part of Maine and New Hampshire abut the relevant area, and must be taken into account in appreciating the overall geographical situation, neither of these coasts is in a controlling position for the delimitation. The coasts that must control a delimitation in the inner area seaward of Point A are, on the Canadian side, the coast of southwest Nova Scotia seaward of Brier Island on Cape St. Marys and, on the United States side, the coast of Maine east of Penobscot Bay, and the coast of Massachusetts southeast of Boston or Cape Ann.

Is the relationship of these coasts to each other vis-à-vis the area to be delimited within the Gulf itself essentially one of oppositeness, or one of adjacency?

Both Parties have acknowledged that the coasts of southwest Nova Scotia and Maine are aligned at approximately a right angle (United States Reply, p. 94, para. 161). Is this a relationship of oppositeness or of adjacency? The United States in its pleadings has described Norway and Sweden, seaward of the area of the *Grisbadarna* award, as opposite States, and has acknowledged that they delimited their continental shelf using the equidistance method, seaward of the Grisbadarna arbitration area. It is therefore interesting to note that the coasts controlling the delimitation in that area are aligned roughly at a right angle.

The United States admits that Nova Scotia lies *opposite* the international boundary terminus (United States Memorial, p. 174, para. 290). If the Nova Scotia coast lies opposite the international boundary terminus, it must also lie opposite the coast of eastern Maine. However, the United States asserts at the same time that the relationship of the Maine and Nova Scotia coasts is essentially adjacent, both within the Gulf and seaward of the Gulf. The only arguments advanced in support of this view are that the Parties share a land boundary and that they are adjacent because they are not opposite (United States Counter-Memorial, p. 21, para. 26; United States Reply, p. 119, para. 204).

As to the first argument, by parity of reasoning, Italy and Yugoslavia, which also share a land boundary, must be adjacent States on the Adriatic. As to the second argument, the fact that the coasts are not perfectly opposite certainly does not mean that they are perfectly or predominantly *adjacent*. It can be demonstrated geometrically that where the coasts are aligned at a right angle, the relationship is at least as much opposite as it is adjacent. I do not propose to take up the time of the Court with such a demonstration this morning; it is, after all, a matter of common sense. A comparable situation in the *Tunisia/Libya* case led the Court to observe that:

> "the major change in direction undergone by the coast of Tunisia seems . . . to go some way, though not the whole way, towards transforming the relationship of Libya and Tunisia from that of adjacent States to that of opposite States . . ." (*I.C.J. Reports 1982*, p. 88, para. 126).

As to the relationship of the coasts of southwest Nova Scotia and Massachu-

setts, I would simply note that after ignoring this relationship in its earlier pleadings, the United States has acknowedged in its Reply what can easily be established by a glance at the map, namely that the coasts of southwest Nova Scotia and Massachusetts lie opposite each other (United States Reply, p. 112, para. 194).

III. The Presence of Incidental Special Features and the Nature of Special Circumstances

Mr. President, distinguished Judges, having addressed the general configuration of the coasts I would now like to turn to the nature of special circumstances and the presence of incidental special features in the Gulf of Maine area. In particular, I propose to discuss Canada's contention that Cape Cod and Nantucket constitute special circumstances, and also the United States contention that Nova Scotia itself constitutes a special circumstance.

The Parties are in agreement that Article 6 of the Continental Shelf Convention is binding on them and applicable in this case. The question of special circumstances is consequently a matter of vital importance. For the applicable law requires the delimitation of the area on the basis of the median or equidistance line unless special circumstances are found to be present. And because Article 6 is the particular expression of a general norm, the question of special circumstances is also pertinent to a delimitation effected under customary law.

A. Scale and Size

While there is no conventional or judicial definition of special circumstances as such, it is possible to deduce the meaning of the term from the jurisprudence. To use the words of the Court in the *North Sea Continental Shelf* cases, a special circumstance is an "unusual" or "incidental special feature" (*I.C.J. Reports 1969*, pp. 49-50, para. 91 and *dispositif*, pp. 53-54, para. 101) – one that "produces results that appear on the face of them to be extraordinary, unnatural or unreasonable" (p. 23, para. 24).

The question is addressed in some detail in paragraph 89 of that Judgment, where the key area is the progressive *magnification* or *exaggeration* of the effect of a particular feature as the boundary extends seaward from the coast, producing *unreasonable* results (*I.C.J. Reports 1969*, p. 49, para. 89). The Court of Arbitration in the Anglo-French case put it this way: "In the case of lateral boundaries the effect of any irregularity in the coastline is automatically *magnified*, the greater the distance the boundary extends from the shore". And it went on to say that this characteristic of the equidistance method "marks a material difference between a geographical situation of 'opposite States' and one of 'adjacent States'" (Decisions, p. 55, para. 87). It also linked the question of "special circumstances" to proportionality, stating that proportionality was "a criterion to assess the distorting effects of particular geographical features and the extent of the resulting inequity" (Decisions, p. 117, para. 250).

The notion of special circumstances therefore involves the *exaggeration* or *magnification* of the effects of an incidental special feature, thereby producing a disproportionate and unreasonable result. This occurs most typically where a boundary extends a great distance seawards from laterally aligned or adjacent coasts, although it is not confined to such coasts.

Thus the notion of special circumstances necessarily involves questions of scale and of size. How can one determine whether the effect of a coastal feature is

exaggerated, or whether it produces a disproportionate result? Only, I submit, by taking into account the size of the feature in question and its relationship to the general configuration of the coasts, together with the extent of the sea area that would be attributed to one State or to the other, as a result of this feature's effect upon an equidistance line.

In contending that Nova Scotia is a special circumstance, the United States dismisses the relevance of scale and size. It argues that the issue is only one of location (United States Reply, p. 107, fn. 3). According to the United States, the Court of Arbitration in the Anglo-French case based its decision concerning the proper effect of the Channel and the Scilly Isles exclusively upon their location, without any regard to their size. But the Court of Arbitration referred to the size of these features several times (Decisions, p. 90, para. 187; p. 92, para. 192; pp. 94-95, para. 199; and p. 116, para. 248), and it clearly gave considerable weight to this factor in determining the appropriate method of delimitation in each region.

In addressing the Canadian submission that Cape Cod and Nantucket Island constitute special circumstances, the United States argues that "Cape Cod differs from the other geographic features to which Canada would have the Court make a comparison" because its size and population are larger than the Scilly Isles, the Kerkennahs, or the Channel Islands (United States Counter-Memorial, p. 25, fn. 2). Since the United States believes that the size of Cape Cod and Nantucket Island are legally relevant to the question whether they constitute special circumstances, it is difficult to see why the same consideration should not apply to the question whether Nova Scotia constitutes a special circumstance.

(152) Figure 31 compares Nova Scotia to several regions in Europe. It can be seen in
(152) Figure 31B that the extent of the Nova Scotia landmass lying behind the coast fronting the Gulf of Maine is equivalent to the breadth of the United Kingdom from Cornwall in the west to Kent and East Anglia in the east. The Court of Arbitration found that the coast of Cornwall alone was the coast relevant to the delimitation in the Atlantic region (Decisions, p. 114, para. 243). But as the Chamber can see, the coastal front and landmass of southwest Nova Scotia that Canada considers to be relevant to the delimitation of the other area is substantially greater than the coastal front and landmass of Cornwall. Yet the Court of Arbitration gave full weight to the Cornish coast in drawing an equidistance line boundary in the Atlantic region.

(152) Figure 31E shows that the extent of the Canadian coast bordering the Gulf of Maine is equivalent to an area of northwestern France extending from Finistère in the west to Paris in the east. The Court of Arbitration found that the coasts relevant to the delimitation in the Atlantic region were essentially those of Finistère here, at the western end of the Britanny peninsula (Decisions, p. 116, para. 248). But it can be seen that the coastal front and landmass of southwest Nova Scotia are roughly equivalent to those of the whole of Britanny.

(152) Figure 31C shows that the landmass of peninsular Nova Scotia is substantially greater than that of Sardinia and Corsica combined, and that the landmass of southern Nova Scotia roughly approximates that of Sardinia.

(152) Finally, in Figure 31F, we can see that the extent of the coast and landmass of Nova Scotia is equivalent to that of the whole of southeastern Italy from the southern coast of Sicily to the Adriatic coast of Apulia.

These comparisons demonstrate the great expanse of the Nova Scotian landmass and the sweep of its relevant coasts. The Nova Scotian landmass backing its coastal front on the Gulf of Maine is some 300 nautical miles deep. This is surely not what the Court had in mind when it referred to "incidental, special features" or to coastal "irregularities" that depart from the general

coastal configuration. In the geographical framework of the Gulf of Maine area, the area relevant to this delimitation, a feature of this size actually defines the general coastal configuration. In this framework, only features of an entirely different order of magnitude – minor features – can be considered incidental to the general geographical situation.

Mr. President, Canada has demonstrated in its written pleadings that Cape Cod and Nantucket Island constitute special circumstances whose effect upon an equidistance line has to be discounted in order to produce an equitable result in this case. In response, the United States has advanced three arguments. First, the United States has argued that Cape Cod and Nantucket played an important role in the history of the United States during the 17th, 18th and 19th centuries (United States Counter-Memorial, p. 25, para. 34 and fn. 3). This may well be true, but it is difficult to see what relevance it has to special circumstances in the delimitation of a modern 200-mile resource zone. Second, the United States argues that Cape Cod and Nantucket are larger than features that have been considered as special circumstances in the jurisprudence (*ibid.*, p. 25, fn. 2). Again, this is so. But how does it fit with the United States view that the issue of special circumstances "is not one of size but of location and the effect upon an equidistance line"? (United States Reply, p. 107, fn. 3). Those are the precise words of the American pleadings. In particular, how does it fit with the United States contention that Nova Scotia is a special circumstance, given that Nova Scotia is some 38 times larger than Cape Cod and Nantucket combined?

Third, the United States argues that Cape Cod has less effect upon an equidistance line than does the Nova Scotia peninsula (United States Counter-Memorial, p. 25, para. 34 and fn. 2). Again, this may well be true, but essentially irrelevant. For, as will be demonstrated by my colleague, Professor Malintoppi, the effect of Cape Cod and Nantucket upon the sea area attributed to the Parties under an equidistance delimitation is approximately ten times the effect of peninsular Nova Scotia when the relative sizes of these features are taken into account. For while peninsular Nova Scotia attracts, at the expense of the United States, a sea area equivalent to just over 80 per cent of its landmass, Cape Cod and Nantucket attract, at the expense of Canada, a sea area almost 850 per cent of their combined landmass. These comparisons show, I submit, that it is Cape Cod and Nantucket, and not Nova Scotia, that have a disproportionate effect upon a delimitation in the Gulf of Maine area. It is these features, and not Nova Scotia, that constitute, in law, a special circumstance, or in the language of customary law, "a circumstance creative of inequity".

To briefly review Canada's position on the geographical issues addressed thus far, our views are as follows:

First, the appropriate geographical framework. Canada submits it is the Gulf of Maine area.

Second, the definition of the Gulf of Maine area – for the United States does recognize *formally* at least that the Gulf of Maine area is the relevant area. Canada defines that area on the basis that the Gulf of Maine forms its axis and that the relevant coasts abutting the outer area extend in a comparable distance on both sides of the Gulf of Maine itself.

Third, the general configuration or general direction of the coasts. Both Parties acknowledge that the coasts abutting the Gulf of Maine seaward of the Bay of Fundy may be visualized as having a semicircular or rectangular general configuration.

Fourth, with respect to the inner area, Canada submits that the maritime zones appertaining to coasts with a general configuration such as that of the Gulf of

Maine overlap and converge towards the centre, this centre being defined by reference to the median line between the opposite coasts of Nova Scotia and Massachusetts.

Finally, Cape Cod and Nantucket are incidental special features that depart from the general configuration of the coasts of the Gulf of Maine area, and that produce a distorting effect upon the course of an equidistance line. They therefore constitute special circumstances the disproportionate effect of which has to be eliminated in order to achieve an equitable result.

The Chamber rose at 1 p.m.

FOURTH PUBLIC SITTING (4 IV 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

III. The Presence of Incidental Special Features and the Nature of Special Circumstances *(cont.)*

B. The "Cut-Off" Effect

Mr. HANKEY: Mr. President, distinguished Judges, yesterday I addressed the issues of the appropriate geographical framework and the general configuration of the coasts, as well as the presence of incidental features or special circumstances.

I had the honour to draw to your attention the formal agreement of the Parties that the Gulf of Maine area is the relevant area for determining the relevant circumstances in this case. I also had the honour to point out that the Parties are agreed that the Gulf of Maine area is comprised of two sectors or components, divided by a hypothetical closing line between Cape Sable and Nantucket Island. We saw that the territories of the Parties abutting the Gulf of Maine area have an essentially east-west juxtaposition, and that their coasts abutting the Gulf of Maine area seaward of the Bay of Fundy have a semicircular or rectangular general configuration. Cape Cod and Nantucket depart radically from the general coastal configuration, and have an effect upon the equidistance line altogether disproportionate to their size and their links to the area being delimited. It is equally evident that in the geographical framework of the Gulf of Maine area, a feature of the size and importance of Nova Scotia establishes the general configuration. But the United States specifically denies the relevance of size and scale to the question of special circumstances, contending that the question is "exclusively one of location and the effect upon an equidistance line".

The United States contention that Nova Scotia constitutes a special circumstance in spite of its substantial size and extensive coastline is apparently based on the view that Nova Scotia "cuts off" the coast of Maine from sea areas that properly appertain to it. Today I shall begin my presentation by addressing the United States contention concerning the "cut off" effect. Then I shall move on to discuss the relationship of the outer area, and in particular of Georges Bank, to the relevant coasts of the Parties.

In Canada's view, the United States argument concerning the alleged cut-off effect of Nova Scotia is based on a misinterpretation of the *North Sea Continental Shelf* cases, and in particular upon a misunderstanding of the arguments and diagrams in the German pleadings in that case.

The phenomenon that the United States now calls the "cut-off" effect, where an equidistance line swings out laterally across a State's coastal front, was called the "diversion" effect in the German pleadings. It was the convergence of two such lines before the coastal front of a third State situated between two other States that the German pleadings and the Judgment – with one exception (para. 44) – referred to as the "cut-off" effect. Where two States "cut off" a third State from its full extension to the outer limits of continental shelf or economic zone jurisdiction, that third State is now said to be "shelf-locked", or "zone-locked". There is clearly no question of such a "cut-off" in the Gulf of Maine

area, because no third State is involved, and the United States is in no way "zone-locked", or "shelf-locked". What the United States alleges to occur in the Gulf of Maine area is what the German pleadings called the "diversion effect". This question of terminology may be of some importance, for the United States seems to imply that the Canadian line prevents it from extending to the outer limits of coastal State jurisdiction in the Gulf of Maine area, a suggestion clearly at odds with the facts.

The "diversion effect" – as opposed to the "cut-off" effect – is very clearly demonstrated in a graph used in the argument of Professor Jaenicke in the *North Sea Continental Shelf* cases. The fact that the United States had adopted the graph to a 200-mile zone and produced it twice in its pleadings (United States (31) Memorial, Fig. 25; United States Reply, Fig. 5) is no doubt a tribute to its utility as an analytical tool. But the United States use of this graph – which is clearly designed to show some analogy with the Gulf of Maine area – is dangerously misleading.

(67) This graph, shown here on the lightbox as Figure 32A, has several distinct characteristics. In the *first* place, the convex feature of headland appears only on the coast of one State. In other words, the concavity here formed by the headland is two-sided, rather than one-sided. *Second*, the distance of the seaward projection of the convex coast is very short, relative to the length of the long recessive coast. Here, the 100-nautical-mile length of the straight recessive coast is 20 times that of the five-nautical-mile convex coast. *Third*, the distance of the seaward project of the convex coast is also very short in relation to the distance from the coast to the outer limit of coastal State jurisdiction. Here, the distance to the limit of coastal State jurisdiction – 200 miles – is 40 times the length of this short convex coast of five miles. *Fourth*, the convex coast constitutes the façade of a relatively small landmass. It is clearly depicted and labelled in the diagram as a headland, and has a landmass of only 75 square nautical miles. *Fifth*, as the equidistance line proceeds seaward, it is progressively diverted in front of the long recessive coast. In other words, as the line extends further from the coast, the lateral extent of the diversion increases. By the time the equidistance line reaches the 200-mile limit, it has swung laterally some 44½ nautical miles in front of the recessive coast.

Thus, the diversion of more than 44 miles in front of the State with the recessive coast is caused by the coast of a headland that projects only 5 miles to seaward. The distance of the lateral diversion caused by this short protruding coast is almost nine times its length. Clearly this is what the Court had in mind when it stated that a "slight irregularity in a coastline is automatically magnified by the equidistance line" as it proceeds seawards "and the further from the coastline the area to be delimited, the more unreasonable the results" (*I.C.J. Reports 1969*, p. 49, para. 89). A lateral diversion across the coastal front of a second State, to a distance nine times the length of the coast causing the diversion, unquestionably produces a disproportionate and unreasonable result. The marine areas that would be attributed to the State with the convex coast are clearly disproportionate both to the size of the feature causing the distortion and to the length of its coastal front. In this instance, a headland with a landmass of only 75 square nautical miles would cause some 5,800 square nautical miles of sea area to be attributed to one State at the expense of the other. In other words, the sea area that this feature attracts is more than 77 times, that is, 7,700 per cent, of the size of the feature itself.

A final characteristic of the diversion effect shown in this Figure is that the "diversion" only begins to materialize once the equidistance line leaves the square-shaped concavity lying between the two coasts. It is only from then on

that the diversion becomes gradually more and more pronounced and disproportionate. This characteristic is easily demonstrated by enlarging the bottom
(207) left-hand corner of the graph, shown here in Figure 33. This here then is the 5-mile headland. One can see that within this square-shaped sea area the equidistance line effects an equal partition by dividing the square into two equal triangles. Within this area, the relationship of the coasts is predominantly opposite, but as you move outside the square-shaped area, the relationship of the coasts becomes predominantly adjacent. And it is only here in the area outside the square area that there exists the possibility of an unequal treatment of the two coasts. Within the square area, on the other hand, the two coasts of equal length are treated equally.

It should be noted that the other diagrams in the German pleadings demonstrating the diversion effect all included these essential characteristics of distortion, progressive magnification, and disproportion. In every case, the distance of the lateral diversion across the longer coastal front is substantially greater than the seaward projection of the shorter convex coast. In the absence of an offsetting convex feature on the coast of the second State, the lateral diversion across its coast continues indefinitely, so that the effect of the convex coast is progressively magnified as the line extends seaward. But this magnification only occurs where there is no offsetting convex feature on the coast of the second State.

Thus, Mr. President, it is the imbalance in the configuration of the two coasts that enables the first State to obtain a disproportionate effect from its convex configuration. Where, however, there is a countervailing feature on the coast of
(206) the second State, as shown here in Figure 32B, there is no imbalance, no exaggeration, and no disproportion. For then the convex configuration on the coast of the second State transforms into a three-sided concavity what would otherwise be a two-sided, right-angled indentation. Again, this can be seen more clearly if part of the diagram is enlarged. Where the concavity is twice as wide as it is deep, the equidistance line bisects the angle formed by the convex coast of the headland on the left and the coast at the back of the concavity. And just as it passes through the mouth of the concavity, midway between the convex coasts on either side, the line is deflected straight out to sea by the convex coast on the right-hand side of the concavity. The distance the equidistance line is diverted laterally in front of the coast at the back exactly equals the distance of the projection seaward of the convex coast on the headland on the left. The two coasts of equal length are treated equally. I submit there is no imbalance, no progressive exaggeration, and no disproportion in the result.

The geographical situation represented in the Jaenicke graph, which is Figure
(206) (207) 32A, of which Figure 33A is the enlargement, bears no comparison with the actual geographical situation in the Gulf of Maine area. Here in the Gulf of Maine area the length of the Canadian coast abutting the Gulf is almost 300 nautical miles, measured by a series of straight line segments following the markedly concave coast of the Bay of Fundy. Moreover, as the United States repeatedly emphasizes, the Nova Scotian coastal front at Cape Sable projects over 100 nautical miles seaward of the coast at the back of the Gulf. This is 20 times the 5-nautical-mile projection seaward of the coast in the Jaenicke graph.

In order to replicate the geographical situation shown in the Jaenicke graph, the United States coast in the Gulf of Maine would have to continue in the same direction beyond Cape Elizabeth for a distance of some 2,000 nautical miles to a point near Monterrey, Mexico. By the same token, in order to produce a diversion effect in front of the United States coast equivalent to that depicted in

the Jaenicke graph, the equidistance line would have to extend some 4,000 nautical miles seaward from the North American coast. The equidistance line would then swing out laterally some 900 nautical miles in front of the United States coast. In the final analysis the whole United States critique of the Canadian line is absolutely dependent upon a macrogeographical framework and scale, for only on a continental scale can Nova Scotia be reduced to the proportion of an incidental headland.

Perhaps the most important difference between the Jaenicke graph and the actual geographical situation in the Gulf of Maine area is the fact that the concavity in the Jaenicke graph is two-sided. In other words, both the convex coasts of Massachusetts and the concave Canadian coast on the Bay of Fundy are absent from this diagram. If we correct the diagram by adding a feature (207) representing the Massachusetts coast as shown here in Figure 33B, we see that the equidistance line is not disproportionately diverted outside the Gulf. As soon as the line leaves the concavity, any possible diverting effect that might have been caused outside the concavity is prevented or offset by the countervailing effect of the convex coast on the right-hand side of the concavity.

Mr. President, the inapplicability of the "cut-off" model to the Gulf of Maine area is demonstrated by laying the Jaenicke graph over a map of the Gulf of Maine area. Figure 34 shows that the equidistance line produces no magnification or exaggeration in the Gulf of Maine area. In the eastern half of the Gulf, the equidistance line passes in front of exactly 101 nautical miles of United States coast. By comparison, the line passes in front of a long concave Canadian coast measuring more than 300 nautical miles along a series of straight-line segments. It is apparent that if any coast is disadvantaged by the equidistance line, it is the long and markedly concave Canadian coast on the Bay of Fundy.

The equidistance line is prevented from passing in front of the coast of Maine that abuts the western half of the Gulf by the convex coast of Massachusetts, which deflects it straight out to sea. The line in the outer area is roughly perpendicular to the closing line of the Gulf, to the coasts of Maine and New Brunswick at the back of the Gulf, and to the average general direction of the Atlantic coasts of Nova Scotia and Massachusetts and Rhode Island on either side of the Gulf.

Even if one were to ignore the Bay of Fundy and adopt the United States approach of representing the Canadian coastal front by a single straight line of 100 nautical miles from the international boundary terminus to Cape Sable, the lengths of the two coastlines in front of which the equidistance line swings would be almost exactly equal, 101 nautical miles of the United States coast and 100 nautical miles of the Canadian coast. Thus, the essential characteristic of the diversion effect – the magnification or exaggeration of a coastal irregularity as the line proceeds seaward – is not present in the Gulf of Maine area. This is because in the area outside the concavity, the equidistance line is not controlled by the recessive or concave coast at the back of the Gulf, but rather by the opposite coasts of Nova Scotia and Massachusetts that actually abut the area to be delimited.

IV. The Relationship of Georges Bank to the Coasts of the Parties

It is in this outer area, off the coasts of Nova Scotia and Massachusetts, that Georges Bank is found. This brings me to the last issue I propose to address, namely the relationship of Georges Bank to the relevant coasts. This is, of course, the decisive geographical issue dividing the Parties, since Georges Bank constitutes the real object of the dispute.

Georges Bank is by far the largest of a series of banks and shoals that together form a shallow rim or sill on the southern or seaward side of the Gulf. The classical description of this region is found in works by Henry Mitchell and Henry Bigelow published as official reports by the United States Coast and Geodetic Survey in 1881 and in 1924 respectively. The reports by Bigelow were described in the United States Memorial as among the "leading scholarly works" in the field (**II**, United States Memorial, p. 71, para. 123).

Mitchell described the "seaward limit" of the Gulf as

> "marked by a chain of shoals, forming, in effect, a submerged dam or barrier intersected by several channels which separate and distinguish shallow districts known as Nantucket Shoals, Georges Bank, Brown's Bank, and Seal Island Bank".

Mitchell noted that the channels had "received no distinctive names upon the chart" and that none were "known to be in general or uniform use". Of the names Mitchell adopted, only the Great South Channel, lying between the Nantucket Shoals and Georges Bank, remains in use today. It was only during recent times that the channel between Georges Bank and Brown's Bank came to be called the Northeast Channel; neither Mitchell nor Bigelow used that term. Mitchell described the sill as lying along the arc of a circle with a radius of 167 nautical miles. The length of this arc from Nantucket to Cape Sable, he gave as 259 nautical miles (H. Mitchell, "Physical Hydrography of the Gulf of Maine", in *Report of the Superintendent of the U.S. Coast and Geodetic Survey*, June 1879, Washington, Government Printing Office, 1881, App. 10, p. 175. This document was deposited with the Registrar on 29 March 1984).

This conception of the seaward rim or sill of the Gulf as following the arc of a circle extending from Nantucket Island to Cape Sable – shown here in Figure 35 – has been received into the geographic and scientific literature as the standard description of the region, and is found, for example, in the extract from Bigelow annexed to the United States Memorial (Documentary Annexes, Vol. II, Ann. 33). A recurring feature of this literature is the association of the seaward rim of the Gulf with the coasts of southwest Nova Scotia and southeast Massachusetts.

It is these coasts of southwest Nova Scotia and southeast Massachusetts on either side of Cape Sable and Nantucket Island that Canada in its pleadings has called the "coastal wings" of the Gulf of Maine area (**III**, Canadian Counter-Memorial, p. 61, para. 146). The coastal wing on the Canadian side may be considered as extending from Cape St. Marys at the southern entrance to the Bay of Fundy, along the Canadian coast bordering the Gulf, around Cape Sable, and northeast along the Atlantic coast of Nova Scotia as far as Lunenburg. The United States coastal wing may be conceived as extending from Cape Ann, on the coast of Massachusetts, along the coast of Massachusetts bordering the Gulf, around Cape Cod and Nantucket Island, and southwest along the United States coast, the Massachusetts and Rhode Island coast, bordering the Atlantic Ocean as far as Newport, or perhaps to Connecticut.

It is easier to see the relationship of the coastal wings to the seaward rim of the Gulf and, in particular, to Georges Bank, if we place the map on its side. It can be seen in Figure 36 that, apart from a purely local configuration of Cape Cod and Nantucket Island, which project into the sea away from the United States coast, apart from these geographic anomalies here, the Canadian and United States coastal wings are in a relationship of almost perfect symmetry to each other vis-à-vis Georges Bank.

Mr. President, the Court has recently noted that:

> "The geographic correlation between the coast and submerged areas off the coast is the basis of the coastal States legal title . . . The coast of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to determine how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position." (*I.C.J. Reports 1982*, p. 61, paras. 73-74.)

Thus, as a necessary first step to the resolution of this dispute in accordance with the applicable law, an answer must be given to the question "To what parts of the coastlines of the Parties does Georges Bank appertain?"

The answers provided by the Parties to this question could not be more clear-cut and more different. Throughout the course of the present dispute Canada has argued that the Bank appertains to the coasts of southwest Nova Scotia and southeast Massachusetts. During the discussions and negotiations from 1970 to 1979, the United States argued that the whole of Georges Bank was the natural prolongation of Massachusetts. However, we now discover from the United States Memorial that Georges Bank is no longer the natural prolongation of Massachusetts, or of Nova Scotia, but has become instead the natural prolongation of Maine and New Hampshire. The result of course is exactly the same – the whole of the Bank goes to the United States but the legal justification and the geographical rationale are completely different.

Why has the United States abandoned its earlier position that Georges Bank is appurtenant to Massachusetts in favour of its current position that the Bank is *appurtenant to Maine*? The answer is not hard to find. If there exists no fundamental discontinuity in the sea-bed of the region – a fact now admitted by the United States; and if the geographical relationship between the coasts and the area to be delimited constitutes the single most important relevant circumstance – a fact now also admitted by the United States; and if the coasts to which Georges Bank is geographically related are the opposite coasts of Nova Scotia and Massachusetts; then it follows, at least prima facie, that the delimitation of the outer area should follow a median line. Since the United States now admits that it is the coasts, rather than submarine features, that must control the delimitation, it obviously has had to change its arguments. For if one accepts that the Bank appertains to the coast of Massachusetts, there is no conceivable reason why it should not appertain equally to the coast of Nova Scotia, since the Bank is situated off and midway between these two coasts. In order to avoid this inescapable conclusion, the United States now contends that Georges Bank appertains in its entirety to the relatively remote coasts at the back of the Gulf. In support of this novel proposition, the United States has developed a new doctrine of maritime delimitation – a doctrine based on macrogeography and geopolitics and upon a caste system of primary and secondary coasts; a doctrine, I might add, that hitherto has been unknown to either geography or to law.

The Canadian position that Georges Bank appertains to the coasts of Nova Scotia and Massachusetts is based on more conventional consideration. In the first place, the whole of Georges Bank – the whole of Georges Bank – lies closer to Nova Scotia or to Massachusetts than any part of Maine or New Hampshire. This is clearly demonstrated in figures in the United States Counter-Memorial (109) (112) (Figs. 22 and 28). Moreover, the whole of the area of the Bank under Canadian claim is closer to Nova Scotia than to any part of Maine or of New Hampshire.

Now Canada's claim to the eastern part of Georges Bank does not rest exclusively on its closer proximity to Canada than to the United States. But

proximity does represent both the starting point and an important factor underlying Canada's claim.

The United States rejection of Canada's claim is based on the view that Canada:

> "asks the Court to delimit a vast maritime area on the basis of two isolated, protruding coastal points, rather than on the basis of the coasts themselves" (V, United States Reply, p. 6, para. 9; see also II, United States Memorial, p. 4, para. 15; p. 149, para. 268; p. 209, paras. 326 and 328; p. 210, para. 329; United States Reply, p. 56, para. 85; p. 106, para. 185; p. 112, para. 197; p. 146, para. 250).

But this assertion is demonstrably incorrect. The whole of the area on Georges Bank claimed by Canada is significantly closer to extensive stretches of Canadian coastline and to substantial areas of the Canadian landmass than it is to the United States. Since the United States now claims that the whole of Georges Bank appertains to the coast of Maine, Canada has prepared a simple demonstration of the relative proximity of the disputed area on the Bank to the coasts and landmass of Nova Scotia and Maine.

(208) The method used in this demonstration, as illustrated in Figure 37A, is the extension of two arcs of circles from points on different parts of Georges Bank to the nearest point on the coastal fronts of Nova Scotia and Maine respectively. The points on Georges Bank from which the arcs are extended are: the point on the disputed area of the Bank furthest from Canada; the point on Georges Bank nearest to Canada; and a point midway between these two points. These points have been labelled X, Y and Z.

Because the purpose of the demonstration is to test the contention that Canada's claim is based only on "two isolated points on a protruding coastline", straight lines representing coastal fronts have been drawn along the mainland coasts of Nova Scotia and Maine, ignoring islands and promontories that project seaward of these generalized coastal fronts. In order to avoid as much as possible any dispute regarding the methodology of this demonstration, the coastal fronts drawn along the Canadian coast are those used in the United (110) (111) States pleadings (United States Counter-Memorial, Figs. 24 and 25; United (184) (185) States Reply, Figs. 2 and 3). The coastal front that represents the Maine coast is a straight line from the international boundary terminus to Cape Elizabeth.

The first arc in each case touches the nearest point on the coastal front of Nova Scotia, and the second arc always touches the nearest point wherever that happens to be on the coastal front of Maine. The coasts and land area between the two arcs represent in each case the coast and landmass of Nova Scotia that are closer to the point on the Bank from which the arcs have been extended than are the coast or landmass of Maine. The distance between the two arcs, in each case, represents the distance by which the point on the Bank is closer to the coastal front of Nova Scotia than it is to the coastal front of Maine.

With the Court's permission, I would like now to examine the relative relationship of Maine and Nova Scotia to Point X, the point where the Canadian line intersects the 200-metre contour on the seaward edge of Georges (208) Bank. As shown in Figure 37B, this point – the furthest point claimed by Canada on the Bank – is some 43 nautical miles closer to the coastal front of Nova Scotia than it is to the coastal front of Maine. The arc X2, which barely touches the coastal front of Maine, intersects the Atlantic coast of Nova Scotia, at Central Port Mouton, and the Gulf of Maine coast of Nova Scotia at Saulnierville, well to the northeast of Cape St. Marys at the southern entrance to the Bay of Fundy. The land area of Nova Scotia that lies closer to this point on

the Bank than any part of Maine comprises over 5,000 square kilometres. It is almost one and one-half times the land area of Cornwall and the Scilly Isles combined. The length of the Canadian coastal front that lies nearer to Point X than does the coastal front of Maine measures 113 nautical miles – this is a coastal front measured by straight line segments, the straight line segments that we found in the United States pleadings to represent the Canadian coast. This same coastline measured along its sinuosities is 342 nautical miles.

(208) Now, I would like to examine the relative relationship of Nova Scotia and Maine to Point Y. As shown in Figure 37C, this point, that lies well within the area claimed by Canada on the Bank, is some 60 nautical miles closer to the coastal front of Nova Scotia than it is to the coastal front of Maine. Arc Y2, which just touches the coastal front of Maine, intersects the coastal front of Nova Scotia at a point between Liverpool and Lunenburg, and it intersects the Gulf of Maine coast of Nova Scotia near the head of St. Marys Bay. The area of Nova Scotia, shaded in red, that lies closer to Point Y than to any part of Maine, comprises over 9,000 square kilometres. This area is considerably larger than Corsica and equal to the landmass of Cyprus. The Canadian coastal front that lies closer to Point Y than does the coastal front of Maine, stretches 151 nautical miles measured along two straight line segments, or if measured along its sinuosities, 481 nautical miles.

(208) Finally, the relative relationship of Canada and of the United States to the part of Georges Bank known as the "northeast peak". As shown in Figure 37D, Point Z is 80 miles nearer to the coastal front of Nova Scotia than it is to the coastal front of Maine. Arc Z2, which barely touches the coastal front of Maine, intersects the Atlantic coast front of Nova Scotia at Lunenburg, and the Gulf of Maine coast near the head of the Annapolis Basin, well to the east of Digby. But the part of Nova Scotia that lies closer to Point Z, closer to the northeast peak of the Bank than does any part of Maine, comprises over 13,000 square kilometres. It is 25 per cent larger than the landmass of Lebanon. The length of the Canadian coastal front that lies closer to the northeast peak of Georges Bank than any part of the coastal front of Maine, measures 182 nautical miles, or, if measured along its sinuosities, 590 nautical miles. This, Mr. President, is scarcely an "isolated point".

In Canada's submission the facts just demonstrated are highly relevant to the determination "within the rules" of the maritime boundary in the Gulf of Maine area. They show conclusively that, taken as a whole, the disputed area on Georges Bank is significantly closer to a substantial area of the Canadian landmass and to an extensive length of the Canadian coastal front than it is to the landmass or coastal front of the United States. In other words, the disputed area on Georges Bank is more proximate to Canada "in a general sense" than it is to the United States. It is Canadian land, and not United States land, that dominates the sea over the eastern part of Georges Bank.

When the Court rejected "the idea of absolute proximity" in its Judgment in the *North Sea Continental Shelf* cases, it stated that "the notion of adjacency so constantly employed in continental shelf doctrine from the start only implies proximity in a general sense" (*I.C.J. Reports 1969*, p. 30, para. 42). Because the area claimed by Canada on Georges Bank is clearly more proximate to Canada than to the United States "in a general sense", this area must be regarded, in fact and law, as adjacent to Canada and not to the United States.

In the course of rejecting the idea of an absolute or complete identity between the notions of adjacency and proximity the Court stated that "local geographical configurations may sometimes cause a (point in the sea) to have a closer physical connection to the coast to which it is not in fact closest" (*I.C.J. Reports 1969*,

p. 30, para. 41). But that consideration cannot apply here. The United States has made no claim that Georges Bank is more closely linked in any way, whether geologically, physiographically, biologically or economically to the coast of Maine than it is to the coast of Nova Scotia. In fact, in arguments based on depth of water and so-called ecological régimes that will be dealt with by my colleague Maître Fortier this afternoon, the United States emphasizes the separation between the coast of Maine and Georges Bank. For the Gulf of Maine Basin, lying between Maine and the Bank, is both substantially deeper and some four-and-a-half times wider than the Northeast Channel. And under the United States scheme of three so-called ecological régimes, the "ecological régime" here in the Gulf of Maine Basin lies between and separates the coast of Maine from the "ecological régime" on Georges Bank.

What of the human links between the coast of Maine and Georges Bank? Current and historic fishing patterns support the geographical division of the Gulf of Maine area into inner and outer sectors. These patterns also confirm the indications of the physical geography as to which parts of the coastline are (159) relevant to each sector. As shown here in Figure 38, almost 75 per cent of the total catch by value taken in the inner area is landed on the coasts of the innermost part of the Gulf, that is to say on the coasts of the Bay of Fundy and of Maine and New Hampshire, with some 46 per cent of the catch from the inner area, from the Gulf itself, being landed on the coasts of Maine and New Hampshire – 46 per cent in ports in Maine and New Hampshire – and some 27 per cent of the catch in the inner area being landed in Canadian ports on the Bay of Fundy. By comparison, only 25 per cent of the catch from the inner area is landed on the coastal wings of the Gulf, some 16 per cent in southwest Nova Scotia, seaward of Cape St. Marys, and almost 10 per cent in ports in Massachusetts and Rhode Island on the United States coastal wing.

The converse situation prevails in relation to Georges Bank as demonstrated (158) here in Figure 39. Here almost 90 per cent of the total catch in terms of value is landed in the two coastal wings of the Gulf, with some 62 per cent of the total Georges Bank catch – I am not referring to the disputed area: this is the total catch on Georges Bank – being landed in the ports of southwest Nova Scotia (exclusive of ports on the Bay of Fundy) and some 27 per cent in the ports of Massachusetts and Rhode Island. Less than one half of 1 per cent of the total catch on Georges Bank is landed in ports on the coasts of Maine or New Hampshire – less than one half of 1 per cent. In fact, one can barely discern in this graph the catch that is landed in these remote coasts at the back of the Gulf. The remainder of the Georges Bank catch, some 10 per cent, is landed in Canadian ports on the lower reaches of the Bay of Fundy, mainly in Digby County, Nova Scotia (V, Canadian Reply, pp. 56-57, paras. 142-143).

We submit that these facts constitute striking evidence of the practical importance of proximity in determining land-sea links in the area. They show that the coastal wings of the Gulf dominate Georges Bank and that Nova Scotia is the land that dominates the sea over the part of Georges Bank claimed by Canada.

As to hydrocarbon development, exploratory operations carried out under United States authority on the western part of Georges Bank, described in the United States Memorial (pp. 58-60, paras. 93-98), have been conducted from bases on the Atlantic coasts of Massachusetts and Rhode Island. Detailed studies by the United States authorities have concluded it highly unlikely that onshore facilities for oil and gas exploitation on Georges Bank would be located in the state of Maine. On the contrary, such facilities will be located on the coastal wings of the Gulf, on the coasts of Massachusetts and Rhode Island

(Canadian Counter-Memorial, p. 33, para. 75; pp. 65-66, para. 161 and fn. 107). Hydrocarbon development on the Canadian side of the Bank will be conducted from the ports of Shelbourne and Yarmouth. Again, these facts show that it is the coastal wings of Nova Scotia and Massachusetts that dominate the sea in the Georges Bank area.

I would now like to say a few words about the use of terminology and its significance to the issue before the Court. The United States case, in simple terms, is based on the argument that Georges Bank is adjacent or appurtenant to the coast of Maine, because it lies "in front of" that coast. In commenting upon the relationship between "the idea of absolute proximity" and "the rather vague and general terminology employed in the literature on the subject", the Court in 1969 stated:

> "terms such as 'near', 'close to its shores', 'off its coast', 'opposite', 'in front of the coast', 'in the vicinity of', 'neighbouring the coast', 'adjacent to', 'contiguous', etc." (*I.C.J. Reports 1969*, p. 30, para. 41),

are terms of a "somewhat imprecise character", and "capable of considerable fluidity of meaning". At the same time, the Court stated that these terms convey a "reasonably clear general idea" (p. 30, para. 41). It is obvious from the context that this "general idea" is simply that of an interconnection or link between the coast and offlying submarine areas. No single criterion can have an absolute value for assessing the relative strength or intensity of competing relationships between a given marine area and different stretches of coastline. However, the Court said that this "general idea" is "most frequently expressed" in the term "adjacent to", and that it does imply "proximity in a general sense" (p. 30, para. 41).

So, while these various terms do imply a general notion of proximity, there is no suggestion that they imply any particular relationship of alignment or juxtaposition between the coast and submarine areas off the coast. In other words, I respectfully submit, the Court was not suggesting that these terms implied a perpendicular relationship between the coast and offlying submarine areas. However, by repeated use of the phrase "in front of the coast" and the virtual exclusion of other terms such as "close to", "off its coast", "adjacent to" and so on, the United States seeks to create an impression of perpendicularity which is in no way conveyed by all of these terms taken together.

If these various terms convey the "general idea" of some form of association or link, one would expect to find these terms used in the general and specialized literature to describe the relationship between a given marine area and the coastlines to which that area might be regarded as appurtenant or adjacent. In particular, one would expect that, if Georges Bank is indeed adjacent to, or appurtenant to, the coasts of Maine or New Hampshire, the land-sea relationship would be described in those terms. At the very least, one would expect to find Georges Bank described as being "in front of" the coast of Maine.

Canada has searched over 1,500 publications in vain for any such reference. As far as we have been able to discover, Georges Bank had never been described in any published work by any geographer, scientist, government official or journalist – for that matter by anyone – as lying "in front of the coast of Maine" until the filing of the United States Memorial in September 1982. Indeed, with two exceptions, we have not been able to find any reference that relates Georges Bank in any terms, or in any way geographically, to the remote coasts or territories of Maine or New Hampshire. One of the exceptions, in a general work on New England written by a self-admitted amateur historian, describes Georges Bank as situated "off the Maine and Massachusetts coasts" (Henry F.

Howe, *Prologue to New England*, New York, 1943, p. 10). The other describes the Bank as lying "between Maine and Nova Scotia" (Ross D. Exkert, *The Enclosure of Ocean Resources, Economics and the Law of the Sea*, Stanford, 1979, p. 99). Every other reference we have been able to find either relates Georges Bank to one or both of the coastal wings of the Gulf, that is to the coasts of Nova Scotia or Massachusetts, or else relates it more generally to the east coast of Canada or the coast of New England or the northeastern United States.

Mr. President, if one looks from Georges Bank to the coasts of Nova Scotia, Massachusetts or Maine, or vice versa, there is no predetermined direction that would attribute a maritime area exclusively to one coast or the other. If a sailor aboard a ship over Georges Bank were asked which coast was "in front" of his vessel, he would certainly look to the coast that was nearest to him, and that would be, depending on his precise location over the Bank, either over Massachusetts or Nova Scotia, but never Maine.

So much for the attempt to detach Georges Bank from where it has always been – "off" the coastal wings of the Gulf – and to relocate it "in front of" the remote coasts at the back of the Gulf.

Since the coasts of Nova Scotia and of Massachusetts and Rhode Island are certainly the coasts to which Georges Bank is appurtenant, the opposite or adjacent relationship of these coasts, vis-à-vis the area to be delimited on Georges Bank, is a factor material to the delimitation. Canada has sought to shed some new light on the question of the opposite or adjacent relationship of coasts vis-à-vis sea areas lying off or between them by subjecting the relationship to mathematical analysis. I do not propose to take up the time of the Chamber now with further explanation, but I do respectfully draw its attention to paragraphs 107 to 113 of the Canadian Counter-Memorial where the analysis is set out in detail.

The United States has ignored the relationship between the coastal wings vis-à-vis Georges Bank, preferring instead to focus its attention on the relationship of the coasts of Nova Scotia and Maine. The relationship between the Nova Scotia and Maine coasts is doubtless pertinent to the delimitation within the Gulf, but it cannot have any relevance to a delimitation in the outer area, which does not appertain to these remote coasts at the back of the Gulf. That is why (189) Figure 9 of the United States Reply, distributed to the Chamber this morning as Figure 40 of the oral proceedings, quite simply misses the point. Canada analysed the relationship between the outer area and the coastal wings in its mathematical analysis of oppositeness and adjacency. Figure 9 of the United States Reply fixes the limits of the zone of oppositeness by reference to the two coastal wings, but then measures the coast-sea relationship from the more distant coast at the back of the concavity (United States Reply, Fig. 9). This approach either ignores or misunderstands the premises upon which the Canadian model is based.

The United States claims that it has "modified" the Canadian model in order to "represent a coastal concavity comparable to the geography of the Gulf of Maine area". But while the width of the Gulf of Maine is twice its depth – the part of the Gulf of Maine seaward of the Bay of Fundy is twice as wide as it is (189) deep – the concavity in Figure 9 is three times as wide as it is deep. This distortion has the effect of bringing the coast at the back of the concavity relatively closer to the outer area and represents yet another attempt to refashion geography.

The United States argues that Canada's mathematical models

> "seem to be designed to convince the Court of Arbitration in the Anglo-French Arbitration that it should overturn its finding that the Atlantic

region constituted an area that was off, rather than between, the coasts of the Parties in that case" (United States Reply, p. 116, para. 200).

Mr. President, those models are not based only on mathematical logic: they are based on common sense. Take the example of the Anglo-French Arbitration. There, the Court of Arbitration recognized that the coasts of Great Britain and France were in a perfectly opposite situation vis-à-vis the continental shelf to be delimited inside the Channel. In finding that "in the Atlantic region the situation geographically is one of two laterally related coasts" (Decisions, p. 113, para. 241), the Court of Arbitration surely could not have meant that as soon as one crosses a hypothetical line at the mouth of the Channel between the outermost points of Cornwall and Finistère, one moves immediately and abruptly from a situation of perfect oppositeness to one of perfect adjacency. It is clear that the Court of Arbitration had no such intention. What the Court must have meant was that the further one proceeds seawards from the coast, the more the element of adjacency predominates. Presumably there must be some transition from a situation of perfect oppositeness within the Channel to one where the element of adjacency predominates "a great distance seawards" from the coasts (Decisions, p. 113, para. 241). In part of this transition zone the element of oppositeness must predominate.

That the Canadian model is fully consistent with the reasoning of the Court of Arbitration is demonstrated by the application of that model to the Western (155) Approaches. Figure 41 shows that in the greater part of the Atlantic region, at a great distance seawards from the coast – as the Court of Arbitration put it – the element of adjacency does indeed predominate.

The same reasoning applies to the geographical situation in the Gulf of Maine area. That the coasts of Nova Scotia and Massachusetts are perfectly opposite vis-à-vis the area to be delimited within the Gulf is too obvious to require explanation. That this relationship of perfect oppositeness should become a relationship of perfect adjacency the very moment one crosses the hypothetical Cape Sable to Nantucket closing line defies both logic and common sense.

There must be a zone of transition where the elements of oppositeness and adjacency are mixed. And, somewhere within that zone of transition there must be a point or line where the element of oppositeness becomes more predominant than the element of adjacency. The Canadian model simply uses mathematical logic to determine the line or point along the continuum where the balance shifts (54) between the elements of oppositeness and those of adjacency. Figure 42 shows that the relationship of the coasts vis-à-vis the area to be delimited is predominantly opposite throughout most of the Georges Bank area.

Conclusion

In concluding my presentation, I respectfully request that in taking account of the relevant geographical circumstances, the Chamber consider the following nine points:

First, the relevant area for determining the relevant geographical and other circumstances is the Gulf of Maine area;

Second, the Gulf of Maine area is comprised of two sectors: an inner area consisting of the whole of the concavity landward of the agreed closing line from Cape Sable to Nantucket Island; and an outer area including the seaward rim of the Gulf and comparable lengths of coastlines abutting the Atlantic on either side of the Gulf, extending to Lunenburg, Nova Scotia and at least to Newport, Rhode Island;

Third, the territories of the Parties abutting the Gulf of Maine area have an essentially east-west juxtaposition and are divided by a land boundary with an essentially north-south direction;

Fourth, the coasts abutting the Gulf of Maine area seaward of the Bay of Fundy have a semicircular or rectangular general configuration;

Fifth, the maritime zones appertaining to the coasts of the Gulf overlap and converge towards a point on a median line situated between the opposite coasts of Nova Scotia and Massachusetts;

Sixth, the only delimitation that would respect the geographical relationship and equality of the coasts abutting the Gulf, and therefore prevent the cut-off of any of them, would be one that permits the overlapping maritime zones of Canada and the United States to extend up to this point of convergence;

Seventh, Georges Bank is "adjacent to" the coasts to which it is geographically nearest and to which it is most closely linked by natural and human ties – the coastal wings of Nova Scotia and Massachusetts that actually abut the outer area; the eastern part of Georges Bank, the area under Canadian claim, is geographically adjacent and most closely linked to the coast of Nova Scotia;

Eighth, the coastal wings of Nova Scotia and Massachusetts are in an essentially symmetrical and predominantly opposite relationship with respect to Georges Bank, a geographical situation that normally calls for the application of the equidistance method; and

Finally, Cape Cod and Nantucket Island are incidental, special features that depart radically from the general configuration of the coasts of the Gulf of Maine area and that produce a distorting effect upon the course of an equidistance line; they therefore constitute special circumstances, the disproportionate effect of which has to be eliminated in order to achieve an equitable result.

The Chamber adjourned from 11.14 a.m. to 11.30 a.m.

ARGUMENT OF MR. BINNIE

COUNSEL FOR THE GOVERNMENT OF CANADA

Mr. BINNIE: Mr. President, distinguished Judges, it is my privilege this morning to address the Chamber on the economic geography of the Gulf of Maine area, what Canada has referred to in the pleadings as the "human dimension" in the delimitation of a maritime boundary. My submissions will fall, broadly speaking, under three headings:

I will deal first with the legal relevance of economic geography in the delimitation of a single maritime boundary. I will then turn to a summary of what Canada considers to be the relevant economic considerations, economic considerations which arise out of the physical geography of the Gulf of Maine area, in particular the special condition of dependence of Canadian fishermen on the fishing grounds of Georges Bank; and finally, I will make a number of submissions about the equitable nature of the result, from the perspective of the legally relevant economic circumstances, of the boundaries proposed by Canada and the United States.

I. The Legal Relevance of Economic Considerations

Stripped to its essentials, this dispute is about resources, as the Attorney-General of Canada stated to the Chamber on Monday, the resources of Georges Bank. Both Parties agree Georges Bank is one of the richest fishing grounds in the world. Both Parties agree that there lies on the slopes of Georges Bank – buried in the continental shelf – rich oil and gas potential, which will not be developed or even defined until this dispute is resolved. Both Parties agree that Georges Bank is linked to the geographically adjacent coasts of southwest Nova Scotia and eastern Massachusetts by an existing major fishing industry in both Canada and the United States, employing directly and indirectly thousands of people, living in communities ranging in size from Clark's Harbour, Nova Scotia to the metropolitan area of Boston, Massachusetts. On these three points, Mr. President, the Parties agree.

What the Parties cannot agree about, is the proper legal division of Georges Bank. The proposed divisions are well known to the Chamber. They are shown
(221) in Figure 43 to the oral proceedings which is the first Figure in the Red Dossier under the heading of the "Human Dimension". As is well known to the Chamber by now, the Canadian line would cut across the Bank and would attribute somewhat under half of the fishing grounds to Canada, and somewhat over half of the fishing grounds to the United States. The United States, on the other hand, since 1976, has sought a boundary which puts all of Georges Bank under its exclusive jurisdiction. But it did not, between 1976 and 1980, claim all of the resources. It is only since 1980, after the United States Senate failed to ratify the 1979 Agreement on East Coast Fisheries Resources, that the United States for the first time claimed all of the resources of Georges Bank for its own exclusive benefit.

Canada says that its established fishery on Georges Bank, and the special condition of economic dependence associated with that fishery, constitute legally relevant circumstances, circumstances that are entitled to very substantial weight in the final balancing up. Their legal relevance rests on a number of distinct

grounds. I will first of all list the grounds which I rely upon and I will then make a number of submissions on each of them.

First, economic considerations are inherent in the legal nature and the legal content of the 200-mile jurisdiction at issue in these proceedings. The fishery and its economic importance to the populations of adjacent coasts are central to the object and purpose of what is, for all practical purposes, an exclusive economic zone.

Second, the economic resources of the Gulf of Maine area, both of the water column and of the continental shelf, constitute the actual subject-matter of the present dispute and the subject-matter of a dispute – the very thing that has brought the Parties before the Chamber – cannot be brushed aside, cannot be ignored, if the delimitation is to respond in a realistic way to the real issues that divide these two Parties.

Third, economic geography in the Gulf of Maine area cannot be divorced from the physical geography. Economic activities in this part of the world are shaped by physical geography. They reflect it. The economic evidence will assist the Chamber to understand the real significance of the physical geography of the Gulf of Maine area.

Fourth, the single maritime boundary should be drawn, as the Parties agree, so as to produce an equitable result. And an important aspect of the "equitable result" on the facts of this case is the economic impact that a proposed boundary would have on the existing fishery and on the coastal population in the Gulf of Maine area.

Fifth, it is well established in international law that a special condition of economic dependence of a coastal State on fishery resources in adjacent waters may constitute a legally relevant circumstance within a framework of equitable principles.

Sixth, and finally, it is equally well established that a boundary delimitation should refrain as far as possible from modifying a state of things (such as an offshore fishery) "which actually exists and has existed for a long time"; particularly where extensive private interests are in question (J. B. Scott, ed., *The Hague Court Reports*, 1916, pp. 121, 130).

I propose now to deal in greater detail with each of these six grounds.

The first basis of legal relevance is undoubtedly the most important. The object and the purpose of the jurisdiction over a 200-mile zone controls its legal content. And it is the legal content – the very concept of the 200-mile zone itself as understood in international law – which is the source, under customary law, from which the rules and principles of the delimitation of the zone must be derived, as the Court held in its 1982 Judgment in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, para. 36).

An analysis of the object and the purpose of the 200-mile zone will provide the Chamber with an objective standard by which to judge the relevance and weight of factual circumstances.

What, then, is the object and what is the purpose of the jurisdiction at issue in this delimitation? The basic concept of the 200-mile zone is of course economic – it is rooted in the recognized interest of coastal States in the marine resources off their coasts. It is also geographic. It ties the economic interests of a State to its geographic reach. The main feature of this zone, as now accepted in international law, is to reserve to the coastal State the full benefit of the resources within the zone up to the extent of its harvesting capacity.

It is therefore, in my submission, inherent in the legal nature of the jurisdictions which the Parties have asked the Chamber to delimit that the

recognized economic interest of the coastal communities of the Parties – and I speak now in particular of the coastal communities of Nova Scotia – in a fishery in an area adjacent to their coast is a legally relevant factor in this delimitation, especially when the fishery to which that interest is related is located closer to the coasts of Nova Scotia than to any part of the coasts of the United States.

I turn now to the second basis of legal relevance. The written pleadings make it clear that, so far as Canada and the United States are concerned, the subject-matter of the present proceedings is resources – resources first, last and foremost – the right to benefit from the economic resources of the water column and the sea-bed within the Gulf of Maine area and in particular the resources, as I said, of Georges Bank. To ignore this factor in the delimitation would be, as Judge Jessup observed in the *North Sea Continental Shelf* cases, to suffer an "academic detachment from realities" (*I.C.J. Reports 1969*, p. 27). The Special Agreement (I) itself in the present case draws attention to the economic basis of the dispute by asking the Chamber to draw the single maritime boundary "that divides the continental shelf and fisheries zones" of the Parties. The importance of this delimitation is not mere space – there is obviously no necessary connection between the extent of an area and the extent of its exploitable resources. What is at issue, from Canada's point of view, is a known dependence on a known resource. And the Court in the 1969 *North Sea Continental Shelf* decisions held that such a situation should be taken into account in a delimitation. The *dispositif* of the *North Sea Continental Shelf* cases is emphatic on this point. It said that natural resources "so far as known or readily ascertainable" should be taken into account (*ibid.*, p. 54, para. 100).

The third basis of legal relevance is that economic circumstances within the Gulf of Maine area reflect and complement the physical geography and explain its true significance. Geography has played an important role in the fishery in the Gulf of Maine area. By virtue of its relative proximity and its relative wealth in fish in comparison with alternative offshore grounds, Georges Bank has assumed a major importance in the entire region. It is no accident that the coasts nearest Georges Bank, southwest Nova Scotia and eastern Massachusetts, are home to the Georges Bank fishing fleets. Distance represents time and expense to a fishing-boat captain. Owing in part to its proximity as well as to the lack of alternative employment opportunities for its people, southwest Nova Scotia has traditionally enjoyed advantages over eastern Massachusetts in harvesting the fishing grounds on the eastern half of Georges Bank, which is the area in dispute. The United States says economic factors are transitory and ephemeral. It is difficult to understand this argument, Mr. President. The economic advantages of proximity, whatever they may be, will continue for so long as Georges Bank and Nova Scotia remain where they are – and they show no signs of moving.

The United States itself acknowledged the direct link between physical geography and economic geography in its Memorial. It was there acknowledged that the "location of the fishery resources has, in turn, shaped human activities in the area" (II, United States Memorial, p. 27, para. 38). The attempt of the United States to isolate Nova Scotia from Georges Bank does not, as the United States pretends elsewhere in its pleadings, fulfil some geographical mandate. On the contrary, it squarely contradicts the patterns of human activity which, as the United States itself observed, have been shaped by the resources within the area this Chamber has been asked to delimit, and which the United States Government itself recognized in the 1979 fisheries agreement. Economic factors in the Gulf of Maine area are thus supportive of the conclusions to be drawn from the physical geography. Economic factors do not contradict the result which physical geography would otherwise tend to favour.

The fourth legal ground is no less fundamental. The object of the delimitation is an equitable result within the law, considered in the light of all the relevant circumstances. An important aspect of the "equitable result" in this case is the impact that a proposed boundary would have on coastal communities in the Gulf of Maine area. The Chamber will have noticed that the United States in its pleadings is very solicitous about the ecology and well-being of the fish. Yet it is the people of these coastal communities who will be affected by the result of this case, not the fish. The fish will be caught, or not, irrespective of what Party gets this or that area of Georges Bank. But, depending on where the Chamber draws the line, to the extent that Canada is excluded from the Bank, whole communities of Nova Scotians will be irreparably damaged.

The United States concedes in its Memorial that the

> "lateral delimitation of the 200-nautical-mile fishing zone should reflect recognition of the relative interests of the coastal States in the living resources off their coasts . . ." (p. 121, para. 195).

It is true that the United States then attempts to limit the "evidence" of these "relative interests" to a historic fishery which no longer exists. But a 19th-century fishery cannot be brought back to life by a 200-mile zone. Massachusetts is not now what it was 150 years ago. The whole concept of a 200-mile zone is a very recent innovation. And one that is specifically and solely designed as a response to modern conditions and the anticipated needs of the future.

In any event the law requires a result based on equity, not history. The equity of the present dispute is that in economic terms Nova Scotia's single most important fishing ground is Georges Bank. The eastern limit of Georges Bank lies within 90 miles of the Canadian coast. All of Georges Bank lies within the 200-mile zone. The United States effort to push the United States 200-mile jurisdiction to within 26 nautical miles of the Nova Scotia coast is tantamount to a denial of the most fundamental, important, equitable consideration in this entire case.

Almost 20 years ago Canada put forward a more realistic concept of what is required to achieve an equitable result – a line drawn by reference to geography but confirmed as equitable by its reasonable accommodation of the established economic interests of the Parties. If the Chamber were to find, as Canada contends, that the Canadian line permits the continuation, with a minimum of disruption, of the established fishing activities of the Parties, and respects to a reasonable degree the economic dependence to the extent such dependence exists of the coastal population, whether Canadian or American, while on the other hand the United States line is designed to destroy the established fishing activities of one of the Parties, and ignores the economic dependence of a Canadian province, then it must be clear – at least from the economic geography perspective – that the Canadian line achieves an "equitable result" whereas the United States line does not.

And that, in a nutshell, Mr. President, is how we would define the issue between the Parties in relation to the requirement of an equitable result as it pertains to the fisheries.

The United States has taken the position, in its pleadings, that it would be a novel and unprecedented thing for this Chamber to take note of economic factors as relevant circumstances in a framework of equitable principles. But this is not so. International tribunals have given full effect to economic dependence in closely related fields of jurisprudence where, as here, the economic interest has its roots in the relevant geography.

My fifth proposition, accordingly, as the *Fisheries Jurisdiction* cases of 1974

demonstrate, is that international law has already recognized that a condition of economic dependence on fishery resources in adjacent waters constitutes a legally relevant circumstance within a framework of equitable principles. These cases did not of course involve the delimitation of a 200-mile zone. But the Court did address the very issues that only a few years later led to the acceptance of the 200-mile zone within international law. And in the solution it prescribed, the Court expressly linked its reasoning to the idea of "an equitable solution derived from the applicable law", which the Court had previously adopted in 1969 in the context of continental shelf delimitation (*I.C.J. Reports 1974*, p. 202, para. 69). Its findings are therefore of very great interest in determining what "relevant circumstances" should be taken into account, along with the geographical factors, in achieving an equitable result in the delimitation of a single maritime boundary.

The factors recognized as relevant in the *Fisheries Jurisdiction* cases included what the Court referred to as the "special dependence" (*I.C.J. Reports 1974*, pp. 191-192, para. 44) of a coastal population upon the living resources off its coast along with the economic dependence of "whole communities" (*I.C.J. Reports 1974*, pp. 197-198, para. 58) on these same resources. Now the issues in the *Fisheries Jurisdiction* cases quite obviously differ from those that arise between two opposite or adjacent States within a boundary area, as here. But that distinction does not affect the basic question of principle. The Judgments in 1974 quite clearly show that an established economic dependence upon fishery resources has been specifically recognized by the Court as a legally relevant consideration within a framework of equitable principles. And I need hardly add that the Court's findings of 1974 closely paralleled its recognition of these same economic interests in fishery resources in the 1951 *Fisheries* case as an equitable consideration of legal importance.

The special interest of Canada in the Georges Bank fishery was accepted by the United States over a period of many years within the International Commission for the Northwest Atlantic Fisheries in setting catch allocations, which not only treated Canada as a "coastal State" in relation to Georges Bank, but also reflected recognition of the special vulnerability of Canada's small vessel fleet whose offshore operations were limited to fishing grounds in proximity to the Canadian mainland.

There is no doubt on the evidence of this case, Mr. President, which I will come to in a moment, that a condition of special dependence of coastal communities in Canada on the fishing grounds of Georges Bank does exist now and did exist for many years prior to the present dispute. It is equally clear on the evidence, in contrast, that the United States is not now, nor has it ever been, in a condition of "special economic dependence" on Georges Bank.

The sixth and final ground of legal relevance that I referred to in my introductory list is the reluctance of the law to upset the stability of established situations of fact. It is my submission that a boundary delimitation should avoid, as far as possible, modifying a state of things "which actually exists and has existed for a long time", particularly where extensive private interests are in question.

This principle has received specific recognition in the international jurisprudence on the law of fisheries. It was expressed by the Arbitral Tribunal in the *Grisbadarna* case in the following words:

> "in the law of nations, it is a well-established principle that it is necessary to refrain as far as possible from modifying the state of things existing in fact and for a long time; ... that principle has a very particular application

> when private interests are in question, which, once disregarded, cannot be preserved in an effective manner even by any sacrifices of the State, to which those interested belong . . ." (Wilson, *The Hague Arbitration Cases*, 1915, pp. 111, 129).

Now there is of course a disagreement between the Parties on the historical duration of Canada's fishery on Georges Bank. But even accepting the United States view of the matter, which of course we do not, the Canadian fishery on Georges Bank goes back at substantial levels for more than a generation of fishermen. And that is clearly more than sufficient to satisfy the *Grisbadarna* principle, in terms of historical stability, as it relates to an established economic dependence.

In the 1969 *North Sea Continental Shelf* cases, Judge Jessup quoted with approval the passage from the *Grisbadarna* case which I have just read, and he went on to consider how it might be applied in a contemporary framework in a practical way. In discussing the principle, he noted that the Fisheries Convention of 1964 considered a period of only ten years as "habitual" exploitation (*I.C.J. Reports 1969*, p. 80). During the First and Second Conferences on the Law of the Sea in 1958 and 1960, recognition of so-called "historic rights" of non-coastal fishing States was based on a fishing practice of only five years – and this was the base-period adopted in the combined United States/Canadian proposal of 1960 (A/CONF.19/C.1/L.10). And, what is even more to the point for our purposes, the 1979 fisheries agreement adopted a base-period of roughly 10 to 13 years to avoid, in the words of Special Ambassador Cutler of the United States, "a major dislocation in the existing fisheries" (*Hearings before the Subcommittee on Fisheries and Wildlife Conservation and the Environment*, House of Representatives, 1979, p. 42).

The important principle of stability, Mr. President, as referred to in the *Grisbadarna* case in the context of fisheries, is very relevant to the case before the Chamber. The reference in the *Grisbadarna* award to "private interests" is directly applicable to the private fishing interests of Nova Scotia "which, once disregarded", in the words of the *Grisbadarna* award, "cannot be preserved in an effective manner even by any sacrifices of the State to which those interested belong". The very fact of delimiting a boundary, of course, means that there will be some disruption to the fishermen of both countries. But the Canadian line would preserve the existing fishing of both Parties to the greatest extent practicable. It would therefore contribute to the stability of economic relations between our two countries.

I turn now to the question of what weight should be assigned to the economic evidence. What importance should economic factors be given in the final balancing up of "relevant circumstances"? The Chamber will recall that yesterday morning the Agent for Canada referred to two criteria. Firstly, how closely are the particular facts associated with the object and purpose of the legal jurisdiction? And secondly, how important a role do these facts play in the particular circumstances of the case? On this aspect of the argument the United States appears to mistake a rule of evidence for a rule of law. It looks at a number of delimitations where economic considerations did not play a major role, and contends, as a conclusion of law, that economic considerations cannot play a major role. But weight is a matter to be determined on the evidence in each case, and as the Court said in the *North Sea Continental Shelf* Judgment: "The 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. 51, para. 93). In the present case economic factors reflect the object and purpose of

the 200-mile jurisdiction. The boundary line was born of geography, but in the eyes of the Parties the major test of its equity will be economic. The division of Georges Bank is the paramount concern, the factor that will determine the real impact of the decision of the Chamber on the Parties. It is, as the Attorney-General of Canada stated, the very heart of the whole dispute. It was at the centre of the negotiations between the Parties once the régime of the 200-mile zone had emerged. *I respectfully submit that economic considerations are* entitled to substantial weight in the Chamber's consideration of the appropriate delimitation in this case.

Having outlined in a summary way the nature of economic considerations which in Canada's view ought to be considered "relevant", I would like to offer a number of comments on the type of economic consideration which Canada regards as wholly irrelevant.

In the first place, Canada's submission that due regard ought to be paid to Canada's established economic interests has nothing to do with notions of so-called "equitable apportionment", Mr. President. Over the years, Canadian fishermen have built up an active fishery over the whole of Georges Bank. Canada now seeks to retain access to that portion of Georges Bank east of the Canadian line, closer to Canada than to the United States, on which her nationals have a special dependence. Canada does not seek a fishery that Canadian fishermen do not already exploit. The issue in this respect is not "equitable apportionment", as the United States has attempted to suggest, but the protection a State is entitled to expect from international law for major existing fishing interests in geographically adjacent waters in respect of which it may validly assert a claim of title.

Second, Canada's submissions do not rely at all on notions of "relative national wealth". On the contrary, it is Canada's view that arguments based on conditions extraneous to the Gulf of Maine area are wholly immaterial. The United States has made much of macroeconomic arguments, just as in its consideration of geography it has used continental scale macrogeographical arguments, which my colleague Mr. Hankey rebutted yesterday and this morning. The United States asks in its written pleadings for special consideration because of the alleged poverty of its alternative fishing grounds outside the Gulf of Maine area (**IV**, United States Counter-Memorial, p. 216, para. 347). Even if this claim were accurate, which it is not, it would be irrelevant. But the result of these macroeconomic arguments may be to leave an erroneous impression with the Chamber – which I would be remiss if I did not correct. The United States 200-mile "exclusive economic zone", Mr. President, encompasses an area of more than two million square nautical miles, according to a White House press release issued in March 1983 (Canadian Counter-Memorial, Anns., Vol. IV, p. 12), and the Comptroller-General of the United States noted in his 1976 Report to Congress that a fifth of all the world's fisheries resources lie within exclusive United States jurisdiction (*ibid.*, p. 115, para. 288). So the United States argument in this respect fails on the facts as well as the law.

The United States also claims in its pleadings jurisdiction over Georges Bank on the basis that its people consume a good part of the fish that are caught there. Undoubtedly the United States offers an immense market for products of all kinds from fish to motor cars, tropical fruit to works of art, but the ability of more than 220 million people to eat a lot of fish has nothing whatsoever to do with the physical geography or the economic geography of the Gulf of Maine, and it is a dangerous proposition in my submission to suggest, as the United States does suggest (**II**, United States Memorial, p. 50, para. 82; **V**, United States Reply, pp. 84-85, para. 144) that the ability to consume is itself a test of

ownership of the thing consumed. It is quite true that relative national wealth is reflected in relative national purchasing power, but neither should play any part in maritime delimitation.

Up to this point my submissions have been largely directed to the fisheries resources of the water column. But the Special Agreement also refers to a division of the continental shelf; and thus potential hydrocarbon resources, to the extent these are known, must also be taken into consideration.

The activities of the Parties in relation to the exploitation of the hydrocarbon resources is an important element in the conduct of the Parties over the past 20 years, and will be addressed in detail by Professor Bowett and Professor Brownlie. For my purposes it is sufficient to note that the hydrocarbon resources, like the important fishery resources, are located in the vicinity of Georges Bank. The location of known continental shelf resources is a relevant factor, as the Court pointed out in the 1982 *Tunisia/Libya* Judgment (*I.C.J. Reports 1982*, pp. 77-78, para. 107). The United States Geological Survey has acknowledged the undiscovered recoverable hydrocarbon resources in the North Atlantic Shelf area, which includes Georges Bank, to be about 4.44 million million cubic feet of gas and 890 million barrels of oil (I, Canadian Memorial, pp. 48-49, para. 87). Some idea of the economic potential of these reserves is given by the fact that the 1979 lease sale of oil and gas rights by the United States on its own side of the Canadian line, and indeed on its own side of the equidistance line used by the United States Bureau of Land Management, fetched 816.5 million dollars. But, Mr. President, unlike the fisheries resources, oil and gas wealth is prospective and potential. Fisheries resources are present and real. No issue arises in connection with the continental shelf of existing patterns of exploitation. No issue arises of special dependence. Undoubtedly, the existence of oil and gas potential on the slopes of Georges Bank is a significant fact, but in my submission a factor of lesser weight in these proceedings than the exploitation of the known fishery resources. Even if hydrocarbons are present, their economic significance may last 10 to 20 years. Properly conserved, the renewable fishery resources may last for ever.

II. A Comparison of the Relevant Economic Circumstances

I would like to turn now to a consideration of the precise economic linkages between the coastal populations of the Parties and the fisheries resources of the maritime area to be delimited, by comparing the extent of the Canadian and United States presence on the fishing grounds, the dependence, if any, of their coastal communities on harvesting these resources, and the impact that loss of access to the disputed area would have on the communities located on the relevant geographic coasts.

A. Comparative Presence on Georges Bank

As to comparative presence, Canada has been on Georges Bank for a long time, its presence has grown as the fishery has developed, its fishing effort during any reasonable definition of the "relevant period" in the context of these proceedings has been extensive and continuous.

Of course, the Canadian fishery has varied through the years. So has that of the United States. Such variations were recognized by the Court in the 1974 *Fisheries Jurisdiction* case as entirely to be expected. But that Judgment also shows that the relevant period is the period leading up to the dispute and not some remote historical fishery of a hundred years ago.

In the modern period – the relevant period – the fishing activities of Canada and the United States have also fluctuated, but these fluctuations have been within a range which in Canada's view entitles both of the Parties to an ongoing fishery on Georges Bank. The Canadian line satisfies this test of fairness, the United States line does not.

Within the period leading up to the dispute the selection of a relevant period involves a matter of judgment: firstly, what length of time is long enough to be representative; secondly, what length of time places before the Chamber the factual dispute which the Chamber is being asked to resolve. Canada's choice of a ten-year period predating the critical year of 1979 satisfies both of these criteria. It coincides with the ten-year period referred to by Judge Jessup in the *North Sea Continental Shelf* cases and it has important precedents between the Parties. When the International Commission for the Northwest Atlantic Fisheries introduced a system of quota allocations for its members in 1973, it used what was called "long-run historical catch performance" for the purpose of determining quota entitlements, and this was based on each party's harvest from the fishery over the preceding ten years. This formula was accepted by all ICNAF members, including Canada and the United States. The appropriateness of the 1969 to 1978 decade, proposed by Canada as the relevant period for the purpose of this delimitation, is also confirmed by the United States acceptance of a similar period as the basis for the calculation of many of the entitlements under the 1979 fisheries agreement. The Comprehensive Environmental Impact Statement, prepared by the United States Government, in connection with Senate ratification proceedings for the 1979 agreement, stated that the entitlements therein preserved "historical fishing patterns". The United States Chief Negotiator, Ambassador Cutler, explained the percentage entitlements under the 1979 agreement to the United States Senate on 15 April 1980, in response to a question from Senator Muskie, as follows:

> "*Senator Muskie.* On what basis were the percentages established? *Mr. Cutler.* They were established in substantial part on the basis of the actual fisheries that both countries were in. They were established in substantial part on the basis of the historical record. The last five years preceding the treaty were more or less, for most fisheries, most favourable to the Canadians. The years back in the 1960 era were most favourable to us. Most of the numbers came out quite close to the 13 years preceding the negotiation of the treaty, except that in the case of scallops we were able to achieve a substantial increase." (*Hearings before the Committee on Foreign Relations*, United States Senate, 1980, pp. 45-46.)

Even the opponents of the 1979 treaty did not deny the magnitude of Canada's interest in the Georges Bank fishery. The decision to brush aside Canada's fishery on Georges Bank did not occur to the United States until relatively recently. In 1980 the representative of the American Fisheries Defense Committee, which was the major lobby organization for New England fishing interests opposed to the 1979 fisheries agreement, referred the United States Senate to the long history of fishery co-operation between Canada and the United States – treaty or no treaty – in the following terms:

> "Canada will inevitably co-operate in setting limits because it has just as great an economic interest as the United States in preserving the fisheries potential of the disputed zone. (Indeed, the total Canadian catch from the disputed zone has a dollar value five times greater than that of American fishermen.) (*Hearings before the Committee on Foreign Relations*, United States Senate, 15 and 17 April, 1980, p. 60.)

Today the United States takes a different position. In fact it takes not one new position but two new positions, which contradict each other. On the one hand, the United States insists that fishing activity can only be measured on the long historical view back to the 19th century, a position that not only avoids the reality of the dispute before the Chamber, Mr. President, but takes a period for most of which no adequate records are available.

On the other hand the United States swings to the other extreme and proposes to take only the post-1978 period, which is not long enough to be representative. In any event Canada does not regard catches subsequent to the conclusion of the Special Agreement as legally relevant. The post-1978 period is overshadowed by the existence of the present dispute. The reason catch statistics post-dating the dispute are not to be relied upon is suggested by the United States itself in its Reply:

> "Acceptance of Canada's arguments regarding the role that its recent fishing activities should play in the boundary delimitation well might encourage States or their nationals to expand their fishing efforts *in order to enhance their position in subsequent negotiations or adjudications.*" (P. 80, fn. 2, emphasis added.)

No party should be rewarded for a failure to properly manage a resource, yet this is what the United States endeavours to do when it seeks to "enhance its position", to use the words of its Reply, by emphasizing the post-1979 catch statistics. At the same time as the United States Government failed to obtain Senate ratification of the 1979 fisheries agreement, a regulatory vacuum occurred in relation to United States fishing on Georges Bank (including the failure to enforce those United States regulations which did exist). During the same period, both the size of the Canadian offshore fleet and its fishing practices were regulated. This United States regulatory vacuum produced serious over-fishing – a depletion of the resource – on a scale which cannot be sustained in the longer term, as is evident from recent sharply reduced harvests and very low stock assessments. The post-1979 statistics, in short, in my submission, are a poor guide for the Chamber to the established interests of the Parties in the fisheries of Georges Bank.

On this branch of the case there are therefore two issues. What is the "relevant period"? And, having identified the relevant period, how do the fishing activities of the Parties compare during the years in question?

(170) I would be grateful at this point if the Chamber would refer to the next graphic in the Red Dossier – Figure 44 to the oral proceedings (Fig. 25 of the Canadian Reply). The graphic shows two statistical portraits. In the bottom right-hand corner is a bar chart taken from the United States Counter-Memorial. It purports to show the landed weight of fish – it does not show value: it shows weight – for the years 1940 to 1981. The fishing effort of Canada as seen by the United States is shown in green at the top, and the fishing effort of the United States is shown in blue. The larger graphic on the same page is a Canadian bar chart, taken from Canada's Economics Annex. It shows similar information to that in the United States bar chart but it puts the record straight on three important matters: and these three matters account for the apparent conflict that the Chamber will observe between the two charts.

First, the time period: the Canadian bar chart starts in 1964 rather than 1940; accordingly it corresponds to the time-span reflected in the right-hand portion of the American chart. The reason for this is because in 1964, for the first time, Canada began to collect information on statistical units which actually isolate the Canadian catch from Georges Bank. Prior to 1964 appropriate Canadian

data are missing and the so-called statistical comparison is therefore incomplete and misleading.

The *second* matter of record is the "area of capture". In this connection I would also ask the Chamber to refer to the next graphic, Figure 45 to the oral proceedings, found in the Red Dossier, which presents the information shown
(12) on Figure 23 to the Canadian Memorial. The United States bar chart includes, up until 1966, all of ICNAF Subarea 5, which, as the Chamber can see, goes as far south as the latitude of Baltimore, Maryland, and of which only 12 per cent lies in the area in dispute. For the period since 1967, the United States bar chart includes all six statistical units within 5Ze, of which, as the Chamber will note, only two-thirds relate to Georges Bank, and one-third, that is 5Zeg and 5Zeo, lie entirely to the west. Even taking the four units which in part cover Georges Bank – that is 5Zeh, ej, em and en – there is a good deal of the ocean area to the south of Georges Bank which lies entirely in undisputed United States jurisdiction. In other words, the catchment area used in the United States chart goes far beyond
(170) the area in dispute in these proceedings. Yet as Figure 44 shows, the Canadian catch from the whole of these four ICNAF statistical units in most of the years between 1964 and 1981 exceeded that of the United States.

Third, the basis of weight calculation. The Canadian chart consistently uses "round weight" for all species, because that is the form in which the catch is taken from the sea. The United States has adopted an inconsistent approach using "round weight" for all species except scallops, which is the major Canadian crop. The United States includes scallops in a semi-processed form called meat weight. In my submission, mixing non-processed weights and semi-processed weights in this way is misleading because, as the Chamber will readily appreciate, the processing operation not only subtracts weight but also adds value, and value is not reflected anywhere in the United States presentation.

(170) In Canada's submission, Figure 44 accurately portrays the fishing activities of both coastal States over the whole of Georges Bank – and I stress that Figure 44 is not the disputed portion: it is the whole of Georges Bank and more – for the 15 years leading up to the critical date of 1979, and for two years after that date, to and including 1981. I submit that there is nothing in Figure 44 to justify the United States claim to the whole of Georges Bank.

The United States position is even less defensible if the Chamber were to look at value instead of weight. For this purpose I would ask the Chamber to look at
(171) the next graphic – Figure 46 to the oral proceedings, which was Figure 26 to the Canadian Reply. In the previous graphic, based on weight, a pound of codfish counted as much as a pound of lobster, even though the lobster is worth ten times the price. Figure 46 compares the annual average value of total catches on the whole of Georges Bank by Canada and the United States. In the left-hand column, the 17-year period 1964-1981, the entire period for which adequate statistics are available, Canada's share was 64 per cent in value on the whole Bank and 76 per cent in the disputed area. In the right-hand column, the 10-year period 1969-1978, Canada harvested 73 per cent of the value of the total combined catch of the Parties on the whole of the Bank and 84 per cent of the value of the catch from the disputed portion of the Bank.

Even in the most recent period for which statistics are available (1978-1981), notwithstanding the regulatory vacuum permitted by the United States, to which I referred a moment ago, and the overfishing by United States boats, Canada harvested 59 per cent by value of the catch from the whole of the Bank and 72 per cent of the catch from the now disputed portion of Georges Bank (V, Canadian Reply, Anns., Vol. II, Tables 23 and 27, pp. 52 and 55). So, Mr. President, and distinguished Judges, throughout this entire period it is un-

deniable that Canada has maintained a major fishing presence across Georges Bank.

But these statistics, supportive as they are of the Canadian claim, in fact understate the Canadian presence because the statistical reporting system used by Canada did not attribute to Georges Bank an appropriate share of the offshore catches of the small vessel fleet, which in moderate weather can and does travel the approximately 90 miles from the communities of southwest Nova Scotia to the eastern portion of Georges Bank.

The question is – how much is enough? What level of fishing effort does a State have to prove in order to retain access to a major fishing ground, 90 miles off its coast, well within its 200-mile zone, closer to it than to any other State? Surely in this case, whatever standard of comparison is selected Canada has more than met the burden of proof. During any plausible "relevant period" Canada's fishing effort not only equals that of the United States but exceeds it, particularly on the eastern portion of Georges Bank. As United States Ambassador Cutler cautioned the United States Senate in 1980, in words of particular cogency before this Chamber this morning:

> "But one of the most important factors that would influence a court of neutral judges . . . is that Canada has had a very important fishery in that disputed area for more than 20 years." (*Hearings before the Committee on Foreign Relations*, United States Senate, 1980, p. 25.)

The result of all this evidence can be simply stated:

First, the Canadian fishing presence on Georges Bank is a major element of the economic geography of the Gulf of Maine area that ought to be taken into account by the Chamber as a "relevant circumstance".

Second, at all relevant times Canada's catch in the disputed area has been substantially greater than that of the United States.

Third, in economic terms, the Canadian claim represents considerably less than its traditional catch on the whole of Georges Bank would justify, having regard to the fact that the single maritime boundary proposed by Canada would leave more than half of Georges Bank under undisputed United States jurisdiction.

Fourth, the United States line does not even reflect its own version of the catch statistics, because the effect of the United States line is to leave Canada with nothing – *zero* percentage – of a fishery in which even the United States concedes Canada has had a major interest for at least 20 years prior to the date of the present dispute.

In short, even putting the United States evidence at its highest, which is certainly unjustified, the United States line bears no equitable relationship to the facts even as the United States has represented the facts to be.

I turn now, Mr. President, to the issue of economic dependence. The physical and human geography of southwest Nova Scotia is reminiscent of the conditions that were before the Court in the 1951 *Fisheries* case. I quote briefly from the Norwegian Counter-Memorial in that case:

> "As with a consequence of the scarcity of tillable land, and also of the coastal configuration, Norwegians have sought from time immemorial their livelihood from maritime fishing and hunting.
>
> Fishing grounds off the coast have been at all times one of the rare natural resources which Norway could offer to her population." (Norwegian Counter-Memorial: *I.C.J. Pleadings, Fisheries*, Vol. I, p. 219.)

In my submission that description applies virtually word for word to southwest Nova Scotia.

Nova Scotia's dependence on the sea is detailed in the evidence presented by Canada. The next graphic in the Red Dossier is Figure 47 to the oral proceedings – which was Figure 2 to the Canadian Economics Annex. This graphic illustrates the distribution within Nova Scotia of fishing employment – full-time and part-time. The longest bars represent the largest concentrations of employed fishermen. As the Chamber will note, it is as if the province had been tilted on its end and the majority of fishermen went sliding over into the southwest corner, closest to Georges Bank. It is estimated that about 15 per cent of the labour force in southwest Nova Scotia work in fish harvesting and fish processing. There is, of course, variation within the region. Fishing employment is as high as 25 per cent in Shelburne county. That is located, as the Chamber will notice, in the extreme southwest of the province, the closest landfall to the eastern portion of Georges Bank. Related manufacturing industries account for a further 5 per cent. Thus, without even considering its role in sustaining the broader economy, including the dependence of businesses that provide services and supplies to the fishing industry, fishing generates about 20 per cent or one-fifth of all employment in southwest Nova Scotia (Canadian Memorial, Anns., Vol. IV, sec. I, Table A-8, p. 9). It might be useful to the Chamber to put this 20 per cent figure in the context of other cases which have come before international tribunals. It may be compared to the situation in Iceland where fishing and fish processing account for about 15 per cent of employment. In Norway the fishing industry accounts for only 2 to 3 per cent of employment (*ibid.*, p. 81, paras. 173-174).

The evidence, Mr. President, demonstrates that the Georges Bank fishery plays an indispensable role in the fishing industry of Nova Scotia generally. The resources of Georges Bank make possible a level of fishing activity that supports a higher level of services and infrastructure – by that I mean fish processing plants, boat building, repair work and so on – than could otherwise be justified. The incomes generated by Georges Bank are widely distributed throughout the coastal communities – incomes that would not be available from any other source.

The evidence demonstrates that without Georges Bank it would not be practical to operate large segments of the offshore fleet. Reduced effort in the offshore would have wide repercussions. Offshore catches represent the main source of supply for the region's major fish plants. These plants are often the only buyers of fish from the inshore fishermen. Without offshore landings many of these plants would cease to be economic. Without Georges Bank, a large part of the offshore fleet of southwest Nova Scotia would be out of business, and the fishing industry that remained would lack its present capacity to drive the regional economy.

In 1978, in the entire province of Nova Scotia, for every three dollars' worth of fish landed, one dollar's worth came from Georges Bank, making it the most valuable fishing ground available to the province (Canadian Memorial, Anns., Vol. IV, sec. I, Table A-6, pp. 7 and 205; Canadian Reply, Anns., Vol. II, Part I, Table 22, p. 51 and Table 23, p. 52). In that year, $58 million worth of scallops alone were landed from Georges Bank, the single most valuable cash crop in the entire province. (Details of the Canadian fishery, by weight and value for that year, are set out in Table A-6, Ann. 4 to the Canadian Memorial.) 1978 was a good year. But there were other good years. Over the ten-year period 1969 to 1978, landings from Georges Bank represented over one-quarter of Nova Scotian landings from all sources of all species (Canadian Reply, Anns., Vol. II, Table 16, p. 457).

The Court has made it clear in previous cases, of course, that economic dependence will be assessed in regional terms where the impact is concentrated at the regional level. In the 1951 *Fisheries* case, the Court emphasized, as an equitable consideration, the importance of "economic interests peculiar to a region" (*I.C.J. Reports 1951*, p. 133). And in the 1974 *Fisheries Jurisdiction* case, the Court emphasized, as a decisive factor to be taken into account, the "economic dependence ... of whole communities ..." (*I.C.J. Reports 1974*, p. 29, para. 66; pp. 197-198, para. 58).

(181) The regional nature of the fishery is even more apparent from the next graphic in the Red Dossier – Figure 48 to the oral proceedings, which was Figure 1 to the Canadian Economics Annex. This graphic shows the distribution of the total value of landings of fish in Nova Scotia in 1979, with southwest Nova Scotia – the coast closest to Georges Bank – leading the way. As was seen in the previous graphic, over half of the Province's fishery-related employment is resident in the five southwest counties. Eighty per cent of the Georges Bank offshore fleet and 45 per cent of the inshore fleet land their catch in those five counties – Lunenburg, Queens, Shelburne, Yarmouth and Digby. Seventy per cent of the province's landings are made in that region. It must be obvious that loss of access to Georges Bank would hit this coast – 190 nautical miles from Lunenburg to Digby – very hard indeed. In 1978 Georges Bank accounted for 41 per cent of the total weight of landings of all species in the five southwestern counties of Nova Scotia (Canadian Reply, Anns., Vol. II, Table 17, p. 46). It was the largest and most valuable single component in that fishery.

How can the Chamber assess the significance to Nova Scotia of this "special condition of economic dependence" on Georges Bank? The Economics Annex filed by Canada contains references to the standard indicators used by economists for this purpose, supported by detailed analysis. I would refer the Chamber merely to two or three of the more important indicators.

Loss of access to Georges Bank would increase regional unemployment in southwest Nova Scotia in the order of 50 per cent. Such an increase would be of major significance anywhere, but its effects would be particularly serious in a part of the world which must earn its livelihood by fishing if it is to continue to support itself. The jobs at risk represent 8 per cent of the total workforce of the five southwestern counties (Canadian Reply, p. 127, para. 295).

The fishing industry in southwest Nova Scotia provides the base on which the superstructure of the economy is built. Indirect employment is generated in all kinds of service industries such as retail stores, construction trades, services which cater to the people directly employed in the fishery. But these service type jobs presuppose the existence of an economic base to create the jobs to attract the population to live in those communities. Every dollar of income earned on Georges Bank works its way through the regional economy, from fisherman to grocer to banker to boatbuilder, multiplying its beneficial effect as it goes. In 1980, which is the last year for which adequate statistics are available, Georges Bank, directly and indirectly, accounted for approximately $146 million and if this loss were concentrated in southwest Nova Scotia it would represent a decline of 17 per cent in the regional Gross Domestic Product (*ibid.*, pp. 128-130, para. 299). By way of comparison, in the same year the iron and steel industry in the Federal Republic of Germany directly contributed only 2.6 per cent of the Gross Domestic Product. Automobile production directly contributed only 2.3 per cent of the Gross Domestic Product of Japan. The wine industry directly contributed only 0.6 per cent of the Gross Domestic Product of France (*ibid.*, p. 131, fn. 34).

The United States, on the other hand, has no significant economic dependence

on the disputed area, whether viewed at the national, State or regional level. The residents of Massachusetts, generally speaking, have more profitable things to do than to fish for a livelihood. Even the temporary surge in United States fishing effort on Georges Bank after 1978 did not represent any degree of economic "dependence". On the contrary, United States experts stated in a 1980 study that the increase was not due to any expansion of the New England fleet but to a "large influx of vessels" from the southern United States and that "the economic benefits to New England were minimal" (S. Sedgewick, C. Collins and S. Olsen, *Commercial Fishing Facilities Needs in Rhode Island*, Coastal Resources Centre, University of Rhode Island, referred to in the Canadian Counter-Memorial, p. 106, fn. 11 **(III)**).

(182) I would now ask the Chamber to turn to the next graphic in the Red Dossier, Figure 49 to the oral hearings, which compares employment opportunities in the primary and secondary sectors of southwest Nova Scotia in the left-hand column with those of eastern Massachusetts in the right-hand column. It does not suggest that the two economies are of comparable size – the economy of eastern Massachusetts is many times larger than that of southwest Nova Scotia – but it gives a profile of the workforce and it illustrates the depth and diversity of the economy of eastern Massachusetts. As the Chamber will see, in the primary and secondary sectors, approximately 86 per cent of the people of eastern Massachusetts are employed in a variety of manufacturing activities, whereas only 1.3 per cent is dependent on fishing and fish processing – which is seen at the bottom of the column. Southwest Nova Scotia by contrast presents an entirely different profile. Over 46 per cent of its jobs in these two sectors are related to fishing. What this graphic illustrates is the exceptional degree to which southwest Nova Scotia is fish-dependent and narrowly based, and this explains its special vulnerability to injury if it were deprived of access to Georges Bank.

The United States has in fact admitted that Georges Bank fishery generates more jobs and more income in Nova Scotia than in Massachusetts (see Ann. 4, Vol. III, to the United States Counter-Memorial). But because of the major difference in the size of the two economies, the *relative* contribution which Georges Bank makes to each of the two regions is more significant. With respect to the regional economy of eastern Massachusetts, Georges Bank accounts for 0.08 per cent of employment (compared with 8 per cent in southwest Nova Scotia) and 0.1 per cent of the eastern Massachusetts regional Gross Domestic Product (compared with 17 per cent of the GDP of southwest Nova Scotia). Maine and New Hampshire do not have a significant presence on the Georges Bank fishing grounds (Canadian Reply, p. 127, para. 295 and pp. 128-130, para. 299), notwithstanding the theory presented by the United States that Georges Bank somehow lies "in front of" the Maine coast. The percentage of Maine's catch from the area actually in dispute is practically non-existent. Fishermen from Maine and New Hampshire tend to concentrate on the inshore fishery – closer to home.

On this branch of the case, I respectfully suggest that the Chamber need not become preoccupied with what may appear to be a battle of statistics. Even if the United States contentions regarding the size and value of the Canadian fishing effort in the disputed area were accurate, instead of being a serious understatement, the United States own version of the facts establishes that southwest Nova Scotia is dependent on Georges Bank, and certainly more dependent than is New England generally, and eastern Massachusetts in particular, on the area in dispute.

The United States in its written pleadings does not attempt to deny the

comparatively greater dependence of southwest Nova Scotia on Georges Bank. But instead it offers the irrelevant advice that Nova Scotians should turn their energies to other activities. What other activities, it may be asked; what will bring about the economic miracle foreseen by the United States, and why did the economic miracle not happen before now? If counsel for the United States persists in what must be regarded as a rather fanciful line of argument, I would be prepared, if permitted, to return to this aspect of the topic at the second stage of these hearings.

B. Comparative Impact of Loss of Access

Mr. President, I turn now to the comparative impact of the boundary delimitation on eastern Massachusetts and southwest Nova Scotia. In my submission, no test of the "equity of the result" could disregard the impact which loss of access to Georges Bank would have on the coastal communities of the Gulf of Maine area, and in particular southwest Nova Scotia.

While the offshore fleet of southwest Nova Scotia is concentrated in eight major ports, the small vessel fleet is scattered along the southwest coast in small, "one-industry" communities (Canadian Counter-Memorial, pp. 121-124), which offer no substantial employment opportunities apart from fishing. Nova Scotia has 19 ports which are dependent for more than 10 per cent of their catch on Georges Bank, whereas Massachusetts has only three ports which fall into that category – Boston, Gloucester and New Bedford – and these ports are associated with urban areas that can absorb the loss of jobs and income in the event that any such loss is sustained, which is highly unlikely having regard to the ample fishing grounds which would remain on Georges Bank within United States jurisdiction. Boston without Georges Bank scallops would still look very much like Boston today. Saulnierville or Lunenburg without Georges Bank scallops would be a shadow of their present selves. The evidence before the Chamber is that in Massachusetts the fishing industry is a relatively minor activity which today is smaller, in comparison with the growing importance of other economic sectors, than it was 20 years ago.

The Chamber should be left in no doubt that the fishing grounds on Georges Bank west of the Canadian line could sustain the New England fleet. Quite apart from the statistical evidence, there is the striking testimony in the record, not only of those in the United States who supported Senate ratification of the 1979 fisheries agreement, but of those who opposed it on the basis that the 1979 agreement would produce about the same result, in fishing terms, as the final boundary line proposed by Canada. Of course, this is not surprising, because both the 1979 agreement and the Canadian line were designed for the same purpose: to respect the established fishing activities of the Parties. As counsel for the American Fisheries Defense Committee told the United States Senate in 1980, in opposition to ratification:

> "a very good case can be made, and statistics can be brought to bear to indicate – that even if we lost the boundary and we had to fish west of the final boundary line which Canada claimed, we might not do any worse than we would do under the treaty and in some cases we would clearly do better" (*Hearings before the Committee on Foreign Relations*, United States Senate, 1980, p. 53).

It is thus apparent that those who opposed the 1979 agreement did so not because they intended merely to secure their established fishery but because they hoped that in these proceedings the United States would benefit beyond what

they were entitled to, in the words of Ambassador Cutler, on the basis of the "historical record".

In the result, the evidence before the Chamber on this point can be summarized as follows:

First, adoption of the Canadian line would leave the United States ample fishing grounds on Georges Bank to occupy the New England fleet and therefore communities in the United States will not be adversely affected in any significant way if the Canadian line is adopted.

Second, in the unlikely event that there were any adverse effect on the United States fishing effort, it would be minimal, and its effects would be quickly and easily absorbed in the regional economy of eastern Massachusetts.

Third, communities along the stretch of coastline 190 nautical miles long between Lunenburg and Digby would be seriously damaged by adoption of the line proposed by the United States, and there is no prospect that such damage could be absorbed, in the short run or in the long run, by the regional economy of southwest Nova Scotia.

The result of all this was aptly summarized by a 1978 study sponsored by the Office of the Geographer of the United States Department of State:

> "Nova Scotia has more to lose, in the short-run, in the present boundary dispute because it is more dependent upon the Georges Bank for its present income. In principle, it is harder to have an accustomed resource taken away than it is to lose a projected one." (Canadian Memorial, p. 61, para. 119.)

In the longer term the State Department Geographer offered the prospect of growth in the fishery on both sides of the boundary, a topic I will return to in a moment.

III. The "Equitable Result"

I would now like to address the requirement, recognized by previous decisions of the Court, to test the lines proposed by Canada and the United States against the need to achieve "an equitable result".

Not only does the Canadian line leave to each Party that part of the Bank which is closer to it, but it balances the interests of the Parties by leaving to each Party the fishing grounds most intensively used by its fishermen. The next (66) graphic in the Red Dossier is Figure 50 in the oral proceedings (Fig. 26 of the Canadian Counter-Memorial). It shows the distribution of the scallop fishing effort of both Parties in the 1969-1978 period. The Chamber will note that there is evidence of a fishing effort by both countries on both sides of the Canadian line, which appears as a black line through Georges Bank. But it will also be seen that the Canadian fishery, which is the upper of the two diagrams, is most strongly positioned in the eastern portion of the Bank, whereas the American effort is concentrated on the American side of the proposed Canadian line. In 1978, 93 per cent of the Canadian scallop catch came from Georges Bank. The important thing about scallops is that they are immobile – the adults just lie in beds on the ocean floor. If the scallop grounds intensively harvested by Canada east of the Canadian line were lost to Canada it would bring an end to that fishery. There are no comparable offshore scallop grounds in that part of the Gulf of Maine which the United States proposes should be left under Canadian jurisdiction, or, for that matter, comparable scallop grounds elsewhere in Canadian waters.

The largest component of the United States Georges Bank fishery, on the other hand, is made up of free-swimming species, not scallops. Many of these free-swimming species spend a substantial part of the year in undisputed American waters. The most important species presently taken by Americans on the Canadian side of the Canadian line is the yellowtail flounder. But the United States Counter-Memorial points out (at p. 219) that the stocks of yellowtail flounder in fact spend most of the summer months on the United States side of the Canadian line, in areas which would continue to be under United States jurisdiction if the Canadian line were accepted by this Chamber.

The point is that the different nature of the Georges Bank fishery in the two countries further reinforces the equitable nature of the Canadian line. As counsel for the American Fisheries Defense Committee put it to the United States Senate Committee in 1980:

> "United States access to fish in the northeastern tip of Georges Bank is significantly less important to us than Canada's continued access to the area is to its fishermen." (Canadian Memorial, p. 61, fn. 5.)

Mr. President, the limits of the United States jurisdiction proposed by Canada would leave the United States with fishing grounds on Georges Bank whose long-term optimum yields substantially exceed traditional United States catches for the whole of the Bank. In the period from 1969 to 1978, in those ten years, on the whole of the Bank, the United States fishermen's annual catch averaged 16.1 million dollars. The Canadian line would leave within United States jurisdiction fishing grounds on Georges Bank having long-term yields of 48.6 million dollars annually, allowing a 200 per cent increase in United States fishing effort on Georges Bank to the south and west of the Canadian line (see analysis at pp. 11-12 of Canada's Economic Annex). This analysis of growth potential is corroborated by independent experts within the United States. A recent analysis by the University of Rhode Island referred to in the evidence (Canadian Memorial, p. 124, para. 317) indicates that when the fishery resources within undisputed United States jurisdiction recover from the severe overfishing of recent years the New England fleet could be expanded by 200 vessels.

IV. Conclusion

Finally, Mr. President and distinguished Judges, what conclusions does Canada ask the Chamber to draw from all of this evidence and all of this analysis? I have taken the time of the Chamber this morning to address the legal relevance of economic considerations, as it is important that the Parties before the Chamber come to terms with the real issues that have brought us before you. In Canada's view, the use that can properly be made of economic considerations in a boundary delimitation is limited and precise: limited to claims that are rooted in the geography of the relevant area; precise in that such factors must be related to the very nature and concept of the 200-mile jurisdiction; to the "physical" geography of the Gulf of Maine area; to the true subject-matter of the dispute before the Court; or to the "human dimension" which is essential to any consideration of the equity of the result. If economic geography is properly addressed by the Parties, within this framework, three relevant circumstances emerge as being, in my submission, of paramount importance.

First, Canada has a major fishery on Georges Bank, particularly in the eastern portion of the Bank which is closer to Canada than to any part of the United States.

Second, a special condition of economic dependence exists in that part of Nova Scotia that is closest to Georges Bank, an equitable consideration that each and every United States claim since 1976 has ignored entirely.

Third, and finally, the Canadian line, drawn by reference to the configuration of the relevant coasts, accommodates the established fishing interests of both of the Parties, and its equitable nature is thus confirmed, not only for Canada but for the United States as well.

The Chamber rose at 1 p.m.

CINQUIÈME AUDIENCE PUBLIQUE (4 IV 84, 15 h)

Présents: [Voir audience du 2 IV 84.]

PLAIDOIRIE DE M. FORTIER

CONSEIL DU GOUVERNEMENT CANADIEN

M. FORTIER: Monsieur le Président, Messieurs les juges, avant de débuter ma plaidoirie, j'aimerais vous présenter un nouveau joueur qui nous a donné un coup de main avec la technicité de la présentation de la cause du Canada, il s'agit de M[e] Ross Hornby du barreau de l'Ontario. J'aimerais vous signaler aussi avant de débuter que j'aurai l'occasion durant ma plaidoirie de me référer au compendium, au livre rouge[1] que vous avez devant vous. Il y a certaines illustrations que je commenterai. Et j'utiliserai aussi la boîte à images, comme je la qualifie. En deux occasions, et vous en avez une présentement, l'illustration sur la boîte ne se retrouve pas dans le cahier rouge qui vous a été remis. Ici, effectivement, vous avez une carte de base de la région concernée.

Alors, Monsieur le Président, Messieurs les juges, c'est à moi, homme de loi, que revient cet après-midi l'insigne honneur de vous parler du milieu marin dans la région du golfe du Maine – de vous parler science, quoi. Tout juriste à qui l'on demande de discuter d'un sujet qui fait intervenir des questions scientifiques complexes doit sûrement passer par la gamme des émotions que j'ai moi-même éprouvées. Je me suis d'abord demandé pourquoi il était nécessaire de se pencher sur ces sujets dans le contexte après tout d'une procédure judiciaire qui vise à déterminer le principe d'une frontière maritime unique sur la base de règles et de principes juridiques.

Assurément la Chambre voudra savoir si elle a affaire à un ou deux plateaux continentaux dans la région du golfe du Maine. Mais, sur ce point central, les Parties sont d'accord depuis le début. Tant le Canada que les Etats-Unis ont reconnu que le plateau continental dans cette région constitue un prolongement naturel unique et fait partie de la marge continentale continue qui longe toute la côte atlantique de l'Amérique du Nord.

De même, il est évident que la Chambre voudra avoir une description générale du milieu marin dans la région du golfe du Maine à des fins de référence, d'autant plus que c'est la première fois qu'un tribunal est appelé à déterminer le tracé d'une frontière maritime qui s'applique à la fois entre autres au plateau continental et à la zone de pêche des 200 milles. Mais pourquoi faut-il que des hommes de loi débattent des questions qui divisent même les hommes de science? Pourquoi est-il nécessaire d'accabler la Chambre de discussions interminables et non concluantes à propos de la répartition des dépôts de sable, de vase et de gravier sur le fond de la mer? Ou encore à propos de la température et de la salinité de la colonne d'eau? Ou des préférences climatiques ou habitudes de frai *particulières de micro-organismes tout comme d'organismes géants*?

La réponse à ces questions réside dans les allégations inouïes avancées par

[1] Les dossiers spécialement préparés à l'intention de la Chambre par les Parties pour illustrer leurs plaidoiries ne sont pas reproduits. Si une carte ou illustration contenue dans un dossier est reprise dans le volume des cartes de la présente édition **(VIII)**, elle est dûment signalée en marge du texte. *[Note du Greffe.]*

les Etats-Unis et fondées sur leur perception de phénomènes naturels et de controverses scientifiques sur lesquels aucun tribunal n'a jusqu'à maintenant été appelé à se prononcer ou n'a accepté de se prononcer – du moins à la connaissance du Canada. L'attitude de nos confrères américains à l'égard de ce qu'ils appellent la « frontière naturelle » du chenal Nord-Est est la raison première pour laquelle je me verrai aujourd'hui obligé de dépasser la description générale du milieu marin dans la région du golfe du Maine pour m'engager dans des considérations secondaires qui se veulent pertinentes, certes, mais qui, en dernière analyse, j'en conviens, aideront moins la Chambre dans l'exécution du mandat qui lui a été confié par le Statut et le compromis que les plaidoiries d'autres de mes collègues. Même si la science, Monsieur le Président, pouvait nous donner une image parfaite de la nature, plaideurs et juges devraient quand même composer avec les notions imparfaites du droit et de l'équité (**I**, mémoire du Canada, par. 24, 83, 306-310; **III**, contre-mémoire du Canada, par. 60, 176-179; **V**, réplique du Canada, par. 81, 164, 190, 373; **II**, mémoire des Etats-Unis, par. 30, 36; **IV**, contre-mémoire des Etats-Unis, par. 35).

La Chambre n'aura pas manqué d'être frappée, comme nous l'avons été nous-mêmes, par la répétition jusqu'à l'obsession du thème de la frontière naturelle du chenal Nord-Est dans les écrits américains. Ce n'est pas dix fois, c'est cent fois que l'on revient là-dessus: le chenal Nord-Est constitue une frontière naturelle – mieux: la seule frontière naturelle dans cette région (« the only natural boundary »). D'un côté et de l'autre du chenal rien n'est identique, absolument rien: ni la géomorphologie, ni le mouvement des eaux, ni leur salinité, ni les espèces de poissons, ni rien d'autre. L'idée derrière ce thème ressassé jusqu'à satiété est clair: comment la Chambre oserait-elle détruire ce que la nature a construit? Comment la Chambre pourrait-elle mettre de côté cette véritable frontière naturelle, cette « zone tampon » que la nature a érigée entre deux mondes? La nature, laisse-t-on entendre, a elle-même désigné ce qui appartient au Canada et ce qui appartient aux Etats-Unis. La ligne proposée par le Canada néglige cette séparation; elle serait une « frontière artificielle » (mémoire des Etats-Unis, par. 268), elle serait une frontière purement « géométrique » qui ne mérite pas d'être retenue par la Chambre. Tel est, Monsieur le Président, Messieurs les juges, le *leitmotiv* qui revient indéfiniment sous la plume de nos adversaires et qui tisse une trame serrée à travers tous les écrits américains (**I**, mémoire des Etats-Unis, par. 13, 15, 53-54, 58, 250, 292, 296, 306, 315, 322, 339; **III**, contre-mémoire des Etats-Unis, par. 7, 12, 51, 290, 315, 319, 410, « Submissions », B 2 B; **V**, réplique des Etats-Unis, par. 12, 155, 166, 212, 215, 219, 227).

Dans mes propos, aujourd'hui, je compte faire intervenir à la fois des questions de fait et des questions de droit. Je chercherai dans un premier temps à décrire les caractéristiques essentielles des trois paliers du milieu marin dans la région du golfe du Maine: le sous-sol, le fond de la mer et finalement la colonne d'eau. Et, dans un second temps, j'essaierai de clarifier leur pertinence en droit.

J'ai déjà noté que les Parties s'entendent sur une question centrale. La Chambre a affaire en l'espèce à un plateau continental unique ou a un prolongement naturel unique. Sur bon nombre d'autres questions de fait et de droit, les Parties toutefois sont en profond désaccord. Ces sujets de litige ont été résumés aux paragraphes 28, 29 et 30 de la réplique du Canada. Je ne prendrai sûrement pas le précieux temps de la Chambre cet après-midi pour vous les rappeler. Mais en bref, ces points de désaccord peuvent se ramener à une seule question. La nature a-t-elle fixé dans la région du golfe du Maine une frontière maritime unique pour le plateau continental et les zones de pêche des Parties, une frontière que les Parties elles-mêmes, voire la Chambre, se doivent de respecter en droit et en équité?

Avant de m'engager dans le vif de mon exposé, il serait utile de répondre de façon sommaire à cette question en rappelant à la Chambre que les frontières terrestres elles-mêmes ne sont jamais «naturelles» en ce sens qu'elles seraient dictées par la nature. Elles sont des faits de l'homme, des faits politiques. M. le juge Jiménez de Aréchaga a rappelé à cet égard que la «dangereuse doctrine des frontières naturelles» a déjà été condamnée au XVIII[e] siècle par Rousseau, qui faisait observer «qu'elles aboutissaient à faire de l'ordre politique l'ouvrage de la nature» (*C.I.J. Recueil 1982*, p. 117, par. 61). Nous avons de notre côté rappelé la condamnation prononcée contre le concept même de «frontières naturelles» par MM. Albert de La Pradelle et par Whittemore Boggs (contre-mémoire du Canada, par. 529).

I. Vue d'ensemble

Monsieur le Président, Messieurs les juges, avant d'entreprendre une discussion détaillée du sous-sol, du fond de la mer et de la colonne d'eau dans cette région du golfe du Maine, pour tenter de découvrir si la nature y joue un rôle dans la détermination du titre juridique et dans la délimitation, je voudrais avec votre permission vous donner une vue d'ensemble du milieu marin dans cette région.

Vous ne serez certes pas surpris de m'entendre vous exposer que la caractéristique la plus frappante de ce milieu est sa complexité et sa variabilité, tout particulièrement en ce qui concerne la colonne d'eau. Les océans sont une force dynamique et non statique. Les eaux circulent; les eaux se mélangent; le plancton est charrié par le courant; les poissons migrent selon les saisons et toute leur vie durant. Pour peu que l'on puisse se permettre une généralisation quelconque, disons que la région du golfe du Maine fait partie d'un continuum nord-sud le long du plateau continental de l'Amérique du Nord. Dans le sous-sol, sur le fond de la mer et dans la colonne d'eau, nous constatons une continuité au niveau des processus et des propriétés géologiques, géomorphologiques, océanographiques et biologiques.

A l'intérieur même de chacun des étages, de chacun des paliers sous étude, nous pouvons évidemment discerner une variété de discontinuités. Ces discontinuités peuvent être plus ou moins prononcées selon le cadre de référence adopté par l'observateur. Mais ce qu'il importe de souligner et ce que je vais tenter de vous démontrer cet après-midi, c'est que les discontinuités qui sont effectivement présentes ne coïncident pas verticalement à la fois dans le sous-sol, sur le fond de la mer et dans la colonne d'eau. Au surplus, les discontinuités varient horizontalement dans chacun des trois étages. Or, Monsieur le Président, 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.

Il ne fait pas de doute que le banc de Georges est un phénomène physique identifiable dans la continuité générale du milieu marin de la région du golfe du Maine. C'est un banc de pêche bien connu, situé au large des côtes de la Nouvelle-Ecosse et du Massachusetts. En tant que trait physiographique ou topographique du plateau continental unique de la région, le banc de Georges est défini à la fois par le grand chenal Sud et par le chenal Nord-Est. En tant que caractéristique océanographique d'un régime marin unique, le banc est à nouveau défini par ces deux mêmes chenaux. J'ai bien dit «défini», Monsieur le Président, et non pas «séparé». Car le banc de Georges fait partie intégrante du milieu qui l'entoure.

Si le banc de Georges accuse des affinités géologiques, océanographiques ou biologiques particulières avec les environs, c'est bien avec le nord-est – autrement dit avec le Canada. Les espèces que l'on trouve sur le banc de Georges sont

essentiellement boréales à tous les niveaux de la chaîne alimentaire, et le banc lui-même est considéré comme faisant partie de la province biogéographique de la Nouvelle-Ecosse. Je dois répéter toutefois que la continuité – et non la discontinuité – est la caractéristique première de la région du golfe du Maine. Il en est ainsi de la distribution du phytoplancton, du zooplancton, du benthos, et des espèces de poissons, de même que pour tous les autres phénomènes. Pour autant qu'il soit possible d'identifier des discontinuités biologiques, celles-ci se produisent dans la région du cap Cod, les hauts-fonds de Nantucket et le grand chenal Sud, car c'est là que s'opère une transition entre les eaux froides du nord et les eaux plus tempérées du sud.

Monsieur le Président, c'est avec pour toile de fond cette description générale du milieu marin dans la région du golfe du Maine que je me propose maintenant d'examiner de façon un peu plus détaillée les trois paliers qui le composent.

II. Le sous-sol

Tant le Canada que les Etats-Unis s'accordent pour affirmer que la structure géologique du sous-sol de la région du golfe du Maine est essentiellement continue. Néanmoins, ce sous-sol présente effectivement certaines caractéristiques qui soulignent son affinité avec des zones situées au nord et à l'est. Tout d'abord comme la Chambre le constatera *de visu* sur cette illustration que nous
(58) retrouvons sur la boîte à images et qui porte le numéro 52 dans le compendium des plaidoiries orales, deux bassins sédimentaires très profonds longent le plateau continental depuis le cap Breton jusque dans la région du golfe du Maine plus au sud. Une dépression structurale appelée le « bassin Scotian » s'étend vers le sud-ouest sous la plus grande partie du plateau Scotian, du chenal Nord-Est et de la partie est de ce fameux banc de Georges, où elle donne sur l'arche de Yarmouth. Cette dépression fournit la preuve de l'existence d'affinités géologiques entre le sous-sol de la partie est du banc de Georges et le sous-sol du plateau Scotian plus au nord. Par ailleurs, le bassin Scotian est partiellement séparé du bassin du banc de Georges qui s'étend sous la partie occidentale de ce banc de Georges et sous le plateau de la côte est des Etats-Unis. Donc, s'il existe une discontinuité dans les caractéristiques sédimentaires du sous-sol, c'est entre le bassin Scotian et le bassin du banc de Georges qu'elle se produit, au milieu du banc lui-même.

(181) Avec l'illustration suivante qui porte le numéro 53 dans votre compendium et qui n'est pas reproduite sur la boîte à images, vous pouvez observer à quel point les alignements du socle de la masse terrestre de la Nouvelle-Ecosse et ceux sous le banc de Georges sont similaires (réplique du Canada, par. 164-169). Les affinités géologiques entre le sous-sol, la masse terrestre canadienne et le sous-sol du banc de Georges sont manifestes. S'il existe des discontinuités, c'est près des monts sous-marins de la Nouvelle-Angleterre *(the New England Seamounts)* identifiés au bas de cette illustration n° 53, c'est près de ces monts sous-marins, dis-je, *qu'il faut les chercher. Cette discontinuité est indiquée effectivement par le* changement de direction des lignes rouges que vous voyez au sud et à l'ouest du banc de Georges. Nous pouvons voir une importante démarcation structurale dans ce secteur de la marge continentale au sud et à l'ouest du banc de Georges. Cette chaîne de monts sous-marins marque une rupture dans le socle rocheux. Les scientifiques imputent ce phénomène à la présence d'une zone de faiblesse crustale qui s'est créée au fur et à mesure de la séparation lente mais progressive *des plaques nord-américaine et africaine. Les monts sous-marins* de la Nouvelle-Angleterre interrompent dans ce même secteur une autre caractéristique importante, que vous pouvez voir sur cette illustration n° 53. Cette caractéristique est connue sous le nom d'« anomalie magnétique de la côte est ». C'est effectivement le

secteur qui est indiqué en gris le long du talus continental sur cette illustration. Cette caractéristique est généralement continue tout le long du plateau continental de l'Amérique du Nord; c'est ce que signifient les petites colonnes grises aux deux extrémités de cette anomalie et qui sont reproduites sur l'illustration.

Monsieur le Président, j'espère que ce très bref examen de la structure géologique de la région du golfe du Maine a fait ressortir que, si, je dis bien si, des caractéristiques quelconques représentent une discontinuité dans le sous-sol de cette région, elles se trouvent au milieu du banc de Georges et dans sa partie occidentale – bien loin du chenal Nord-Est. Si donc la nature pouvait dicter des frontières aux juristes au niveau du sous-sol, c'est là que nous en trouverions une.

III. Le fond de la mer

Si vous le permettez, Monsieur le Président, Messieurs les juges, je voudrais maintenant monter d'un étage et examiner brièvement le deuxième niveau du milieu marin dans la région du golfe du Maine, soit le fond de la mer, plus particulièrement sa couverture sédimentaire et sa topographie. Vous retrouvez à nouveau sur la boîte à images cette carte de base des écritures canadiennes qui ne se trouve pas dans votre compendium.

Je suis donc au niveau du fond de la mer et je ne m'attarderai pas longuement sur les sédiments qui le tapissent. Il n'existe aucune différence significative entre les sédiments qui recouvrent les diverses parties de la région en litige. Toute la région a subi la glaciation, et nous ne voyons pas comment les prétendues différences de densité du sable et du gravier pourraient aider à identifier quelque frontière que ce soit dans le cadre du débat dont la Chambre est saisie. Je tiens cependant à relever ici que nos adversaires font erreur lorsqu'ils situent au chenal Nord-Est la ligne de démarcation entre la zone érodée par les glaciers et la zone d'alluvions proglaciaires (annexes au contre-mémoire des Etats-Unis, vol. IV, annexe 5). En fait, cette démarcation s'établit le long d'une ligne qui coupe en diagonale le banc de Georges, de l'ouest à l'est.

Parlons maintenant de la topographie du fond de la mer dans la région concernée. Ce qui tranche le plus, au sujet de cette topographie, c'est la transition du plateau de la côte est, situé au sud du cap Cod et dépourvu de tout modelé glaciaire, au plateau glaciaire qui couvre la région au nord de ce même cap Cod. Et l'un des aspects les plus remarquables de cette zone glaciaire est la présence d'une série de bassins qui bordent la partie intérieure du plateau continental, et qui est elle-même doublée d'un chapelet de bancs larges et peu profonds le long du rebord extérieur du plateau. Vous avez par exemple le bassin de Wilkinson, le bassin de Georges, le bassin La Have et le bassin Emeraude, et pour ce qui est des bancs vous avez évidemment le banc de Georges, vous avez le banc de Brown, le banc La Have et finalement le banc Emeraude. Alors j'ai bien dit qu'il y a une série de bassins qui bordent la partie intérieure du plateau continental et qui est elle-même doublée d'un chapelet de bancs le long du rebord extérieur du plateau. Le banc de Georges est l'un de ces bancs qui se trouvent entre Terre-Neuve, je dis bien Terre-Neuve, et le grand chenal Sud plus au sud-ouest.

Evidemment, ces bancs peu profonds relativement parlant sont définis par des chenaux, tels le grand chenal Sud et le chenal Nord-Est qui, comme je l'ai souligné plus tôt, encadrent le banc de Georges à l'ouest et à l'est respectivement. Mais ces chenaux sont beaucoup moins profonds que les bassins qui bordent les bancs du côté de la terre. Il est donc tout à fait inexact de prétendre comme le font nos adversaires que l'un quelconque de ces chenaux, soit le chenal Nord-Est, marque une «rupture appréciable» («a significant break») dans la topo-

graphie du plateau continental. En fait, Monsieur le Président, Messieurs les juges, comme vous pouvez le constater en lisant la bathymétrie du milieu, l'élévation des bancs et des chenaux par rapport aux bassins plus profonds du côté de la terre est beaucoup plus significative.

Mais même cette élévation est relativement insignifiante. En effet, le plateau continental de toute la région du golfe du Maine présente une surface virtuellement plate. Les dénivellations s'y étalent sur de si vastes distances que si le plateau était asséché le fond de la mer apparaîtrait comme une plaine unie. Il suffit pour s'en rendre compte d'observer ces deux images, maintenant sur la (59) boîte, qui ont été produites par ordinateur. Il s'agit de l'illustration n° 54 dans votre compendium. Dans l'illustration du haut le relief a été exagéré deux fois, et même avec cette exagération le talus et le glacis continental y sont à peine perceptibles. Lorsque le relief est exagéré cinq fois, comme dans l'image du bas, les seuls accidents topographiques vraiment dignes de mention dans la région sont le rebord du plateau, la chaîne de monts sous-marins de la Nouvelle-Angleterre et le bassin de Georges.

Monsieur le Président, Messieurs les juges, il est clair, je vous le soumets bien respectueusement, que pour attacher quelque importance que ce soit à la topographie du plateau continental dans la région du golfe du Maine il faudrait exagérer la réalité encore bien au-delà de l'exagération à laquelle nous avons eu recours nous-mêmes pour produire ces images.

IV. La colonne d'eau : caractéristiques physiques

Je me propose maintenant d'emprunter à nouveau l'escalier pour atteindre et examiner le troisième et dernier palier du milieu marin, qui est à la fois le niveau le plus complexe et l'élément inédit de la présente affaire ; j'ai nommé la colonne d'eau. Si vous en êtes d'accord, Monsieur le Président, je me pencherai d'abord sur ses caractéristiques physiques pour ensuite étudier ses caractéristiques biologiques.

L'océanographie physique c'est l'étude, comme vous le savez mieux que moi, de la constitution et des propriétés physiques des océans. Les océanographes se fondent sur l'observation des courants, des marées, des variations de température, de même que de la salinité des océans, pour construire des hypothèses sur la nature de la colonne d'eau. Même si ces hommes de science ne sont pas toujours d'accord sur l'importance relative à attribuer aux divers phénomènes physiques qu'ils identifient, ils sont néanmoins unanimes à reconnaître que l'océan est un environnement extrêmement variable. Ses caractéristiques se modifient dans le temps et dans l'espace à mesure que divers phénomènes se juxtaposent, se confondent, se séparent, puis se rejoignent à nouveau pour réapparaître sous une forme différente. Il ne saurait exister de discontinuités géographiques fixes dans le milieu mouvant de la mer.

Pourtant, en dépit de sa nature fluide et toujours changeante, la colonne d'eau présente certaines caractéristiques clés qu'il est possible de circonscrire de façon certaine.

Parmi les influences qui s'exercent dans la région du golfe du Maine, l'une des plus importantes est celle des eaux arctiques froides et de faible salinité qu'y entraînent les courants du Labrador et de Nouvelle-Ecosse. Les marées constituent aussi une autre influence clé dans la région. Elles sont parmi les plus fortes du monde en raison à la fois de l'étendue et de la configuration particulière de la baie de Fundy. Comme résultat, l'ensemble de la région du golfe du Maine obéit à un seul et unique régime de marées.

En fait, Monsieur le Président, ces marées «fundiennes» sont si prononcées que

la construction d'un barrage dans le bassin des Mines, tout à fait au fond de la baie de Fundy, affecterait probablement l'amplitude des marées sur le banc de Georges et même dans le port de Boston. Et d'ailleurs, en 1981, le département d'Etat des Etats-Unis a fait part au Canada de ses préoccupations à cet égard, et le Sénat des Etats-Unis lui-même a tenu des audiences l'année dernière, en 1983, en vue de déterminer l'impact que pourrait avoir sur la côte américaine le développement marémoteur de la baie de Fundy (réplique du Canada, par. 192).

(163) L'illustration n° 55 dans votre compendium, que je n'ai pas jugé nécessaire de reproduire sur la boîte à images, met en relief l'action réciproque, les rapports mutuels entre les divers secteurs de la colonne d'eau dans la région du golfe du Maine. S'il se produisait un déversement de pétrole sur le banc de Georges pendant les mois d'été, la nappe serait véhiculée vers le nord et vers l'est par les marées, les courants et les vents dominants, et viendrait ainsi souiller la côte canadienne et le plateau Scotian. Vous pouvez effectivement voir le mouvement de la nappe d'eau sur ladite illustration, vous pouvez le deviner à tout le moins. Ces trajectoires du pétrole en surface ont été calculées à l'aide d'un modèle établi par ordinateur à partir de données sur les vents et les courants pendant vingt-trois étés; c'est là la signification des dates que vous voyez sur cette illustration. Reconnaissant d'ailleurs l'interdépendance qu'imposent les conditions du milieu, le Canada et les Etats-Unis ont 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).

Avec votre indulgence, Monsieur le Président, je voudrais maintenant me pencher sur certains aspects du litige qui divisent encore les Parties en ce qui concerne l'océanographie physique de la région du golfe du Maine. Le Canada a expliqué dans ses écritures que la colonne d'eau dans la région concernée se modifie constamment à mesure que les eaux qui se déplacent vers le sud le long du plateau Scotian pénètrent dans le golfe du Maine et ce à cause de l'interaction des marées et des courants (annexes au contre-mémoire du Canada, livre I,

(209) par. 47). L'illustration n° 56 reproduite dans votre compendium comprend un diagramme des températures de la surface de la mer – l'une des données prises en compte par l'océanographie physique. Cette illustration est particulièrement utile du fait que les deux Parties ont reconnu l'exactitude des données qu'elle comporte. Elle peut paraître de prime abord compliquée mais j'espère pouvoir vous démontrer dans quelque temps qu'elle ne l'est pas.

(209) Selon nous, cette illustration démontre de façon convaincante que la zone comprise entre le plateau Scotian et le banc de Georges présente un continuum océanographique, empreint de modification constante mais graduelle de la température à mesure que l'on navigue vers le sud-ouest.

La température la plus froide est représentée par la colonne bleue au bas de cette illustration, à droite, et la température la plus chaude est représentée par la colonne rouge. Le banc de Georges est représenté par cette colonne de même que par cette courbe qui sont colorées en brun ou en jaune orange. Cette illustration démontre que plus on navigue vers le sud plus l'eau devient chaude. L'eau en Floride est plus chaude que l'eau du Labrador, quoi!

Les Etats-Unis dans le cadre de leur thèse centrale affirment que la modification est très prononcée, ce qui indiquerait l'existence d'une frontière naturelle dans la colonne d'eau entre le banc de Georges et le banc de Brown, c'est-à-dire entre la courbe orange et la courbe rose. Bien respectueusement, nos adversaires sont dans l'erreur. Comme vous pouvez le constater, les différences de température reflètent un continuum entre le plateau Scotian et le banc de Georges et non

(209) pas une rupture. Mais, il y a plus. En effet, l'illustration du Canada compare, entre autres, les températures prises sur le plateau à celles mesurées sur le talus

continental (rouge). Nous avons établi cette comparaison des températures prises sur le plateau de celles mesurées sur le talus continental et il me semble que l'illustration démontre que la différence relevée entre les eaux froides du plateau, qui subissent l'influence du nord, et les eaux chaudes du talus, qui sont soumises à l'influence du Gulf Stream, est bien plus importante que l'écart négligeable observé entre les eaux des diverses zones échantillonnées sur le plateau.

(200) Or, dans la reproduction de l'illustration du Canada que les Etats-Unis présentent dans leur annexe (je me réfère à la figure 2 de l'annexe 25 à la réplique des Etats-Unis) nos adversaires, comme par hasard, ont choisi de supprimer la comparaison entre les eaux du plateau et celles du talus. Dans la réplique de nos alliés américains, à l'annexe 25, figure 2, la colonne rouge et la courbe rouge ont disparu. Le Canada maintient que c'est cette comparaison qui offre la seule mesure valable de l'importance relative des différences de température observées dans la région.

Cela m'amène, Monsieur le Président, Messieurs les juges, à poser une question fort pertinente. Comment cette Chambre pourra-t-elle faire la part de l'important et de l'accessoire dans les caractéristiques physiques de la colonne d'eau si le Canada et les Etats-Unis, alors même qu'ils sont d'accord sur certains facteurs, les interprètent de façon largement divergente?

Ces divergences tiennent à la nature même de l'océanographie. Certes, il est possible de tracer une ligne dans n'importe quel secteur de l'océan, d'étudier l'environnement de part et d'autre de cette ligne et de démontrer qu'il existe des différences. Selon l'étendue des zones choisies pour établir les moyennes, les différences peuvent apparaître plus ou moins marquées. En termes de statistiques, les écarts peuvent être considérés comme significatifs ou négligeables et, ce qui est encore plus important, ils peuvent ne pas être plus prononcés entre les zones qu'à l'intérieur d'une même zone. Ce que je veux faire valoir ici, c'est que les hommes de science, de façon tout à fait justifiée d'ailleurs, cherchent à isoler les phénomènes en fonction des régions, des «compartiments» ou des «régimes» qu'ils ont choisi d'étudier. Si ce sont là des procédés légitimes sur le plan théorique, ils n'ont pas été conçus – et ils ne doivent surtout pas être invoqués – dans le but de suggérer l'existence de «discontinuités» ou de «frontières» dans la texture complexe d'un environnement marin.

Au surplus, le profane que je suis devrait savoir qu'il est dans la nature même des sciences océanographiques de chercher à définir des anomalies, des discontinuités, des fronts et autres caractéristiques distinctives dans un milieu dont tous s'accordent à reconnaître qu'il se définit surtout par son ouverture, sa variabilité, sa continuité et son dynamisme. Bien sûr, il existe des discontinuités; mais celles-ci sont à la fois diffuses et immensément variables dans leur localisation géographique. Elles ne sauraient surtout pas marquer une frontière unique et fixe à l'intérieur même de la colonne d'eau, et encore moins une frontière qui se prolongerait et se superposerait à la fois dans le fond de la mer et dans le sous-sol.

Je crois qu'il est inutile que je m'attarde davantage sur la multitude des caractéristiques physiques de la colonne d'eau. Je voudrais plutôt passer à ses caractéristiques biologiques.

V. La colonne d'eau: caractéristiques biologiques

Depuis un siècle déjà – ce qui constitue une très longue période dans la jeune histoire de l'Amérique du Nord –, des études scientifiques menées par des experts aussi bien du Canada que des Etats-Unis démontrent de façon constante que les communautés de poissons et d'organismes du fond de la région du golfe du

Maine sont, d'une part, étroitement liées aux communautés dont l'habitat se situe au nord et à l'est et, d'autre part, tendent à se différencier des communautés se situant au sud et à l'ouest.

Ces experts ont consigné à maintes reprises leurs constatations à l'effet qu'on devait désigner la zone côtière s'étendant de cap Cod jusqu'à la côte sud de Terre-Neuve comme la province biogéographique néo-écossaise et la zone au sud-ouest de cap Cod comme la province virginienne. Si tant est encore une fois, Monsieur le Président, qu'une frontière pouvait être dictée par la nature, c'est là, selon nous, qu'elle se situerait.

La thèse du Canada selon laquelle le banc de Georges se caractérise par la présence d'espèces nordiques ou boréales est corroborée par un ensemble cohérent de données scientifiques qui démontre clairement les affinités de ce banc avec les autres bancs canadiens plus au nord. Les Etats-Unis citent dans leur contre-mémoire plusieurs auteurs y compris un ouvrage canadien qui, selon leur interprétation, appuieraient leur prétention d'une frontière au chenal Nord-Est (contre-mémoire des Etats-Unis, par. 50; voir aussi réplique du Canada, par. 180). En réalité, aucun de ces textes ne qualifie le chenal Nord-Est de frontière naturelle ou même de ligne de démarcation. Par contre, tous mettent en relief l'importance de la région au large du cap Cod en termes biogéographiques. L'unité faunique du golfe du Maine est incontestable, tout autant que son affinité avec les eaux canadiennes au nord-est.

1. Plancton et benthos

Ces considérations d'ordre général mises à part, je dois maintenant examiner brièvement la distribution du plancton et du benthos dans la région du golfe du Maine. Monsieur le Président, je me serais bien dispensé de vous parler, même brièvement, de ces petits organismes végétaux qui vivent en suspension dans la mer, de ces animaux microscopiques qui dérivent dans les courants de la région du golfe du Maine et de ces organismes benthiques qui habitent le fond de la mer. Cependant, comme les Etats-Unis ont fait mention, avec emphase, de ces organismes pour appuyer leur thèse d'une frontière naturelle et de trois régimes écologiques séparés, distincts et identifiables, je n'ai aucun choix, je dois en traiter, mais le ferai brièvement.

D'abord, il est évident que c'est le propre du plancton, de ces tout petits organismes, de se laisser ballotter dans la mer, de dériver avec les courants de région en région et non pas de se cantonner géographiquement dans une zone étanche.

De plus, le Canada a démontré, et ne craignez rien, je n'entends pas vous donner lecture des données scientifiques colligées dans nos écritures, le Canada a démontré, dis-je (annexes au contre-mémoire du Canada, livre I, par. 79-92), que le plancton qui dérive dans les courants de la région et le benthos sont principalement d'origine septentrionale et appartiennent surtout à la communauté boréale; ils reflètent donc des affinités canadiennes.

J'ouvre une courte parenthèse au sujet des organismes benthiques. Le Canada a soumis des données sur la distribution de cent neuf espèces dont quatre-vingt-onze seraient à orientation nordique. Selon les Etats-Unis neuf espèces parmi ces quatre-vingt-onze auraient une aire de distribution plus méridionale que ne l'indique la présentation canadienne. Profane en la matière, j'ai relevé avec intérêt et avec un léger sourire que deux de ces neuf espèces contestées par les Etats-Unis portent les noms scientifiques de *Arctica islandica* et *Pandalus borealis*.

Pour autant qu'il est possible de discerner une zone de transition biologique

pour ces micro-organismes, Monsieur le Président, celle-ci se situerait dans la région délimitée par le cap Cod, les hauts-fonds de Nantucket et le grand chenal Sud et non pas au chenal Nord-Est.

Je ne peux pas terminer cette partie de mon exposé sans commenter l'extraordinaire série de douze images satellites produite par les Etats-Unis dans leur réplique afin, et je cite, «to confirm the existence of three separate and identifiable oceanographic and ecological régimes». Il s'agit de la figure 13 de la réplique américaine qui est reproduite en partie en ce moment sur la boîte à images. Nos techniciens malheureusement n'ont pu reproduire les douze photographies, il y en a une pour chaque mois, dans votre compendium. Nous en avons donc choisi quatre pour illustrer chacune des quatre saisons et nous les exhibons sur la boîte. J'invite donc la Chambre à examiner cette illustration qui reproduit quatre de ces images. A y regarder de près, je vous suggère respectueusement qu'elle prouve tout à fait le contraire de ce qu'elle est censée démontrer. Ce qui saute aux yeux dans ces images, vous l'aurez remarqué j'en suis certain, c'est la forte accentuation, hautement sélective d'ailleurs, des courbes de niveau bathymétriques sur le banc de Georges. Mais si l'on fait abstraction de cet élément de diversion, on s'aperçoit qu'il reste bien peu de choses pour appuyer la thèse des Etats-Unis. Selon moi, aucune des ces quatre photographies pas plus que les huit autres que vous avez déjà consultées dans la réplique des Etats-Unis ne réussissent même à faire apparaître le chenal Nord-Est comme une caractéristique importante de la région en ce qui concerne la distribution du phytoplancton. Ces images réussissent-elles à faire apparaître le chenal Nord-Est comme une frontière naturelle?

S'il existait vraiment une frontière naturelle au chenal Nord-Est et trois compartiments distincts dans la région comme le prétendent les Etats-Unis, ne devrions-nous pas voir sur les photographies des lignes distinctes et trois concentrations distinctes de couleurs? Or, ces images n'apportent aucune preuve convaincante de l'existence soit de régimes écologiques distincts et reconnaissables soit de barrière naturelle, et c'est à cette fin, cependant, qu'elles ont été invoquées par les Etats-Unis. Au contraire, elles démontrent d'abord et avant tout la variabilité du milieu et elles étaient ainsi plutôt la thèse du Canada que celle des Etats-Unis.

2. Poissons et invertébrés d'importance commerciale

Monsieur le Président, Messieurs les juges, je crois pouvoir affirmer sans me tromper que ni l'une ni l'autre des Parties ne s'intéressent vraiment aux micro-organismes. Leur attention se porte manifestement sur les ressources biologiques qui ont une valeur économique. Le Canada a analysé dans son contre-mémoire des données de distribution portant sur vingt-huit des espèces d'organismes marins qui présentent le plus d'intérêt pour la pêche commerciale et sportive dans la région du golfe du Maine. Le Canada en est venu à la conclusion que les modes de distribution et de migration de ces espèces ne sauraient être contenus dans les limites des trois prétendus régimes écologiques proposés par les Etats-Unis. Si vous le permettez, Monsieur le Président, j'aimerais rappeler ici les points qu'il importe selon nous de retenir à cet égard:

– *Premièrement*, les modes de distribution changent à la fois selon les saisons et selon les diverses périodes du cycle vital des espèces. Autrement dit, les poissons migrent, les poissons nagent et, en règle générale, leurs migrations s'effectuent sur de grandes distances relativement à l'échelle considérée dans la région du golfe du Maine. Les espèces sédentaires sont l'exception et non la règle.

- *Deuxièmement*, les populations ou stocks sont définis en fonction des lieux de frai; or la période du frai peut ne durer que quelques semaines. A d'autres moments de l'année, les poissons de stocks différents se mélangent et ce phénomène est observable dans le cas de bon nombre d'espèces.
- *Troisièmement*, la structure des populations de la plupart des espèces d'importance commerciale est encore mal connue.
- Et, finalement, *quatrièmement*, les discontinuités observées chez les populations ou les stocks varient selon les espèces. Il est impossible de les définir toutes en fonction d'un seul et unique critère.

Les Etats-Unis contestent dans leur réplique les conclusions du Canada concernant les espèces d'importance commerciale de la région du golfe du Maine (réplique des Etats-Unis, par. 218-227). Nos amis américains prétendent que le Canada se contredit sur la « notion de stock »; qu'il a choisi pour étayer ses thèses des espèces dénuées d'intérêt; et, enfin, qu'il fait reposer ses arguments sur une mauvaise interprétation des sources citées (*ibid.*, par. 223). Je me propose de traiter brièvement de chacune de ces critiques.

Pour ce qui est de la notion de stock, je vous suggère bien respectueusement, Monsieur le Président, que ce sont les Etats-Unis qui sont confus et, même, se contredisent. En effet, nos adversaires confondent science et administration, tirant des conclusions d'ordre biologique de zones de gestion des pêches qui n'ont été établies que dans le but de recueillir des statistiques sur les prises. Au surplus, les Etats-Unis ont eux-mêmes abandonné la notion de stock dans leurs politiques actuelles de gestion pour la région du golfe du Maine.

En fait, le désaccord entre les Parties sur la notion de stock peut être facilement circonscrit. Le Canada et les Etats-Units conviennent tous deux qu'il existe dans la mer dans le domaine des pêcheries des « stocks » de poissons. Ils reconnaissent tous deux que ce terme se prête à deux définitions, l'une d'ordre biologique, l'autre du domaine de la gestion, encore que les Etats-Unis attribuent à ces deux définitions plus de rigidité et plus de certitude que le Canada ne considère justifiées dans l'état actuel de la science.

Mais la divergence la plus importante entre les Parties surgit en ce que les Etats-Unis donnent à la notion de stock une troisième définition, inconnue jusqu'ici de l'une et de l'autre Partie, et qui se concrétise dans leur théorie de la frontière naturelle et des régimes écologiques distincts et reconnaissables. Selon cette troisième définition, les stocks seraient confinés à leurs aires de frai non seulement pendant l'année du frai, mais aussi à tous les stades du cycle vital, des œufs, aux larves, aux juvéniles et aux poissons adultes. Cette théorie américaine n'a qu'un seul défaut, mais il lui est fatal selon nous: les poissons nagent, les poissons se déplacent. Les poissons ne se cantonnent pas à leurs aires de frai. Ils migrent et, à la vérité, les migrations sont la règle pour la plupart des espèces.

Monsieur le Président, le fait de qualifier de stock un groupe de poissons à des fins de gestion ne renseigne guère sur les modes de distribution et de migration de ce groupe. Je n'en veux pour exemple que le stock de harengs dit stock du banc de Georges. Dans leur réplique, les Etats-Unis soutiennent que « le mélange des larves ou la confusion des stocks à diverses périodes de leur cycle d'existence n'affectent pas leur caractère de stocks distincts... » (réplique des Etats-Unis, par. 223). Peu importe que cette affirmation soit ou non vérifiée dans les faits. Il n'en demeure pas moins que les harengs nés sur le banc de Georges traversent plusieurs fois au cours de leur cycle vital les frontières des prétendus régimes, réduisant ainsi à néant la théorie américaine qui postule qu'il existe des compartiments écologiques distincts et étanches dans un milieu qui se caractérise

par sa fluidité et son dynamisme. Que les poissons forment ou non des stocks est sans pertinence lorsqu'il s'agit de déterminer s'ils sont ou non cantonnés à l'intérieur de prétendues frontières naturelles ou cloisons étanches.

De même, le fait de désigner un stock de morues comme étant indigène au banc de Georges ne nous révèle pas tout ce qui concerne ce stock. Il est tout aussi important, selon nous, de savoir qu'il se produit des mouvements notables de morues du banc de Georges vers le banc de Brown à travers le chenal Nord-Est; que les morues du banc de Georges présentent manifestement des liens beaucoup plus étroits avec les morues vivant au nord qu'avec celles qui habitent les eaux plus méridionales; et que la principale discontinuité observée pour les stocks de morues dans la région du golfe du Maine s'établit selon un axe nord-sud à travers le banc de Georges lui-même.

Autrement dit, la désignation de stocks de poissons n'est jamais qu'un épisode ou un chapitre dans une histoire fort complexe. Une biographie de Napoléon qui commencerait et se terminerait par son lieu de naissance nous dirait certes quelque chose sur la Corse, mais fort peu sur l'homme et encore moins sur l'Egypte. Dans la même veine, nous ne pouvons espérer obtenir beaucoup de renseignements sur l'unité écologique de la région du golfe du Maine en nous attachant exclusivement à la définition de stocks. Ces renseignements, nous devons les chercher dans l'étude des modes de distribution et de migration des poissons, ce que le Canada a amplement fait dans ses écritures.

L'analyse du Canada porte sur vingt-huit espèces de poissons, de mollusques et de crustacés qui présentent de l'importance pour la pêche commerciale et sportive dans la région du golfe du Maine. Ces vingt-huit espèces sont identifiées
(93) sur l'illustration n° 59 qui est incluse dans le compendium et qui n'est pas projetée sur la boîte à images. C'est l'illustration n° 59 dans le livre rouge qui vous été remis, Monsieur le Président, Messieurs les juges. Cette illustration indique très clairement les aires de distribution connues pour chacune de ces espèces.

Dans leur réplique, les Etats-Unis critiquent la liste établie par le Canada, alléguant que douze des espèces concernées sont dénuées d'intérêt parce qu'elles sont, disent-ils, d'une importance commerciale mineure dans la région en litige.

Monsieur le Président, Messieurs les juges, depuis quand est-ce que l'importance commerciale d'un poisson va déterminer s'il est cantonné ou non à l'intérieur d'une cloison étanche? De plus, la Chambre ne manquera pas de remarquer que les Etats-Unis acceptent d'introduire ici un argument économique pour étayer leur théorie de la frontière naturelle; ils oublient manifestement qu'ils ont ailleurs dans leurs écritures rejeté les arguments économiques invoqués par le Canada à l'appui de sa conception des considérations d'équité à prendre en compte pour la délimitation de la zone économique exclusive. Mais cette contradiction est une digression, Monsieur le Président, et, je m'en excuse, ce que je veux démontrer ici c'est que la liste de vingt-huit espèces présentée par le Canada, à la différence de la liste de seize espèces proposée par les Etats-Unis, se fonde sur des critères purement objectifs.

Le Canada a effectivement choisi d'abord les vingt-cinq espèces commerciales qui ont fourni les prises les plus importantes dans la subdivision 5Ze de la CIPAN (qui comprend le banc de Georges et le grand chenal Sud) et ce depuis 1962, c'est-à-dire depuis qu'il existe des statistiques pour cette subdivision. La liste des Etats-Unis, par contre, exclut un certain nombre d'espèces de cette subdivision qui sont au moins aussi importantes que celles qui y figurent. En outre, les Etats-Unis s'élèvent contre l'inclusion dans la liste du Canada de trois espèces qui ont une importance pour la pêche sportive, le saumon, le thon rouge et l'alose américaine – sous prétexte que celles-ci ne sont guère pêchées sur le

banc de Georges. Mais ces espèces, qui migrent aux quatre coins du golfe du Maine, font autant partie que tout autre de la communauté écologique de la région. Le fait qu'elles soient migratrices, et s'inscrivent dont en faux contre la théorie des Etats-Unis, ne peut sûrement pas être une raison valable de les exclure aux fins de l'analyse en cours.

Monsieur le Président, Messieurs les juges, après avoir examiné ces critiques, de même que tous les autres reproches formulés par les Etats-Unis, le Canada demeure convaincu que ses conclusions sur la distribution des stocks de poissons et d'invertébrés dans la région du golfe du Maine sont irréfutées, étant solidement fondées dans les faits. Ainsi qu'il a été démontré dans le contre-mémoire du Canada, des preuves directes, fondées sur la distribution et la migration des vingt-huit espèces d'importance pour la pêche commerciale et sportive dans la région nous permettent d'affirmer que les stocks de deux espèces seulement, sur les vingt-huit étudiées, sont effectivement divisés par le fameux chenal Nord-Est. Les stocks de toutes les autres espèces ou bien chevauchent ce chenal, ou bien violent les frontières mythiques des prétendus régimes écologiques de la région. Et qui plus est, en ce qui concerne deux de ces espèces y compris le homard, le chenal lui-même fait partie intégrante de la zone de pêche des pêcheurs canadiens.

Encore une fois, lorsqu'il existe des zones de transition à ce troisième et dernier niveau du milieu marin où la chambre doit délimiter une frontière maritime unique, celles-ci ne coïncident pas. Nous avons vu qu'il en était ainsi que l'environnement soit considéré horizontalement ou verticalement – que la *colonne d'eau, le fond de la mer et le sous-sol soient considérés comme un tout* ou séparément. L'unité, la continuité et la complexité sont les thèmes dominants. Ici comme ailleurs, la nature ne saurait être compartimentée dans de petites cases. Il n'y a pas de moule rigide à l'intérieur des océans. C'est bien là d'ailleurs ce que faisait ressortir l'ambassadeur Cutler, négociateur spécial des Etats-Unis pour la région du golfe du Maine, dans un exposé présenté au Sénat des Etats-Unis le 15 avril 1980. Pour reprendre les termes de l'ambassadeur Cutler: «while good fences make good neighbours in some situations, there are no fences on or beneath the surface of the sea» (*Hearings Before the Committee on Foreign Relations*, United States Senate, Ninety-sixth Congress, Second Session, p. 35).

Monsieur le Président, le Canada est tout à fait d'accord avec cette affirmation au sujet de l'absence de clôtures dans la mer. Cependant, nous émettons les plus sérieuses réserves quant à la conception que se font les Etats-Unis des clôtures et des voisins dans la présente affaire. J'arrive donc maintenant à ce dernier aspect du dossier que j'ai l'honneur de vous exposer – à savoir la thèse inédite de la «gestion par un seul Etat» proposée par les Etats-Unis en tant que principe équitable de délimitation.

L'audience, suspendue à 16 h 17, est reprise à 16 h 34

VI. «Gestion par un seul Etat»

Au début de mon intervention, plus tôt cet après-midi, j'ai indiqué que je décrirai dans un premier temps les caractéristiques essentielles du milieu marin dans la région du golfe du Maine et que je chercherai dans un deuxième temps à clarifier leur pertinence en droit. Le deuxième volet de mon argument, heureusement, prendra moins de temps à développer que le premier.

Ni le droit ni l'équité ne viennent appuyer la théorie américaine d'une frontière naturelle à trois étages pour le sous-sol, le fond de la mer et la colonne d'eau de la zone économique exclusive. D'ailleurs, ni le droit ni l'équité ne

viennent appuyer la notion d'une frontière naturelle, ne serait-ce que pour le plateau continental sauf peut-être dans les cas où il est indubitable que nous avons affaire à deux plateaux continentaux séparés et distincts.

Je n'entends pas revenir ici sur l'évolution qui a conduit la théorie du plateau continental lui-même, pourtant particulièrement sensible, en raison de ses origines historiques, à des éléments naturels, à se décrocher de ces derniers pour s'orienter vers une conception essentiellement juridique, fondée sur une certaine distance de la côte.

Je n'insisterai pas sur ce point puisque l'agent du Canada en a déjà parlé. Mon collègue, M. Legault, a démontré que le concept de prolongement naturel pourtant «introduit par la Cour dans le vocabulaire du droit international de la mer» dans son arrêt de 1969 est devenu un concept de caractère spatial, qui opère indépendamment de toute caractéristique naturelle.

Je me contenterai donc de souligner qu'une prétendue frontière naturelle définie par des prétendus régimes écologiques dissocierait entièrement la délimitation des côtes ou «façades côtières» ou «extensions de la façade maritime» qui d'ailleurs, en tout premier lieu, rendent cette délimitation nécessaire. En d'autres termes, la théorie américaine de la frontière naturelle est en contradiction flagrante avec leur propre thèse au sujet du «fondement de tout titre à des zones maritimes» et du «principe fondamental de la délimitation maritime».

Cette théorie de la frontière naturelle est manifestement un échafaudage *ex post facto*, une tentative de rationaliser la revendication monopolistique des Etats-Unis à la totalité du banc de Georges. En fait, cette revendication trouve en elle-même sa propre justification; le fondement juridique de cette revendication, c'est la revendication elle-même. Parce que le banc de Georges est une caractéristique physiquement identifiable, il devient – on ne sait trop comment – juridiquement indivisible.

Je ne verse pas dans la simplification à outrance, Monsieur le Président. Je me contente de décrire les simplifications excessives avancées par les Etats-Unis. Car le seul revêtement juridique que ces derniers aient pu trouver pour embellir et appuyer leur théorie de la frontière naturelle réside dans leur théorie de la «gestion par un seul Etat». Mais ces deux théories ne se soutiennent pas mutuellement; elles s'écroulent ensemble. Et elles s'écroulent ensemble parce que l'une est tout simplement une redite de l'autre – en fait, la rationalisation d'une rationalisation.

Mais que signifie exactement la «gestion par un seul Etat»? L'expression elle-même est évocatrice, fidèle en cela à son objectif premier. Elle évoque évidemment le concept très différent de la «gestion par l'Etat côtier», qui fait maintenant partie intégrante du droit de la mer contemporain. Mais la gestion par l'Etat côtier et la gestion par un seul Etat sont deux concepts radicalement différents.

La notion de la gestion des ressources halieutiques par l'Etat côtier a été définie dans la convention des Nations Unies sur le droit de la mer de 1982. Elle signifie tout simplement que l'Etat côtier a seul autorité pour gérer les ressources biologiques à l'intérieur de sa zone économique exclusive – en d'autres termes, dans les zones adjacentes à sa côte et ce jusqu'à une distance maximum de 200 milles. La gestion par l'Etat côtier est un objectif dont la réalisation nécessite souvent la coopération bilatérale ou régionale entre deux ou plusieurs Etats intéressés par des ressources halieutiques, migratrices ou transfrontières. Dans ces situations de chevauchement ou de migration, l'Etat côtier est tenu en droit de collaborer avec les autres Etats ou organisations concernés pour assurer la conservation efficace des ressources en question.

C'est aussi simple que cela. Aux termes de la convention de 1982 sur le droit de la mer l'Etat côtier a des droits exclusifs en matière de gestion mais des

responsabilités partagées au chapitre de la conservation. Ni ces droits ni ces responsabilités n'influent de quelque façon que ce soit sur la délimitation de la zone économique exclusive ou zone de pêche de 200 milles. Ils n'ont rien à voir avec la détermination de droits souverains ou de la juridiction d'Etats côtiers qui se font face ou qui sont adjacents.

Toutefois, si nous voulons trouver une définition de la notion de la gestion par un seul Etat, nous n'avons d'autre choix que de consulter les écritures des Etats-Unis. Car cette notion n'a d'autres sources ni d'autre autorité que les écritures de nos amis américains. Or, d'après les Etats-Unis, la gestion par un seul Etat signifie que les frontières maritimes sont tracées de façon à éviter, dans toute la mesure du possible, la division de ressources halieutiques entre deux Etats côtiers voisins (mémoire des Etats-Unis, par. 16-17, 247, 320, 322; contre-mémoire des Etats-Unis, par. 10, 128; réplique des Etats-Unis, par. 133). En d'autres termes, toutes les fois que la chose est possible, l'un des Etats doit remporter la part du lion.

Ce postulat est peut-être d'autant plus étonnant qu'il est mis en avant dans cette affaire par nos adversaires sous le couvert d'un « principe équitable ». Mieux encore, selon les Etats-Unis, toute contestation de ce prétendu principe doit être automatiquement écartée, et ce du revers de la main, puisqu'elle équivaudrait à la revendication d'une part juste et équitable – ce qui n'est pas admis en droit international.

Toujours selon les Etat-Unis, ce postulat extraordinaire s'appuie sur deux fondements. *Premièrement*, si l'intégralité d'une ressource est placée sous l'autorité d'un seul Etat, il en résultera automatiquement une conservation plus efficace. *Deuxièmement*, si les Etats sont appelés à collaborer à la conservation d'une ressource partagée, il surgira inévitablement un différend entre eux.

Même s'il est impossible de trouver en droit quelque fondement sur lequel puissent reposer ces deux balises du principe américain de « la gestion par un seul Etat », on serait peut-être tenté de conclure qu'ils ont à tout le moins une base quelconque dans la *realpolitik*. Mais une telle conclusion serait-elle vraiment valable? Je ne le crois pas, Monsieur le Président, surtout pas en ce qui concerne le Canada et les Etats-Unis.

Ces deux pays, en effet, ont une longue et généralement fructueuse tradition de coopération dans le domaine de la conservation efficace des ressources halieutiques. Dans le contre-mémoire du Canada nous retrouvons quelques exemples des commentaires élogieux formulés par des fonctionnaires et mêmes des pêcheurs américains à l'endroit, entre autres, de la commission internationale du flétan du Pacifique et de la commission internationale des pêcheries de saumon du Pacifique (par. 236, 237 et 240). Un examen rigoureux des résultats de la recherche menée sous les auspices de commissions bilatérales a garanti l'objectivité du processus et a aidé les deux Parties à résister aux demandes parfois exagérées de leurs industries halieutiques, qui, elles, ne sont pas toujours prêtes d'emblée à accepter les restrictions nécessaires à la conservation des ressources.

Nous reconnaissons qu'il peut survenir parfois dans les pratiques de gestion des divergences susceptibles d'occasionner des difficultés. Nous avons d'ailleurs mis en relief dans nos écritures les sérieux problèmes qui se sont posés, notamment au niveau de la conservation des pétoncles, après que les Parties eurent étendu leur juridiction. Ces problèmes tenaient à deux raisons principales: d'une part, les Etats-Unis n'ont pas cherché à adopter les mesures de réglementation nécessaires et, d'autre part, la gestion coordonnée qu'aurait permis d'assurer l'accord de 1979 sur les ressources halieutiques de la côte est ne s'est pas matérialisée. Mais, là aussi, la solution ne se trouve pas dans la « gestion par un seul Etat ». A vrai dire, le problème réside dans le défaut de gestion par un

seul Etat. Et, encore une fois, c'est dans la coordination et la coopération qu'il faut chercher la solution. Le Canada et les Etats-Unis ont amplement démontré qu'ils peuvent coopérer et coordonner leurs efforts afin d'assurer la conservation de ressources auxquelles ils attachent tous deux une importance considérable.

Dans leur réplique, les Etats-Unis ne contestent pas les exemples d'activités bilatérales efficaces que cite le Canada aux chapitres de la coopération et de la conservation (réplique des Etats-Unis, par. 145). Ils ne les contestent pas. Ils s'attardent plutôt à mettre en relief les problèmes auxquels les Parties se sont heurtées récemment dans le cadre de leurs efforts en vue de mettre au point des ententes prévoyant une coopération élargie dans le domaine de la conservation et de la gestion du saumon du Pacifique.

Ces difficultés existent bel et bien. Et des efforts sont faits des deux côtés pour arriver à les surmonter. Il est toutefois regrettable que les Etats-Unis misent maintenant sur ces difficultés pour appuyer leur revendication dans la présente affaire. Selon nous, pareille attitude n'est pas susceptible de jeter beaucoup plus de lumière sur le différend qui oppose les deux pays dans la région du golfe du Maine.

J'ai traité brièvement, Monsieur le Président, Messieurs les juges, de la coopération bilatérale dans la gestion des pêches. J'espère vous avoir démontré qu'elle a été la norme et non l'exception dans les rapports entre le Canada et les Etats-Unis, dans tous les cas où n'intervenaient pas des questions de juridiction. La même tradition de coopération dans la gestion des ressources transfrontières a prévalu ailleurs que dans la mer entre ces deux pays. Ainsi, tous les juristes internationaux connaissent le travail de la commission mixte internationale; depuis sa création, en 1909, cet organisme a joué un rôle crucial dans la réglementation des eaux frontalières des Parties.

Mais il n'y a pas seulement cette tradition bilatérale. En effet, cette tradition reflète, et a même contribué, à un « corpus » de plus en plus imposant de règles de droit international en matière de gestion de ressources naturelles ou de ressources transfrontières communes. Cet ensemble de règles, vous le savez mieux que moi, a été entériné par la Cour dans les affaires du *Plateau continental de la mer du Nord* de 1969.

Il est quelque peu étonnant que les Etats-Unis aient choisi de citer les affaires de la mer du Nord pour appuyer leur théorie de la gestion par un seul Etat. Car la notion d'« unité de gisements » dont il est fait mention dans ces affaires ne vient certes pas avaliser la proposition selon laquelle le tracé des frontières au large doit contourner les gisements de façon à les attribuer à un seul Etat. En fait, dans sa décision, la Cour a adopté précisément la position contraire en insistant sur la nécessité d'une forme quelconque de coopération pour préserver l'unité des gisements là où le tracé d'une ligne de démarcation pouvait les traverser. La Cour a statué comme suit:

> « il faut accepter cette situation comme une donnée de fait et la résoudre soit par une division des zones de chevauchement effectuée par voie d'accord ou, à défaut, par parts égales, soit par des accords d'exploitation en commun, cette dernière solution paraissant particulièrement appropriée lorsqu'il s'agit de préserver l'unité d'un gisement » (*C.I.J. Recueil 1969*, p. 52, par. 99).

Dans son opinion individuelle, M. le juge Jessup a fait sienne l'opinion de la Cour. Il a également enchaîné et fait allusion à des accords existants relatifs à la mer du Nord et traitant de l'exploitation en commun, ainsi qu'à d'autres accords bilatéraux de coopération à l'extérieur de la région de la mer du Nord dans le cadre desquels les lignes de délimitation traversaient des gisements d'hydrocarbures. Et M. le juge Jessup a rappelé « that the principle of international

cooperation in the exploitation of a natural resource is well established in other international practice» (*C.I.J. Recueil 1969*, p. 82).

L'éventail des exemples de coopération dans la gestion de ressources communes cité par M. le juge Jessup est très instructif. Ses exemples – il parle entre autres du règlement d'Helsinki – viennent réfuter carrément l'allégation des Etats-Unis selon laquelle le droit international appuie leur théorie de la gestion par un seul Etat.

Bref, le concept de l'unité de gisement signifie tout simplement que, là où les ressources en mer sont divisées ou peuvent être divisées par une ligne de délimitation déterminée sur la base de règles juridiques, les Etats en cause doivent coopérer à leur conservation.

Or, comme les Etats-Unis le reconnaissent eux-mêmes, toute frontière maritime dans la région du golfe du Maine divisera des ressources (réplique des Etats-Unis, par. 146). Aucune ligne unique ne peut partager inéluctablement la myriade des ressources en cause. La coopération entre le Canada et les Etats-Unis s'imposera de toute façon, non seulement en ce qui a trait aux ressources de pêche mais aussi très vraisemblablement en ce qui concerne les ressources minérales et les ressources en hydrocarbures. Au niveau de la protection du milieu marin, la coopération devra être la règle. Voilà pourquoi, selon le Canada, Monsieur le Président, la théorie de la gestion par un seul Etat postulée par les Etats-Unis ne tient pas dans les faits et encore moins dans de droit. Elle susciterait les problèmes mêmes qu'elle prétend vouloir éviter.

VII. Conclusion

Je conclus maintenant mon exposé par quelques remarques d'ordre général.

Comme je le mentionnais cet après-midi au début de mon exposé, le concept de la frontière naturelle est depuis longtemps rejeté en droit et en pratique sur terre. Il n'a jamais été reconnu dans la mer. Même en ce qui concerne le plateau continental, c'est-à-dire la juridiction maritime où, sous le couvert de «prolongement naturel», la «nature» a pu à un moment donné jouer un certain rôle dans la détermination du titre juridique et dans la délimitation, les faits de la nature ont progressivement cédé la place aux faits juridiques. Si l'identification du prolongement «naturel» ne suffit plus à déterminer le tracé d'une frontière sur le fond de la mer, encore plus vain apparaît-il de poursuivre l'identification d'une quelconque limite «naturelle» entre deux juridictions étatiques sur la colonne d'eau. La vérité est qu'il n'y a tout simplement aucune rupture «naturelle» dans la mer.

Cette théorie de la frontière naturelle est d'autant plus redoutable en l'espèce qu'elle s'accompagne de son *doppelganger*, son *alter ego*, soit la «gestion par un seul Etat». Nous ne pouvons demander à des hommes de science de se substituer aux plaideurs et aux juges. Agir ainsi ne contribue en rien ni à la science ni au droit.

La science, surtout dans le secteur relativement jeune des pêches, est le siège de nombre de controverses légitimes. Mais les doutes scientifiques se dissipent dès que des frontières naturelles sont introduites dans l'équation. Tout devient noir et blanc, toutes les nuances disparaissent. Et même si de telles simplifications excessives étaient acceptées pour argent comptant, elles ne sauraient certes se substituer ni au droit ni à l'équité.

Monsieur le Président, Messieurs les juges, en lisant les écritures des Etats-Unis, nous serions portés à croire que le chenal Nord-Est est l'une des merveilles naturelles du monde – au même titre que les chutes du Niagara, ou encore le Grand Canyon du Colorado ou encore la Grande Barrière en Australie. Nous

serions portés à croire qu'un phénomène naturel d'une telle ampleur – qui, prétend-on, constituerait une frontière naturelle même pour les activités humaines – aurait une place de choix dans la littérature scientifique et même dans la littérature populaire. Or, ce n'est pas le cas. On a beau fouiller les écrits qui font autorité, il n'est aucunement fait mention du chenal Nord-Est dans ces termes.

La conclusion que le Canada tire de tout cela, c'est que le milieu marin ne peut dicter une frontière maritime unique dans la région du golfe du Maine. Dans les faits, la caractéristique dominante de ce milieu est sa complexité et sa variabilité à l'intérieur d'un ensemble intégré. En droit, sa caractéristique véritablement pertinente est l'unité incontestée du plateau continental et son prolongement naturel commun aux deux Etats. Cette réalité suffirait à elle seule à détruire la théorie de la «frontière naturelle» proposée par les Etats-Unis.

Qui plus est, le banc de Georges montre beaucoup d'affinités particulières avec d'autres zones canadiennes au nord-est, sur les plans géologique, géophysique, océanographique et biologique. Ces affinités tiennent à la structure du bassin Scotian, au transport d'eaux arctiques dans la région par les courants de la Nouvelle-Ecosse et du Labrador et à l'influence des marées de la baie de Fundy. Comme nous l'avons vu un peu plus tôt cet après-midi, ces affinités sont par ailleurs observables à tous les échelons de la chaîne alimentaire depuis le phytoplancton jusqu'aux poissons, où les espèces dominantes sont d'origine boréale.

C'est dans ce sens, Monsieur le Président, que la nature confirme la logique de la revendication canadienne à la partie est du banc de Georges. Mais la revendication du Canada est fondée sur le droit et non sur la «nature» selon la conception que s'en font les Etats-Unis. Ainsi, la revendication du Canada respecte l'élément de l'ordre naturel auquel le droit attache une importance prépondérante – à savoir la configuration des côtes. Par contre, la revendication des Etats-Unis dissocie la délimitation de cet aspect vital de l'ordre naturel dans la région du golfe du Maine.

En fait, non seulement les Etats-Unis ne tiennent-ils aucun compte des côtes, mais ils ont aussi une perception erronée du milieu marin. Ils ont réussi à compliquer le concept simple de l'unité du plateau continental tout en simplifiant à l'excès les complexités inhérentes à la colonne d'eau. Comme j'espère l'avoir démontré, la réalité ne correspond pas à cette description, même si le droit et l'équité reconnaissaient la théorie de la frontière naturelle préconisée par les Etats-Unis.

La réalité ne correspond pas davantage à cette théorie de la frontière naturelle tout le long de la frontière terrestre que partagent le Canada et les Etats-Unis. Le traité de Paris de 1783 a réparti lacs et rivières entre les deux pays sur de longues étendues de la frontière terrestre. Dans la région qui s'étend immédiatement au nord du golfe du Maine, la frontière territoriale établie par le traité de Paris consiste en une ligne tirée au milieu de la rivière Sainte-Croix, depuis son embouchure dans la baie de Fundy jusqu'à sa source. Ce même traité stipulait en outre que, plus avant dans les terres, la ligne de délimitation devait passer par le milieu du fleuve Saint-Laurent pour rejoindre le lac Ontario, puis du lac Ontario passer par le milieu du lac Erié et du lac Huron et, pour une bonne partie du reste du tracé, par le milieu du lac Supérieur. Le tracé précis de cette frontière, et celui de la frontière qui s'étend du lac Supérieur au lac des Bois, a été arrêté par le traité de Gand en 1814 et, plus tard, par le traité Webster-Ashburton de 1842. Là encore, la majeure partie de la ligne de délimitation est constituée par la médiane équidistante des rives opposées des rivières et des lacs.

En d'autres termes, Monsieur le President, ni les frontières naturelles ni la

gestion par un seul Etat n'ont jamais joué un rôle important dans les relations entre les Parties depuis que les Etats-Unis ont acquis leur indépendance. Ce serait nier l'histoire et le droit que d'introduire ces concepts dans la détermination des derniers 200 milles de frontière entre le Canada et les Etats-Unis, dans une mer en perpétuel mouvement.

ARGUMENT OF PROFESSOR BROWNLIE

COUNSEL FOR THE GOVERNMENT OF CANADA

Professor BROWNLIE: Mr. President, distinguished Judges, it is my task this afternoon to examine the conduct of the Parties in this case from the point of view of the law relating to acquiescence and estoppel. In making my presentation, I am assisted by my colleague, Miss Valerie Hughes of the Ontario Bar.

The Canadian position has two aspects, which are independent but complementary. Mr. Legault has already outlined the law of the sea basis of the single maritime boundary as defined in the submission of the Government of Canada which concludes the Canadian Reply.

In addition Canada rests her case on the principles of acquiescence – or recognition – and estoppel. These principles are of course part of general international law and have an independent role in confirming and reinforcing the legal validity of the Canadian claim.

Evidently, the conduct of the Parties also forms part of the relevant circumstances of which account is to be taken in achieving an equitable result, and this aspect of the matter will be examined by my colleague, Professor Bowett.

It will be helpful to the Chamber if I commence with my main propositions of law.

The conduct of the United States from 1965 to 1969 – and indeed from 1964 to 1969 – constitutes 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 Georges Bank, and creates an estoppel in favour of Canada; consequently, the single maritime boundary to be determined by the Court should be compatible with the rights that vested in Canada during that period.

The key elements in Canada's position in respect of acquiescence and estoppel can be stated in summary form, thus:

First, Canada began issuing permits for the continental shelf on the northeast portion of Georges Bank beginning in 1964, based on the assumption of an equidistance boundary.

Second, Canada's issuance of permits up to the equidistance line in 1964 and actually straddling the equidistance line in 1965 was widely publicized in publications transmitted to United States authorities through the United States Embassy in Ottawa and otherwise. The Bureau of Land Management letters, among other things, constitute irrefutable evidence of actual knowledge of the Canadian permits by United States officials at least by 1 April 1965.

Third, the United States did not make any reservation of rights until November 1969. No specific alternative to an equidistance boundary was formulated by the United States until it put forward its Northeast Channel line in 1976.

Fourth, Canada relied upon United States acquiescence and did not take immediate steps to fix, in the words of the United States, "the exact location of the boundary", according to the equidistance method then accepted by both Parties (I, Canadian Memorial, Anns., Vol. III, Ann. 11, p. 64). Canada also

took certain steps with regard to its permits which bound the Government and also extended private rights created by the permits.

Fifth, in the circumstances – the public activity by Canada in issuing permits in respect of Georges Bank and the prolonged absence of any reservation of rights on the part of the United States – the validity of the Canadian line is opposable to the United States on the basis of the legal principles of acquiescence and estoppel.

Canada's position thus summarized reflects important realities and is not an artificial construct. Above all, Canada's line is consistent with her previous positions and has not been invented for the purposes of this case. Moreover, in the material period the United States itself assumed an equidistance boundary in granting permission to conduct geophysical surveys on Georges Bank.

Mr. President, what is particularly striking is the general compatibility – indeed, the conformation – of the administrative practice of the two Parties in the material period in relation of the Gulf of Maine area.

The absence of protest by the United States in face of Canadian public activity based upon an equidistance line is perfectly understandable when it is appreciated that the practice of the two States was coincident.

It was the United States alone which was eventually to have second thoughts about the principle of the equidistance line boundary. But these second thoughts were slow to mature and have never cohered, as the state of the pleadings shows. No reservation of rights occurred until late in 1969 (Canadian Memorial, Anns., Vol. III, Ann. 13, p. 67); the specific formulation of a line other than the equidistance line only took place in November 1976 (*ibid.*, Anns., Vol. II, Ann. 30, p. 213); and the so-called adjusted perpendicular line appears as recently as 1982.

These are the realities of the dispute which are reflected in Canada's line and which provide the underpinning to her position concerning acquiescence and estoppel.

Canada's reliance upon these principles is to be seen also as a reflection of the practical needs of the system of international relations. The general concept of acquiescence lies within the best traditions of international law in matters of delimitation.

The principles of acquiescence and estoppel rest after all upon the concepts of stability and fairness, and not upon a narrow legalism.

Against this background – the actual history of the dispute and the general consistency of Canada's position compared with that of the other Party – I can now turn to an examination of the essential factual elements relating to acquiescence and estoppel in this case.

The details of the Canadian permit programme have been set forth in Canada's written pleadings. Canadian "permits" are long-term instruments conferring the option of exclusive production rights. They are thus quite different from the temporary, non-exclusive authorizations relied upon by the United States in its argument concerning its geophysical survey "permits". My colleague Professor Bowett will explain these differences in terminology.

Canada issued oil and gas permits for Georges Bank based on a rectangular grid system, beginning in mid-1964. By the end of that year permits had been issued extending close to and in some cases actually abutting on an equidistance line. Early in 1965 Canada issued additional permits straddling the equidistance line. By that time a total of 35 permits had been issued covering the northeast portion of Georges Bank, all to major United States oil companies.

Mr. President, the figure which has been on the lightbox for some minutes is a

representation of a part of the permit map attached to the letter of 8 April 1965 from the Canadian Department of Northern Affairs of National Resources to
(20) the United States Department of the Interior, and it appears as Figure 60 of the dossier of Canadian illustrations to the oral hearings. The figure is now being
(210) replaced by Figure 61, which shows the same distribution of permits at that date, 8 April 1965, depicted more conveniently and in more vivid form on a Canadian basemap of the Gulf of Maine area.

The Canadian permit programme, which involved an express and direct concern with legal rights of exploration and exploitation in respect of the mineral resources of the continental shelf, was implemented with the amount of publicity that would be normal in the circumstances, and it is no matter for surprise that it was known to the relevant officials of the United States. It was in every sense a public activity and it affected continental shelf areas that were the object of attention by leading corporations intent on carrying out oil exploration on both the United States and Canadian sides of the equidistance line.

The Canadian Government promptly published information on its permits in the *Monthly Oil and Gas Report* (**III**, Canadian Counter-Memorial, Anns., Vol. III, Chap. 1, App. 5, p. 217) including the location of the permits, the name of the permit holders and other matters. The *Monthly Oil and Gas Report* was circulated to a wide range of recipients, including the United States Embassy in Ottawa, and major companies and trade associations in the oil and gas industry. The Canadian Government issued maps showing the Georges Bank permits and other Canadian permits.

In a sense the question whether the Canadian programme was a public activity is rather academic, since there is a considerable body of direct evidence to the effect that the United States Government had full knowledge of the issue of Canadian permits.

The principal, but by no means the only, evidence of the knowledge of United States officials is the correspondence which took place in the period 1965 to 1969 (ref. generally to Canadian Memorial, Anns., Vol. III, Anns. 1-14, pp. 1 *et seq.*).

The first reaction to the issuing of permits was a letter dated 1 April 1965 from the United States Bureau of Land Management of the Department of the Interior. In this letter, the Bureau's Assistant Director for Lands and Minerals stated that:

> "[W]e have information that the Canadian Federal Government recently has issued offshore permits for mineral prospecting on the Outer Continental Shelf.
>
> Some of the submerged lands we understand you have leased under offshore permits are approximately 125 nautical miles east of Cape Cod."

As a consequence, the letter requested information for the specific purpose of locating the permits in the context of

> "the median line as defined in Article 6 of the Convention on the Continental Shelf, agreed upon at the 1958 United Nations Conference on the Law of the Sea at Geneva" (*ibid.*, Anns., Vol. III, Ann. 1, p. 1).

On 8 April 1965, Canada complied with the request for information by sending detailed maps showing the location of Canada's oil and gas permits, off both the Atlantic and Pacific coasts, and also a sketch map showing the areas under permit on Georges Bank (*ibid.*, Ann., Vol. III, Ann. 2, p. 5).

Mr. President, this distribution of the permits as at 8 April 1965 is shown on
(210) Figure 61, already on the lightbox.

On 14 May 1965, the United States Bureau of Land Management acknow-

ledged receipt of the maps showing the location of the permits and proceeded to raise a particular question:

> "Inasmuch as the *location* of a median line might be subject to different interpretations, we suggest that you check the locations of your permits which approach submerged lands under United States jurisdiction to see if they are within Canadian jurisdiction under an application of Article 6 of the Convention on the Continental Shelf of the 1958 Geneva Conference."

The letter continues:

> "This communication is being written solely in the interest of seeing if there is a basis for disagreement as to the location of a median line separating our respective jurisdictions on the Outer Continental Shelf. As an operating Bureau, we, of course, have no authority to enter into any formal discussion of the location of a median line in case of a dispute. However, we are hopeful that there could be a simple misunderstanding on either our part or yours, *of the elements positioning a median line*. If this is the case, then the matter could be amicably determined without resort to high authority." (*Ibid.*, Anns., Vol. III, Ann. 4, p. 26; emphasis added.)

The implications of this letter are absolutely clear. The United States Department of the Interior, of which the Bureau of Land Management was a part, was well aware of the legal implications of the Canadian permit programme and was concerned not to challenge the principle of a median line, but to raise the question of the precise location, the elements positioning a median line. The context was the application of Article 6 of the Convention on the Continental Shelf.

The Canadian reply to this letter dated 16 June 1965 was unambiguous. It assured the United States that Canada had utilized a median line "constructed in accordance with the equidistance principle as defined in Article 6" of the Continental Shelf Convention, and went on to explain the operation of the Canadian grid system (Canadian Memorial, Anns., Vol. III, Ann. 6, p. 32).

On 16 August 1966, an official of the United States Embassy in Ottawa telephoned the Director of the Research Development Branch of the Canadian Department of Mines and Technical Surveys requesting information concerning Canadian permits in the Gulf of Maine area. This request was confirmed by a letter from the United States Embassy to the Canadian Government of the same date (*ibid.*, Anns., Vol. III, Ann. 7, p. 33).

In order to leave no doubt as to the formal and clearly defined position of the Canadian Government on the boundary in the Gulf of Maine area, the Canadian Under-Secretary of State for External Affairs replied to this enquiry by the United States Embassy. In his letter dated 30 August 1966, the Under-Secretary affirmed previous explanations of Canadian policy, and referred to the median line "which divides the areas of jurisdiction between Canada and the United States . . .". Once again the Canadian grid system was described, and it was noted that "the exact position" of the median line "might be open to some interpretation" (*ibid.*, Anns., Vol. III, Ann. 8, p. 36).

Attached to this letter was a map of the Canadian permits relating to the Georges Bank area issued at that time, the pattern of which clearly indicates the existence of an equidistance line dividing Georges Bank (see *ibid.*, Anns., Vol. III, Ann. 8, p. 35).

(211) Mr. President, Figure 62, which is also present in the dossier, is a representation of part of the permit map attached to the letter of 30 August 1966 from the Canadian Department of External Affairs to the United States Embassy in

Ottawa, and this is conveniently depicted on a Canadian basemap of the Gulf of Maine area.

This correspondence shows that the United States had detailed knowledge of the Canadian permit programme and of the existence of an equidistance boundary from some time before April 1965.

Even after the correspondence of the period 1965-1966, the position relating to permits remained unchanged for another three years, during which no challenge was made to the equidistance line.

A United States aide-mémoire of 10 May 1968 refers to the need to seek an agreement on the "exact location" of the boundary "in the area of the northern half of the Georges Bank", and does not question the validity of the equidistance line (*ibid.*, Anns., Vol. III, Ann. 11, p. 63).

In spite of the correspondence going back to early 1965 and the several transmissions of maps by Canada showing the pattern of permits, the United States made no reservation of rights until the appearance of an aide-mémoire of 5 November 1969 (*ibid.*, Anns., Vol. III, Ann. 13, p. 67).

That this aide-mémoire constituted the first reservation of rights was explicitly recognized by the United States in a diplomatic note of 20 May 1976 (*ibid.*, Anns., Vol. III, Ann. 32, p. 115).

The reservation of rights late in 1969 comes after a period of more than five years during which Canada's well-publicized programme of permits had elicited no protest as to the principle of Canada's equidistance line.

It is notable, too, that the reservation of rights of 1969 was in general terms and it was not until late in 1976 that the United States formulated a line other than equidistance.

The United States has sought to deny its acquiescence in the use of equidistance for the delimitation of a boundary on the continental shelf in the Gulf of Maine area by referring to its own conduct during the relevant period in granting geophysical survey permits. This conduct, it is said, establishes that the United States issued permits over the "northeastern portion of Georges Bank" during the period in which the United States is alleged to have acquiesced in an equidistance boundary (**IV**, United States Counter-Memorial, p. 176, para. 280).

However, as my colleague Professor Bowett will demonstrate in detail, a close examination of the United States geophysical survey permits reveals conduct substantially consistent with acquiescence in Canada's reliance on the equidistance method for delimitation in the Gulf of Maine area. Such examination demonstrates – as was implicit in the correspondence of the Bureau of Land Management, the BLM correspondence – that the United States Bureau of Land Management was itself using an equidistance line on Georges Bank.

The existence of the "BLM line" reinforces the Canadian argument on acquiescence, for it confirms that the United States was not disposed to protest the Canadian equidistance line; and the location of the BLM line slightly to the northeast of the Canadian line explains the queries raised by the United States about the "exact location" of, and "elements positioning", an equidistance line (Canadian Memorial, Anns., Vol. III, Anns. 4 and 11, pp. 26 and 64). As Professor Bowett will explain, the difference between the BLM line and the Canadian equidistance line appears to have been due to failure to make allowance for scale distortion on a Mercator projection – the "simple misunderstanding" mentioned in the BLM letter of 14 May 1965 (*ibid.*, Anns., Vol. III, Ann. 4, p. 26).

(167) Mr. President, the BLM line has been illustrated in Figure 21 of the Canadian Reply and this is reproduced now as Figure 63 of the dossier of Canadian illustrations to the oral hearings. The continuous green line represents the line on

which United States administrative practice was based in the material period, and the pecked black line represents the strict equidistance line in the Gulf of Maine area.

When the United States Geological Survey, another agency within the Interior Department, began issuing geophysical survey permits for Georges Bank, reference was made to the BLM line. Again, Professor Bowett will describe in detail what can be seen from the United States survey permits for large co-operative surveys by several dozen oil companies. The important point for present purposes is that throughout the 1960s – and indeed until 1972 – none of those permits impinged significantly upon the northeast portion of Georges Bank.

The United States seeks to escape from the consequences of its conduct by diminishing the role of the Department of the Interior with respect to continental shelf policy. The extent of the Interior Department's mandate in this regard, however, was recently reaffirmed when on 8 December 1982 it published a notice of jurisdiction in the United States *Federal Register* announcing United States jurisdiction for leasing and otherwise regulating the recovery of polymetallic sulfides on the continental shelf and sea-bed off the west coast of the United States (V, Canadian Reply, Anns., Vol. II, Part IV, Ann. 21, p. 783). Canada promptly protested to the United States Department of State regarding this apparent assertion of jurisdiction over an area lying partly within the continental shelf of Canada, and over other areas beyond the seaward limit of the continental margin and beyond the seaward limit of the 200-mile fishing zone (*ibid.*, Anns., Vol. II, Part IV, Ann. 22, p. 790). The Interior Department subsequently published a clarification limiting United States continental shelf jurisdiction to 200 miles. Significantly, however, in the face of the Canadian diplomatic protest the United States State Department did not seek to deny that the claims made by the Department of the Interior were made on behalf of the United States (*ibid.*, Anns., Vol. II, Anns. 21-23, pp. 783-798).

Moreover, the United States contentions concerning the authority of the Interior Department are designed to obscure certain realities: namely, the fact that a number of agencies within the United States Government had actual knowledge of the Canadian permit programme, and that their collective behaviour was fully consistent with acquiescence in Canada's use of the equidistance method. In 1965 it was the United States Bureau of Land Management which had two separate exchanges of correspondence with Canadian officials regarding the Canadian permits. In 1966, it was the United States State Department, acting through the United States Embassy in Ottawa, which telephoned and wrote to Canadian officials – and which received a reply from the highest levels within the Canadian Department of External Affairs. Subsequently, there is evidence that, in 1969, the Bureau of Land Management was still using an equidistance line on Georges Bank, and that the United States Geological Survey was issuing geophysical survey permits with reference to the BLM line.

Even with these manifestations of United States acquiescence, Canada was nevertheless vigilant in the protection of its own rights. When in late 1969 it came to the attention of Canadian officials that a United States company, Exploration Surveys Inc., planned to do research on the Canadian side of the equidistance line without securing the proper Canadian licence, the company was informed immediately of the requirements of Canadian law (Canadian Memorial, Anns., Vol. II, Ann. 50, pp. 576-583). Canada did not, of course, have to make any enquiries of the United States Government. The aide-mémoire of 5 November 1969 assured Canada with respect to the "northern portion of

the Georges Bank continental shelf" that "the United States has refrained from authorizing mineral exploration or exploitation in the area" (*ibid.*, Anns., Vol. III, Ann. 13, p. 68).

It might be added that when the United States later issued its own leases on Georges Bank – United States "leases" being roughly equivalent in their creation of legal rights to what Canada calls "permits" – in 1976, no leases were issued for the area north of the strict equidistance line on Georges Bank. The *Eastern United States Coastal and Ocean Zones Data Atlas*, published by the United States National Oceanic and Atmospheric Administration, depicts both United States leases and Canadian permits on Georges Bank.

(87) The relevant plate from the *Data Atlas* I have just referred to appears as Figure 64 in the dossier handed to the Chamber. As the Chamber will observe, this, like the other figures, shows a divided Georges Bank. In the dossier, apart from the reproduction of the plate from the *Data Atlas*, there is also a copy of a part of this plate which is so to speak placed on its side. The reason for that is simply to remind the Chamber of what is admittedly rather obvious, that unlike the other figures which I have shown during my presentation, this figure is not on a north-south alignment. The other figures, all related to a north-south alignment, have to be compared with some care when one is thinking of the angle at which the line divides Georges Bank. So the figure in the *Data Atlas* is, so to speak, aligned towards the coast rather than on a north-south alignment.

The map from the *Data Atlas*, now on the lightbox, shows both the equation of United States leases and Canadian permits, and that the two are divided by an equidistance boundary on Georges Bank. Thus, an equidistance boundary would be fully consistent both with past conduct by the two Governments concerned and with existing private rights.

Before I leave the particulars of United States knowledge of and acquiescence in the Canadian equidistance line in the period 1964 onwards, there are two other aspects of the evidence to be recorded.

In the first place the terms of the United States aide-mémoire of 5 November 1969 are of great interest. For, in making a reservation of rights, the United States for the first time raises a question about Canadian rights in respect of parts of Georges Bank. In all the correspondence prior to this, as in the practice of the United States itself, it had been assumed that a substantial part of Georges Bank was subject to Canada's exclusive entitlement. In a five-year period, the only issue was the precise location of the delimitation between the two areas of entitlement on Georges Bank.

The concluding item of evidence consists of the admissions to be found in the text of the United States Counter-Memorial (pp. 95-105, 171-177, paras. 107-120 and 267-284), where considerable attention is given to the Canadian permit programme.

The following important admissions are made in confirmation of Canada's position on some key issues of fact:

First, that the United States Government knew of the Canadian permit programme and its implications at least by April 1965.

Second, that the activities on Georges Bank under Canadian auspices involved the exercise of continental shelf rights.

Third, that the United States did not make any reservation of rights until 5 November 1969.

Fourth, and last, that during the period from 1964 to the late 1970s the Canadian position was not opposed by a delimitation based on the Northeast Channel.

The United States Counter-Memorial makes no reference to a view, much less a claim, which would exclude Canada from Georges Bank. Indeed, according to the United States Memorial (pp. 86-89, paras. 150-151 (II)) the claim to a line based upon the Northeast Channel was first formulated in 1976. In fact the diplomatic correspondence did not reflect the claim until 1977 (Canadian Memorial, Anns., Vol. III, Ann. 51, p. 171).

Mr. President, this concludes my review of the essential factual elements relating to acquiescence and estoppel in this case.

Central to the facts is the knowledge of the United States Government of the Canadian permit programme and the absence of protest or reservation on the part of the United States when a protest or reservation was called for.

And, if the United States did not – as it now asserts – truly accept the equidistance method for Georges Bank during the material period, then a protest or reservation was called for, since the implications of the permit programme were obvious. The issuing of permits directly related to the exercise of legal rights in respect of the mineral resources of the continental shelf, and officials on both sides appreciated their legal implications for delimitation. The course of conduct on the part of both Governments involved the implementation of policies which assumed the existence of an equidistance line.

The fact that each side had a marginally divergent technical version of an equidistance line is all-important. The restricted nature of the divergence indicates a substantial concordance of view as to the nature and extent of Canada's legal rights in respect of areas of the Georges Bank.

This concordance of view is evidenced by the terms of the United States aide-mémoire of 5 November 1969. This important document formally assured the Canadian Government that, with regard to the "northern portion of the Georges Bank continental shelf", "the United States has refrained from authorizing mineral exploration or exploitation in the area" (*ibid.*, Anns., Vol. III, Ann. 13, p. 68).

So much for the facts relevant to the issues of acquiescence and estoppel. I now turn, Mr. President, to the legal principle of acquiescence. It would be impertinent to offer the Chamber a lengthy disquisition on the doctrine, and I shall confine myself to a brief statement of the principle.

The essence of the principle is that one government's knowledge, actual or constructive, of the conduct or assertion of rights of the other party to a dispute, and the failure to protest in the face of that conduct, or assertion of rights, involves a tacit acceptance of the legal position represented by the other party's conduct or assertion of rights.

The elements of special importance are first, that the conduct which is acquiesced in should be a public activity affecting legal rights as between the parties, and, secondly, that in face of this public activity there should be an absence of protest or reservation of rights. The result of having knowledge, or the means of knowledge, and keeping silent is a tacit acceptance of the legal position. There is no question of a transaction and consequently there is no question of authority on the part of officials to bind the State as in the context of treaty-making.

The authorities on the subject of acquiescence do not contain any reference to a condition that officials should have authority to bind the acquiescent State. Far from propounding such a principle, the law treats governments as integral units for the purposes of the law relating to acquiescence. No curtains are drawn between different departments of government or between senior and junior officials.

Governments are treated as integral units for the purposes of the law of

acquiescence in another connection. The duty to protest is created not only when actual knowledge is established but also when knowledge may be inferred in situations in which reasonable opportunities for knowing of the conduct of the other party existed. In the Anglo-Norwegian *Fisheries* case the Court stated that in the circumstances "the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government" (*I.C.J. Reports 1951*, pp. 138-139).

It may be recalled that the United States possessed actual knowledge of the Canadian permit programme in April 1965, whereas this programme had been operating before that date. The pertinent maps were available earlier and publicity for the programme had been given in various forms in oil and gas trade publications. Consequently, knowledge of the Canadian programme in April 1965 was preceded by a period of access to knowledge of the public activity which the issuing of gas and oil exploratory permits necessarily involves. Thus it can be inferred that knowledge existed earlier than April 1965.

Knowledge creates a duty to protest, but the United States failure to protest is well established. No reservation of rights by the United States took place prior to the aide-mémoire of 5 November 1969. Before this the conduct of the United States had been consistent, but in the 1970s a change of front began to develop.

The failure to protest, the acquiescence, must be established by the evidence and if it is proved, the passage of a certain period of time *per se* is not required. It is clear from the authorities that in certain circumstances a failure to protest even in the short run may be critical.

On the facts of the present case a period of five-and-a-half years, and even more, is a substantial period of time, given the bureaucratic focus upon oil and gas resources, and given the importance of continental shelf rights to both Parties.

The letters exchanged in 1965 and 1966 provide sufficient evidence of acquiescence in the Canadian equidistance line in the first phase of the five-and-a-half years of silence. Given the nature of the maps transmitted by Canada to Washington in this phase, the continuing failure to protest is particularly striking.

Mr. President, it is Canada's position that the facts disclose a strong case of acquiescence and that, on this ground alone, the single maritime boundary should be compatible with the equidistance line as it was established in the period 1964 to 1969. At the same time, Canada contends that the silence of the United States also creates an estoppel in favour of Canada with consequences similar to those of the case based upon acquiescence.

Canada's views on the doctrine of estoppel have been set forth in her Memorial, and it is not my purpose to repeat what is said there.

In the opinion of a proportion of the authorities on the subject, the concept of estoppel is the *alter ego* of acquiescence, and on this view nothing needs to be added.

However, certain authorities have asserted the existence of a more rigorous form of estoppel which is a separate rule with criteria not in all respects identical with the content of acquiescence. In particular, in this mode the essential condition for the operation of estoppel is that the party invoking the rule must have relied on the statements or conduct of the other party either to its own detriment or to the other's advantage.

On the assumption – which must be open to doubt – that this condition is established in the law, it has certainly been satisfied on the facts of the present case. Canadian detrimental reliance takes the following forms:

In the first place, as early as April 1965, Canada was given to understand that no dispute existed as to the principle of the equidistance line dividing Georges Bank. This adoption by the United States of an equidistance line caused a relative "disarmament" in the legal posture of the Parties. Canada was given no warning that the United States would produce a radical revision of its stance on delimitation, and had no reason to expect a switch to a line based upon the Northeast Channel. Indeed, in November 1969, as we have seen, Canada was assured that the United States had refrained from authorizing mineral exploration and exploitation in the area.

Second, the issuing of permits relating to the areas of Georges Bank which, in the period 1964 to 1969 fell within the line acquiesced in by the United States, involved a detriment for Canada. For the holders, the permits involved legitimate expectations of conversion to leases with long-term oil and gas production rights. In reliance on the equidistance line Canada created legal relationships, recognizable as acquired rights, in areas which, subsequent to changes of policy on the part of the United States, lie in the disputed area to the west of the Northeast Channel line brought to light in 1976. The requirement of detrimental reliance – if it be a requirement recognized by the law – is amply fulfilled in the circumstances of the present case.

For more than five years the United States failed to protest the Canadian position. As a result, Canada was lulled into passivity on a matter which otherwise would have been an issue of urgent priority, and private rights were created and extended. Moreover, there is evidence indicating that the United States, in its own administrative practice relating to oil and gas activities during that time, was utilizing an equidistance method on Georges Bank. Thus, not only was there acquiescence by the United States, and an estoppel created, there was a conformity of the administrative practice of the two Parties.

In concluding the argument on the question of acquiescence and estoppel, I would make one final point. Canada's conduct has been stable and consistent over a substantial period of time. Canada has not wavered in its adherence to the equidistance principle and to Article 6 of the Continental Shelf Convention. The Canadian line has a firm basis in law as well as continuity in the diplomatic and administrative history of this case.

United States statements and conduct were likewise stable and consistent for a significant period. In 1965 and later years – indeed as late as 1969 – Canada is given assurances which on any reasonable view excluded the possibility of a claim to the whole of Georges Bank.

Late in 1969 a reservation of rights in general terms was formulated by the United States.

It is only in 1976 that a line other than equidistance is claimed by the other Party, namely a claim based upon the Northeast Channel. In 1982, a further claim line – the so-called adjusted perpendicular line – appears in the United States Memorial.

The scale of the United States change from an equidistance line in 1969 to monopolistic claims to the whole of Georges Bank in 1976 and again in 1982 is remarkable. Changes of such magnitude engage in a dramatic way the principles of stability of dealing and of good faith which constitute the policy foundations of the law relating to acquiescence and estoppel.

As Judge Hersch Lauterpacht has said:

> "[T]he far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability – a requirement even more important in the international than in other spheres; it is a precept of

> fair dealing inasmuch as it prevents states from playing fast and loose with situations affecting a state from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very states." (*British Year Book of International Law*, Vol. 27, 1950, pp. 395-396.)

These principles of stability and good faith form part of the legal framework within which delimitation in accordance with equitable principles must take place. When all is said and done, good faith and consistency are consonant with equity.

These principles of stability and fairness have particular significance in the context of delimitation of submarine areas which are the object of grants to private interests. Both the Canadian Government and private companies have incurred numerous responsibilities and considerable expense in connection with the Canadian permits on the northeast portion of Georges Bank. In the present case, the Canadian and United States equidistance lines, which were only a few miles apart for a considerable period, represented a conjoint basis for exploitation of the areas of Georges Bank appurtenant to Canada and the United States respectively.

The importance of the incidence and location of concessions in the context of delimitation is widely appreciated by international lawyers and negotiators. The factor was referred to by Judge Jessup in his separate opinion in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, pp. 79-80) and by the Judgment of the Court in the *Tunisia/Libya* continental shelf case, with reference to the "line of adjoining concessions, which was tacitly respected for a number of years" and which constituted "a circumstance of great relevance for the delimitation" (*I.C.J. Reports 1982*, p. 71, para. 96).

Mr. President, I am near the conclusion of my presentation. The Canadian argument based upon acquiescence and estoppel is built upon classical elements. The facts are simple enough. Since the early 1960s gas and oil operations have been conducted in the area of Georges Bank in the interest of a large number of corporations. At least until 1972 both the United States and Canada assumed the application of an equidistance line dividing Georges Bank as the basis for the exercise of continental shelf jurisdiction. Although the technical provenance and precise articulation of the delimitation based upon equidistance was the subject of disagreement, the practice of the two States was substantially concordant.

In November 1969 the United States made the first reservation of rights on Georges Bank but did not formulate a claim of its own – based upon the Northeast Channel – until 1976.

It is clear that in the early part of the 1970s the United States was considering a change of position and was eventually seduced by the sirens of the Northeast Channel. In consequence of this, the United States geophysical survey documentation begins to refer to the area beyond equidistance as the "extended area" on Georges Bank (Canadian Reply, p. 102, para. 241). This development is of considerable interest. What is remarkable, is that the concept of the "extended area" involves an assumption of the existence of a criterion of division of Georges Bank prior to the extension. I now come to my final conclusions on this part of Canada's case.

First, the conduct of the United States from 1964 to 1969 constituted acquiescence in or recognition of the use of the equidistance method in the Gulf of Maine area and the exercise of Canadian jurisdiction over Georges Bank.

Second, in so far as detrimental reliance may be a necessary condition for the operation of the doctrine of estoppel, on the facts there was a detrimental

reliance by Canada on the existence of a maritime boundary, and thus the existence of estoppel in its more rigorous form is established.

Third, the first formulation of a line claiming Georges Bank in its entirety on the part of the United States took place in 1976, 12 years after the beginning of the Canadian permit programme in 1964. But before 1976 the maritime boundary based upon equidistance had become legally opposable to the United States on the basis of acquiescence and estoppel.

The conduct of the Parties has a considerable significance in other respects, of course, and these other matters will be explored tomorrow by my colleague Professor Bowett.

The Chamber rose at 6 p.m.

SIXTH PUBLIC SITTING (5 IV 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

ARGUMENT OF PROFESSOR BOWETT

COUNSEL FOR THE GOVERNMENT OF CANADA

Professor BOWETT: Mr. President, distinguished Judges, may I express the sense of privilege which it gives me to address a Chamber of this distinction. This morning I shall be assisted by Miss Valerie Hughes, of the Ontario Bar.

My task this morning is to review the conduct of the Parties. I do so not as a basis for an argument that the United States is estopped, by its conduct, from denying that the correct boundary in law is the equidistance line. That is the argument already put to the Chamber by Professor Brownlie. I do so because in the conduct of the Parties the Chamber will discern three things of fundamental importance to its task of achieving an equitable result. The first is that the Parties themselves have over many years identified those interests which any equitable result must protect. The second is that the Parties have also demonstrated their attitudes towards what would be a fair or equitable balancing of their respective interests. The third is that, for the purposes of oil and gas exploration, the Parties have established a *de facto* maritime limit. I do not say that the Parties ever reached total agreement on these last two matters: had they done so we should not be here today. But they reached certain conclusions, as a result of their many contacts and negotiations over the years, which set the limits, as it were, to their disagreement over what would be equitable. So the Chamber can see plainly, from this conduct, the parameters of the "equitable problem", if I may use that term.

The probative value of this conduct is beyond question. In the recent Judgment of the Court in the 1982 *Tunisia/Libya* case the Court deemed such conduct "highly relevant to the determination of the method of delimitation" (*I.C.J. Reports 1982*, p. 83, para. 117). But, of course, the Court's use of the Parties' conduct as a test of what appears to have been mutually accepted as reasonable goes back much further. It can be seen in the Anglo-Norwegian *Fisheries* case *(I.C.J. Reports 1951)*, in which the Court analysed in detail the conduct of both Norway and the United Kingdom in relation to Norway's adoption of straight baselines. It can equally be seen in the Award of the Permanent Court of Arbitration in the *Grisbadarna* case (J. B. Scott, ed., *The Hague Court Reports*, 1916), both in relation to fishing practices and the lighting of the Banks by Sweden.

Yet if conduct is regarded as having probative value, for the purpose of demonstrating what the Parties themselves conceived to be an equitable result, there still remain three critical, preliminary questions.

First, whose conduct are we concerned with? Is it only that of the two Governments, or is the conduct of private parties relevant?

Second, by what test may we distinguish relevant from irrelevant conduct? and

Third, at what time is the conduct most relevant? Specifically, are we more concerned with conduct in, say, the last 20 years, or in the last century?

Let me deal with those three questions in turn:

First, it is State conduct alone which can afford evidence of what the two States regarded as an equitable, reasonable accommodation of their respective interests. The views of private persons are wholly irrelevant to that issue. However, if one seeks to identify the real interests at stake, the interests which the States sought to accommodate, then one necessarily has to take account of the activities of private parties. For, at least in that area of the world, it is private parties who fish and explore the sea-bed for oil and gas. As we shall see, some of the most telling evidence relates to how the Parties visualized a reasonable, equitable accommodation of these private interests and activities.

Second, not all State conduct is relevant: it has to be conduct germane to this dispute. Now the dispute is essentially over which of the Parties has sovereign rights, or jurisdiction, over the fisheries and mineral resources of the area. So the conduct must be related to the nature and purpose of the legal régimes of either fishery zones or the continental shelf. Necessarily, therefore, we shall be concerned with State conduct which either asserts such sovereign rights or jurisdiction for those purposes, or recognizes such rights in the other. As we shall see, conduct which is nothing more than a high seas activity, involving neither an assertion of sovereign rights or jurisdiction nor a recognition of such rights, is essentially irrelevant for our purpose. Equally irrelevant is conduct which takes place quite outside the relevant area.

Third, we are concerned with a contemporary issue, and it must be right for the Chamber to place the primary weight on the present interests of the Parties and their contemporary conduct with regard to those interests. I say this for a number of reasons. So far as the boundary is concerned, the record shows quite clearly that neither Party took active steps to negotiate a boundary, or express a view about a boundary, before the mid-1960s. Thus, there simply is no State conduct directly relevant to the issue of where an equitable boundary might be drawn pre-1964. For the first permits abutting on the equidistance line were issued by Canada on 30 December 1964. As regards the interests at stake, the interests in offshore oil and gas began at about the same time. This is scarcely surprising, for it is commonplace for the concern over the boundary to develop only when technology makes exploration feasible. Of course, the fishing interests are of much greater antiquity, and both Parties had established fisheries on Georges Bank by the beginning of this century. But the boundary issue is very recent, for the concept of a 200-mile exclusive fishing zone – and the need for a boundary to demarcate adjacent zones – came after the continental shelf doctrine was established law. In fact, Canada's 200-mile fishing zone dates from 1 January 1977, followed by the United States three months later (I, Canadian Memorial, p. 100, para. 224).

The purpose of these zones is unquestionably to allow coastal States to protect *contemporary and potential fishing practices. To assume, as apparently the* United States does, that these zones are designed to protect 19th-century fishing patterns – or even pre-1945 fishing practices – is really to ignore the whole ethos of the Third Law of the Sea Conference. The development of the exclusive economic zone was not designed to preserve the status quo of the 19th century, but rather to promote the aspirations of coastal States based on existing, contemporary needs. Moreover, in settling contemporary fishing disputes States sensibly avoid major economic disruption that would cause hardship. The point was made forcibly, and clearly, by Mr. Cutler when he addressed the Congressional Committee in June 1979 to explain the virtues of the 1979 fisheries agreement:

"it could not be expected that any sharing arrangement could be negotiated

> that would cause a major dislocation in the existing fisheries of one country that would redound to the benefit of the other country. Thus, the *recent historical catch data was considered to be of more relevance to the negotiation of entitlement shares than data from earlier periods.*" (Emphasis added.) (Canadian Memorial, Anns., Vol. II, Ann. 44, p. 311.)

Now that made good sense. But the United States has now changed its mind. The United States would now have the Chamber disregard that Canadian fishing on Georges Bank because, as they say in their Reply, it "did not become significant until the 1960s" (V, United States Reply, p. 139, para. 231). Now even if this were factually correct (which it is not, because the United States had already recognized the Canadian fishing presence in the 1950s; II, United States Memorial, p. 41, para. 61), and even if the United States had consistently taken this view (which it has not), is this not an extraordinary assertion? To ask the Chamber to withhold judicial recognition from a substantial fishing practice, by a coastal State, of more than 20 years' duration, is an extraordinary request. It may be recalled that, during the First and Second Conferences on the Law of the Sea in 1958 and 1960, recognition of so-called "historic rights" of non-coastal fishing States was based on a fishing practice of only five years. That was the "base-period" adopted in the combined United States/Canadian proposal of 1960. Indeed, this very question of the "base-period" arose in the discussions between the Parties in November 1977. The specific issue was the base-period to be used to determine entitlements to groundfish in ICNAF areas 3 and 4. Canada wanted a short base-period, but the United States expressed a preference for a period between 10 and 20 years. And the reason given was not that Canada's recent fishing was legally irrelevant, but rather that, in the view of the United States, the recent levels of fishing for scallops was artificially high because of alleged government subsidies by Canada. But at no time, during the whole of these negotiations on both boundaries and resources, was it ever suggested that a fishing practice established over 20 years could be ignored. Yet that is precisely what the United States now proposes to this Chamber. What is in issue between the Parties is not a dispute over whether the relevant base-period should be 3 years, 10 years, or 20 years. The United States line would ignore *all* Canadian fishing on the Bank, *regardless of its duration or its* intensity. The proposal is so patently unreasonable that it will, I trust, be rejected outright by this Chamber. Canada can find no precedent, in any fisheries dispute between coastal States, for ignoring so well-established a fishing practice. It represents the investment of millions of dollars; it represents the *livelihood of two generations of Canadian fishermen; and it represents, in this* case, a legal interest which is central to the dispute.

I turn now, Mr. President, to examine the different categories of conduct on which the two Parties have relied. As I indicated earlier, not all conduct is relevant to this dispute: and I must first mention, if only to set aside, certain *categories of conduct invoked by the United States, but, in Canada's view,* totally irrelevant to this dispute.

In its Memorial, the United States developed a theory of "dominance" over the entire Gulf of Maine. The argument appeared to be that the United States had provided the early cartographic work, the bulk of the navigational aids to vessels and aircraft, the main services for search and rescue, and had also assumed the main burden of defending the area (pp. 63-74, paras. 102-132). And so, it was implied, the Gulf had become a sort of "mare nostrum" under United States dominance. The implication of the argument was, therefore, that the Chamber should preserve this "dominance" by according most of the Gulf to

the United States, in line with the United States claim. Now Canada has dealt fully with this rather distasteful theory in its Counter-Memorial, at paragraphs 431 to 455 (III), and given that this particular line of reasoning has not been repeated in subsequent pleadings, I do not propose to deal with it further now. Suffice it to say that, in addition to being largely erroneous on the facts, the particular forms of conduct relied on by the United States are wholly irrelevant to the present dispute. As I mentioned earlier, relevance turns on the extent to which the State conduct involves a claim of sovereign rights of jurisdiction. Not one of the forms of conduct invoked by the United States involved any such claim. They were either high seas activities open to any nation – such as charting or surveying – or they were activities undertaken pursuant to co-operative agreements – such as the LORAN-C navigational aids agreement of 1964, or the operational agreements on air and sea rescue or air defence. But at no stage did either Party ever consider that these activities carried any significance for the question of maritime boundaries.

I turn now to the relevant conduct. In Canada's view the relevant conduct relates to fisheries on the one hand, and to exploration for oil and gas on the other. I deal first with fisheries.

I need not repeat my reasons for concentrating on the contemporary situation. Nor do I need to review the facts of the situation: that has been done exhaustively by my learned colleague, Mr. Binnie. I intend to concentrate on two phases of the relationship of the Parties on fishing matters: their co-operation in ICNAF until 1977 and their negotiations leading up to the 1979 fisheries agreement. For it is here that one sees most clearly how the Parties identified their respective interests, and how they visualized a reasonable – and equitable – accommodation of those interests might be accomplished.

I take ICNAF first. I think the Chamber will already have identified the three central issues.

The first is whether, in relation to Georges Bank, the United States had conceded within ICNAF that Canada was a coastal State, with legitimate fishing interests, to be treated on a basis of parity with the United States. If the Chamber will look at this map, which is Figure 65 in your dossier, you will see that Georges Bank lies within subdivision 5Ze. That area fell within the responsibility of Panel 5 of ICNAF, and the membership of any Panel was to be based on two criteria: the first was "current substantial exploitation" and the second was that "each High Contracting Party with coastline contiguous to a sub-area shall have the right of representation . . ." (Canadian Memorial, Anns., Vol. II, Ann. 11, p. 53).

The draft Convention which was before the International Conference was a United States proposal, dated 1 October 1948 – I ask the Chamber to mark the year – 1948. The United States proposed two States for membership of what was to become Panel 5: the two were the United States and Canada. At the meeting on 4 February 1949, the following exchange took place between the Canadian representative and the United States Chairman:

> "*Mr. Bates* (Canada): . . . the areas in which we fish intensively now are Areas 3, 4 and 5, and we would claim representation on these because of contiguity, . . ." (Canadian Memorial, Anns., Vol. II, Ann. 15, p. 101).

Now there followed a brief exchange to clarify the position off Labrador, and then there came the following comment from the United States delegate: "*Mr. Chapman* (Chairman): Oh, yes; thank you." (*Ibid.*, Anns., Vol. II, Ann. 15, p. 101.) So, in 1949 Canada claimed to fish intensively and to have a contiguous coastline to Georges Bank. And the United States reply was "Oh, yes; thank

you". The Chamber may find if difficult to reconcile that reply with the United States pleadings in this case which assert first that the United States fished Georges Bank exclusively until the 1950s (IV, United States Counter-Memorial, p. 51, para. 63) and second, that Canada is not a coastal State vis-à-vis Georges Bank (*ibid.*, p. 75, paras. 92-96).

Nor did the matter end there. For later, in 1972, when the question of allocating national quotas for fishing on Georges Bank arose, the claim was made for preferential treatment for coastal States. In Subarea 5 those States were the United States and Canada. Indeed in 1972 the United States itself proposed a coastal State preference for Canada for herring. In 1973 Canada was given a coastal State preference for mackerel and cod, and in 1974 for mackerel (V, Canadian Reply, pp. 108-109, para. 257 and fn. 86).

The United States now argues that the coastal State concept meant nothing more than a distinction between North American and distant water fleets. And she seeks to support that argument by suggesting that the United States was equally a coastal State for Subarea 4, off Nova Scotia (United States Counter-Memorial, p. 75, para. 92). But that won't do. For the United States membership of Panel 4 was quite legitimately based on an established fishing practice in that area, and also on coastal State status. And coastal State status meant proximity to the fishery. The western boundary of Subarea 4 in fact lies close to the coast of Maine, and indeed the Canadian equidistance line, as you will see, would place part of Subarea 4 within the United States zone. So Canada has never contested the legitimate interest of the United States in Subarea 4. The real question is how can the United States contest Canada's legitimate interest, both as a coastal State and a fishing State, in Subarea 5, the Georges Bank fishery?

The second ICNAF issue relates to the statistical evidence provided by ICNAF as to the extent of the Canadian fishing interests in the Georges Bank area. Here the United States makes a number of assertions. She says (United States Memorial, p. 49, para. 79) that ICNAF statistics in 1952 show that Georges Bank was fished exclusively by the United States. That assertion is simply wrong. The ICNAF statistics were based on data provided by Canada, but the data were confined to groundfish species. They did not indicate either the Canadian swordfish fishery, or the early Canadian scallop fishery. And, indeed, even in relation to groundfish, the statistics show where the catch was landed, not where it was caught. And from this fact flows the further fact that landings from the Georges Bank were absorbed into a total figure which represented landings at ports all along the coasts of the Gulf of St. Lawrence, Nova Scotia and New England: everything except the Grand Bank catches in fact. This total figure was simply attributed by ICNAF to what is now essentially Subarea 5. The details are set out in the Canadian Reply, Annexes, Volume II, Part II, pages 290 ff. The essential point is, however, that those ICNAF statistics do not prove an exclusive United States fishery. The United States understood this well enough, and accepted the fact of an established Canadian fishery. Why else would the United States concede Canada's claim to membership of Panel 5 in 1949 on the basis of intensive fishing? But let us move on to more relevant times. I turn to recent times. In the United States pleadings we find a use of the statistical evidence which justifies all the lawyer's traditional distrust of statistics. It contains two fundamental flaws. First, it uses statistics for the whole of Subarea 5. The point has been fully explained by Mr. Binnie, so I need not labour it. But perhaps I may remind the Chamber that, as they will see from this map (Fig. 65), Subarea 5 includes vast areas which have nothing to do with the Bank, nothing to do with the area in dispute, and are far removed from the Canadian claim-line. What possible purpose can such statistics serve, except to

confuse the issue? Then there is the second flaw, also explained by Mr. Binnie. The United States uses the weight of fish caught. So "trash" fish, used for fish-meal, are equated with the high-value catches such as scallop and lobster. Again, what purpose do such statistics serve except to obscure the real issue?

What Canada has attempted to do is to provide the Chamber with statistics which can reasonably be said to reflect the real interests of the two Parties in the Georges Bank area. If you take the ten years prior to the signing of the Special Agreement, that is to say 1969-1978, then the picture which emerges is the following.

Taking all the species fished on the Bank, in terms of value, Canada landed more than the United States. In the ten years 1969-1978 Canada landed 73 per cent of the whole of the catch from Georges Bank, and 84 per cent of the catch from the disputed area of the Bank. Even in the period of the most intensive United States fishing, 1978-1981, Canada's share was 59 per cent of the whole Bank, and 72 per cent of the catch from the disputed portion. And the Chamber will also bear in mind the point explained by Mr. Binnie, that these statistics do not include the fishing by the small vessel fleet of southwest Nova Scotia.

If one takes the scallop catch, which is economically the most important resource on the Bank, during the same period 1969-1978, the Canadian catch in the disputed area represented 95 per cent of the total Canadian scallop catch.

These figures will suffice to give the Chamber some idea of how misleading the statistics used by the United States are. The fact of the matter is that the Bank fisheries are vital to Canada. They represent what is now a well-established fishery. The Canadian share over the Bank as a whole is at least equal to that of the United States. And in the disputed area the Canadian interest is by far the greater interest.

The third, central issue arising out of ICNAF is the use made by the United States of the lines used to divide subareas. The Chamber will recall that the United States has made the point that even under NACFI, the line dividing area XXI and XXII went along the Northeast Channel. And that ICNAF took over the same line as the divider between Subareas 4 and 5. Thus, says the United States, the line is a "natural" boundary separating most of the commercially important stocks (United States Memorial, pp. 35, 46-47, paras. 53, 76 and 78). And it must be stressed that, by "natural" boundary the United States means a boundary which will give to the United States a monopoly in the west, in the old Subarea 5. Now the credibility of this thesis can be tested against the records of the 1949 Conference at which the United States explained the basis for these areas and lines.

I refer to the Minutes of the Second Session on 27 January 1949. These can be found in the Canadian Memorial Annexes, Volume II, at page 58. And the Chairman, Mr. Chapman of the United States, had this to say (at para. 32):

> "In the present instance, however, we hope to jump from that rather simple situation [he had earlier described the United States/Canadian control of high seas fisheries by two Commissions] ... to an extremely complex situation, ... where many nations are involved. Thus we have sought to provide for as much simplification of the biological and the political problems as is possible. We have thought that this would be achieved best by splitting the over-all area into smaller areas, 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 the fish stocks in one of the other areas . . ."

He went on to concede (at para. 34) that:

> "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."

That record makes a number of things clear. First, no one was talking about monopolies or exclusive claims: these were high seas fisheries. Two factors determined the zones or areas. The first was which nations fished there and the second was this assumption, the tentative assumption, about biological homogeneity. As we have seen, the United States proposed Canada as a joint founder member of Panel 5 because Canada fished there. And the assumption of biological homogeneity, of the separation of stocks, has proved inaccurate as the Chairman intimated might happen. But, clearly, the areas were areas of convenience, for purposes of stock management. Everyone knew of Georges Bank and Browns Bank – the terms were in common use and their location well known. So it seemed sensible enough to draw a line, for management purposes, between them, and even though scientific knowledge later destroyed any assumption of the separation of the stocks on those Banks. But the lines were simply lines of convenience. To suggest that the dividing lines can now be used to support a United States claim to exclusive rights in the area is something which would have amazed and shocked the participants at the 1949 Conference.

I want now, Mr. President, to leave ICNAF and to turn to the second phase of the relationship of the Parties on fishery matters: by this I mean the negotiations culminating in the abortive 1979 fisheries agreement.

I should preface my remarks by saying that Canada respects Article V of the Special Agreement (I, p. 11). Accordingly, nothing that I shall say will divulge any proposal made by either Party with regard to a settlement of the boundary. I am concerned, essentially, with two questions. First, did the negotiations reflect a common acceptance of a Canadian presence in the Georges Bank fishery which an agreement had to respect? And, second, what was the assessment made by the Parties of the quantum or extent of that interest which an agreement should reasonably – or equitably – protect?

Now, plainly, the United States is somewhat embarrassed by this agreement of 1979. It figures not at all in the United States Memorial. In the United States Counter-Memorial we are told that no obligations can arise from an unratified agreement (p. 151, para. 266). But of course! We do not argue that they do! Then we are told that if the Chamber takes notice of a failed agreement this would be detrimental to negotiations on the settlement of disputes (United States Memorial, p. 153, para. 230). That, with respect, is nonsense. It is common-form for a Court to consider, and for the parties to explain, the history of a dispute including negotiations which failed, ultimately, to produce a binding agreement. And so I ask the Chamber to look on this phase of the history of the dispute, as part of the dispute and a very revealing part at that.

Of course the United States seeks to dilute the relevance of the agreement by saying that it covered fisheries from North Carolina to Newfoundland. So it did, in a marginal way. But the real dispute was over Georges Bank, and both sides realized that, if the allocation on the Bank could be agreed, the rest was trivial. As we shall see, of the three categories of stocks, categories A and B concerned principally the Georges Bank stocks; and it was to these two categories that joint management was applied. The third category, C, included stocks "clearly off the

coast of only one country" – I use the phrase of the Joint Report of 21 October 1977 (Canadian Memorial, Anns., Vol. II, Ann. 36, p. 246). So the category C stocks were not in the areas in dispute, and hence single-nation management was acceptable. But the A and B categories were in the disputed area, and that was Georges Bank.

Moreover, in economic terms, the dispute was over Georges Bank. The potential annual value of the Georges Bank stocks was about 97 per cent of the value of all entitlements under the agreement. Thus, to be realistic, the 1979 agreement has to be seen as an agreement over the equitable sharing of the resources of Georges Bank.

The vital question is "How were they to be shared?" There were in fact two aspects of sharing. There was sharing of management, and there was sharing of stocks by quota.

As to management, the category A stocks came under the full joint management of both Parties. The stocks were mackerel, pollock, cusk and lobster. The geographical area for mackerel is shown here on this map (Fig. 66A), in Subareas 3, 4, 5 and 6 (virtually the whole of the area on this map). The shares were: United States 60 per cent; Canada 40 per cent. The area for pollock is shown on the next figure (Fig. 66B), in divisions 4V, 4W and 4X, and also in Subarea 5 – that is, the whole of this area shaded in pink. The shares there were: United States 25.6 per cent; Canada 74.4 per cent. I turn now to cusk, which is located in subdivision 5Ze, again shaded pink (Fig. 66C). The shares were: United States 34 per cent; Canada 66 per cent. So for the category A stocks covering this large area of the Bank, Canada's interest is recognized to justify joint management and a share ranging from 40 per cent to 74 per cent (Canadian Memorial, Anns., Vol. I, Ann. 20, pp. 294 and 296).

If one turns to the category B stocks, these included herring, cod, haddock, silver hake, red hake, argentine, white hake, squid and, above all, scallops. Here there is qualified joint management, with one or other Party being assigned the "lead role" because of its primary interest in the stock.

If I can show the Chamber the area for herring, Canada was assigned primary interest in Divisions 4W, 4X and the Grand Manan Banks, the area shown here in red (Fig. 67). Canada was to have 100 per cent of that catch. However, in Division 5Y – the green area here, excluding the Grand Manan Banks – the United States had primary interest and 100 per cent of the catch. Yet the areas of real significance are Division 5Z and Subarea 6 – the pink areas – for these lie within the area now claimed exclusively by the United States. Although the United States had primary interest in that area, Canada was allowed to fish as far as 68° 30′ W longitude – the red line here on the map – up to a limit of 2,000 tons, plus a share in any surplus over the annual permissible commercial catch for the whole area. So all of that Canadian fishery lies within the area over which the United States now claims an exclusive fishery. And the United States in its turn was allowed to fish up to 66° W longitude – the green line here – for the remainder of the allowable catch (Canadian Memorial, Anns., Vol. I, Ann. 20, pp. 298 and 300).

I turn now to deal with cod. With cod, lying in Division 5Z, here coloured in pink, the United States had primary interest, but the catch was to be split between the United States, with 83 per cent, and Canada with 17 per cent of the allowable catch (Fig. 68A). Again, the Chamber will note the recognition of Canadian fishing rights well within the United States claim-line. With haddock, in Subarea 5, again coloured pink, the split was the United States, 79 per cent, Canada, 21 per cent (Fig. 68B). With silver and red hake in Division 5Ze, the United States had 90 per cent, and Canada 10 per cent (Fig. 68C). The Chamber

will note that most of Subarea 5, and indeed, of Division 5Ze, lies well outside the disputed area, in waters which are indisputably United States waters, so that allocation of the major share to the United States is not surprising.

Correspondingly, with argentine, in Divisions 4V, 4W and 4X and also some argentine in Subarea 5 also, illustrated here in this pink area, the lion's share goes to Canada: Canada gets 75 per cent of the argentine (Fig. 68D) (Canadian Memorial, Anns., Vol. I, Ann. 20, pp. 302, 304 and 306).

There is also one category C stock which I should mention – and that is the Atlantic redfish. I say this because this was a stock in category C and therefore assumed to lie "clearly off the coast of only one country", and was treated by the Joint Report as lying outside the area in dispute. The agreement refers to the stock as located in Divisions 4V, 4W and 4X. Of this stock, Canada was to have 65 per cent and the United States 35 per cent, and Canada had sole management (*ibid.*, Anns., Vol. I, Ann. 20, pp. 310, 312 and 314). The point of interest is that the agreement assumed 4X – surrounded by that line there – to be outside the area of dispute and to lie clearly off the coast of Canada (Fig. 69). Now, it is quite clear, if the Chamber will look at the United States claim-line, that the United States now claims part of this area and also denies that the area lies off Canada's coasts. So we have here very clear evidence of the radical shift in the United States position since 1979: the inconsistency is inescapable.

But the stock to which I would ask the Chamber to attach the greatest significance is the scallops in category B: and really for two reasons. It is far and away the most valuable of all the stocks – for Canada it represents 85 per cent of the value of all stock landed from the Georges Bank. It was worth 58 million dollars in 1978: it is the Georges Bank stock par excellence. It is the stock which is located essentially in the disputed area.

Now the question is, what did the agreement have to say about this stock? The area is subdivision 5Ze, the area shown in pink on your Figure 70. It includes the disputed area, plus a considerable area of United States waters, which Canada does not claim. Canada is the Party with primary interest: that's the point. The further point is that the catch quotas are Canada 73.35 per cent; United States 26.65 per cent. Moreover, this figure of 73.35 per cent was a reduction in the Canadian share, as compared with past years. For the bargain struck was that Canada was to have its scallop catch reduced and to be given compensation in the groundfish elsewhere. But Canada was entitled to take its 73 per cent catch anywhere up to this red line, the line lying far west of the Canadian claim-line (Fig. 70) (Canadian Memorial, Anns., Vol. I, Ann. 20, p. 302).

Yet, even at 73 per cent, that is a striking figure. For if this was a negotiated, fair compromise, the question arises: "What has happened to our notions of fairness that the United States now claims 100 per cent of this stock?"

Now it may be said that the 1979 agreement was not concerned with boundaries. That is true. But Canada asked its scientists the following question. Can you indicate what lines would provide the same allocation of these fish species as the 1979 agreement? The scientists said they could, and the full details of their method are set out in Annex 111 of Volume V (pp. 745-765) of the Canadian Counter-Memorial.

Even allowing for the lawyer's suspicion of statistics and computer analysis, the results are highly interesting. What the scientists did was to take the United States figures for size of stocks and value (these are reproduced in Annex 110 in the same volume (pp. 741-743)). Then, for each of 13 different species, they produced a line which would divide the area within which the particular species is found in the same proportions as the species was divided in the 1979 agreement. But of course that gave us 13 different lines. So the next step was to

produce one composite line to represent the overall picture. And this was done by weighting each line by its economic value, giving more weight to the valuable species, less weight to the less valuable. The result which emerges, the final result, which we have called the "composite" or "aggregate" line, can be seen on this map here, which is Figure 71 in your dossier (Canadian Counter-Memorial, (79) p. 300 f.; Fig. 54). It is the broken red line. Now that line would allocate 35.1 per cent of the value of the resource for these 13 fish species to Canada : and I think the Chamber may wish to bear in mind that the United States own Environmental Impact Statement in 1980 arrived at a somewhat similar figure, 38.3 per cent, as an estimate of what the 1979 agreement would have allocated to Canada (*ibid.*, Anns., Vol. V, Ann. 110, pp. 741-743). So we believe that this exercise has a certain validity. What it shows is that something like the Canadian line would be necessary to achieve the results which the Parties had provisionally agreed in the 1979 agreement.

The conclusion which emerges from this brief review of the 1979 agreement is strikingly obvious. In 1979 the Parties considered that a fair, equitable solution to the fishing problem required a sharing of the Georges Bank resources: and in terms of real, economic value Canada was to have the major share. It is quite impossible to reconcile this 1979 concept of fairness with this new 1984 United States conception of fairness or equity which involves a United States monopoly over all the Georges Bank fisheries.

There is one further feature of the 1979 agreement to which I would call the attention of the Chamber. Clearly, the agreement accepted the feasibility and desirability of co-operative, joint management over shared resources. Indeed, the system was designed to reflect, in a scheme for joint United States/Canadian management, the principles contained in the United States *Fishery Conservation and Management Act* of 1976. Why, therefore, does the United States now argue that co-operation in management is impractical, inefficient and likely to lead to disputes: and that a monopoly is the answer? I confess we have yet to hear a satisfactory answer to that question.

Now it is common knowledge that the United States did not ratify the agreement and did not even press for ratification within the United States Senate. The reasons, we are told in the United States pleadings, are that it was deemed fundamentally unfair (Counter-Memorial, pp. 213-214, para. 338), and it did not respect the exclusive jurisdiction of the United States within its 200-mile zone. I have to say, Mr. President, that Canada finds these reasons incomprehensible and totally unacceptable. The terms of the agreement could not possibly have been deemed fundamentally unfair by the United States negotiating team – and it should be remembered that this team was in continuous contact with the United States east coast fishing interests. And certainly the team was fully aware of the United States 200-mile claim, made earlier in 1977. Moreover, the two Governments approved – yes, the word used in the official Joint Report was approved – the Cutler/Cadieux Report of 21 October 1977, on which the 1979 agreement was based (Canadian Memorial, Anns., Vol. II, Ann. 26, p. 242). Indeed, when the United States President, Mr. Carter, transmitted the agreement to the Senate on 3 May 1979, he commended the agreement, and in the following terms:

> "These treaties will make an important contribution to good relations between the United States and Canada by resolving, *in a way that is fair to both Parties*, a vexing dispute over fisheries and the maritime boundary . . . I believe that these treaties are in the best interests of the United States." (*Ibid.*, Anns., Vol. II, Ann. 43, p. 309; emphasis added.)

And Mr. Cutler, the negotiator, addressing the House Committee on Merchant Marine and Wildlife on 22 June 1979, said the following:

> "the entitlement shares established by the Agreement are fair and equitably balanced. With one minor exception, each U.S. entitlement to stocks found on Georges Bank *exceeds* the share of the total catch which the U.S. took over the 1965-77 period." (*Ibid.*, Anns., Vol. II, Ann. 44, p. 313; emphasis added.)

So what went wrong?

The Chamber will have noted the rather extraordinary suggestion in the United States Counter-Memorial (p. 212, para. 334) that it was Canada's fault – because Canada had unilaterally terminated reciprocal fishing in June 1978 and this had eroded support for the agreement within the United States. Now that explanation simply will not do. It is factually incorrect – or at least incomplete – for what in fact happened was that, pending the entry into force of the 1978 renewal agreement, a number of disputes arose. Many of these had nothing to do with the Gulf of Maine. There were west coast problems, principally the United States restrictions on Canadian salmon trolling on Swiftsure Bank and the intensification of United States fishing for groundfish off Washington State. Of course, in the east there were also serious problems, arising from the intensification of United States fishing for scallop and groundfish. And in Canada's view this overfishing by the United States jeopardized the interim agreement on reciprocal fishing and damaged Canadian fishing. There was, in effect, a regulatory vacuum on the United States side. Moreover, both Parties at that stage assumed that the 1979 agreement would enter into force and stabilize the position. So Canada's decision to terminate reciprocal fishing was therefore taken as a temporary measure in self-protection and with great reluctance. And as to the suggestion that it was Canada's insistence on a permanent agreement which caused the opposition to it (United States Counter-Memorial, pp. 212-213, para. 335), I can simply say that Canada had always envisaged a permanent fisheries agreement. And so had both sides during the negotiations. The Cadieux-Cutler Joint Report of 21 October 1977 stated that "the two sides directed their attention to the basic principles of long-term resource arrangements for fisheries" (Canadian Memorial, Anns., Vol. II, Ann. 36, p. 244). What in fact happened, at quite a late stage in the negotiations, was that the New England Fisheries Council urged a temporary, three-year agreement on the United States negotiator, Ambassador Cutler, plus a further restriction of Canadian scallop fishing back to the so-called "Kennedy line". Now this had not been part of the official negotiating position of either side, and certainly not part of the agreement. The introduction of this quite new element came from the United States side via the Regional Council, although the United States did eventually propose a ten-year agreement rather than a three-year agreement. But it is quite wrong to imply that Canada had somehow created some new barrier to agreement.

But whatever the rights and wrongs of the decision by both Parties to terminate reciprocal fishing, this was not the reason for non-ratification of the 1979 agreement. Indeed, Ambassador Cutler certainly expressed the view that that situation made the rapid conclusion of the 1979 agreement more necessary. And if one looks at the various statements of United States Senators, which are reproduced at paragraphs 35 to 36 of the United States Reply (pp. 21-23), none of them give the termination of reciprocal fishing as the reason for their opposition to the agreement.

The truth seems to be, Mr. President, that the United States Administration simply took a political decision not to risk antagonizing certain New England

interests. Views were divided in New England (just as they were in Nova Scotia), but whereas Canada was prepared to take a decision in the national interest – and at the risk of alienating certain sectional interests – the United States was not. But this was pure politics. The 1979 agreement had been negotiated under one Administration and inherited by another. So perhaps that is one reason for the *volte-face*. Perhaps the United States decided to take a gamble. After all, if they win they get all of the Bank. If Canada wins, the United States still gets half of the Bank. But be that as it may, it is simply unacceptable for the United States to pretend that the terms of the 1979 agreement, representing a reasonable, fair compromise to the many persons involved on both sides, had suddenly, somehow, become inequitable and unfair in 1980.

I believe I can now leave the subject of fisheries and turn to the second main area of conduct, which throws light on how the Parties visualized the equities of the situation. I refer to their conduct in relation to continental shelf rights, that is to say, to their exploration and exploitation for oil and gas.

May I first say a word about the terminology used by the Parties in their offshore grants and authorizations? This is necessary because the terminology they use is different, and it is important to be clear about what each Party was in fact doing. The Canadian "permits" upon which Canada has relied in this case are very different from the United States "geophysical survey permits".

The Canadian régime is long-standing, deriving from the Oil and Gas Land Regulations enacted in 1961, now supplemented by the 1982 *Oil and Gas Act*. It uses two types of legal instruments of interest here:

First, there are the exploratory licences – these are short-term instruments, which expire on 31 March of each year and they authorize geophysical research. This research is exploratory, using seismic techniques, but it also allows drilling down to 305 metres. But the licensee acquires no exclusive or proprietary rights.

And then there are permits – these are long-term instruments that confer an exclusive option to obtain a lease; and this would grant exclusive long-term oil and gas exploitation rights in a specific portion of the Canadian continental shelf.

There are also two types of United States legal instruments relevant in this case:

First, the geophysical survey permits – these are, like the Canadian exploratory licences, temporary and non-exclusive authorizations to carry out offshore research; and they expire at the end of each year.

And then second, there are leases – these convey exclusive exploitation rights to a specific portion of the United States continental shelf.

For present purposes, I think it is sufficient to remember that the Canadian "permits" are more like what in the United States system are called "leases". The United States "geophysical survey permits" on the other hand are roughly equivalent to Canadian "exploratory licences". That is the broad comparison to keep in mind. Thus, when Canada relies on Canadian "permits", the reference is to long-term instruments involving binding commitments on the part of both the company which has been granted exclusive rights and the Canadian Government. By contrast, the United States "geophysical survey permits" do not vest any long-term rights; they merely give permission to conduct research.

But let me now turn to a description of the actual activity of the two Parties. The Canadian seismic exploration by both licensees and permittees can be seen in these three successive diagrams (Canadian Counter-Memorial, Anns., (212) (213) Vol. III, Chap. 1, pp. 4-5). Figure 72A covers the years 1965-1969, Figure 72B the years 1970-1973, and Figure 72C the years 1974-1979, and the Chamber will (214) note the intensification of effort in these later years. The permits issued can be

(215) seen in the next diagram, Figure 72D. These Canadian permits date from 20 May 1964, that was the earliest permit to Texaco Exploration Company, up to 24 November 1971, the permit issued to Fairholme Development Ltd. And the Chamber will note that these Canadian permits broadly respected the strict equidistance line.

I would emphasize that the activities undertaken pursuant to these permits have been costly, and undertaken in good faith. The attempt by the United States in its Counter-Memorial, paragraph 119 (p. 105) to represent the Canadian activity as of minimum financial significance is quite wrong. Expenditures have been considerable. Nor is it correct to describe the activities as "dormant" (United States Counter-Memorial, p. 77, para. 97). The fact is that the activities have progressed as far as it is reasonably prudent to go until this dispute is settled. But meanwhile, the permit-holders retain all their proprietary rights.

The Chamber adjourned from 11.10 a.m. to 11.20 a.m.

You will recall that before the break I was outlining the Canadian activity. I want now to turn to the United States activity. I do so with rather less confidence, simply because, as we shall see, a good deal of the evidence provided by the United States is ambiguous.

The first striking feature is that, as the United States candidly admits (Memorial, pp. 60 and 63, paras. 97 and 99), no leases whatever have been granted by the United States in any area claimed by Canada. So there is nothing really comparable to the Canadian permits. This means that all the description in the United States pleadings of the Call for Nominations in 1975, or the offer of leases in 1979 (*ibid.*, pp. 58-63, paras. 94-95) is quite irrelevant. No leases at all have been granted in any area claimed by Canada: that is the point!

But the United States did grant some geophysical survey permits on Georges Bank. So let me deal with those. The treatment will have to be rather detailed and – I hope – meticulous. But I hope, Mr. President, that you will bear with me, because these permits form an important part of the case for the United States. I simply cannot afford to ignore them, or treat them lightly. The Chamber will remember that the United States has made some rather grandiose claims in its pleadings concerning data collected under United States geophysical permits in the "northeast portion" of Georges Bank (*ibid.*, Anns., Vol. II, Ann. 40). The importance lies in that term "northeast portion", because it suggests that it is the area claimed by Canada.

Annex 40 to the United States Memorial and Annex 26 to the United States Counter-Memorial list a number of permits upon which the United States has based these claims. The United States geophysical survey permit alleged to contain the largest number of line miles in the "northeast portion" of Georges Bank is permit No. E3-75. Canada has carefully traced the history of this group survey permit through its predecessor group survey permits. I should add that group surveys are surveys conducted on behalf of a number of oil companies acting jointly. What emerges from this examination is that, at least prior to 1972, exploration work done on Georges Bank under United States authorization respected an equidistance boundary. This, of course, would accord – or almost – with the assurance given by the United States to Canada in November 1969. The Chamber will recall that the United States in an aide-mémoire of 5 November 1969 assured Canada that it had refrained from authorizing mineral exploration or exploitation in the northern area of Georges Bank (Canadian Memorial, Anns., Vol. III, Ann. 13, p. 67).

Nevertheless, we are left with an enigma. For the United States pleadings do say that, since 1964, extensive collection of geophysical data, under United States permits, has taken place "in the northeastern part of Georges Bank" (United States Memorial, p. 58, para. 93). The United States has confirmed that they mean by this that part claimed by Canada (I refer to Enclosure 1 to the United States Agent's letter to the Registrar of 27 February 1984[1]). How then can we reconcile this assertion with the permits actually issued and the categorical assurance given by the United States in November 1969 that they had refrained from authorizing work in the area?

The answer is both simple and surprising. The fact is, as we shall see shortly, that United States oil companies, in applying for permits, did refer to the "northeast area" of the Bank. But by that they meant the northeast area of the United States portion of the Bank. The evidence clearly shows that when they referred to the northeast area they meant the area north of the Great South Channel and extending to the median line. I can only presume that the authors of the United States pleadings were unaware of what the oil companies actually meant when they referred to the "northeast area" of the Bank.

The truth of the matter seems to be that the United States was in fact operating on the basis of an equidistance line: although, in fact, there were two equidistance lines. Let me explain.

There was first a line adopted by the Bureau of Land Management, and referred to as the BLM line. This was an equidistance line apparently measured from Cape Cod to Seal Island. I invite the Chamber to give particular scrutiny to the use of this line by the United States Department of the Interior, of which the Bureau was a part, as was also the United States Geological Survey which issued the permits. Then there was another equidistance line used by the oil companies for their surveys. This, too, was an equidistance line, but it was measured from Cape Cod to the Nova Scotian mainland, disregarding both Seal Island and Cape Sable Island. It lay a few miles further northeast than the BLM line.

It appears that when permits were granted by the United States Geological Survey, they allowed surveys to go as far as the BLM line or, if the companies requested, as far as this further company equidistance line. Why, you may wonder, should they do that? It seems that there are two reasons. The first is that the United States assumed it could regulate geophysical surveys by their own nationals on the basis of nationality, without claiming title to the shelf area: and there is evidence to support that. The second is that perhaps the United States was not too reluctant to move to a more ambitious equidistance line, notwithstanding that it ignored relevant basepoints.

In any event, whether the line we find is the BLM line or the company equidistance line, the method was equidistance. And all this survey mileage, which the United States has so painstakingly listed in Attachment 1 to its letter of 27 February appears, on examination, to be on the United States side of one or other of these equidistance lines. We do not have real evidence of surveys being conducted on the northeastern part of the Bank, beyond these equidistance lines, at least prior to 1972. The full history of this United States practice is set out in the Canadian Reply, Annexes, Volume II, pages 539 to 667.

I now turn to a very summary and chronological survey of this permit activity which will, I hope, clarify matters for the Chamber.

The first United States geophysical survey permit listed by the United States is E3-67, granted to Chevron in 1967. As depicted on the "Reproduction Map", supplied by the United States Agent – that was an attachment to his letter of

[1] See **VII**, Correspondence, No. 84.

20 January 1983[1] to the Registrar – the area of the survey under permit E3-67 terminated at a northeastern boundary slightly to the southwest of a strict (165) equidistance line, and if the Chamber will look at Figure 73, it can be seen in green on this map here. This same map also shows in red the area of a companion survey conducted by the same company, Chevron, but under Canadian exploratory licence 927 two years earlier. There were also two extensions to the area under the United States permit, one for some lines extending into the Gulf of Maine area here to the north and also for a few additional lines into deeper waters on the Georges Bank slope. But neither appears to have intruded on to the northeastern portion of Georges Bank beyond the original survey area.

Mr. President, in 1969 Chevron made a further application, this time as agent for Digicon Inc., a United States survey corporation, and received United States permit E2-69. This was in fact a major programme on behalf of 27 oil companies, and it was called the 1969 East Coast Joint Survey. We have obtained and deposited a programme map, showing the actual survey lines that (216) were proposed for permit E2-69. You have on the lightbox and in Figure 74 of your dossier a reproduction of this programme map. Now we have transposed it onto a Canadian basemap. The documentation relating to this permit was signed by the official issuing the permit, a Mr. Dupont, and it contains a significant phrase – it says "portions of two of the lines extend to the Canadian side of the BLM line" (Canadian Reply, Anns., Vol. II, Part III, p. 574). Now the portions referred to are obviously these and these. If you look at these lines – these are survey lines – you see that survey line 437 is running parallel to, but of course on the United States side of the equidistance line. Survey lines 440, 441, 442 terminate before the equidistance line: and two lines, 438 and 439, trespass across the equidistance line. So we can locate the BLM line quite accurately, and it is an equidistance line. And of course this particular trespass across the BLM line occurs just at the time when the United States was beginning to challenge the Canadian claim to equidistance. The Chamber will recall that it was on 5 November 1969 that the United States aide-mémoire signalled the first United States reservation about equidistance, but at the same time assured Canada that they were not authorizing survey work beyond the equidistance line. But, clearly, the United States had itself been operating on the basis of equidistance, for that was what the BLM line was, and also the company equidistance line.

Now, the BLM line is obviously named after the United States Bureau of Land Management, which at the time relevant here was responsible for United States continental shelf policy. Let me just add, in parenthesis, that the BLM line differed slightly from the Canadian strict equidistance line, but only because it did not allow for the scale distortion of the Mercator projection. The United States was using a Mercator projection: Canada was using a Lambert Conformal Map.

In the same year, 1969, Chevron obtained authorization to conduct exploration pursuant to Canadian exploratory licence No. 1283, covering the area on the Canadian side of the Canadian equidistance line, and so Chevron acquired Canadian authority for exploration on the Canadian shelf. Clearly, Chevron was taking no chances.

In the following year, 1970, Chevron, again acting as agent for Digicon, applied for a continuation of permit E2-69, and the United States permit E1-70 was issued to Digicon as a continuation. As shown on the "Reproduction Map" supplied by the United States Agent – and this was an attachment to the

[1] See **VII**, Correspondence, No. 49.

letter[1] of 20 January 1983 to the Registrar – the limit of the survey area under permit E1-70 seems to stop short of a strict equidistance line on Georges Bank. Now on the programme map deposited by Canada, however, there do seem to be some extensions to this permit to cover additional survey lines which appear to have transgressed the BLM line, but by about the same distance as the two earlier lines the year before.

The next group survey listed in the United States Annexes was conducted under United States permit E1-71, again with Digicon as the surveying company. The lines shown on this programme map again crossed the BLM line by about the same distance as had their predecessors under permits E2-69 and E1-70.

When the terminal points of all these lines and indeed of the subsequent Digicon group survey lines are plotted, it readily becomes apparent that these surveys extended to an equidistance line on Georges Bank, or just slightly beyond as you can see from Figure 75. Now the numbers which you can identify are the numbers of the survey lines; the little points, or crosses, attached to those numbers indicate the terminal points of those survey lines.

Obviously, the companies were planning their programmes under these United States geophysical survey permits to cover the maximum possible equidistance claim that could be advanced by the United States. It might help the Chamber to see these three different equidistance lines being used at this (217) time. They are illustrated on Figure 76, the map now behind me, and you will see first the company equidistance line – the line in light green, based on a mainland to mainland measurement. Then there is the BLM line, the line in dark green. Then you have the Canadian strict equidistance line, the line in light grey. And then, just for purposes of comparison, we have also added the present Canadian claim, which is the black line – here. I believe it can be said that, if there is an area of dispute, it is most realistically portrayed by those lines.

Then in 1972 Digicon itself applied for and obtained United States permit E2-72, on behalf of a large group of oil companies. The map supplied by the United States Agent (this was an attachment to the letter of 20 January 1983 to the Registrar) does show that this permit did cover all of Georges Bank. But if one examines the actual survey lines, it is clear that a rather extraordinary development occurred. The original survey lines mostly stayed south of the equidistance line. But out of some 30 lines, four of them continued over on to the Canadian side of the company equidistance line and one – line 730 – went wholly across the company equidistance line. This appears to be the first substantial incursion beyond the equidistance line, authorized under a United States permit. So 1972 really marks the first real breach of equidistance.

After these original survey lines had been agreed for this permit E2-72, one company apparently suggested some 380 miles of additional survey programme but still covering the same area of Georges Bank. Now this was objected to by companies with operating entities in Canadian waters.

As a result, the 380-mile extension was divided into two parts: there were to be 246 miles in "United States" waters, and 134 miles in "Canadian" waters. If the (218) Chamber will look at Figure 77, on the map behind me, the original survey lines are in black. For the extension, the lines in Canadian waters are in red and the lines in United States waters are the green lines crossing the BLM line. A ballot was circulated to the companies involved, and some 28 companies expressed a willingness to participate in the "United States" extension, and some 25 became participants in the "Canadian" extension. And the division between the United States waters and the Canadian waters was an equidistance line.

[1] See **VII**, Correspondence, No. 49.

But after 1972, things began to change despite the dispute. Despite all the implications of a "critical date", the United States set about improving its position: it became more and more expansionist. Yet, as we shall see, even then the United States essentially kept equidistance as the true limit of the United States shelf. The forays into Canadian waters, beyond any equidistance line, were characterized as "extensions". And that meant extensions into Canadian waters on the northeast portion of the Bank. But let me not anticipate. I will resume the narrative.

In 1974, Digicon obtained United States permit E1-74, for another large participation survey. The sketch submitted by the United States Agent (attachment to his letter of 20 January 1983 to the Registrar) is a rough one and not easy to follow. But Canada has obtained and deposited an original Digicon programme map, and this is reproduced here behind me on Figure 78, reproduced on the Canadian basemap. Now, it is clear that the survey was in two parts: there was one area, "D", extending approximately to an equidistance line, and then a second area, labelled "DS", embracing what was called the "Georges Bank Slope". But these areas coincided broadly with those of the earlier permits in 1970, 1971 and 1972; it was restricted to the southwest portion of the Bank. However, Digicon shot some three additional lines in 1974 – and
(219) they are labelled DX1, DX2 and the return is DX3 (Fig. 79). These three lines projected northeast into an area, coloured pink, which in the following year, 1975, was granted to Digicon as an "extension". And the word "extension" is, again, a reference to an extension into the northeastern portion of the Bank, into what must have been regarded as Canadian waters. The programme for 1975 covered an original programme, shown in green here, and an extension programme, shown here in pink.

I should add that the surveys along these three DX lines extending far to the northeast, as well as some work in parts of the "D" and the "DS" areas, were authorized by Canadian exploratory licence No. 2245 – that was issued to Digicon on 1 August 1974, and this can be found at Tab. 18 of the Canadian licence materials deposited with the Court (12 December 1983). And that licence clearly shows these DX lines.

The 1975 Group Survey is of particular interest because it is claimed in the United States Annexes to contain the largest number of line miles on this northeast portion of Georges Bank (United States Memorial and Counter-Memorial, Anns. 40 and 26). This is the survey by Digicon under United States permit E3-75. There were, in fact, two areas involved in this survey. Although the original area of the survey appears from the map supplied by the United States Agent (attachment to letter of 20 January 1983 to the Registrar) to be bounded by a line slightly to the southwest of a strict equidistance line on Georges Bank, the actual programme map shows a division at about the company equidistance line, the line previously followed by the companies. The two areas can be seen here (Fig. 80), the green and the pink. The second area – the pink area – was an extended area encompassing the northeast portion of Georges Bank. But again, for this "extended area", across the equidistance line, Digicon obtained Canadian exploratory licence 2414. I should add that the areas covered by the United States geophysical survey permit, and by the Canadian
(168) licence for this survey, are depicted in Figure 22 of the Canadian Reply, reproduced in your dossier as Figure 81. That is the map behind me, with the Canadian licence areas shown here in pink.

I would ask the Court to mark some very interesting terminology which appears on Digicon's own map. The original 1975 survey area (which corresponded to the "D" area from the year before, on the southwestern portion of

Georges Bank) was, curiously, referred to by the companies as "1975 Georges Bank Programme (Northeast Area)". So what the companies referred to as the "Northeast Area" (Fig. 82) was only the northeast area of the United States portion of Georges Bank. It did not extend beyond the equidistance line and the true northeast portion, that is on the Canadian, or northeast side of the median line, was labelled differently. It was labelled "1975 Georges Bank Extension Programme". And this "extension programme" began in 1974 following the extended United States claims.

That completes the list of group surveys contained in Annexes 40 and 26 to the United States Memorial and Counter-Memorial, or referred to in the documents supplied by the United States Agent in response to Canada's request for information of 15 December 1982[1]. What the programme maps for these surveys show beyond any doubt is the assumption of the equidistance method of delimitation, of an equidistance boundary on Georges Bank.

If you will allow me, I ought to say a few words about the single-company surveys, as opposed to the group surveys. They, too, are either listed in United States Annexes 40 and 26, or they can be found in the materials supplied by the United States Agent in response to Canada's 1982 request. An examination of the single-company surveys provides a virtually identical picture.

The first such single-company permit was E4-64 issued to the Mobil Oil Company. That was bounded to the north by latitude 41° 00′; so that does not impinge upon the northeastern portion of Georges Bank. The map for the second single-company permit, E1-65, issued to the Shell Oil Company, is very rough, but it appears to be bounded by some sort of equidistance line; and certainly not by the Northeast Channel line. Mobil's application letter for the third single-company permit at issue, E1-66, did cover the whole of Georges Bank, but the company noted that it was applying to the Canadian authorities for permission to conduct survey work on the Canadian side of what was called an "offshore projection" of the United States/Canadian boundary. But that boundary, or rather, its projection, was not further specified. So this permit signifies nothing, either way.

Finally, the fourth and last permit in question was E2-68, granted to Exploration Surveys, Inc. in 1968. This is the one exception to the statement that the United States did not authorize geophysical research north of an equidistance line prior to 1972. As explained in our written pleadings, when the survey proposed to be conducted by ESI on Georges Bank came to the attention of the Canadian authorities in October 1969, they wrote to the company on 5 November 1969 explaining the need for a Canadian licence (Canadian Memorial, Anns., Vol. II, Ann. 50, pp. 576-583). Canada did not, of course, have to raise the question with the United States Government, having received on the same day, 5 November 1969, a formal aide-mémoire assuring Canada, with respect to the "northern portion of the Georges Bank", that the United States had "refrained from authorizing mineral exploration or exploitation in the area" (*ibid.*, Anns., Vol. III, Ann. 13, p. 68). In addition, the letter from the United States Geological Survey, granting permit E2-68 to ESI, contained a jurisdictional caveat granting authorization only for that area which was part of the United States outer continental shelf (United States Memorial, Anns., Vol. II, Ann. 40). So the United States was not prepared to guarantee that it had title over this area of shelf.

Mr. President, as you know, after the submission of its Reply, Canada asked

[1] See **VII**, Correspondence, Nos. 48 and 49.

the United States on 9 January 1984[1] for certain original maps for use in these oral proceedings, to avoid the great time and expense entailed in obtaining or reconstructing these maps. On 27 February 1984, instead of supplying a single one of the maps requested by Canada, the United States entered what looked like a fourth written pleading. Not a shred of documentation was submitted in support of the allegations set forth in that letter until last week, on 29 March.

Moreover, the United States letter of 27 February 1984[2] mentions a few new permits not mentioned in United States Annexes 40 and 26, or in the material supplied to the Court and Canada in response to Canada's December 1982 request for documents. These new permits in fact support Canada's contentions. Nothing in this new material invalidates Canada's argument in any way.

Let me illustrate by referring to United States permit E5-66. The programme map for this survey was already included in Annex 74 to the Canadian Counter-Memorial (Vol. V, p. 474), and you have a copy in your folder; it is labelled Figure 83. If I can just ask you to look at it, you will see clearly that this survey respected a strict equidistance line on Georges Bank. That is Figure 83 in your dossier. The reconstruction is, of course, superimposed upon a map so that you can identify the limits of the survey.

The two other new group surveys mentioned by the United States Agent in his letter of 27 February are those led by the Humble Oil Company and by the Continental Oil Company – Conoco – under United States geophysical survey permits E1-67 and E1-68. These surveys, which respected the company equidistance line, which I illustrated a few moments ago, are already shown on the cumulative programme and shot point maps deposited by Canada with its Reply, so there is really nothing new there.

But let me perhaps stress something which is much more important. All of these United States permits which I have laboriously examined – and I do apologize to the Chamber – they are all purely temporary instruments, authorizing geophysical surveys. Of course, the same is true of the Canadian licences. But not one of them conferred any property rights and, moreover, they are now all expired, at least to the best of my knowledge. They have an importance, certainly, as part of the history of the conduct of the Parties: but we are clearly not dealing with a situation in which there are proprietary rights and future expectations, which the Chamber might feel a boundary ought to respect.

With the United States leases, and the Canadian permits, the matter is quite different, for *there* there are proprietary rights. So it may be more important, and indeed Canada believes it is more important, to look at the situation of the long-term leases.

The overall picture with the long-term leases can be seen on this map here (67) (Canadian Counter-Memorial, p. 146, Fig. 31), which is Figure 84 in your dossier. The map is from an official United States Data Atlas, published by NOAA – that is the National Oceanic and Atmospheric Administration – published in 1980 (Fig. 84): and it shows the United States leases and the Canadian permits. It shows the comparable activities of the two Parties. And again, I invite the Chamber to mark the year, 1980. As you can see, the division between the United States and the Canadian activities is clear. It goes straight through the middle of Georges Bank, clearly respecting the equidistance principle.

I cannot properly end this discussion – particularly of the BLM line – without drawing to the Chamber's attention the affidavit of Mr. Harry A. Dupont, filed

[1] See VII, Correspondence, No. 80.
[2] See VII, Correspondence, No. 84.

with the letter from the United States Agent of 27 February. Mr. Dupont was the Oil and Gas Supervisor responsible for issuing the United States permits from 1966 until 1977. What he says on affidavit, in effect, is that he used the phrase "BLM line" simply to remind himself that beyond that line Canadian permits had been issued and that he had obtained this information from the Bureau of Land Management. He also says that at no time did he ever consider any type of median line to be the boundary: he says he had always presumed the boundary "would have taken advantage of the Northeast Channel, beyond Georges Bank". Now Mr. Dupont is clearly a remarkable man, and I am only sorry he is not here as a witness so that I might ask him a question or two. Mr. Dupont made those annotations in 1969. Considering that the State Department itself did not decide upon the Northeast Channel tactic until late 1969 at the earliest, and Canada knew of it only in the year 1976, Mr. Dupont's prescience is remarkable.

But his memory is anything but remarkable: in fact, it looks downright unreliable. I have here a copy of a letter he wrote to Mr. John Crook of the State Department on 3 October 1974: the letter can be found in the Canadian Reply, Annexes, Volume II, at page 620. In his letter he is referring to correspondence with Digicon over survey lines, and he refers to "four additional lines, none of which are near the median line in the Georges Bank area" and a little later he refers to a line "east (on the Canadian side) of the median line between the United States and Canada". For a man who says that he never considered the median line to be the boundary, but always assumed the boundary was the Northeast Channel, that is very strange language: and I am afraid I must invite the Chamber to place no reliance whatever on that affidavit by Mr. Dupont.

I can only ask the Chamber to look at the whole of the evidence and to draw its own conclusions. The evidence just does not bear out Mr. Dupont's memory of these events. Whatever the line is called, and wherever its exact location, the facts indicate beyond question that the United States was respecting some form of equidistance line dividing the Bank, until 1972 – and thereafter, gradually began to authorize permits going beyond it.

Mr. President, if we can emerge from all this detail, the question is, what does it all show? In Canada's view it shows two things.

It shows, first, that the United States has never granted anything but exploratory permits in the disputed area: no rights of a proprietary character have been created at all.

It shows, secondly, that even the exploration activities authorized by the United States respected equidistance at least until 1972, and in all essentials until today. Of course, as the United States changed its position and as it became more ambitious in its claims from 1972 onwards, we find increasing evidence of a tendency to trespass over on to the Canadian side. But the oil companies, the permit-holders, were taking no chances. They at least respected the Canadian claim and they took good care to get a Canadian licence or permit for their activities on the Canadian shelf.

The use of equidistance, particularly in granting leases, has a significance which goes far beyond that of evidence of what the Parties believed to be an equitable result. It was, in effect, a *de facto* maritime limit for purposes of oil and gas exploration. I do not need to remind the Chamber of the significance it attached to the 26° line in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 71, para. 96). But that was a line between two grants of concession by the Parties to one company. Here we have evidence of a *de facto* limit of a far more persuasive character. For it is evidence of repeated reliance on equidistance over several years – from the early 1960s to 1972 – and is supported by grants of either leases

or permits by both Parties to dozens of oil companies. There is yet a further feature in the present case which makes it far stronger than the Tunisian/Libyan 26° line. In this case, it is clear that the Parties not only had a *de facto* agreement on the line, but they also agreed on the legal principle which dictated that line. The fact that it was an equidistance line was not accidental. It was an equidistance line because both Parties believed the equidistance principle to be the correct principle in law, in all the circumstances of this case.

Mr. President, distinguished Judges, I believe I have reached the point when I can suggest to you the broad conclusion which emerges from this survey of the conduct of the Parties.

If we add all of this conduct together – both in relation to fisheries and to oil and gas – what conclusions are we offered? The conclusions are quite inescapable. Canada's interests on Georges Bank – both in fish and oil – were accepted by the United States for many, many years. And not only as a question of fact, although that is true enough, but equally clearly as a matter of what the United States recognized to be reasonable and equitable, in conformity with the law.

I do not say that the record ties the United States down to a specific line. The fisheries conduct was not of that kind. And even on oil and gas, the conduct reflected an agreement on principle, rather than on an absolutely specific line. The principle, of course, was the equidistance principle, consistent with the obligations of the Parties under the 1958 Convention. How, ultimately, one applies that principle so as to take account of "special circumstances", or, to use more contemporary language, to be consistent with equitable principles, is a matter I happily leave to my friend and colleague, Professor Weil.

PLAIDOIRIE DE M. WEIL

CONSEIL DU GOUVERNEMENT CANADIEN

M. WEIL: Monsieur le Président, Messieurs les juges, permettez-moi avant de commencer d'exprimer mes vifs remerciements à M[e] Ross Hornby qui a contribué de manière efficace et compétente à la préparation des éléments cartographiques que je vais être amené à utiliser dans mon exposé et qui va m'aider maintenant à les présenter à la Chambre.

LE TRACÉ DE LA FRONTIÈRE MARITIME UNIQUE

Il m'appartient d'exposer les vues du Canada sur le tracé de la frontière maritime unique que la Chambre est appelée à définir.

Cette responsabilité, dont je mesure tout le poids, me vaut l'honneur et me procure le plaisir de prendre la parole aujourd'hui devant la Chambre.

Cet honneur et ce plaisir sont d'autant plus grands que la présente affaire met en cause deux grands pays amis qui donnent l'exemple du règlement pacifique – plus que cela, serein – des différends qui les opposent. Ce phénomène de fraternité profonde par-delà les divergences de vues occasionnelles est trop rare pour que je ne ressente pas pleinement le privilège d'être associé, même très modestement, à la présente procédure.

Si c'est toujours un honneur, pour un professeur de droit, de se voir confier la défense d'intérêts nationaux importants devant la juridiction internationale, cet honneur ne trouve pas seulement sa source, pour moi, dans le cas présent, dans la personnalité de l'Etat qui m'a honoré de sa confiance, mais également dans celle de l'Etat dont il m'appartient de combattre les thèses sur le plan noble et élevé du droit. Plaider pour le Canada est pour moi un rare privilège; plaider contre les Etats-Unis en est un autre, non moins précieux, tant sont nombreux et profonds les liens qui m'attachent aux deux pays. Qu'il me soit permis de dire ici au Gouvernement canadien ma gratitude pour me procurer cette joie.

La Chambre ayant été saisie par voie de compromis, c'est, pour emprunter les formules bien connues de la Cour permanente (affaires du *Lotus*, *C.P.J.I., série A n° 9*, p. 12, et des *Zones franches de la Haute-Savoie et du Pays de Gex*, *C.P.J.I., série A/B n° 46*, p. 163), «dans les termes de ce compromis», qui «représente la volonté commune des Parties», qu'il convient de rechercher les points précis sur lesquels la Chambre doit se prononcer.

C'est donc dans le cadre du compromis qu'il convient de situer les revendications des Parties, et c'est au regard des dispositions pertinentes du compromis qu'il importe d'apprécier les conclusions finales formulées par chacune d'elles en ce qui concerne le tracé de la ligne de délimitation.

Par le compromis les Parties demandent à la Chambre une délimitation dont les trois caractéristiques principales me paraissent être les suivantes:

Premièrement: la Chambre est appelée à délimiter la frontière maritime entre les deux pays dans la région du golfe du Maine sur une partie seulement de son parcours.

Deuxièmement: la frontière à délimiter est une «frontière maritime unique».

Troisièmement: cette frontière doit être définie «conformément aux règles et principes du droit international applicables en la matière entre les Parties».

C'est à l'analyse de ces trois éléments qui émanent de la volonté commune des Parties et qui dessinent les contours de la juridiction de la Chambre que je consacrerai la première partie de mon exposé.

A la lumière de cette analyse, il me sera ensuite possible, dans une seconde partie, d'examiner le tracé proposé par chacune des Parties au différend.

I. Les caractéristiques de la délimitation demandée à la Chambre

A. Une délimitation partielle

Abordons tout de suite le premier trait distinctif: le tracé que la Chambre est appelée à définir ne représentera qu'une partie de la frontière maritime dans la région du golfe du Maine. C'est à trois points de vue que la délimitation demandée à la Chambre est partielle.

La délimitation demandée est partielle, d'abord, en ce sens qu'un premier segment de la frontière maritime a été délimité conventionnellement entre 1908 et 1925 et ne fait donc plus problème.

La délimitation demandée est partielle en ce sens également que ce n'est pas à partir du point terminal de la frontière maritime convenu en 1925 que la Chambre est priée de tracer la frontière maritime unique, mais seulement à partir d'un point situé plus bas défini d'un commun accord par les Parties. Il restera donc à combler par voie de négociation, ou autrement, à une date ultérieure, un hiatus d'environ 39 milles marins, entre le terminus de la frontière maritime délimitée en 1925 et le point de départ de la délimitation que la Cour est priée d'établir (cf. V, réplique des Etats-Unis, par. 275).

La délimitation demandée est partielle, enfin, en ce sens qu'elle devra être ultérieurement, c'est-à-dire après l'arrêt de la Chambre, prolongée au-delà du point que celle-ci fixera à l'intérieur du triangle, «sur une aussi grande distance vers le large que les Parties le jugent souhaitable». Si l'on tient compte de ce que le rebord extérieur de la marge continentale dans cette région se situe à des distances variant de 45 à plus de 150 milles marins au-delà des limites des 200 milles, on constate que la délimitation qui restera à effectuer après l'arrêt de la Chambre est considérable.

Ceci me conduit à une observation importante. La Chambre n'est pas invitée par le compromis à déterminer quels espaces maritimes relèvent respectivement des Etats-Unis et du Canada dans l'ensemble d'une région donnée. Elle est priée seulement d'établir le tracé de la frontière maritime sur un segment donné, défini par un point au nord et une zone en forme de triangle au sud, laissant ainsi à plus tard le tracé des segments manquants, en amont et en aval; et c'est seulement une fois que le tracé de la frontière maritime entre les deux pays aura été complètement défini – donc bien après l'arrêt – que l'on saura quelle partie de la région du golfe du Maine tombe sous la juridiction des Etats-Unis et quelle partie tombe sous la juridiction du Canada.

Cette constatation évidente à la lecture du compromis conduit à s'interroger successivement sur l'explication de la formule ainsi prévue par le compromis et sur les implications de cette formule pour le choix du tracé.

1. L'explication de la formule de l'article II du compromis

Voyons d'abord, Monsieur le Président, comment s'expliquent le point A et le triangle, c'est-à-dire les deux extrémités de ce segment de la frontière maritime que la Cour est priée par les Parties de tracer. Sur la raison d'être de ces deux caractérisiques, les écritures des Parties sont à la fois parfaitement claires.

Ainsi qu'il ressort de la figure 85 de la procédure orale, le point choisi par les

Parties comme point de départ de la délimitation demandée à la Chambre – et que nous appelons pour des raisons de commodité le point A – n'est autre que le premier point d'intersection des deux lignes officiellement publiées des deux pays à la date de la conclusion du compromis, c'est-à-dire en 1979. Le point A est donc un point jugé équitable à la fois par les Etats-Unis et par le Canada ; c'est, si j'ose dire, un point américain aussi bien qu'un point canadien.

A cette explication, sur laquelle les deux Parties convergent (**I**, mémoire du Canada, par. 3 ; **II**, mémoire des Etats-Unis, par. 4, note 1 ; **V**, réplique des Etats-Unis, par. 238), les Etats-Unis ajoutent une précision : le point A a été choisi de manière à ne pas préjuger du différend qui sépare les Parties en ce qui concerne la souveraineté sur l'île de Machias Seal et sur North Rock *(loc. cit.)*.

Voilà pour le point A.

Pour ce qui est du triangle, les explications données dans les écritures des Parties concordent sauf sur un point mineur.

Selon les Etats-Unis, la formule du triangle a été retenue afin d'éviter toute prise de position sur la définition du rebord externe de la marge continentale ou sur des questions relatives à la limite extérieure de la zone des 200 milles (mémoire des Etats-Unis, par. 4, note 1 ; réplique des Etats-Unis, par. 241).

De notre côté nous avons expliqué (**I**, mémoire du Canada, par. 12; **III**, contre-mémoire du Canada, par. 23 et 611) que le triangle a été construit de manière à englober trois points : les deux points où les lignes alors revendiquées par les deux Parties coupaient les limites extérieures des zones respectives de 200 milles de chacune d'elles, et le point d'intersection de ces lignes ; il englobe également les arcs de cercle entre ces points. Les trois sommets du triangle ont été définis d'après les degrés entiers de longitude et de latitude les plus proches qui puissent former une figure plane englobant précisément ces trois points.

Ainsi, comme il est facile de le constater en jetant un coup d'œil sur la carte, le sommet nord du triangle a été défini de manière à englober dans le triangle le point d'intersection de la ligne américaine avec la limite extérieure de la zone américaine des 200 milles. Le sommet sud-ouest du triangle a été déterminé de manière à inclure le point d'intersection de la ligne canadienne avec la limite extérieure canadienne de la zone canadienne des 200 milles. Enfin, en plaçant le côté sud du triangle sur le 40e parallèle, on incluait dans le triangle le point d'intersection des deux limites extérieures des 200 milles.

Les explications ainsi fournies des deux côtés de la barre sont complémentaires.

D'un côté, le triangle se présentait comme un moyen technique commode et neutre permettant d'indiquer à la Cour la zone où doit se terminer la ligne qu'elle est appelée à fixer, sans que cette indication ne porte préjudice aux revendications des Parties telles qu'elles se présentaient alors.

Mais il s'agissait en même temps de ne pas prendre position sur la question du rebord externe de la marge continentale et sur celle de la limite extérieure de la zone des 200 milles. Au moment où le compromis a été négocié, la définition juridique de la marge continentale faisait l'objet de discussions à la conférence sur le droit de la mer, et les Etats-Unis et le Canada avaient à cet égard des vues quelque peu divergentes. Les études techniques sur la marge continentale dans cette région n'avaient en outre pas encore été poussées suffisamment loin pour qu'il ait pu être possible de demander à la Chambre de tracer la frontière maritime jusqu'à sa limite extrême vers le large. A quoi s'ajoute que le concept d'une zone maritime polyvalente de 200 milles était encore à cette époque (nous sommes dans les années 1977, 1978, 1979), l'objet de certaines réticences et que ni les Etats-Unis ni le Canada ne s'y étaient encore entièrement ralliés. A cet égard également la formule du triangle se présentait comme un mécanisme « non

préjudiciel» commode. Le second alinéa de l'article III du compromis et la rédaction prudente de l'article VII vont exactement dans le même sens.

Une légère divergence subsiste cependant entre les deux Parties en ce qui concerne le triangle. Les Etats-Unis soutiennent dans la réplique que: «There is no relationship between the triangle and the 200-nautical-mile limit.» (Par. 241.) Cette assertion, Monsieur le Président, paraît erronée, étant donné que c'est précisément l'emplacement des points d'intersection des limites extérieures des zones des 200 milles entre elles et avec les lignes revendiquées alors par chaque Partie, ainsi que l'emplacement des arcs de cercle joignant ces points, qui a déterminé – et qui seul explique – l'emplacement du triangle; sinon le triangle n'aurait plus aucun sens. Entre le triangle et la limite des 200 milles la relation est indiscutable.

Tels étant les faits, il reste – et c'est le plus important – à en analyser les implications sur le tracé de la frontière maritime unique.

2. Les implications du point A et du triangle

Les implications du point A

Le choix conventionnel du point A et sa situation entraîne deux constatations. Je prie à cet égard respectueusement la Chambre de bien vouloir se reporter à la
(160) figure 86 qui lui a été remise ce matin.

D'abord, la situation du point A: où est-il? Par rapport à quoi se situe-t-il? Il est évident que ce point est en relation avec les côtes du Maine américain et de la Nouvelle-Ecosse canadienne. Il est évident que ce point est entièrement détaché de la frontière terrestre et du point terminal de la frontière terrestre situé dans le fond de la baie de Passamaquoddy.

Ensuite, en amont du point A se trouvent deux segments de la frontière maritime que vous voyez mieux, Monsieur le Président, sur la carte qui est en votre possession, l'un déjà délimité conventionnellement, l'autre à délimiter ultérieurement. Le segment déjà délimité, qui figure en rouge sur cette carte, a été tracé manifestement en considération des côtes opposées de configuration complexe des deux pays dans cette région et sans aucune considération de la frontière terrestre ou de la soi-disant direction générale sud-ouest/nord-est chère à nos adversaires. Le dernier tronçon de ce segment délimité est orienté nord-est/sud-ouest entre les côtes opposées et pratiquement parallèles du Maine américain et de l'île canadienne de Grand Manan – là encore, de toute évidence, sans considération de la frontière terrestre située loin de là au fond de la baie de Passamaquoddy. Quant au segment qui restera à délimiter à l'avenir (ce que j'ai appelé tout à l'heure le hiatus) entre le point terminal de la frontière internationale et le point A, l'alignement même de ces deux points imposera à ce segment dans l'avenir – quel que soit son tracé par ailleurs, lequel dépendra en grande partie de la solution du problème de souveraineté sur Machias Seal et North Rock – une direction nord-est/sud-ouest. Cette direction est dictée également par la configuration des côtes opposées et parallèles des territoires américains et canadiens pertinents – là encore, sans considération de la configuration côtière aux abords de la frontière terrestre dans le fond de la baie de Passamaquoddy.

De là, Monsieur le Président, me semble-t-il, un double enseignement.

Premièrement, le point terminal de la frontière terrestre n'a pas de pertinence pour la délimitation entre le point A et le triangle.

Dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, il est vrai, la Cour a porté attention à la direction générale de la frontière terrestre séparant les deux pays et au point terminal de cette frontière. Mais elle ne l'a fait

qu'en raison de l'absence de toute délimitation conventionnelle des eaux territoriales ou de tout autre espace maritime – faute de mieux, en quelque sorte (*C.I.J. Recueil 1982*, p. 35, par. 21; p. 65, par. 82; p. 83, par. 116). Dans notre affaire, au contraire, les Parties ont d'ores et déjà fixé d'un commun accord un tronçon de leur frontière maritime, et il n'y a aucune raison, mais aucune raison, pour tracer le tronçon en aval du point A, de revenir en quelque sorte en arrière pour prendre appui sur la frontière terrestre, sautant ainsi à la fois par-dessus le tronçon déjà délimité et le tronçon non encore délimité.

Il n'est pas sans intérêt au surplus de rappeler à ce sujet que les écritures américaines ne distinguent pas clairement entre «land boundary» et «international boundary» (ce point a déjà été relevé) et qu'elles paraissent employer indifféremment les deux expressions comme si elles étaient synonymes («international boundary»: I, mémoire des Etats-Unis, par. 15, 20, 25, 26, 28, 29, 282, 302, 327 et conclusions; IV, contre-mémoire, par. 31, 293, 294 et conclusions; V, réplique, par. 161 et conclusions; «land boundary»: I, mémoire des Etats-Unis, par. 11 et 284; IV, contre-mémoire, par. 7, 30, 33, 290, 291, 292, 295; V, réplique, par. 158, 160, 288, 289). A vrai dire aucune des illustrations cartographiques américaines ne permet de distinguer clairement entre ces deux concepts – à moins d'avoir de bons, de très bons yeux – alors pourtant que la frontière dite internationale est déjà une frontière maritime et que les points terminaux de la frontière terrestre, d'une part, et du premier segment de la frontière maritime dite internationale, d'autre part, sont situés à plus de 20 milles marins l'un de l'autre.

Deuxièmement, de la succesion nord-est/sud-ouest des repères significatifs qui apparaissent sur cette carte on peut raisonnablement inférer que, dans la logique du système mis en place par les Parties, la frontière maritime en aval du point A doit se diriger plus ou moins dans la même direction. La géographie dicte cet alignement de manière impérative. La ligne canadienne respecte cet alignement. Tel n'est pas le cas de la ligne américaine de 1982, qui forme avec cet alignement voulu par les Parties un angle presque droit, sans qu'aucune configuration de la côte ne vienne expliquer un changement aussi brutal.

Les implications du triangle

A l'autre extrémité de la frontière à tracer par la Chambre, le triangle se révèle tout aussi riche d'implications, et c'est vers celles-ci que je voudrais, si la Chambre me le permet, me tourner maintenant.

Je ne m'arrêterai pas sur l'intérêt du triangle pour d'éventuels tests de proportionnalité. Mon ami, le professeur Malintoppi traitera de ce point. Ce sont deux autres aspects qui retiendront mon attention.

D'une part, le fait déjà signalé que le triangle a été conçu de manière à englober les points où les lignes du Canada et des Etats-Unis, telles qu'elles se présentaient au moment de la conclusion du compromis, coupent les limites extérieures des zones des 200 milles des deux Parties, ainsi que le point d'intersection des limites extérieures de ces zones.

D'autre part, le fait, également signalé, que l'article VII du compromis (I, p. 15) prévoit qu'à la suite de la décision de la Chambre il pourra y avoir lieu à une «extension de la frontière maritime vers le large» bien au-delà des limites du triangle.

La conjonction de ces deux aspects fait apparaître une constatation intéressante. Il résulte en effet de la conjugaison de ces deux aspects que, si la Chambre est très certainement libre, comme les deux Parties en sont d'accord, de fixer le point terminal de sa délimitation à n'importe quel point dans le triangle, y compris à un point qui se situerait en deçà de la limite des 200 milles des deux

Parties (mémoire du Canada, par. 12; mémoire des Etats-Unis, par. 4, note 1; réplique, par. 242), le choix que fera la Chambre est loin d'être indifférent, et il n'est pas vrai, contrairement à ce que pensent nos adversaires, que «no point in the triangle is more significant than any other» (mémoire des Etats-Unis, par. 4, note 1; cf. réplique, par. 242).

D'abord, en effet, il est clair que plus le point terminal de la délimitation choisi par la Chambre à l'intérieur du triangle se trouvera en deçà des limites des 200 milles de chacune des Parties, plus grand, plus long, sera le segment de frontière qui restera à délimiter entre les Parties et moins complète donc sera la solution judiciaire du différend.

Ensuite, le choix que la Chambre va faire du point terminal à l'intérieur du triangle aura, par la force des choses, inévitablement, une répercussion directe sur le prolongement ultérieur de la frontière au-delà du triangle, en direction du rebord externe de la marge continentale.

Il est évident qu'il est prématuré d'examiner dès à présent quels pourraient être, à partir de chaque point terminal envisageable à l'intérieur du triangle, le tracé et la longueur du prolongement possible au-delà du triangle. Ce sera là, précisément, l'objet des négociations prévues par l'article VII du compromis. Aussi le Canada ne saurait-il accepter que les Etats-Unis préfigurent d'ores et déjà l'extension de leur ligne au-delà du triangle, même à titre de simple illustration. Ni la petite flèche par laquelle se termine la ligne américaine sur les cartes américaines (mémoire des Etats-Unis, fig. 30; contre-mémoire, fig. 1, 14, 15, 16, 17 et 18), ni le prolongement explicitement représenté sur la figure 34 du mémoire américain ne sont acceptables (la Chambre trouvera cette flèche sur la figure 87 et ce prolongement sur la figure 92 de la procédure orale): cette question, Monsieur le président, tout simplement, n'est pas aujourd'hui devant la Chambre.

La seule chose que l'on puisse faire au stade actuel, c'est de se borner à relever que, selon le choix fait par la Chambre du point terminal de sa délimitation à l'intérieur du triangle, les problèmes engendrés pour la phase ultérieure de la délimitation maritime seront d'une plus ou moins grande ampleur. Comme nous l'avons montré dans nos écritures (contre-mémoire du Canada, par. 24-25, 570-576), toute frontière qui ne se terminerait pas au point d'intersection des limites extérieures des 200 milles – en fait, toute ligne autre qu'une ligne d'équidistance stricte – entraînerait la création d'une «zone grise» dans laquelle 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 des deux Etats ou bien appartiendrait à l'autre Etat, ce qui créerait une superposition verticale de droits génératrice de difficultés.

Cette «zone grise» serait d'une étendue d'autant plus considérable que le point terminal de la frontière à tracer s'éloignerait davantage du point d'intersection des limites extérieures des 200 milles. Les croquis que nous nous sommes permis d'établir à l'intention de la Chambre montrent que si la ligne d'équidistance stricte n'engendre par définition même, mathématiquement si j'ose dire, aucune «zone grise» (c'est la figure 88 de la procédure orale) et si la ligne canadienne, qui n'est pas une ligne d'équidistance stricte, engendre une «zone grise» de faible étendue (c'est la figure 89 de la procédure orale), les lignes américaines de 1976 et de 1982 créent une «zone grise» d'importance considérable: la figure 90 illustre la «zone grise» qu'engendrerait la ligne de 1976; la figure 91 illustre celle qu'engendrerait la ligne de 1982 si on la prolongeait dans la direction de la perpendiculaire; la figure 92, enfin, montre que dans l'hypothèse du prolongement, je n'ose dire revendiqué, mais, mettons, indiqué sur la figure 34 du contre-mémoire américain, ce serait une superficie comparable à celle de la Belgique qui poserait problème.

C'est pourquoi le Canada, désireux à la fois de voir régler le différend dans sa phase actuelle aussi complètement que le compromis le permet et de ne pas voir s'accumuler les difficultés pour la phase ultérieure de la délimitation du dernier segment de la frontière maritime avec les Etats-Unis dans cette région, prie respectueusement la Chambre: d'une part, de fixer le point terminal de la délimitation sur la limite extérieure de la zone des 200 milles de l'une des Parties; d'autre part, d'éviter la création d'une «zone grise» d'une ampleur excessive.

Voilà, Monsieur le Président, pour le caractère partiel de la délimitation demandée à la Chambre, et pour l'intérêt que présentent, pour cette délimitation, le point A et ce qui est en amont et le triangle et ce qui est en aval.

Délaissant à présent l'avant et l'après de la délimitation, c'est au second trait distinctif de cette dernière que je compte m'attacher, à savoir que c'est une frontière maritime unique que la Chambre est invitée à tracer.

L'audience est levée à 13 h 10

SEPTIÈME AUDIENCE PUBLIQUE (6 IV 84, 10 h)

Présents: [Voir audience du 2 IV 84.]

M. WEIL: Monsieur le Président, Messieurs les juges, j'ai examiné hier la première des trois caractéristiques de la délimitation demandée à la Chambre, telle que celle-ci est définie par le compromis: il s'agit d'une délimitation partielle qui intéresse un segment de l'ensemble de la frontière maritime qui séparera un jour les Etats-Unis et le Canada dans la région du golfe du Maine.

J'en arrive maintenant à la seconde caractéristique de la délimitation découlant du compromis: le tracé à définir doit être celui d'une frontière maritime unique.

B. Une frontière maritime unique

Qu'est-ce que les Parties ont entendu demander à la Chambre? Pourquoi ont-elles recouru aux formules employées dans le compromis?

Pour le comprendre, il faut, je crois, se référer à l'histoire du différend.

Comme les deux Parties l'ont expliqué dans leurs écritures (I, mémoire du Canada, par. 203 et suiv.; II, mémoire des Etats-Unis, par. 135 et suiv.), le différend est passé par deux stades successifs. Dans un premier temps – *grosso modo* de 1969 à 1976-1977 – les divergences des Parties portaient sur les activités relatives à l'exploration et à l'exploitation des hydrocarbures; il s'agissait, à ce stade, d'un différend de plateau continental de type tout à fait classique. En 1976-1977 ce différend prit des dimensions nouvelles avec la création par les deux pays de zones de pêche de 200 milles marins: il est intéressant de noter que c'est exactement par ce même terme de «dimension nouvelle» que les mémoires des deux Parties décrivent le tournant pris par le différend à ce moment-là (mémoire du Canada, par. 223; mémoire des Etats-Unis, par. 149). La publication des limites latérales revendiquées par les Etats-Unis au *Federal Register* du 4 novembre 1976 (I, annexes au mémoire du Canada, livre II, annexe 30; II, annexes au mémoire des Etats-Unis, vol. IV, annexe 64) spécifiait que ces limites latérales étaient celles à la fois de la zone de pêche et du plateau continental des Etats-Unis. Du côté canadien, les choses se sont déroulées un peu différemment. Le décret du 1er janvier 1977 (annexes au mémoire du Canada, livre II, annexe 29; annexes au mémoire des Etats-Unis, vol. IV, annexe 63) ne définissait les limites latérales qu'il décrivait qu'en termes de zones de pêche, et c'est seulement par un avis joint au projet de décret du 15 septembre 1978, c'est-à-dire un an et demi après (annexes au mémoire du Canada, livre II, annexe 41; annexes au mémoire des Etats-Unis, vol. IV, annexe 73), qu'il sera indiqué que ces mêmes limites latérales sont également revendiquées par le Canada en tant que limites de ses droits de plateau continental.

Au moment de la négociation du compromis, c'est donc un double différend qui séparait les Parties: un différend portant sur la délimitation du plateau continental et un différend portant sur la délimitation des zones de pêche. Et c'est, par conséquent, de manière tout à fait exacte que dans le préambule du compromis les deux gouvernements constatèrent

> «qu'ils n'ont pu résoudre par voie de négociation leurs différends [ce mot au pluriel] en matière de délimitation du plateau continental et des zones de pêche de l'un et l'autre pays dans la région du golfe du Maine».

Au moment de soumettre leur différend à la Chambre, les Parties ont pris deux décisions d'une grande importance.

La première était de demander à la Chambre de tracer la même frontière pour le plateau continental et pour les zones de pêche. Auraient-elles pu envisager deux frontières différentes, l'une pour le sol et le sous-sol, l'autre pour la colonne d'eau? Cela n'aurait peut-être pas été impossible – encore que, j'y reviendrai, cela aurait été à contre-courant de l'évolution du droit international et de la pratique des Etats; en tout cas ce n'est pas ce qu'elles ont fait. En demandant à la Chambre une frontière unique pour ces deux juridictions maritimes les Parties restaient fidèles à leurs revendications, telles qu'elles les avaient publiées l'une et l'autre dans les conditions que j'ai rappelées il y a quelques instants. Elles se conformaient aussi, j'y reviendrai, aux données les plus récentes du droit de la mer, attestées déjà par une pratique assez importante.

Voilà, Monsieur le Président, pour la première décision, qui trouve son expression dans l'article II, paragraphe 1, du compromis (I, p. 13), qui demande à la Chambre de dire «quel est le tracé de la frontière maritime unique divisant le plateau continental et les zones de pêche du Canada et des Etats-Unis» entre le point A et le triangle.

Les deux gouvernements ne se sont toutefois pas arrêtés là. Par le premier paragraphe de l'article III ils ont décidé en outre qu'aucun des deux Etats ne pourra, au-delà de la frontière ainsi établie – c'est-à-dire de la frontière commune au plateau continental et à la zone de pêche – «à quelque fin que ce soit, revendiquer ou exercer de juridiction ou de droits souverains sur les eaux ou sur le fond marin et le sous-sol de la mer». Le sens et la portée de cette disposition sont clairs. Il ne s'agit pas d'une clause par laquelle les Parties se seraient réservé la faculté d'étendre dans l'avenir la frontière unique de plateau continental et de zones de pêche à des types de juridiction nouveaux, mais bien d'une clause par laquelle elles ont immédiatement décidé que la frontière tracée par la Chambre pour le plateau et les zones de pêche s'appliquerait automatiquement à toute forme de juridiction ou de droits souverains que le droit international pourrait dans l'avenir reconnaître au profit des Etats côtiers.

La frontière que la Chambre est appelée à définir mérite dès lors le qualificatif de frontière unique à un double niveau et à un double titre: d'abord, parce que c'est une seule et même frontière que la Chambre est priée de tracer pour délimiter le plateau continental et la zone de pêche; ensuite, parce que c'est cette même frontière qui séparera *ipso jure*, sans qu'aucune nouvelle décision des Parties ne soit nécessaire, toute autre forme de juridiction ou de droits souverains des Etats-Unis et du Canada sur les espaces maritimes dans cette région. La nature de la frontière qui va être tracée par la Chambre se trouve ainsi déterminée conjointement par les deux dispositions combinées du paragraphe premier de l'article II et du paragraphe premier de l'article III du compromis: ces deux dispositions doivent être lues ensemble, car c'est ensemble qu'elles définissent la mission de la Chambre.

En termes clairs, cela signifie que la frontière que la Chambre va tracer divisera non seulement les zones de plateau continental et les zones de pêche des deux Etats, mais également le faisceau de droits et juridictions que le droit international ramasse aujourd'hui sous le concept de zone économique exclusive et, plus généralement encore, toutes nouvelles juridictions maritimes que le droit international pourrait faire apparaître à chaque moment de son évolution.

Mais alors, pourquoi les Parties n'ont-elles pas appelé un chat un chat et une zone économique exclusive une zone économique exclusive? Pourquoi ont-elles eu recours à des périphrases d'apparence sibylline?

La réponse est simple. C'est qu'au moment de la négociation du compromis,

comme j'ai déjà eu l'occasion de le relever, les deux gouvernements n'avaient pas encore arrêté définitivement leur attitude vis-à-vis de cette innovation spectaculaire du droit international qu'est la zone économique exclusive. Le concept même de zone économique exclusive était d'ailleurs encore en gestation à ce moment-là, et l'on n'était pas parvenu au stade où l'on aurait pu dire, comme le fera la Cour trois ans plus tard, que la zone économique exclusive fait partie du droit international moderne (*C.I.J. Recueil 1982*, p. 74, par. 100). C'est en considération de cette situation essentiellement fluctuante et évolutive du moment, où les institutions n'avaient pas suffisamment mûri et où les gouvernements ne s'étaient pas suffisamment fixés, que les Parties ont adopté la formule apparemment complexe qui figure dans le compromis.

Que telle soit bien l'explication de cette formule, deux autres dispositions du compromis l'attestent et le confirment. Ce sont ces mêmes raisons, en effet, qui expliquent le triangle et le renvoi à plus tard du prolongement de la frontière. Ce sont ces mêmes raisons encore qui expliquent la précaution prise par les Parties au second paragraphe de l'article III, d'après lequel:

> «Aucune disposition du présent compromis ne modifie la position de l'une ou l'autre Partie à l'égard de la nature juridique ou de l'étendue vers le large du plateau continental, de la juridiction en matière de pêches, ou de la juridiction ou des droits souverains à toute autre fin en vertu du droit international.»

Une formule prudente et évolutive de ce genre se retrouve dans nombre d'accords de délimitation conclus au cours de ces dernières années par les Etats-Unis avec Cuba (**V**, annexes à la réplique du Canada, livre I – ci-après désigné comme «Annexe sur la pratique des Etats» – accord 62), le Venezuela (accord 65), le Mexique (accord 67), les îles Cook (accord 79), et la Nouvelle-Zélande (accord 82). Dans un ordre d'idée voisin, l'accord France/Brésil (accord 84) fixe «la ligne de délimitation maritime, y compris celle du plateau continental», entre la France au large de la Guyane et le Brésil selon une ligne d'azimuth dont l'extrémité n'est pas fixée, parce que, au moment de la conclusion de l'accord, il restait des incertitudes au sujet de l'extension de la marge continentale au-delà de 200 milles marins. Bien entendu la Chambre trouvera le texte de tous ces accords avec des illustrations dans l'annexe sur la pratique des Etats jointe à la réplique du Canada.

Pour en revenir au cas présent, l'événement a montré que la formule évolutive choisie par les deux gouvernements n'avait rien d'académique. Entre le dépôt des mémoires et celui des contre-mémoires les Etats-Unis, la Chambre le sait, ont en effet proclamé une zone économique exclusive (**III**, annexes au contre-mémoire du Canada, livre IV, annexe 1; **IV**, annexes au contre-mémoire des Etats-Unis, vol. V, annexe 28). Dans une note du 26 avril 1983 le Gouvernement canadien a exprimé certaines réserves à l'égard de cette proclamation et des documents qui s'y rapportent.

Quoi qu'il en soit de ce dernier problème, il est certain que la frontière que la Chambre est appelée à tracer va s'appliquer à présent à la zone économique exclusive des Etats-Unis – de même qu'elle s'appliquerait à la zone économique exclusive du Canada si celui-ci décidait d'en proclamer une à son tour. Le Canada a d'ores et déjà, comme il l'a indiqué dans ses écritures, mis en place les composantes les plus importantes de cette zone: exploration et exploitation des fonds marins et de leur sous-sol, droits exclusifs de pêche, protection du milieu marin (**I**, mémoire du Canada, par. 15, note 7; **III**, contre-mémoire, par. 464, note 10); il peut à n'importe quel moment mettre en place d'autres composantes de la zone économique exclusive ou bien la proclamer en tant que telle, comme

l'ont fait les Etats-Unis et près d'une centaine d'autres pays. Le Canada a pris clairement position sur ce point dans ses pièces écrites (contre-mémoire du Canada, par. 7, 25, 464).

En bref, la frontière maritime unique que la Chambre est appelée à tracer va séparer dans l'immédiat les droits et juridictions des Etats-Unis tels qu'ils sont définis dans la proclamation du président Reagan de mars 1983 et les droits et juridictions du Canada tels qu'ils résultent des diverses législations canadiennes applicables à la zone des 200 milles du Canada. Dans l'avenir elle pourra s'appliquer à toute nouvelle juridiction et à tout nouveau droit que les Etats-Unis ou le Canada entendraient exercer conformément au droit international.

Il ressort du compromis que les Parties n'ont pas envisagé la frontière unique comme l'addition ou la résultante de frontières spécifiques et diverses, que l'on aurait ensuite ajustées afin d'obtenir une ligne unique. Elles n'ont pas envisagé que l'on trace successivement et séparément une frontière de plateau continental en application des règles régissant la délimitation du plateau, une frontière de pêches en application des règles régissant la délimitation des zones de pêche, une frontière pour la pollution, une frontière scientifique, que sais-je encore? et puis que l'on recherche, dans un second temps, comment les lignes diverses ainsi obtenues à partir des règles de droit qui leur sont spécifiquement applicables pourraient être fusionnées en une ligne unique. Non, Monsieur le Président, ce n'est pas cela que les Parties ont eu en vue, mais bien une opération globale et unique consistant à déterminer, si j'ose dire, d'un seul coup le tracé de la ligne unique et polyvalente qui séparera la totalité du faisceau de leurs droits et juridictions maritimes. Le seul fait que les Parties ont adopté la formule évolutive que nous avons examinée le prouverait à lui seul: car sinon cela signifierait qu'à chaque nouvelle adjonction de droits souverains ou de juridiction toute l'opération de délimitation serait à recommencer. C'est donc bien une opération synthétique, globale et unique, que les Parties ont eu en vue et à laquelle elles prient la chambre de procéder en application des principes et règles de droit qui régissent ce genre de frontière.

Pour définir la mission de la Chambre, les Parties, nous le savons, ont employé un certain vocable, le vocable «frontière maritime unique». Le terme constituait à certains égards une nouveauté, mais le concept auquel il correspond était, si j'ose dire, dans l'air depuis quelques années puisque c'est dans le contexte de l'acceptation récente et spectaculaire de la zone économique exclusive par le droit international coutumier que se situe la frontière maritime unique voulue par les Parties. Si la Chambre veut bien se reporter au tableau qui figure en tête de notre annexe sur la pratique des Etats, elle constatera que de plus en plus souvent, au cours de ces dernières années, les Etats ne se contentent pas, comme ils le faisaient auparavant, de délimiter le plateau continental, mais que de plus en plus souvent ils conviennent d'une frontière maritime couvrant plusieurs, ou la totalité, de leurs juridictions maritimes. Je me permets respectueusement d'attirer l'attention de la Chambre sur les accords conclus par la France avec l'île Maurice (accord 78), le Brésil (accord 84), Sainte-Lucie (accord 85), le Venezuela (accord 80) et l'Australie (accord 87), ainsi que sur les accords conclus par les Etats-Unis avec le Mexique (accord 67), les îles Cook (accord 79), la Nouvelle-Zélande (accord 82). Ces accords, qui portent délimitation d'une «frontière maritime» *(maritime boundary)* sous des appellations parfois diverses mais recouvrant une même réalité, l'emportent en nombre, depuis quelques années, sur les accords de délimitation de plateau continental proprement dit. L'affaire de Jan Mayen (accord 86) dans laquelle l'Islande et la Norvège ont décidé, conformément aux recommandations d'une commission de conciliation, de recourir à une frontière unique, présente également un intérêt à cet égard. C'est

dire que l'opinion émise par nos amis américains dans leur mémoire selon laquelle «State practice concerning single maritime boundaries seaward of the territorial sea as yet is sparse» (mémoire des Etats-Unis, par. 165) ne correspond pas exactement à la réalité. A quoi s'ajoute que, inversement, la pratique des Etats ne fournit – sauf erreur de ma part, ce qui est possible – qu'un seul et unique exemple où des Etats aient établi positivement des frontières différentes pour le fond de la mer et pour les pêches. Cet exemple, c'est celui de l'accord entre l'Australie et la Papouasie-Nouvelle-Guinée concernant le détroit de Torres (accord 71); mais, comme l'a expliqué en détail l'un des négociateurs de l'accord dans une longue étude publiée dans l'*American Journal* en 1982, il s'agissait dans ce cas de faire face à des problèmes tout à fait exceptionnels et spécifiques (H. Burmester, «The Torres Strait Treaty», *AJIL*, vol. 76, 1982, p. 321 et suiv., et notamment p. 333 et 340).

Il n'est pas exagéré, on le constate pour terminer, de dire que la frontière maritime unique voulue par les Parties se situe dans le droit fil de l'évolution du droit international et de la pratique des Etats.

Il me reste, pour achever l'examen des caractéristiques majeures de la délimitation demandée à la Chambre, à me tourner vers la disposition du compromis prescrivant que la délimitation soit effectuée «conformément aux règles et principes du droit international applicables en la matière entre les Parties» (I, p. 13, art. I). C'est à l'analyse de cette disposition, dont chaque mot est lourd de sens, que je me propose de consacrer la troisième et dernière section de cette première partie.

C. Une délimitation conforme «aux principes et règles du droit international applicables en la matière entre les Parties»

Pour la commodité de l'exposé, j'examinerai séparément les trois composantes de la formule employée par le compromis et que je me suis permis de rappeler. Les trois paragraphes de cette section porteront donc successivement sur:

- la notion de délimitation fondée sur le droit;
- les règles de droit applicables «entre les Parties»;
- et enfin le droit régissant la «matière», c'est-à-dire la délimitation de la frontière maritime unique dans la présente affaire.

1. Une délimitation fondée sur le droit

La délimitation que la Chambre est priée d'effectuer doit, tout d'abord, être fondée sur les principes et règles du droit international; elle doit résulter de l'application de principes et de règles de caractère juridique.

Cette prescription comporte deux volets.

Le premier, sur lequel M. Legault, agent du Canada, s'est expliqué, est que la délimitation demandée n'est pas une délimitation *ex aequo et bono* reposant sur une solution transactionnelle qui consisterait à *split the difference*. Je n'en dirai pas davantage sur ce point.

Le second volet, sur lequel je souhaiterais m'attarder quelque instants, est qu'il ne suffit pas que la délimitation soit équitable pour qu'il soit satisfait à l'exigence énoncée dans le compromis.

Nos adversaires affirment, réaffirment et répètent dans leurs écritures que: «Any method or combination of method that produces an equitable result may be applied» (**II**, mémoire des Etats-Unis, par. 262; **IV**, annexes au contre-mémoire, annexe 10, par. 9; **V**, réplique, par. 91 et 258), et ceci me paraît sujet à

caution. Admettre que le choix de la méthode est indifférent au droit et n'est commandé que par l'équité du résultat, et par elle seule, *équivaudrait*, me semble-t-il, à tomber dans cet «exercice d'un pouvoir discrétionnaire ou de conciliation», dans ce «recours à la justice distributive» que la Cour a fermement écarté dans son arrêt de 1982 (*C.I.J. Recueil 1982*, p. 60, par. 71). Ce serait, en quelque sorte, la méthode de la non-méthode.

La thèse américaine que je viens de rappeler ressemble comme une sœur à celle qui avait été soutenue par la France dans l'affaire du plateau continental de la Manche. Dans la région atlantique, soutenait la France, le tribunal arbitral était libre de choisir toute méthode, quelle qu'elle soit, ou diverses méthodes, assurant à son avis une délimitation équitable (sentence, par. 207 et 218). Quelle fut la réponse du tribunal? Elle fut ferme et sans équivoque: le tribunal n'a pas, est-il écrit dans la sentence, «carte blanche [et le mot français figure également dans la version anglaise de l'arrêt] pour recourir à n'importe quelle méthode de son choix pour effectuer une délimitation équitable...» (par. 245).

En énonçant que toute méthode ou combinaison de méthodes *(any method or combination of methods)* est applicable pourvu qu'elle conduise à un résultat équitable, nos adversaires commettent une confusion entre le pouvoir d'un organe judiciaire ou arbitral, appelé à effectuer la délimitation en cas de désaccord des Parties, et le pouvoir des Parties elles-mêmes dans le cadre d'une négociation.

Je m'explique.

Il est évident que lorsque deux gouvernements effectuent une délimitation par voie conventionnelle ils peuvent choisir de se conformer à des principes et règles de droit; cela ne leur est évidemment pas interdit. Je n'en veux pour preuve que la référence au droit international qui se trouve dans le préambule de certains accords de délimitation signés au cours de ces dernières années par la France (réplique du Canada, «Annexe sur la pratique des Etats», accords 76, 78, 80, 85, 87). Mais ils peuvent tout aussi bien s'évader des considérations juridiques pour recourir à n'importe quelle méthode ou combinaison de méthodes. Ils peuvent même ne recourir à aucune méthode du tout et se contenter de tracer sur la carte une ligne qui leur paraît satisfaisante pour des raisons qui leur appartiennent. Ce n'est pas un hasard si tant d'accords de délimitation gardent le silence sur la ou les méthodes auxquelles il a été recouru. La solution retenue a, par définition même, semblé équitable à chacune des Parties, sinon elle n'y aurait pas souscrit. Ce caractère équitable peut se fonder sur mille et une considérations: géographiques, économiques, militaires, que sais-je encore? Un gouvernement peut accepter une délimitation défavorable sur une de ses côtes en contrepartie d'une délimitation plus favorable sur une autre côte. Il peut également accepter une délimitation défavorable en contrepartie d'avantages économiques ou politiques dans des secteurs complètement différents de ses relations avec l'autre gouvernement. En un mot tout est possible à deux gouvernements dans le cadre d'un accord de délimitation – y compris de procéder à un «partage juste et équitable» ou à une «répartition» de leurs espaces maritimes; les gouvernements peuvent recourir à n'importe quelle méthode ou combinaison de méthodes de leur choix; ils peuvent convenir de n'importe quelle ligne de leur choix; aucune règle de *jus cogens* ne vient restreindre leur liberté contractuelle en cette matière.

Tout autre, me semble-t-il, est la situation d'une juridiction ou d'un tribunal arbitral chargé d'appliquer le droit. Et c'est là que se situe la confusion de nos adversaires. Loin de jouir de la liberté quasi absolue dont bénéficient les gouvernements lorsqu'ils procèdent à une délimitation par voie d'accord, le juge ou l'arbitre doit obligatoirement adopter des méthodes, et tracer une ligne, qui ne se contentent pas de constituer une solution équitable mais qui soient en outre enracinées dans des considérations juridiques.

Il existe, comme on l'a dit, une «différence énorme» – *«a world of difference»* – entre une délimitation conventionnelle et une délimitation par voie judiciaire ou arbitrale (*C.I.J. Recueil 1982*, p. 117, par. 61).

C'est ainsi que, dans les affaires du *Plateau continental de la mer du Nord*, la Cour a fourni aux Parties, selon sa propre expression, «les directions nécessaires» *(directions)* – et encore leur a-t-elle donné ces directions «sans prescrire les méthodes à utiliser» (*C.I.J. Recueil 1969*, p. 46, par. 84). En 1969, la Cour n'a pas, semble-t-il, entendu énoncer des règles de droit applicables impérativement dans une délimitation judiciaire ou arbitrale. Et c'est dans cette perspective très particulière de «directions», c'est-à-dire de conseils donnés à des Parties sans «prescription», que la Cour a énoncé la phrase sur laquelle s'appuient nos adversaires et selon laquelle le droit international «autorise le recours à divers principes ou méthodes, selon le cas, ainsi qu'à leur combinaison, pourvu qu'on aboutisse par application de principes équitables à un résultat raisonnable» (*ibid.*, p. 49, par. 90). Ce *dictum* qui fournit le fondement juridique de la théorie de nos adversaires ne concerne en rien, me semble-t-il, les règles applicables à une délimitation judiciaire ou arbitrale.

Si ces observations, au demeurant banales, sont exactes, l'exigence du compromis selon laquelle la Chambre doit définir le tracé de la frontière maritime unique entre le point A et le triangle conformément aux principes et règles du droit international se révèle lourde de signification concrète. Elle signifie que la délimitation doit être faite selon une méthode, ou une combinaison de méthodes, dont la justification ne se trouve pas seulement *ex post* dans le caractère équitable du résultat auquel elle aboutit, mais également *ex ante* dans des considérations juridiques de caractère objectif. En d'autres termes, pour obtenir le tracé concret de la délimitation entre le point A et le triangle, les Parties n'ont pas la liberté de demander à la Chambre d'employer n'importe quelle méthode que le caractère équitable du résultat viendrait justifier *a posteriori*. La méthode, ou la combinaison de méthodes, appropriée est celle qui jette un pont entre les considérations juridiques relatives à la juridiction maritime considérée et la ligne équitable qui doit en être le résultat.

En d'autres termes, la méthode, ou la combinaison de méthodes, appropriée doit être à la fois enracinée dans des considérations juridiques et aboutir à une solution équitable. Les deux conditions sont toutes deux nécessaires, mais aucune d'elles n'est suffisante: une méthode aboutissant à une solution équitable ne répondrait pas à l'exigence du compromis si elle n'était pas en même temps ancrée dans le droit; et une solution ancrée dans le droit ne répondrait pas à l'exigence du compromis si elle n'aboutissait pas en même temps à une solution équitable. C'est ce que la Cour a exprimé dans un autre contexte en quelques mots, plus précis que mes longues explications: «Il ne s'agit pas seulement d'arriver à une solution équitable, mais d'arriver à une solution équitable qui repose sur le droit applicable» (*Compétence en matière de pêcheries, C.I.J. Recueil 1974*, p. 33, par. 78).

Il existe en définitive une séquence directe entre le droit, la méthode et le tracé de la ligne. La méthode fait appel à des techniques: non pas à n'importe quelle technique, mais à des techniques reposant sur la double condition d'être intégrées dans le droit et d'aboutir à une solution équitable. La méthode, c'est-à-dire la technique, est ainsi encadrée en amont par le droit, en aval par l'équité du résultat. Les «principes et règles du droit international» conformément auxquels la délimitation doit être effectuée inspirent par conséquent à la fois le choix de la méthode et le caractère du résultat: technique et équité sont situées l'une et l'autre à l'intérieur du droit – *«within the rules»*.

Ceci me conduit, Monsieur le Président, à aborder le second aspect de mon

analyse, à savoir que les principes et règles de droit applicables sont les principes et règles de droit applicables «entre les Parties».

2. Les règles de droit applicables «entre les Parties»

Quelles sont-elles? En dehors du compromis, autour duquel j'ai cru pouvoir axer toute ma plaidoirie, il n'existe qu'une seule règle de caractère conventionnel qui soit applicable entre les Parties dans cette affaire: c'est l'article 6 de la convention de Genève sur le plateau continental. Depuis la réplique des Etats-Unis, les deux Parties se trouvent en concordance sur ce point. L'agent du Canada a exprimé les vues de son gouvernement à ce sujet.

A côté de ces principes et règles de droit de caractère conventionnel, il convient de faire place également aux principes et règles de droit coutumier applicables en la matière entre les Parties. Cette constatation prend d'autant plus de relief dans notre affaire que, comme l'a énoncé le tribunal arbitral franco-britannique, «les règles du droit coutumier sont pertinentes et en vérité essentielles pour interpréter et compléter les dispositions de l'article 6» (par. 75).

Ces règles de droit coutumier ne sont cependant pas immuables, et c'est à la lumière du droit coutumier tel qu'il existe à un moment donné qu'il faut comprendre et interpréter les concepts en cause. C'est cette approche évolutive que la Cour a adoptée au sujet de la délimitation du plateau continental et du rôle de la notion de prolongement naturel. Cette notion, a-t-elle déclaré au sujet du plateau continental et du prolongement naturel, cette notion «est et demeure ... une notion à examiner dans le contexte du droit coutumier et de la pratique des Etats» (*C.I.J. Recueil 1982*, p. 46, par. 43). Mais ce *dictum* a de toute évidence une portée générale: tous les concepts pertinents en matière de délimitation – tous, qu'il s'agisse du prolongement naturel, de la zone économique exclusive, de la frontière maritime unique, d'équidistance, d'équité – tous ces concepts doivent être appréciés en tenant compte de l'évolution du droit coutumier.

Banalité, sans nul doute, et je ne me serais pas permis d'énoncer une vérité aussi évidente si les Etats-Unis n'avaient pas adopté dans la procédure écrite une position systématiquement minimisante – voire négatrice – à cet égard.

Les deux premiers écrits américains (mémoire et contre-mémoire) nous avaient déjà étonnés, je dois l'avouer, par leur extrême discrétion à l'égard des évolutions majeures subies par le droit de la mer. Pour prendre un exemple, les zones de pêche n'étaient étudiées que dans la perspective du soi-disant «principe de conservation» et pas du tout dans celle du développement du concept de zone économique exclusive (mémoire des Etats-Unis, par. 183-197) auquel elles ont de toute évidence contribué. Pas un mot n'était dit des transformations subies par le plateau continental et de ses relations actuelles avec la zone économique exclusive: à lire les écrits américains on aurait pu croire que la théorie du plateau continental n'a pas bougé d'un pouce depuis ses premiers balbutiements et que le plateau continental est conçu aujourd'hui exactement de la même façon qu'il y a plusieurs décennies. Les relations évidentes entre la frontière maritime unique voulue par les Parties et le concept de zone économique exclusive étaient passées sous silence; et, chose surprenante entre toutes, de la proclamation d'une zone économique exclusive par les Etats-Unis eux-mêmes entre le dépôt du mémoire et celui du contre-mémoire il n'était question que dans une discrète note, reléguée au bas de la page 123 du contre-mémoire, et c'est tout.

Mais voici que dans leur troisième écrit, leur réplique, les Etats-Unis vont plus loin encore. L'évolution du plateau continental et sa relation avec la zone

économique exclusive en deçà de 200 milles marins des côtes sont carrément niées (par. 94-99); pis que cela, le Canada se trouve cloué au banc d'infamie pour avoir «assert[ed] mistakenly that a "profound transformation of the concept of continental shelf" has taken place in international law» (réplique des Etats-Unis, p. 60).

Dans la même foulée, la réplique américaine rejette globalement et massivement toute idée que le droit de la délimitation maritime aurait pu subir quelque évolution depuis un quart de siècle, en raison notamment de l'émergence du concept nouveau de zone économique exclusive. Sur ce problème, comme sur d'autres, rien, selon les Etats-Unis, n'a changé, et la troisième conférence sur le droit de la mer – cela est écrit en toutes lettres dans la réplique – n'a pas apporté le moindre élément nouveau au droit de la délimitation: tant et si bien que la délimitation de la zone économique exclusive est, selon les Etats-Unis, régie aujourd'hui, en 1984, exactement par les mêmes règles que l'était hier, voire avant-hier, la délimitation du plateau continental (réplique, par. 10-11 et 91). Là encore, lorsque le Canada entend situer le droit de la délimitation régissant la présente affaire dans le cadre des concepts actuels du droit de la mer, nos adversaires ne trouvent pas de mots assez durs pour le condamner. N'est-il pas accusé d'appliquer «a new law of delimitation» (*ibid.*, par. 10, 74), de chercher «a full refashioning of the relevant jurisprudence» et de «rewrite the jurisprudence on the delimitation of maritime boundaries» (*ibid.*, par. 76), de demander à la Cour «to overturn established law» (*ibid.*, p. 53), de suggérer à la chambre «to overrule and abandon that law» (*ibid.*, par. 78; cf. par. 7, 74, 80, 115)?

Ce n'est qu'à une seule occasion, à une seule, que nos adversaires consentent à abandonner ce parti pris d'immobilisme juridique et qu'ils prennent en considération l'évolution du droit international coutumier: c'est lorsqu'ils cherchent à justifier le changement de leur revendication en 1982, le passage de la ligne de 1976 à celle de 1982. S'ils ont abandonné leur ligne de 1976, c'est en raison – je cite la réplique américaine – de «the considerable development of the law between 1976 and the filing of the Memorials in this case» (réplique des Etats-Unis, par. 68; cf. par. 69).

De même que le Canada s'est élevé contre le fait qu'en proclamant en mars 1983 une zone économique exclusive les Etats-Unis aient effectué un tri entre ceux des éléments de ce régime juridique qui leur convenaient et les autres, de même le Canada doit s'élever contre la tactique des Etats-Unis consistant à s'appuyer fermement sur «the considerable development of the law» pour justifier leur propre position tout en déniant radicalement au Canada le droit de faire état de l'évolution intervenue depuis le début des années soixante-dix dans le droit de la mer. On ne saurait souffler en même temps le chaud et le froid.

Du contenu évolutif des règles du droit coutumier et du développement incontestable du droit international, la jurisprudence est à la fois un témoin et un acteur, et c'est dans ses décisions que nous trouverons le fil directeur pour la solution de notre affaire. C'est elle, notamment, qui a pris acte de ce que certaines – pas toutes assurément – des dispositions de la convention de 1982 ont acquis valeur de droit coutumier et sont donc applicables à la présente affaire. La Cour a ainsi déclaré en 1982 que la zone économique exclusive peut être considérée d'ores et déjà «comme faisant partie du droit international moderne» – *«as part of modern international law»* (*C.I.J. Recueil 1982*, p. 74, par. 100). La Cour a déclaré également que la disposition de l'article 76, qui reflète la conception nouvelle du plateau continental et ses relations avec le concept de zone économique exclusive, «ne doit pas être perdue de vue» *(«cannot be ignored»)*. Quant à l'article 74 de la convention de 1982, qui traite spécifiquement de la délimitation de la zone économique exclusive, la question de savoir s'il a ou non

acquis valeur de droit coutumier, ainsi que celle de ses rapports avec l'article 83 relatif à la délimitation du plateau continental, ne sont pas ici d'un grand intérêt. L'article 74 – tout comme l'article 83 – se borne en effet, la Cour l'a dit, à «aider les Etats intéressés à parvenir à une solution équitable» (*ibid.*, p. 49, par. 50) et, contrairement à ce que fait l'article 6 de la convention de 1958, il n'énonce pas la moindre règle de fond qui puisse être appliquée en cas de désaccord des Parties. D'ailleurs, même dans le contexte limité d'une aide aux Etats intéressés dans leurs négociations, la Cour a précisé que «toute indication d'un caractère spécifique ... a disparu» *(ibid.)*. La nature juridique de l'article 74 et ses rapports avec l'article 83 ne me semble donc pas exiger de développement plus considérable ici.

Après les règles conventionnelles et les règles coutumières, la pratique. Comme je l'ai mentionné, la Cour cite la pratique des Etats à côté du droit coutumier pour définir le contexte dans lequel le développement du droit international doit être abordé. La Chambre le sait, les Etats-Unis et le Canada se réfèrent l'un et l'autre fréquemment à la pratique des Etats, comme le font tous les Etats qui sont en litige sur les problèmes de délimitation maritime. Ils s'y réfèrent d'autant plus que cette pratique est riche déjà d'une centaine d'accords; et c'est pour assister la Chambre que le Canada a cru bon de consacrer le livre I des annexes de sa réplique à un répertoire aussi complet qu'il est possible des accords déjà signés.

Cette pratique fait-elle partie des règles et principes de droit applicables à la présente affaire. Cette pratique ne constitue évidemment pas une source de droit coutumier au sens précis et strict du terme, puisqu'il est clair, comme j'ai déjà eu l'occasion de le relever, que les gouvernements ont pu s'inspirer dans la conclusion de leurs accords de délimitation de considérations diverses et que le tracé auquel ils se sont arrêtés n'était pas forcément dicté par le sentiment d'une obligation juridique. Les observations que la Cour a formulées à ce sujet en 1969 déjà (*C.I.J. Recueil 1969*, p. 44-45, par. 76-78) demeurent entièrement d'actualité: qu'il s'agisse des accords basés sur l'équidistance ou sur une variante de l'équidistance, ou des accords écartant l'équidistance au profit de quelque autre méthode ou combinaison de méthodes, ce n'est jamais, me semble-t-il, d'une pratique constitutive d'une coutume internationale qu'il s'agit. Cela est d'autant plus vrai que, comme la jurisprudence l'a maintes fois souligné, il n'existe pas deux situations entièrement identiques et que, en cette matière, comparaison n'est jamais raison.

C'est à un autre point de vue, me semble-t-il, que la pratique des Etats est juridiquement pertinente. Les accords de délimitation même s'ils sont fondés sur des considérations de pure opportunité, même s'ils ne sont inspirés d'aucun sentiment d'obligation juridique, constituent néanmoins des indices précieux au sujet des méthodes et des lignes que les gouvernements ont pu considérer comme équitables. C'est dans cette perspective, limitée certe, mais importante à l'intérieur de ces limites, que les arrêts de la Cour et la sentence arbitrale franco-britannique se sont référés à la pratique des Etats. C'est dans cette même perspective, limitée certes, mais importante dans ces limites, que le Canada fait état de ce que le plus grand nombre des accords de délimitation – pas tous, évidemment – ont regardé comme équitable une ligne basée sur l'équidistance ou sur une variante de cette dernière et de ce que presque aucun accord de délimitation, même portant sur le seul plateau continental, n'a retenu pour frontière maritime une dépression, un chenal, une fosse ou un canyon, fussent-ils même infiniment plus importants que le modeste chenal Nord-Est.

Voilà dans quelle mesure me semble-t-il la pratique présente de l'intérêt dans le cadre des règles et principes de droit applicables dans notre affaire.

Après avoir examiné le concept d'une délimitation conformément au droit et les sources du droit applicables, il me reste à appréhender la substance des règles de droit applicables «en la matière», c'est-à-dire régissant la délimitation de la frontière maritime unique demandée à la Chambre.

3. Les règles de droit applicables «en la matière»

Comme l'a rappelé l'agent du Canada, les Parties sont d'accord sur l'existence d'une «norme fondamentale» gouvernant la délimitation de la frontière maritime unique dans notre affaire. Elles se rencontrent également pour considérer comme applicable à cette délimitation la règle équidistance-circonstances spéciales énoncée par l'article 6 pour la délimitation du plateau continental.

En dépit de cette concordance de vues sur les principes, de graves divergences séparent les Parties sur le contenu concret de ces derniers dans leur application au cas d'espèce. Et pour peu que l'on descende de ces hauteurs, l'accord s'évanouit rapidement.

A titre préliminaire, je voudrais rappeler que, si le droit applicable à la délimitation de la frontière maritime unique voulue par les Parties emprunte à coup sûr à l'analogie, en ce sens qu'il s'inspire des règles qui ont été dégagées pour la délimitation d'autres espaces maritimes – cela ne lui est évidemment pas interdit – ce droit doit néanmoins être appréhendé de manière globale et synthétique à l'instar de la frontière maritime unique elle-même. Nous ne saurions nous rallier à la tentative des Etats-Unis d'aborder notre affaire comme une simple affaire de délimitation de plateau continental, légèrement modifiée par l'addition d'une affaire de délimitation de zones de pêche ou d'autres juridictions (contre-mémoire des Etats-Unis, par. 122; réplique, par. 10). Une telle vue est d'autant moins justifiable en droit que la frontière unique est appelée à séparer certaines juridictions qui ne se rattachent directement ni au plateau continental ni aux zones de pêche; il y a plus que cela dans la frontière maritime unique. Pour le Canada, contrairement aux Etats-Unis, il s'agit de fixer dans une seule et même opération la frontière unique et polyvalente appelée à séparer la zone économique des Etats-Unis et ce qui en tient lieu du côté canadien.

Dans la terminologie de l'article 6 dont le ministre de la justice et l'agent du Canada ont montré qu'il est applicable à cette affaire on mettrait en œuvre ce que la sentence arbitrale franco-britannique a appelé la «règle unique combinant équidistance-circonstances spéciales» (par. 68). Dans cette optique, comme le suggère cette même sentence, on poserait le problème sous la forme «de la question de savoir si certaines caractéristiques géographiques ont pour effet de rendre injustifiée ou inéquitable une délimitation conforme au principe de l'équidistance» (par. 240).

Dans la terminologie du droit coutumier, telle qu'évoquée également par le ministre de la justice et l'agent du Canada on constaterait qu'il ne suffit pas qu'une méthode donnée conduise à un résultat équitable pour qu'elle puisse être regardée par là même comme produisant une délimitation conforme au droit et qu'il faut également que cette méthode soit enracinée dans une considération juridique de caractère objectif. Cette considération ne saurait être autre que le fondement juridique du titre des Parties à la zone des 200 milles sur laquelle elles exerceront leurs faisceaux respectifs de juridictions de part et d'autre de la frontière, c'est-à-dire, comme nous l'avons amplement montré dans nos écritures et comme M. Legault l'a rappelé, le couple «côtes-distance».

Si cette dernière analyse, abordée sous l'angle du droit coutumier est exacte, les principes et règles de droit applicables en la matière exigent que la méthode de délimitation réponde en même temps à deux conditions:

- cette méthode doit être ancrée dans le fondement juridique du titre de l'Etat côtier à la zone économique exclusive;
- elle doit aboutir à un résultat équitable.

Ces deux conditions d'égale importance constituent les deux pôles autour desquels doit s'élaborer la délimitation si elle doit être conforme au droit applicable.

L'accord des Parties sur la «norme fondamentale» montre qu'il n'existe pas de divergence entre elles sur la seconde condition – l'exigence d'une solution équitable; là-dessus, Etats-Unis et Canada n'ont pas la moindre divergence. Mais il en va tout autrement de la première condition, à savoir le rattachement de la méthode au fondement juridique du titre à l'espace maritime considéré.

Pour contester la nécessaire corrélation entre le fondement juridique du titre à l'espace maritime considéré et la méthode de délimitation juridiquement appropriée, les Etats-Unis ont établi deux lignes de défense, qui me semblent aussi fragiles l'une que l'autre. Pour la défense éloignée, si j'ose dire, ils cherchent à minimiser, comme nous l'avons déjà vu, la portée de l'évolution du droit de la mer vers la zone économique exclusive. Parvenant toutefois mal à nier l'évidence, ils consacrent leurs efforts les plus remarquables à l'érection d'une ligne de défense rapprochée consistant à prétendre que la question de la délimitation de la zone économique n'a aucun lien avec celle du titre sur cette zone (contre-mémoire des Etats-Unis, par. 195, 199, 205; réplique, par. 83, 89).

Les Etats-Unis cherchent ainsi à dresser un écran coupe-feu entre le développement du droit de la mer et le droit régissant la délimitation de la frontière maritime unique dans notre affaire. Ils espèrent sans doute faire admettre par la Chambre que la délimitation de la frontière maritime unique dans notre affaire doit s'effectuer à partir des principes et règles qui régissaient dans le passé les frontières maritimes spécifiques et diverses. C'est cette opération de prophylaxie, si j'ose dire, qui vise à placer le droit de la délimitation applicable à l'abri de la contamination des vents du large, qui conduit nos adversaires à la thèse, surprenante de leur part, de l'immobilisme du droit de la délimitation, qu'ils viennent si longuement d'exposer dans leur réplique (par. 10, 11 et 91). Nous avons été heureux, à tout le moins, de constater qu'à deux reprises (par. 107 et 111) la réplique américaine admet le lien inhérent entre le titre juridique et la délimitation: «the coastline is the starting point for title to, and delimitation of, the exclusive economic zone» (par. 111), écrivent-ils, et à cela nous ne pouvons évidemment que souscrire.

Il serait en effet inconcevable que le droit de la délimitation n'ait pas été affecté par les bouleversements profonds de l'environnement juridique du droit de la mer. Comment peut-il être resté à l'abri de ces bouleversements? Le droit de la délimitation du plateau continental s'est séparé de celui de la mer territoriale auquel il était étroitement lié dans les premiers travaux de la Commission du droit international des années cinquante. Il s'en est séparé parce que la base juridique du titre n'est pas la même dans les deux cas. Le droit de la délimitation du plateau continental a lui-même subi certains infléchissements au fur et à mesure que le concept de prolongement naturel, qui constitue le titre juridique au plateau continental, a lui-même évolué. A l'instar de ce concept, le droit de la délimitation du plateau continental s'est détaché petit à petit des phénomènes physiques auxquels il était rattaché à l'origine pour s'appuyer toujours davantage sur des critères juridiques (cf. *C.I.J. Recueil 1982*, p. 45-46, par. 41-43). Ne serait-il pas dès lors contraire à toute logique que seul le droit de la délimitation de la zone des 200 milles soit, comme le voudraient nos amis américains, sans relation aucune avec le fondement du titre juridique à cette zone?

Oh! certes, je ne l'ignore pas, titre juridique et délimitation ne sont pas des concepts synonymes et identiques. La Cour l'a relevé à maintes reprises (*C.I.J. Recueil 1969*, p. 22, par. 18 et 20; p. 32, par. 86; *C.I.J. Recueil 1982*, p. 47, par. 44; p. 61, par. 73), et je dois dire que les Etats-Unis enfoncent des portes ouvertes en s'attachant à démontrer que titre juridique et délimitation ne sont pas des concepts identiques. Mais de là à affirmer que les deux concepts évoluent sur des orbites différentes, il y a un pas que rien n'autorise à franchir. Dès lors que l'opération de délimitation consiste, selon la définition qui en a été donnée par la Cour elle-même, «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), cette opération ne saurait s'effectuer en faisant abstraction du titre juridique de chacun des deux Etats intéressés sur l'espace maritime à délimiter.

Ce lien entre fondement du titre juridique et droit de la délimitation a été établi avec clarté par la jurisprudence en ce qui concerne la délimitation du plateau continental. Non pas certes, pour la zone économique exclusive, puisque la jurisprudence n'a pas encore eu l'occasion jusqu'ici de statuer sur cette délimitation. C'est ainsi que, dans son arrêt de 1969, la Cour a introduit le concept de prolongement naturel dans le droit de la délimitation du plateau tout simplement parce que ce concept lui est apparu comme dominant le titre de l'Etat sur le plateau continental. Et en 1982 la Cour précisera que:

> «les principes et règles du droit international qui peuvent être appliqués pour la délimitation des zones du plateau continental découlent nécessairement de la notion même de plateau continental, telle qu'elle est comprise en droit international» (*C.I.J. Recueil 1982*, p. 43, par. 36).

Quant au tribunal arbitral franco-britannique, il a écarté la méthode de délimitation de la région atlantique préconisée par la France comme équitable, pour la raison de droit que voici: «cette méthode ne semble pas au tribunal être compatible avec le régime juridique applicable au plateau continental...» (par. 246).

Il n'y a aucune raison, Monsieur le Président, pour que ce lien entre la délimitation et le fondement juridique du titre ne soit pas respecté lorsqu'il s'agit de la zone des 200 milles. Comme pour le plateau continental, la délimitation doit être gouvernée par des «principes et règles de droit international qui découlent nécessairement de la notion même» de cette zone, «telle qu'elle est comprise en droit international». Le fondement du titre de l'Etat à la zone des 200 milles se trouve, aussi bien en ce qui concerne les fonds marins que les eaux surjacentes, dans le double paramètre d'une certaine distance par rapport aux côtes. C'est là le point d'aboutissement d'une évolution dont la Cour avait, par une sorte de prémonition surprenante, donné par avance la justification dès 1969, lorsqu'elle avait laissé entendre dans un passage remarquable que la «corrélation directe entre la notion de proximité par rapport à la côte» et les droits de l'Etat côtier est plus forte dans le cas d'une juridiction portant à la fois sur les eaux et sur les fonds marins» – la Cour pensait à ce moment-là à la mer territoriale, mais la remarque vaut pour la zone des 200 milles – «que dans le cas d'une juridiction portant seulement sur le lit de la mer à l'exclusion des eaux surjacentes (*C.I.J. Recueil 1969*, p. 37, par. 59). Ce paragraphe 59 de l'arrêt de 1969 est tout à fait extraordinaire lu avec quelques années de recul. En conséquence, la méthode juridiquement appropriée pour délimiter la frontière maritime unique dans notre affaire doit nécessairement être enracinée dans le double paramètre côtes-distance – distance par rapport aux côtes – qui sert de fondement au titre juridique des deux Etats, Etats-Unis et Canada, à l'ensemble des droits et juridictions en cause.

On constate ainsi, Monsieur le Président, que la ligne américaine, du fait qu'elle repose sur des considérations de nature – oserais-je dire, de pseudo-nature? – et de perpendicularité – pourrais-je dire, de pseudo-perpendicularité? – à une direction unique et artificielle des côtes, est sans rapport avec les côtes qui bordent le golfe du Maine et ne tient aucun compte du concept de distance. Le titre juridique des deux Etats à la zone à délimiter est tout simplement évacué par la thèse de nos adversaires. Et cette thèse ignore au demeurant l'article 6, que les Etats-Unis ont pourtant eux-mêmes proclamé dans leur réplique comme «the controlling law» (par. 54).

On constate également que la ligne canadienne quant à elle repose sur un processus de délimitation – ce mot de «process of delimitation» est employé des dizaines de fois par la Cour (*C.I.J. Recueil 1969*, p. 22, par. 18 et 20; *C.I.J. Recueil 1982*, p. 47, par. 44; p. 77, par. 106; p. 78, par. 107) qui intègre en une opération globale et unique la prise en considération du couple côtes-distance d'un côté, l'exigence d'un résultat équitable de l'autre.

Que la méthode de l'équidistance à laquelle a eu recours le Canada incorpore à la fois le concept de côtes et celui de distance, les deux composantes du fondement juridique du titre, est évident. Celui de côtes, parce que la nature même de la méthode de l'équidistance la fait reposer sur la configuration côtière. Comme la Cour l'a noté, il s'agit là d'une «méthode de délimitation géométrique ... où la ligne de délimitation est directement fonction de points sur les côtes en cause» (*C.I.J. Recueil 1982*, p. 62, par. 76). Celui de distance également, parce que cette méthode consiste, par définition même, à tracer une ligne dont chaque point est à égale distance des points les plus proches sur les lignes de base de la mer territoriale des deux pays et qu'elle traduit parfaitement ce rapport entre les côtes et les espaces maritimes qui, selon la Cour (*C.I.J. Recueil 1982*, p. 45, par. 41, et p. 61, par. 73-74), constitue l'essence du principe de distance.

Le concept de distance apparaît ainsi, si j'ose emprunter ce terme au vocabulaire de la théologie, comme consubstantiel à la méthode de l'équidistance. Lorsque les espaces maritimes auxquels chacun des Etats possède un titre se chavauchent, comme c'est le cas dans notre affaire, la méthode de l'équidistance permet à chacun d'eux d'exercer ses droits souverains jusqu'à une certaine distance de ses côtes, dans toute la mesure et, je crois que ceci est important, jusqu'au point où ces droits rencontrent les droits équivalents et de même valeur de l'autre Etat. Du même coup se trouve sauvegardé le principe du non-empiétement puisque, sauf dans quelques situations particulières qui appellent alors une correction, l'équidistance permet de tenir la frontière à la distance maximum de chacun des Etats et d'éviter ainsi tout effet d'amputation de leur projection maritime.

Mais la ligne canadienne satisfait en même temps à l'exigence de l'équité du résultat. Le Canada ne demande à la Chambre de tracer la frontière maritime unique selon la méthode de l'équidistance qu'après s'être assurée du caractère équitable de la solution et ceci grâce au test de la confrontation aux circonstances pertinentes de l'espèce, et après un ajustement destiné à remédier à l'effet disproportionné de distorsion que crée, à son avis, la configuration particulière du cap Cod et de Nantucket.

L'«obligation conventionnelle» énoncée à l'article 6 se trouve du même coup respectée.

En un mot, la ligne américaine ne satisfait pas aux «principes et règles de droit applicables en la matière entre les Parties». La ligne canadienne y satisfait.

L'audience, suspendue à 11 h 20, est reprise à 11 h 43

II. Les lignes en présence

A. La ligne américaine

J'aborde à présent la seconde partie de mon exposé consacrée à l'examen des lignes en présence par rapport aux exigences du compromis que j'ai tenté de dégager dans la première partie. Je commencerai par la ligne américaine.

A l'égard de la ligne américaine, la Chambre se trouve devant une situation surprenante.

Lorsque le compromis a été signé et que l'affaire lui a été soumise, la revendication américaine s'exprimait dans la ligne officiellement publiée au *Federal Register* en 1976. Dans le mémoire une nouvelle ligne est apparue sans que la moindre explication ne fût donnée de ce changement de position, et la ligne de 1976 se trouva rejetée dans l'oubli exception faite d'une seule et brève mention au paragraphe 151 du mémoire. Et voici que la réplique américaine réhabilite cette ligne, l'explique longuement et en vante les mérites (par. 57-69).

Cela dit, trois constatations s'imposent.

La première est que les deux lignes ne sont que deux présentations différentes d'une seule et même revendication: la totalité du banc de Georges aux Etats-Unis; là-dessus, tout a été dit.

La seconde est que, sous l'une comme sous l'autre des deux formes sous lesquelles elle a été présentée, la revendication américaine évacue complètement du débat l'obligation conventionnelle, découlant de l'article 6 de la convention de 1958, d'envisager, au moins à titre de premier pas, la méthode de l'équidistance.

La troisième est que les deux lignes comportent un dénominateur commun, en ce sens qu'elles se targuent l'une et l'autre de respecter la soi-disant «frontière naturelle» du chenal Nord-Est.

Il a déjà été montré que cette théorie est inexacte scientifiquement, et je n'y reviendrai pas.

Ce que je voudrais souligner ici brièvement, c'est que cette théorie n'a pas davantage de valeur sur le plan juridique, puisqu'elle ne trouve aucun appui dans le fondement juridique du titre à la zone des 200 milles, c'est-à-dire dans le couple côtes-distance. Ni la géologie ni la topographie sous-marine, ni la distinction des écosystèmes, ni, plus généralement, aucun élément tenant à une séparation physique entre espaces maritimes n'ont le moindre rapport avec ces deux piliers du droit de la délimitation tels qu'ils découlent nécessairement du fondement du titre, pas plus qu'ils n'en ont avec le concept d'adjacence géographique, dénominateur commun de toutes les juridictions qui forment les composantes de la zone polyvalente des 200 milles.

En outre, s'il est à la rigueur concevable d'identifier des configurations physiques de caractère séparatif sur le sol et le sous-sol de la mer – encore que, même pour la délimitation du plateau continental, ni la jurisprudence ni la pratique des Etats n'attachent aujourd'hui une importance décisive à de telles configurations –, une telle entreprise serait tout simplement chimérique s'agissant de la colonne d'eau surjacente. Une mer sans relief, qui offre un moyen de communication sans entrave, ne comporte pas de frontière naturelle. Cette «continuité» de la mer a été soulignée par Rivier, par Gidel, par Scelle, par Charles De Visscher, par bien d'autres. Le concept de zone économique exclusive ne repose pas sur un fait de nature; il est une institution juridique, fruit exclusif de la volonté politique.

Les frontières terrestres ne sont elles-mêmes jamais imposées par la nature. Les frontières de plateau continental ne le sont plus guère, si tant est qu'elles

l'ont jamais été. Les frontières de zones économiques exclusives, quant à elles, ne le sont en aucun cas pour la bonne raison qu'elles ne peuvent pas l'être – et elles ne peuvent l'être ni dans les faits, parce que la mer est une et continue, ni dans le droit, parce que le fondement juridique du titre sur de telles zones n'a rien à voir avec la nature.

En répétant jusqu'à l'obsession le thème de la *«natural boundary»*, nos adversaires poursuivent une véritable action psychologique: comment, disent-ils en quelque sorte, la Chambre oserait-elle défaire ce que la nature a fait? Comment pourrait-elle négliger cette véritable barrière naturelle, cette *«buffer zone»* que la nature a érigée entre deux mondes? Comment pourrait-elle ne pas s'incliner devant le *diktat* de la nature?

Les Etats-Unis conçoivent en fait la mission de la Chambre non pas comme celle d'un organe judiciaire chargé de dire le droit, mais comme celle d'un collège scientifique qui viendrait, à la manière d'un super-expert, dresser avec force de vérité légale le constat d'un *break*, d'une discontinuité géologique, géomorphologique et écologique.

La réponse du Canada tient en un mot: on peut dire du chenal Nord-Est ce que le tribunal arbitral franco-britannique a dit d'une dépression située, comme le chenal, sur un plateau continental caractérisé par sa continuité, à savoir que son axe,

> «se trouve là où il est par un simple accident de la nature *(a fact of nature)*, et il n'y a en soi aucun motif pour que cet axe constitue la limite... *(there is no intrinsic reason why a boundary along this axis should be the boundary)*» (par. 107).

Si cela était vrai pour une délimitation de plateau continental effectuée il y a sept ans, à combien plus forte raison cela doit-il l'être aujourd'hui pour une délimitation de zones de 200 milles effectuée après une évolution juridique incontestable!

Ce trait commun de la frontière naturelle mis à part, les deux lignes américaines de 1976 et de 1982 sont revêtues par nos adversaires d'un habillage juridique différent.

A en croire les Etats-Unis, la ligne de 1982 est conforme à la «norme fondamentale» régissant la matière, mais voici que dans la réplique la ligne de 1976 est présentée elle aussi comme «firmly rooted in the law» (par. 63). Il y a décidément beaucoup de lignes dans la maison du Droit telle que la conçoivent les Etats-Unis. Nos adversaires déclarent d'ailleurs avoir pensé à deux autres habillages juridiques encore de leur revendication: l'enclave de 12 milles marins autour de la Nouvelle-Ecosse (réplique des Etats-Unis, par. 32, note 2; cf. mémoire, par. 302) et une ligne d'équidistance donnant demi-effet à la côte sud-ouest de la Nouvelle-Ecosse (réplique, par. 63, note 3). Et ceci sans parler de la ligne de protection du homard mise en vigueur par eux entre 1974 et 1976 (29) (mémoire, par. 145 et fig. 16). Le droit est décidément bien flexible pour nos adversaires!

Mais voyons de plus près les deux variantes de la revendication au banc de Georges que les Etats-Unis proposent aujourd'hui à la Chambre, la version de 1976 et la version de 1982.

1. La version de 1976

La version de 1976 est restée presque inexpliquée jusqu'au dépôt de la réplique: rien, à part une discrète mention au paragraphe 151 du mémoire dans lequel il était indiqué que cette ligne «followed the line of deepest water through

the Northeast Channel» (par. 151). Cette explication nous laissait cependant sur notre faim, car elle ne valait que pour le dernier segment de la ligne. Plus au nord, la ligne, comme nous l'avons indiqué (contre-mémoire du Canada, par. 618), jouait allègrement à saute-moutons par-dessus seuils et profondeurs. Un coup d'œil sur la bathymétrie permet de constater qu'elle n'avait rien à voir avec une ligne des plus grandes profondeurs.

La réplique américaine se montre certes plus prudente. Cette fois-ci il est dit que la ligne de 1976 «*generally* followed the line of deepest water through the Gulf of Main Basin and the Northeast Channel» (par. 58). Elle n'en est pas pour autant plus exacte. De toutes manières, Monsieur le Président, le principe du *thalweg*, imaginé naguère pour les besoins de la navigation intérieure, est étranger à la délimitation des espaces maritimes et n'a juridiquement rien à voir avec la base du titre sur la zone économique exclusive.

La réplique ajoute, il est vrai, que: «This 1976 line was based upon the equidistance-special circumstances rule of Article 6 of the Continental Shelf Convention» (par. 59). Ce coup de chapeau à l'article 6 s'accompagne toutefois d'une précision surprenante: la méthode de l'équidistance entre les côtes est écartée au nom des circonstances spéciales et on y substitue le concept – qui n'a rien à voir avec l'article 6 – d'une équidistance, qualifiée d'approximative d'ailleurs, entre les isobathes de 200 mètres. La Chambre trouvera cette justification rétrospective de la ligne de 1976 aux paragraphes 58 et 59 de la réplique des Etats-Unis.

La version primitive de la revendication américaine à la totalité du banc de Georges n'avait décidément aucune crédibilité juridique. On peut supposer que c'est pour cette raison que les Etats-Unis ont recouru à une présentation juridique nouvelle au moment du dépôt de leur mémoire. Cette variante est-elle plus solide que la précédente? Nous ne le pensons pas; et voici pourquoi.

2. La version de 1982

Une remarque préliminaire d'abord au sujet de cette ligne perpendiculaire aujourd'hui revendiquée.

Quelle corrélation nécessaire existe-t-il entre une ligne perpendiculaire et une frontière naturelle? En vertu de quelle nécessité inhérente une ligne perpendiculaire à la direction générale de la côte permettrait-elle de respecter également *ipso facto* les limites géomorphologiques et écologiques prétendument dictées par la nature? Et, à l'inverse, en vertu de quelle nécessité inhérente une ligne respectant le prétendu *diktat* de la nature serait-elle forcément aussi une ligne perpendiculaire à la direction générale de la côte? On nous répondra sans doute que, dans le cas de l'espèce, les deux exigences coexistent heureusement.

Mais alors, qu'auraient fait nos amis américains si le hasard avait moins bien fait les choses, et si, au lieu de coïncider par le plus grand des bonheurs avec leur prétendue frontière naturelle du chenal Nord-Est, leur perpendiculaire avait eu la mauvaise idée de passer à quelque distance d'elle ou même de la couper transversalement en plein milieu? La Chambre n'ignore pas que tel a bien failli être le cas puisque la version première de la perpendiculaire américaine passait très à l'est du chenal et que, même au prix de multiples ajustements, elle n'a réussi qu'à effleurer le chenal sans vraiment y pénétrer et moins encore à en suivre l'axe.

Cela dit, je me propose de montrer qu'en optant pour une ligne perpendiculaire de préférence à une ligne d'équidistance les Etats-Unis ont fait un mauvais choix et qu'ils se sont placés en marge du droit. Rien d'étonnant alors à ce que les ajustements apportés à cette ligne perpendiculaire de départ dans la seconde partie de l'opération ne parviennent pas à sauver une ligne viciée dès l'origine.

La ligne perpendiculaire de départ

Dans sa nudité originelle, la ligne de 1982 se présente sous la forme d'une perpendiculaire à la direction générale de la côte au point terminal de la frontière internationale. Je me réfère à ce sujet à la figure 93 de la procédure orale, qui (33) reproduit elle-même la figure 27 du mémoire américain.

A vrai dire, nos adversaires ne paraissent pas avoir une vue très cohérente de la méthode dont ils préconisent ainsi l'application.

Lorsqu'il a été question dans le passé d'une perpendiculaire à la côte où à la direction générale de la côte, cette perpendiculaire prenait naissance au point terminal de la frontière terrestre. Or, ici, c'est au point terminal de la frontière internationale, c'est-à-dire à un point situé en mer, sur la frontière maritime entre les deux pays, que la perpendiculaire vient s'ancrer, la légende même de la carte le dit (mémoire des Etats-Unis, par. 302 et fig. 27). Elle cesse dès lors d'avoir toute raison d'être.

Par ailleurs, la réplique américaine se réfère dans un passage à l'idée – toute différente – d'une perpendiculaire qui se situerait en prolongement de la « general direction of the land boundary over its 110-kilometer segment» (par. 94). Cette conception nouvelle se trouve illustrée sur la figure 94 de la procédure orale, elle- (187) même empruntée à la figure 6 de la réplique des Etats-Unis.

Mais pourquoi choisir les derniers 110 kilomètres – au demeurant très zigzagants – plutôt que la célèbre et longue ligne nord-sud, fixée il y a deux siècles, qui précède? Et par quel hasard de la nature le prolongement de ce segment zigzagant de la frontière terrestre correspondrait-il miraculeusement à cette perpendiculaire à la direction générale de la côte que le droit maritime d'aujourd'hui imposerait, nous dit-on, comme frontière maritime?

Nos adversaires confondent les méthodes diverses que le comité d'experts et la Commission du droit international, puis la Cour, ont soigneusement distinguées (*Commission du droit international, Annuaire*, 1953, vol. II, p. 79, et 1956, vol. II, p. 272; *C.I.J. Recueil 1982*, p. 84, par. 119).

Le concept même qui sert de point de départ à la délimitation proposée par nos adversaires baigne ainsi dans un *chiaroscuro* qui n'en facilite pas la critique.

Mais revenons-en à la méthode de la perpendiculaire. Cette méthode, disent nos adversaires, a acquis depuis longtemps droit de cité en matière de délimitation maritime, c'est une méthode dotée de tous les atouts de la respectabilité – et il n'y a donc aucune raison de ne pas l'appliquer ici.

Nous avons montré dans notre contre-mémoire que les références du passé sur lesquelles nos adversaires s'appuient pour faire admettre la légitimité juridique de cette méthode sont erronées, qu'il s'agisse de l'affaire des *Grisbadarna*, des travaux de la Commission du droit international, de l'arrêt *Tunisie/Libye* ou de la pratique des Etats (par. 633-644). Les précédents de la mer du Nord et du golfe de Gascogne, entre autres, ignorent totalement cette méthode, qui n'a pas davantage été mentionnée dans aucun des projets successifs élaborés à la troisième conférence sur le droit de la mer.

Nous avons montré également que ceux qui ont préconisé cette méthode dans le passé pour la délimitation de la mer territoriale (alors seule en cause), loin de la considérer comme opposée à la méthode de l'équidistance, ne l'ont envisagée que parce qu'elle présentait les mérites que l'on reconnaît aujourd'hui à l'équidistance (contre-mémoire du Canada, par. 625-628).

Comme l'écrivait en 1934 le professeur Münch dans son ouvrage *Die technischen Fagen des Küstenmeers*, dans un passage dont le modernisme, cinquante ans après, étonne:

"Mittellinie im engeren Sinn bezieht sich auf Fälle, in denen die

Nachbarn . . . sich gegenüberliegen. . .; die Senkrechte ist die Mittellinie bei gerader Küste, da jeder Punkt der Senkrechten gliech weit von der Küste jedes Nachbarn entfernt ist." (P. 156.)

Je traduis librement:

« La ligne médiane au sens strict du mot se rapporte à des situations dans lesquelles les Etats voisins se font face; la perpendiculaire est la ligne médiane dans les cas d'une côte rectiligne, étant donné que chaque point de la perpendiculaire se trouve à égale distance de la côte de chacun des Etats voisins. »

Gidel reprend cette explication presque mot pour mot et ajoute, toujours en empruntant au professeur Münch:

« La solution de la perpendiculaire sur la côte n'est donc qu'une modalité spéciale [*ein Sonderfall*, avait dit Münch] de *la ligne* médiane entendue au sens large. » (P. 769.)

Ainsi, la méthode de la perpendiculaire a été conçue et appliquée comme une variante de celle de la ligne médiane, parce qu'elle permettait d'obtenir entre Etats limitrophes cette division égale que la ligne médiane permettait d'obtenir dans le cas de côtes opposées. Perpendiculaire et ligne médiane n'ont pas été envisagées comme des méthodes de nature différente, moins encore comme des méthodes antinomiques, mais bien comme une seule et même méthode. Gidel ne relève-t-il pas la « faveur généralement rencontrée en pratique et en doctrine par la solution de la ligne médiane perpendiculaire à la direction générale de la côte » (p. 768)? et il observe que « la solution de la ligne médiane ou perpendiculaire a reçu un certain nombre d'applications positives » (p. 759)?

La méthode demeurait toutefois trop fruste pour atteindre l'objectif poursuivi d'une division égale des espaces maritimes lorsque la côte n'était pas suffisamment rectiligne et qu'il était donc difficile d'identifier une direction générale de la côte. La mise au point, grâce notamment aux travaux de Boggs, de la technique scientifique plus élaborée de la ligne d'équidistance, allait permettre la substitution à la méthode de la perpendiculaire de celle de l'équidistance pour la délimitation de la mer territoriale; et c'est dans cette perspective que le comité d'experts consulté par la Commission du droit international en 1953 écartera la perpendiculaire en tant que telle pour se rallier à la technique de la ligne médiane « tracée selon le principe d'équidistance ». La Commission et la conférence de 1958 lui emboîteront le pas; la troisième conférence sur le droit de la mer et la convention de 1982 feront de même.

On constate ainsi à quel point le mémoire des Etats-Unis a tort de présenter les méthodes de la perpendiculaire et de l'équidistance comme deux méthodes opposées, dont l'une, celle de la perpendiculaire, n'aurait que des avantages et l'autre, celle de l'équidistance, que des inconvénients. La méthode de l'équidistance n'est pas autre chose que le développement scientifiquement plus élaboré de celle de la perpendiculaire. Bien mieux, l'équidistance intègre, dans sa technique même, la perpendiculaire: une ligne d'équidistance entre deux points est, par définition, la perpendiculaire bissectrice de la droite qui relie ces deux points; tant et si bien qu'une ligne d'équidistance n'est en définitive rien d'autre qu'une succession de perpendiculaires.

Dans le cas d'une côte à peu près rectiligne, ou lorsqu'on est en présence d'une ligne de fermeture rectiligne d'un golfe, on peut parler presque indifféremment d'une ligne perpendiculaire ou d'une ligne d'équidistance. Tel est le cas, par exemple, de la délimitation au large du Rio de la Plata, où la ligne définie par l'accord comme une ligne d'équidistance aurait tout aussi bien pu être définie,

dans son premier segment, comme une perpendiculaire à la ligne de fermeture imaginaire du Rio de la Plata («Annexe à la pratique des Etats», accord 39, art. 70). Tel est le cas également de la délimitation Costa Rica/Panama (accord 77), qui est définie dans l'accord par référence à l'équidistance mais qui aurait aussi bien pu être définie comme une ligne perpendiculaire à la direction générale de la côte, ainsi qu'il est remarqué à juste titre dans *Limits in the Sea* (n° 97, p. 4 et 5). Tel est aussi le cas de l'accord Brésil/Uruguay (accord 35), qui se définit par référence à la perpendiculaire mais qui constitue en réalité une délimitation pratiquement équidistante.

Ce que l'on doit reprocher au recours à la méthode de la perpendiculaire dans notre affaire, ce sont en définitive moins les vices propres de cette méthode – car dans certains contextes elle peut se révéler appropriée – que son utilisation par les Etats-Unis dans le cas d'espèce, en dehors de toute référence au fondement juridique du titre. La réplique américaine essaie certes de remédier à cette fragilité juridique en se référant à la «seaward extension of coastal fronts» érigée à cette occasion en fondement juridique du titre (par. 249; cf. par. 107). Mon ami M. Legault a montré, et j'aurai l'occasion d'y revenir un instant, les erreurs de cette conception. C'est la combinaison côtes-distance qui constitue – et constitue seule – le fondement juridique du titre à la zone des 200 milles.

Or il est aisé de montrer que la perpendiculaire américaine ignore entièrement ce fondement.

En premier lieu, la ligne américaine n'a qu'un rapport ténu avec la côte du fond du golfe, et elle n'en a aucun avec les côtes qui bordent le golfe à l'est et à l'ouest.

Si le lien de cette ligne avec la côte du fond du golfe n'est pas inexistant, il est en tout cas d'une extrême minceur. Les Etats-Unis présentent certes leur ligne comme construite à partir de la direction générale des côtes. Mais comment ne
(33) pas rester sceptique devant ces lignes de la figure 27 du mémoire des Etats-Unis, trop miraculeusement parallèles pour emporter la conviction? Comment accorder crédit à des lignes de références conçues à l'échelle macrogéographique et construites à partir de points situés en grande partie en dehors de la région du golfe du Maine? N'oublions pas que même la ligne la plus proche de la côte ne touche celle-ci qu'à de rares points et ne touche la soi-disant «primary coast» américaine du Maine en aucun point. En présence de côtes qui changent aussi souvent de direction, on serait tenté de dire de la direction générale de la côte ce que nos amis de langue anglaise disent de la beauté: elle est dans les yeux de ceux qui la contemplent. Asseoir une frontière maritime d'une telle importance pour les deux pays sur une appréciation aussi subjective et aussi sujette à controverses serait d'autant moins conforme au droit que cette fragile direction générale de référence commanderait une délimitation s'étendant très loin vers le large. Or la Cour l'a dit expressément:

> «Une perpendiculaire devient généralement d'autant moins adaptée comme ligne de délimitation qu'elle s'éloigne du littoral.» (*C.I.J. Recueil 1982*, p. 87-88, par. 125.)

Si le lien avec les côtes de part et d'autre de la frontière dans le fond du golfe est précaire, il devient tout simplement inexistant avec les autres côtes de la région. Comme nous l'avons montré (contre-mémoire du Canada, par. 612, 629-632), les contraintes inhérentes à la ligne à cap constant qu'est la perpendiculaire interdit à la ligne américaine, par définition même, de rendre compte des changements successifs de direction des côtes de part et d'autre du golfe. La dualité des secteurs intérieur et extérieur du golfe est méconnue par cette ligne à direction unique; la complexité des côtes est effacée; les angles sont gommés; les

concavités et convexités, les rentrants et les saillants de part et d'autre de la perpendiculaire sont traités comme s'ils n'existaient pas. Les Etats-Unis insistent sur la concavité formée par le golfe du Maine. Mais dans une concavité, nous l'avons écrit, il n'y a précisément pas *une* direction générale de la côte, à moins bien sûr de noyer cette concavité dans une vision macrogéographique: vue d'assez loin, toute baie, tout golfe, toute concavité finissent par se ramener à des lignes droites. Par sa nature même, la ligne américaine est incapable de refléter la configuration côtière réelle.

Nos adversaires ont oublié visiblement ce qu'a déclaré le tribunal arbitral franco-britannique: «la méthode de délimitation à adopter ... doit être en rapport avec les côtes des Parties qui bordent effectivement ... cette région» (par. 248). A la place de quoi c'est sur une configuration côtière reconstituée pour les besoins de la cause, sur une véritable géographie-fiction, que la ligne des Etats-Unis repose. La géographie ajustée qui sert de base à la perpendiculaire américaine d'origine lisse les côtes du fond du golfe et ignore les côtes qui se font face du Massachusetts et de la Nouvelle-Ecosse. Comment au surplus les Etats-Unis peuvent-ils présenter comme ayant un rapport quelconque avec les côtes de la région une ligne qui, dans son état premier, coupe carrément la Nouvelle-Ecosse en passant derrière ses côtes?

Un simple coup d'œil sur la carte permet de constater que la perpendiculaire proposée comme point de départ de la frontière maritime unique serait exactement la même si la côte américaine avec le Canada jusqu'à Long Island était rectiligne, si la côte du Massachusetts et du cap Cod, au lieu de s'avancer vers l'est, fuyait dans la direction générale de la côte, si la Nouvelle-Ecosse disparaissait sous la mer, créant du même coup ces côtes rectilignes que nos adversaires n'ont réussi qu'à imaginer dans leurs visions à l'échelle continentale.

Peu de points de référence côtiers, à cette ligne américaine, nous venons de le voir. Mais aucun lien du tout avec le concept de distance, cet autre point d'ancrage de la délimitation dans le droit. Nul ne conteste qu'une frontière maritime ne doit pas empiéter sur les espaces maritimes situés «juste devant la façade maritime» de l'autre Etat. Et voici que l'on nous chante les louanges d'une méthodologie qui fait passer la frontière retenue comme point de départ du processus de délimitation derrière la côte du territoire canadien; ce n'est plus seulement un espace maritime qui se trouve amputé et qui devient victime d'un empiétement, c'est le territoire terrestre lui-même. Si un arbre se juge à ses fruits, la ligne perpendiculaire américaine est condamnée de ce seul fait.

Les ajustements de la ligne perpendiculaire de départ

Voilà pour la ligne de départ. A cette ligne de départ dépourvue de tout lien avec le fondement juridique côtes-distance, et qui au surplus ne part pas du point A et n'aboutit pas dans le triangle, les Etats-Unis font subir, dans un second temps, une série d'ajustements afin, disent-ils, de tenir compte des circonstances pertinentes de la région.

Premier ajustement: la ligne perpendiculaire d'origine, c'est-à-dire celle tracée à partir du point terminal de la frontière internationale, coupe la Nouvelle-Ecosse; qu'à cela ne tienne, on va la modifier: «The line therefore must be adjusted to take account of Nova Scotia» (mémoire des Etats-Unis, par. 302), autrement dit pour ne pas la couper.

En déplaçant le point de départ de la ligne jusqu'au point A, qualifié curieusement de circonstance pertinente *(ibid.)*, nos adversaires ajoutent que cette «line extends into the triangle» *(ibid.)*.

Certes, encore que le «into» relève d'un euphémisme, puisque la ligne effleure à peine le triangle d'une discrète caresse. On se demande au surplus, en vertu de

quelle corrélation logique une ligne perpendiculaire à la direction générale de la côte tracée à partir du point A atteindrait nécessairement un triangle dont la logique – la Chambre le sait – se situe ailleurs? Notre soupçon serait-il donc justifié que la ligne a été tracée du point A au sommet du triangle d'abord, et qu'ensuite seulement on ait cherché à lui trouver une explication? C'est ainsi en (33) tout cas que la ligne d'origine de la figure 27 subit son premier avatar et devient (34) celle de la figure 28 que la Chambre trouvera comme figure 95 de la procédure orale: la ligne a glissé jusqu'au point A.

Survient alors le second ajustement: pour éviter que la ligne ne coupe à travers deux bancs, on lui fait suivre l'isobathe des 50 brasses – et c'est la figure 29 du (35) mémoire américain, reproduite comme figure 96 de la procédure orale.

Puis, enfin, troisième ajustement: cette ligne apparaissant à nos amis américains eux-mêmes comme trop «complexe et difficile» (mémoire des Etats-Unis, (36) par. 303), elle devient enfin la perpendiculaire dite ajustée de la figure 30 que nous soumettons à la Chambre comme figure 97 de la procédure orale.

(221) Ainsi, d'ajustement en ajustement, on aboutit à une ligne qui n'a vraiment plus rien de commun avec la ligne de départ. Les sciences de la nature connaissaient la métamorphose des insectes: le droit de la mer va-t-il connaître la métamorphose des frontières? Où est, je le demande, la parenté entre la ligne (33) (36) d'origine de la figure 27 et la ligne d'arrivée de la figure 30? Ce n'est plus une perpendiculaire du tout, mais une ligne zigzagante comportant de nombreux segments qui, loin d'être perpendiculaires à la direction générale de la côte (telle que la conçoivent les Etats-Unis), sont perpendiculaires à cette perpendiculaire, autrement dit parallèles – je dis bien parallèles – à cette direction générale de la côte. Ligne «ajustée»? Certes. Ligne «perpendiculaire»? Sûrement pas – et qui ne respecte les impératifs du compromis sur le point de départ et le triangle d'arrivée qu'au prix de purs et simples artifices.

En principe, Monsieur le Président, ma démonstration pourrait s'arrêter là. Dès lors qu'elle repose sur une méthodologie étrangère à toute considération juridique, la ligne proposée par les Etats-Unis serait en effet à rejeter même si elle pouvait apparaître équitable. Mais elle ne l'est pas.

La ligne américaine respecte-t-elle les façades côtières des Parties dans la région, comme s'en vantent les Etats-Unis? Pas le moins du monde, on l'a vu. Même au prix des ajustements successifs, les Etats-Unis n'ont quand même pas réussi à éloigner leur ligne de plus de 25 milles du port de Yarmouth – alors qu'à ce même endroit cette ligne se trouve à 180 milles marins environ de la côte américaine qui se trouve en face! Comment oublier la critique qui a été faite aux lignes proposées dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* par les deux gouvernements, critique qui se fondait sur le fait que l'une se rapprochait exagérément du port tunisien de Sfax et l'autre du port libyen de Tripoli (*C.I.J. Recueil 1982*, p. 122, par. 75)?

La ligne américaine facilite-t-elle au moins la conservation et la gestion des ressources biologiques et marines de la région en assurant le «single-State management» de part et d'autre de la soi-disant frontière naturelle du chenal Nord-Est? Cet élément d'équité est-il au moins présent? Je me demande pourquoi nos amis américains ne vont pas jusqu'au bout de leur logique. Selon leurs propres dires en effet, quatre espèces de poissons se rencontrent à cheval sur le chenal Nord-Est (mémoire des Etats-Unis, par. 317-318). Ces quatre espèces: calmar à nageoire courte, maquereau, argentine et goberge, méritent assurément d'être à tout jamais clouées au pilori pour ne pas respecter les *natural boundaries*. Mais est-ce une raison suffisante pour les livrer à la surexploitation? Est-ce une raison suffisante pour les priver des bienfaits du «single-State management»? Pourquoi donc, au nom de la même logique qui les conduit à

revendiquer la frontière du chenal, les Etats-Unis ne revendiquent-ils pas une frontière au ras même de la côte de la Nouvelle-Ecosse? Avec une *costa seca* de ce genre, l'ombrelle protectrice du « single-State management » s'étendrait jusque sur ces quatre malheureuses espèces qui, autrement, paieraient leur indiscipline écologique d'un prix vraiment excessif!

C'est à bien d'autres égards encore, nous l'avons montré, que la ligne américaine est inéquitable et déraisonnable, mais je crois inutile d'y revenir à mon tour.

Voilà, Monsieur le Président, pour la ligne américaine.

Au début de la procédure écrite, les Etats-Unis ont visiblement réalisé que leur ligne de 1976 n'avait pas de plausibilité juridique. C'est pourquoi, sans changer leur revendication sur le fond, ils l'ont fait bénéficier d'une espèce de « facelifting » juridique – et c'est ainsi que nous avons été mis en présence de la version 1982. Vers la fin de la procédure écrite, les Etats-Unis ont visiblement compris que cette nouvelle version n'offre pas, elle non plus, de résistance juridique suffisante, et voilà qu'ils sortent à nouveau au grand jour la ligne de 1976. Malheureusement pour eux, le millésime 82 n'est pas meilleur que le millésime 76, et le millésime 76 ne vaut pas plus que le millésime 82. Abondance de biens ne nuit pas, dit le proverbe. Mais il dit aussi qu'avec trois fois rien on ne fait pas grand-chose. De deux lignes mauvaises on n'en fait pas une bonne.

J'en arrive à présent, Monsieur le Président, si vous le permettez, à la ligne canadienne.

B. La ligne canadienne

Le Canada estime que, dans le cas de l'espèce, c'est une ligne d'équidistance qui doit servir de point de départ au tracé de la frontière maritime unique. Cette méthode, dictée au demeurant par l'article 6, intègre, de manière particulièrement heureuse, les deux composantes du titre juridique sur la zone polyvalente que la frontière à tracer par la Chambre est appelée à délimiter.

Mais le Canada ne s'en tient pas là. La ligne d'équidistance ne peut prétendre devenir le tracé de la frontière que si elle s'avère équitable; et c'est seulement après examen et mise en balance des circonstances pertinentes qu'il a déterminé le tracé qu'il considère conforme aux règles de droit applicables en la matière entre les Parties.

Contre cette ligne canadienne les Etats-Unis ont déclenché un véritable tir de barrage.

D'abord en travestissant la position canadienne, qu'ils présentent comme une tentative de ressusciter la thèse danoise et néerlandaise d'une équidistance juridiquement obligatoire et nécessairement équitable (contre-mémoire des Etats-Unis, par. 192, et réplique, par. 77 et 81), ce que la thèse canadienne n'est de toute évidence pas.

Ensuite, en croyant nécessaire, pour convaincre la Chambre de l'inéquité de la ligne canadienne, de dépasser la critique spécifique de cette ligne pour se livrer à une offensive de grande envergure contre la méthode de l'équidistance en soi, pratiquant ainsi ce que nous, Français, appelons souvent en anglais inexact de l'« overkilling ». Que dire, par exemple, du reproche fait à la méthode de l'équidistance d'être particulièrement inéquitable dans la délimitation d'une frontière maritime unique parce qu'elle ne tient pas compte des circonstances autres que géographiques, tels la bathymétrie, les autres configurations topographiques, les caractéristiques du milieu marin ou les intérêts prédominants que l'un des Etats peut avoir dans la région (mémoire des Etats-Unis, par. 276) – comme si la méthode de la perpendicularité tenait compte, elle, de

circonstances autres que géographiques? Non contents de faire état d'inéquités possibles, les Etats-Unis en arrivent, par un glissement subtil, à avancer des critiques qui condamneraient, si elles étaient justifiées, l'emploi de la méthode de l'équidistance dans tous les cas. Du «parfois» ils glissent insensiblement au «toujours».

Par son excès même, on le sait, la critique perd toute valeur. «Ce qui est excessif devient insignifiant», disait déjà Talleyrand. Equidistance et inéquité ne sont pas plus synonymes que ne le sont équidistance et équité. Le fait que l'équidistance n'est pas toujours équitable ne signifie pas qu'elle ne l'est jamais. L'équidistance n'est pas le contraire de l'équité.

Un bon exemple du caractère excessif de la position américaine est fourni par la manière dont les écrits américains traitent la pratique des Etats. A les en croire, «most boundaries in force are not equidistance lines» (ceci est énoncé au paragraphe 215 du contre-mémoire américain). Mais, Monsieur le Président, un simple coup d'œil sur les accords conclus montre que dans un très grand nombre de cas – le plus grand nombre sans doute, mais peu importent les statistiques – les Etats considèrent que l'équidistance fournit les bases d'une délimitation équitable, même pour le plateau continental.

C'est à cette conclusion qu'aboutissent, entre bien d'autres, les auteurs de l'atlas italien, Conforti et Francalanci (*Atlas of Seabed Boundaries*, Milan, 1979, p. XIII) et, plus récemment, M. Jagota dans son cours à l'Académie («Maritime Boundaries», *Recueil des cours de l'Académie de droit international de La Haye*, t. 171 (1981-II), p. 130-131). Il n'est pas sans intérêt de noter que plusieurs accords passés par la France, pourtant peu suspecte de parti pris en faveur de l'équidistance, comportent la disposition suivante dans leur préambule: «Considérant que l'application de la méthode de l'équidistance constitue dans ce cas un mode équitable de délimitation.» («Annexe sur la pratique des Etats», accords 76, 78, 85.) La pratique américaine, citée par les deux Parties, comporte elle-même l'étude de nombreuses délimitations équidistantes ainsi que le montre la classique étude parue à l'*American Journal* il y a quelques années (voir l'étude de Feldman et Colson, «The Maritime Boundaries of the United States», contre-mémoire du Canada, livre V, annexe 109; mémoire des Etats-Unis, par. 269; contre-mémoire, par. 221).

De toute manière, même dans le cas de délimitations qui ne retiennent pas en définitive une solution d'équidistance, c'est presque toujours – pour ne pas dire toujours – l'équidistance qui a servi de point de départ à la négociation. Aux témoignages que nous avons déjà cités dans nos écrits (réplique, par. 325, note 8, et par. 328), j'ajouterai ici simplement celui d'un géographe du département d'Etat dont fait état Whiteman dans son *Digest* (*Digest of International Law*, vol. IV, p. 329), et qui utilise à ce propos le terme révélateur de «point of departure».

A en croire M. Jiménez de Aréchaga les tribunaux ne procèdent pas autrement (*C.I.J. Recueil 1982*, p. 105, par. 18); et, si la Cour a refusé d'examiner l'équidistance *«as a first step»* dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, c'est essentiellement, elle l'a dit elle-même et, si je l'ai bien comprise, parce qu'elle estimait devoir «tenir compte de [la] ferme position des Parties» – des deux Parties – en faveur d'une ligne non équidistante (*ibid.*, p. 79, par. 110).

Sous le bénéfice de ces observations préliminaires, je me propose d'examiner de plus près les critiques avancées par les Etats-Unis contre la ligne canadienne. Après quoi, la défense de la ligne canadienne se dégagera d'elle-même, et sa justification, je me permets du moins de l'espérer, s'imposera comme une évidence.

La ligne canadienne et son mode de construction sont illustrés sur la figure 98 de la procédure orale.

1. Les critiques américaines contre la ligne canadienne

Dans le réquisitoire dressé contre la ligne canadienne, les chefs d'accusation se croisent et s'entrecroisent.

Pour tenter d'apporter quelque clarté dans le débat, je les regrouperai autour de trois thèmes principaux espérant ne pas trahir la pensée de nos adversaires: le thème de la trahison de la configuration côtière, celui de la méconnaissance de la frontière terrestre, celui de la concavité génératrice d'empiétement.

Le thème de la trahison de la configuration côtière

Premier thème récurrent des écrits adverses: en tant que fondée sur l'équidistance, est-il dit, la ligne canadienne ne reflète pas la configuration côtière. L'accusation est plutôt inattendue dès lors que la Cour elle-même a défini la ligne d'équidistance comme étant «directement fonction de points sur les côtes en cause» et qu'elle a précisé que cette méthode, «a 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).

A l'appui de leur position paradoxale, les Etats-Unis avancent, si je les ai bien compris, trois arguments que je vais examiner tour à tour et dont certains ont déjà été évoqués, sous d'autres angles, par M. Legault ou par M. Hankey.

En premier lieu, les Etats-Unis allèguent que l'équidistance est «inherently inequitable in irregular geographical situations» (mémoire, par. 270; cf. contre-mémoire, par. 224), critique de vaste envergure certes.

L'argument ne résiste pas à l'examen: l'équidistance est, tout au contraire, la seule méthode qui permette, au moins comme point de départ, comme «first step», du processus de délimitation, de tenir compte de configurations côtières hautement irrégulières puisque la séquence des points de base le long des côtes en présence assure le reflet permanent de ces dernières: chaque point de base représente en quelque sorte une certaine étendue de côte, jusqu'à mi-chemin du point de base qui le précède et du point de base qui le suit. Cela est d'autant plus vrai dans le cas présent, où l'on se trouve en présence de deux régions à configuration différente. Une méthode unidirectionnelle, telle que la perpendiculaire, ou une ligne fondée sur des séparations prétendument naturelles, ne présente pas cet avantage.

En second lieu, faut-il le rappeler une fois encore, nos adversaires utilisent pour dénoncer la trahison de la configuration côtière qui serait inhérente à la méthode de l'équidistance le graphique que M. Jaenicke avait montré à la Cour en 1969 pour établir que le moindre saillant de la côte produit un effet de déviation qui s'accentue au fur et à mesure que la ligne s'avance vers le large. En prolongeant jusqu'à 200 milles marins de la côte la ligne que le graphique de M. Jaenicke arrêtait plus modestement à environ 50 milles des côtes, les Etats-Unis cherchent apparemment à convaincre la Chambre que l'extension d'une ligne d'équidistance jusqu'à la limite extérieure des 200 milles est nécessairement inéquitable.

La réponse est simple. Comme l'ont montré l'agent et l'agent adjoint du Canada, nous ne sommes pas du tout dans la situation décrite. Sur le graphique allemand, un saillant mineur unique, situé tout près de la frontière, fait sentir son effet sur la totalité de la ligne, lui imprimant un effet de déviation croissante. Ici, au contraire, le segment de la ligne canadienne situé à l'intérieur du golfe est commandé par une succession de points de base – ce qu'atteste la succession

même de ses points d'infléchissement. Quant au segment situé au-delà de la ligne de fermeture imaginaire du golfe – celui qui intéresse le banc de Georges – il est commandé par les points de base opposés situés sur l'île Seal, du côté canadien, et sur le canal du cap Cod du côté américain. Ces deux points, cela a été rappelé, sont situés à une grande distance l'un en face de l'autre, et à une grande distance de l'origine de la ligne. Bref, Monsieur le Président, il n'y a pas ici d'effet Jaenicke.

En troisième lieu, et surtout, les Etats-Unis reprochent à la ligne d'équidistance de refléter seulement «a few selected base points on the Parties' coasts» et, pis encore, de reposer dans la seconde partie de son parcours – le segment extérieur – sur «two isolated protruding points» (mémoire des Etats-Unis, par. 15, 268, 326, 328, 329; contre-mémoire, par. 234; réplique, par. 9, 85, 185, 250). Cet argument revient plusieurs fois et est destiné à montrer que la ligne d'équidistance canadienne ne reflète pas la configuration côtière.

Contrairement à ce qu'avancent nos adversaires, les points de base ne sont pas «choisis» arbitrairement, ils s'imposent aux cartographes et à l'ordinateur dès lors qu'ils sont considérés comme juridiquement pertinents. Le juriste peut se demander si tel îlot ou rocher peut juridiquement servir de point de base; une fois qu'il s'est prononcé, le cartographe ou l'ordinateur perd toute liberté à cet égard.

Sans doute cette technique conduit-elle à ne pas attacher d'influence, pour le tracé de la ligne, à certains points de la côte – *grosso modo* aux points en retrait – qui sont en quelque sorte «perdus» pour les besoins de cette opération. Peut-être est-ce là ce que les Etats-Unis reprochent à la méthode d'équidistance?

C'est là un trait que la méthode de l'équidistance partage avec la méthode des enveloppes des arcs de cercle mise au point pour tracer la limite extérieure de la mer territoriale. Cette méthode – qu'ont décrite et illustrée graphiquement Whittemore Boggs en 1930 («Delimitation of the Territorial Sea», *American Journal of International Law*, vol. 24, 1930, p. 541 et suiv.), M. Münch *(op. cit.)* et Gidel en 1934 (*Droit international de la mer*, t. 3, p. 503-516) et dont le *Digest* de Whiteman retrace l'historique détaillé (vol. IV, p. 195 et suiv.) – consiste, on le sait, à définir la limite extérieure comme la courbe tangente à tous les arcs de cercle d'un rayon égal à la largeur de la mer territoriale, tracés de tous les points de la côte. Etant donné, cependant, que seule est retenue en définitive la tangente à tous les arcs de cercle ainsi obtenus (c'est-à-dire leur enveloppe extérieure), les arcs de cercle qui se trouvent en deçà (c'est-à-dire à l'intérieur de cette enveloppe) ne sont finalement pas déterminants, ni même utiles, pour la construction de la limite; ils sont en quelque sorte «perdus», comme le sont également, du même coup, les points côtiers à partir desquels ces arcs sont tracés. D'où il résulte, comme l'ont noté Gidel (*op. cit.*, p. 510) et Boggs (*American Journal of International Law*, vol. 45, 1951, p. 250), qu'un certain nombre seulement de points de la côte ont une incidence sur la construction de la limite extérieure. Ce sont ces points qui contrôleront seuls le tracé de la ligne, laquelle pourra dès lors être définie avec Boggs (*op. cit.*, p. 546, fig. 1) comme une ligne dont chaque point est exactement à la distance équivalant à la largeur de la mer territoriale du point le plus proche de la côte. Grâce à cette méthode, la projection maritime fondée sur le principe que «la terre domine la mer» s'effectue, on le constate, non pas par une avancée frontale dans une direction perpendiculaire à la côte, mais de manière radiale, dans toutes les directions autour de chacun des points de base qui, grâce à la construction des arcs de cercle, servent à construire la ligne.

Imaginée par des techniciens, la méthode des enveloppes des arcs de cercle a été proposée à la conférence de codification de 1930 par la délégation des Etats-

Unis. En 1951, la Cour l'a décrite dans l'affaire des *Pêcheries*, en déclarant qu'«elle n'a rien de juridiquement obligatoire» (*C.I.J. Recueil 1951*, p. 129). Dans les années cinquante le comité des experts et la Commission du droit international en ont recommandé l'emploi (*Annuaire 1953*, vol. II, p. 76; *1954*, vol. I, p. 85-87; *1956*, vol. II, p. 268). Elle a fini par devenir la méthode juridiquement obligatoire pour la fixation de la limite extérieure de la mer territoriale avec l'article 6 de la convention de 1958 sur la mer territoriale et la zone contiguë et avec l'article 4 de la convention sur le droit de la mer de 1982, qui définissent cette méthode comme conduisant à «une ligne dont chaque point est à une distance égale à la largeur de la mer territoriale du point le plus proche de la ligne de base».

C'est cette méthode, Monsieur le Président, que les Etats-Unis et le Canada ont appliquée l'un et l'autre pour les limites extérieures de leurs mers territoriales respectives (pour les Etats-Unis, voir G. Etzel Pearcy, «Measurement of the U.S. Territorial Sea», XI *Bulletin*, Department of State, No. 144, 29 juin 1959, p. 963-964, reproduit par M. Whiteman dans son *Digest*, *op. cit.*, p. 201; pour le Canada, voir *Loi sur la mer territoriale et les zones de pêche de 1964*, art. 3, mémoire du Canada, livre II, annexe 17).

Conçue à propos de la limite extérieure de la mer territoriale, la méthode des arcs de cercle peut trouver application chaque fois que la limite extérieure d'une juridiction maritime se définit, comme c'est le cas pour la mer territoriale, par une certaine distance par rapport aux côtes. Pour le plateau continental, cette méthode n'était pas applicable aussi longtemps que le critère en était la profondeur ou l'exploitabilité. Elle est applicable par contre pour fixer la limite extérieure des zones de pêche et de la zone économique exclusive, puisque le fondement juridique du titre à ces zones est la distance par rapport aux côtes – ce qui, je le note en passant, crée une certaine similitude entre la mer territoriale et la zone économique exclusive en ce qui concerne leur limite. C'est effectivement cette méthode que les Etats-Unis et le Canada ont appliquée l'un et l'autre pour fixer en 1976 les limites exterieures de leurs zones de 200 milles (pour les Etats-Unis, voir, *Fishery Conservation and Management Act*, 1811, mémoire des Etats-Unis, vol. I, annexe 8; pour le Canada, voir la loi précitée, art. 4).

La parenté d'inspiration entre la méthode des arcs de cercle pour fixer la limite extérieure et la méthode de l'équidistance pour fixer une délimitation saute aux yeux.

L'une et l'autre, d'abord, sont des méthodes scientifiques qui ne prêtent pas à contestation. Ce que Boggs disait de la première vaut tout aussi bien pour la seconde: «There is one and only one such line which can be drawn in front of any coast» (*op. cit.*, p. 545). Son emploi, précisait l'éminent géographe, est aussi simple que l'utilisation du papier de tournesol pour déterminer si une solution est acide ou alcaline – «as simple as the use of litmus paper to determine whether a solution is acid or alkali» (*American Journal of International Law*, vol. 45, 1951, p. 248).

Mais les deux méthodes partagent un autre trait encore. Exactement comme la méthode des enveloppes des arcs de cercle, la méthode de l'équidistance conduit à donner effet à certains points seulement de la côte dans la construction de la ligne, d'autres points étant au contraire sans influence sur cette construction. Dans les deux cas, par conséquent, les rentrants de la côte, les concavités, bénéficient de la projection vers le large créée par les saillants, les convexités.

Il n'est pas sans intérêt à cet égard de noter qu'au fur et à mesure que la méthode des enveloppes des arcs de cercle est appliquée à des distances de la côte plus grandes – 200 milles par exemple, au lieu de 3, 6 ou 12 milles – le nombre de points de base qui contrôlent la ligne diminue, et chaque point de base contrôle

la ligne sur une longueur plus grande. Si la Chambre veut bien se référer à la (5) figure 5 de notre mémoire et à la figure plus élaborée qui porte le numéro 99 de la procédure orale, elle constatera que les limites extérieures des zones des 200 milles des Etats-Unis et du Canada sont construites toutes deux à partir de quelques points seulement. Il faut croire que le fait de « perdre » certains points de la côte et de se contenter, pour construire la ligne, de quelques points de base seulement n'est pas apparu aux Etats-Unis comme de nature à condamner l'application à leur zone des 200 milles de la méthode des enveloppes des arcs de cercle qu'ils ont tant contribué à établir et à laquelle ils viennent ainsi de conférer de nouvelles lettres de noblesse.

Pourquoi alors ces mêmes caractéristiques conduiraient-elles à condamner la méthode de l'équidistance? Pourquoi le fait qu'une ligne d'équidistance se trouve contrôlée, dans certaines situations, sur une partie appréciable de son parcours par quelques points de base seulement serait-il considéré comme signifiant que cette ligne ne reflète pas la configuration côtière? Pourquoi ce qui est considéré comme normal et équitable – y compris par les Etats-Unis – pour la méthode des enveloppes des arcs de cercles deviendrait-il anormal et inéquitable lorsqu'il s'agit de la méthode de l'équidistance? La pratique, pourtant, n'est pas avare d'exemples à cet égard? L'accord entre l'Argentine et l'Uruguay, que j'ai déjà cité, conduit à faire contrôler la totalité de la ligne jusqu'à 200 milles marins au large par deux seuls points, ceux qui marquent l'extrémité de la ligne imaginaire fermant le Rio de la Plata (« Annexe sur la pratique des Etats », accord 39). De même, dans la délimitation entre la Norvège et le Danemark (accord 14), un long segment de la ligne (environ 90 milles marins) est contrôlé par un ou deux points très rapprochés de la ligne de base droite norvégienne. Dans la délimitation entre l'Inde et Sri Lanka (accord 51) près de 50 milles marins de la ligne sont contrôlés par un seul point de base sur la côte de Sri Lanka, et les derniers 58 milles marins de la ligne dépendent d'un seul point sur la côte de Sri Lanka et d'un seul point sur la côte de l'Inde. Cela ressort clairement des indications fournies par le géographe du département d'Etat dans le numéro 77 de la série *Limits in the Sea*.

L'accusation américaine selon laquelle la ligne d'équidistance canadienne serait comme toute ligne d'équidistance nécessairement inéquitable parce qu'elle ne refléterait pas la configuration côtière du seul fait qu'elle serait basée sur « a few select base points on the Parties' coast » et qu'elle reposerait sur quelques « isolated protruding points », cette accusation ne résiste pas à l'examen.

L'audience est levée à 12 h 55

HUITIÈME AUDIENCE PUBLIQUE (10 IV 84, 10 h)

Présents: [Voir audience du 2 IV 84.]

M. WEIL: Monsieur le Président, Messieurs les juges, après avoir confronté le tracé de la ligne proposée par les Etats-Unis aux exigences du compromis et plus particulièrement aux règles de droits applicables à la délimitation de la frontière maritime unique dans notre affaire, j'avais entrepris lors de ma précédente intervention l'examen de la ligne canadienne dans la même perspective. M'attachant dans un premier temps aux critiques adressées par nos adversaires à la ligne canadienne, j'avais cru pouvoir regrouper ces critiques autour de trois thèmes principaux. J'ai tenté de faire justice du premier d'entre eux et je me propose à présent d'aborder les deux autres avant de montrer dans une approche plus positive que la ligne canadienne est équitable et raisonnable.

Le thème de la méconnaissance de la frontière terrestre

Après le grief fait à la ligne canadienne de trahir la configuration côtière, un second thème revient sans cesse sous la plume de nos amis américains: la ligne canadienne ne tient pas compte de l'emplacement de la frontière terrestre.

L'argumentation américaine sur ce point est difficilement compréhensible. La ligne canadienne commence, comme il se doit, au point A, et elle est commandée, comme il se doit, par les points de base appropriés sur les deux côtes et non pas par le point terminal de la frontière terrestre. Pourquoi donc le serait-elle? La ligne américaine après tout, ne part pas non plus du point terminal de la frontière terrestre, mais d'un point maritime: le terminus de la frontière internationale dans son état premier; le point A après ajustements. Serait-ce alors de ne pas respecter la direction des cent derniers kilomètres de la frontière terrestre elle-même qu'il est fait grief à la ligne canadienne, comme cela paraît être le cas dans la réplique américaine (V, par. 160-161)? Cela voudrait dire alors que les Etats-Unis n'attachent aucun poids ni au segment de frontière maritime, de direction toute différente, déjà délimité conventionnellement, ni aux critiques auxquelles se heurte le prolongement vers le large de la direction de la frontière terrestre dans les cas où cette frontière est elle-même irrégulière et coupe la côte à angle aigu.

A y réfléchir de plus près, le thème de la méconnaissance par la ligne canadienne de l'emplacement de la frontière terrestre paraît servir de paravent à une théorie plus vaste, et c'est cela sans doute qui explique que nos adversaires, qui connaissent autant que nous le sens précis des termes qu'ils emploient, aient recouru à cette espèce de stratégie du brouillard.

Le thème de l'emplacement de la frontière terrestre est en effet associé avec plusieurs autres, qui reposent sur des constatations d'une évidente banalité. Oui, bien sûr, qui le nierait? La Nouvelle-Ecosse fait saillie au sud de la frontière internationale. Oui, bien sûr, qui le contesterait? La ligne canadienne se prolonge jusqu'au 40e degré de latitude. Oui, bien sûr, qui le mettrait en doute? Les Etats-Unis et le Canada sont des Etats adjacents de part et d'autre de la frontière terrestre qui les sépare. On a envie de dire: et alors? *so what?*

De ce que la Nouvelle-Ecosse se projette au sud de la frontière, les Etats-Unis tirent la conséquence que la côte de la Nouvelle-Ecosse qui donne sur le golfe du Maine est «aberrante» et «secondaire» et que sa projection maritime doit céder

le pas à celle de la côte américaine «principale» («primary») qui lui fait face de l'autre côté du golfe. L'argument est inattendu. Lorsque deux Etats cherchent à délimiter leur frontière maritime, pourquoi, et au nom de quel principe supérieur, déciderait-on de ne pas tenir compte de celles de leurs côtes qui se trouvent au sud – ou au nord, ou à l'est, ou à l'ouest – du point terminal de leur frontière terrestre?

Et quel mal y a-t-il à ce que la frontière maritime proposée par le Canada aille jusqu'au 40e parallèle? L'argument se veut spectaculaire, et les Etats-Unis espèrent sans doute montrer par là que la prétention du Canada est excessive, déraisonnable. Mais l'argument ne résiste, là encore, pas à l'examen. N'est-ce pas le compromis lui-même qui place le côté sud du triangle à cette latitude? Après tout la frontière maritime américano-mexicaine dans le Pacifique se projette elle aussi nettement au sud de la frontière terrestre entre les Etats-Unis et le Mexique («Annexe sur la pratique des Etats», accord 67).

Et que veut-on prouver en disant que les deux Etats sont adjacents de part et d'autre de leur frontière? Veut-on prouver par là que pour cette raison leurs côtes dans la région du golfe du Maine sont également dans un rapport d'adjacence? C'est bien sûr ce que l'on fait, mais on glisse ainsi du concept – exact – de «adjacent States» à celui – inexact – de «adjacent coasts». Mais nos adversaires sont trop avertis pour avancer de tels arguments sans raisons sérieuses.

Ces raisons se trouvent sans nul doute dans l'approche macrogéographique qui, comme l'ont montré l'agent et l'agent adjoint, caractérise l'ensemble de l'argumentation américaine. Je fais allusion, la Chambre l'aura compris, à la thèse selon laquelle les Etats-Unis et le Canada sont situés dans une relation nord-sud. Alors que, juridiquement, seule compte la relation des côtes pertinentes vis-à-vis de la région à délimiter, les Etats-Unis proposent, comme cela a déjà été montré, une conception macrogéographique, dans laquelle la relation des Etats se substituerait à celle des côtes, et la «broad relationship» – c'est-à-dire la relation à l'échelle continentale – à la relation dans le golfe du Maine.

En énonçant la proposition à la fois banale et approximative que le Canada «est situé au nord des Etats-Unis», les Etats-Unis cherchent probablement à accréditer l'idée qu'il existe une sorte de principe prééminent, en vertu duquel aucun espace terrestre ou maritime au sud de la grande frontière continentale est-ouest ne saurait relever du Canada.

C'est cette approche macrogéographique qui explique aussi que nos adversaires tirent argument du fait que le golfe du Maine et le banc de Georges sont l'un et l'autre situés au sud de la frontière terrestre comme si cette constatation suffisait pour déterminer leur appartenance aux Etats-Unis...

C'est cette approche macrogéographique également qui explique que les Etats-Unis cherchent à effacer cette Nouvelle-Ecosse qui vient si manifestement troubler l'harmonie préétablie nord-sud, ou du moins à ravaler sa côte donnant sur le golfe au rang d'une côte «aberrante» et donc «secondaire» qui ne saurait prétendre à une projection dans le golfe. Pour les Etats-Unis la Nouvelle-Ecosse n'est là où elle est, c'est-à-dire au sud de la frontière des deux Etats, que par l'effet d'une erreur de la nature, et ce que l'on demande à la Chambre ce n'est rien de moins que de corriger cette erreur. Cela porte un nom, Monsieur le Président, cela s'appelle «refaire la géographie».

Le thème de la concavité génératrice d'empiétement

J'en viens à présent au troisième thème majeur de l'acte d'accusation dressé contre la ligne canadienne: celui de la concavité.

L'idée centrale de la thèse américaine est que, du fait de la concavité qui caractérise la situation géographique dans la région du golfe du Maine, la ligne d'équidistance du Canada produit un effet d'empiétement et d'amputation et est, par là même, fondamentalement inéquitable.

Cette thèse comporte, me semble-t-il, trois aspects, qui ne sont pas nettement différenciés dans les écritures américaines mais que j'ai cru pouvoir distinguer pour la clarté de l'exposé:

– *primo:* la ligne canadienne est inéquitable, arguënt les Etats-Unis, parce qu'en présence d'une concavité la méthode de l'équidistance produit toujours une solution inéquitable;

– *secundo:* la ligne canadienne est inéquitable, soutiennent les Etats-Unis, parce que son segment extérieur ne reflète pas les côtes situées à l'intérieur de la concavité;

– *tertio:* la ligne canadienne est inéquitable, allèguent les Etats-Unis, parce qu'elle attache le même poids à toutes les côtes de la concavité alors pourtant que certaines sont plus importantes que d'autres.

Prenons d'abord le premier volet de cette théorie de la concavité: dans une configuration de concavité, nous dit-on, une ligne d'équidistance est par nature même toujours inéquitable. Cette proposition paraît tellement évidente à nos adversaires qu'ils jugent inutile de la démontrer: «The distortion inherent in the application of the equidistance method to concavities is well-established» (**II**, mémoire des Etats-Unis, par. 328). Ainsi, à en croire les Etats-Unis, l'Etat qui possède une côte concave se trouve toujours et inévitablement défavorisé par une ligne d'équidistance, laquelle, au contraire, favorise toujours et inévitablement l'Etat qui possède une côte convexe. Tout ceci, bien entendu, en écho au traitement de la côte concave de l'Allemagne fédérale dans les affaires du *Plateau continental de la mer du Nord.*

En y regardant d'un peu plus près, on s'aperçoit aisément que sous cette forme la théorie selon laquelle «concavité = inéquité» de la ligne d'équidistance repose à la fois sur une ambiguïté et sur une erreur.

L'ambiguïté saute aux yeux: est-ce la concavité constituée par le golfe du Maine dans son ensemble qui est accusée d'être créatrice d'inéquité, ou bien est-ce la concavité de la seule côte américaine? Le problème n'est pas le même dans un cas et dans l'autre.

Dans certains passages de leurs écrits, c'est la côte de la Nouvelle-Angleterre que les Etats-Unis paraissent mettre en avant pour arguer de l'inéquité de la ligne d'équidistance. C'est cet aspect, en tout cas, qu'ils ont invoqué dans leur note du 2 décembre 1977 (**I**, mémoire du Canada, livre III, annexe 60). C'est dans cette perspective également que le mémoire des Etats-Unis se réfère au passage bien connu de l'arrêt de 1969 relatif à l'effet des côtes concaves: «Dans le cas d'une côte concave ou rentrante...», écrivait la Cour, «l'application de la méthode de l'équidistance tend à infléchir les lignes de délimitation vers la concavité.» (*C.I.J. Recueil 1969*, p. 17, par. 8; cité dans le mémoire des Etats-Unis, par. 271.)

Si c'est cela la thèse des Etats-Unis, il est clair qu'elle est dépourvue de toute justification.

D'abord, comme cela a déjà été montré, parce qu'aucune comparaison n'est possible à cet égard entre la situation dans notre affaire et celle qui se présentait dans l'affaire du *Plateau continental de la mer du Nord.* En 1969, la Cour était en présence de trois Etats, et la côte de l'Etat situé au milieu (la République fédérale d'Allemagne) avait dans son ensemble une configuration concave et se trouvait encadrée par les côtes convexes des deux Etats voisins. La Cour a souligné que

l'amputation de la projection maritime allemande n'«était pas attribuable à l'une ou l'autre des lignes [entre l'Allemagne et le Danemark et entre l'Allemagne et les Pays-Bas] prise isolément, mais à l'effet combiné des deux lignes prises ensemble» (*C.I.J. Recueil 1969*, p. 17, par. 7), et c'est cet «effet combiné» (*ibid.*, par. 8) entre «trois Etats» (*ibid.*, p. 50, par. 91) qui était générateur d'inéquité. Dans notre affaire, au contraire, deux Etats seulement sont en présence et, contrairement à ce qui se passait dans l'affaire de la mer du Nord, la délimitation débute dans le fond de la concavité, ce qui évite l'effet d'empiétement condamné en 1969.

Ensuite – et ceci est plus important encore – il ne faut quand même pas (15) oublier, ainsi qu'il ressort du mémoire canadien (par. 339-340 et fig. 32), que la ligne canadienne n'est construite à partir d'aucun point pris sur la côte continentale de la Nouvelle-Angleterre, mais à partir des rochers de Mont-Désert et Matinicus situés à une vingtaine de milles marins de la côte continentale; le premier point de base situé sur la côte continentale américaine est celui du canal du cap Cod.

Je note en passant que les rochers de Mont-Désert et Matinicus ont servi aux Etats-Unis eux-mêmes de points de base pour leur mer territoriale et leur zone de 200 milles. Loin de défavoriser les Etats-Unis, la ligne canadienne d'équidistance, construite à partir des points de base dictés par la géographie, les favorise au contraire en repoussant la frontière maritime vers l'est et en allouant aux Etats-Unis la plus grande partie de l'espace maritime entre les côtes de la Nouvelle-Angleterre et de la Nouvelle-Ecosse. Faire état, dans de telles conditions, de l'inéquité due à la concavité de la côte américaine et à la configuration du golfe du Maine c'est commettre une erreur. De cela je ne veux pour preuve que le fait suivant, qu'a déjà signalé mon ami M. Legault et qui se trouve illustré (180) sur la figure 11 de la procédure orale: de 1974 à 1982, sous l'empire de leur ligne de protection du homard puis de leur ligne officielle de 1976, les Etats-Unis ont revendiqué eux-mêmes une ligne située plus à l'ouest que la ligne canadienne d'équidistance, donc une ligne plus proche de la côte américaine que la ligne canadienne – ce qui a produit le curieux effet, relevé à juste titre par le mémoire américain, qu'au moment de la conclusion du compromis il existait une zone qui n'était revendiquée ni par les Etats-Unis ni par le Canada (par. 151; cf. mémoire du Canada, par. 3). Le reproche fait à la ligne canadienne d'amputer la projection maritime des côtes américaines et d'empiéter sur cette projection est donc assez piquant.

Mais les Etats-Unis mettent également en cause, outre la courbure de leur propre côte, la concavité du golfe du Maine dans son ensemble. Ce n'est plus l'idée que l'équidistance défavorise obligatoirement l'Etat qui possède une côte concave qui est mise en avant dans cette seconde version, mais l'idée qu'une ligne d'équidistance est nécessairement inéquitable lorsqu'il s'agit de délimiter des Etats de part et d'autre d'une concavité profonde, et séparés par une frontière située dans le fond de cette concavité.

Monsieur le Président, pourquoi y aurait-il ainsi une espèce d'inéquité inhérente à une délimitation équidistante dans le cas d'un golfe ou d'une baie? Si l'on se réfère au contre-mémoire américain (**IV**, par. 294-299) et à ses (108) (109) figures 21 et 22 (reproduites comme figures 100 et 101 de la procédure orale), figures qui ont déjà été montrées à la Chambre, il semble que la thèse américaine soit la suivante. Dans une configuration semi-circulaire telle que celle du golfe du Maine, nous dit-on, une ligne d'équidistance est nécessairement inéquitable parce que cette ligne conserve le même tracé dans la zone extérieure à la concavité quel que soit le lieu où la frontière internationale aboutit à l'intérieur de celle-ci. Plus précisément, expliquent nos amis américains, vers l'extérieur la ligne d'équidistance sera toujours une perpendiculaire à la ligne de fermeture de

la concavité partant du milieu de cette ligne, quel que soit par ailleurs l'emplacement de la frontière terrestre.

L'argument est assez surprenant. Un coup d'oeil sur les figures américaines montre qu'une ligne d'équidistance partagerait différemment l'intérieur du golfe selon l'emplacement de la frontière terrestre, et dans chaque cas de manière proportionnelle à la longueur des côtes. Quant au segment extérieur, mis en cause par nos amis américains, il est tout à fait normal qu'il soit contrôlé par des points de base situés sur les ailes extérieures du golfe. Ce qui serait anormal, tout au contraire, c'est que ce segment extérieur soit contrôlé jusqu'à son extrême limite vers le large par le seul point terminal de la frontière terrestre situé au fond du golfe ou par des points situés de part et d'autre de cette frontière, mais beaucoup plus éloignés de ce segment que les points situés sur les ailes côtières. Ce qui serait inconcevable, c'est que le tronçon de la frontière maritime intéressant le banc de Georges soit commandé par le point où la frontière terrestre coupe la côte alors que ce point est situé à une grande distance du banc et qu'il existe des côtes tant américaines que canadiennes situées à une beaucoup plus grande proximité.

On constate ainsi que la thèse de l'inéquité inhérente de l'équidistance à l'intérieur d'un golfe s'évanouit aussitôt qu'on l'approche de près (voir V, réplique du Canada, fig. 31 C et D). Le précédent conventionnel du golfe de Venise, que nous analysons dans notre réplique (V, par. 335 et fig. 30), en constitue une preuve remarquable – parmi bien d'autres, tels les accords entre la Finlande et l'Union soviétique (accord 10), entre le Danemark et la Norvège (accord 14), entre la Suède et la Norvège (accord 19), entre la Finlande et la Norvège (accord 36), entre la Turquie et l'Union soviétique (accord 70).

Ce n'est en tout cas pas la méthode de la perpendiculaire qui pourrait se révéler plus appropriée dans le cas d'une profonde concavité, puisqu'une ligne perpendiculaire ne refléterait pas les côtes en perpétuel changement de direction de la concavité mais seulement une hypothétique direction générale unique de la côte à l'endroit où la frontière terrestre atteint la concavité.

Voilà, Monsieur le Président, Messieurs les juges, pour le premier volet du thème américain de la concavité, à savoir que l'équidistance serait toujours inéquitable dans une configuration de concavité.

Le second volet du thème de la concavité paraît être le suivant. Dans la partie extérieure – c'est-à-dire au-delà de la ligne hypothétique Nantucket-cap de Sable – la ligne canadienne, disent nos amis américains, n'est plus contrôlée par les côtes situées au fond du golfe, mais par des points situés aux entrées de la concavité formée par ce golfe (contre-mémoire des Etats-Unis, par. 30).

L'objectif tactique de cet argument saute au yeux: les Etats-Unis tentent de faire admettre à la Chambre que si la ligne canadienne peut être acceptée par eux à l'intérieur du golfe – ce qui n'a rien de surprenant puisque cette ligne est plus favorable aux Etats-Unis que les lignes qu'ils revendiquaient eux-mêmes jusqu'en 1982 – le segment extérieur de la ligne, celui qui réglera le sort du banc de Georges, doit au contraire être rejeté parce qu'il ne tient pas compte des côtes américaines du fond du golfe.

Quelle qu'en soit l'intention tactique, l'argument est, en tout état de cause, dépouvu de tout fondement, et il en a déjà été fait justice.

On ne voit aucune raison pour que dans le cas d'une concavité profonde – et Dieu sait si les Etats-Unis insistent sur la profondeur de la concavité du golfe du Maine – les mêmes points de base situés dans le fond de la concavité contrôlent la ligne d'un bout à l'autre, au lieu de céder la place à de nouveaux points de contrôle au fur et à mesure de l'avancement de la ligne. La frontière doit, sur chaque segment de son tracé, refléter les côtes qui bordent effectivement la

région en cause. Dans l'affaire du plateau continental franco-britannique, faut-il le rappeler encore une fois, le tribunal arbitral a rejeté avec fermeté la thèse française qui tendait à faire gouverner la délimitation dans la région atlantique par la direction générale des côtes dans la Manche: on ne voit pas, a dit le tribunal, «comment ou pourquoi les côtes de la Manche devraient ... assumer une importance décisive pour déterminer le tracé de la délimitation dans la région atlantique»; «la méthode de délimitation à adopter pour la région atlantique doit être en rapport avec les côtes des Parties qui bordent effectivement le plateau continental dans cette région» (sentence, par. 246-247). Il serait donc inconcevable que des points situés dans le fond du golfe contrôlent le segment de la ligne situé à l'extérieur du golfe de préférence à des points situés plus près, sur les ailes côtières du Massachusetts et de la Nouvelle-Ecosse. Qu'auraient dit nos amis américains, je me permets de poser la question, si le Canada revendiquait une ligne dominée d'un bout à l'autre par les mêmes points au fond du golfe et gardant donc à l'extérieur du golfe la même direction qu'à l'intérieur? C'est alors – et alors seulement – que l'on se trouverait en présence de l'amputation dénoncée par M. Jaenicke, car alors ce seraient des configurations situées à l'origine de la ligne qui imprimeraient leur effet jusqu'à son extrémité loin au large.

J'en arrive ainsi au troisième aspect du thème de la concavité, corollaire d'ailleurs du précédent, à savoir l'allégation d'une hiérarchie entre les côtes qui bordent la concavité. Dix fois, cent fois tout au long des écritures américaines on nous répète que les côtes qui bordent le golfe du Maine ne sont pas comparables. Dans le golfe du Maine, expliquent les Etats-Unis dans leur mémoire (par. 308-309), la côte américaine du fond du golfe est conforme à la direction générale à l'échelle continentale tandis que la côte de la Nouvelle-Ecosse canadienne qui donne sur le golfe «deviates from the broad geographical relationship of the Parties»: la première forme dès lors un «primary coastal front», la seconde n'est qu'un «secondary coastal front». Dans la réplique, la justification change quelque peu: c'est au titre de «seaward-facing coastal front» que la côte américaine du fond du golfe se voit élevée au rang de «primary coast», et c'est au titre de «lateral coast not facing the open sea» que la côte canadienne donnant sur le golfe se voit ravalée au rang de «secondary coast» (par. 188 et 252). Quoi qu'il en soit de ces nuances qui séparent la réplique du mémoire américain, pour les Etats-Unis les côtes dites principales («primary») possèdent des droits prééminents («paramount rights») (réplique, par. 188) qui l'emportent sur ceux des côtes dites secondaires, tant et si bien que lorsque la projection frontale des premières et celle des secondes produit un chevauchement, la projection frontale des côtes principales doit nécessairement prévaloir sur celle des côtes secondaires.

Les côtes du Maine et du New Hampshire ont dès lors, selon les Etats-Unis, le «paramount right» de se projeter sans entrave jusqu'à l'extrême limite de la juridiction nationale des Etats-Unis et les côtes de la Nouvelle-Ecosse n'ont qu'à s'effacer humblement. J'exagère? Lisons plutôt: «The Maine and New Hampshire coasts ... are entitled to their extension seaward to the limits of coastal-State jurisdiction ...» (**IV**, contre-mémoire des Etats-Unis, par. 298). Dans la réplique américaine, on parle de «a delimitation that respects the extension of the United States coastal front at Maine and New Hampshire through the Gulf of Maine and seaward across Georges Bank and beyond» (**V**, par. 12). Et enfin:

> «The seaward extension of the primary coastal front of the United States along Maine and New Hampshire cannot be erased from the map by any alleged proximity of a secondary coastal front of Canada that does not face Georges Bank.» (Contre-mémoire des Etats-Unis, par. 300.)

Telle est la logique, si j'ose dire, de la thèse américaine: toute frontière qui ne donnerait pas aux Etats-Unis la totalité de la projection de leur «primary coastal front» – cette projection passerait elle-même sur le pas de la porte de la côte de la Nouvelle-Ecosse – est par définition même une ligne inéquitable.

Depuis quand, Monsieur le Président, et en vertu de quoi, y aurait-il dans une concavité de «bonnes côtes» et de «mauvaises côtes», des côtes qui respectent une *direction générale macrogéographique et des côtes aberrantes*? *Une concavité* est faite par définition même d'une série de changements de direction; si les côtes bordant le golfe du Maine suivaient toutes la même direction, ce ne serait plus un golfe!

Depuis quand, et en vertu de quel principe, la délimitation des espaces à l'extérieur d'un golfe serait-elle nécessairement déterminée par les côtes situées au fin fond du golfe, c'est-à-dire les plus éloignées, tandis que l'on priverait de *pertinence les côtes les plus proches*? La terre domine la mer, certes. Mais cela ne veut pas dire que le banc de Georges doive être dominé par la côte la plus éloignée, celle du Maine et du New Hampshire. Cela veut dire, à l'évidence, qu'il doit être contrôlé par les côtes les plus proches, celles du Massachusetts américain et celles de la Nouvelle-Ecosse canadienne.

Depuis quand, et en vertu de quel principe juridique, la projection de la façade côtière – «coastal front extension» – dont les Etats-Unis déclarent qu'elle constitue à la fois la base juridique du titre et «a fundamental principle of delimitation» (réplique, par. 107) – est-elle conçue par le droit international comme une espèce de plate-forme s'avançant perpendiculairement vers le large? Singulière théorie, qui méconnaît, comme l'a rappelé l'agent du Canada, que les côtes engendrent des espaces maritimes dans toutes les directions et que la projection est radiale et non pas frontale! Singulière théorie, contredite par les Etats-Unis eux-mêmes lorsqu'ils ont construit leur zone des 200 milles! Et si même cette théorie pouvait se prévaloir d'un quelconque fondement juridique, au nom de quel principe la projection perpendiculaire américaine serait-elle autorisée à enjamber la protection perpendiculaire canadienne? Pourquoi la projection américaine s'épanouirait-elle librement à travers le golfe, sautant par-dessus le bassin de Georges, plus profond et plus large pourtant que le chenal Nord-Est, à travers le banc de Georges et au-delà, alors que la projection canadienne devrait s'arrêter, elle, net à quelques encablures de la côte? Le Canada ne conteste aucunement le droit à la projection vers le large – dans toutes les directions des côtes américaines; ce qu'il conteste, c'est que ce droit s'exerce de manière illimitée au mépris du droit rigoureusement identique et de même valeur des côtes canadiennes.

Ces quelques mots suffiront, Monsieur le Président, sur ce problème que les Parties ont longuement exposé dans leurs écritures respectives (**II**, mémoire des (37) Etats-Unis, par. 307-309 et fig. 31; **IV**, contre-mémoire, par. 300-301 et fig. 23; **V**, réplique, par. 107 et 249; **III**, contre-mémoire du Canada, par. 151 et 564-568; **V**, réplique, par. 68-79) et sur lequel l'agent et l'agent adjoint du Canada se sont déjà expliqués plus en détail.

Ce que l'on reproche, en somme, à la ligne canadienne, c'est d'avoir accordé le même poids aux côtes du Canada qu'à celles des Etats-Unis, alors que, sur l'échelle qualitative des côtes imaginée par nos adversaires, ces dernières se situent plus haut que les côtes canadiennes et auraient en conséquence dû recevoir un traitement privilégié. La ligne canadienne est inéquitable aux yeux de nos adversaires parce qu'elle traite de manière égale des côtes qui existent également, parce qu'elle refuse d'établir entre ces côtes une hiérarchie qui permettrait de valoriser certaines côtes et d'ignorer certaines autres.

Bien sûr, si la Nouvelle-Ecosse n'existait pas, la frontière pourrait se situer

(80) plus loin des côtes américaines, et la ligne proposée par les Etats-Unis ne serait alors pas déraisonnable, comme le montre la figure 55 de notre contre-mémoire, que la Chambre trouvera comme figure 102 de la procédure orale. Mais la Nouvelle-Ecosse existe, et on ne voit pas pourquoi toute ligne qui tiendrait compte de cette existence serait *ipso facto* accusée d'être «déportée» vers l'ouest – de «swing out across and cut off, the coastal front of the United States» (réplique des Etats-Unis, par. 161). Tel est cependant l'axiome sur lequel s'articule toute la thèse américaine: du seul fait de son existence, la Nouvelle-Ecosse conduit la ligne d'équidistance, «to encroach upon the extension seaward of the primary coastal front of the United States» (*ibid.*, par. 173).

Si la Chambre rejette – comme le Canada espère qu'elle le fera – la tentative américaine de lui imposer une géographie ajustée à la place de la situation géographique réelle, les accusations d'inéquité proférées à l'encontre de la ligne canadienne s'effondreront comme un château de cartes.

Voilà, Monsieur le Président, Messieurs les juges, pour l'essentiel des critiques américaines contre la ligne canadienne. Il me reste à présent, pour achever mon exposé, à aborder la ligne canadienne de manière plus positive et à montrer que cette ligne est équitable et raisonnable. Je ne le ferai qu'au regard des seules données géographiques, les autres aspects étant traités par mes collègues.

2. La ligne canadienne est équitable

Le contexte géographique dans lequel la ligne canadienne s'inscrit se caractérise par deux traits.

Le premier est l'unité physique fondamentale de la région à travers laquelle va courir la frontière maritime que la Chambre est appelée à tracer. En ce qui concerne plus particulièrement le sol et le sous-sol de la mer, les deux Parties sont d'accord, la Chambre le sait, pour constater que le plateau continental de la région du golfe du Maine est essentiellement continu et homogène, et cet accord, qui s'est exprimé dès le début de la procédure écrite, a été expressément confirmé par les Parties dans leurs répliques respectives (Canada, par. 371; Etats-Unis, par. 213).

Le second trait est que la configuration côtière permet de distinguer deux «composantes» (*«components»*) ou «secteurs» (*«areas»*) (mémoire du Canada, par. 328-329; contre-mémoire, par. 683-690; mémoire des Etats-Unis, par. 25-29; contre-mémoire, par. 16, note 4) séparés par une ligne imaginaire qui joint l'île de Nantucket au cap de Sable (réplique du Canada, par. 108, 116, 154; réplique des Etats-Unis, par. 11, note 1, par. 204). Sur ce point, les deux Parties concordent à nouveau entièrement.

De cette double caractéristique, la ligne américaine, nous l'avons vu, ne tire aucune conséquence, puisqu'elle prétend se conformer à une frontière soi-disant naturelle du chenal Nord-Est et qu'elle ne reflète en rien la dualité entre le secteur intérieur et le secteur extérieur. Il s'agit d'une ligne unidirectionnelle.

La ligne canadienne, tout au contraire, sans tenir compte d'aucune prétendue rupture naturelle, repose, comme l'exige le droit applicable, sur le double paramètre côtes et distance. Elle est construite à partir de points représentatifs des côtes des deux Parties dans toute leur complexité, et elle reflète la différence de la situation géographique de part et d'autre de la ligne de fermeture imaginaire du golfe.

D'autre part, comme nous l'avons montré, si l'on construit, conformément à la suggestion faite par la Cour en 1969, des lignes de base droites représentant les façades maritimes, on constate que la ligne canadienne est très proche d'une ligne d'équidistance tracée à partir de ces lignes de base droites (contre-mémoire

(75) du Canada, par. 692 et fig. 50; figure 3 de la procédure orale): c'est dire que, de ce point de vue également, elle reflète la configuration générale des côtes.

Un coup d'oeil sur la carte permet enfin de distinguer sur la ligne canadienne deux segments correspondant aux deux secteurs de la région, le changement de direction de la ligne traduisant fidèlement le changement dans la configuration côtière.

Le rappel de ces indications très générales ne suffit cependant pas à épuiser la question, et il convient d'y regarder de plus près. Pour ce faire, je me permets d'inviter la Chambre à une brève promenade le long de la ligne canadienne, comme si nous la parcourions en bateau en regardant défiler les rivages de part et d'autre. La Chambre pourra ainsi vérifier que, jusque dans la moindre de ses inflexions, cette ligne tient équitablement compte des côtes que nous verrons apparaître puis disparaître au cours de cette excursion.

Le segment intérieur

L'embarquement se fera, bien sûr, au point A. Pendant la première partie du voyage, c'est-à-dire *grosso modo* jusqu'à ce que nous traversions la ligne imaginaire de fermeture du golfe, nous naviguerons entre les côtes opposées de la Nouvelle-Ecosse canadienne, du Maine, du New Hampshire et du Massachusetts américains. La ligne que nous suivrons est équidistante d'un certain nombre de points situés sur chacune de ces côtes, et il est donc nécessaire pour apprécier l'équité de porter notre attention successivement sur les points de base qui ont servi à la construction de la ligne et sur les points d'infléchissement de la ligne qui en sont le fruit.

Et d'abord, les points de base. L'équidistance entre quoi et quoi, telle est la question.

La Chambre trouvera dans notre mémoire les indications détaillées sur la (3) (15) construction de notre ligne (mémoire du Canada, par. 335-338 et fig. 3 et 32), et je ne la lasserai pas par une répétition de ces données techniques. Il me suffira de trois observations.

Premièrement, les points qui contrôlent la ligne sont d'autant plus représentatifs des côtes qui bordent l'intérieur du golfe de part et d'autre qu'ils n'ont pas été définis arbitrairement par le Canada pour les besoins de la cause. Ce sont des points qui, pour la plupart, ont servi précédemment au Canada et aux Etats-Unis pour l'établissement de leur mer territoriale ou de leur zone de 200 milles.

Deuxièmement, je rappellerai que la succession des points de base qui prennent le relais l'un de l'autre au fur et à mesure que la ligne progresse vers le large prive de toute pertinence l'argument selon lequel une ligne d'équidistance contrôlée par un point isolé produirait une distorsion croissante au fur et à mesure de l'avancée de la ligne vers le large.

Troisièmement, les points de base retenus sur la côte américaine sont situés, je l'ai déjà indiqué, au large de la côte continentale américaine et ils sont plus éloignés de cette côte que les points canadiens ne le sont de la côte continentale canadienne. De cette manière, je me permets de le répéter, la courbure de la côte américaine, loin de constituer un désavantage pour les Etats-Unis, contribue à (15) accroître l'espace maritime que la ligne canadienne leur attribue. La figure 32 de notre mémoire est parlante à cet égard.

Ce résultat se confirme lorsque, délaissant les points de base, on porte son attention sur la ligne elle-même. Le navigateur qui suivrait cette ligne resterait en permanence plus près de la côte continentale du Canada que de celle des Etats-Unis. Aucun effet de distorsion génératrice d'inéquité, ou d'empiétement, ou d'amputation, ne saurait donc être relevé au détriment des Etats-Unis. Faut-il

rappeler une fois de plus que de 1974 à 1982 les Etats-Unis ont eux-mêmes revendiqué une ligne moins favorable pour eux que la ligne d'équidistance revendiquée par le Canada?

Le segment extérieur

Mais continuons notre navigation le long de la ligne.

Nous voici donc au point d'infléchissement 49, situé aux confins du golfe et du grand large. Nous nous trouvons encore *inter fauces terrarum*, entre les côtes opposées, et pratiquement parallèles, du Massachusetts et de la Nouvelle-Ecosse. Bientôt ce ne sera plus le rocher Matinicus, situé trop loin au fond du golfe, qui va contrôler la ligne; c'est un autre point qui va prendre le relais, situé sur la côte du Massachusetts. Dans peu de temps d'ailleurs, nous allons quitter le golfe proprement dit; nous allons franchir la ligne imaginaire de fermeture du golfe et nous trouver dans l'océan, au grand large. Cela apparaît clairement sur (222) la figure 103 de la procédure orale. Les côtes de la Nouvelle-Ecosse et du Massachusetts vont petit à petit cesser d'être directement à notre gauche et à notre droite, et il faudra nous retourner pour voir ces ailes côtières s'éloigner peu à peu derrière nous, l'une à droite, l'autre à gauche, au fur et à mesure que nous avançons vers le large.

Sommes-nous en présence d'une situation de côtes qui se font face ou en présence d'une situation de côtes adjacentes? Les ailes côtières entre lesquelles nous passons d'abord, pour ensuite les laisser derrière nous, se font sans nul doute face l'une à l'autre. Mais se font-elles face également par rapport à nous qui nous en éloignons? La Chambre connaît la position canadienne à ce sujet. J'ajouterai que la question ne me paraît pas présenter une importance décisive. Comme le tribunal arbitral franco-britannique l'a dit à propos de la région atlantique, avec laquelle notre situation présente certaines analogies, la classification juridique précise – côtes qui se font face ou côtes adjacentes – ne suffit pas à elle seule à régler la question du caractère équitable ou inéquitable d'une ligne d'équidistance (par. 241). *Une ligne d'équidistance n'est pas nécessairement* équitable en présence de côtes qui se font face, pas plus qu'elle n'est nécessairement inéquitable en présence de côtes adjacentes. Tout dépend de ce que le tribunal arbitral a appelé la «situation géographique réelle de la zone ... à délimiter» et des «rapports de fait des deux côtes avec cette zone particulière» (sentence, par. 240).

La caractéristique principale de la situation géographique au-delà de la ligne imaginaire de fermeture du golfe est, je l'ai déjà relevé, que nous avançons vers une région où les côtes pertinentes sont formées par les ailes côtières du Massachusetts et de la Nouvelle-Ecosse: les points de base qui vont contrôler la ligne seront donc, en principe, l'île Seal du côté canadien, le cap Cod du côté américain. Les points côtiers situés plus au nord, plus au fond du golfe, sont à présent trop loin derrière nous pour exercer une influence. Comme il se doit, la terre la plus proche domine la mer la plus proche. Les Etats-Unis se plaignent, je l'ai déjà relevé, que le segment extérieur de la ligne canadienne soit contrôlé par deux points seulement, et deux points en saillie «protruding points». C'est le contraire qui serait surprenant, car c'est là très exactement ce qu'impose la situation géographique réelle. Les Etats-Unis ont eux-mêmes, je le rappelle, tracé la limite extérieure de leur zone des 200 milles dans toute cette région à partir d'un seul point de base car la situation géographique réelle ne leur permettait pas de faire autrement.

Dans le secteur extérieur, c'est-à-dire *grosso modo* après le point d'infléchissement 49 et en aval de la ligne imaginaire Nantucket-cap de Sable, la situation géographique réelle impose donc une ligne à cap constant contrôlée par des

points situés sur les ailes côtières opposées du Massachusetts et de la Nouvelle-Ecosse.

C'est au vu de ces données que le Canada avait, dans un premier temps, en 1977, revendiqué une ligne contrôlée du côté canadien par l'île Seal et du côté américain par le cap Cod et par l'île de Nantucket. Cette ligne est représentée, en
(223) même temps que la ligne canadienne actuelle, sur la figure 104 de la procédure orale.

Cette ligne, qui constituait par définition la bissectrice perpendiculaire d'une ligne joignant le cap Cod à l'île Seal, était particulièrement favorable pour les Etats-Unis parce qu'elle était contrôlée du côté américain par les points de la côte américaine se projetant le plus avant vers l'est. La ligne se trouvait ainsi déportée loin de la côte américaine et laissait aux Etats-Unis la plus grande *partie – et de loin – du banc de Georges.*

Cette ligne présentait en outre la particularité d'aboutir au point d'intersection des limites extérieures des 200 milles des deux pays et d'éviter ainsi toute «zone grise».

Les analyses juridiques contenues dans la sentence arbitrale franco-britannique de 1977 ont cependant conduit le Canada à réexaminer sa position juridique et à modifier sa revendication. La projection vers l'est du promontoire du cap Cod, ajoutée à la saillie marquée du littoral américain au sud-est de Boston, lui a semblé constituer à l'égard du Canada un élément d'inéquité et de distorsion semblable à celui que le tribunal franco-britannique avait relevé à propos de «la projection des Sorlingues plus avant vers l'ouest, ajoutée à la projection de la masse terrestre de la Cornouaille plus avant vers l'ouest que le Finistère» (par. 244). C'est pourquoi le Canada a décidé de calculer la ligne d'équidistance depuis un point de base situé à l'entrée nord du canal du cap Cod. La modification des points de base retenus pour la construction de la ligne constitue l'un des procédés reconnus pour remédier à l'inéquité d'une ligne d'équidistance.

J'ajouterai que les points de base du canal du cap Cod et de l'île Seal, situés comme ils sont au tournant des façades côtières américaines et canadiennes donnant sur l'intérieur du golfe et des façades côtières américaines et canadiennes donnant sur l'Atlantique, constituent des emplacements hautement représentatifs de la configuration côtière de la région.

A la suite de cette modification la frontière revendiquée par le Canada, au lieu de changer de direction immédiatement au sud de la ligne imaginaire de fermeture Nantucket-cap de Sable, à 2 milles marins au sud du point d'infléchissement 49, poursuit encore sa direction nord-est/sud-ouest sur une distance de 21,5 milles marins au-delà du point d'infléchissement 49 et ne prend une nouvelle direction nord-ouest/sud-est qu'un peu plus loin, au point d'infléchissement 50. Elle suit ensuite cette nouvelle direction à cap presque constant jusqu'à la limite des 200 milles, à travers le banc de Georges.

Nous avons donné, Monsieur le Président, dans nos écritures les indications chiffrées qui permettent à la Cour de vérifier que le cap Cod constitue effectivement une «configuration géographique particulière» (mémoire, par. 33; contre-mémoire, par. 131 et suiv.). Nous sommes en présence d'un promontoire exceptionnellement long, qui rompt l'équilibre général des côtes et qui est en contraste complet tant avec la direction de la côte américaine à cet endroit qu'avec celle de la côte canadienne qui lui fait face de l'autre côté du golfe. C'est là une constatation difficilement contestable, et l'on peut s'étonner que les Etats-Unis n'aient pas jugé utile de faire la moindre mention du cap Cod dans l'énumération des «geographical irregularities in the relevant area» (mémoire des Etats-Unis, par. 286-291).

Nous avons montré également que la prise en considération du cap Cod par la

première revendication canadienne engendrait une distorsion disproportionnée par rapport à sa superficie puisqu'elle faisait perdre au Canada une superficie maritime plus de huit fois supérieure à la superficie du cap (contre-mémoire du (157) Canada, par. 137; réplique, par. 138 et fig. 9).

Ce sont ces considérations qui ont conduit le Canada à voir dans la projection vers l'est du cap Cod et de l'île de Nantucket ce que la sentence franco-britannique a appelé un «élément de délimitation assez important pour justifier une ligne de délimitation autre que la ligne médiane stricte» (par. 244) – en un mot, si l'on préfère, une «circonstance spéciale» au sens de l'article 6.

A cela nos adversaires rétorquent, on le sait, en brandissant la «protrusion» de la Nouvelle-Ecosse. Comment, Monsieur le Président, peut-on raisonnablement tenir pour une «particularité non essentielle», ou une «caractéristique spéciale ou non habituelle» (*C.I.J. Recueil 1969*, p. 50, par. 91, et p. 54, par. 101), une province dotée d'un statut politique propre au sein de l'Etat fédéral? Peut-on raisonnablement assimiler à un «léger saillant de la côte» (*ibid.*, p. 36, par. 57) ou à un «promontoire exceptionnellement long» (sentence de 1977, par. 244) – bref à une «circonstance spéciale» – un territoire d'une telle importance (cf. réplique du (152) Canada, fig. 3)? La question a déjà été posée ici. La comparaison que nos adversaires tentent d'accréditer entre l'effet de saillie de la Nouvelle-Ecosse et celui du cap Cod est difficilement soutenable, comme M. Hankey l'a montré. La Nouvelle-Ecosse est, je me permets de le rappeler, trente-huit fois plus grande que le cap Cod et les îles avoisinantes, et la superficie maritime qu'elle attire au Canada n'est que de 0,8 fois sa superficie terrestre (cf. réplique du Canada, (157) par. 134-138 et fig. 9).

Ainsi corrigée afin de porter remède aux effets disproportionnés du promontoire exceptionnellement long du cap Cod, la ligne canadienne apparaît bien comme la résultante directe de la configuration côtière.

Sur son segment intérieur, elle suit la direction nord-est/sud-ouest imposée par la direction des côtes pertinentes du Maine et de la Nouvelle-Ecosse – auxquelles elle est sensiblement parallèle – ainsi que par le segment de la frontière maritime déjà délimité conventionnellement par les Parties il y a plus d'un demi-siècle, en amont du point A.

Sur son segment extérieur, la ligne canadienne prend la direction nord-nord-ouest/sud-est, ce qui correspond à la direction de la côte du Massachusetts, du côté américain, et de la partie méridionale de la côte de la Nouvelle-Ecosse, du côté canadien. Elle prend ainsi, sur son segment extérieur, une direction perpendiculaire à la ligne de fermeture imaginaire du golfe.

Sur l'un comme sur l'autre de ses segments, elle traite de manière égale les côtes des Etats-Unis et du Canada, conformément à ce qu'imposent le droit et la raison.

Ni sur l'un ni sur l'autre de ses segments on ne peut relever le moindre effet d'empiétement ou d'amputation par rapport à la côte américaine. A aucun endroit de son parcours, la ligne canadienne ne passe «juste devant» la côte américaine.

Le seul défaut que l'on pourrait relever à la charge de la ligne canadienne serait de ne pas aboutir au point d'intersection des limites extérieures des 200 milles marins et de créer ainsi une «zone grise». Cette zone est cependant de faible superficie, et ne saurait se comparer avec l'énorme «zone grise» engendrée par la ligne américaine.

D'un bout à l'autre, la ligne canadienne respecte donc cette primauté de la géographie côtière que les Etats-Unis eux-mêmes présentent comme une donnée fondamentale du droit contemporain de la mer (réplique des Etats-Unis, par. 107).

CONCLUSION

J'en arrive ainsi à la conclusion de ce long exposé.

Des deux lignes qui s'affrontent devant la Chambre, quelle est celle qui est conforme au droit parce que enracinée dans le droit conventionnel aussi bien que dans le fondement juridique du titre à la zone des 200 milles? Est-ce la ligne américaine, fondée sur la perpendicularité à une direction générale hypothétique des côtes à l'échelle continentale, sur la théorie de la projection frontale des juridictions maritimes et sur la thèse des frontières maritimes dites naturelles?

Ou bien est-ce la ligne canadienne, qui repose sur la méthode de l'équidistance et sur la conception d'une juridiction polyvalente s'étendant, pour l'un comme pour l'autre des deux Etats, jusqu'à une certaine distance de leurs côtes telles qu'elles sont *réellement*?

Des deux lignes qui s'affrontent devant la Chambre, quelle est celle qui subit avec succès le test des circonstances pertinentes, et plus particulièrement de celles de caractère géographique? Est-ce la ligne américaine, qui ne reflète pas la configuration changeante des côtes de la région du golfe du Maine et qui s'approche de si près des côtes canadiennes que son effet d'empiétement et d'amputation saute aux yeux au premier coup d'œil sur la carte? Ou bien est-ce la ligne canadienne, qui suit pas à pas la configuration des deux côtes et qui se tient suffisamment à distance de chacune d'elles – y compris de la côte américaine – pour éviter tout effet d'empiétement ou d'amputation.

C'est à ces questions, parmi d'autres, que la Chambre est appelée à apporter une réponse qui fera droit entre les Parties.

Le Canada attend cette réponse avec confiance.

L'audience, suspendue à 11 h 11, est reprise à 11 h 26

PLAIDOIRIE DE M. MALINTOPPI

CONSEIL DU GOUVERNEMENT CANADIEN

M. MALINTOPPI: Monsieur le Président, Messieurs les juges, c'est un privilège et un honneur que de participer à la première affaire que deux grands pays amis ont portée devant votre Chambre, en utilisant ainsi pour la première fois une procédure que les pères fondateurs de la plus haute juridiction internationale avaient conçue pour élargir le domaine de la justice internationale en ouvrant à l'attention des Etats un éventail de procédures caractérisées.

Monsieur le Président, il m'appartient de vous présenter les points de vue du gouvernement qui m'a honoré par sa confiance en ce qui concerne ce que nous avons appelé, au sens large, les critères pour l'appréciation du caractère équitable du résultat demandé. Dans cette tâche, je serai assisté par M. Ross Hornby, que je remercie de sa collaboration.

I. Le droit

Les Parties à l'affaire dont la Chambre est actuellement saisie ont reconnu à plusieurs reprises que toute délimitation d'espaces maritimes doit être réalisée de manière à aboutir à un résultat équitable. Les Parties sont également d'accord pour attribuer à l'équité, dans ce contexte, le rôle typique de l'équité *infra legem*. En d'autres termes, les Parties ne demandent pas que la Chambre juge *ex aequo et bono*, mais que, suivant une jurisprudence désormais bien établie, elle applique les principes et règles de droit en fonction d'un résultat qui doit être intrinsèquement équitable. C'est donc au droit des délimitations maritimes lui-même de mettre en garde contre toute tentation de sacrifier la justice de la solution concrète à la rigueur de l'adage *dura lex sed lex*. C'est finalement le contenu de la règle abstraite elle-même qui exige que l'application concrète aboutisse à un résultat équitable et équilibré au point de vue de l'ensemble des intérêts en jeu.

C'est précisément dans cet esprit que l'arrêt rendu par la Cour le 20 février 1969 affirme que:

> « Un dernier élément à prendre en considération est le rapport raisonnable qu'une délimitation effectuée selon des principes équitables devrait faire apparaître entre l'étendue du plateau continental relevant des Etats intéressés et la longueur de leurs côtes; on mesurerait ces côtes d'après leur direction générale afin d'établir l'équilibre nécessaire entre les Etats ayant des côtes droites et les Etats ayant des côtes fortement concaves ou convexes ou afin de ramener des côtes très irrégulières à des proportions plus exactes. » (*C.I.J. Recueil 1969*, p. 52, par. 98.)

Cette affirmation, qui est la première contenant une référence à l'idée de proportionnalité, exige quelques commentaires parce qu'elle constitue l'origine et la base du problème. On remarquera d'abord que le texte français ne se réfère qu'au « rapport raisonnable », sans utiliser le mot « proportionnalité ». Ce dernier figure par contre dans le texte anglais: *« a reasonable degree of proportionality »*. L'observation n'est pas sans importance, parce qu'elle montre à quel point l'idée était floue à ses débuts. La référence à l'idée de « proportions » (au pluriel) figure plutôt – et ce dans les deux langues – dans la partie finale du passage précité. Mais à cet endroit l'accent est mis sur l'opportunité de ramener des côtes très

irrégulières à des proportions plus exactes, tout comme la phrase immédiatement précédente invoquait l'exigence d'établir l'équilibre nécessaire entre des Etats ayant des côtes aux caractéristiques divergentes.

Ainsi donc, dès le début, l'idée de proportionnalité est liée à celle de remédier à un déséquilibre tout autant qu'à celle d'éviter une disproportion, plutôt que d'assurer une proportion. Qu'il s'agisse de la détermination des éléments à prendre en considération ou de la méthode à employer, ce qui importe c'est de s'assurer que la délimitation soit effectuée selon des principes équitables et que, par conséquent, le résultat ne soit jamais déraisonnable, excessif, anormal, en trois mots: hors de proportion.

Lorsque le tribunal arbitral établi entre le Royaume-Uni et la France statua à son tour en 1977, il n'eut aucune difficulté à s'exprimer précisément dans ce sens: «En bref, c'est la disproportion plutôt qu'un principe général de proportionnalité qui constitue le critère ou facteur pertinent.» (Sentence, par. 101.) Ce qui est important, c'est que pareille affirmation a été faite en réponse à l'argument de l'une des parties, selon laquelle la proportionnalité aurait été l'un des principes applicables à la délimitation du plateau continental. La nature de la proportionnalité dans le domaine qui nous occupe était de toute évidence encore trop indéterminée pour justifier une telle argumentation. Le tribunal, quant à lui, prit soin de ne jamais qualifier la proportionnalité de «principe». Tout comme l'évaluation des effets de circonstances naturelles:

> «Il est clair que ces concepts sont inhérents à la notion de délimitation conforme à des principes équitables; de ce fait, ils constituent un des éléments permettant d'établir si c'est la méthode de l'équidistance ou une autre méthode de délimitation qui est appropriée.» (Par. 98.)

Et le tribunal arbitral d'ajouter aussitôt: «Ils ne semblent guère avoir le caractère autonome de principes ou de règles de délimitation...» *(Ibid.)*

Il est évident que la notion de proportionnalité retenue par le tribunal arbitral constitue un développement de la notion contenue dans les arrêts de la Cour de 1969. Rien de plus normal, et ce pour deux raisons. D'abord, parce que l'idée même de proportionnalité était nouvelle à l'époque dans ce domaine – il n'y avait jusque-là de véritables constructions juridiques sur ce point qu'en droit administratif et en droit pénal (mais là d'un caractère plus philosophique parfois que juridique). Par conséquent, il fallait en préciser le contenu et les contours d'une manière à la fois progressive et pragmatique. En deuxième lieu, il faut également souligner une différence essentielle entre les affaires de 1969 et celle de 1977. Dans les premières, la Cour n'avait à déterminer que les règles et principes puisque la délimitation elle-même devait être effectuée par les Parties par voie d'accords ultérieurs. Dans l'affaire anglo-française, par contre, le tribunal arbitral était appelé à tracer une limite maritime, ce qui mettait beaucoup plus l'accent sur la proportionnalité en tant que moyen d'évaluation d'un résultat. Le tribunal est formel à cet égard:

> «La proportionnalité doit donc être utilisée comme un critère ou un facteur permettant d'établir si certaines situations géographiques produisent des délimitations équitables et non comme un principe général qui constituerait une source indépendante de droits sur des étendues de plateau continental.» (Sentence, par. 101.)

La sentence arbitrale de 1977 permet ainsi de dégager deux aspects essentiels de l'idée de proportionnalité, en progressant dans la voie ouverte par les arrêts de la Cour de 1969. Le premier aspect, c'est la fonction négative (et non pas positive) de la proportionnalité, ce qui explique pourquoi elle ne saurait

constituer un «titre» au sens juridique de l'expression, c'est-à-dire, un titre attributif d'un droit ou d'un pouvoir ou d'une faculté quelconques. Le deuxième aspect de la proportionnalité, c'est son caractère relatif: la proportionnalité a, selon les particularités de chaque cas d'espèce, un rôle variable, ce qui explique à son tour pourquoi ce rôle a pu être considéré, dans l'affaire de 1977, comme plus étendu que dans celles de 1969. Ces deux développements et précisions tirés des arrêts de 1969 par la sentence de 1977 sont donc de la première importance. Mais c'est surtout au dernier arrêt de la Cour en la matière, celui de 1982, qu'il appartient d'avoir précisé davantage l'idée qui nous occupe.

A regarder de près l'arrêt de 1982, la Cour est en réalité parvenue à définir d'une manière très exacte – ce qui est essentiel – le rôle et la nature de la proportionnalité dans le cadre du processus de délimitation d'une frontière maritime. Il ne faut pas oublier, pour mieux saisir le sens de la portée de l'arrêt de 1982, que les Parties, dans cette affaire, avaient demandé à la Cour non seulement de se prononcer sur les principes et règles applicables à une démarcation consensuelle, mais aussi d'indiquer – et ce «avec précision» – la méthode «pratique» que les Parties devaient utiliser pour appliquer ces règles et ces principes. Dans ces conditions, le rôle de la Cour, tout en ne consistant pas à fixer le tracé d'une frontière, ne pouvait pas non plus être totalement assimilé à celui qu'elle avait joué en 1969 lorsqu'il ne s'agissait que d'indiquer des règles et des principes. C'est pourquoi l'arrêt de 1982 nous permet de mieux dégager les traits saillants de la théorie de la proportionnalité. Ces traits saillants peuvent être résumés en six points.

En *premier lieu*, la Cour, en reprenant les termes mêmes des arrêts de 1969, rappelle que la proportionnalité se traduit par un «rapport raisonnable» et considère également «que ce rapport doit en effet être respecté en vertu du principe fondamental suivant lequel la délimitation entre les Etats intéressés doit être équitable» (*C.I.J. Recueil 1982*, p. 75, par. 103). Ce qui est raisonnable au point de vue de la proportion est donc équitable. Il s'ensuit aussi que, inversement, ce qui serait déraisonnable au point de vue de la proportion ne saurait être considéré comme équitable.

Le *deuxième point* est, dans un certains sens, lié au premier. La Chambre voudra bien constater l'intérêt qu'il présente au point de vue de la présente affaire. A l'occasion de l'arrêt de 1982, la Cour était en présence d'une divergence d'opinions sur la question de savoir si les fonds marins sous-jacents aux eaux territoriales et aux eaux intérieures entrent ou non en ligne de compte dans les calculs de la proportionnalité. A cet égard la Cour a souligné le rôle des circonstances et des conditions de l'espèce, en excluant «qu'il existe une règle générale de droit qui imposerait d'apprécier dans tous les cas la proportionalité en appliquant l'une ou l'autre de ces deux méthodes» *(ibid.)*. Ainsi, la relativité soulignée par la sentence arbitrale de 1977 est précisée davantage. Chaque fois que les deux

> «calculs aboutiraient à des résultats différents, ce sont les circonstances pertinentes propres à la région qui permettront de dire si, pour se prononcer sur l'équité du résultat, ce sont les plus étendues ou les plus restreintes des surfaces qui doivent être comparées» (*C.I.J. Recueil 1982*, p. 76, par. 103).

Cependant – et c'est là le *troisième point* – cette référence aux circonstances pertinentes propres à la région n'implique nullement l'absence de tout critère pour déterminer quelles sont les circonstances qui, dans un cas concret, doivent être prises en considération: «puisqu'il s'agit de proportionnalité, l'équité impose seulement de comparer ce qui est comparable» (*ibid.*, par. 104). Cette réponse est simple, mais en même temps souple. Une fois de plus, le souci est d'éviter toute

rigidité. Le texte français de l'arrêt – «comparer ce qui est comparable» – a probablement ici un sens un tout petit peu plus large que le texte anglais – *«to compare like with like»*. Mais le trait commun des deux textes est surtout à rechercher dans leur but: indiquer la limite au-delà de laquelle la comparaison ne serait plus raisonnable; au-delà de laquelle le résultat de la délimitation ne serait plus équitable parce qu'il n'est plus raisonnable.

Quant au *quatrième point*, il est lui aussi lié à la détermination des circonstances à retenir dans l'espèce. En ce qui concerne la question de la proportionnalité, le dispositif de l'arrêt de 1982 reprend presque mot par mot les termes des arrêts de 1969, à l'exception d'une omission et d'une addition. L'omission est celle de l'adjectif «limitrophes» qui qualifiait en 1969 les Etats de la même région dont on devait tenir compte pour l'évaluation de la proportionnalité. L'addition est celle de l'adjectif «pertinente» pour qualifier la partie de la côte du littoral de chaque Etat à prendre en considération pour le calcul de la proportionnalité. Or, à mon sens, pareille addition a pour but d'indiquer que dans chaque délimitation il peut y avoir un «cadre de référence» qui peut être essentiel pour déterminer ce qui entre en ligne de compte aussi bien, en définitive, que pour définir les termes mêmes de la comparaison. C'est ici qu'il faut notamment situer ce que les Parties ont appelé dans la présente procédure les «modèles de proportionnalité» – *«proportionality models»*.

Cinquième point. Il complète et résume les autres. En calculant le rapport entre la longueur respective des côtes pertinentes et des zones de plateau continental de la Libye et de la Tunisie, la Cour a pris soin de préciser que «ce résultat, qui tient compte de toutes les circonstances pertinentes, paraît satisfaire au critère de proportionnalité en tant qu'aspect de l'équité» (*C.I.J. Recueil 1982*, p. 91, par. 131). Cette formule me paraît particulièrement heureuse, car elle incorpore dans un tout le cadre de la proportionnalité et sa nature en tant que critère, ou *test*, selon le mot qui figure dans la version anglaise mais qui est désormais entré dans les autres idiomes. La proportionnalité, ce n'est donc pas un principe de droit – comme certains auteurs et parfois même nos contradicteurs l'ont cru – ni une méthode de délimitation, ni une circonstance pertinente, ni – enfin et surtout – le fondement d'un titre juridique de par elle-même. C'est un critère, un *test*, pour empêcher que la «disproportion» n'entraîne le caractère déraisonnable d'un résultat auquel on doit aboutir par le biais de l'équité *infra legem*.

Cela dit, il convient d'ajouter quelques considérations très sommaires sur un *sixième point*. On a vu que la proportionnalité est l'un des aspects de l'équité parce qu'elle constitue essentiellement un test de l'équité. On doit ajouter aussitôt que la proportionnalité n'est pas le seul test de l'équité, tout en étant de loin le plus important. Cette possibilité a été évoquée en des termes concrets par le Gouvernement du Canada dans son contre-mémoire (par. 719-722) et j'y reviendrai à la fin de mon exposé. Ce qu'il faut souligner ici, c'est que l'idée même de l'équité – qu'il s'agisse de l'équité *infra* ou *extra* ou même *contra legem* – est fonction d'un résultat et que la proportion est donc l'un des moyens pour apprécier si un résultat est équilibré ou si, au contraire, il est déraisonnable. En d'autres termes, nous ne croyons pas pouvoir souscrire à une conception restrictive des tests de l'équité. Bien au contraire, et tout en admettant que dans la délimitation des espaces maritimes la proportionnalité joue un rôle primordial, il faut garder l'esprit ouvert et envisager la possibilité, au fil des affaires qui se succéderont désormais, que les différents aspects de l'équité fassent apparaître à leur tour des critères différents et complémentaires pour l'évaluation des résultats.

Le souci du Gouvernement du Canada dans cet effort de systématisation a été de montrer comment et pourquoi nous avons apprécié l'œuvre de la Cour,

accompagnée par celle du tribunal arbitral anglo-français, dans le développement progressif de ce que l'on pourrait appeler le droit de la proportionnalité et, plus généralement, des tests de l'équité. Mon ambition était celle d'aporter ici une petite pierre à l'édifice de ce *Law in Progress*, ce droit *in fieri* dans le domaine des délimitations maritimes. Ici, on l'a vu, la proportionnalité est une idée relativement récente, parce que issue de l'expansion de la juridiction des Etats côtiers au-delà des limites traditionnelles de la mer territoriale. Il ne faudrait pourtant pas croire qu'il s'agit d'une innovation absolue dans le domaine du droit. La Partie adverse s'est employée à ce propos à rechercher des antécédents dans des délimitations fluviales ou lacustres. Qu'il nous soit permis d'exprimer les doutes les plus sérieux sur l'exactitude et l'utilité de ces références. Mais ce serait abuser de la patience de la Chambre que de s'arrêter à une telle querelle, parce que personne ne conteste que l'idée de base de la proportionnalité existe depuis toujours dans le droit et chez les juristes. C'est une notion qui, on l'a vu, ne manque certes pas de légitimité en droit administratif, dans le droit de la responsabilité ou en droit pénal. Le droit international la connaissait aussi, et il suffit de songer à cet égard au traitement des minorités. C'est donc une idée de base, celle dont l'on doit s'inspirer ici pour l'appréciation des divers aspects de la présente affaire: c'est, en définitive, la recherche d'un équilibre, sans la rigidité que pourraient lui conférer des calculs strictement mathématiques mais, au contraire, avec la souplesse qui découle du caractère «raisonnable» de l'évaluation. Au fond, Monsieur le Président, Messieurs les juges, on pourrait simplement retenir, sur le plan le plus général, ce que Montesquieu disait dans les *Lettres persanes* (par. 102) à propos du rapport entre les fautes et les peines: «La proportion ... est comme l'âme des Etats et l'harmonie des Empires.» C'est bien cette harmonie que nous allons maintenant rechercher dans le golfe du Maine.

II. La région à délimiter et les zones qui la composent

On a vu ainsi pourquoi tout calcul de proportionnalité, pour ne pas être arbitraire, doit prendre en considération les circonstances et les conditions de l'espèce. S'agissant de la délimitation d'une frontière maritime il s'ensuit qu'il faut localiser un «cadre de référence» pour individualiser une ou, le cas échéant, plusieurs zones, dans lesquelles les circonstances et les conditions deviennent pertinentes à l'espèce et pourront ainsi avoir une influence sur les calculs exigés par le test de la proportionnalité.

Les Parties quant à elles sont d'ailleurs d'accord sur la nécessité d'établir de tels cadres de référence. Là où, par contre, elles ne sont plus d'accord, c'est sur leur définition concrète. Pareille divergence ne doit cependant pas étonner. La ligne de démarcation maritime qui correspond à la prétention exorbitante de la partie adverse est en effet tellement déraisonnable, que c'est seulement au prix de l'invention de cadres de référence arbitraires, voire même téméraires, que l'on pourrait chercher à justifier un tracé aussi déséquilibré du point de vue de la proportionnalité.

Le Gouvernement canadien, pour sa part, s'est efforcé de placer le problème sur le terrain de la souplesse, comme l'exige l'idée même de la proportionnalité. C'est ainsi qu'il a d'abord adopté comme point de départ l'objet de la présente affaire tel qu'il est défini par le compromis lui-même, c'est-à-dire, la délimitation de la frontière maritime dans la région du golfe du Maine. On peut constater dès l'abord, à ce propos, que les Parties semblent être d'accord pour considérer ladite région comme constituée par deux parties. L'une est celle cernée par les côtes situées à l'intérieur du golfe lui-même. L'autre est celle qui s'ouvre à l'extérieur du golfe: elle est caractérisée latéralement par les côtes du littoral

atlantique qui s'étendent de manière indéfinie de part et d'autre et qui débordent par conséquent la «région du golfe» proprement dite.

Or, si l'on prend comme point de départ cette bipartition de la région à démarquer, l'on peut aisément commencer par se demander si le critère – ou *test* – de la proportionnalité ne devrait pas lui aussi être appliqué séparément dans chacune desdites parties.

Bien entendu, il ne nous échappe pas que c'est bien l'ensemble du tracé de la frontière qui doit aboutir à un résultat compatible avec le *test* de la proportionnalité. Mais l'application du *test* se ferait au moyen de deux opérations techniquement distinctes. Et il y a assez de circonstances particulières à chacune des deux sous-régions en question pour qu'elles puissent jouer un rôle important dans l'application du critère de la proportionnalité.

Au cours de la procédure écrite, le Gouvernement canadien a souligné que l'on peut appliquer sans difficulté au secteur intérieur – le golfe du Maine proprement dit – un *test* de proportionnalité fondé sur la mesure du rapport entre la longueur des côtes et l'ampleur des espaces maritimes, et ce parce que le golfe du Maine est une entité clairement définie, enserrée par les côtes des Parties et aux limites aisément identifiables (I, mémoire du Canada, par. 370). Les Parties ont par ailleurs reconnu que le golfe peut être fermé du côté de la mer par une ligne tirée depuis le cap de Sable jusqu'à l'île de Nantucket. Il fournit donc un cadre – ou, si l'on préfère, un sous-cadre – à l'intérieur duquel peuvent être déterminées objectivement à la fois la longueur des côtes et l'étendue des espaces maritimes. Il n'est point besoin, à cette fin, d'échafauder des «modèles» géométriques et de les superposer à la géographie physique. Qui plus est, les rapports entre la longueur des côtes et l'espace maritime à l'intérieur du golfe du Maine dissipent tout doute quant au caractère proportionné de la ligne canadienne, et à la disproportion flagrante de la revendication des Etats-Unis. Les rapports mathématiques auxquels je fais allusion sont ceux donnés pour le secteur intérieur à la colonne 1 du tableau reproduit à la figure 106 de votre dossier (78) (figure 51 du contre-mémoire du Canada).

A l'extérieur du golfe du Maine lui-même, la situation géographique est sensiblement différente. Comme nous l'avons vu, la frontière débouche sur une vaste étendue maritime qui n'est plus encadrée par des terres. Les côtes des Parties s'étendent à l'infini au nord-est et au sud-ouest, suivant le littoral atlantique de l'Amérique du Nord. L'équilibre géographique des côtes est évident. Et, pour autant que l'on compare ce qui est comparable, il est tout aussi évident que les côtes des Parties qui bordent ce secteur sont à peu près de la même longueur.

Il y a sans doute des analogies remarquables entre cette situation et celle envisagée par le tribunal arbitral anglo-français de 1977. Le tribunal arbitral a alors indiqué que la région atlantique se distinguait principalement par le fait qu'elle n'était pas encadrée mais qu'elle s'étendait au large des côtes des deux pays «dans les espaces libres de l'océan Atlantique» (sentence, par. 233). Le tribunal a considéré les effets proportionnés ou disproportionnés des revendications en fonction de l'équilibre général des côtes qui bordent effectivement la région. Nous estimons être en droit de nous demander ici pourquoi l'on devrait adopter une approche différente, alors même que la situation concernant la partie extérieure de la région du golfe du Maine est encore plus indéterminée.

C'est d'ailleurs pour cette raison, Monsieur le Président, Messieurs les juges, que le Canada dans ses écritures s'est interrogé sur le mérite réel d'une évaluation de la proportionnalité dans le secteur extérieur au moyen de «modèles géométriques». Lorsqu'on est en présence d'une région indéterminée, l'utilisation d'un modèle géométrique peut effectivement donner l'illusion de la précision

mathématique. Mais il s'agit justement d'une illusion. Le tribunal arbitral, qui était appelé en 1977 à se prononcer sur une situation si comparable à la nôtre, n'a pas considéré qu'il était nécessaire de recourir à un instrument pareil. Il n'a pas cherché à enclore une région que la nature elle-même a affranchie de limites précises.

Dans une telle optique, bien entendu, on n'a jamais songé le moins du monde à ôter au critère de la proportionnalité sa valeur en tant que *test* de l'équité. Le point essentiel est que l'ensemble de la zone extérieure est dans ce cas caractérisé par un équilibre inhérent et global. L'application du critère de la proportionnalité demeure indispensable afin de vérifier qu'il n'y ait pas d'éléments géographiques introduisant des distorsions. Mais une fois que cette possibilité a été exclue, la proportion est *in re ipsa* à cause du caractère «ouvert» de la zone.

Le Gouvernement des Etats-Unis, pour sa part, ne conteste pas en réalité le caractère «ouvert» et par conséquent – et dans un certain sens – «indéterminé» de la zone située à l'extérieur du golfe. La Partie adverse semble plutôt considérer qu'il serait néanmoins possible de cerner la zone extérieure aussi dans un cadre de référence établi en utilisant des méthodes géométriques (IV, contre-mémoire des Etats-Unis, par. 308-309). Nous avons vu, Monsieur le Président, Messieurs les juges, les raisons de principe qui peuvent faire douter que, dans des zones ouvertes et indéterminées telles que la partie située à l'extérieur du golfe, le critère de la proportionnalité s'applique de la même manière et dans les mêmes conditions que dans une zone aussi bien délimitée et déterminée que la partie intérieure du golfe proprement dit. Mais il y a là une réserve technique inspirée par la notion et par l'essence même de la proportionnalité en tant que critère du caractère équitable des démarcations maritimes. En d'autres termes, si nos honorables contradicteurs demeurent toujours de l'avis de se maintenir fidèles à cet esprit de géométrie artificielle, eh bien, nous n'avons pas la moindre difficulté à montrer comment des cadres globaux de référence pourraient être construits qui comprennent la partie interne aussi bien que la zone extérieure du golfe. Si cependant un tel procédé n'est pas en mesure de donner la moindre satisfaction aux prétentions de la Partie adverse, la responsabilité n'en revient certes pas au Gouvernement du Canada.

Mais avant d'aborder ces cadres ou modèles globaux, un certain nombre de constatations et de considérations s'imposent. La première constatation est facile à faire. Tout en admettant que nous sommes en réalité en présence de deux zones dans la région du golfe du Maine (mémoire des Etats-Unis, par. 25), le Gouvernement des Etats-Unis est parfaitement conscient de la faiblesse insurmontable de sa position si l'appréciation du *test* de la proportionnalité devait se faire sur la base de deux zones séparées et caractérisées par des particularités différentes.

L'insistance de la Partie adverse sur la recherche d'un cadre global est donc déjà un indice significatif des difficultés d'application du test de la proportionnalité lorsque les prétentions d'une Partie sont si exorbitantes.

C'est donc pour sortir de cette impasse que la Partie adverse suggère un cadre global de référence qui comprend les deux zones de la région. Cependant, le procédé suivi par elle pour construire un tel cadre n'est pas seulement artificiel. Il est aussi – et surtout – artificieux vu qu'il se traduit par une véritable pétition de principe. Nos honorables contradicteurs ont en réalité essayé de bâtir des cadres ou modèles de référence en faisant pivot sur la frontière qu'ils demandent à la Chambre de leur adjuger sans se soucier le moins du monde des données objectives de la géographie. La géométrie dont s'inspirent les cadres de référence de la Partie adverse est donc une géométrie subjective et, dès lors, arbitraire.

De toute évidence, on n'a pas compris de l'autre côté de la barre que la réserve

canadienne quant au rôle effectif de la proportionnalité dans la partie extérieure de la région maritime à délimiter invitait la Partie adverse à réfléchir sur l'absence, dans l'ensemble de la région, d'un cadre naturel. Il faut donc, si l'on veut, en construire un ou, si l'on préfère, plusieurs. Mais cela toujours bien entendu en partant des données objectives afin de ne pas tomber dans le subjectivisme et dans l'arbitraire. En d'autres termes, il faut que tout cadre de référence ait des bases et que ces bases soient aussi objectives que possible par rapport à la configuration des lieux. Et puisqu'il s'agit de bâtir un cadre d'ensemble, il faut également que la configuration des lieux fasse elle aussi l'objet d'une appréciation d'ensemble.

Ce dernier point nous semble avoir une importance capitale dans la présente affaire et nous allons le voir immédiatement. Avant de ce faire, la Chambre me permettra cependant de rappeler un passage essentiel de la sentence arbitrale anglo-française de 1977, là où le tribunal souligne que le critère de la proportionnalité sert aussi à éviter les effets disproportionnés de certains facteurs naturels (par. 101). De toute évidence cela doit s'appliquer également à la réalisation d'un cadre global de référence. Mais revenons au passage de la sentence de 1977:

> «Le facteur de proportionnalité peut se présenter sous la forme d'un rapport entre l'étendue du plateau continental et la longueur des côtes de chaque Etat, comme ce fut le cas dans les affaires du *Plateau continental de la mer du Nord*. Mais il peut également s'agir – cela est plus courant – d'un facteur permettant d'établir si des caractéristiques géographiques ou configurations particulières ont un effet raisonnable ou déraisonnable, équitable ou inéquitable sur le tracé d'une limite équidistante.» (Par. 100.)

Sous sa deuxième forme, le critère de la proportionnalité nous donne ainsi des éléments dont l'on ne saurait faire abstraction dans la construction de cadres de référence globaux dans la présente affaire. C'est pourquoi la construction d'un cadre global de référence exige beaucoup plus de prudence et de caution que celles témoignées par la Partie adverse au long de la procédure écrite.

III. Les cadres de référence des Etats-Unis

J'en viens donc à examiner les cadres de référence proposés par la Partie adverse. Je devrais plutôt parler ici d'un cadre, au singulier, vu qu'en réalité le Gouvernement des Etats-Unis n'a utilisé, jusqu'à présent, qu'un seul modèle de base, doublé il est vrai d'un certain nombre de variantes (dont l'une leur semble plus importante que les autres), qui témoignent déjà des incertitudes dont la position de nos honorables contradicteurs est affectée en ce qui concerne le problème de la proportionnalité. Cela dit, rappelons tout de suite que le modèle
(40) est celui qui apparaît à la figure 34 du mémoire des Etats-Unis et que nous avons reproduit sur notre carte de base qui apparaît en ce moment dans la boîte à images à côté de moi. Il figure également dans votre dossier au numéro 107, cadre C. Ainsi que vous le voyez, l'exagération de ce modèle au détriment du Canada est telle qu'il déborde la marge extérieure de notre carte. Mais je crois qu'avec un tout petit effort d'imagination on peut prolonger ces deux lignes et, hors de la boîte, établir le point où elles se rencontrent.

Monsieur le Président, les défauts de ce modèle sautent aux yeux. Et ce, sur quatre grands points: *Premièrement*, la position des limites latérales choisies par les Etats-Unis produit un déséquilibre géographique. *Deuxièmement*, la direction des lignes qui constituent ces limites n'est pas établie en fonction de critères issus de la géographie de la région pertinente. *Troisièmement*, les Etats-Unis déforment encore davantage la région soumise au *test* en lui attribuant une limite

inappropriée du côté du large. *Quatrièmement*, les Etats-Unis excluent les côtes et les eaux de la baie de Fundy sans la moindre justification.

Premièrement, donc, le modèle proposé par les Etats-Unis introduit un déséquilibre dans la géographie. Mais la première chose qui frappe, c'est l'absence totale, complète, absolue de symétrie qui l'entache et qui découle du choix arbitraire des limites latérales. Le cadre de référence que nos honorables contradicteurs souhaiteraient voir adopter ne s'étend pas au sud-ouest de l'île de Nantucket, ce qui est la preuve d'une discrétion étonnante mais qui suscite immédiatement une suspicion légitime. En revanche, lorsqu'on passe de l'autre côté, c'est la gourmandise qui l'emporte sur la discrétion. Le cadre de référence proposé par la Partie adverse s'étend ainsi au nord-est, même au-delà de la région qui d'après nous est celle du golfe, pour dépasser Halifax et pour aboutir finalement à la hauteur de l'isthme de Chignectou tout au fond de la baie de Fundy (mémoire des Etats-Unis, p. 205, par. 317). Oui, la même baie qu'ils essaieront plus tard d'écarter. Eh oui. En effet, même le plus grand effort d'imagination ne saurait être sans limites. Bien entendu, nous connaissons tous la théorie des quatre changements de direction de la côte, qui est si chère à la Partie adverse et qui se traduit concrètement par l'«annulation» de la Nouvelle-Ecosse comme si cet «accident de la nature» devrait avoir le bon goût de ne pas faire obstacle à la prétention *maxima* de la Partie adverse. Mais en réalité, Messieurs, l'observation la plus pertinente à faire n'est pas là. La Cour me permettra ici une très courte digression d'ordre général qui vise les bases les plus sensibles sur lesquelles la Partie adverse aimerait fonder toute sa demande.

Nous serions en effet tentés de poser à la Partie adverse une question fort simple. La Cour sait bien comment la Partie adverse s'est efforcée de soutenir, contre toute évidence, l'inexistence de liens pertinents entre la Nouvelle-Ecosse (et même de cette partie de la Nouvelle-Ecosse qui est située au sud de Lunenburg) et la région du golfe du Maine, qu'il s'agisse de la partie interne ou de la zone extérieure.

Et voici la question: Comment, dans ces conditions, peut-on prétendre pousser les limites du cadre de référence très loin au nord-est, et même au-delà d'Halifax, sans avouer en même temps qu'il existe des liens à la fois substantiels et directs entre la plus grande partie de la Nouvelle-Ecosse et la région du golfe du Maine? De deux choses l'une. Ou bien l'on admet ces liens substantiels et directs, mais alors toute la toile de fond de l'argumentation des Etats-Unis s'effondre et l'équilibre des intérêts en jeu dans la zone du golfe penche définitivement du côté canadien; ou bien l'on persiste à nier l'évidence de ces liens substantiels et directs, mais alors c'est le cadre de référence avancé par les Etats-Unis qui ne tient plus debout.

Si le manque de symétrie du modèle suggéré par les Etats-Unis ne saurait nullement être justifié, on peut néanmoins essayer de l'expliquer. Evidemment, cette explication ne saurait prendre appui sur les caractéristiques naturelles qui fournissent une base objective pour encadrer le secteur. Les Etats-Unis ont tout simplement affirmé sans autre explication que l'île de Nantucket et un point sur la côte situé à 14 milles (V, réplique des Etats-Unis, par. 270) à l'est d'Halifax constituent des limites appropriées. Et ce point à l'est d'Halifax se trouverait sur une ligne perpendiculaire à l'isthme de Chignectou (mémoire des Etats-Unis, par. 312) au fond de la baie de Fundy. Mais nous ignorons tout des caractéristiques spéciales qui justifient l'utilisation de ces points particuliers pour établir les limites latérales de la zone soumise au *test*.

Une fois de plus, Monsieur le Président, Messieurs les juges, l'on est en droit de se demander si l'artifice du modèle avancé par les Etats-Unis ne consiste pas, tout simplement, dans la nécessité d'adopter comme point de départ la

prétention *maxima* qu'ils ont avancée dès le début de la phase judiciaire du différend qui oppose les Parties. Ayant décidé à l'avance que le modèle devait justifier une telle prétention, il fallait évidemment aller aussi loin que nécessaire au long de la côte de la Nouvelle-Ecosse vers le nord-est pour que la frontière demandée devienne l'axe passant par le centre du cadre de référence. Au lieu de placer la frontière demandée dans un cadre possédant au moins des points de repère objectifs, la Partie adverse vous a soumis un modèle qui est la projection géométrique artificielle d'une ligne déjà artificieuse par elle-même. Au point de vue de l'application du critère de proportionnalité, voilà pourquoi le modèle des Etats-Unis se traduit donc par une pétition de principe véritable.

J'en viens maintenant à ma deuxième critique. En effet, cette même approche explique une deuxième lacune importante du modèle des Etats-Unis, que j'ai relevée il y a quelques instants. Je veux parler de la direction empruntée par les lignes qui y sont utilisées comme limites latérales. Il s'agit de perpendiculaires à ce que les Etats-Unis assument être la direction générale du littoral atlantique à une échelle continentale (**II**, mémoire des Etats-Unis, par. 312). Et, comme on pouvait s'y attendre, la direction de ces perpendiculaires coïncide en tous points avec celle de la ligne revendiquée par les Etats-Unis – je veux évidemment parler des portions non ajustées de leur ligne perpendiculaire. La même conception de la macrogéographie et les mêmes perceptions erronées des faits sous-tendent à la fois la revendication des Etats-Unis et leur test. Mes collègues et amis ont déjà démontré que la description de la côte donnée dans les écritures des Etats-Unis n'est aucunement confirmée par la géographie. En fait, aucun autre point litigieux sur le plan de la géographie ne divise aussi profondément les Parties.

L'application du modèle de proportionnalité a pour effet de faire basculer les limites latérales bien plus à l'est que ne le justifierait la géographie de la région pertinente – et, partant, elle fausse le rapport entre les côtes et les espaces maritimes au détriment du Canada. Les dimensions mêmes du modèle montrent bien l'étendue de la distorsion. La limite latérale du côté canadien est portée à un point situé à 419 milles marins du point terrestre des Etats-Unis le plus proche. Par ailleurs, la limite latérale du côté des Etats-Unis s'étend jusqu'à un point qui n'est éloigné que de 295 milles du point terrestre canadien le plus proche. Où est l'équilibre? Où est la symétrie? Voilà Monsieur le Président, Messieurs les juges, des questions de pure réthorique.

Nous avons déjà vu que la position des limites latérales du modèle des Etats-Unis n'a d'autre fondement que la revendication des Etats-Unis elle-même. Maintenant, Monsieur le Président, nous pouvons voir que la direction qu'empruntent ces limites latérales est entachée par le même défaut. Dans chaque cas, les critères utilisés tiennent tout simplement pour acquise la validité des prémisses. Je ne crois pas devoir m'étendre davantage sur l'évidente «circularité» de ce raisonnement.

J'en viens maintenant à mon troisième point, à savoir que les Etats-Unis ont déformé la zone soumise au critère en adoptant, dans leur modèle de base, une limite vers le large qui n'est pas appropriée. Je noterai en passant que cette question n'a pas vraiment été soulevée comme point distinct dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*. Une fois que la Cour avait fixé des limites latérales au moyen de méridiens et de parallèles tirés depuis Ras Tadjoura et Ras Kapoudia (*C.I.J. Recueil 1982*, p. 91, par. 139), la limite vers le large a été automatiquement déterminée par l'intersection de ces deux lignes à cause de l'angle d'opposition des côtes des deux Etats. Il n'en est pas ainsi dans la présente affaire. Et, comme les Etats-Unis l'ont souligné dans leur réplique, quatre options différentes ont jusqu'à maintenant été offertes à la Cour

à cette fin (par. 277.) La variété même des options disponibles ne peut que nous amener à nous interroger sur la validité de tout le processus.

Et il y a un point auquel j'accorderai une importance particulière. C'est précisément parce que les Parties ne pouvaient se mettre d'accord que le compromis a prévu le recours à un triangle. Le triangle était nécessaire parce que les Parties ne pouvaient s'entendre sur l'utilisation d'un critère spécifique comme une courbe isobathe en tant que limite vers le large pour cette phase de la délimitation. Elles ont donc adopté le triangle comme une sorte de définition conventionnelle d'une région à l'extérieur de laquelle les revendications des Parties dans ce secteur ne pourraient plus se chevaucher.

N'empêche que ce triangle, ainsi qu'on le verra, présente une importance particulière pour la solution du problème qui nous occupe. Mais revenons aux défauts intrinsèques du modèle suggéré par nos adversaires. Une fois de plus, la limite extérieure de ce modèle fait ressortir de façon non équivoque le caractère arbitraire de la construction dans son ensemble. Les Etats-Unis ont fermé le secteur extérieur au moyen d'une ligne droite joignant les points d'intersection des lignes latérales et la limite externe des zones de 200 milles marins des Parties (mémoire des Etats-Unis, p. 192, par. 312). Cette distorsion a pour effet d'englober dans la zone soumise au critère une étendue de 14 600 milles marins carrés au-delà des limites de 200 milles des Parties – toute cette superficie étant extérieure à la région à délimiter et par conséquent à la tâche qui est confiée à la Chambre.

J'en ai ainsi terminé avec les premiers trois points qui me semblent devoir suffire pour rejeter la conception même qui est à la base du modèle introduit par le mémoire des Etats-Unis, en ce qui concerne notamment ses limites latérales et vers le large. J'ajouterai comme quatrième point que les Etats-Unis ont, à tort, exclu les côtes et les eaux de la baie de Fundy. De l'avis du Canada, cette exclusion n'est aucunement justifiée ni en droit, ni dans les faits.

Je m'excuse auprès de la Chambre de devoir m'étendre quelque peu sur cette question, mais la Partie adverse semble y attacher un tel prix que je me vois obligé de montrer à la Chambre pourquoi la position qu'on a adoptée sur ce point de l'autre côté de la barre est dénuée de tout fondement.

Plutôt que de mesurer les côtes en s'appuyant sur la géographie physique, les Etats-Unis voudraient en effet représenter toutes les côtes de la baie de Fundy par une seule ligne droite tirée en travers de son entrée (contre-mémoire des Etats-Unis, par. 307). Par conséquent la longueur naturelle des côtes de la baie de Fundy se trouve réduite à la longueur de cette ligne artificielle. Bien entendu les calculs de la proportionnalité en résultant en sont inévitablement affectés. Une fois de plus, ce qu'on demande à la Chambre c'est bel et bien que le *test* de l'équité se fasse sur la base de fictions et non pas en rapport avec la réalité des lieux. Ainsi, après avoir vainement essayé de refaire la géographie en éliminant la Nouvelle-Ecosse en tant que presqu'île, la Partie adverse essaie ici par contre de la rattacher à la côte du Nouveau-Brunswick comme si la baie de Fundy n'existait pas. Le but de l'opération apparaît au grand jour, si l'on considère que les côtes de la baie de Fundy sont environ de 250 milles marins de long lorsqu'elles sont mesurées selon le principe des façades côtières représentant leur direction générale. Or, la ligne de clôture proposée par les Etats-Unis dépasse à peine 50 milles marins. Par conséquent, l'utilisation de cette ligne réduit de 80 pour cent les côtes de la baie de Fundy, les ramenant au cinquième de leur longueur réelle.

Je pense que la position des Etats-Unis soit indéfendable pour la simple et bonne raison qu'elle fausse radicalement le géographie physique. La baie de Fundy fait partie intégrante de la région pertinente. Elle n'est ni une caractéris-

tique mineure ni une irrégularité de la côte. Au contraire, elle est formée par des façades côtières étendues et elle constitue par conséquent une composante importante de la configuration générale. Ces faits à eux seuls exigent que les côtes de la baie de Fundy ne soient pas écartées pour l'application du *test* de la proportionnalité.

La position des Etats-Unis à cet égard est d'ailleurs surprenante, voire presque inexplicable, si l'on considère le traitement qu'ils accordent à la baie de Fundy à toutes autres fins. Comme je viens de le dire, les Etats-Unis eux-mêmes reconnaissent que cette baie fait partie de la région pertinente. Ils affirment dans leur mémoire que la région du golfe est constituée d'une composante antérieure et d'une composante extérieure, et que la baie de Fundy est l'une des «caractéristiques géographiques principales» de la composante intérieure (mémoire des Etats-Unis, par. 25). Deuxièmement, la côte de la baie de Fundy, du côté du Nouveau-Brunswick, est la seule côte canadienne à l'intérieur du golfe du Maine que les Etats-Unis utilisent pour établir la direction de leur ligne dite «perpendiculaire ajustée» (*ibid.*, par. 203 et par. 301). Troisièmement, les Etats-unis tiennent le «quadruple changement» de direction de la côte canadienne, qui commence à l'isthme de Chignectou au fond de la baie de Fundy, pour l'une des caractéristiques géographiques (*ibid.*, par. 287) dont «les effets proportionnés ou disproportionnés» doivent être pris en compte en l'espèce. Enfin, et ainsi qu'on l'a déjà vu, fait révélateur entre tous, les Etats-Unis se servent du fond de la baie de Fundy pour marquer la limite orientale de leur modèle de proportionnalité. Oui, Monsieur le Président, le modèle même dont les côtes de la baie de Fundy sont exclues.

Monsieur le Président, Messieurs les juges, je ne cherche pas à impressionner la Chambre en faisant valoir les aberrations de la thèse des Etats-Unis. Ce que je veux mettre en lumière, c'est que les Etats-Unis ont reconnu que la géographie de la région du golfe du Maine ne saurait être évaluée en faisant abstraction de la configuration de la baie de Fundy. Et pourtant, la Partie adverse aimerait faire oublier tout cela, lorsqu'il s'agit de prendre le baie en considération pour la construction du modèle et par conséquent pour l'appréciation du caractère équitable de la délimitation que la Cour est appelée à réaliser. La Partie adverse voudrait ici, aussi froidement que possible, accréditer l'idée que la baie de Fundy doit entrer en jeu à toutes fins utiles, sauf *une*.

Sans doute, Monsieur le Président, nous n'avons pas la moindre difficulté à admettre que le critère de la proportionnalité soit appliqué d'une manière souple et sans rigidités non justifiées. Mais d'ici à admettre que cette flexibilité du *test* puisse parvenir à repousser hors du tableau une baie dont vous avez connu et apprécié les caractères et l'ampleur tout au long de la présente procédure, d'ici là il y a un pas énorme à franchir et ce n'est certes pas sur la base de simples affirmations plus ou moins catégoriques que l'on pourrait y parvenir.

D'ailleurs, dans la partie initiale de mon exposé – celle consacrée aux principes du droit en matière de proportionnalité –, j'avais souligné certaines idées dont on peut maintenant faire découler deux considérations d'une importance capitale.

La première est *in re ipsa*. Un *test* de l'équité doit lui-même être appliqué d'une manière qui soit équitable. Les critères adoptés doivent être appliqués également. Si une inégalité est introduite dans le *test* au départ, son application en devient inéquitable presque par définition. De toute évidence, je ne veux pas parler ici d'inégalité résultant de la situation géographique réelle: comme l'a dit la Cour en 1969, «ce n'est pas à de telles inégalités naturelles que l'équité pourrait porter remède» (*C.I.J. Recueil 1969*, p. 50, par. 91). Je veux parler d'inégalités créées arbitrairement par un artifice dépourvu de tout caractère de nécessité inhérente compte tenu des faits naturels de l'espèce.

Une ligne artificielle qui réduit de 80 pour cent un long littoral situé dans la région pertinente – et ce, même lorsqu'il est mesuré selon le principe des façades côtières – constitue précisément un artifice de ce genre. Cet artifice détruit entièrement ce que l'arrêt de 1969 dans les affaires de la mer du Nord appelle «l'équilibre nécessaire» dans la comparaison des côtes des Parties (*C.I.J. Recueil 1969*, p. 52, par. 98). De plus, et précisément pour la même raison, il est en contradiction avec les enseignements de la Cour, qui a établi en 1982 que «l'équité impose seulement de comparer ce qui est comparable» dans le contexte de la proportionnalité (*C.I.J. Recueil 1982*, p. 76, par. 104).

La seconde considération d'importance capitale est que le *test* doit être appliqué d'une manière qui reflète les éléments essentiels de la géographie. Il doit, si vous voulez bien me permettre l'expression, «réagir» à la configuration effective des côtes. C'est d'ailleurs pour cette raison que l'arrêt en l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* conclut que 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» *(ibid.)*. Ce passage de l'arrêt ne laisse aucun doute possible sur l'approche générale qui doit présider à la mesure des côtes pour l'application du *test*. En un mot, il faut mesurer les côtes réelles. Tout le reste est sans intérêt.

Assurément, il est possible de tracer des lignes droites pour mesurer les côtes selon leur direction générale. Mais ces lignes ont pour seule fonction d'évaluer la géographie en tenant compte de ses véritables proportions. La ligne de clôture des Etats-Unis poursuit un objectif et produit un résultat exactement inverse. Elle ne peut mesurer la direction générale des côtes qu'elle représente parce qu'elle se situe pratiquement à angle droit par rapport à ces côtes. Or, par définition, une ligne qui s'écarte si radicalement de la configuration réelle des côtes ne saurait apporter une mesure précise de leur étendue.

Le recours à des lignes droites pour mesurer la longueur des côtes est souvent justifié par la présence d'irrégularités mineures susceptibles d'allonger artificiellement le littoral. Mais la fermeture d'une baie ou d'un golfe d'une telle importance, et à pareille échelle, produirait exactement le genre de distorsion que la méthode est censée empêcher. Elle raccourcirait artificiellement le littoral en faisant abstraction de façades côtières importantes situées à l'intérieur de la concavité. Elle réduirait à néant la raison d'être de la méthode et, par conséquent, la validité du *test* lui-même.

Les Etats-Unis trahissent la véritable nature de leur approche lorsqu'ils suggèrent dans leur réplique que la baie de Fundy devrait être traitée comme faisant partie du «territoire terrestre du Canada» (par. 268). N'est-ce pas là encore une fois tout simplement vouloir refaire la géographie? Cette suggestion nous paraît procéder de l'idée que la baie de Fundy pourrait être assimilée au territoire de l'Etat côtier comme s'il s'agissait d'une baie susceptible d'être fermée en raison de ses caractères géographiques. Mais cette position est de toute évidence intenable lorsqu'on considère les dimensions de cette étendue d'eau. Celles-ci sont de loin supérieures aux dimensions maximales fixées dans les conventions de 1958 et de 1982 pour la fermeture des baies. Et, même dans sa partie supérieure, la baie de Fundy ne se resserre jamais jusqu'à la limite de 24 milles acceptée par le droit international.

En fait, dès 1853, un arbitrage entre la Grande-Bretagne, alors puissance coloniale, et les Etats-Unis donnait une idée de l'étendue de la baie de Fundy. Je veux parler de l'arbitrage de Washington (Moore, *International Arbitrations*, vol. 4, p. 4342) sur la question de savoir si la baie de Fundy constituait une «baie» au sens du traité de 1818 sur les pêcheries de l'Atlantique Nord-Ouest. Et l'arbitre a décrit la géographie de la région en ces termes:

« The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long. It has several bays on its coasts. 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[1]. » (P. 4344.)

« This great body of water. » Cette grande étendue d'eau. Eh oui, Monsieur le Président, Messieurs les juges, il s'agit sans doute d'une zone d'eaux d'une étendue imposante. Pour s'en faire une idée, il suffit de jeter un coup d'oeil aux trois surimpressions qui accompagnent la carte de la baie de Fundy, dans la boîte à images à côté de moi. Ces images parlent de par elles-mêmes. Il suffit de comparer la baie de Fundy d'un côté avec la zone du détroit d'Ormuz ou si vous voulez avec le golfe de Finlande ou, pourquoi pas, avec presque toute la zone envisagée par l'arrêt de la Cour dans l'affaire du *Plateau continental (Tunisie/ Jamahiriya arabe libyenne)*. Et c'est bien aux côtes d'une baie d'une telle dimension que la Partie adverse ne voudrait reconnaître qu'un seul cinquième d'effet aux fins de l'application du test de la proportionnalité. Voilà une nouvelle expression: « le cinquième d'effet ». On a jusqu'à maintenant entendu parlé dans la jurisprudence internationale d'un demi-effet, d'un tiers d'effet. Non, ici on voudrait introduire une nouvelle notion: le cinquième d'effet; mais l'étendue des côtes de la baie de Fundy fait à elle seule justice de la prétention des Etats-Unis.

Monsieur le Président, Messieurs les juges, je ne reviendrai pas ici sur d'autres objections que les Etats-Unis soulèvent dans leur contre-mémoire (par. 307) à la prise en compte de la baie de Fundy. Nous en avons déjà fait justice aux paragraphes 668 à 671 de notre contre-mémoire **(III)** et aux paragraphes 358 à 364 de notre réplique **(V)**. Nous y reviendrons si nécessaire dans notre réplique orale.

Mais je tiens à ajouter un point final sur cette question. Au cours de ces discussions orales, l'agent du Canada a déjà fait observer (ci-dessus p. 49) que les côtes de la baie de Fundy ne peuvent, de leur propre chef, donner naissance qu'à une extension vers le large très limitée. Ces côtes sont géographiquement désavantagées, et dans une grave mesure, du fait de leur concavité. Nous ne demandons pas à la Chambre de remédier à cette inéquité, car celle-ci résulte de la géographie elle-même. Mais nous ne voyons pas pourquoi il faudrait ajouter à l'inéquité en refusant de tenir compte de ces côtes pour l'appréciation de l'équité du résultat d'ensemble.

L'audience est levée à 12 h 55

---

[1] *[Traduction]* « La baie de Fundy mesure de 65 à 75 milles de large et de 130 à 140 milles de long. Ses côtes présentent plusieurs échancrures. Aussi le terme baie, lorsqu'il est appliqué à cette grande étendue d'eau, doit-il avoir la même acception que le mot golfe utilisé pour désigner le golfe de Gascogne et le golfe du Bengale, sur lesquels aucune nation n'est en droit de prétendre à la souveraineté. »

NEUVIÈME AUDIENCE PUBLIQUE (10 IV 84, 15 h)

Présents: [Voir audience du 2 IV 84.]

M. MALINTOPPI: Monsieur le Président, Messieurs les juges, à vrai dire les Etats-Unis n'ont pas su produire jusqu'à présent un seul modèle de proportionnalité qui puisse servir de mesure raisonnable, équilibrée et objective aux revendications que les deux Parties à la présente procédure ont respectivement avancées. Et même la variante la plus récente n'est pas de nature à étayer d'une manière quelconque les prétentions de la Partie adverse.

(110) (111) (184) (185) Je me réfère au modèle que l'on peut déduire des figures 24 et 25 du contre-mémoire et des figures 2 et 3 de la réplique des Etats-Unis. Il apparaît aussi à mon côté dans la boîte à images et vous l'avez dans votre dossier à la figure 110, cadre D. Les traits saillants de ce modèle se rapportent eux aussi à ceux du modèle de base que je viens d'examiner. Et nos honorables contradicteurs ont dû se rendre compte que ce modèle de base donnait, surtout vers le nord-est, une impression très nette d'exagération en ce qui concerne les portions de zones de mer artificieusement attribuées au Canada pour altérer l'équilibre du test de la proportionnalité. Ils se sont par conséquent donné la peine de soumettre ce modèle de base à une opération habile de maquillage esthétique afin de réduire cette impression désastreuse d'absence de symétrie et de déséquilibre au détriment du Canada. Qu'est-ce qu'on a fait? La Partie adverse a commencé par tracer deux lignes de base droites le long des côtes qui appartiennent aux Etats-Unis. Après tout, de telles opérations ne coûtent en réalité pas un sou, vu que les eaux cernées par les lignes de base droites tracées à l'intérieur du golfe reviendraient en tout cas aux Etats-Unis. On les déduit par contre du cadre global de la proportionnalité mais ce sont quand même des zones d'eau qui reviennent aux Etats-Unis. Cette partie de l'opération esthétique terminée – elle a ainsi éliminé les rides – l'on est passé à l'autre extrémité, c'est-à-dire à la limite extérieure du modèle vers la haute mer. Ici, la technique opératoire a été celle de créer des courbes séduisantes en utilisant comme ligne terminale la ligne bathymétrique des 1000 brasses. Voilà l'opération terminée. Mais la ruse est claire, et comme, hélas, il arrive souvent dans des opérations de chirurgie esthétique superficielles, le résultat final n'est pas de nature à donner la moindre satisfaction à celui qui aspirait à rajeunir son image.

Trêve de métaphores. La variante du modèle de base ne saurait nullement être prise en considération. Elle ne peut servir dans la présente affaire pour deux raisons essentielles qui découlent de la volonté même des Parties telle qu'elle est consacrée par le compromis. En premier lieu, nous savons fort bien – et je n'ai pas manqué de le souligner auparavant moi-même – que l'utilisation d'une ligne bathymétrique pour la détermination du point final de la frontière maritime vers la haute mer a été prise en considération par les Parties, débattue lors des négociations, et finalement rejetée. Le modèle qui constitue une variante du modèle de base des Etats-Unis n'est donc qu'une tentative de réintroduire subrepticement par la fenêtre une technique que les Parties d'un commun accord avaient chassée par la porte. En deuxième lieu, cette ligne bathymétrique des 1000 brasses se situe totalement en amont du triangle à l'intérieur duquel et selon, encore une fois, les termes mêmes du compromis la tâche de la Chambre doit nécessairement aboutir.

Voilà donc les deux raisons péremptoires qui empêchent de reconnaître à

cette variante du modèle de base une valeur quelconque dans l'effort auquel la Partie adverse est contrainte de se livrer.

IV. Les cadres de référence canadiens

Monsieur le Président, Messieurs les juges, si vous me le permettez, je voudrais maintenant demander à la Chambre de se pencher sur les deux modèles de proportionnalité proposés par le Canada dans son contre-mémoire.

Le Gouvernement canadien, pour sa part, a essayé de placer le problème sur le terrain de la prudence et de la souplesse, comme l'exige l'idée même de la proportionnalité. C'est bien là la raison pour laquelle le contre-mémoire canadien suggéra deux modèles de cadres de référence et non pas un seul (contre-mémoire du Canada, p. 296-300, par. 711-718). Dans un certain sens, ils peuvent être considérés comme équivalents ou alternatifs. Ils le sont certainement aux yeux du Gouvernement canadien. Sans doute pourrait-on avoir des préférences, dans la mesure où l'on peut estimer que l'un des modèles répond mieux que l'autre aux exigences spécifiques caractérisant une délimitation par la voie judiciaire. Mais nous avons surtout tenu à montrer à la Cour que la demande canadienne, tout autant que la frontière visée par elle, peut être largement justifiée par rapport à l'un quelconque des deux cadres de référence qui s'inspirent de critères techniques différents et qui, à la différence des modèles des Etats-Unis, sont réellement applicables d'une manière égale aux deux Parties. En termes concrets, ces deux modèles ont été construits en employant respectivement: 1) une étendue latérale des côtes des deux Etats à l'extérieur du golfe du Maine proprement dit, de manière à comparer ce qui est comparable, et 2) le triangle utilisé par l'article II du compromis comme point d'arrivée de la ligne que la Cour est appelée à tracer. Voilà les deux méthodes adoptées. Il s'agit maintenant de les justifier et de dégager les conséquences qui découlent de chaque cadre. Examinons-les séparément.

En ce qui concerne le premier modèle ou cadre de référence proposé par le Gouvernement canadien, il est maintenant reproduit à côté de moi. La version qui est au numéro 111 dans votre dossier personnel comprend aussi, en plus, les chiffres relatifs aux rapports côtes-mer dans ce modèle. La formule qui a présidé à sa conception est très simple. Tout en faisant abstraction pour le moment du triangle visé par le compromis, l'idée de base du triangle – c'est-à-dire le point d'arrivée de la frontière que l'on demande à la Cour de fixer – demeure néanmoins la même. En effet, la frontière à arrêter par la voie judiciaire à ce stade est limitée à la distance de 200 milles marins. Et, par conséquent, c'est bien cette distance que l'on pourrait adopter pour déterminer la limite extérieure du cadre de référence. D'ailleurs, même la Partie adverse ne semble pas avoir de difficultés particulières à ce sujet (paragraphe 277 de sa réplique), bien qu'une telle limite soit loin d'être correctement appliquée dans la formule élaborée par
(40) les Etats-Unis pour les besoins de leur cause (mémoire des Etats-Unis, fig. 34). Mais on peut certainement glisser sur ce point qui n'a véritablement pas d'importance.

Ce qu'il faut plutôt souligner, et ce d'une façon très nette, c'est que l'opposition entre les Parties est frappante lorsqu'il s'agit de déterminer les limites latérales du cadre de référence.

Examinons d'abord le modèle canadien, que vous voyez ici. Vous avez en réalité ici le même modèle en deux versions contenant, respectivement, le tracé de la frontière proposé par chacune des deux Parties. La conception du modèle canadien est fort simple. Il y a une «région du golfe du Maine», dont la réalité historique, économique et sociale a été établie par les collègues qui m'ont

précédé. Cette région comprend, bien entendu, le golfe proprement dit. Mais elle s'étend aussi, respectivement, au nord-est et au sud-ouest. D'une manière approximative, mais néanmoins raisonnable, les limites latérales de la région peuvent être situées à Lunenberg, en Nouvelle-Ecosse, et à Newport, dans le Rhode Island. L'adoption de pareilles limites latérales permet *ictu oculi* de comparer des éléments assurément comparables. Le cadre est bien équilibré, si ces limites latérales sont tracées sur la mer en utilisant la projection perpendiculaire à la direction générale des côtes pertinentes. Contrairement à la méthode de nos amis américains, cette direction générale a été établie selon les données géographiques de la région pertinente – c'est-à-dire dans le cadre des côtes qui sont juridiquement pertinentes. Je renvoie la Chambre à la description technique de cette méthode au paragraphe 713 du contre-mémoire canadien **(III)**. Nous avons, quant à nous, toute confiance dans la validité de nos données techniques car après tout il ne s'agit pas seulement que de données; et nous faisons une confiance totale à la Chambre à cet égard aussi.

Quant à la Partie adverse, elle se méprend en prétendant, au paragraphe 282 de la réplique des Etats-Unis **(V)**, nous adresser un reproche d'ordre général quant à notre manière de concevoir les limites latérales du cadre de référence. En effet, ce passage de la réplique nous reproche d'employer à cette fin des méridiens et des parallèles. On verra dans un instant pourquoi pareil reproche n'affecte pas notre modèle basé sur le triangle. Mais, en ce qui concerne le modèle basé sur la région du golfe, le reproche est totalement à côté de la question, vu que le modèle canadien ne fait point usage ni de méridiens ni de parallèles. Il s'agit donc probablement, à cet égard, d'un tout petit moment de distraction des auteurs de la réplique des Etats-Unis...

Monsieur le Président, Messieurs les juges, j'attire l'attention de la Chambre sur les rapports côtes-mer indiqués dans ce modèle et que vous trouvez dans
(76) votre dossier au numéro 111 (contre-mémoire du Canada, fig. 51). Ces chiffres démontrent, comme je l'ai d'ailleurs souligné, que la ligne canadienne produit un résultat proportionné dans la partie intérieure – à vrai dire, la revendication canadienne est même fort modeste dans ce secteur. Mais ces chiffres démontrent aussi que la ligne canadienne produit également un résultat proportionné dans la partie extérieure. Ainsi que je l'ai fait valoir tout à l'heure, les côtes qui bordent le secteur extérieur présentent un équilibre tel que n'importe quel modèle de proportionnalité, pourvu qu'il soit objectif et appliqué de façon raisonnable, démontrera le caractère proportionné du résultat produit par la ligne canadienne. J'invite la Chambre à prendre connaissance des rapports numériques indiqués à la colonne 2 du tableau. Et lorsqu'on combine les chiffres donnés pour les deux secteurs, le résultat global – porté à la colonne 3 – démontre lui aussi le bien-fondé de la position canadienne.

Avec la permission de la Chambre, Monsieur le Président, je me propose
(77) d'examiner maintenant le deuxième modèle canadien qui se trouve à la figure 52 du contre-mémoire canadien – qui est également reproduite ici dans la boîte à images et qui constitue le numéro 112 de votre dossier. Encore une fois, la version qui est entre vos mains contient les chiffres pertinents.

Pourquoi a-t-on suggéré dans le contre-mémoire canadien d'utiliser le triangle décrit à l'article II du compromis pour bâtir un cadre de référence pour le *test* de proprotionnalité? La réponse découle des considérations qu'on a exposées lors de l'examen de la jurisprudence internationale. Le rôle de la proportionnalité est tout à fait particulier dans une délimitation par voie judiciaire – et, par conséquent, contentieuse. Les choses en vont autrement dans l'hypothèse d'une délimitation consensuelle. Les Parties demeurent toujours libres de déterminer le tracé de la frontière de manière conforme à leur volonté commune. Cela peut

s'imaginer. N'empêche que le triangle, en tant que disposition « technique », n'est pas seulement un miroir qui réfléchit les revendications des Parties telles qu'elles s'étaient cristallisées lors de la signature du compromis. Le triangle représente une définition convenue de la zone maximale de chevauchement à l'extrémité de la frontière qui doit être établie au cours de la présente étape de la délimitation. Il y a plus. Le triangle est un point d'arrivée « nécessité », c'est-à-dire un point auquel la frontière doit nécessairement arriver. La Cour ne peut tracer la frontière maritime qu'en aboutissant à l'intérieur du triangle. Il est simplement impensable qu'un élément aussi essentiel ne soit pas en même temps le point de repère extérieur le plus légitime pour la définition d'un cadre de référence de la proportionnalité. Le triangle est ainsi l'un des éléments clés de la présente affaire. Plus précisément encore, d'après le Gouvernement canadien cette limite extérieure du modèle coïncide avec l'hypoténuse du triangle et il convient de rappeler à cet égard que les frontières demandées respectivement par l'une et l'autre des Parties terminent en effet immédiatement au-delà de cette hypoténuse.

Les Etats-Unis critiquent également ce modèle parce qu'il fait appel à des méridiens et à des parallèles pour définir la zone soumise au *test* de la proportionnalité (réplique des Etats-Unis, par. 282). Et ils laissent entendre que, si la Cour a utilisé une technique analogue dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, c'est uniquement parce que les lignes en question étaient « à peu près perpendiculaires » à la direction générale des côtes pertinentes *(ibid.)*. Mais en réalité, l'arrêt ne fait pas état d'un tel raisonnement, ni implicitement ni explicitement. La Cour a simplement dit que ces lignes avaient l'avantage de la commodité cartographique et qu'elles fournissaient une base permettant de comparer ce qui est comparable (*C.I.J. Recueil 1982*, p. 91, par. 130). Autrement dit, qu'elles apportaient un équilibre juste et raisonnable. Ce sont ces mêmes qualités qui se retrouvent à mon sens dans le modèle canadien que je viens d'illustrer, et c'est ce même esprit qui a présidé à sa construction.

Les objections soulevées par les Etats-Unis à ce modèle canadien sont par conséquent mal fondées. Il suffit d'ailleurs de lire la critique que les Etats-Unis font de ce modèle dans leur réplique pour se rendre compte que leur principal reproche tient tout simplement à ce que ce modèle aboutit à un résultat qui leur est défavorable. Ce résultat apparaît dans les rapports indiqués au tableau qui accompagne le modèle dans votre dossier. Ceux-ci confirment le résultat dont j'ai déjà discuté dans le contexte du premier modèle présenté par le Canada. Et ils viennent confirmer la disproportion véritablement saisissante qui entache la revendication des Etats-Unis.

Mais il est désormais temps de conclure sur la question des modèles. J'ai la faiblesse de croire qu'il convient, à ce stade de la procédure, de mettre de côté les paroles pour laisser parler les cartes. Vous voyez donc à côté de moi les quatre modèles correspondant aux conceptions qui opposent les Parties lorsqu'il s'agit de déterminer un cadre sérieux et valable de référence pour les besoins du *test* de la proportionnalité dans la présente affaire. Vous voyez notamment au niveau supérieur les deux modèles établis par le Canada. Au niveau inférieur, figurent par contre le modèle de base des Etats-Unis et sa variante principale. Il s'agit maintenant de choisir, parmi eux, celui qui apparaît, dans les circonstances et les conditions du cas d'espèce, comme le plus raisonnable ou plutôt, pour être encore plus précis, comme le moins déraisonnable. Monsieur le Président, je n'ai pas la moindre difficulté à admettre, quant à moi, que dans toute affaire judiciaire les Parties, de parfaite bonne foi, essaient de tirer profit dans la façon de présenter leurs arguments. En général, chacun cherche à les élaborer ou cherche à faire leur présentation dans l'optique et dans le cadre – ce dernier n'étant certes pas ici hors de propos... – qui s'adaptent le mieux aux besoins de

sa propre cause. Il y a évidemment des limites, au-delà desquelles l'on tombe dans l'arbitraire. Mais ici la question ne nous oblige pas d'aller, dans nos appréciations, jusque-là.

En réalité, il suffit ici de faire une simple comparaison entre les diverses méthodes et les différents résultats. La Cour me permettra de rappeler pourquoi le Gouvernement canadien, en même temps et avec les mêmes effets, a tenu à développer deux modèles alternatifs. Dans la conception du Gouvernement du Canada, pareille méthode devrait montrer que ce que l'on recherche c'est un cadre juridique pour une évaluation fondée sur l'équité du résultat, et non pas une formule géométrique pour des petits calculs ou des « nice calculations ». Ce qui importe à ce stade, c'est la recherche de l'équilibre et du raisonnable. Mais c'est aussi – et surtout – le rejet du déséquilibre et du déraisonnable. Voilà l'objectif dont doit s'inspirer le choix d'un cadre de référence, si la proportionnalité est censée permettre d'évaluer le caractère équitable du résultat d'une délimitation maritime. Vous avez, Monsieur le Président, Messieurs les juges, devant vous quatre hypothèses de cadres de référence. Les deux modèles canadiens me semblent répondre à la conception et à la fonction que je viens d'indiquer. Peut-on dire vraiment de même des cadres si chers à nos honorables contradicteurs? Voilà la question qui est devant la Chambre.

V. Les autres *tests* de l'équité

J'en viens à la dernière partie de mon exposé, celle qui a trait à d'autres *tests* possibles de l'équité du résultat d'une délimitation maritime. Si j'ai consacré la plus grande partie de mon exposé à l'examen du critère de la proportionnalité en tant que mesure du caractère équitable du résultat d'une démarcation maritime, c'est parce que la jurisprudence internationale jusqu'ici a mis un accent particulier sur ce *test* de l'équité. Mais on a vu également que tout le droit en la matière est en voie d'application progressive au fur et à mesure que des questions *concrètes de délimitation se présentent devant des juridictions internationales.* Il serait par conséquent erroné que de qualifier la proportionnalité comme le seul *test* de l'équité. C'est d'ailleurs dans ce sens que le Gouvernement du Canada, dans ses écritures (voir en particulier contre-mémoire du Canada, par. 719-722), a cru opportun de poser la question de savoir si, à côté de la proportionnalité, d'autres critères ne pourraient entrer en jeu dans un cadre global d'appréciation du caractère équitable d'une démarcation maritime déterminée.

En posant pareille question, le Gouvernement du Canada a eu surtout à l'esprit le rôle qu'il faut reconnaître, dans un tel exercice, à la conduite des parties. Cette optique n'est pas seulement due aux particularités du cas d'espèce, où – et ainsi que mes distingués collègues l'ont démontré au fil de leurs plaidoiries – la conduite des Parties est amenée à exercer un rôle beaucoup plus étendu que nos adversaires n'aimeraient l'admettre. Il y a, au fond, une raison juridique beaucoup plus générale sur laquelle je me permets d'attirer l'attention de la Chambre.

Nous savons tous que le principe de base retenu par la nouvelle convention sur le droit de la mer de 1982 pour la délimitation des espaces maritimes au-delà de la mer territoriale est constitué par l'accord mutuel aboutissant à un résultat équitable. L'accent qui est mis sur le caractère consensuel de la délimitation reflète d'ailleurs la pratique des Etats. Leur préférence pour ce règlement consensuel est telle que, faute d'accord immédiat quant au fond, les Etats ont souvent choisi la voie judiciaire, mais seulement pour demander au juge d'arrêter les règles et principes applicables.

Dans de tels cas, il appartiendra aux parties de traduire par la suite ces règles

et principes par un accord mutuel et de délimiter ainsi matériellement leur frontière maritime. Néanmoins, l'équité du résultat demeure ici encore l'un des éléments qui, selon la jurisprudence désormais traditionnelle, seront parmi les règles et principes indiqués par le juge aux parties et que les parties devront à leur tour appliquer dans la délimitation concrète.

Il en est évidemment de même lorsque les parties demandent au juge de procéder directement à tracer la frontière ainsi qu'elles l'ont fait dans la présente affaire. Ainsi, dans aucune de ces trois hypothèses formellement différentes – accord mutuel entre les parties, accord consécutif à la détermination des règles et principes par le juge, délimitation de la frontière directement par la voie judiciaire –, on n'échappe ni à la condition fondamentale du caractère intrinsèquement équitable du résultat final ni au rôle de la conduite des parties.

Il s'ensuit qu'en l'état actuel du droit des délimitations maritimes il y a un lien caractérisé et caractéristique entre la conduite des parties et l'équité d'un certain résultat. Qu'il s'agisse de manifestations de volonté ou de comportements concrets, les Etats ne peuvent pas ignorer que par leur conduite ils contribuent à établir, dans le domaine de leurs relations maritimes, des unités de mesure – des «paramètres», comme le disait si justement il y a quelques jours mon ami érudit, *my learned friend*, le professeur Bowett – pour apprécier ce qu'ils considèrent comme raisonnable, approprié, équitable dans cette matière.

Peut-on parler, dans des circonstances pareilles, de véritables présomptions, ou, si l'on veut, de présomptions *de facto*, quant à l'équité d'une délimitation de frontière qui suit *en principe* – et je souligne, en principe – des lignes de démarcation pour lesquelles des préférences communes se sont manifestées entre les parties et/ou qui ont été *de facto* utilisées par les Etats intéressés? Je crois que la question théorique demeure, en tant que telle, probablement ouverte. Mais une chose me paraît certaine. Même si l'on préfère de ne pas parler ici dans la présente affaire de présomptions aux sens formels de l'expression, il y a dans tout et chacun de ces éléments une accumulation impressionnante d'indices que l'on ne saurait oublier. Ces éléments ne sont pas étrangers à une délimitation maritime. Le lien est trop évident pour qu'on cherche à le nier en affirmant, aussi froidement que possible, que les relations maritimes entre deux Etats se déroulent à l'intérieur de compartiments étanches.

Le problème ainsi posé sur le plan théorique ne manque pas d'applications concrètes dans la présente affaire. Ainsi, si l'on se souvient notamment des deux idées-forces de l'exposé de mon collègue et ami M. Bowett, l'on peut aisément y trouver la confirmation de mon raisonnement. En premier lieu, nous avons l'accord de 1979 sur les ressources halieutiques de la côte est, un accord qui n'est jamais arrivé au vote du Sénat de Washington, mais qui avait été recommandé par le président Carter comme ayant abouti à certaines solutions *«in a way which is fair to both Parties»*. En deuxième lieu, nous avons tout l'ensemble des circonstances relatives à la distribution des permis et des concessions pétrolières et gazières qui non seulement respecte la ligne d'équidistance comme séparation des intérêts nationaux, mais qui est en effet fondée sur l'idée d'une ligne médiane. Ainsi donc, dans chacun de ces deux cas, un jugement de valeur a bel et bien été porté par les Parties elles-mêmes. Les solutions envisagées et/ou pratiquement appliquées ont été considérées raisonnables, appropriées, en un mot: équitables. Ce sont bien ces circonstances que l'on ne saurait ignorer si la tâche du juge est aussi celle de s'assurer de la manière la plus complète et satisfaisante que l'application des règles et principes de droit aboutit à un résultat équitable.

Mais plus important encore que chaque différent critère d'appréciation de l'équité d'un même résultat, c'est surtout la convergence éventuelle des différentes données. Et c'est précisément dans cette optique que d'après le

Gouvernement du Canada l'on peut parler d'une pluralité de critères de l'équité dans l'affaire de la délimitation maritime du golfe du Maine.

Monsieur le Président, Messieurs les juges, si l'on considère le *test* de l'équité dans la présente affaire comme un ensemble qui n'est pas limité au seul critère de la proportionnalité, tout se tient. Bien entendu, tout se tient autour de la demande du Governement canadien. Par contre, rien ne se tient plus si l'on se place de l'autre côté de la barre. Le noyau de ma plaidoirie et de ma conclusion est bien là: dans l'opposition entre la cohérence globale de la position canadienne au point de vue de l'équité du résultat demandé et les contradictions qui s'enchevêtrent par contre dans les méandres des arguments de nos adversaires et qui doivent conduire, j'en ai toute confiance, au rejet de leur demande.

ARGUMENT OF MR. LEGAULT

AGENT FOR THE GOVERNMENT OF CANADA

Mr. LEGAULT: Mr. President, distinguished Judges.

You have now heard Canada's case. It is, in the end, a simple one. Out of the treaty law; out of the general principles common to the law of the continental shelf and the law of the exclusive economic zone; out of the geographical and non-geographical circumstances of the Gulf of Maine area; out of the history of the dispute and the conduct of the Parties; out of the parity of interests of Canada and the United States in relation to Georges Bank; out of all of this, there emerges a simple, reasonable and time-honoured solution: the use of the equidistance method, not as a matter of blind juristic inevitability but in compliance with the fundamental norm of maritime delimitation applied in the context of a single maritime boundary.

I said in my statement last week that the evolution of this dispute reflects the evolution of the law of the sea. It began with the continental shelf and later extended to the water column as well, so that today it encompasses all the resources of the 200-mile zone now recognized in international law. And the concept of a single maritime boundary referred to in Article II of the Special Agreement (I, p. 10) is itself the outcome of this evolution.

It is because of the concept of the single maritime boundary that this case will break new ground in international law. It is here that the challenge really lies in legal terms. And the challenge can be met, because the starting-point is clear, and the path to an equitable result is well marked with common denominators provided by the law, and common indicators left by the Parties themselves.

The law applicable to a single maritime boundary within the 200-mile limit must take as its starting-point the principles that are common to the forms of jurisdiction in issue. As we see it there are 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.

Equity within the rules is the fundamental norm originally formulated by the Court in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, pp. 48-49, para. 88) and codified in the delimitation articles of the 1982 Law of the Sea Convention (Arts. 74 and 83) as the common basis for the delimitation of both the continental shelf and the exclusive economic zone. And, as the *Anglo-French* award made clear, the idea of equity within the rules is the source and object of the equidistance-special circumstances rule of Article 6 of the Continental Shelf Convention (paras. 69 and 75). This idea accordingly provides the essential bridge between the law of the continental shelf and the law of the exclusive economic zone; between the conventional and the customary law of delimitation; and between the old and the new law of the sea. And it imposes a double condition that a legal delimitation must satisfy. Thus, the delimitation must be based upon international law, which means that it must respect whatever treaty rules are applicable, and respect as well the basis of title and the legal content of the jurisdiction in question. And at the same time the delimitation must give an equitable result in the particular circumstances of the case.

As formulated in the new Convention on the Law of the Sea, the idea of equity within the rules calls for an equitable solution on the basis of international law.

This reference to international law implies a second idea, which in turn indicates the source from which more specific criteria can be derived. This second idea lies in the basis of coastal State title. More precisely, it lies in the concept of geographical adjacency measured from the coast.

This concept of geographical adjacency measured from the coast is also common to both the continental shelf and the exclusive economic zone. It is inherent in the equidistance-special circumstances rule of Article 6 of the Continental Shelf Convention. And it has been given its most concrete manifestation in the "distance principle" as the sole basis of title to the 200-mile zone in respect of the water column, and as an important element of the basis of title to the continental shelf.

This general framework provides important guidelines for the determination of a single maritime boundary. It is built upon the common elements inherent in the various forms of jurisdiction that international law now accords to coastal States beyond the territorial sea. It incorporates a substantial continuity with the legal principles developed for the continental shelf as an independent régime. For, as I have just pointed out, it reflects the principles that underlie the equidistance-special circumstances rule of Article 6. But at the same time, this general framework provides a setting within which the new developments in the law of the sea can receive their full expression. It accommodates the expanded legal content of the jurisdiction of the coastal State, which requires that a broader range of relevant circumstances be taken into account in the final balancing-up to achieve an equitable result. And it allows for the required emphasis on the distance principle as the basis of title to a 200-mile zone of jurisdiction. For it must not be forgotten that the title of the coastal State is not conferred but simply *confirmed* by the process of delimitation.

The legal basis for the determination of a single maritime boundary rests upon these twin pillars of equity within the rules and geographical adjacency measured from the coast as the basis of coastal State title.

Against this background, Mr. President, I shall return very briefly to the concrete elements of the Canadian case. The Chamber will recall that in my statement last week I identified three elements in the form of three specific principles that will produce an equitable result within the law in the factual circumstances of this case. The first is what I have called proximity in a general sense – proximity not to some isolated point but to extensive stretches of abutting coast, assessed and appreciated with due regard to the effect of special, incidental geographical features. This principle is grounded equally in the equidistance-special circumstances rule of Article 6, and in the distance principle as the basis of coastal State title to a 200-mile zone.

An equitable result must be one that takes account of the physical geography, and it must also be consonant with the real interests at stake. The second specific principle of Canada's case, therefore, is that the boundary should allow for the maintenance of established patterns of fishing that are of vital importance to coastal communities within the relevant area. It calls, in short, for the recognition of the established interests of coastal communities in the marine resources off their shores. As our pleadings have stressed, this factor is central both to the object and purpose of a 200-mile zone, and to the particular factual circumstances of this case. And it is therefore entitled to a particular weight in the final balancing-up.

Finally, the Canadian case is based on the principle that the single maritime boundary should respect the indicia of what the Parties themselves have considered equitable as revealed by their conduct. As we have shown, this aspect of our case extends to both the continental shelf and the fishery. And it takes two

forms. First, it is founded upon acquiescence or estoppel as these concepts are understood in general international law, as a source of vested rights with which the single maritime boundary should be compatible. And secondly, the conduct of the Parties provides objective and precise evidence of the nature of an equitable result within the context of the fundamental norm of maritime delimitation.

The Canadian claim therefore takes into account and gives effect to both the physical geography and the other relevant circumstances of this case. What I would like to address in my concluding remarks, Mr. President, distinguished Judges, is the interrelationship of these various categories of relevant circumstances.

We have pointed out that Canada's fishery on eastern Georges Bank is based in the coastal areas that are adjacent to this part of the sea, and is in fact an expression and a practical consequence of the physical geography. Its close connection with geographical adjacency as a basis of title is therefore clear. And the same holds true for the indicia of equity derived from the conduct of the Parties. For example, the 1979 Agreement on East Coast Fishery Resources. Its provisions regarding the joint management and sharing of the fishery resources of Georges Bank reflect not only Canada's traditional interest in these resources, but also Canada's geographical situation and its legal interests as a State with a very substantial coastline adjacent to Georges Bank.

And so too with the continental shelf. For the acquiescence of the United States in Canada's use of the equidistance method during the 1960s took place not in a vacuum but within a definite legal and geographical context. And it reflects not only the fact of Canada's proximity to the areas concerned, but also a recognition that this proximity is in relation to an extensive coastal area that could not possibly be disregarded or dismissed as a "special circumstance".

Every category of relevant circumstances on which we rely, both physical and human, therefore reflects a single integrated pattern. Every one of them reveals the close association that links the maritime areas under Canadian claim to Canada's coasts and Canada's territory. Every one of them confirms Canada's legal interests as a coastal State in relation to these maritime areas. In other words, every one of them reflects the *appurtenance* of these areas to Canada. Every one of them calls for the use of the equidistance method, with due regard to the distorting effects of incidental special features. Only in this manner will it be possible for the Parties to meet half-way without "splitting the difference".

Mr. President, distinguished Judges, I conclude my final statement in the first round of the Canadian oral pleadings by formally affirming Canada's Submission as set out in Canada's Memorial, Counter-Memorial and Reply. I hope we have been able to state our case clearly. I hope we have made a contribution that will assist the Chamber. I hope we have not forgotten that we are not only servants of Canada, but servants of the law as well. I thank the Chamber on behalf of my Government and my delegation for the patient and attentive hearing you have given us. I thank my distinguished friends and colleagues from the United States for their attention too, and once again I emphasize that I look forward to hearing their views on the matters we have raised.

The Chamber rose at 3.58 p.m.

TENTH PUBLIC SITTING (11 IV 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

ARGUMENT OF MR. ROBINSON

AGENT FOR THE UNITED STATES OF AMERICA

Mr. ROBINSON: Mr. President, distinguished Judges, may it please the Chamber: it is a great honour and a personal privilege to appear before the Chamber as the Agent of the United States of America in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*. This is one of those rare moments that comes to few attorneys and for this opportunity, I wish with your permission to express my gratitude to those who are responsible for my presence here today.

Within the Executive Branch of the United States Government, the Department of State has the responsibility of representing the United States before international tribunals. As the Senior Attorney advising the Secretary of State, and, through him, the President of the United States on matters of international law, it has been my good fortune to have been appointed by the Secretary of State as the Agent of the United States in this case. In the discharge of that responsibility, it is a signal honour to have the opportunity to appear before the Chamber in this case of the highest national importance to the United States.

With your permission, Mr. President, the United States will now present an introductory statement to its oral argument in this case.

The United States of America has long supported the rule of law in international relations. It is a serious step for any nation to submit its sovereign territorial rights to binding decision by third-party dispute resolution, and the United States presence before this Chamber constitutes a significant act of faith in the rule of law.

This case brings before the Chamber two very close neighbours, allies and indeed friends. As such, it is appropriate that the United States salute those distinguished counsel who are representing Canada before the Chamber. As a personal matter, I wish to extend special greetings to my counterpart, the distinguished Agent for Canada, His Excellency Ambassador Leonard Legault, Legal Adviser to the Department of External Affairs, and to thank him for the spirit of co-operation that has been so instrumental in bringing both our great countries before the Chamber. Although the gulf between our two nations on many of the issues in this case is great, and although the United States will argue its cause with conviction, the two Agents are committed to maintaining that *spirit of co-operation in the conduct of these oral proceedings.*

The close relations that have developed between the United States and Canada over many generations have not been without incident or, as the Agent for Canada so eloquently put it, without ripples in the stream. The warm relations between the two countries have been troubled by a long history of boundary and fishery disputes that extends back to the establishment of the United States of America as an independent republic. These disputes often have been protracted and difficult to resolve. The opposing boundary claims in this case have aroused and preoccupied diplomats, legislators, and others in both

countries since Canada planted the seeds of the dispute through a series of unilateral measures beginning in the mid-1960s. The United States believes that these Canadian measures were contrary not only to the spirit and letter of the Truman Proclamation issued almost 20 years earlier, but also to the foundation of our close relationship. Thus, on occasion, one or another of the ripples in the stream has threatened to become a lasting eddy that could disturb the overall steady course of our relations.

Fortunately, the United States and Canada also have a long history of settling their disputes peacefully, through good faith negotiations or third-party dispute resolution. The United States and Canada are proud that ours remains the longest demilitarized boundary in the world. The two nations previously have submitted disputes to international adjudication, particularly those relating to boundaries and fisheries. Thus, placing this major case before the Chamber is in keeping with a tradition to which both nations attach overriding importance. We should note that this is the first time that our two nations jointly have submitted a dispute to this supreme judicial authority.

In the United States, the intense concern with this case stems largely from historical American links with Georges Bank. United States fishermen have fished significantly on Georges Bank since the 1820s. A rich folklore developed surrounding the exploits and the daring of these brave New Englanders. For almost a century and a half, it was, with few isolated exceptions, United States vessels alone that fished the waters over Georges Bank. During this period, especially in New England, the fisheries of Georges Bank were, to use a rather common American metaphor, considered by many citizens to be as "American as apple pie". In brief, Georges Bank has been closely connected with the United States for a long time. As could be expected, Canada's aspirations regarding the northeast portion of Georges Bank provoked a strong response, not only in New England, but also in the corridors of Washington.

Canada asserts in this case that its modified equidistant boundary would protect Canada's fisheries on Georges Bank without serious injury to the United States. That is simply not so. The United States has had an important fishery on the northeast portion of Georges Bank continually since the 1820s and it would be a great blow to lose it, particularly since the United States no longer has access to its once traditional fisheries off the Canadian coasts of Labrador, Newfoundland and Nova Scotia. The United States has since 1978 adjusted to the termination of its fisheries in those areas; however, Georges Bank is another matter entirely. Georges Bank is the last great American fishery in the northwest Atlantic which Canada now proposes to annex on the primary basis of one comparatively recent scallop fishery.

The United States recognizes that any boundary that the Chamber will delimit in the Gulf of Maine area will adversely affect one group of fishermen or the other. The Chamber cannot avoid that consequence of its decision. The United States believes that a decision based on law can only reach one equitable solution in the relevant circumstances of this case, and that solution is confirmation of United States jurisdiction over all of Georges Bank.

The United States seeks here a just decision. We seek a judgment that, in the words of Article II of the Special Agreement (**I**, p. 10) between the United States and Canada, is "in accordance with the principles and rules of international law applicable in the matter as between the Parties". We are confident that a decision in accordance with law in this case will re-enforce the commitment of the United States to the International Court of Justice. The United States further believes that a decision in this case on the basis of the rule of law will serve the broader interests of the community of nations at large.

Although under the Special Agreement the Chamber is only requested to delimit the single maritime boundary in the Gulf of Maine area, the United States believes that this case has broader significance. This is the first case in which Rule 26 (2) of the Statute of the Court has been invoked for the formation of a Chamber. This is also the first case to determine a single maritime boundary, delimiting the continental shelf and the 200-nautical-mile fishing zone. Under Article III of the Special Agreement, once this boundary is set, neither Party shall "claim or exercise sovereign rights or jurisdiction for any purpose over the waters or sea-bed and subsoil" on the other side of the boundary. Thus, the boundary between the Parties as determined by the Chamber will delimit all sovereign rights and jurisdiction that are currently or may in the future become recognized in international law. Accordingly, and contrary to Canada's assertions, there is more at stake in this case than simply the resources of the northeast portion of Georges Bank.

As a result of these considerations, it goes without saying that the United States and its people do not seek in this case any decision that amounts in substance or perception to a compromise or a judgment that splits the difference. The United States is here, before the Chamber, in the search for justice and right. The United States is convinced that by every rule and principle rooted in the law that is applicable to this case, it is entitled to the entirety of Georges Bank. Moreover, the United States believes that any other boundary will perpetuate a major irritant in United States relations with our friend, Canada, that can only become more serious as time passes.

Overview

Mr. President, distinguished Judges, with that brief review of the broader significance of this case as seen by the United States, we now shall turn, with your permission, to a United States overview. Although the pleadings of the Parties have been lengthy, the issues on which this case turns are, in our view, few and straightforward. We have heard nothing in the first round of the Canadian oral presentation that would cause us to change our position on this point. With your permission, this introductory overview is divided into the following four parts:

First, a brief history of the dispute between the Parties, including a discussion of the Special Agreement and several Canadian interpretations of that Agreement that the United States believes are misguided.

Second, two examples of why the United States regards some aspects of Canada's case as being based on erroneous statements of fact.

Third, a summary review of the reasons why the United States believes that it is entitled to Georges Bank in its entirety.

Fourth, a general description of the relevant geography in the Gulf of Maine area and of the boundary proposed by the United States in this case.

Before the Chamber is a package of five charts to which I shall refer during this introductory presentation, as well as a binder to hold the packages of illustrations to which I and my colleagues shall be referring in this and subsequent statements. For ease of reference, the United States will also be presenting large-scale versions of the same illustrations on the easel to my right. With your permission, Mr. President, I shall be assisted in this endeavour by two of my colleagues, Messrs. Ray Meyer and Jonathan Olsson.

I. History of the Dispute between the Parties

Mr. President, distinguished Judges, the United States, with your permission, now turns to a brief history of the dispute between the Parties.

This history, as it relates to the continental shelf, begins with the issuance of the proclamation relating to the continental shelf by President Truman in 1945. With regard to fishery rights, the dispute took seed when Canada first began to fish significantly on Georges Bank in about 1960. The fishery dimension of the dispute became acute more recently with the extension by the two Parties, in 1977, of their respective exclusive fishing zones to 200 nautical miles.

Continental Shelf

The Truman Proclamation on the Continental Shelf is well known to the Chamber. Of great significance to this case, the Truman Proclamation specifically provided as follows:

> "In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles." (II, United States Memorial, Ann. 3.)

The International Court of Justice, in the *North Sea Continental Shelf* cases, referred to the Truman Proclamation as having "a special status" (*I.C.J. Reports 1969*, para. 47). The Court went on to say:

> "Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation, however, soon came to be regarded as the starting point of the positive law on the subject . . ." (Para. 47.)

The International Court of Justice also said that the

> "two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject" (para. 47).

Subject to these provisions, the Truman Proclamation established for the United States its exclusive jurisdiction and control over the natural resources of the sea-bed and subsoil of the continental shelf off the coasts of the United States.

The United States consulted with its neighbours, including Canada, before the Proclamation was made public by the President in 1945. During these consultations, the United States specifically transmitted to Canada through diplomatic channels a draft of this Proclamation, together with a draft proclamation dealing with fisheries (United States Memorial, Ann. 3). Included with these drafts were papers containing detailed explanations of the proposed United States policies that were to be proclaimed by the highest executive official of the United States Government.

Neither Canada, nor any of the other governments consulted, objected to the proposed statements of policy, and on 28 September 1945, President Truman issued the two proclamations. The United States thereafter formally transmitted both proclamations and an accompanying press release to Canada. The press release generally described the United States continental shelf as an area of 750,000 square miles of "submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 ft.) of water" (*ibid.*,

Ann. 3). That 1945 description of the United States continental shelf plainly included all of Georges Bank.

As noted, the Truman Proclamation took the position that the boundaries of the continental shelf with neighbouring States would be determined by agreement in accordance with equitable principles. Canada thus specifically was placed on notice from 1945 forward that any unilateral steps by Canada within the 100-fathom line off the coast of the United States would be unacceptable *a priori* and *ab initio* in the absence of agreement with the United States.

For many years, the Truman Proclamation and its accompanying material marked the only correspondence with Canada on this subject. Specifically, our research has revealed no pertinent communication on this subject between the Parties in connection with the First or Second Law of the Sea Conferences. The United States had ample reason to assume, therefore, that each of the Parties was committed to the establishment of maritime boundaries by mutual agreement.

Mr. President, there were at least three reasons why the United States saw no need to address any continental shelf boundary question in the Gulf of Maine area before Canada undertook its unilateral measures beginning in 1964. First, technological developments were required before oil and gas exploration and exploitation could be considered feasible for an offshore area such as Georges Bank. Second, in relative terms, the oil and gas resources of the continental shelf off the New England coast were not thought by the United States to be as promising as those of the Gulf of Mexico and the continental shelf off California. Third, there was an ongoing legal debate in the United States between several of the states and the federal Government concerning offshore resource rights. This question was not resolved finally in the New England area until 1975, when the Supreme Court of the United States decided the case of *United States* v. *Maine*, referred to at paragraph 94 of the United States Memorial.

Nonetheless, had the United States, in the early years following the Truman Proclamation, formulated a specific negotiating position for the boundary in the Gulf of Maine area, it is clear as a bell what the result necessarily would have been under the terms and conditions of the Proclamation and the accompanying public material. The 100-fathom contour definition of the continental shelf meant that from 1945 until the First United Nations Conference on the Law of the Sea, which brought about general acceptance of a broader concept of the continental shelf, Canada was plainly on notice that the then definition of the continental shelf, at least as widely heralded by the United States President, would have confirmed United States jurisdiction over all of Georges Bank. The Northeast Channel and much of the Gulf of Maine Basin both reach depths of more than 100 fathoms and would therefore have fallen outside of the purview of the Truman Proclamation.

(183) In the United States Reply, at Figure 1, which appears as Figure 1 in the package of maps before you, we showed charts that depicted the continental shelf as it was defined from the issuance of the Truman Proclamation in 1945 until the First United Nations Conference on the Law of the Sea in 1958. Here, in the upper left-hand corner, is a simple basemap of the Gulf of Maine and adjacent area with the sea-bed at less than 100 fathoms deep shown in blue, and with the sea-bed at greater depth shown in white. If the 100-fathom definition of the continental shelf were applied, all the blue area on the United States side of a line between the international boundary terminus and the 100-fathom depth contour would fall under United States national jurisdiction. This same

(183) perspective is confirmed by the accompanying three charts on Figure 1 before

you. At the upper right is a depiction from the seminal work of the American author, A. L. Shalowitz, entitled *Shore and Sea Boundaries*. The contours of what was considered to be continental shelf are apparent. The continuity of Georges Bank is immediately apparent. At the lower left is a chart from the 1952 book by the Dutch author, M. W. Mouton, entitled *The Continental Shelf*. At the time, this book was considered a definitive work on the physical and legal issues relating to the continental shelf and its depiction of the Gulf of Maine area also clearly shows an unmistakable interruption in the shelf at the Northeast Channel.

Here, in the lower right corner, is a chart that appeared in both the United States Memorial, as Figure 31, Annex 3, Volume I, and the United States Reply,
(183) as Figure 1. This chart was passed to Canada in 1948 through diplomatic channels (United States Counter-Memorial, Ann. 3. See also *ibid.*, para. 117). As did Professor Bowett, in his presentation on the legal relevance of the conduct of the Parties, I would ask the Chamber, in his words, "to mark the year – 1948" (p. 140, *supra*).

(183) The 1948 chart in the lower right corner of Figure 1 depicts proposed statistical areas and subareas for the International Convention for the Northwest Atlantic Fisheries that was then under consideration. The Chamber will note that one of the lines on the chart is dotted and is defined in the legend as "limit of continental shelf (100-fathom contour)". If you look at it carefully, that contour clearly defines Georges Bank, the Scotian Shelf, the Gulf of Maine Basin, and the Northeast Channel. We would ask the Chamber also to note that the proposed subarea boundary for ICNAF passed between these continental shelf areas, extending through the Gulf of Maine Basin and to the Atlantic Ocean through the Northeast Channel. Thus, under each of these charts, one of which was transmitted to the Canadian Government through diplomatic channels in 1948 during the development of the ICNAF text, the 100-fathom contour of the continental shelf would have placed all of Georges Bank under the jurisdiction of the United States in the absence of United States agreement to the contrary.

Canada was thus well on notice for an extended period that without the agreement of its friend and neighbour, Canada could not unilaterally vault the Northeast Channel to claim portions of Georges Bank, none of which is within the 100-fathom depth contour contiguous to the coast of Canada, and all of which is within the 100-fathom depth contour contiguous to the coast of the United States.

United States and Canadian Permit Programmes

Mr. President, distinguished Judges, with your permission, I would like now to turn attention to the development of the continental shelf programme of the United States in the Gulf of Maine area. It will be remembered that the United States ratified the 1958 Convention on the Continental Shelf in 1961 and became a party when the Convention entered into force in 1964. At about that time, the United States began to consider the development of oil and gas resources off its east coast. In 1960, the United States Geological Survey began issuing offshore geophysical permits to qualified applicants under the United States Outer Continental Shelf Lands Act of 1953. These permits covered large areas of the shelf. Surveys were conducted in those areas of the shelf that the applicants considered to be the most prospective for oil and gas. The geological survey does not dictate the location of these geophysical exploration activities. Pursuant to this programme, certain companies subsequently requested permits to cover all

of Georges Bank, whereas others restricted their operations to only a part of the Bank. In each instance, the geological survey granted the permit area that was requested. Leases that would confer a right to drill for oil or gas were not issued at this time because of great concern in the United States regarding the marine environment. Any such development at that time was regarded as premature.

As it happens, Canada also instituted an oil and gas development programme on the continental shelf in the 1960s. Canada issued permits for specific tracts on the continental shelf within which the permittees were granted exclusive rights to conduct exploration and the option to convert such rights into production leases. Notably, under the Canadian system, the oil companies pay relatively nominal sums for the permits, and then must compensate Canada through much larger royalties if oil or gas subsequently is discovered and produced under exclusive production leases.

In this case, Canada makes much of having issued permits that purportedly created legally cognizable proprietary rights, whereas those of the United States did not. To this day, however, none of the Canadian permits issued for nominal sums on Georges Bank has been converted to a lease and no drilling activities have been conducted. The United States therefore respectfully submits that Canada's argument is based on a distinction of form rather than substance.

In contrast to the United States handling of the Truman Proclamation, Canada neither consulted with, nor gave any notice to, the United States with regard to actions under its permit programme. Rather, Canada now seeks to build a case upon a routine exchange of correspondence between mid-level bureaucrats concerned with oil and gas matters, and not with international boundaries. This correspondence was initiated by the United States functionary, not by Canada's, and occurred after Canada already had issued most, if not all, of the relevant permits. One cannot help but find such behaviour odd when the friendly relations of our two countries and their normal channels of communications are considered. Canada's conduct was completely out of keeping with its actions in other outstanding maritime jurisdictional issues between the two Governments, such as those pertaining to the breadth of the territorial sea, to straight baselines, and to fisheries jurisdiction. Such other issues were the subject of high-ranking consultation, even at the level of the President and the Prime Minister (V, United States Reply, Ann. 2, Vol. 1).

In spite of this long history, Canada now asserts in this case that it was not until 1976 that it became aware of United States intentions to claim jurisdiction up to the Northeast Channel. This, to use a popular Canadian term in these proceedings, is "nonsense". Moreover, as early as 10 May 1968 Canada was, through diplomatic channels, provided specific notice of the unacceptability to the United States of Canada's permit programme on Georges Bank. On 5 November 1969, the United States formally protested the permits (United States Memorial, Ann. 56).

Negotiations between the Parties in 1970 confirmed that the United States thought the boundary should extend through the Northeast Channel. What is particularly startling about Canada's contention in this regard is that Canada itself never made a formal statement of claim until 1976 when it set forth the geographic co-ordinates of its original line.

The early efforts to resolve the dispute failed. As the years passed, the continental shelf dimension became submerged in a much broader dispute in which the dominant element for both of the Parties became the fisheries resources of the northeast portion of Georges Bank.

From the United States perspective, the story of the Canadian permit programme, the work requirements for which were effectively suspended long

ago, was insignificant and certainly has had little real meaning for the past 15 years. The whole affair would be no more than "much ado about nothing" were it not for the severe implications of Canada's argument in light of the Truman Proclamation and its "special status" in international law as specifically recognized in 1969 in the *North Sea Continental Shelf* cases (para. 47).

Suffice it to say that, since the 1960s, numerous diplomatic notes have been passed between the Parties protesting one or another purported exercise of continental shelf jurisdiction. Throughout it all, the United States has maintained its position, as expressed in the Truman Proclamation, that the continental shelf boundary should be established by agreement, as the need arose, in accordance with equitable principles. The United States never changed its initial position of 1945 that all of Georges Bank was assumed to appertain to the United States and that any contrary unilateral measures were unacceptable to the United States in the absence of agreement.

Mr. President, distinguished Judges, there is a final point to be made that bears on the story of the Canadian permit programme, Canada's claim of acquiescence and estoppel, and the United States outer continental shelf programme. 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. Truth to tell, the United States ultimately did not go so far as to hold lease sales in the disputed portion of Georges Bank because the United States did not want to lessen the chances of reaching an agreement with its close friend, ally, and neighbour, and surely not because the United States, as a legal matter, accepted any purported Canadian claim.

200-Mile Fisheries Jurisdiction

So far this introductory statement has focused upon the continental shelf. Throughout the period, however, large-scale fishing operations were conducted on Georges Bank. Canada entered the Georges Bank fishery at significant levels only in the early 1960s. Third countries did so at about the same time. Of course, in those days the fisheries of Georges Bank were high seas resources open to all fishermen. Under the auspices of ICNAF, efforts were made to conserve and to manage the fisheries stocks of Georges Bank and the Canadian grounds on the Scotian Shelf and the Grand Banks of Newfoundland. As time passed, these efforts became less and less successful.

A continental shelf dispute between friendly States is normally a manageable issue because shelf exploration is of such recent origin. But fisheries are another matter. As of the mid-1970s, the dispute in the Gulf of Maine area included a region developed and fished since the 1820s almost exclusively by United States fishermen and only fished significantly by Canadian fishermen for less than 20 years, and then basically for scallops.

When, in late 1975, the United States realized that its longstanding efforts to resist extension of coastal State jurisdiction to 200 nautical miles on a worldwide basis, of which Canada was a leading proponent, were to fail, the United States and Canada began a series of consultations and negotiations. At first, these related solely to the continental shelf, but subsequently they dealt with the anticipated issue of exclusive fisheries jurisdiction as well. Although there were many meetings throughout 1976, including several at the Secretarial and Ministerial level, little progress was made in agreeing on a maritime boundary in the Gulf of Maine area.

During 1976, both nations announced their intention to establish 200-nauti-

cal-mile fishing zones. By the time they did so in 1977, it was recognized that this step would add a compelling new dimension to the existing boundary dispute between the United States and Canada in the Gulf of Maine area. The statements by which the two countries first notified the public of the co-ordinates of their claimed 200-nautical-mile fishing zones contained identical provisions to the effect that the respective claimed lines of the Parties were intended specifically to be without prejudice not only to any negotiations but also "to any positions which may have been or may be adopted respecting the limits of maritime jurisdiction in such areas" (United States Memorial, Anns. 63 and 64).

Once the precise co-ordinates of the two boundary claims became public, the efforts of the United States and Canada focused upon interim fishery arrangements to provide some time for further negotiations on the boundary. Before 1976 ended, the Parties agreed to refrain from enforcing their respective laws against each other's vessels in the area between the two published positions.

In early 1977, the United States and Canada signed the 1977 Interim Reciprocal Fisheries Agreement. This short-term agreement provided for the continuation of existing fisheries at existing levels off the east and west coasts of the United States and Canada, both within and beyond the boundary regions. It was in effect a status quo agreement.

After the extensions to 200-nautical-mile jurisdiction, senior officials in both nations became convinced of the need to resolve all the boundary and fishery problems on both the east and west coasts of the United States and Canada. Thus, on 27 July 1977, the President of the United States and the Prime Minister of Canada appointed special negotiators to deal with these issues. Their mandate was to report to their Governments by 15 October 1977 on the principles of a comprehensive settlement for the four maritime boundaries and related resource matters.

The Expanded Canadian Claim

The negotiations got off to a good start. However, on 14 October 1977, while United States and Canadian officials were holding talks in Ottawa, and only one day before the reports were due under the mandate, Canada informed the United States that it intended to expand its boundary claim in the Gulf of Maine area based upon Canada's interpretation of the then recent award of the Court of Arbitration in the Anglo-French Arbitration.

Thus, in the midst of sensitive negotiations that the United States thought were directed at reaching a political resolution between close friends rather than at leading to a day in court between adversaries, Canada chose to widen the dispute rather than to narrow it.

On that occasion, Canada put forward a detailed legal analysis which as the United States written pleadings have indicated (United States Reply, para. 199), was in many instances contrary to positions which Canada previously had taken or which Canada now espouses in these proceedings. Previously, they had expressed rigid views regarding equidistance and special circumstances. Canada had gone so far as to say that the factors identified by the Court in the *North Sea Continental Shelf* cases as relevant circumstances were irrelevant to a delimitation under Article 6 of the continental shelf convention. Under Canada's previous view of the law, there were no Article 6 "special circumstances" in the Gulf of Maine area (*ibid.*, Ann. 12, p. 2).

Notwithstanding that the Anglo-French Arbitration, in the view of the United States, had clarified the law in such a way as completely to do away with Canada's theretofore considered legal views, Canada rebounded by expanding

its original claim on the theory that Cape Cod and Nantucket Island simply do not exist. On such a basis, Canada asserted entitlement to an additional 2,900 *square nautical miles of Georges Bank. The United States Government reacted* vigorously to the new Canadian claim. The United States made clear that it could not agree that the decision in the Anglo-French Arbitration justified such an expansion of Canada's position.

The 1979 Failed Agreement

After this unsettling event for the United States, the special negotiators nonetheless pressed on. However, they did not succeed in developing a comprehensive solution by the end of 1977. The 1977 Interim Reciprocal Fisheries Agreement expired, but each Government refrained from enforcing national laws against fishermen of the other while the negotiations laboured on. In April 1978, the two Governments exchanged Notes constituting a proposed 1978 interim reciprocal fisheries agreement (United States Memorial, Ann. 71), and they began to apply that agreement provisionally. However, the 1978 agreement never formally entered into force. Less than two months after the exchange of Notes, the Canadian Government decided to cease provisional application and to terminate all United States fishing off the coast of Canada.

This was not a small step. Canada thereby terminated some 200 years of fishing by New Englanders off the coasts of Nova Scotia, Newfoundland and Labrador. Over this 200-year period, slowly but surely, Canada one way or another had whittled away at the United States presence in the vast fisheries off Canada's eastern coast. Finally, in 1978, it was over. The United States and its fishermen had to adjust to the fact that they were left with only Georges Bank in the northwest Atlantic and that even then and despite all the history that had gone before, Canada had seen fit to claim the northeast portion of Georges Bank. Some Americans could not be blamed for having wondered whether Canada sought not only to have its enormous cake but to eat ours as well.

Mr. President, distinguished Judges, it is an understatement to say that the expanded Canadian claim and the termination of reciprocal fishing, when combined with the saga of the Canadian permit programme, soured the mood in various quarters of the United States towards the ongoing negotiations. While the United States special negotiator energetically carried the discussions forward with the support of the then Executive Branch of the United States Government, political support in the public and in the Congress ebbed away. Nevertheless, the two special negotiators reached agreement in March of 1979 on a package of two treaties to recommend to their respective Governments.

One proposed treaty established a régime to govern east coast fishery resources extending from Cape Hatteras to Newfoundland. The other proposed treaty submitted the maritime boundary dispute in the Gulf of Maine area to binding adjudication. Thus, the one applied to the east coast while the other *applied only to the Gulf of Maine area.*

Later in these proceedings the United States will deal in some detail with the failed 1979 east coast fisheries agreement. That 1979 proposal, like all negotiated agreements of this sort, involved factors that were quite unrelated to the legal considerations that will determine the outcome of this case. It is exactly for such reasons that too much importance cannot and must not be attached to unratified treaties. To do otherwise would have a chilling effect on the progress of seeking amicably to resolve future disputes through negotiation. At this point, we need only recall that the package of two treaties failed to obtain the necessary approval of the United States Senate.

In his opening statement, the distinguished Agent for Canada said "the Parties before the Court today are the *same Parties* that concluded the 1979 agreement" (p. 55, *supra*). Mr. President, that is an incorrect statement that fails to take into account the fact that the United States Senate did not approve the 1979 fisheries agreement. As Canada is well aware, the United States adheres to the principle of separation of powers. Under our system of government, the United States as an entity is not a party to any treaty subject to ratification that has been negotiated by the Executive Branch until that treaty has received the advice and consent of the United States Senate. Specifically, Article 2, section 2, of the United States Constitution provides that the President of the United States "shall have the Power by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur".

As is customary under our form of government, the negotiation of the 1979 fisheries agreement was carried out by the Executive Branch of the United States Government. It then became the duty of the Executive Branch to go to the Senate and present its product for the consideration and approval of the Senate. In common parlance, the Executive Branch endeavours to sell the fruits of its labour to the relevant Congressional committees and ultimately to the Senate itself. Professor Bowett asked in his presentation in Canada's opening round: "So what went wrong?" (p. 147, *supra*). The answer is that the proposed agreement, in the view of the United States Senate, so missed the mark of reflecting the rights of the United States under the new 200-nautical-mile jurisdiction, that even one of the nation's most renowned attorneys and eloquent advocates, Special Negotiator Cutler, could not persuade the Senate that the agreement was fair.

Within a few months after the proposed fisheries agreement was signed in 1979, it became apparent that the agreement would not be approved by the Senate nor implemented by the House of Representatives. Opposition to the 1979 fisheries agreement in the Congress was strong, widespread, and crossed party lines. It was exacerbated by the late attempt by Canada to expand its claim in the area. In its Reply, the United States included a number of statements made by Senators showing that they rejected the proposed fisheries agreement negotiated by the Executive Branch because it was fundamentally unfair to the United States (paras. 35-36).

Thus, for example, Senator Pell of Rhode Island, the now ranking minority member of the Senate Foreign Relations Committee, a well-known supporter of international law and legal institutions, and despite the fact that he is a member of the party of the Administration in office at the time, said of the 1979 fisheries agreement:

> "my own analysis had led me to conclude that the treaty in its present form is inequitable and should *not* be approved by the Senate" (United States Reply, Ann. 10, p. 2, emphasis added).

Similarly, when the then Deputy-Secretary of State sought to defend the fisheries agreement as necessary to prevent harm to "our vitally important bilateral relationship" with Canada, Senator Javits of New York responded:

> "We must not confuse the idea that we have to ratify a treaty which we may not consider a fair treaty just because we are friends. The Canadians would not do it, and they should not expect us to do it." (*Ibid.*, Ann. 10, p. 20.)

In opposition to the proposed agreement, it was pointed out during Senate consideration that the complicated joint fisheries management system envisioned was cumbersome, if not unworkable, and that the different fishery management

objectives and policies of the United States and Canada were likely to lead to numerous disputes under such a system, resulting in mismanagement of the stocks. Most importantly, it was emphasized that the amount of Canadian fishing permitted on Georges Bank and in the Gulf of Maine under the proposed permanent agreement was not justified by past Canadian activities since United States fishermen had dominated the fishery in those areas for over 150 years.

The central problem with the 1979 fisheries agreement was that, while the joint report of the negotiators in 1977 had called for an agreement with a termination provision, the proposed text called for a permanent agreement. Since one important rationale of the negotiations was to preserve the status quo while the final boundary was settled by negotiation or otherwise, the addition of permanence changed the whole political dynamic surrounding the proposed agreement. The concessions to which United States fishermen had agreed early in the negotiations relating to catch allocations, particularly in regard to scallops and to management, were based on the expectation that there would be a temporary agreement and not the permanent one signed by the negotiators. In addition, an important incentive for the agreement to some United States fishermen, access to fisheries in Canadian waters, disappeared as a result of the unilateral termination of United States reciprocal fishing rights in the midst of the negotiations. Political support for the agreement finally withered on the vine with the addition of the provision that it was to last forever regardless of where the boundary ultimately would be drawn. Mr. President, the United States believes that allowing a neighbour to keep his garden patch in your front yard for a little time, while you and he both decide where the fence should be built, is one thing, but to agree to it forever is quite another.

In brief, it was the Executive Branch of the United States Government that negotiated the terms of the 1979 fisheries agreement with Canada, and not the United States as a whole. That agreement did not represent the position of the United States as an entity, but that of only one branch of the Government. This proposed treaty was dead in the water before the United States Presidential elections in 1980. One of the first steps of the new United States Administration was its recommendation that the boundary dispute in the Gulf of Maine area should be resolved in all respects by means of this adjudication. Canada accepted that solution in November 1981. Today, with the United States Senate having given its advice and consent to the ratification by the President of the boundary treaty between the United States and Canada, which submitted the Special Agreement to the Court, the United States as a whole is indeed before the Chamber and with one united voice is asking for a judicial resolution of this dispute in accordance with law.

In its opening oral presentations, Canada characterized this decision of the United States not to proceed with the 1979 fisheries agreement as pure politics, and a gamble by American fishermen. The United States does not accept that characterization. To be sure, the United States has an important fishery on the northeast portion of Georges Bank and that fishery is at risk in this proceedings. However, the United States is here because of the courage of its conviction that the Chamber will determine the rights of both Parties under international law and will rule accordingly, with the result that United States jurisdiction over all of Georges Bank will be confirmed.

The Terms of the Special Agreement

With your permission, the United States now turns to the matter of the Special Agreement pursuant to which the Parties notified the International Court of

Justice of their desire to seek a judicial delimitation of the single maritime boundary in the Gulf of Maine area. As would be expected in a dispute of this history and magnitude, the Parties carefully drafted the Special Agreement to be as neutral as possible. Yet Canada has seen fit in these proceedings to seek support for its boundary position in the very provisions of the Special Agreement.

Article II of the Special Agreement sets forth the geographic co-ordinates of a starting-point for the boundary. The starting-point is shown on Figure 2 of the (186) United States oral presentation. This Figure appeared initially as Figure 4 of the United States Reply. Canada alleges in its Counter-Memorial (**III**) that in choosing the starting-point, the Parties:

> "have thus recognized that it is the opposite coasts of Maine and Grand Manan Island and of Maine and Nova Scotia that should control the course of the line . . ." (para. 647).

Canada also asserts, at paragraph 88 in its Counter-Memorial, that the relation between the starting-point and the international boundary terminus "reflects the common view of the Parties ... that the boundary inside the Gulf of Maine itself should run in a general southwesterly direction". These statements are incorrect.

As the Chamber is aware, the United States and Canada dispute sovereignty over Machias Seal Island and North Rock. Therefore, the Parties chose as the starting-point for the boundary the point seaward of Machias Seal Island and North Rock at which their initial 1976 boundary claims first intersected. The purpose was not to bring the dispute over Machias Seal Island and North Rock before the Chamber. The starting-point certainly does not suggest any agreement about the relationship of the coasts, or about the direction of the boundary that the Chamber is to delimit.

Mr. President, the United States may only surmise that had Canada's current interpretation of the Special Agreement been pressed before the United States Senate while it was considering its advice and consent to the boundary agreement that has brought this case before the Chamber, yet another proposed treaty between the Parties would not have received Senate approval.

The second Canadian misreading of the Special Agreement relates to the triangle. Paragraph 23 of Canada's Counter-Memorial states that the triangle was constructed to include three points: the two points where the 1976 Canadian and United States claims intersect the outer limits of their claimed 200-nautical-mile zones, and the point at which the outer limits of these zones intersect each other. Canada implies at paragraph 24 of its Counter-Memorial, and now again in its first round of oral argument (pp. 162-163, *supra*) that the boundary proposed by the United States is inconsistent with the Special Agreement because it does not intersect the 200-nautical-mile limit of the United States within the triangle.

Canada's argument directly contradicts earlier Canadian statements (Canadian Memorial, para. 12). Under the Special Agreement, the Chamber may terminate the delimitation at any point of its choosing within the triangle. Thus, Article II of the Special Agreement asks that the delimitation be drawn between the starting-point and "a point to be determined by the Chamber within an area bounded by straight lines". In its Memorial (**I**), Canada itself stated:

> "The Court . . . may fix the seaward terminal point . . . at any point in the triangle . . . There is no other significance in the use of this device or in the configuration of the triangle itself; it was chosen simply as a convenient, neutral technique that accomplishes the task of indicating clearly where the adjudicated boundary is to end." (Para. 12. See also United States Memorial, para. 4, fn. 1.)

Under Canada's more recent interpretation of the Special Agreement, more than half of the area within the triangle would be disqualified, because a line that terminated in that area would not intersect the 200-nautical-mile arc of either Party.

(185) This leads me, with your permission, to further consideration of Figure 2 before you. In its Counter-Memorial, Canada describes the United States claim depicted thereon as "extravagant" (para. 22) and "simply a straight line from the starting-point to the northeast corner of the triangle" (para. 44).

(186) Mr. President, what Figure 2 before you shows is that, on the one hand, the United States has claimed 5,954 square kilometres less than would result from a boundary drawn from the starting-point to the corner of the triangle nearest to Canada. This area is in grey. All of the area claimed by the United States lies in front of the United States coast. Although the United States adopted the régime of 200-nautical-mile resource zones reluctantly, nevertheless, having done so, it is now entitled to claim those maritime areas that lie off its own coast. On the other hand, as shown by the yellow area on the chart, Canada has now claimed 9,076 square kilometres more than it would receive from a straight line from the starting-point to the corner of the triangle nearest the United States notwithstanding the fact that the seaward area does not lie in front of the Canadian

(188) coast. The United States believes that Figure 2 of today's presentation is striking evidence, not of American extravagance, but rather of the unreasonable and inequitable nature of Canada's position in this case.

II. Other Aspects of Canada's Unreasonable Claim

Mr. President, distinguished Judges, with your permission the United States would like to take a moment to address a subject that has troubled the United States throughout these proceedings. It appears to us 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. The United States has been caught between an urge to address each and every one of these distortions, and the realization that to do so would mean that our written pleadings and now our oral presentation would become no more than a patchwork of minutiae in which the real issues in this matter would be lost. In order to give a flavour of the problem that has worried us since 27 September 1982, the United States briefly shall recall here but two instances of what we regard as a larger problem. The first relates to the question of the history of the predominant interests in the development and exploitation of the Georges Bank Fisheries. The second relates to the existence of separate stocks of fish and shellfish associated with Georges Bank.

We would have added a third example relating to the nature of the United States permit programme on the northeast portion of Georges Bank, but I have already said more than enough on this subject in this introductory statement. My able colleague, Mr. Rashkow, will, however, provide the Chamber with the details of this matter.

As to the first example, Canada at paragraph 190 of its Memorial, suggested that it had started the scallop fishery on Georges Bank. However, upon review, Canada's own evidence confirmed that the United States, and not Canada, had established this fishery. A *Bulletin* of the Fisheries Research Board of Canada published in 1964 noted that when Canadian vessels began to fish for scallops on Georges Bank, they were entering an established United States scallop fishery. That document, an official publication of a Canadian Government institution, states:

> "The thriving *United States* offshore scallop fishery . . . began off Long Island in the early 1920's and spread to Georges Bank in the late 1920's and *early 1930's*." (N. Bourne, "Scallops and the Offshore Fishery of the Maritimes", Fisheries Research Board of Canada, *Bulletin No. 145*, 1964, p. 21, deposited in accordance with Art. 50 of the Rules of the Court. Emphasis added.)

This was cited by Canada in its Memorial (para. 290, fn. 57) as a document.

Similarly, Canada relied heavily in connection with its history of the scallop fishery on Georges Bank upon what it called the "pioneer voyage" of the *Mary E. Kenney* (Canadian Memorial, para. 190). The Canadian *Bulletin* from which I just quoted also refers to the voyage of this ship, as follows:

> "In the late 1930's interest was expressed in developing a Canadian offshore fishery and necessary alterations in the fishery regulations were proposed to permit this. However, with the advent of World War II, interest was diverted."

The Canadian document went on:

> "A great deal of the credit for reviving interest and encouraging the development of the Canadian offshore scallop fishery must go to the late Mr. T. R. Clouston, of General Sea Foods, Halifax. He knew of the United States Georges Bank fishery and postulated that some of the Nova Scotian banks had populations of scallops which might support a similar Canadian fishery. In 1945 he charted the M.V. *Mary E. Kenney* (under Captain John Beck of Halifax) to explore for scallop beds on *Nova Scotia banks*, particularly middle ground.
>
> Captain Beck was acquainted with offshore scalloping since he had sailed on Georges Bank scallop boats out of the port of New Bedford, Massachusetts. In 1945 he took the *Mary E. Kenney* to New Bedford and had her rigged in the same manner as United States offshore scallopers. On his return trip to Halifax, he fished 9 days on Georges Bank and with his crew of 6 men landed 8,000 lb. of scallop meats in Halifax. This was the *first* catch of scallops landed in *Canada by an offshore scalloper and it came from Georges Bank*." (N. Bourne, *op. cit.*, p. 21, emphasis added.)

Thus, in Canada's own official reports, cited by Canada in this case, the 1945 voyage of the *Mary E. Kenney* is proven not to have been "pioneer" at all, but rather a tentative first step into a fishery known by Canada to have been developed by United States fishermen (see also United States Counter-Memorial, Ann. 7, pp. 14-19).

In the second example, Canada, in an effort to tie Georges Bank fisheries to those of Canadian waters, showed in an annex to its Counter-Memorial an illustration of what it called the "extensive migrations . . . throughout the Gulf (90) of Maine area" by lobster (Anns., Vol. I, Fig. 41). This Figure showed migration routes radiating out from the area off Port Maitland, Nova Scotia, leaving the impression that lobster commonly travel from Nova Scotian waters to Georges Bank. In fact, the source of this illustration was a study involving the tagging and release of 28,226 lobsters in the area off Port Maitland, over a period of (90) 35 years (*ibid.*, Anns., Vol. I, para. 131 (B) and Fig. 41). (This study, "Movements of tagged lobster released off Port Maitland, Nova Scotia, 1944-1980", by A. Campbell, was also discussed in Ann. 21 of the United States Reply.)

According to the study, some 14,000 of the lobsters were recaptured. A reading of the study discloses, however, that of these, 80.8 per cent were re-

captured inside the area in which they were released, 95.4 per cent were recaptured within 18.5 kilometres of the release area, and 4.1 per cent were recaptured farther away, mostly inshore. As the study records, only *two* adventurous lobsters out of the 14,000 recaptured were found on Georges Bank.

Based on this, Canada saw fit to produce a chart with arrows drawn to the 30 most far-flung of the 14,000 recaptured lobsters, implying thereby that the illustration was a fair indication of lobster migrations, even though the 30 lobsters that were represented constituted only two-tenths of 1 per cent (0.002) of the tag returns.

The United States recalls these examples in the confidence and knowledge that factual assertions by both of the Parties will be scrutinized by the Chamber with the care and caution they deserve.

The Chamber adjourned from 11.20 a.m. to 11.47 a.m.

III. The Reasons Why the United States Is Entitled to Georges Bank in its Entirety

Mr. President, distinguished Judges, thus having cleared away a little bit of the underbrush, so to speak, the United States, with your permission, now would like to enumerate the primary reasons why the United States is of the view that it is entitled to Georges Bank in its entirety as a matter of law.

The United States believes that its boundary proposal properly applies the required equitable principles and takes account of the relevant circumstances in the Gulf of Maine area to produce an equitable solution. The United States respectfully submits that the application in this case of the equitable principles first called for by the Truman Proclamation and as later developed and articulated by the International Court of Justice, arbitral tribunals and various international conferences, commissions and scholars, will confirm United States jurisdiction over all of Georges Bank.

The Parties' pleadings by their sheer strength, and by the number of topics addressed, could leave one with the impression that this is a complicated case. Canada's oral presentation in this first round in our view has contributed further to that impression. The detailed facts are indeed important to an understanding of this case. However, in the opinion of the United States, the wealth of minutiae must not be allowed to obscure the key issues before the Chamber. The United States believes that this case is at heart a simple one and fundamentally involves but a few straightforward issues, the resolution of which, in accordance with the law applicable in the matter as between the Parties, will confirm United States entitlement to all of Georges Bank.

There are some seven major reasons why the United States is entitled to Georges Bank in its entirety. These will be addressed more fully by my colleagues, but with your permission I shall touch on them here.

First, one of Canada's exaggerated labels for the claim of the United States is that of "monopoly". This sounds like an impressive accusation against one who is seeking all the pie and not just a slice, but it is, with all due respect, nothing but rhetoric. The United States could equally well accuse Canada of having been monopolistic when it expelled United States fishermen from the Grand Banks and the Scotian Shelf. It is not an application of international law to deprive a party of an area to which it is entitled. It is extraordinary for Canada to say that if entitlement exists, it is nonetheless "monopolistic" to assert it. Indeed, the very concept of the exclusive economic zone, which the Judgment of the *Tunisia/Libya* case termed "part of modern international law" (para. 100), is by

definition "exclusive". Of course, another name for the very same concept of exclusivity is dominance or "monopoly". The United States recalls that it was Canada, not the United States, that led the effort to extend exclusive coastal State jurisdiction. It seems odd that Canada now chooses to call the United States "monopolistic" when the United States seeks to assert its rights in zones, the concept for which Canada was in the forefront of creating. Mr. President, the United States respectfully submits that it is no more "monopolistic" for the United States to bring under United States control Canadian fishing on Georges Bank in what was ICNAF's Subarea 5 than it was for Canada to terminate United States fishing in what were ICNAF's Subareas 3 and 4 following the extension of Canada's fishing jurisdiction to 200 nautical miles.

Second, under the terms of the Special Agreement, this case is to involve an application of the principles and rules of international law that are applicable as between the Parties in the delimitation of this single maritime boundary. The United States believes that such an application can only confirm United States jurisdiction over Georges Bank in its entirety. On the one hand, the United States seeks an affirmation of existing and well-known principles of international law as reaffirmed by recent trends. Canada, on the other hand, is seeking to resurrect as a new principle – the so-called "distance principle" – the rejected notion of proximity, whereby each State receives the area of the sea closest to its coast even if such a result cuts off the coastal projection of a neighbouring State. As a corollary of this distance principle, controlling effect would be given to the equidistance method as inherently equitable, despite the Court's clear indication in prior cases that in particular instances, which we believe are applicable here, the equidistance method does not produce an equitable solution. In those cases, another method or methods in whole or in part may be used to produce an equitable solution. Canada also seeks to have the Chamber revitalize the discarded notion of equitable apportionment of the maritime area in dispute rather than to set forth a delimitation in accordance with law.

Third, in our opinion, the relevant circumstances of the geography of the Gulf of Maine area dictate that the United States should have jurisdiction over all of Georges Bank. We believe that the geography of the relevant area is the single most important fact in this case. We especially note in this regard the configuration and length of the Parties' coasts in the area, the location of the land boundary and the international boundary terminus, and the coastal concavity that is the Gulf of Maine.

We note in this regard that the United States coastlines around the Gulf of Maine are at least three times longer than the Canadian coast facing the Gulf. As a result of the configuration of the coasts in the Gulf of Maine area, an equidistance boundary crossing Georges Bank perpendicular to the closing line across the Gulf at its midpoint would thus produce a delimitation grossly disproportionate to the length of Canada's coast in the area.

It is important to remember that the name of the area that is before the Chamber is not the Gulf of Southwest Nova Scotia area nor the Gulf of Cape Cod and Nantucket area, but the Gulf of Maine area. It is the United States state of Maine after which the Gulf of Maine is named.

That is as it should be, for it is Maine that faces seaward into the Atlantic Ocean, and not the laterally facing coasts of southwest Nova Scotia or of Cape Cod and Nantucket.

Fourth, the next most important factual aspect of this case as far as the United States is concerned is the integrity, or unity, of the respective fishing banks in the area and the existence of the separate fish stocks associated therewith. The division of the stocks at the Northeast Channel has been recognized for literally

decades, including by Canada. It is only because Canada, for the purposes of this case, has chosen to disavow its long-espoused position regarding stock division that the United States has been obliged to seek the assistance of an expert. The United States will let our expert's credibility speak for itself, and we encourage both the Chamber and Canada to examine him fully. The United States concludes that the principle of resource conservation and management and that of dispute minimization again require that the United States retain jurisdiction over all of Georges Bank.

Fifth, Georges Bank has been a traditional fishing ground for New England fishermen since the early 1820s. For over a century and a half, the United States and its nationals have developed and remained active on Georges Bank, in all fisheries, and in all other pertinent non-fishing activities as well. By contrast, Canadian activities have been recent and limited primarily to a single fishery – scallops. The United States respectfully submits that international law would not favour the dislocation of what otherwise would be an appropriate boundary on the basis of Canada's recent fishery in one stock, even if, as Canada said in its first round, it were, out of 16 important stocks on Georges Bank "the Georges Bank stock par excellence" (p. 145, *supra*).

The longstanding predominant interest of the United States in Georges Bank, in our view, leads to United States entitlement to Georges Bank in its entirety. The United States believes that the conduct of the Parties is an important indicia of the equity of a boundary line where, as in the *Tunisia/Libya* case, both Parties used the same line for the same purpose. The only lines in the Gulf of Maine area that have been used by both Parties for the same purposes, are those shown at Figures 8, 9, 13, 14 and 15 of the United States Memorial. These lines run through, or near to, the Northeast Channel. Most particularly, the NACFI and ICNAF lines dividing Subarea 4 and Subarea 5, at the Northeast Channel, have been used in bilateral and multilateral fishery conservation and management agreements. In their respective programmes the Parties have both respected this identical NACFI and ICNAF line. The Parties, by their conduct, have thus affirmatively given the Northeast Channel legal significance in their bilateral relationship.

Sixth, in our view, the Judgment of the Court in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case held that economic dependence and relative wealth were extraneous to the delimitation of the continental shelf between the two Parties to that case for reasons that we believe are fully applicable to the delimitation of the single maritime boundary in this case. Thus, even were Canada's economic dependence arguments factually correct, which they certainly are not, they would not require a boundary other than the one proposed by the United States.

Seventh, the United States trusts that the review of the history of the dispute in this introductory statement already has made clear, that the past conduct of the Parties serves simply to confirm the past predominant interest of the United States in Georges Bank and its entitlement to all of it in the future rather than to provide Canada with any cognizable rights or interests in Georges Bank.

IV. The Boundary Proposed by the United States

Mr. President, distinguished Judges, with your permission, the United States now would like to describe the boundary that it is proposing in this case and to explain the method used by the United States to construct that boundary.

The proposed United States boundary is drawn perpendicular to the general direction of the coast, both at the international boundary terminus and in the

relevant area. The line obviously takes account of the Special Agreement between the Parties. It also takes account of what the United States regards as the relevant circumstances in this case, in particular the coastal configuration, the location of the land boundary and the international boundary terminus, the concavity that is the Gulf of Maine, the length of the respective coasts of the Parties facing on the Gulf of Maine, and lastly the integrity of the separate and identifiable fishing banks in the area and the fish stock divisions related thereto. Unlike the equidistance method as applied by Canada, this construction of an adjusted perpendicular does not use selected protruding coastal base points. Rather, the United States line is based upon a more complete view of the coastal geography, both within and beyond the Gulf of Maine and the other significant circumstances in this case, all of which, in our view, point to a line that respects the division at the Northeast Channel.

(33) Figure 3 of this presentation, which appeared as Figure 27 of the United States Memorial, shows a line perpendicular to the general direction of the coast drawn from the international boundary terminus. It is the position of the United States that the location of the land frontier and the international terminus are central facts in this case. The United States recalls that the Court in the *Tunisia/Libya* case afforded great weight to the location of the land boundary (*I.C.J. Reports 1982*, para. 116).

The Parties agree that the general direction of the coast of North America, as well as in the Gulf of Maine area, is from southwest to northeast. More precisely, the United States calculates the general direction of the coast in the Gulf of Maine area to be 54° and, as noted, finds this direction consistent with that of the North Atlantic coast as a whole. Such was the only purpose of the United States reference to so-called macrogeography, of which Canada makes so much – that is to show the consistency of the approach of the United States within the Gulf of Maine area with the broader geography. A line perpendicular to that general direction would follow an azimuth of 144°.

We would ask that the Chamber note that the line depicted here would leave to Canada all the area seaward of the Atlantic-facing coast of Nova Scotia. It would also leave to the United States all the area in front of its own coast. Thus, this line reflects the broad equality of the Parties' coasts in the Gulf of Maine area in relation to the Atlantic Ocean. However, such a line would not take into account the Special Agreement or the southwest coast of Nova Scotia that faces laterally onto the coastal concavity that is the Gulf of Maine.

Figure 4 of this presentation shows a line perpendicular to the general direction of the coast drawn from the starting point set forth in the Special
(34) Agreement between the Parties. This Figure first appeared as Figure 28 of the United States Memorial. This line gives to Canada all the area seaward of its Atlantic-facing coast, and it gives the United States most but not all of the area in front of its own Atlantic-facing coast. This line, therefore, would afford the Atlantic-facing coasts of the Parties roughly comparable treatment. Moreover, at the same time it would leave to the southwest coast of Nova Scotia a band of maritime jurisdiction not only in front of that coast within the Gulf of Maine, but also extending seaward into the Atlantic Ocean to the limit of coastal-State jurisdiction.

(34) Thus, in this Figure the coastal front of Canada, at southwest Nova Scotia, receives an area of maritime jurisdiction beyond the Gulf of Maine, notwithstanding that only the United States coast at Maine and New Hampshire faces upon the area seaward of the closing line of the Gulf of Maine.

(34) However, the line in Figure 4 fails to reflect what the United States regards as one of the most relevant circumstances in this the first case to delimit a single

maritime boundary. The line in Figure 4 would cross two important fishing banks on the Scotian Shelf, this bank, known as the Browns Bank, and this bank here, known as the German Bank, and thereby would fail to preserve their integrity of part of a separate and identifiable ecological unit. Were the line in Figure 4 to be the boundary, the rich and discrete fish stocks of the Scotian Shelf would be divided between the United States and Canada, thereby complicating the task of conservation and management, and potentially causing disputes in the future between two countries that want every reason to remain close friends, neighbours, and allies.

Since this case involves a single maritime boundary and requires the delimitation of fisheries jurisdiction as well as jurisdiction over the continental shelf, the United States believes that fishing banks, the distributional patterns of fish stocks, and other features of the marine environment are relevant circumstances that must be taken into account if an equitable solution is to be achieved. In the opinion of the United States – and I would like to stress this point, Mr. President – these circumstances of the marine environment point to a boundary in exactly the same area as that to which the geography points.

(36) Figure 5 of this presentation, which is Figure 30 of the United States Memorial, shows the line proposed by the United States in this case. The line is based upon a perpendicular to the general direction of the coast, drawn from the starting-point but adjusted to avoid crossing German Bank and also Browns Bank, and then proceeds seaward into the triangle. In this manner, these fishing banks are left in their entirety to Canada. Importantly, under this boundary, most of the commercially important fishery stocks of the Scotian Shelf would not range into United States fishery jurisdiction. Canada therefore could conserve and manage the stocks on the Scotian Shelf without the risk that fishing by the United States would undermine its particular form of conservation programme.

In addition, the adjustments in the line leave an even larger area of maritime jurisdiction to the southwest coast of Nova Scotia, both laterally within the Gulf of Maine and also seaward of the closing line. The United States line also respects the integrity of Georges Bank. Georges Bank lies off the coast of the United States alone, and not off any coast of Canada.

V. Road Map and Concluding Remarks

Mr. President, distinguished Judges, I now have come to the concluding portion of this introductory statement. The United States is before the Chamber today respectfully seeking a judicial solution to a problem that has proved incapable of political settlement through negotiations.

United States fisheries interests in the northwest Atlantic have been pushed farther and farther back, first off the Grand Banks, then off the Scotian Shelf, and now the issue is, will the United States at least retain what is rightfully ours under the law? Under the new régime, Canada was entitled to push the United States out of the Grand Banks and off the Scotian Shelf, if that was its choice, but the new régime does not entitle Canada to push beyond and to trespass onto areas that rightfully appertain to the United States. It is because that belief is so strongly held in the United States that we are before the Chamber today, thankful that there is such a forum for a resolution of this dispute in accordance with law.

It is the position of the United States that on every relevant basis, individually, comparatively and cumulatively, the delimitation in this case must respect the integrity of Georges Bank. The boundary traced by this Chamber will delimit

not only continental shelf and fishery jurisdiction in the Gulf of Maine area but all other jurisdictions under international law for all times. Some of these may tread into the sensitive area of national security. We believe that the reasons for confirming United States entitlement to all of Georges Bank are greater than the sum of their parts. The United States is convinced that the only truly equitable solution in this case is one that does not split Georges Bank.

Mr. President, during the remaining sessions of this, the opening round of the United States oral argument, my distinguished colleagues will, with your permission, discuss the issues in the following order. First, Mr. Stevenson, a distinguished predecessor as the Legal Adviser to the Department of State, will address the law that governs this case.

Next, Mr. Colson, the Deputy Agent of the United States in this case, will address the geography of the Gulf of Maine area and the application of delimitation methods within that area, followed by Mr. Feldman, who will address the proportionality test. We shall then move to the past activities of the Parties, with Mr. Lancaster addressing fishing activities and Mr. Rashkow addressing other activities as well as the failed 1979 fisheries agreement. Mr. Rashkow then will review Canada's contentions regarding acquiescence and estoppel. Mr. Feldman then will return to address Canada's socio-economic arguments. Finally, Mr. Rashkow and Mr. Lancaster will address the marine environment, with the aid of the expert testimony of Dr. Edwards, who, with your permission, will be examined by Mr. Lancaster. In the session following, Dr. Edwards will be available, with your permission, for examination by Canada and by the Chamber. Mr. Colson then will return to address the principles of resource conservation and management as they relate to this case. Lastly, it will be my privilege to return to make some brief concluding remarks.

Mr. President and distinguished Judges, it has been a unique honour to appear before you this morning as the Agent of the United States of America in this great and historic case.

ARGUMENT OF MR. STEVENSON

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES

Mr. STEVENSON: Mr. President, distinguished Judges. May it please the Chamber.

I am particularly delighted to have the privilege of appearing before this distinguished Chamber and to have the opportunity to discuss important legal questions with so many old friends and colleagues on both sides of this great Hall of Justice.

In both public service and private practice, I have had the opportunity to observe the vital importance of international law. It is because I understand the importance of the rule of law that I am deeply honoured to discuss with you the law applicable to this case.

I disagree with those who think international law is only the concern of scholars. The law does, of course, depend on scholars and scholarship. Indeed, it requires rigorous logic and scholarship, and the scholar's respect for reason and truth. But international law should be this and more. It should guide the behaviour of nations and bring order to the world of nations.

The task, Mr. President, distinguished Judges, of this Chamber is to enunciate and to apply the principles and rules of international law. In doing so, the Chamber will be promoting an understanding of the reality of law and increasing respect for the integrity of international law. There is no duty more important. For unless the integrity of the law is respected, international law will lose its force in world affairs and will fail to fulfil its function of providing order to the world.

Our discussion today and tomorrow of the law has been prepared in accordance with Article 60 of the Rules of Court. This Article of course requires that this statement be as succinct as possible, be directed to the issues that still divide the Parties, and not merely repeat what was covered in the written pleadings.

A succinct statement of the legal issues still dividing the Parties is in this case somewhat complicated by Canada's manner of presenting these issues: Canada, time and time again, has repeated in different contexts its two principal legal arguments as if they were separate or new points: *first*, that the alleged principle of proximity and the method of equidistance should be controlling; *second*, that the delimitation should take into account the economic dependence of the Parties on the resources of the area. Moreover, Canada frequently has suggested that the Chamber must choose between two alternatives, when in fact, as will be shown later in this presentation, no such election is required: for instance, Canada argues that the Chamber must choose between the concept of the Northeast Channel as a natural boundary and "equitable principles within the law", or between the geographical circumstances in the Gulf of Maine and the geographical circumstances on a continental basis.

Mr. President, in its presentation, today and tomorrow, the United States will discuss the legal issues in the following order:

First, the function of the Chamber and the applicable law;
Second, the fundamental rule of maritime boundary delimitation;
Third, the nature of equitable principles;
Fourth, equitable principles identified by the United States;

Fifth, equitable principles proposed by Canada;
Sixth, the identification of circumstances which are relevant and circumstances which are not relevant;
Seventh, the balancing up of these relevant circumstances;
Eighth, the single maritime boundary and the applicable legal principles;
Ninth, and finally, methods of delimitation to produce an equitable solution.

Naturally, because of time limitations I will not be able to deal with all these subjects today. It appears that I shall be able to begin the discussion of the first equitable principle identified by the United States, and have to leave the rest of this presentation for tomorrow. But now let me turn first to the function of this Chamber and the applicable law.

The Function of the Chamber and the Applicable Law

The United States wishes to emphasize, first of all, that the function of the Chamber in this case is to delimit the single maritime boundary in accordance with international law. It is not the function of the Chamber to apportion the area through an exercise of distributive justice.

Under Article 38 of its Statute, the function of the International Court of Justice is "to decide in accordance with international law such disputes as are submitted to it". The Parties in the Special Agreement submitting this dispute have requested the Chamber, in Article II (**I**, p. 10), to determine the course of the single maritime boundary in the Gulf of Maine area "in accordance with the principles and rules of international law applicable in the matter as between them".

Both Parties recognize that the fundamental rule of international law applicable to this case is that the maritime boundary must be determined in accordance with equitable principles, taking account of the relevant circumstances in the area, to produce an equitable solution. There is no difference on this basic principle. The Parties also agree, at least both have stated that they agree, that this rule does not entail an exercise in distributive justice. It is common ground between Canada and the United States that the Chamber does not have a mandate to enter a judgment *ex aequo et bono*. Both Parties also recognize the distinction made in the 1969 and 1982 Judgments of the Court between an impermissible application of equity "as a matter of abstract justice", and the application of "a rule of law which itself requires the application of equitable principles" (*North Sea Continental Shelf*, para. 85).

The Court held in 1969 that delimitation in an equitable manner is to be distinguished from awarding a just and equitable share of a "previously undelimited area" (*ibid.*, para. 18). The reasons stated there apply with equal force to this case: first, the function of this Chamber is not to apportion an area but to delimit it; secondly, the theory of just and equitable shares is "wholly at variance" with the basis of the State's title to the maritime areas in front of its coasts – that is, the natural extension of its land territory into and under the sea (*ibid.*, para. 19). The very same point was made by the Court of Arbitration in 1977 in the Anglo-French Arbitration when it stated that although the delimitation in that case must be equitable, it could not have as its object "simply the awarding of an equitable 'share' in the continental shelf to each Party" (para. 78).

The United States submits that Canada, despite assertions to the contrary, is asking this Chamber to disregard these principles and to divide the area between the Parties in accordance with theory of just and equitable shares. Canada

presents this position in different ways, all, however, looking towards the same result.

First, Canada explicitly requests the Chamber to divide Georges Bank and maintains that it is entitled to an "equitable share" of the fishery resources of that area. Thus, Canada states that "the application of equitable principles demands that Georges Bank not be allotted in its entirety to one or the other of the Parties" (I, Canadian Memorial, para. 319). According to Canada, the equitable character of the Canadian claimed line in the outer area brings about "a reasonable division of the adjacent fishing grounds and shelf between the two Parties" (*ibid.*, para. 379). Last week, at the opening session, on 2 April, Attorney-General MacGuigan of Canada said that whether or not Georges Bank is divided is "the benchmark, the crucial test of an equitable delimitation in these proceedings" (p. 16, *supra*).

The logic of Canada's argument is that, because Canada has claimed part of Georges Bank, it is entitled to a share of it. A claim, however, is not an entitlement. The boundary must be determined by the application of the principles and rules of international law, and not simply by dividing the area in dispute.

Secondly, the assumption that the resources of Georges Bank must be divided is the principal basis for Canada's sharp attack on two equitable principles suggested by the United States. These principles are that the maritime boundary should facilitate conservation and management of the resources of the area and should minimize present and future disputes between the Parties. Canada in fact admits that both are "valid objectives and important rules of behaviour". But it argues that application of these principles to this boundary is "almost perverse", because their application here would "rule out an equitable division of the resources of the relevant area" (**III**, Canadian Counter-Memorial, para. 497).

Thirdly, there is yet another way in which Canada, without admitting its objective, seeks to have this Chamber engage in an exercise in distributive justice. This is by asking the Chamber to give decisive weight to claimed circumstances which would not be legally relevant even if true. In particular, Canada urges the Chamber to give special weight to considerations of purported economic dependence, which the Court has excluded as irrelevant to the delimitation of maritime boundaries.

Canada in fact acknowledges that "an equitable division is a division *ex aequo et bono* if it is effected without regard to the applicable law" (V, Canadian Reply, para. 45). Yet if there is no legal basis for the division of this area in accordance with relative economic dependence as urged by Canada, Canada is in effect seeking just such a delimitation *ex aequo et bono*, a delimitation outside the law (*I.C.J. Reports 1969*, para. 88).

The Fundamental Rule of Maritime Delimitation

Mr. President, distinguished Judges, let me now turn to the fundamental rule of maritime boundary delimitation.

The Parties agree that the fundamental rule of law applicable to this case is that the single maritime boundary shall be determined in accordance with equitable principles, taking into account the relevant circumstances in the area, to produce an equitable solution.

Canada includes in its statement of the rule the phrase "on the basis of the applicable law". This does not represent any difference between the Parties. The United States also believes that the boundary must be determined on the basis of the applicable principles and rules of international law, including both the

fundamental law of maritime boundary delimitation – which I have just set forth – and also, where appropriate, other general principles of international law, such as those relating to acquiescence and estoppel and treaties.

THE NATURE OF EQUITABLE PRINCIPLES

This brings us to a discussion of the nature of equitable principles.

The United States is of the view that it is essential, in applying international law in this case, to consider the equitable principles that have been found to be applicable in prior maritime boundary disputes as well as any other principles that should be applicable in the case of a delimitation of a single maritime boundary for both the water column and the sea-bed. Canada initially, in its Memorial, included no identification of equitable principles, but has included what purport to be such principles in its Counter-Memorial (Part III, Chap. III) and Reply (para. 43). The United States, for reasons which I will explain later, does not agree that the "equitable principles" Canada has cited are the equitable principles applicable in this case. But in any event, the United States is most pleased that Canada no longer takes the position that equitable principles need not be identified.

Canada states that it is the United States position that equitable principles should be identified and applied without reference to the applicable law. The Agent of Canada said at the opening session that the United States case is "floating in a legal vacuum" (p. 23, *supra*). This is not the case. The United States view is that relevant equitable principles are part of the applicable law and must be applied within a legal framework.

Secondly, Canada asserts that equitable principles cannot be determined in the abstract, but only in the light of what will produce an equitable result. In Canada's view, however, the United States regards these principles as having a universal *a priori* validity, independent of the relevant circumstances and the result to be achieved (Canadian Counter-Memorial, paras. 473-476, 546). This again is not the United States position. All of the equitable principles referred to in the United States pleadings are those the application of which, in the United States view – and I will go into this in much greater detail today and tomorrow – will produce an equitable result in the relevant circumstances of this case.

Mr. President, I come now to one of the major areas of differences between Canada and the United States, namely, the applicable equitable principles. I will first discuss the United States principles and then Canada's. However, because of time limitations I shall probably today only be able to deal with the first principle identified by the United States.

The first United States equitable principle is that the boundary must respect the relationship between the coasts of the Parties and the maritime areas in front of those coasts.

Because of its importance, allow me to repeat that principle. The boundary must respect the relationship between the coasts of the Parties and the maritime areas in front of those coasts.

The basic support for this principle has been set forth by the United States in its Memorial (II) (paras. 239-246). The United States has identified as subsidiary delimitation principles, derived from this general principle (and therefore not set forth as independent principles), the following: non-encroachment, proportionality and natural prolongation.

First, let me discuss the general principle itself. Canada does not assert that the first United States equitable principle is unfounded in law – as it does in the case of the second and third United States equitable principles (Canadian

Counter-Memorial, para. 474). In fact, while it does not include this principle among the three Canadian equitable principles and disagrees with the United States characterization and application of it, Canada does accept the basic jurisprudential support for this principle, that is, the maxim first set forth by the Court in the *North Sea Continental Shelf* cases, that "the land dominates the sea" (Canadian Reply, para. 139). However, Canada interprets this maxim in an entirely different way than does the United States.

Canada, in effect, would give this maxim no independent status and asserts that its real meaning is that the domination of the land is merely a function of the fact that it is from the land that States extend political control, legal jurisdiction, and economic activity to the seas off their coasts. In Canada's view it does not express a natural or physical hierarchy between the land and the sea (*ibid.*, para. 149).

In other words, Mr. President and distinguished Judges, Canada's very sophisticated way of arguing is to suggest that what really is important is not the physical geographic relationship between the coasts and the maritime areas to be delimited: what is important to Canada is what the respective countries do on those coasts.

Canada is here attempting to introduce a new concept, which Canada calls by various names: human geography, socio-economic geography, economic geography, and political geography. Canada uses this concept in a number of ways, which I shall refer to throughout this statement.

The United States disagrees with Canada. It is the land itself, not what States do on the land, that is the source of maritime jurisdiction.

The Court determined, in 1969, that its function was to delimit the maritime areas which already appertained in principle to the Parties (*I.C.J. Reports 1969*, para. 18). A State's title to the maritime areas in front of its coast is derived from its sovereignty over the land. It follows that a delimitation in accordance with equitable principles is one which is consistent with the geographic relationship between the coasts of the Parties and the maritime areas to be delimited.

Thus, in the *Tunisia/Libya* case, the Court emphasized the principle that the land dominates the sea. The Court will not refashion nature. A landlocked State does not attract maritime jurisdiction. A State with a shorter coastline facing a particular maritime area will attract a smaller area of maritime jurisdiction than another State with a longer comparable coastline facing the same area. A coast will attract jurisdiction over the sea-bed and the superjacent waters in front of that coast. It will not attract jurisdiction over a maritime area that does not lie in front of that coast.

Canada's new concept in determining the relationship of the coast to the sea – this notion of so-called human geography – has no basis whatsoever in law. The 200-nautical-mile exclusive economic zone, like all other maritime zones, extends from the land, from the coast. Land territory is entitled to maritime jurisdiction, whether populated or unpopulated, whether its people are wealthy or not, and whether the inhabitants have or have not exploited the maritime resources off their coast.

Canada apparently recognizes the weakness of its argument based on the importance in a boundary delimitation of human geography. It suggests that human geography should be considered in a manner consistent with physical geography. It does so, in fact, by asserting that economic geography, in this case, merely "serves to confirm and reinforce the implications that may be drawn independently from physical geography" (Canadian Reply, para. 142). In this case, however, this Canadian argument rests on the equation of physical geography with the equidistance method: this enables Canada to argue that its

economic dependence argument supports the application of the previously rejected proximity principle.

Finally, Canada suggests that human geography "assists in the interpretation" of physical geography because it shows "the close linkages that exist between portions of the adjacent coasts and the disputed area" (*ibid.*, para. 141).

Its thesis is that fishing patterns are determined by geography and in particular by proximity; therefore, fishing patterns in the Canadian argument confirm geographical facts. But we all know from practice that that simply is not an accurate picture. Geography may influence fishing patterns, but imprecisely, and only to a modest extent. For example, for a time most of the harvest in the Gulf of Maine area was taken by European and Soviet fleets that travelled thousands of miles to the fishing grounds. Even now, most of Canada's Georges Bank harvest is taken by vessels from the Lunenburg-Riverport complex, some 150 nautical miles distant, rather than from Nova Scotian seaports much closer to the Bank. Economic circumstances, including in particular government subsidies and regulations, are often much more important than geography in determining fishing patterns. Ultimately, international law is the most important factor. For example, the extension of coastal State jurisdiction to 200 nautical miles created a new reality: thus, distant-water fleets withdrew, and coastal-State fishing expanded to take advantage of the new opportunities.

Fishing patterns simply are not useful in interpreting the coastal geography, not merely because a number of non-geographical factors determine fishing patterns but also because fishing patterns are transitory. Thirty years ago, there was no sustained Canadian fishery on Georges Bank: 200 years ago, there was no United States fishery to speak of. But the physical geography has been as it is now, and will so remain.

Canada also buttresses its arguments that human geography is but a reflection of the physical geography by asserting that the Gulf of Maine itself and the outer area should be dominated respectively by the coasts that immediately abut them – that is, according to Canada, by the most proximate coasts (p. 36, *supra*). In this analysis of physical geography, of course, Canada ignores that the coasts of Maine and New Hampshire also abut on Georges Bank. They would be cut off from doing so only by the Canadian equidistance line, and not by physical geography.

Thus, Canada, in effect, gives the maxim "the land dominates the sea" no independent significance: in the Canadian view, it merely means that physical geography, which for Canada means equidistance, is confirmed by human geography which, for Canada, means economic dependence. The United States submits that, rather than refashioning physical geography on the basis of economic dependence, or what Canada calls human geography, it is far simpler, far more reliable and far more consistent with the law, to base geographical conclusions upon the actual physical geography.

NON-ENCROACHMENT

I turn now, Mr. President, to the first subsidiary delimitation principle, that of non-encroachment. With respect to this subsidiary principle of non-encroachment, the United States would like to stress here the importance of this equitable principle in avoiding the cutting-off of a coastline from the maritime area in front of it. This cutting-off effect is the basic reason why the Canadian proposed line, which would cross so dramatically in front of the coastlines of Maine and
(94) New Hampshire – as you can see on this chart, the Canadian line is the yellow line – would be so grossly inequitable. It would cut off the coastlines of Maine

and New Hampshire from their coastal projections. Mr. President, distinguished
(94) Judges, you have this same chart in your map package, which shows very clearly this cut-off effect.

I have also requested that the original Canadian equidistance line, which does not discount Cape Cod and Nantucket, be shown on the same map and I now request that this same map, adjusted so as to show the original Canadian line, be set before the Chamber. This adjusted map is not in your map package.

In our geographic presentation, Mr. Colson will provide further insight and analysis of why, in a coastal concavity such as the Gulf of Maine, the equidistance method produces a cut-off effect in violation of this subsidiary principle of non-encroachment. This cut-off effect begins close to the coast, close to the international boundary terminus, and continues further out.

The relationship of this principle of non-encroachment to the principle of coastal State extension of geographic natural prolongation is fundamental to the concept that a coastal State is entitled to the maritime area in front of its coast. Thus, the Court, in the *North Sea Continental Shelf* cases, stated that the delimitation should

> "leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea without encroachment on the natural prolongation of the land territory of the other" (para. 101 (C) (1)).

The Court explained that the equidistance method, the method employed in computing the various Canadian lines, frequently would violate the principle of non-encroachment because the equidistance line would cut off a State from the extension of its coastal front. We can clearly see that these lines cut off the extension of the states of Maine and New Hampshire. In paragraph 44 of its Judgment, the Court stated that:

> "the use of this 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 equidistant line swing out laterally across the former's coastal front, cutting it off from areas situated directly before that front".

Both the Canadian lines do precisely that.

I would like to make one observation here. Canada has asserted that the United States has built much of its case upon a "single phrase" – the phrase "in front of the coast" (Canadian Reply, para. 71). This is not accurate. The Court's statement which I have just quoted is not an isolated passage or mere dictum. It expresses the Court's fundamental conclusion: the equidistance method would be inequitable because it would cut off the coast at the back of the concavity which faces the open sea from the areas in front of it (*I.C.J. Reports 1969*, para. 8). That is what the *North Sea Continental Shelf* cases were all about. In good part, that is what the Gulf of Maine case is about.

Canada seeks to reinterpret this principle of non-encroachment as first developed in the *North Sea Continental Shelf* cases. This is understandable, perhaps, because the equidistance line and Canada's modified equidistance line both would violate the principle of non-encroachment on the coastal front extension. However, Canada's arguments are without merit.

Canada contends that the principle of non-encroachment must be reinterpreted because the so-called "distance principle" – which Canada in fact uses synonymously with the alleged and rejected proximity principle – has replaced natural prolongation as the basis of title. Instead of receiving as much of its

coastal-front extension as possible, Canada believes that new developments in the law require that a State should now "receive as much as possible of its 200-mile entitlement without encroachment on the corresponding entitlement of the other Party". Canada further believes that "the equidistance method most precisely reflects this requirement" (Canadian Reply, para. 66).

The Chamber rose at 12.49 p.m.

ELEVENTH PUBLIC SITTING (12 IV 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

Mr. STEVENSON: Mr. President, distinguished Judges, before resuming my oral statement I would ask your indulgence to review briefly where we are. Yesterday I indicated that this statement would deal with nine general legal issues. I have completed my discussion of three of them, namely, the function of the Chamber, the fundamental rule of maritime boundary delimitation, and the nature of equitable principles.

When we terminated yesterday I had begun our discussion of the applicable equitable principles identified by the United States. I had completed the general discussion of the first such principle, that is, the general principle that the boundary must respect the relationship between the coasts of the Parties and the maritime areas in front of them. I also mentioned that there were three delimitation principles subsidiary to this general principle, namely, non-encroachment, proportionality and natural prolongation. I had in fact begun my discussion of the subsidiary principle of non-encroachment, emphasizing its importance in avoiding cutting-off a coastline from the maritime area in front of it. I pointed out in particular, as shown on the map before this Chamber and (224) now in your binder as Figure 6A, both Canadian lines: its original equidistance line and its present line – an equidistance line adjusted to give no effect to Cape Cod or Nantucket. You can see here on this map the original Canadian black-dashed line and the present Canadian yellow line. It is obvious from the map that both these Canadian lines cross dramatically in front of the coast of Maine, which lies in the general direction of the coast, and cut it off from its coastal projection seaward.

At the adjournment I was speaking of Canada's attempt to reinterpret the principle of non-encroachment as first developed in the *North Sea Continental Shelf* cases. Canada in fact does so on a theory that the so-called distance principle is now the basis of coastal State title. I indicated that this distance principle is fundamental to Canada's case, and that I would deal with it in considerably more detail later on. I intend to do so during the discussion of the equitable principles put forth by Canada.

Let me now return to where we were yesterday, when we adjourned. This distance principle, as asserted by Canada, refers to the extension of coastal State jurisdiction to 200 nautical miles from the coast, "in a radial projection of the coast in every direction in which ocean space within the prescribed distance is found" (**III**, Canadian Counter-Memorial, paras. 484, 555-557).

But now that 200 nautical miles has been accepted as the seaward limit of certain maritime jurisdictions, has the holding in the *North Sea Continental Shelf* cases become irrelevant to the delimitation of the single maritime boundary? Is it now necessary to break what Canada itself described in its Memorial as the

> "continuum of law that links the shelf and the water column, the traditional law of the sea and its contemporary development, and the conventional and customary law of maritime delimitation"? (Para. 285.)

It is not the United States view that this continuum should be broken. The United States believes that the Court in its 1969 decision was concerned with the equitable principle of non-encroachment on the coastal front extension. That

principle applies equally to the delimitation of the continental shelf and to the delimitation of the exclusive economic zone.

In its 1969 Judgment, the Court noted that the coastlines of the Parties were comparable in length and had been given broadly equal treatment by nature,

> "except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two" (*I.C.J. Reports 1969*, para. 91).

Here was a situation of what the Court described as "equality . . . within the . . . plane" (*I.C.J. Reports 1969*, para. 91). You may recognize that phrase, because Canada has adapted it for its own purpose. In the North Sea situation, the equidistance method would have been inequitable because its cut-off effect would have denied one of these comparable coasts comparable treatment. It was unacceptable to the Court that one State should enjoy considerably different rights simply because one coast was convex and the other was concave, although they were comparable in length and in their relation to the shelf.

The logic of the Court's analysis is not confined to the continental shelf. The Court was concerned about geographical relationships, about the relationship of the coasts to the maritime areas, and not about the geology of the continental shelf. The diagrams at page 16 of the Court's Judgment illustrated the cut-off effect of the use of the equidistance method in the "geographical situations" described in paragraph 8 of the Judgment. This in fact was a geographical analysis of the relationship of coast and sea, an analysis which would apply equally well to the delimitation of single maritime boundaries.

The extension of coastal-State jurisdiction to 200 nautical miles has of course increased the importance of the principle of non-encroachment. To begin with, the 200-nautical-mile limit requires that the boundary be extended a great distance seaward.

As the Court recognized in the *North Sea Continental Shelf* cases, the further the equidistance line is extended seaward, the larger the area of cut-off, and the greater the degree of inequity (paras. 8 and 89). The 200-nautical-mile zone has increased the potential for cut-off in yet another way. Previously, in the case of a continental shelf delimitation as in the North Sea or the Bay of Biscay, the coast at the back of a concavity would have been cut off by the equidistance line from the continental shelf in front of it. In the case of a single maritime boundary, however, the equidistance line would cut that coast off not only from the continental shelf, but from the water column and the fisheries as well. If the cut-off was inequitable in the first instance, it would be even more inequitable in the case of a single maritime boundary. The consequences are ever so much greater.

Mr. President, allow me now to restate Canada's argument. It is this: the principle of non-encroachment on the coastal front extension may have been relevant to the delimitation of the continental shelf. Now, however, that other maritime jurisdictions have been extended to 200 nautical miles and, in Canada's view, distance from the coast is the basis of a coastal State's title, this principle of non-encroachment on the coastal front extension is no longer relevant. Now, as a consequence of the 200-nautical-mile zone, it is no longer necessary to give comparable treatment to comparable coasts. Now that more rights and resources, and oftentimes more area, are at stake, it is no longer necessary to be concerned about geographical equity. Now it has become equitable to deny a coast the areas in front of it, for continental shelf as well as for fisheries and other purposes, simply because the coast lies at the back of a concavity.

These are the implications of Canada's argument that the distance principle has rendered the principle of non-encroachment on the coastal front extension

irrelevant to the delimitation of the single maritime boundary. Such a result in our view is both illogical and without support in the development of the 200-nautical-mile zone. The principle of non-encroachment on the coastal front extension applies to the delimitation of the continental shelf in the Gulf of Maine area. The same principle applies equally to the delimitation of the single maritime boundary in that area.

Canada has suggested a reinterpretation of the principle of non-encroachment, namely that the principle of non-encroachment should not cut off a State from the areas close to its coast (Canadian Counter-Memorial, paras. 481-483). Here, Canada would emphasize the word "close". This implies that it would not violate the principle of non-encroachment to cut a State off from the areas in front of, but not those closest to, its coast.

This is simply wrong. The principle of non-encroachment is not so restricted. In the North Sea, for example, the cut-off occurred at distances from the coast comparable to the distances involved in this case. This is discussed in greater detail in the United States Reply (V), at paragraph 127. Nor would there be any logical reason to restrict the non-encroachment principle to inshore areas. On the contrary, we are dealing with 200-nautical-mile zones and with continental shelves that extend a great distance seaward. Nations and the law of nations are concerned with the cut-off of the outer, as well as the inshore, portions of these zones. As noted a moment ago, this cut-off effect begins close to the coast. It tends to become more exacerbated and inequitable as a boundary swings out laterally across the coastal front and then is extended seaward.

The Court articulated the principle of non-encroachment in order to address the inequities of an equidistance line. In the North Sea, as in the Gulf of Maine, the equidistance method would violate the principle of non-encroachment by cutting off the coast at the back of the concavity from the area in front of it, and, for that reason, would produce an inequitable result.

Proportionality

With respect to the second subsidiary principle, that of proportionality, the United States view – and here, I think, we agree with our Canadian friends – is that proportionality is not a method by which a boundary is to be determined in the first instance. Any number of lines in a relevant area may in fact meet the test of proportionality. Rather, proportionality is a test to determine the equity or disproportion of the result. It is to be applied to a particular result otherwise reached, in accordance with the approach followed by the Arbitral Tribunal in the Anglo-French Arbitration (paras. 99-101) and the Court in the *Tunisia/Libya* case (paras. 103 and 131). However, this procedure is in no way meant to take away from the importance of proportionality in determining the equitableness of a particular boundary line in terms of the relationship between the area to be delimited and the relevant coasts. It is in fact a fundamental test of the equitableness of a particular solution. Mr. Feldman's subsequent oral statement will examine the application of the proportionality test in the circumstances of this case, but there is one additional point I would like to emphasize here.

That is that proportionality has nothing whatsoever to do with economics. It is strictly a geographic test with the objective of determining whether or not there is a reasonable degree of proportionality between the lengths of the relevant coasts and the maritime areas to be limited. It is an objective test for the equitableness of a proposed delimitation. Economic criteria on the other hand, such as the Parties' economic dependence on the resources of the area, are imprecise and not relevant.

Canada's attempt to include an economic dimension in the proportionality test is, in our view, completely flawed. Canada has attempted here once again to interject what it calls human geography. This is part of Canada's larger goal of avoiding the objective application of the proportionality principle to the actual geography of this case. The fallacies of the human geography theory have already been discussed. It should be noted here that it would be senseless to try to determine the relevant coasts on the basis of asserted economic links. Fishing patterns and other human activities change, whereas the physical geography is constant. Since proportionality is a test of geographical relationships, it can only be determined by physical geographic criteria.

In a similar attempt to avoid the relevant geographical circumstances of the Gulf of Maine area, Canada implies in its Counter-Memorial (paras. 702-703) that a proportionate boundary should divide equitably and equally the resources of the area, particularly where the resources in issue are asserted to be of vital importance to the economy of adjacent coastal regions. This reflects the true nature of Canada's case: Canada is not asking the Chamber to delimit the area that already appertains to one Party or the other. Instead, Canada is asking for a sharing-out of resources. Even here, I might add, Canada is inconsistent. For Canada would have the Chamber ignore the abundant fishery and hydrocarbon resources of the Scotian Shelf and share out only the resources in front of the United States coast. Fortunately, this Chamber need not calculate and compare fishery or hydrocarbon resources. The proportionality principle is a test of physical geography. There is no basis whatsoever in the law to suggest that proportionality requires a sharing-out of the resources.

Natural prolongation

The third subsidiary principle of the relationship between the coast and the adjacent sea is that of natural prolongation. As discussed in the United States pleadings the term "natural prolongation" may refer to two different doctrines. On the one hand, there is natural prolongation in the geological or geomorphological sense. This, in fact, was how the term was used by the Parties and the Court in the *Tunisia/Libya* case.

There is no question that the Court in the *Tunisia/Libya* case indicated that natural prolongation in its geological and geomorphological sense has a very reduced role in the application of equitable principles to a boundary delimitation. The natural geological or geomorphological prolongation principle is in fact controlling in maritime boundary delimitations only in one, rather special, circumstance: that is, if there is such a marked disruption in the continuity of the continental shelf as to constitute two separate natural prolongations, or two separate shelves in a geological or geomorphological sense (*I.C.J. Reports 1982*, para. 66). This rather narrow application of the natural prolongation principle is not before this Chamber, since both Parties agree that the continental shelf in the Gulf of Maine area is continuous and does not represent the separation of this area into two natural prolongations or two shelves.

The term "natural prolongation", however, may also be used in a geographical sense. In this sense it refers to the extension of a State's coastal front into the sea. This, in fact, is how it was used in the *North Sea Continental Shelf* cases (para. 96). In the North Sea there was a single, continuous continental shelf. The Court was not asked to consider geological or geomorphological variations in that shelf. Thus, the Court's repeated discussions of natural prolongation can only be understood to be referring to the geographical sense of that term.

Natural prolongation in the geographic sense, or coastal-front extension, is of fundamental importance to the implementation of the maxim that the land dominates the sea. Thus, in the *North Sea Continental Shelf* cases, the Court stated that the continental shelf doctrine requires application of the principle "that the land dominates the sea" and that "the land is the legal source of the power which a State may exercise over territorial extension to seaward" (*I.C.J. Reports 1969*, para. 96).

Thus, it is a central tenet of the United States case that the boundary chosen must respect the relationship between the coasts of the Parties and the maritime areas in front of those coasts. The application of this principle to this case requires that the boundary give each Party as much as possible of the geographic natural prolongation, or extension, of its coastal front.

Mr. President and distinguished Judges, this concludes my discussion of the first equitable principle identified by the United States.

The second equitable principle identified by the United States is the principle that the delimitation should facilitate conservation and management of the natural resources of the area.

This is not a principle for application in every case. In many cases, the choice of boundaries will not affect conservation and management. In the Gulf of Maine area, however, the environmental conditions are such that a boundary which respects the integrity of the fishing banks would facilitate conservation and management. It would do so by running seaward through the Northeast Channel separating important fishing banks. On the other hand, a boundary that crossed Georges Bank would impede conservation and management by dividing important fishing stocks.

The question of law that is involved here is whether it is proper for this Chamber to give preference to a boundary that facilitates resource conservation and management as opposed to a boundary that impedes conservation and management. The United States believes that this is a proper concern. This is partly a matter of common sense: a boundary that works well should be preferred to a boundary that does not work well. This is why the Court of Arbitration in the *Grisbadarna* case, reflecting the views of the Parties, altered the course of the boundary to avoid crossing a fishing bank.

The United States Memorial discussed the development of the principle of conservation in international law. The first articulation of the principle of conservation as it applies to the continental shelf was the Truman Proclamation of 1945. The Court itself has also underscored the need to conserve and to manage continental shelf resources in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, para. 97). Finally, the three United Nations Law of the Sea Conferences were very much concerned with conservation of fisheries resources. The provisions of the 1958 Fisheries Convention and of the 1982 Law of the Sea Convention reflect this concern. Mr. Colson will deal with the principle of resource conservation in the light of the facts of this case in considerably more detail in a subsequent oral statement.

Conservation is particularly important to the 200-nautical-mile fishery zone. This fishery zone developed largely in response to two facts: first, fishery technology and harvesting capacity increased to the point that man became capable of destroying fishery resources through overfishing. Second, the strategy of seeking conservation through agreement proved unsuccessful. As a result, the 200-nautical-mile fishery zone became necessary in order to prevent the destruction of coastal fishery resources. In fact, the progressive destruction of the Georges Bank fishery stocks was a primary reason that the United States itself declared a 200-nautical-mile fishery zone.

The new régime placed most of the world's fishery resources under the control of individual coastal States. In most instances, the jurisdiction of each coastal State extended sufficiently seaward to include the entire range of the individual stocks. In the case of anadromous and catadromous species that ranged beyond the coastal State's 200-nautical-mile zone, the 1982 United Nations Law of the Sea Convention also recognized that one State rather than several should have authority to manage these resources. In general, it limited harvesting to the coastal State's exclusive economic zone. Article 66, moreover, provides that the State of origin shall manage anadromous stocks throughout their range. Such management is to be in co-operation with other States through whose waters these fish migrate. In the case of catadromous species, Article 67 provides that the coastal State, in whose waters they spend the greater part of the life cycle, shall determine management measures. Such measures are to be adopted with the agreement of other States through whose waters they migrate. Thus, where possible, international law solved the problems of conservation by seeking single-State management.

In large part, the nature, the purpose, and the history of the 200-nautical-mile zone is that international law sought to improve the prospects for successful conservation and management by bringing fishery stocks under the control of individual coastal States. It therefore is indeed relevant and equitable to take these concerns into account, where possible, in the delimitation of maritime boundaries between coastal States.

Canada raises several objections. First, Canada argues that the law provides that the problem of conservation of transboundary stocks should be dealt with by co-operation between the States involved (Canadian Counter-Memorial, para. 502). However, the obligation to co-operate is not new in international law. It was one of the most important elements in the 1958 Convention on Fisheries. But despite the obligation – the treaty obligation – to co-operate, States found it difficult to agree on conservation measures, particularly on the allocation of scarce resources. Accordingly, the law has preferred to solve the conservation problem by placing stocks under the management of a single State, where possible. It has resorted to conservation by agreement only where single-State management is not a realistic alternative.

Secondly, Canada also argues that the object of single-State management is a mere consideration of administrative convenience, that it misconceives the object and purpose of the zones to be delimited. However, as pointed out earlier, the need to facilitate conservation of living resources of the area, by assigning responsibility for the management of the stocks to a single State, served as a primary basis for the extension of coastal State fishery jurisdiction to 200 nautical miles. The Convention adopted by the Third United Nations Conference on the Law of the Sea also reflects this preference for single-State management (II, United States Memorial, para. 250). The Court of Arbitration's recognition in the *Grisbadarna* case that the boundary should be adjusted to avoid crossing the edge of a fishing bank was to the same effect, illustrating the principle of placing stocks associated with a fishing bank under the jurisdiction of a single State rather than dividing these stocks between different national jurisdictions (*ibid.*, para. 180).

Finally, Canada argues that there is no similarity between a true common like the high seas, which is beyond all coastal States' jurisdiction and where everyone may fish, and an area divided by a line between two coastal States, each with exclusive authority on its side of the line (V, Canadian Reply, para. 52).

With all due respect, Mr. President, this seems to the United States to be a distinction without a difference. Whether the stocks are fished by the fishermen

of two States or many, the fishermen in a coastal State know that the fish they do not catch will not be conserved for their later use, but are likely to be caught by foreign fishermen from the other State when the fish move across the boundary with the other coastal State; likewise, they are likely to be caught by fishermen from a number of foreign States when they cross the high seas boundary. Whether the stocks are fished by the fishermen of two States or many States, conservation will require the States involved to reach agreement on the allocation of a scarce resource between their nationals. Allocation is a sensitive political and economic issue. Whether there are two States or many, reaching agreement on allocation is difficult, and sometimes impossible.

Canada also argues that the principle that the boundary should facilitate conservation and management is a pretext for monopoly (Counter-Memorial, para. 500). This resort to pejorative labels does not advance our enquiry. On the one hand, each State does have exclusive jurisdiction over the resources in its zone, so that each State does have a monopoly on the resources off its coast. But this is merely a result of the extension of coastal-State fisheries jurisdiction to 200 nautical miles. It is a result to which Canada has not been heard to object. On the other hand, the application of the principle of conservation will not lead to a monopoly of the resources of the entire area, because there will be fishery resources on both sides of whatever boundary the Chamber determines. Canada, in particular, has enormous fishery resources on the Scotian Shelf and on the banks to the north. I would refer the Chamber, in this connection, to Annex 31 of the United States Reply, which contains a fuller discussion of these alternative fishery resources. In this respect, the application of the principle of conservation and management to the Gulf of Maine area produces a result similar to that in the *Grisbadarna* case: that is, the boundary avoids crossing any particular fishing bank but, at the same time, it leaves fishing banks and fishery resources to each Party. This is hardly monopoly.

Finally, Canada objects that the principle of conservation has no logical connection with the "basis of title". Canada of course equates the "basis of title" with the distance principle and the equidistance method. This is an error that I will deal with later. However, it is correct to say that there is no connection between the principle that the boundary should facilitate conservation and the equidistance method. Indeed, one of the shortcomings of the equidistance method is that it is constructed only by reference to the projecting points on the coast. Therefore, it does not take account of variations in the marine environment. Thus, the equidistance method will not produce boundaries that facilitate resource conservation and management except in circumstances, not present here, where it does so by accident.

I come now to the third equitable principle identified by the United States – the principle that the delimitation should minimize the potential for disputes between the Parties.

Mr. Colson will discuss, in a subsequent oral statement, why it is that a boundary that does not divide the fishing banks and takes advantage of the Northeast Channel would minimize the potential for international disputes, whereas, on the other hand, a boundary across Georges Bank would increase the potential for disputes. There is here a question of law, which I believe is easily answered.

Is it lawful for this Chamber to prefer a boundary that minimizes international disputes to a boundary that maximizes disputes? The United States believes that it is lawful, and promotes an equitable solution, to provide a result that avoids further disputes. The United States Memorial refers to the concern for minimizing the potential for international disputes in the *Grisbadarna* case

and the *North Sea Continental Shelf* cases as well as in the international cases delimiting land boundaries (paras. 255 and 256).

This is not an equitable principle that is confined to maritime boundary delimitation. Quite the contrary. It is fundamental to all of international law. Indeed, the basic purpose of international law, as well as the basic purpose of the United Nations and of the International Court of Justice, is to avoid, to resolve, to minimize, disputes. It would be perverse, indeed, to ignore this aspect of the case.

The fourth and final equitable principle identified by the United States is that the boundary must take account of the relevant circumstances in the area.

Canada, of course, cannot deny this principle since it is part of the basic fundamental rule of maritime boundary delimitation set forth by the Court. Moreover, Canada itself has expressly endorsed this principle. Canada instead attacks the fourth equitable principle identified by the United States, by contending that the United States has not put forth any legal criterion of relevancy – that is, any basis on which the relevance of various circumstances may be determined and balanced up (Canadian Counter-Memorial, para. 540). Canada, on the contrary, states that it is relying on circumstances rooted in the object and the purpose of the zones to be delimited (*ibid.*, para. 549).

This is once again a very sophisticated way of Canada attacking what is a very fundamental concept: this Chamber not only has the right but also the responsibility to determine what are the relevant circumstances in the area. Moreover, the Chamber is not as restricted as Canada would restrict it to selecting only one type of relevant circumstances – namely, those which Canada asserts are related to the object of the zone to be delimited. This Canadian position is contrary to the Court's view in the *Tunisia/Libya* case where the Court stated that:

> "It is clear that what is reasonable and equitable in any given case must depend on its particular circumstances. There can be no doubt that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances of the area." (*I.C.J. Reports 1982*, para. 72.)

In the *North Sea Continental Shelf* cases, the Court was even more specific. There it stated:

> "In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case." (*I.C.J. Reports 1969*, para. 93.)

The United States agrees that the relevant circumstances must be related to equitable principles. In fact, all of the circumstances identified by the United States as relevant circumstances in the area either relate to equitable principles expressly set forth in the first three principles we have identified as applicable here or they are circumstances which the United States believes that the Chamber may reasonably take into account in determining what are the circumstances in this area that will lead to an equitable result – the United States fourth equitable principle.

The United States agrees with Canada that circumstances relating to the object and purpose of the 200-nautical-mile zone are among the circumstances

relevant to delimitation. We do not believe that these are the exclusive relevant circumstances. However, in the United States view, even with respect to this relevant circumstance, the primary object and purpose of the zone is conservation and management of resources – the United States second equitable principle – not, as Canada has suggested, the satisfaction of coastal State dependence on the resources of the zone (Canadian Reply, para. 86).

Certainly a major underlying purpose of the zone was to extend coastal State jurisdiction seaward to include most coastal stocks under single coastal State management and thus to avoid the common pool problems which were devastating world fisheries and particularly Georges Bank. This purpose is made even clearer by the special treatment (which I earlier referred to) accorded anadromous, catadromous and highly migratory species under the 1982 Convention on the Law of the Sea simultaneously with the creation of the exclusive economic zone.

Of course, the zone does benefit coastal States, as a whole, as against distant-water fishing States, but this is quite different indeed from benefiting individual coastal States in accordance with their respective economic need.

This mistaken characterization of the purpose of the zone represents yet another instance in which Canada seeks to have the Chamber consider, as a relevant circumstance, economic dependence, which the Court has expressly found not to be relevant (*I.C.J. Reports 1982*, para. 107).

As to the question of balancing up the relevant circumstances I will return to that subject at a later point in this paper.

The Equitable Principles Proposed by Canada

Now that I have discussed the four equitable principles identified by the United States, I will discuss the three equitable principles proposed by Canada.

Canada's first equitable principle is that the single maritime boundary should leave to each Party those areas of the sea that are closest to its coast, provided that due account is taken of the distorting effects of incidental special features not in keeping with the general configuration of the coast in the relevant area (Counter-Memorial, para. 729).

This proposed equitable principle is merely a rephrasing – as the alleged "distance principle" – of the equidistance method and implies that equidistance, by ensuring proximity, produces equitable results.

Canada's argument is not new. In the *North Sea Continental Shelf* cases, Denmark and the Netherlands also argued that the equidistance method was inherently equitable. The Court, of course, rejected that argument. The Court's observation, in its Judgment, is equally applicable to Canada's proposed equitable principle:

> "The plea that ... the results can never be inequitable, because the equidistance principle is by definition an equitable principle of delimitation, involves a postulate that clearly begs the whole question at issue." (*I.C.J. Reports 1969*, para. 24.)

The United States believes that the equidistance method is not inherently equitable and that its equitability varies with the circumstances of each particular case.

In the view of the United States, the status in the law of the equidistance method has already been determined by the Court. I will not recount all that the Court has said on this subject – much of that has been set forth in our written pleadings. But I will note here, briefly, several of the Court's conclusions.

In the *North Sea Continental Shelf* cases, the Court noted that the equidistance method can produce results that are "extraordinary, unnatural or unreasonable" (para. 24): that because of the "cut-off effect" the equidistance method may be particularly inequitable if the coasts are concave or convex, and that the inequity of the equidistance line in such a circumstance tends to become magnified as the line is extended seaward (para. 8).

In the *Tunisia/Libya* case, the Court recognized that the equidistance method does not always produce equitable results. It stated that the equidistance method "may be applied if it leads to an equitable solution: if not, other methods should be employed" (para. 109). The Court also concluded that equidistance is not "either a mandatory legal principle, or a method having some privileged status in relation to other methods" (para. 110).

The practice of States in maritime boundary delimitations confirms the Court's conclusions. In a large number of boundaries, States have avoided altogether the use of the equidistance method, or have deviated, often quite markedly, from the strict or simplified equidistant line. Moreover, State practice in geographical situations analogous to the Gulf of Maine, namely, the North Sea and Bay of Biscay, demonstrates further that the boundaries in those situations must deviate significantly from the equidistance line in order to achieve an equitable result.

Canada recognizes that it is asking the Chamber to overturn the established law. For example, in its Counter-Memorial, Canada admits that its argument requires "a reconsideration of . . . the essential rationale of the conclusions reached by the Court in the *North Sea Continental Shelf* cases" (para. 468).

Mr. President and distinguished Judges, what reason is there to believe that the established law has been reversed by the introduction of the 200-nautical-mile zone? To put the question another way, what reason is there to believe that equidistance line boundaries that were inequitable a few years ago, for example, in the North Sea, in the English Channel in the vicinity of the Channel Islands, or the Bay of Biscay, have now become equitable?

Canada's answer is that the 200-nautical-mile zone and the claimed emergence of the distance principle as the primary basis of coastal State title "lends a new weight to equidistance as a method of delimitation" (Canadian Counter-Memorial, para. 559). I will call this Canada's "distance" theory. There are two parts to it: first, that the "distance of 200 miles from the coast is the sole basis of coastal State title to a 200-mile fishing zone or exclusive economic zone" (*ibid.*, para. 556). Second, that distance from the coast in the sense of "closer distance" or "closer proximity", should therefore be controlling in determining the boundary (*ibid.*, para. 558).

Canada's distance principle is of great importance to this boundary delimitation, because this theory is the very foundation of the greater part of Canada's affirmative case. Therefore, it is of great significance that the "distance" theory is both illogical and wholly unfounded in law.

Canada's distance principle is wrong as a matter of logic because it confuses three quite separate concepts. These are the source of jurisdiction, the outer limit of jurisdiction, and the delimitation of disputed areas between neighbouring States.

The source of jurisdiction – the "basis of title", if you will – is sovereignty over land territory. 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" (*I.C.J. Reports 1969*, para. 96). It is because maritime jurisdiction extends from the coast that the relation of the coasts and the maritime areas in front of those coasts is so important to boundary delimitation.

The definitions of both the exclusive economic zone and the continental shelf found in the 1982 United Nations Convention on the Law of the Sea recognize this link of the maritime areas to the land from which they extend. Thus, Article 55 defines the exclusive economic zone as "an area beyond and adjacent to the territorial sea". Accordingly there must be a territorial sea of the coastal State adjacent to its exclusive economic zone. Article 76, moreover, defines the continental shelf as "the sea-bed and subsoil of the submarine area that extends beyond . . . [the territorial sea] throughout the natural prolongation of its land territory . . .".

The distances these zones may extend beyond the territorial sea is not the source of jurisdiction or title, just as the three-mile or 12-mile distance is not the source of a State's jurisdiction over, or title to, the territorial sea. These distances are merely the seaward limit to which such jurisdiction may extend. Canada errs by ignoring this distinction between the land as the source of rights and the 200-nautical-mile distance as the seaward limit of those rights.

Moreover, even were Canada correct that the distance principle had replaced extension of sovereignty over the land territory as the basis of title, Canada also in effect is arguing that the legal basis of title to a zone controls delimitation. Canada argues that in the *North Sea Continental Shelf* cases, the Court embraced natural prolongation of the land as the essential basis of title, and that it accordingly became "the key principle of continental shelf delimitation under customary law" (Canadian Reply, para. 59). According to Canada, when the 1982 Law of the Sea Convention replaced natural prolongation with the distance principle as the legal basis of title, in doing so – so Canada argues – the distance principle replaced natural prolongation as the basic principle of maritime delimitation.

As set forth in its Reply, the United States does not agree at all that the distance principle has become the fundamental basis of title (paras. 77-99). Moreover, it does not accept that there is no difference between legal title and delimitation so that with the alleged movement to the distance principle in determining legal title, equidistance becomes the basic delimitation principle. Clearly, in the *North Sea Continental Shelf* cases, the Court distinguished between the basis of title and delimitation, stating that "the appurtenance of a given area . . . in no way governs the precise delimitation of its boundaries" (*I.C.J. Reports 1969*, para. 46). The Court in the *Tunisia/Libya* case agreed, stating that in the *North Sea Continental Shelf* cases the "Court . . . clearly distinguished between a principle which affords the justification for the appurtenance of an area to a State and a rule for determining the extent and limits of such area" (*I.C.J. Reports 1982*, para. 44). Moreover, the delimitation provisions of the 1982 Law of the Sea Convention itself are quite separate from the provisions that use 200 nautical miles to define the outer limit of coastal-State jurisdiction. These delimitation provisions in no sense embrace any kind of distance principle.

The Third Law of the Sea Conference agreed upon the 200-nautical-mile seaward limit for several reasons. These included the desire to encompass the entire range of coastal fishery stocks, and as a basis for agreement upon a resource zone in exchange for recognition of navigational rights and freedoms. The negotiation of the rules of delimitation for the economic zone and continental shelf were quite separate and they lasted far longer. There was no suggestion, at the Conference, that the acceptance of the 200-nautical-mile seaward limit in any way whatsoever determined the rules of delimitation between neighbouring States. In particular, there was no suggestion that the 200-mile limit implied the use of the equidistance method. Quite the contrary,

the Conference rejected all attempts to incorporate the equidistance method in any way into the articles on delimitation.

Ultimately, the Law of the Sea Conference chose not to make any changes in the international law of delimitation. Both Article 74, relating to the delimitation of the economic zone, and Article 83, relating to the delimitation of the continental shelf, provide that delimitations "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 order to achieve an equitable solution".

Thus, Mr. President and distinguished Judges, the very same Conference that negotiated the extension of coastal-State water column jurisdiction seaward to 200 nautical miles also endorsed the existing international law of delimitation. It also rejected a preferential role for equidistance. It is preposterous to find in this history the exactly opposite conclusion. The 200-nautical-mile seaward limit of the exclusive economic zone clearly did not reverse the established law and require the use of the equidistance method in its delimitation.

To recapitulate: Canada urges this Chamber to overturn the established law of delimitation and to transform the equidistance method, a method which is sometimes useful and sometimes not, into an equitable principle applicable to every boundary delimitation. However, Canada's argument depends entirely upon a theory, the theory of the "distance" principle. This alleged principle is wrong as a matter of logic and plainly contradicted by the law.

The Chamber adjourned from 11.20 a.m. to 11.43 a.m.

Mr. President, distinguished Judges, I had completed my discussion of Canada's first equitable principle.

I will now turn to *Canada's second equitable principle, that is, that the single maritime boundary should allow for the maintenance of established patterns of fishing that are of vital importance to coastal communities within the relevant area.*

In order to understand this principle it should be read together with the relevant circumstances identified in the conclusion to Canada's Reply, namely, the assertions of:

> "The strong Canadian presence in the fishery of Georges Bank and the established and vitally important economic dependence of Canadian coastal communities in the relevant area upon the fishery resources of the Bank; and
>
> The lack of any comparable dependence on the part of the United States coastal communities." (Para. 375.)

Established patterns, as set forth in the Canadian principle apparently would not refer solely to the present fishery, but would imply consideration of historic fisheries in establishing the patterns. However, if these patterns were interpreted to refer solely or principally to the present fishery, the United States would not agree. The full history of the Parties' exploitation of the resources of the area is relevant to their conduct in the area. Moreover, Canada has here again committed its repeated fault of associating the use of the resource, which is a relevant circumstance, with coastal-State dependence on a resource, which is not. Economic dependence is not a relevant circumstance, much less an equitable principle.

Canada proposes that economic dependence should influence the boundary delimitation. But Canada's argument entails critical errors of fact. These errors have been discussed in some detail in Annex 4 to the United States Counter-Memorial (IV) and Annexes 31 and 32 to the United States Reply. My colleague,

Mr. Feldman, will discuss Canada's economic dependence argument in more detail, particularly as to the facts.

I shall now discuss what the United States believes to be a critical error of law. Economic dependence is not relevant to boundary delimitation. The economic dependence thesis is contradicted by the nature and development of the 200-nautical-mile resource zones.

I would like to begin by discussing the history of the emergence of the 200-nautical-mile zones and the implication of this history for the economic dependence argument.

Canada argues that the development of the 200-nautical-mile zones was "based upon a recognition of the special dependence of coastal States upon the resources off their coasts" (Canadian Reply, para. 86). It is from this premise, argues Canada, that the economic dependence of a State upon a fishery should be given weight in boundary delimitations. However, Canada's conclusion does not follow from the premise. Certainly, coastal States supported the extension of their fishery jurisdiction in order to claim for themselves more resources. Certainly, some of these coastal States were especially dependent upon the fisheries. However, the rule of law that emerged was not that each State was entitled to assert jurisdiction according to its degree of dependence; the rule, instead, was that each State was entitled to assert fisheries jurisdiction within 200 nautical miles over the area off its coasts. The coastal State was entitled to the new jurisdiction regardless of whether it was dependent upon the resources and, indeed, even if it did not exploit the resources. Even now many coastal States lack the capability to harvest the fishery resources off their coasts. Yet no one would argue that they are not entitled to the full extent of fishery jurisdiction conferred by the 200-nautical-mile zone.

The other aspect of the extended coastal State fishery jurisdiction was that foreign fleets lost their right of access to fisheries they had been exploiting. These fleets lost their right of access whether or not they could prove economic dependence. Here again, sovereignty over the coast was the basis for resource jurisdiction, and economic dependence was irrelevant.

The extension of coastal-State jurisdiction was a revolution in the law of the sea and a revolution in worldwide fishing patterns. Coastal State fleets gained enormously at the expense of the distant-water fleets. In this process, many States experienced a trade-off. They lost distant-water fisheries but gained fisheries off their own coasts which others had been exploiting. France and the United States fall in this category. For some States with large distant-water fleets the results were far worse. For example, the Federal Republic of Germany, Great Britain, and Italy were all forced to accept sharp reductions in the size of their fleets and the number of jobs in their fishing industries. Spain, also a great distant-water fishing nation, energetically sought access to new fishing grounds and managed thereby to postpone the day of reckoning. But today even Spain is beginning to make large reductions in its fleet.

Some nations fared better than others. Canada, in particular, gained enormous fishery resources, especially on its east coast. But, except for Georges Bank, Canada had few fisheries off the coasts of other States. Canada has maintained its Georges Bank fishery until now by virtue of its boundary claim. Thus, Canada has managed so far to enjoy the benefits of creating its own 200-nautical-mile fishery zone, without having to face the consequences of losing access to fisheries off the coasts of other States.

Let us examine further the concepts of "economic dependence" and "relative economic wealth". Two years ago, in the *Tunisia/Libya* case, the Court characterized Tunisia's arguments as follows:

> "Tunisia seems to have invoked economic considerations in two ways: firstly, by drawing attention to its relative poverty vis-à-vis Libya in terms of absence of natural resources . . . compared with the relative abundance of Libya . . .; secondly, by pointing out that fishing resources derived from its claimed 'historic rights' and 'historic waters' areas must necessarily be taken into account as supplementing its national economy in eking out its survival as a country." (*I.C.J. Reports 1982*, para. 106.)
>
> "The Court is, however, of the view that these economic considerations cannot be taken into account . . ." (*Ibid.*, para. 107.)

Thus the Court declared considerations of both economic dependence and relative wealth to be legally inadmissible. Canada's argument that southwest Nova Scotia is dependent upon the fishery resources of Georges Bank is the same as Tunisia's argument that the fishery resources of the area were necessary to "eking out its survival". And Canada's argument that southwest Nova Scotia is relatively more dependent than Eastern Massachusetts upon Georges Bank is the same as Tunisia's argument that Libya was relatively wealthier. For the same reasons adduced by the Court in that case, Canada's arguments must be rejected in this case.

In explaining why it would not take account of economic dependence and relative wealth, as urged by Tunisia, the Court stated that these:

> "are virtually extraneous factors since they are variables which unpredictable national fortune or calamity ... might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource." (Para. 107.)

This reasoning applies with even greater force to the present dispute. Canada and the United States have large and complex economies. There are many unpredictable factors that will affect their relative economic dependence upon the fisheries of Georges Bank. One such factor is the substantial new hydrocarbon resources that have been discovered off the coast of Nova Scotia and that will dramatically enrich the economy of that area. Another such factor is government intervention, whether in the form of subsidies or in the form of investment incentives. Any examination of the reasons why one area is more dependent than the other upon a particular industry would lead this Chamber into an examination of national economic policies, resource prospects and global trends that are impossible to understand and predict with any measure of confidence.

The facts discussed by the Parties in their pleadings are only a small part of the overall economic picture. Moreover, even these facts are complex and controversial. Even taking into account the complexity of these facts, however, it is clear that Canada's prediction that southwest Nova Scotia will suffer severe and long-lasting, even permanent, economic damage if the United States prevails, is grossly over-stated. Mr. Feldman's subsequent presentation will discuss the analytic and statistical errors involved in Canada's assertions about the relative economic dependence of the Parties.

Mr. President, distinguished Judges, is there any basis for the proposition that a nation with lesser economic dependence should be disadvantaged in boundary delimitations? The United States does not believe that a court should take into account the future needs of the parties as a factor in the delimitation of maritime boundaries. It believes that such a proposition would be inconsistent with the principle that all sovereign States have equal rights and are entitled to equal

treatment under international law. Every coastal State is entitled to jurisdiction over the waters off its coast whatever the State's economic dependence on the resources of those waters. Considerations of economic dependence are not germane to the delimitation of maritime boundaries. Any effort to take them into account inevitably would involve the Chamber in an exercise of distributive justice that is inconsistent with its judicial function.

In short, the doctrine of economic dependence is wrong in logic, wrong in law, and, in addition, inimicable to the peaceful settlement of disputes.

Canada's third and last equitable principle is that the single maritime boundary should respect the indicia of what the Parties themselves have considered equitable as revealed by their conduct (Canadian Counter-Memorial, para. 729).

With respect to this third equitable principle stated by Canada, the United States does consider the conduct of the Parties to be a relevant circumstance. The activities of the Parties in the Gulf of Maine area as set forth in the United States pleadings are considered relevant conduct of the Parties. However, it is the view of the United States that the conduct of the Parties is properly viewed as a relevant circumstance to be taken into account and weighed under the fourth equitable principle set forth by the United States.

The United States also agrees that the conduct of the Parties may be indicia of what the Parties would consider to be an equitable result. However, the Parties disagree as to the Parties' conduct in this case, and its significance in indicating what the Parties would consider to be an equitable boundary. The United States Agent has already dealt in part with this question. Subsequent oral presentations will deal with the issues of fact in more detail. However, there is one circumstance identified by Canada that I will discuss here because it must be excluded, in our opinion, as a matter of law. This concerns the restraint exercised by the United States in issuing oil and gas leases during the pendency of this dispute.

It will be recalled that both Parties have authorized and conducted seismic work in the disputed area, and that neither Party has drilled there. Canada's leases do purport to authorize drilling, but Canada suspended the work requirements and no drilling has in fact been conducted. The United States has issued permits for seismic work, but has deliberately refrained from issuing leases which would authorize drilling. The United States has done so in the disputed area, in order to facilitate the settlement of this dispute.

Canada, on the other hand, has sought to take advantage of this restraint exercised by the United States. For example, in its Counter-Memorial, Canada states:

> "From 1965 until the end of the decade the United States clearly acquiesced in and recognized the exercise of Canadian jurisdiction with respect to what is now the disputed portion of the Gulf of Maine area." (Para. 380.)

Counsel for Canada have emphasized the same point in these hearings. In this way, Canada seeks to penalize the United States for acting with restraint. Canada's argument, however, is contrary to the law and adverse to the peaceful settlement of disputes. It is contrary to the spirit of Article 74 (3) of the 1982 Law of the Sea Convention which provides that provisional arrangements pending the settlement of the boundary shall be without prejudice to the delimitation. It is absolutely critical that the Chamber confirm this rule of law. Currently, there are several hundred unresolved maritime boundaries, including three others between these very Parties. Many of these could become a source of conflict if the States involved were to believe that their exercise of restraint could prejudice their boundary positions in subsequent negotiations or adjudications.

This, Mr. President, concludes my discussion of the Parties' views on the applicable equitable principles.

The Identification of Relevant Circumstances

I will now discuss the sixth part of this presentation of the legal issues separating the Parties, namely the identification of the relevant circumstances.

The Parties agree that in this delimitation, the Chamber must take account of the relevant circumstances in the area. Furthermore, the Parties agree that the relevant circumstances must be balanced up to determine an equitable solution.

However, the Parties do not agree on what circumstances are relevant or on what weight should be given to the various circumstances. On the one hand, Canada has attempted, without stating so expressly, to reduce the weight of the actual geography by emphasizing so-called "human geography". Canada also has attempted, most recently in Mr. Fortier's statement last Wednesday, to exclude as irrelevant as a matter of law aspects of the marine environment that strongly support a boundary respecting the Northeast Channel. Professor Bowett, in his statement last Thursday, sought to exclude a variety of human activities that tend to confirm the predominant interest of the United States on Georges Bank. On the other hand, Canada has sought to include and to give great weight to considerations of economic dependence already determined by the Court to be irrelevant to boundary determinations (*I.C.J. Reports 1982*, para. 107).

Accordingly, in this part of my presentation, the United States will discuss the relevance of circumstances relating to geography, the marine environment, geology, human activities, the conduct of the Parties, and economic considerations. I shall refer in particular to the differences between the Parties as to the relevance of these circumstances.

Geographical Circumstances

First let us consider geographic circumstances. The most important considerations in this case are those relating to geography. The Court and arbitral tribunals have consistently emphasized geographic factors, such as the general configuration of the coasts of the Parties, the location of the terminus of the land boundary, and the element of a reasonable degree of proportionality.

Both Parties acknowledge that geography is at least "a leading factor" (I, Canadian Memorial, para. 303). Both quote the Court to the effect that the maxim "the land dominates the sea" requires that the delimitation "faithfully reflect the general configuration of the coast" (*ibid.*, para. 305). In the view of the United States, a boundary not drawn in accordance with the geographical factors cannot produce an equitable result. And Canada agrees. Last week, the Agent of Canada stated that:

> "No one would contend that an interest in the fishery can support a claim that has no reasonable basis in coastal geography. Nor, for that matter, could any *other* non-geographical factor serve as a substitute for a geographical basis of claim." (P. 46, *supra*.)

Geography is most important for several reasons:

First, the land is the source of all coastal State rights to maritime jurisdiction, including the continental shelf and the exclusive 200-nautical-mile zone (*I.C.J. Reports 1969*, para. 96).

Second, geography is relevant to the delimitation of both the water column and the continental shelf. This is unlike some other circumstances that may only pertain to one or the other. Thus, geography was relevant in both the delimitation of the water column in *Grisbadarna* and of the continental shelf in the *Tunisia/Libya* case.

Third, geography is for ever. Some other circumstances, such as man's activities or economics, may change, but the geography will not change (at least not within the time-span relevant to this case).

Canada has attempted to confuse physical geography with so-called "human geography". This should be seen for what it is – an attempt to escape the logical consequences that follow from the physical geography. It is the actual configuration of the coasts that courts have relied upon, and it is the actual configuration of the coasts that must be considered here.

Canada has also attempted to confuse the issue by posing a false dichotomy between the geography of the Gulf of Maine area and "macrogeography", which Canada asserts to be irrelevant. This is a matter of scale. Certainly the Court in the *North Sea Continental Shelf* cases examined the totality of the geography of the North Sea. It is also worth noting that a number of States have used continental geography to determine their boundaries. For example, the maritime boundaries between Chile, Peru and Ecuador extend east-west, perpendicular to the general north-south direction of the west coast of South America. Even Canada has employed macrogeographical arguments in this case. (7) I would refer the Chamber to paragraph 19 and to Figure 7 of the Canadian Memorial.

In this case, Mr. President and distinguished Judges, it is not necessary to choose between local and macrogeography. An examination of either the Gulf of Maine, the Gulf of Maine area, or the east coast of North America confirms that the general direction of the coast is southwest to northeast, and that the land boundary terminus is located in the corner of a coastal concavity that is the Gulf of Maine.

The United States has shown in its pleadings the factual relevance of the location of the land boundary in the northern corner of the Gulf of Maine concavity. Perhaps because of its awareness that this location of the land boundary causes the Canadian lines to swing out across and cut off the coastal front of the state of Maine, Canada seeks to exclude this relevant circumstance from consideration as a matter of law. Canada argues that the United States offers no legal reason why the terminus of the land boundary should control the course of the maritime boundary in the areas beyond its immediate vicinity, in a situation where other coastal areas are much closer to the maritime boundary as it moves seaward (Canadian Reply, para. 148). Once again, we have a reiteration by Canada of the distance principle and the equidistance method.

The location of the land boundary is in fact quite relevant in determining the cut-off effect of the Canadian lines, which run so far south of the latitude of the land boundary. Given the location of the land boundary, the maritime boundaries proposed by Canada do not respect the first equitable principle identified by the United States of taking into account the relationship between the coasts of the Parties and the maritime areas in front of these coasts and, more particularly, the subsidiary principle of non-encroachment on the coastal projections from these coasts.

If Canada chooses to deprecate the cut-off effect of the Canadian lines as "cartographical impressionism", so be it. The inequitable character of such a maritime boundary should be fully apparent, however, to anyone looking at a

map of the Gulf of Maine area, such as the map presently before this Chamber. Such a boundary would drop virtually due south for 200 nautical miles, and cut off the coast of Maine from the sea. So much for geographic circumstances.

Circumstances Relating to the Marine Environment

The relevant circumstances of the marine environment also deserve most careful consideration in the balancing-up process. In its pleadings, the United States has described how Georges Bank has a separate and integrated oceanographic régime and how the Northeast Channel is also a significant natural feature in the Gulf of Maine area. It divides not only the Georges Bank and Scotian Shelf ecological régimes but also most of the important commercial fish stocks in the area. These circumstances of the marine environment are especially relevant to the boundary delimitation in applying the two equitable principles previously identified by the United States that the delimitation should facilitate conservation and management and minimize the potential for international disputes.

Canada contends that the natural boundary between fishing banks and fishing stocks of the Gulf of Maine area located at the Northeast Channel is not legally entitled to be considered as a relevant circumstance (Reply, para. 162). The Agent for Canada said last week that "the idea of a natural boundary determined on the basis of the physical character of the offshore environment has no place in the law" (p. 39, *supra*).

Canada argues in the first place that an equitable result is determined on the basis of equitable principles within the law, a principle that must take precedence over any alleged natural boundary (Reply, para. 28). This again is a false dichotomy. The Canadian phrasing of the issue implies a conflict of concepts that does not in fact exist. In his opening statement the Agent for Canada stated that a natural boundary "cannot confer an equitable character upon an inequitable result" (p. 40, *supra*). That may well be, but that is not the United States argument. If a natural boundary exists, which it does in this case, if that boundary has important implications for the Parties' ability to manage and conserve the natural resources of the area and for the minimization of future conflict between them, which this natural boundary does, then such a boundary can bolster and confirm a delimitation reached by the application of equitable geographic principles. A natural boundary may, and in this case does, produce an equitable result consistent with equitable principles within the law.

Canada contends, secondly, that a natural boundary could only exist where the continental shelf exhibits such a marked disruption or discontinuity of the sea-bed as to constitute an indisputable indication of the limits of two separate continental shelves or two separate natural prolongations. Since the Parties have agreed that there is a single continuous shelf in the Gulf of Maine area, Canada contends that there can be no natural boundary there (Reply, para. 81). Canada here fails to distinguish between the concept of natural prolongation in the geological or geomorphological sense and a natural boundary that exists at the Northeast Channel as a relevant circumstance in this case. The Court in fact has indicated that there could be a geomorphological feature that is important and is relevant although not rising to the status of a division of prolongations (*I.C.J. Reports 1982*, para. 8). Such a feature may constitute a natural boundary, as does the Northeast Channel, both for the sea-bed and the water column.

Third, Canada also attempts to reject the natural boundary thesis on the scientific basis that a natural boundary would be in complete "defiance of the essential continuity that characterizes ocean systems" (Reply, para. 81). The water

column is not, in fact, as uniform as Canada asserts. There can in fact be, as the United States factual pleadings have shown, and the United States expert, Dr. Robert Edwards, will demonstrate, separate régimes within the water column.

Fourth, Canada alleges that such a boundary would also have to take into account the distance principle, as the legal basis of title (*ibid.*, para. 82). The United States agrees that the natural boundary would not coincide with an equidistance boundary based on the distance principle. Indeed, this is one of the deficiencies of the application in this case of the equidistance method. But the United States would note that the natural boundary at the Northeast Channel, in this case, would be respected by a boundary giving effect to the principle of coastal-front projection.

Fifth, and last, the natural boundary would have to be consistent with an equitable result. According to Canada, the natural boundary has been advanced by the United States to produce a result as far removed from equity as possible (*ibid.*, para. 82). Here, indeed, we come to a real question: whether or not a boundary that respects the natural boundary at the Northeast Channel would produce an equitable result in this case. The United States, for reasons set forth in its pleadings, which will be summarized and supported in a subsequent oral statement by Mr. Colson, is of the view that it would do so. It is consistent with the equitable principles set forth, including those relating to management and conservation of fishery resources, to the minimization of the potential for international disputes, and to the taking into account of the other relevant circumstances in the area. Most importantly, the natural boundary in this case coincides with the result indicated by the equitable principles relating to coastal geography.

The consideration of a natural boundary has a solid foundation in jurisprudence. As the United States has demonstrated in its written pleadings, adjudications involving delimitation of fishing rights authorize, if not require, consideration of natural features in the marine environment. The Court of Arbitration took account of such features in the *Grisbadarna* case. The boundary was drawn to pass through deep water between two important fishing banks, thereby avoiding a division of authority on either bank. In the 1951 *Fisheries* case, Norway stressed the relationship of the coastal fisheries to the numerous banks and ledges within the waters that Norway sought to include within its straight baseline system. The existence of these banks and ledges was one of the geographical realities of which the Court took note in affirming Norway's exclusive jurisdiction over the sea area there in issue (*Fisheries, I.C.J. Reports 1951*, p. 127). More recently, the parties to the Convention on the Conservation of Antarctic Marine Living Resources of 20 May 1980, used a natural feature in the marine environment to delimit the area subject to that Convention: they used the Antarctic Convergence, which is an oceanographic boundary between Antarctic waters to the south and warmer sub-Antarctic waters to the north, and which limits the range of many Antarctic marine species (Art. I). The parties to this Convention are Argentina, Australia, Belgium, Chile, France, the German Democratic Republic, the Federal Republic of Germany, Japan, New Zealand, South Africa, the Union of Soviet Socialist Republics, the United Kingdom, the United States and the European Economic Community.

Geological Circumstances

What about geological circumstances? In this respect, the United States fully agrees with the Court's rejection in the *Tunisia/Libya* case of the Tunisian and Libyan arguments based upon geology, upon events occurring a million years ago, that is upon "the processes and events which gave rise to features . . . on

and beneath the earth's surface" and upon the "analysis and classification of minerals, rocks, and fossils" (*I.C.J. Reports 1982*, paras. 100-101).

We also agree with the Court's determination in that case that what is relevant in delimitations are "the physical circumstances as they are today . . . the present day sea-bed" (*ibid.*, para. 61).

We accordingly invite the Chamber to consider, as a relevant circumstance in this case, the Northeast Channel which divides important fishing banks of the present day sea-bed.

Activities in the Area

I turn now to a consideration of activities in the area as a legally relevant circumstance.

The United States and Canada disagree about the relevance, as a legal matter, of many of their respective activities in the Gulf of Maine area. In the view of the United States, the activities of the Parties are relevant as evidence of the predominant interest of the United States in the Georges Bank area. As noted in the United States submission (United States Reply, p. 166, B (3)), those activities include:

> "The longer and larger extent of fishing by United States fishermen since before the United States became an independent country;
>
> The sole development, and, until recently, the almost exclusive domination of the Georges Bank fisheries by United States fishermen; and
>
> The exercise by the United States and its nationals for more than 200 years of the responsibility for aids to navigation, search and rescue, defense, scientific research, and fisheries conservation and management."

That the boundary may take into account the "predominant interest" in the area of one of the parties was expressly noted by the Court of Arbitration in the Anglo-French Arbitration case (para. 188).

Canada disputes the relevance of some of the particular activities discussed by the United States and contends that the most weight should be accorded recent fishing patterns. In this connection, Canada has advanced several legal theories that deserve comment.

In its Reply, Canada argues that most of the activities invoked by the United States:

> "took place for the most part at a time when extended coastal State jurisdiction was entirely uncontemplated, and the principles of intertemporal law consequently rule out their consideration" (para. 98).

It must be noted, Mr. President, that this theory of intertemporal law if valid, if applicable, would render irrelevant not only many of the activities invoked by the United States but also, until 1977, Canada's comparatively recent Georges Bank fishery. For as Canada itself notes in its Counter-Memorial:

> "The diverse activities of both Parties on Georges Bank, before the advent of the continental shelf and fishing zone régimes . . ., were activities in common with other nations and carried out as traditional freedoms of the high seas." (Para. 602.)

However, Canada's theory of intertemporal law does not render irrelevant the Parties' activities, because these activities were not introduced as evidence of historic title or prior claims to jurisdiction. Quite to the contrary: the United States introduced these activities solely to demonstrate its predominant interest on Georges Bank.

Canada also argues in its Reply that many of the activities invoked by the United States are irrelevant because they

> "are even today unrelated to the subject-matter of the zones to be delimited and remain in the category of high seas freedoms that may be exercised in common with other nations" (para. 98).

This argument is wrong both in fact and in law. In fact, the activities invoked by the United States relate either directly or indirectly to the subject-matter of existing zones and maritime jurisdiction in the area. Fishing and fishery conservation and management activities relate directly. The exercise of responsibility for aids to navigation, search and rescue and scientific research in good part has been conducted in support of United States fishing and continental shelf activities and relates indirectly to what Canada calls "the purposes of the zone". As a matter of law, it should be recalled that these and similar activities have been considered in past cases to be relevant circumstances. These are noted in paragraph 259 of the United States Memorial. *Grisbadarna*, for example, considered activities involving not only the use of the resources but also the exercise of responsibilities for measuring and charting the sea and the maintenance of aids to navigation by the State (45th Whereas). The Court of Arbitration in the Anglo-French Arbitration particularly noted the relevance of national defence and security interests as evidencing a "predominant interest" (para. 188). In that case, however, these considerations were diminished by the very particular character of the English Channel as a major route of international maritime navigation.

In light of the provision in the Special Agreement that this boundary will limit all rights and jurisdictions now recognized and to be recognized in the future by international law, it would be unwise to limit arbitrarily the interests and activities that this Chamber may consider. The United States believes that coastal State rights in the exclusive economic zone do not and should not extend beyond the guidelines reflected in the 1982 Law of the Sea Convention. Given, however, Canada's past attitude towards expanding coastal State jurisdiction, it is possible that the boundary to be established by the Chamber eventually could affect rights and jurisdictions not now at issue.

Mr. President, distinguished Judges, some of the activities here involved are indeed relevant as indicia of the Parties' recognition of the Northeast Channel as an appropriate natural boundary between the United States and Canada in the Gulf of Maine area. I call your attention in this connection to Figures 14-18 of the United States Counter-Memorial. These are maps depicting divisions of responsibility with respect to fishing and other relevant areas.

(102)-(106)

Canada also argues that only contemporary fishing patterns are relevant, and that the history of the fishery is irrelevant. Canada's reason for disregarding 160 years of United States fishing on Georges Bank is that "the impact of the single maritime boundary will be limited by present and future generations of fishermen ..." (Canadian Counter-Memorial, para. 596). Canada dismisses the United States fisheries as "obsolete fisheries of early historical times, whose impermanence has been a known fact for generations" (Canadian Reply, para. 100).

In a sense, all of man's activities are impermanent. Just as the fishing techniques of 1820 are obsolete today, and New England's "Georges schooners" of the last century have crumbled into dust, so too will today's fishing habits be outdated and today's vessels become obsolete. The impermanence, in this sense, of fishing activities is one more reason why geographical considerations must be given more weight. However, it should be added that, in another sense, the

historical fisheries have not been "impermanent", because there has been an unbroken tradition of United States fishing on Georges Bank including the disputed area of the Bank. Mr. Lancaster will address the history of this United States fishery in a subsequent presentation.

The United States believes that the historical fishing activities, as well as the history of other activities, are relevant. They are relevant to the issue of predominant interest because they evidence the enduring interest of the United States in Georges Bank.

Canada's attempt to disregard the historical fishing patterns is contrary to the jurisprudence. In *Grisbadarna*, the Court of Arbitration awarded the Grisbadarna Bank to Sweden, whose fishermen had fished there "a much longer time, to a much larger extent, and by a much larger number" than had the Norwegians (45th Whereas). The Court in the Anglo-Norwegian *Fisheries* case also relied upon the history of fishing by the Parties. The areas in question had been fished by Norway "from time immemorial" (*I.C.J. Reports 1951*, p. 127), but had been fished by Great Britain only from 1906 (*ibid.*, p. 124).

Mr. President, I now turn very briefly to the conduct of the Parties as a relevant circumstance.

Conduct of the Parties

Both the United States and Canada are in agreement that the conduct of the Parties is a relevant circumstance to be taken into account in reaching an equitable delimitation. However, as has been set forth in the United States pleadings and the opening statement of the United States Agent, the United States and Canada are in sharp disagreement as to the nature of that conduct and its significance.

The United States and Canada also disagree with respect to a number of specific aspects of the law relating to acquiescence and estoppel. The subsequent oral presentation by Mr. Rashkow will deal with these issues.

Economic Circumstances

Finally, let me deal with economic considerations as a relevant circumstance. Canada has attempted to assert explicitly the relevance of economic dependence and implicitly the relevance of relative wealth. Indeed, one of the most emphasized aspects of Canada's case is its asserted dependence upon the scallop fishery of Georges Bank. It is unnecessary to belabour this point here, because the irrelevance of economic dependence has been discussed earlier.

It should perhaps be pointed out here, however, that the Court in the *Tunisia/Libya* case also made a distinction between factors such as relative wealth and economic dependence and the actual exploitation of the resources in the relevant area (*I.C.J. Reports 1982*, paras. 106-107).

This illustrates very clearly a distinction that Canada consistently fails to make between relative wealth and economic dependence, which as a matter of law may not be taken into account, and a party's use of the natural resources of the area, which may be taken into account.

Balancing-Up of Relevant Circumstances

Mr. President, I turn now to my seventh major topic, which in many ways is the most critical in the determination of this case by this Chamber. I refer to the question of balancing-up the relevant circumstances.

In addition to ascertaining the relevant circumstances, the Chamber, as set forth in both the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, para. 92) and the *Tunisia/Libya* case (*I.C.J. Reports 1982*, para. 72) must assess the relative weight of these circumstances and balance them up in order to reach an equitable result.

In so doing, the Chamber, in the United States view, should give more weight to circumstances which relate to substantive articulated equitable principles, such as the first three principles identified by the United States, than to relevant circumstances in the area which do not relate to a specific substantive equitable principle. The reason for the greater weighing of circumstances relating to articulated equitable principles is the importance of applying equitable principles in the light of the circumstances in achieving an equitable boundary solution.

This has two aspects. First, it is highly desirable to provide parties discharging their legal obligations to negotiate agreements on maritime boundary disputes with as specific guidance as possible as to the legal basis for a solution and thus contribute to the minimization of international disputes. Secondly, the greater weighing of circumstances relating to articulated principles will give parties to a dispute submitted to international adjudication greater assurance that the dispute will be determined on the basis of equitable principles within the law.

In view, moreover, of the Chamber's responsibility to fix a single maritime boundary, circumstances relevant to the functional effectiveness of a boundary relating to both the water column and the sea-bed may be given greater weight than circumstances only relating to one of them. Geographical circumstances, particularly those relating to non-encroachment on coastal projections and proportionality, as well as the natural boundary, as a relevant circumstance in this case, meet this requirement.

Finally, the Chamber would doubtless take into account the fact that similar circumstances have been found relevant in other maritime delimitations, and that a substantive articulated equitable principle relating to the consideration of these circumstances, as a means of achieving an equitable solution, may be developing in the international jurisprudence.

Now coming to this case, it is the position of the United States that, in the relevant circumstances of this case, the circumstances entitled to the most weight are geographic – specifically, this means the position of the land boundary and the coastal extension from the coast of Maine southwest of the land boundary, extending seaward to embrace all of Georges Bank. These geographical circumstances are relevant to the application of the first equitable principle identified by the United States of respecting the relationship between the coasts of the Parties and the maritime area in front of these coasts, including both the water column and the present day sea-bed of that area. Moreover, these geographic circumstances are strongly reinforced by the marine environmental circumstances – I refer, of course, particularly to the discrete environmental régimes and important stocks of commercial fish separated by the natural boundary between the fishing banks constituted by the Northeast Channel, which is in turn, in addition to being a natural boundary, an important geomorphological feature of the sea-bed. These environmental circumstances are particularly relevant to the second and third equitable principles of facilitating conservation and management of natural resources and minimizing disputes.

What about the activities of the Parties? In the view of the United States, the activities and conduct of the Parties in the area are considered relevant circumstances in this case under the fourth equitable principle identified by the

United States. However, they are, in the view of the United States, not entitled to as much weight as the geographic and environmental circumstances.

The United States considers that the activities of the Parties and their nationals in the area to be delimited, including the exploitation of the resources of the area, are relevant to the delimitation of a single maritime boundary if these activities are long-standing and are dominant. However, these factors are significant only to the extent that they point to a boundary that is independently consistent with the basic geographic relationship between the coasts of the Parties and the maritime area to be delimited. The hierarchy of norms is inherent in the nature of the legal interests that are being delimited. Legal interests in the shelf and superjacent waters are based in the first instance on geographic factors, particularly the extension of coastal jurisdiction into and under the sea. When the activities of the Parties in the area point in the same direction as the fundamental geographic circumstances, they make even more certain the equitableness of a determination based on the geographic factors. Where, however, the activities of the Parties are balanced or point in another direction, they are entitled to little, if any, weight.

In this case, the United States predominant interest in a large number of both resource and resource-related activities outweighs Canada's recent interest in a scallop fishery on Georges Bank. In addition, the conduct of the Parties, taken as a whole, indicates that Canada's challenges to the United States predominant interest in Georges Bank and the area south of the Northeast Channel have been both relatively recent and relatively limited. Thus, in the United States view, the activities of the Parties in the area lend additional weight, but are not essential, to an equitable delimitation within the law made on the basis of the fundamental geographic circumstances, reinforced by the environmental circumstances.

Canada's assertion of considerations of economic dependence and geology as relevant circumstances should be denied as a matter of law.

The Chamber rose at 12.58 p.m.

TWELFTH PUBLIC SITTING (12 IV 84, 3 p.m.)

Present: [See sitting of 2 IV 84.]

Mr. STEVENSON: Mr. President, distinguished Judges, I had just completed, before adjournment, our discussion of the seventh general legal issue, the very important question of the balancing-up of relevant circumstances. I now turn to a consideration of an issue arising for the first time in this case, namely, the single maritime boundary.

THE SINGLE MARITIME BOUNDARY AND THE APPLICABLE LEGAL PRINCIPLES

By Article II of the Special Agreement (**I**, p. 10), this Chamber is requested to decide the course of the single maritime boundary that divides the continental shelf and fishery zones of Canada and the United States from a fixed starting-point on the United States side of the terminus of the international boundary in the Gulf of Maine, to a point within a specified triangular-shaped area beyond the Gulf of Maine and near the continental slope. The Parties have agreed in Article III not to claim or exercise sovereign rights or jurisdiction for any purpose over the waters or sea-bed and subsoil on the other side of the boundary that the Chamber determines. Also in Article 3 and in Article 7 the Parties recognize, and have provided for, the potential necessity of a further seaward extension of the boundary that the Chamber establishes.

The Special Agreement between the Parties obviates the theoretical problem of whether the boundaries between the same States may be different for different maritime zones and whether the applicable rules, though the same, may lead to different lines when applied in different frameworks for different zones.

Moreover, in the view of the United States, the single maritime boundary which the Chamber is requested to determine specifically avoids a difficult theoretical problem raised by the 1982 Convention on the Law of the Sea. That problem is whether the case of a conceivable incongruity between a continental shelf boundary and an exclusive economic zone boundary between two neighbouring States must be avoided, either by attributing superior weight to the continental shelf boundary or to the exclusive economic zone boundary.

In addition to the equitable principles of law previously identified and discussed at some considerable length by the United States, there are two transcending principles which must be applied to the single maritime boundary. The first is the basic proposition that the delimitation must take account of the uniqueness or individuality of each case, particularly the coastal configuration concerned, since all maritime jurisdiction depends on the projection out to sea of that coast. The other is that delimitation methods must be so applied that coastal irregularities are not highlighted, in particular as the boundary extends a great distance seaward. In implementing these principles, a rigorous application of the equidistance method in irregular situations must be avoided; in some cases, different methods may be required in different parts of the boundary, as the relationship between neighbouring coasts changes.

Beyond these two transcending principles, the delimitation of the single maritime boundary in this case demands that the equitable principles previously identified and discussed should be applied. Moreover, they should be applied in such a way that together with an appropriate balancing of the relevant

circumstances in the manner suggested in the immediately preceding part of this statement – which I completed just before our adjournment – the Chamber will reach an equitable result.

METHODS OF DELIMITATION

I turn now to the final legal issue which I will address today, namely, the question of methods of delimitation. The fundamental rule of maritime boundary delimitation requires that the boundary produce an equitable solution. As the Court declared in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, "any method or combination of methods that produces an equitable solution may be used" (*I.C.J. Reports 1982*, para. 111).

This general discussion of methods is an appropriate place to consider the application of Article 6 of the 1958 Continental Shelf Convention.

Canada has expressed its concern regarding the alleged silence of the United States on the status of the equidistance method under this Article. This concern is not justified, in our view, in the light of the United States statement of its position on Article 6 in both the Memorial (**II**) and Counter-Memorial (**IV**). In any event, however, the United States extended treatment of this subject in its Reply (**V**) (paras. 115-120) should have dispelled this concern.

The United States there 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. It has also emphasized the express finding of the Court of Arbitration in the Anglo-French Arbitration case that the combined "equidistance-special circumstance rule of Article 6" gives effect to the general norm of customary international law that equitable principles are to be controlling and that there is to be no presumption in favour of the equidistance method (United States Reply, paras. 119-120). Thus, in the Court of Arbitration's view, "The role of the 'special circumstance' condition in Article 6 is to ensure an equitable delimitation" (Anglo-French Arbitration, para. 70). The United States has also expressly noted that the Court of Arbitration held that the sole difference between customary international law and Article 6 is that, when Article 6 is applicable, equidistance "ultimately possesses an obligatory force which it does not have in the same measure under the rules of customary law" (Anglo-French Arbitration, para. 70).

Mr. President, distinguished Judges, what is the teaching of the Anglo-French Arbitration as applied to this case, and how does the United States view of Article 6 differ from that of Canada as set forth in its pleadings and in its oral statements last week?

In the first place, since this is not solely a continental shelf case, the United States disagrees with Canada as to the application of Article 6 as a matter of treaty obligation. Thus, the United States does not regard equidistance as ultimately possessing that obligatory force of which the Anglo-French Tribunal spoke. However, the United States does not attribute any importance in this case to that difference with Canada, since, as hereafter set forth, and as has been repeated many times in our pleadings, the United States is strongly of the view that the Canadian equidistance lines should not be used, even if Article 6 were to apply.

Second, the United States agrees with the Anglo-French Tribunal that, in considering the applicability of the equidistance method to a particular case, that method does not enjoy any presumption in its favour.

Third – and this is the major point of difference with Canada – the United States does not regard the equidistance method as required in this case under the

principles expressed in Article 6, as interpreted by the Anglo-French Tribunal. In all of its pleadings, the United States has given full and extensive consideration to the equidistance method. It has urged the Chamber not to use this method, because to do so would be contrary to the applicable equitable principles in the light of the relevant circumstances, and would not produce an equitable solution. The equidistance method as applied by Canada in its two lines clearly does not meet the standards for its use set forth by the Court of Arbitration. The Court stated that:

> "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." (Anglo-French Arbitration, para. 70.)

This, in the United States view, is what Article 6 requires – the consideration of the application of the equidistance method in the light of the applicable principles and relevant circumstances. This, in our view, is what the Court of Arbitration meant by saying there was a single combined rule giving effect to equitable principles. Accordingly, there is not a two-step procedure in which a determination is first made as to whether or not there are "special circumstances" and if there are no special circumstances the equidistance method applies. In the United States view, what Article 6 means is that the combined "equidistance-special circumstance" rule requires consideration of the equidistance method and that the determination of whether or not there are any "special circumstances" is just another way of expressing the conclusion as to whether or not the equidistance method would produce an equitable result in light of the applicable principles and relevant circumstances. However, even if this were not so, and the inapplicability of the equidistance method depended upon 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". It is not the United States position that Nova Scotia, as such, would constitute a special circumstance, but that the coastal configuration of which its coasts form a part, would do so.

Fourth – and I am listing our differences with Canada with respect to Article 6 – the United States also strongly disagrees with the position stated by the Agent of Canada last week (p. 25, *supra*) that where the equidistance rule itself is determined not to be applicable, a court must consider whether or not an adjusted equidistance method will produce an equitable result before turning to other methods. Whether or not there is a legal obligation to consider the equidistance method in this case – which the Chamber really does not have to decide, since both Parties have considered this method and agree that the Chamber may also do so – there is certainly no legal obligation for the Chamber to consider an adjusted equidistance line before considering any other methods once an equidistance line itself has been rejected. While the Chamber may certainly consider an adjusted equidistance line, it has no legally preferred status among methods.

Now, Mr. President and distinguished Judges, just a final word about methods in general. It is important to understand the hierarchy of solution and method. An equitable solution justifies the method used. But the method does not itself justify the result. Canada, in our view, has reversed this hierarchy in two ways, with respect to its own case and with respect to the United States case.

First, Canada argues that its result is equitable because the equidistance

method inherently produces equitable results. This argument appears in many forms and in many places. It is the basis, for example, of the purported equitable principle that the boundary should leave to each Party the areas closest to its coast. As we have already stated, this involves a postulate that begs the question at issue. Moreover, the Court already has recognized that the equidistance method often does not produce an equitable result.

In all the maritime boundary cases, the Court and arbitral tribunals have recognized that the primary equities relate to the geographic relationship of the parties. With respect to the question of whether or not the equidistance method is the best means of effecting a delimitation that corresponds to that geographic relationship, the consistent answer has been that the Court will apply the equidistance method only when a delimitation based on the closest points of the coasts of the parties is consistent with the general relationship of those coasts to the area to be delimited. That method will not be applied when the configuration of the coasts is such that the equidistance method will give weight to particular points that is disproportionate to the general relationship of the coasts.

Second, Canada suggests that the United States case is built upon the proposition that the adjusted perpendicular line is inherently equitable. For example, Canada has asserted in its Reply (V) that the United States uses "perpendicularity" not merely as a method of delimitation, but also as a basis of title (para. 68) and as a principle (para. 78). This is a mischaracterization of the United States position. We do not contend that the perpendicular method is inherently equitable. Moreover, we do not believe that any method, whether the perpendicular method or the equidistance method, can be the basis of title or an equitable principle.

It is not necessary to prove that the perpendicular method works in every situation. It is enough that the adjusted perpendicular method produces an equitable solution in this case. It is the equitableness of the solution, which also satisfies the applicable principles of law, that justifies the method proposed by the United States.

Although the method of delimitation used in the United States proposal produces an equitable solution, the United States recognizes that there may be another method or methods that could also produce an equitable solution in this case. 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 that in the United States are best satisfied through a line perpendicular to the general direction of the coast. To produce an equitable solution in this case, however, any method or methods must avoid cutting off the coastal projection of the coast of Maine, must satisfy the test of proportionality, and must respect the natural boundary between the fishing banks at the Northeast Channel. It would thereby, Mr. President and distinguished Judges, confirm United States jurisdiction over all of Georges Bank.

ARGUMENT OF MR. COLSON

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES

Mr. COLSON: Mr. President, distinguished Judges. May it please the Chamber.

It is my high honour to appear before this Chamber to represent my country in this Great Hall of Justice. This presentation will address the geographical circumstances of the Gulf of Maine area and how they affect the delimitation of the single maritime boundary in this case. The geographical presentation has three parts.

In Part I, the United States will examine certain geographical circumstances that are central to the case.

Part II will deal with a particular characteristic of the strict application of the equidistance method in coastal concavities – the cut-off effect. Part II begins with a general geometrical analysis of the characteristics of the equidistant line in coastal concavities such as the Gulf of Maine. Part II concludes with an analysis of the cut-off effect that would be caused by an equidistant line, or the modified equidistant line proposed by Canada in the Gulf of Maine area.

The United States believes that the single most important fact in this case is that the combination of the location of the land boundary, together with the concavity that is the Gulf of Maine, causes the equidistant line to swing out across the front of the United States coast, cutting it off from the maritime areas in front of it and thereby producing a disproportionate and inequitable result.

Part III will describe the nature of an equitable solution in the geographical circumstances in the Gulf of Maine area. It begins with a brief review of State practice in similar geographic situations. It ends with an explanation of how an equitable boundary must abate or avoid the cut-off effect, by extending seaward within the concavity, rather than laterally, so that each Party's coast receives an equitable seaward extension. A boundary that respects the Northeast Channel attains that result, whereas the boundaries that Canada has proposed, which split Georges Bank, do not.

In this presentation we will examine a number of charts, and I will be assisted by Dr. Robert Smith of the Office of the Geographer of the Department of State, and by Lieutenant Neil Gitin, of the Judge Advocate General's Corps of the United States Navy, who will manage the changing of the boards on the easel.

As you perhaps will note, there is a certain concordance between this presentation and that made last week by the Deputy-Agent of Canada, because the geographical facts are there for all to see.

Nonetheless, you will find that there is an even greater degree of discordance between our two presentations, because the United States and Canada have fundamentally different ways of analysing the geographical equities in this case. This presentation is designed to shed some light upon those differences and to demonstrate both the fundamental flaws in Canada's analysis and the correctness and reasonableness of our own.

I. The Relevant Area and the Relevant Geographical Circumstances

The United States shall begin the discussion of the relevant geographical circumstances with several comments about the definition of the relevant area.

A. The Definition of the Relevant Area

There is a logical sequence that must be observed when defining the relevant area. One does not define an area and then by virtue of that definition, declare the features inside the area to be relevant and the features outside the area to be irrelevant. Rather, one begins by defining the relevant coasts, and using these coasts, in turn, to define the relevant area.

This, in fact, is the sequence described in paragraphs 72 to 75 of the Court's Judgment in the *Tunisia/Libya* case.

There, the Court stated:

> "It is evident that the first and most essential step . . . is to determine with greater precision what is the area in dispute between the Parties and what is the area which is relevant to the delimitation." (*I.C.J. Reports 1982*, para. 72.)

After noting that "the *geographic* correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title" (*ibid.*, para. 73) (emphasis added), the Court stated:

> "The *coast* of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States ..." (*Ibid.*, para. 74.)

Thus it is the coast, not the area behind the coast, where one's analysis must begin. With respect to the area that is relevant to the delimitation, the Court stated in paragraph 74:

> "The only areas which can be relevant for the determination of the claims of Libya and Tunisia to the continental shelf in front of their respective coasts are those which can be considered as lying *either* off the Tunisian or off the Libyan coast. These areas *form together* the area which is relevant to the decision of the dispute." (*Ibid.*, para. 74.) (Emphasis added.)

In paragraph 75 of its Judgment, however, the Court limited this statement, which, if taken literally, would mean that all the Parties' coasts were relevant. It adopted a subjective test. The Court 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." (*Ibid.*, para. 75.)

Let us examine a map.

It may be recalled that the United States and Canada both include in the relevant area in this case the coast from Nantucket Island to Lunenburg, just south of Halifax. Canada would add to its definition of the relevant area the coast from Nantucket, somewhere southwest of here, to Rhode Island or the Connecticut border or Long Island. The United States has suggested that the relevant area should extend northeastward from Lunenburg to Cape Canso.

(8) Figure 8 of the Canadian Memorial, which was also produced as Figure 2 of the United States Counter-Memorial, is now before you as Figure 7 of the United States oral presentation. Canada titles this illustration in the table of figures in its Memorial: "Coasts and Major Geographic Features of the Gulf of Maine Area." This Figure covers all the coastline and offshore area that either Party considers relevant. The United States suggests that this may be taken as a

starting-point in the Chamber's consideration, which may require some slight refinement.

The relevant area must be distinguished from the area in which the delimitation takes place. Both Parties recognize this, because both the United States and Canada include in their respective definitions of the relevant area coastlines and marine areas that do not lie seaward of the point described in Article II of the Special Agreement (**I**, p. 10) between the Parties, from which the delimitation is to begin. Both Parties also include coastlines and areas that do not lie landward of the triangle, also described in Article II, where the delimitation is to end.

It is clear that, under the terms of the Special Agreement, the delimitation is to take place somewhere between the starting-point and the triangle – both within and seaward of the Gulf of Maine.

The relevant area and the area in which the delimitation takes place must also be distinguished from the area in which the proportionality test is to be applied. In the *Tunisia/Libya* case, the Court applied the proportionality test to the smaller of the two areas that it identified. But it also stated at paragraph 104 of its Judgment that "the only absolute requirement of equity is that one should compare like with like . . ." (*I.C.J. Reports 1982*, para. 104). The proportionality test in the Gulf of Maine area must, in the view of the United States, be determined with reference to criteria derived from the theory and purpose of the
(8) proportionality test, and must not include all the coasts shown here on Figure 7. If it is recognized that the proportionality test area must be determined on its own terms, and that such determination is not prejudiced by the definition of the relevant area, or the more limited area in which the delimitation takes place, then any debate concerning the relevant area, or the area in which the delimitation takes place, becomes less important.

B. The Relevant Geographical Circumstances

(8) Using this Figure from the Canadian Memorial, we would like to comment on six geographical circumstances of particular importance to the issues dividing the Parties. These are:

1. the large coastal concavity that is the Gulf of Maine;
2. the location of the land boundary and the international boundary terminus between the Parties in the Gulf of Maine area;
3. the general direction of the coast;
4. the relationship of the Parties' coasts to one another;
5. the comparability of the Parties' coasts in relation to one another and in relation to the land boundary; and
6. the relationship of the Bay of Fundy to the relevant area, to the area in which the delimitation takes place, and to the proportionality test area.

1. The large coastal concavity that is the Gulf of Maine

First, there is the Gulf of Maine itself. The United States has described this as a large coastal concavity. Canada, too, has described the Gulf as a "concavity" (**III**, Canadian Counter-Memorial, para. 120; **V**, Reply, paras. 107, 111, 116, 154, 158, 334, 340); and as a "major embayment" (Counter-Memorial, paras. 116, 126, 164). Furthermore, as the Agent and Deputy-Agent for Canada noted a few days ago, there is no disagreement between the Parties that the seaward limit of the Gulf of Maine may be described by a hypothetical closing line from Nantucket Island, Massachusetts, across to Cape Sable, Nova Scotia (p. 38; p. 66, *supra*).

The back of the Gulf of Maine is formed by the coast of the United States state of Maine, after which the Gulf is named, and the coast of the United States state of New Hampshire. This back is roughly parallel to the closing line and is about 200 nautical miles long. The sides of the Gulf, from Cape Ann to Nantucket and from the international boundary terminus to Cape Sable, are roughly perpendicular to the closing line, and each is about 100 nautical miles long. As the Agent for Canada noted, the coasts of Maine and Nova Scotia "have a right-angled juxtaposition" (p. 49, *supra*).

We would add that so, too, does the United States coast at Maine and New Hampshire with the coast of Massachusetts. Thus, the Gulf of Maine closely resembles a rectangle with a length that is twice its width. This again would not seem to be a contested point. The Deputy-Agent for Canada noted that "the area of the concavity lying seaward of the Bay of Fundy is twice as wide as it is deep" (p. 66, *supra*), and he described the Gulf of Maine as having a "rectangular general configuration", in the conclusion to his remarks (p. 86, *supra*).

2. The location of the land boundary and the international boundary terminus between the Parties in the Gulf of Maine area

Second, it is important to note that the land boundary meets the sea in the far northern corner of the Gulf of Maine, in the far northern corner of this rectangle. Both the land boundary and the international boundary terminus are situated there. Canada's stated inability to understand our usage of these terms is only designed to sow seeds of confusion. Where necessary, we have been specific, but for the purpose of our general analysis, it matters not to which of these reference is made. They both mark the fact that all of the coast of Maine belongs to the United States.

The United States has emphasized the location of the land boundary terminus, and the international boundary terminus not, as Canada alleges, because the line or single point is critical, as Canada would make the last two protruding points at Nantucket and Cape Sable critical, but because the location of the land boundary and the resulting terminus of the international boundary in the northern corner of the Gulf of Maine means that the entire coast southwest of this point is United States territory. As a result, at least three-fourths of the coastline facing the coastal concavity that is the Gulf of Maine is part of the United States.

In our view, this fact has enormous consequences for the boundary delimitation. It means that the entire Gulf of Maine and all of Georges Bank lie in front of the United States coast, and, in the latter case, United States coast alone. It means that any proportionality test must recognize that the ratio of United States-to-Canadian coast facing the Gulf is 3 to 1. It also means, of course, that the land boundary is not located near the middle of the coastline forming the concavity.

Since it is not, the geometrical effect of the equidistant line is that the line will swing across the front of the longer coast, in this case belonging in its entirety to the United States, to the advantage of the State with the shorter of the coasts forming the concavity – that is, Canada.

In this connection, we would note one additional fact about the location of the land boundary. Canada states: "The Gulf forms the axis of the dispute" (p. 58, *supra*), and, on this basis, Canada proceeds to argue that "the coasts *relevant* to the delimitation outside the Gulf must extend a *comparable* distance on *both* sides of the entrance to the Gulf" *(ibid.)*. Mr. President, distinguished Judges, in the view of the United States, it is the land boundary, or the international

boundary terminus, if you wish, that marks the axis of the dispute, not the Gulf of Maine. If the limits of the relevant area are to be established by coastal fronts *of comparable distances on either side of the axis of the dispute, which is the* land boundary, then the relevant area that the United States has described meets that criterion perfectly.

3. The general direction of the coast

Third, there is the matter of the general direction of the coast in the Gulf of Maine area.

Two facts are self-evident in this respect, and are recognized by both Parties. First, there is a general southwest-to-northeast direction of the Parties' Atlantic coasts. The Canadian Memorial (I) refers repeatedly to the southwest-northeast general direction of the coast. Figure 7 of Canada's Memorial illustrates the directional trend identified by Canada. Canada's Counter-Memorial, at paragraph 94 and at Figure 6, states that this directional trend is at an azimuth of 67°. The United States, on the other hand, contends that the general direction is more accurately described as 54°. The reasons for this are set forth in paragraphs 21 and 283 of the United States Memorial (II). Thus, the Parties disagree about the exact angle of that directional trend, but they agree that it extends generally from southwest to northeast. The second of these facts is that there is a concavity in this coast, the concavity of the Gulf of Maine.

In its Counter-Memorial, Canada shifted its emphasis from the general direction of the coast to the specific bends in the coast that form the Gulf of Maine and the other coastal features. At the same time, Canada implied that it is impossible to speak of both a general direction and a concavity existing together in the Gulf of Maine area.

Canada stated: "There is no single general direction of the coast within the relevant area" (Counter-Memorial, para. 96). It is particularly in this respect that the United States must disagree with Canada. The United States believes that it is useful and accurate to recognize that there is both a general direction to the coast, and a concavity in the coast. In this case the back of the concavity and the closing line across its mouth both extend from southwest to northeast and are essentially parallel, or correspond to, the general direction of the coast.

The general direction of the coast is reflected in the closing line across the mouth of the Gulf, which extends from southwest to northeast. It is reflected in the Atlantic-facing coast of Nova Scotia, which begins at Cape Sable and, as Canada stated in paragraph 21 of its Memorial: "extends in a northeasterly direction along the Atlantic shore of the Nova Scotia mainland . . . following the general directional trend of the North American coast."

The general direction is seen in the United States coast at the back of the Gulf of Maine, which, according to paragraph 22 of the Canadian Memorial, "extends southwestward" from the international boundary terminus.

And the general direction is seen also in the United States coast southwest of Cape Cod, which, according to the same paragraph in Canada's Memorial, follows "The general northeast to southwest orientation of the North American coastline".

In short, there is a general southwest-to-northeast direction of the coast in the Gulf of Maine area, and the back and the closing line of the coastal concavity of the Gulf of Maine itself are aligned parallel to this direction. This determination of the general direction of the coast may be depicted on Figure 7, demonstrating that this determination is quite independent of any macrogeographical considerations.

As to the question of whether the general direction is 54° or 67°, we would only note that Canada's general direction has only been justified on a macro-geographic scale as being the geodetic line between Long Island and Cape Race, Newfoundland, which is not even on this chart. Since, by definition, this line has no constant bearing, we would also note that the Gulf of Maine portion of the line has a bearing more precisely described as ranging between 63° and 65° (V, United States Reply, Ann. 35). The Chamber is in a position to decide this question, and in doing so it may wish to note that the hypothetical closing line from Nantucket to Cape Sable runs at a bearing of 56.7°.

4. The relationship of the Parties' coasts to one another

The *fourth* circumstance we would note concerns the relationship of the Parties to each other in the Gulf of Maine area: the United States is generally southwest of Canada, and Canada is generally northeast of the United States.

This may be illustrated by drawing a straight line from the source of the St. Croix River, the river that comprises the last segment of the land boundary, to the international boundary terminus. That line and its extension seaward is illustrated here on Figure 8 of our presentation. The direction of this line is southeast, at an azimuth of approximately 151°, which is very nearly perpendicular to what, in the view of the United States, is the most reasonable general direction of the coast. Indeed, it is an azimuth that reflects the average between the two different general directions the Parties have respectively advanced. Almost all of the Canadian land territory in the Gulf of Maine area lies northeast of this line, and almost all of the United States land territory lies southwest of this line. Thus, the general geographical relationship of the Parties parallels the general direction of the coast.

Canada has identified one segment of the land boundary, that which extends north from the St. Croix River, the geographic co-ordinates of which are shown on this Figure 8. And Canada has inferred from this that the geographical relationship of the Parties is that of west to east. Of course, this argument ignores the direction of by far the greater part of the land boundary between the countries, which is from east to west, thereby creating a north-south relationship. It is also an inaccurate description of the boundary because this short north-south segment is completely removed from the coast and ignores the direction of the boundary as it follows the St. Croix River to the sea.

5. The comparability of the Parties' coasts in relation to one another and in relation to the land boundary

Fifth, there is the issue of the overall comparability of the Parties' coasts. Canada has argued that the two Parties are comparable in their relation to the Gulf of Maine and Georges Bank. However, as discussed in the United States Reply, the Canadian argument ignores the location of the land boundary and the fact that Maine and New Hampshire are part of the United States, and not of Canada.

In fact, Canada would appear to have forgotten that the Gulf of Maine is named after Maine, a state of the United States, and not a province of Canada. Three-fourths of the coast facing the Gulf of Maine is United States coast, not Canadian coast. It is the coast of the United States alone that faces the open sea through the mouth of the concavity. There lies Georges Bank, in front of the United States coast, not in front of any coast of Canada. Canada's argument would make sense only if the state of Maine were to be erased from

the map, in which case, I suppose, the name of the Gulf of Maine would have to be changed.

Although the Parties' coasts are not comparable in relation to the Gulf of Maine and Georges Bank, they are comparable, in general, in the relevant area. If one begins at the international boundary terminus, there is on the United States coast a long Atlantic-facing coastal front, approximately 200 nautical miles in length, which forms the back of the Gulf of Maine, and a shorter, approximately 100-nautical-mile-long coast that faces laterally across the Gulf of Maine, from Cape Ann to Nantucket Island. For convenience, the United States has identified these as its primary and secondary coastal fronts.

On the Canadian side, there is also a 100 nautical mile coastal front that faces laterally across the Gulf of Maine. This is the coastal front from the international boundary terminus to Cape Sable. It is the other lateral side of the rectangle that we spoke of earlier. Finally, there is the long Canadian coastal front that faces onto the Atlantic Ocean from Cape Sable to Cape Canso. We have called this coast Nova Scotia's primary coastal front. If we measure to the end of the Nova Scotia peninsula at Cape Canso, this coastal front is about 200 nautical miles long, or about as long as the Maine-New Hampshire coast at the back of the Gulf of Maine.

Thus, from Nantucket to Cape Canso, each Party has an equal length of Atlantic-facing coastal front and an equal length of coastal front facing laterally onto the Gulf of Maine. An incidental point of interest is that the end points of these relevant coasts, Nantucket and Cape Canso, each are about the same distance from the international boundary terminus, or about 250 nautical miles, when measured by a straight line. In short, the Parties' coasts on either side of the international boundary terminus are comparable, both in relation to the Atlantic Ocean and in length. As such, they meet Canada's test that the limits of the relevant area are to be marked by coastal fronts that extend comparable distances on either side of the axis of the dispute.

The major difference between the coasts of the two Parties is that the Atlantic-facing Nova Scotia coast lies outside the concavity of the Gulf of Maine, whereas the coast of Maine and New Hampshire is inside, at the back of the concavity.

6. The relationship of the Bay of Fundy to the relevant area, the area in which the delimitation takes place and the proportionality test area

The *sixth*, and last, geographical feature to which the United States would invite the Chamber's attention, is the Bay of Fundy. The Parties have previously had a great deal to say about the Bay of Fundy: how large it is, and how long are its coasts. These facts are not the issue (Canadian Counter-Memorial, para. 129). The issue is whether the Bay of Fundy, which lies behind the starting-point specified in Article II of the Special Agreement, deeply snuggled into Canadian land territory, promotes Canada's interest and entitlement to maritime area in and beyond the Gulf of Maine.

The Parties agree that the Bay of Fundy is part of the relevant area. They also agree that the Bay of Fundy is not within the area in which the delimitation takes place, since it is landward of the starting-point. The only question, therefore, relates to whether the Bay of Fundy, and its coasts, should be included in the proportionality test area.

Mr. Feldman will discuss this issue in greater detail in the course of his presentation on the proportionality test. As a preliminary matter, however, we 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. This proposition may also be expressed in another manner: Canada is entitled to no greater area of maritime jurisdiction outside the Bay than that to which it would be entitled were the Bay of Fundy to be Canadian land territory.

Canada long has maintained an inchoate claim that the Bay of Fundy constitutes Canadian historic or internal waters. Canada closed off the Bay to foreign fishermen in 1971, long before the 200-mile zone was claimed by Canada, using the novel technique in international practice of drawing "fishery closing lines" across the Bay, while Canadian ministers, at the same time, asserted that this special jurisdiction was not inconsistent with Canada's historic bay claim. Should the Chamber wish further information on this matter, we would refer you to the article at Annex 6 to the United States Reply and, to repay a compliment, a classic article written by Canada's distinguished Agent in this case.

Therefore, if we treat the Bay of Fundy 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 according it and treating it at least as favourably as it deserves. For analytical purposes, we have drawn a line across the mouth of the Bay and used this line to represent the Canadian coastline. The effect of the closing line is that, for purposes of the delimitation, Canadian land territory is regarded as extending up to and across the mouth of the Bay of Fundy.

(225) The equity of using such a closing line is easily demonstrated. Before you is Figure 9 of our presentation made up of Figures 9A and 9B.

(225) Figure 9A shows a hypothetical coastline belonging to two States, State A and State B, with the land boundary in the middle of a coastline forming a coastal concavity. In this instance, the equidistant line and the line perpendicular to the general direction of the coast, as determined by reference to the closing line across the mouth of the concavity, are identical. This equidistant and perpendicular line is shown in red.

(225) Figure 9B shows the same coastline, with the land boundary still in the same position as it is in Figure 9A, except that a large bay appears now in the coast of State B. Permit me to pose a question: 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. In fact, if this Figure is examined closely, it will be seen that, if anything, the equidistant line bends slightly towards State B – the State with the bay. In all events, we can state what surely must be a fundamental proposition – 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". Here, the true measure of Canada's coastal front facing the Gulf of Maine is 100 nautical miles long.

This coastal front cannot be enlarged by removing the land behind it. The distinguished Agent for Canada conceded as much when he said:

> "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." (P. 49, *supra*.)

In summary, the use of a closing line across the mouth of the Bay of Fundy for analytical purposes and, later for the proportionality test, has the effect of treating the Bay of Fundy as land. This may exaggerate the relationship of Canada's land territory to the sea, but in no way does it understate that relationship.

The Chamber adjourned from 16.10 p.m. to 16.30 p.m.

II. The Cut-Off Effect

Mr. President, distinguished Judges, we would now like to turn to the second part of our presentation, to the discussion of a particular characteristic of the application of the strict equidistance method in coastal concavities – namely, the cut-off effect.

Introduction

The United States written pleadings explain why the equidistant line often would produce an inequitable result when the land boundary meets the sea inside a large coastal concavity. If the land boundary does not meet the sea at the midpoint of the lengths of coastal fronts forming the 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. Thus, we say, as the Court said in the *North Sea Continental Shelf* cases, that the use of the equidistance method in coastal concavities

> "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 cut-off effect was the central issue in the *North Sea Continental Shelf* cases. As the United States noted in its written pleadings, the coast of the Federal Republic of Germany lies at the back of a large coastal concavity in the North Sea, much as the coast of Maine and New Hampshire lies at the back of the Gulf of Maine (IV, Counter-Memorial, paras. 376-387). The Court discussed the nature of this cut-off effect in paragraphs 8 and 44 of its Judgment. Sketches I and II on page 16 of the Court's Judgment illustrate the cut-off effect in the situation of a curved and of a three-sided concavity made up of sides meeting at obtuse angles.

A. A geometrical analysis of the cut-off effect

In order better to understand the cut-off effect and the factors that influence the extent of the cut-off, it is useful to begin with a geometrical analysis of the effect of coastal concavities upon the construction of equidistant lines. We would ask that the Chamber bear with us through a preliminary discussion of elementary geometry, after which we shall discuss the cut-off created by the equidistant line in the Gulf of Maine area.

We have placed before you Figure 10 of this presentation, which consists of Figures 10A and 10B. This Figure illustrates the effect of a rectangular concavity (226) such as the Gulf of Maine upon the course of the equidistant line. In Figure 10A, the coasts of State A and State B comprise one continuous straight coast. The

(226) red line is the equidistant line. In Figure 10A, whether one draws an equidistant line or a line perpendicular to the general direction of the coast, the result is the same. Each State's coast receives the entire maritime area in front of it, seaward to the limits of coastal-State jurisdiction.

(226) Figure 10B sets into this coast a rectangular concavity – one, like the Gulf of Maine, half as deep as it is wide. For the Chamber's convenience, we have labelled various points on the chart. We have used the same letters as those that (179) Canada used in Figure 34 of its Reply to designate corresponding points. Point X represents the point where the land boundary between State A and State B reaches the coast in a corner of the concavity. Point W represents the corresponding corner at the other end of the long coast forming the back of the concavity, and point Y is in the middle of the coast halfway between points X and W. Points R and S represent the most protruding parts of the coasts of States A and B forming the concavity, or, to put it another way, the headlands of the coastal concavity. The red line is the equidistant line. Point T is where, in this example, the equidistant line turns seaward, at the midpoint of a hypothetical line between points R and S – the closing line across the mouth of the concavity. Here is point X; here is point W; point Y is in the middle of the coast at the back of the concavity; point R and point S are the two protruding points, or headlands, of the concavity; the red line is the equidistant line; and point T is the midpoint on a hypothetical closing line between point R and point S.

Quite clearly, the equidistant line is displaced to the disadvantage of State A. It swings out laterally, far across the front of State A's coast, before it turns (226) seaward. The shaded area in this Figure is the area in front of the coast of State A that is cut off from the seaward extension of that coast by the equidistant line. The cut-off begins within the concavity, close to the coast, but the cut-off is broadest in the seaward area beyond the mouth of the concavity.

While the foregoing would seem to be self-evident, it is precisely this analysis that Canada refuses to accept. In Canada's view, the cut-off does not begin close to the coast, but only farther out, once the midpoint on the closing line has been reached. Let us demonstrate this difference – one that is fundamental – by an (179) examination of Figure 34 of Canada's Reply, which we will put before you as Figure *11* of our presentation.

Canada's analysis begins with the acceptance of a basic proposition. Canada states, at paragraph 352 of its Reply: "In the case of a delimitation between a long recessive coast and a shorter convex coast ... an equidistant line will tend to swing in front of the recessive coast." In support of this proposition, with which (179) the United States agrees, Canada points to Figure 34A. Next, Canada states, still at paragraph 352 of its Reply that "the cut-off in the area immediately off coasts YX and XS is shared equally by the two coastal States, as the line progresses seaward segment ZY of the longer coast continues to be cut off". Here is the major fallacy in Canada's whole case.

Canada's figure indicates that the cut-off effect only begins at point T – far seaward from either coast. The United States submits that this figure is in error in this respect. As the Court indicated in paragraph 8 of its Judgment in the *North Sea Continental Shelf* cases, the cut-off effect begins close to the coast. (226) Figure 10B of today's presentation, which we just examined a moment ago, is an accurate depiction of the cut-off effect.

The cut-off of coast YX, this coast, by the equidistant line in the interior of the concavity, denies that coast its seaward extension beyond the concavity. It is as if the land boundary has been moved to point T.

Of course, it is true that as the equidistant line progresses seaward, as shown (179) in Figure 34A of Canada's Reply, segment ZY of the longer coast continues to

be cut off. But what of the extension of the coast between point X and point Y? What did Canada say at paragraph 352 of its Reply? Canada said the area immediately off coast YX and XS is "shared equally". Well, that may be true for the square area defined by points X, Y, T and S. But what of the area seaward of that square, the area seaward of a line between points T and S. Canada would say that area does not appertain to coast YX because it is closer to coast XS. But that is no answer. The red area, which, as Canada recognizes, has been cut off by the equidistant line from the extension of coast ZY, is also closer to coast XS. If coast ZY's extension is cut off, which Canada admits, so, too, is the extension of coast XY cut off.

(179) Canada's analysis continues with Figure 34B of its Reply. According to Canada, coast RW eliminates the cut-off of coast WY, by turning the equidistant line at point T out to sea, away from the coast at the back of the concavity (para. 353). Canada states:

> "The length of coast YX equals the length of coast XS, and the equidistance line bisects the angle formed by these coasts. Any cut-off is therefore shared equally. . . . *Figure 34B* demonstrates that there is no cut-off of the United States coast that *is not* equally shared by Canada . . ." (Reply, para. 353, latter emphasis added).

The facts plainly contradict Canada's assertion. Coasts YX and XS do not share equally any cut-off. Only the area within the square defined by the points S, X, Y and T is divided equally. However, the area seaward of this square, that is, seaward of the closing line from T to S, is left entirely to coast XS. The equidistant line completely – 100 per cent – cuts off coast YX from the area seaward of the closing line.

(227) Figure 12 of our presentation is now before us to illustrate this point. It is (226) (179) made up of Figures 12A and 12B, whose dimensions and labels are consistent with those in Figures 10 and 11, which we have just examined. Figure 12A adds (227) an outer limit roughly corresponding to the proportions of the 200-nautical-mile limit in the Gulf of Maine area as measured from point S as Canada does. It is marked by an arc between point N and point M, which has its centre at point S and with a radius, SN or SM, that is the same length as WX, the coast at the (227) back of the concavity. This Figure 12A allows one to quantify the inequality of treatment given to these two coasts of comparable length, that is coast YX and coast XS, by the equidistant line. This quantification is accomplished by comparing the area of the triangle marked number 1, together with the combined area of the triangle marked 2, the triangle marked 3 and the segment of the circle marked 4. To compute the relative sizes of these areas, we assume that XS and XY are 100 units long. In that case, YT and TS will also be 100 units long. And the line SM and the line SN will be 200 units long. With that information, one can compare the relative effect of the equidistant line on coasts YX and XS.

The area of triangle 1 is determined by the familiar formula that the area of a triangle may be found by multiplying one-half of the base times the height. Thus, the area of triangle 1 will be one-half of 100 units, or 50, multiplied by 100. The solution is 5,000 square units. In this geometric diagram, this is the amount of area left to State A in front of coast YX by the equidistant line, 5,000 square units.

Let us determine the area left to State B and coast XS. First, there is the triangle marked 2. That is a right triangle of the same dimensions as triangle 1, so we know its area is also 5,000 square units.

The computation of the area of triangle 3 is a bit more complicated. It is a right triangle, so we can use the same formula as in the area solution for triangles

1 and 2 – one-half the base times the height. We know that the base – ST – is 100 units. We do not know the height, TM, but by using the Pythagorean theorem – which I am sure we all remember – which says that, in a right triangle the square of the hypotenuse is equal to the sum of the squares of the other sides. Using that formula we can solve for the length of side TM and without reciting the numbers, we find that line TM is equal to 173.2 units. Using that value, we can solve for the area of triangle 3, and find that it is 8,660 square units.

The area marked 4 – the segment of the circle – is a bit more difficult to compute.

However, since it is the segment of a circle, and since we know that the area of a circle is found by multiplying the constant pi by the radius squared, we can compute area 4 if we know the angle theta, this angle between line SM and SN.

We must solve, then, for theta. Since theta together with the corresponding angle in the right triangle, which we call alpha in our diagram, is equal to 90°, theta is equal to 90° minus alpha. We can solve for alpha using basic trigonometry. The cosine of alpha is equal to the adjacent side divided by the hypotenuse which, using the units that we have given in our presentation, means that we divide 100 by 200 and we determine that the cosine of the angle alpha is 0.5. Any trigonometry book shows us that the angle with a cosine of 0.5 is equal to 60°. Thus, alpha is equal to 60° and theta is equal to 30°. With that information we can solve for the area of the segment of the circle numbered 4. As can be seen, it is 10,472 square units. Again, all the equations needed to (227) calculate this area are before you in Figure 12A.

Thus, the equidistant line leaves to coast XS of State B the sum of triangle 2, triangle 3 and the segment of the circle 4 or 5,000 square units in area 2, 8,660 square units in area 3, and 10,472 square units in area 4.

A total of 24,132 square units are left to coast XS, whereas coast YX was left with only 5,000 square units. The United States submits that a delimitation which has such a result is clearly inequitable.

(227) We would like to turn to Figure 12B to illustrate another characteristic of the equidistant line in this geographic setting. The equidistant line, by definition, is determined by proximity to the closest points on the coast. Article 12 of the Territorial Sea and the Contiguous Zone Convention and Article 6 of the Continental Shelf Convention use nearly identical words, that an equidistant line is a line every point on which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each State is measured.

(227) In Figure 12B, the location of the equidistant at point T and seaward is determined in its entirety by the nearest point on the two coasts, point R and point S, the headlands of the coastal concavity. The coasts inside the concavity have no effect whatsoever upon the equidistant line seaward of the concavity. It is as if they did not exist. They are completely irrelevant, no matter where any land boundary on the coast might be located.

(227) This fundamentally important fact is illustrated in Figure 12B. Whether the land boundary meets the sea at point W, point Y, or point X, or any other point inside the concavity, the equidistant line will proceed to point T, which is the midpoint on the closing line across the mouth of the concavity. From point T, the equidistant line proceeds seaward at an angle perpendicular to the closing line. Although Canada has had little good to say about perpendicular lines in this case, all equidistant lines that begin within a coastal concavity and extend seaward become at some point a line perpendicular to the closing line across the mouth of the concavity at the midpoint of that closing line. Thus, seaward of the

(227) concavity shown in Figure 12B, the location of the land boundary has no bearing on the course of the equidistant line.

All coastal concavities have the same general effect upon the equidistant line, and all equidistant lines generally have the same properties within and seaward of the coastal concavity. Wherever the land boundary meets the sea inside a coastal concavity, the final turning point of the equidistant line is determined entirely by point R and point S, the projecting points on the coast of each State. Regardless of where the land boundary is located within the concavity, the equidistant line will extend to that same turning point, and from there will proceed seaward at an angle perpendicular to the closing line, which in these illustrations is a line between R and S. The location of the final turning point depends upon the geographic characteristics of the concavity, specifically, the relationship of the depth to the width of the concavity. For instance, in a three-sided concavity, where the coasts are at right angles to one another, if the concavity is relatively deep, the final turning point will occur inside the concavity. If the concavity is relatively shallow, the final turning point will occur on the closing line. If the sides of the concavity are of different length, the final turning point may occur within, or outside the concavity, depending upon which is the shorter coast. In every case, however, the final turning point will be aligned with the midpoint of the closing line of the concavity.

(228) Permit us to demonstrate these characteristics through an examination of Figure 13 of our presentation. Figure 13 is made up of four figures – A, B, C and D. Each of these figures shows concavities of different depth-to-width proportional dimensions. Before analysing each illustration, it should be noted that label T1 and T2 appears on each. T1 is the point at which the equidistant line first changes direction after leaving the land boundary, and T2 represents the final turning point of the equidistant line before it assumes its final seaward direction.

(228) The concavity in Figure 13A is the one that we have been working with in the previous illustrations. Each side is one-half of the length of the back. As we have seen, the final turning point of an equidistant line in a concavity of these dimensions occurs at the midpoint of the closing line across the mouth of the concavity, labelled here as T2. It is also labelled T1, however, because this is the first turning point of that equidistant line as well.

(228) Figure 13B depicts a relatively shallow concavity. Each side is one-fourth the length of the back. From the land boundary to the first turning point, T1, the equidistant line bisects the angle formed by the two coasts. At T1, which in this situation is located on the closing line of the concavity, the equidistant line begins curving seaward. The location of the final turning point, T2, again is determined entirely by its equal proximity to point R and to point S, the headlands of the concavity. This is true for all concavities, whether shallow or deep. In shallow concavities such as this one, the final turning point occurs seaward of the concavity because, until the line reaches T2, there is a point on the longer coast, the coast of State A, that is closer to the equidistant line than is the headland of State A, point R. Nevertheless, no matter where within this concavity the land boundary may be located, the final turning point of the equidistant line, T2, as calculated from the coastline that defines the concavity, always will be exactly in the same spot. Here, as in all other coastal concavities, the final turning point is aligned with the midpoint of the closing line. Here, also, the course of the equidistant line seaward of the final turning point is always perpendicular to the closing line, even if it begins at a point that is not on that line.

(228) Figure 13C shows a deeper concavity, where, in this case, the sides are as long as the back. In this case, the two turning points, T1 and T2, coincide at the same point inside the concavity. Here, as in all other concavities, the final turning

point is aligned with the midpoint of the closing line, and the equidistant line seaward of the final turning point extends perpendicular to the closing line at its midpoint. This will be true no matter where the land boundary is located within the concavity.

(228) Figure 13D illustrates the result of shortening one of the sides of the concavity. In Figure 13D, the length of coast WR is one-half the length of the lateral coast XS of State B. This, in effect, is what Canada accomplishes by disregarding Cape Cod and Nantucket in its proposed modified equidistant line in this case. In this situation, both the first and the final turning points of the equidistant line occur seaward of the concavity. Here, as in the other concavities, the final turning point, T2, is aligned with the midpoint of the closing line across the mouth of the concavity. Also, as in the other concavities, the equidistant line seaward of the final turning point extends perpendicular to the closing line across the mouth of the concavity at its midpoint. However, since the closing line has been aligned to the left by the shortening of the lateral coast of State A, the final segment of the equidistant line also angles to the left. Thus, the shortening of the lateral coast of State A increases the cut-off effect to the disadvantage of State A. Here again, the location of the land boundary within the concavity has no effect upon the location of the final turning point or upon the course of the equidistant line seaward of that point.

We shall now summarize what has been said about the behaviour of equidistant lines in situations where the land boundary meets the sea inside a three-sided coastal concavity made up of coasts in a right-angle juxtaposition. In every case, the seaward portion of the equidistant line will, at some point, lie perpendicular to the closing line of the concavity at its midpoint. Moreover, neither the location of the land boundary within the concavity nor the coasts of the concavity have any effect whatsoever upon the final course of the seaward portion of the equidistant line. Wherever the cut-off effect is disproportionate, the equidistant line is inequitable. A disproportionate cut-off violates the equitable principle that the boundary should respect the relationship between the coasts and the maritime areas in front of those coasts. In particular, a disproportionate cut-off violates the subsidiary principles of non-encroachment and proportionality.

There is one, and only one, exception where the equidistant line does not create a cut-off effect inside or seaward of a coastal concavity. As noted, the equidistance method pays little heed to the location of the land boundary inside the concavity. However, if the land boundary meets the sea in the middle of the coast forming the concavity, no cut-off effect will occur either inside or seaward of the concavity. If the land boundary is not at the midpoint of the coast forming the concavity, the cut-off will occur, and the farther the land boundary is from the midpoint of the coast forming the concavity, the greater the degree of that cut-off.

For example, let us examine Figure 14 of our presentation, which appeared (190) as Figure 10 in the United States Reply. Canada has cited the United States-Mexico maritime boundary against us the other day as an example of United States use of the equidistance method which we do not deny. But in the Gulf of Mexico the land boundary meets the sea roughly in the middle of the coastline forming the concavity.

(190) Figure 10B shows an equitable boundary in the Gulf of Maine area, if most of the state of Maine happened to belong to Canada, rather than to the United States, and the land boundary happened to reach the sea at about Penobscot Bay rather than at the mouth of the St. Croix river in Passamaquoddy Bay.

The geographical principles we have seen may be expressed in different ways.

In the *North Sea Continental Shelf* cases the Court stated that the equidistant line would be inequitable because it denied comparable treatment to comparable coasts. I quote from paragraph 91 of the Court's Judgment:

> "But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length." *(I.C.J. Reports 1969.)*

(229) Let us demonstrate these points further with Figure 15, which is once again
(229) made up of four Figures, A, B, C, and D. Figures 15A and 15C illustrate the
(229) importance of the location of the land boundary in the case of a curved concavity. In Figure 15A, the land boundary meets the sea in the middle of the concavity. Here again, the equidistant line coincides with the line perpendicular to the general direction of the coast, as determined by reference to the closing line across the mouth of the concavity, and leaves to each State all the area in front of its coast. Here again, however, moving the land boundary away from the middle of the coastline forming the concavity creates a cut-off effect, as in
(229) Figure 15C.

Finally, one last point to illustrate the relationship between the location of the land boundary and the cut-off effect caused by the equidistant line is shown in
(229) Figures 15B and 15D. In Figure 15B, the land territory has been removed. The States are opposite. There is no land boundary. The equidistant line equitably divides the area in the Channel between the Parties. Extending the equidistant line seaward does not cause a cut-off, because there is no coast at the back of the Channel to be cut off. The cut-off is created if a coast is added to the back of the concavity and the land boundary is moved away from the middle of the
(229) concavity, as shown in Figure 15D.

In a geographical situation such as Figure 15D, the coasts of States A and B are comparable. Each State has an equal length of coast facing directly seaward, and each has an equal length of coast facing laterally across the concavity. The rule that comparable coasts should receive comparable treatment requires that each coast receives as much as possible of its seaward extension.

The defect of the equidistance method in this situation is that it does not give comparable treatment to comparable coasts. Although the equidistant line leaves to the seaward-facing coast of State B all of the area that lies in front of it, that line swings across the coast of State A and cuts it off from this enormous area that lies in front of it. The equidistant line leaves all the area of cut-off to the short, lateral coast of State B. Not only does the equidistant line encroach upon State A, but it gives State B an offshore area that is disproportionately large in relation to the length of its coast whereas State A receives a disproportionately small area. The inequity is particularly concentrated on the coast of State A nearest the land boundary, which suffers the full measure of the cut-off effect in its seaward extension, and the lateral coast of State B, which receives the entire benefit of the cut-off.

The inequity of the cut-off effect was the central issue in the *North Sea Continental Shelf* cases. As the Court stated in paragraph 24, the equidistance

method: "can under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable. *It is basically this fact which underlies the present proceedings.*" Here, I would interject, the Court added the words, reminiscent of this case:

> "The plea that, however this may be, the results can never be inequitable, because the equidistance principle is by definition an equitable principle of delimitation, involves a postulate that clearly begs the whole question at issue." (*I.C.J. Reports 1969*, para. 24; emphasis added.)

The inequity of the cut-off effect – the "extraordinary, unnatural or unreasonable" result of the equidistance method – is also in our view the central issue in this case.

B. The cut-off effect in the Gulf of Maine area

Mr. President, distinguished Judges, let us proceed from the geometrical diagrams to the Gulf of Maine area. The presentation first will describe the cut-off effect that would exist if an equidistant line were used in the Gulf of Maine area. Then it will deal with Canada's attempts to deny or to justify the cut-off effect.

(230) This chart, Figure 16, quantifies the extent and the inequity of the cut-off effect in the Gulf of Maine area. The Canadian coastal front is 100 nautical miles long. The United States coastal front is also 100 nautical miles long. The red line is an equidistant line. The outer limit is 200 nautical miles from Cape Sable and this dashed line is a perpendicular to the general direction of the coast at 144°.

The equidistant line would leave to the United States approximately 3,900 square nautical miles in front of this part of the coast of the United States, the coast of Maine. At the same time, the equidistant line would leave to the southwest-facing coast of Nova Scotia an area of approximately 29,600 square nautical miles. Canada's line, not shown here, would leave the same 3,900 square nautical miles to this part of the United States coast and would leave about 32,500 square nautical miles to the southwest-facing coast of Canada.

In brief, this portion of the coast of the United States, after which the Gulf of Maine is named, simply because it lies at the back of the concavity and is the closest part of the United States coast to the land boundary terminus, receives only a small fraction of the maritime area in front of it. Although the two coasts are equal in length, under Canada's proximity approach, the southwest-facing coast, the Canadian coast, because it extends farther seaward, receives about eight times as much maritime area, notwithstanding that, beyond the closing line, it has no coast fronting on that area. This is the nature of the cut-off effect proposed by Canada. The United States submits that it is grossly inequitable.

Canada's responses on the subject of the cut-off effect fall into two categories.

In the first category are the arguments that attempt to deny that the cut-off effect exists. These arguments do not succeed because no amount of rhetoric, however clever or eloquent, can deny the fact that the equidistant line does swing across the coast of Maine and thus cuts it off from the area in front of it. In the second category are the arguments that attempt to justify the cut-off in this case. As we shall see, these arguments are, in fact, different ways of restating the proposition that the boundary should be determined by proximity to the projecting coast. In other words, they merely restate the equidistance method as if it were a rationale, or a binding principle. Of course, this proposition already has been rejected in the *North Sea Continental Shelf* cases. Proximity to the projecting coasts does not justify the inequity of the cut-off effect.

Canada attempts, in three respects, to deny the fact of the cut-off in this case. First, Canada asserts that there is no cut-off caused by the effect of the southwest-facing coast of Nova Scotia on the equidistant line because the coast of Massachusetts turns the line back towards Canada. Canada's assertion, which (179) is displayed in Figure 34 of Canada's Reply, which we examined earlier as Figure 11 of our presentation, is based upon the misconception that the cut-off begins only at the midpoint of the closing line of the concavity.

(208) (207) In the Canadian oral presentation (Figs. 32-33; pp. 74-77, *supra*), Canada raised this same argument by seeking to disguise the basic truths reflected on this chart, of which the Court took account at paragraph 8 of its Judgment in the (31) *North Sea Continental Shelf* cases. Before you is Figure 17 of this presentation, which shows how a small headland, which protrudes seaward five nautical miles, diverts the equidistant line as it leaves the coast and continues seaward. Canada's presentation placed in the picture another small headland. But, in doing so, all Canada could show was what we knew before – which is that, in the concavity that Canada created, the two headlands would control the equidistant line as a perpendicular to the closing line across the mouth of the concavity at its midpoint.

In this case, 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. This area of cut-off is in front of the coast of Maine. It is true that the area of cut-off would be even larger were it not for Massachusetts, including Cape Cod and Nantucket. Nevertheless, the area of cut-off that does exist is enormous and disproportionate.

Canada's second attempt to deny the existence of a cut-off begins by dividing the Gulf of Maine area into two sectors, the area inside and the area outside the closing line of the concavity.

Canada asserts that the equidistant line equitably divides the area inside the closing line because it leaves to the United States "a greater area within the Gulf of Maine than is left to Canada" (Reply, para. 77, fn. omitted). In fact, any reasonable line will leave to the United States the greater part of the area within the Gulf of Maine. Because of the location of the land boundary, United States coastline comprises at least three-fourths of the coastal front facing the Gulf of Maine, and it, therefore, is only natural that the United States should receive a large part of these waters.

Then, in a most remarkable argument, at paragraph 356 of its Reply, Canada asserts: "If the Canadian line does not produce an inequitable cut-off effect of the coast of Maine within the Gulf, it cannot suddenly produce such an effect outside the Gulf."

The Deputy-Agent for Canada reiterated this argument on 3 April in these proceedings. He said: "If there is nothing wrong with the Canadian line in this inner area, there can hardly be anything wrong with its direction further out to sea . . ." (p. 52, *supra*).

This is entirely wrong. As Professor Weil reminded us the other day, "two wrong lines cannot make a right" (p. 187, *supra*).

Here, I would like to interject a comment in regard to an argument made by Professor Weil. He implied that the issue is the curvature of the United States side of the Gulf, not the overall configuration of the concavity and the location of the land boundary. He implied that Matinicus Rock and Mount Desert Rock, off the coast of Maine, advantaged the United States. Of course, within the concavity, there is some truth to this, because, for a distance, these basepoints push back the line as the southwest-facing coast of Nova Scotia pushes it towards the United States. But, again, this is a minor point which disguises the

major point. Matinicus Rock and Mount Desert Rock have no impact on the line at the closing line. In the end they fail in the effort to keep the equidistant line from extending laterally. In the end the equidistant line answers its call to reach the midpoint of the closing line of the concavity.

As the geometrical discussion previously illustrated, in a concavity of dimensions such as those found in the Gulf of Maine, the equidistant line within the concavity gives some effect to the coast at the back of the concavity, but, beyond the closing line, the equidistant line gives absolutely no effect to the coasts within the concavity, and gives effect only to the headlands at the mouth of the concavity. Thus, it is not surprising that the inequity caused by the equidistant line involves the outer area to an even greater extent than it involves the inner area, especially, once again, when the position of the land boundary is taken into account.

(230) Figure 16, which we examined a moment ago, showed that the part of the United States coast at the back of the concavity, the 100-nautical-mile coastal front of Maine adjacent to the land boundary, does receive some portion of the area that lies in front of it, within the Gulf. However, since the equidistant line intersects the midpoint of the closing line across the mouth of the concavity, and proceeds seaward from there, it cuts off the coast of Maine from the area beyond the closing line. The Canadian line is even more egregious than the strict equidistant line. By disregarding Cape Cod and Nantucket, Canada causes the line to swing farther across the coast of Maine and alters the course of the seaward portion of the line farther to the southwest.

For these reasons, the equidistant line, if it is used at all in geographic configurations such as this, must, in our view, be used only in areas much closer to the shore. If the equidistant line is extended as far as the closing line, then the outer portion of the boundary begins at a point that already is far across the coastal front of the United States.

A third argument with which Canada attempts to deny the cut-off effect is based upon the assertion that Massachusetts and Nova Scotia are opposite coasts in relation to each other, both at the closing line across the mouth of the concavity and in a so-called zone of oppositeness seaward of the closing line. It is then stated that median lines between opposite States cannot be distorted and, therefore, that the equidistant line in this case is not distorted or inequitable.

The question of oppositeness and adjacency was discussed at length in the written pleadings, and it is not necessary to repeat all that was contained there. Two points suffice. First, the result of a delimitation must be equitable. If the equidistant line is inequitable because it cuts off the coast of the United States from the area in front of it, then it is immaterial whether the relationship of the coasts is characterized as opposite, adjacent, or mixed. Second, the argument that Canada makes ignores the coast of Maine and New Hampshire and the position of the land boundary. It may be that the relationship of the Nova Scotia and Massachusetts coasts is such that, if these were the only coasts involved, a median-line boundary would deserve further consideration. In the same way a median-line boundary between Denmark and the Netherlands might have been appropriate if the Federal Republic of Germany did not exist. However, in both the North Sea and the Gulf of Maine there is a coast at the back of the concavity. The equidistant line is inequitable because it cuts off that coast. That there is such a cut-off is true, no matter how one characterizes the relationship between the lateral coasts of the concavity.

(189) The United States rebutted Canada's contentions about a zone of oppositeness in Figure 9 of the United States Reply, shown here as Figure 18. In response, in Canada's oral presentation, Canada can only say that we have

missed the point and that the diagram there shown does not accurately represent the proportions of the Gulf of Maine (p. 84, *supra*). We concede this latter point. Our Figure does depict a concavity three times, rather than two times, as wide as it is deep, and we apologize for any confusion that we may have created on this point. Nonetheless, our point still stands. We invite you to examine this
(189) Figure 9 of the Reply at your leisure. By taking a ruler you may lengthen the sides until the proportions are 1:2, and then you may connect the points in the so-called zone of oppositeness with point X at the back of the concavity. They all will still be less than 90°, thus meeting Canada's own test of geographic adjacency.

Paragraph 131 of the Canadian Reply represents a variation of the opposite/adjacent argument. Canada states that the basepoints used to construct its line are opposite "*to each other vis-à-vis the area to be delimited*" (emphasis added) and, therefore, that the equidistant line has not been distorted by the configuration of the coast.

Here again, if the result of the equidistant line is inequitable, it does not matter whether the relationship of the basepoints is opposite or adjacent or both. Much more important than the relationship of the basepoints is their location. As Canada has demonstrated, the basepoints of the equidistant line move farther and farther across the front of the United States coast, as far as the southwestern-most basepoint on the coast of Massachusetts on Nantucket Island. The last basepoint for the equidistant line on the United States coast is 249 nautical miles southwest from the international boundary terminus measured in a straight line. The last basepoint on the Canadian coast is 92 nautical miles, measured in the same way, in a straight line southeast from the international boundary terminus. As a result, the equidistant line swings ever farther across the front of the United States coast until it crosses the midpoint of the closing line forming the concavity. It is this imperative to reach the midpoint, regardless of the location of the headlands, that creates the cut-off effect within the concavity, which is only compounded as the boundary extends seaward.

It cannot be denied that the equidistant line swings across the coast of Maine and cuts the coast off from the areas in front of it. Can this cut-off effect be justified? The first of five justifications offered by Canada is that Nova Scotia is more "proximate" than Maine to the area beyond the closing line. The summary of principal conclusions in both Canada's Counter-Memorial and Reply includes the principle that "the single maritime boundary should leave to each Party those areas of the sea that are closest to its coast", and includes as a relevant circumstance "the closer proximity to Canada of the area under Canadian claim" (Canadian Counter-Memorial, para. 729; Canadian Reply, para. 375).

Since the equidistant line is drawn on the basis of closer proximity, Canada's argument that the line gives each Party the area closer to its coast merely describes the equidistance method. It does nothing to justify the result. This point deserves to be emphasized. Most of Canada's case has been built upon the assumption that proximity is the test of fairness, or that proximity is inherently equitable.

Canada's assumption is fundamentally wrong. As Mr. Stevenson has emphasized, the law does not require that maritime boundaries be delimited according to closer proximity, or by use of the equidistance method, which is exactly the same thing. Equidistance has produced an equitable solution in some cases, but it is not by definition equitable and it is not a test of equity. We know that because the Court in the *North Sea Continental Shelf* cases told us that the equidistance method can produce results which are "extraordinary, unnatural or

unreasonable" (*I.C.J. Reports 1969*, para. 24). Moreover, strict equidistance has been determined to be inappropriate for part or all of the boundary in a large number of existing maritime boundaries that have been concluded either by agreement or through adjudication. And, we can be sure, closer proximity will not produce an equitable solution in many of the several hundred maritime boundaries that remain to be concluded.

Because proximity, or equidistance, often does not produce an equitable result, the equitableness of any specific equidistant line cannot be presumed. It must be demonstrated in the circumstances of each case. As we shall see, most of Canada's arguments on behalf of the equidistant line are circular. They only restate the unproven proposition that the equidistant line is equitable because it allocates maritime areas to the more proximate coasts.

The second Canadian justification for the cut-off is given in paragraph 109 of Canada's Reply: "Georges Bank is geographically appurtenant to the coasts to which it is most proximate."

It must be remembered that Georges Bank, as well as other maritime areas beyond the mouth of the Gulf, are also appurtenant to the coast of Maine and New Hampshire, the only coasts that front on Georges Bank because of the location of the land boundary. Canada admitted as much when it stated, in paragraph 563 of its Counter-Memorial, that: "The seaward extension of a coastal State includes all waters within 200 nautical miles of its coast, and all such areas must prima facie be considered legally adjacent or appurtenant to that State."

There is some logic to Canada's statement, although it should be added that continental shelves extending beyond 200 nautical miles also may appertain to
(226) or abut a particular coast. Figure 19 shown here shows the maritime area in front of and within 200 nautical miles of the Maine and New Hampshire coast, but without reference to Machias Seal Island and North Rock lest there be an outcry from our Canadian friends. This area includes all of Georges Bank, as well as large areas that the United States has not claimed. This entire area is appurtenant to the coast of Maine and New Hampshire. Some of the inner area is also appurtenant to the southwest-facing coast of Nova Scotia and to the Massachusetts coast. This is why it is necessary to delimit a maritime boundary. But to insist that the boundary should be delimited on the basis of proximity to the closer of the appurtenant coasts only restates the rejected proposition that the boundary must be delimited by the equidistance method.

The third justification offered for the cut-off is that "the boundary should be controlled by the immediately abutting coasts" (Canadian Reply, para. 158). By this, Canada means that the boundary should reflect "the position of the most proximate coasts" *(ibid.)*.

Canada claims that this argument is supported by the Anglo-French arbitration. Canada, in fact, has restated what the Court of Arbitration said, but in doing so has turned the Court's analysis upside down.

The Court of Arbitration stated at paragraph 248 of its Judgment, that the method of delimitation must have relation "to the coasts of the Parties actually abutting on the continental shelf of that region".

Canada says instead that the boundary should be controlled by the "immediately abutting coasts" (Reply, para. 158). Thus, while the Court of Arbitration stressed the significance of the actual coasts, Canada looks only to the proximate coasts. There is a tremendous difference between these approaches. Indeed, Canada's reliance upon proximity has led it throughout the case to ignore the actual geography by ignoring the existence of Maine and New Hampshire.

The Court of Arbitration found that the coasts of the Parties actually abutting

on the continental shelf of the Atlantic approaches to the English Channel were the coasts of Finistère and Ushant, and those of Cornwall and the Scilly Isles (para. 248). The Court stated that the boundary delimitation must relate to these coasts. The Court declined to delimit the boundary by drawing a line equidistant from the two lines reflecting the general directions of the coasts of the Parties within and along the sides of the English Channel.

There are analogies but there is also a major difference between the geography of the Gulf of Maine area and the geography of the Atlantic approaches in the Anglo-French Arbitration. This difference lies in the existence of the coast of Maine and New Hampshire along the back of the Gulf of Maine concavity. That coast faces and abuts the area seaward of the closing line. Figure 20 of our (188) presentation, which was Figure 8 of the United States Reply, adds such a coast to the English Channel. Such a coast, if it did exist, would also abut the continental shelf of the Atlantic approaches, and the method of delimitation adopted by the Court of Arbitration, in the United States view, would have had to have taken it into account.

In short, Canada's contention that the boundary should reflect the "immediately" abutting coasts would require this Chamber to do what the Court of Arbitration refused to do: to ignore the actual coasts that abut upon the region. Here again, Canada merely has restated the purported proximity principle, but has not justified the cut-off effect.

Fourth, Canada has sought to use a semicircle test to justify cutting off the Maine-New Hampshire coast from the area in front of it. The test calls for a semicircle to be drawn in the Gulf in such a way that the closing line of the Gulf (174) forms the diameter of the semicircle. This is illustrated in Figure 29 of the Canadian Reply.

Canada asserts at paragraph 332 of its Reply that the semicircle test indicates whether the coasts of the concavity are related to the waters *outside* the closing line. According to Canada, if the concavity meets the test, Canada implies that the coast at the back should have no influence on the delimitation seaward of the concavity.

This premise is not supportable, especially if we recall the semicircle test that already exists in international law. A semicircle is used in Article 7 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and in Article 10 of the 1982 Convention on the Law of the Sea to determine whether a bay closing line may be used as the baseline from which the breadth of the territorial sea is measured. As the Chamber well understands, if the bay exceeds the area of the semicircle, the diameter of which is the closing line, and if other criteria are satisfied, then the closing line may be drawn. In that case, all the waters *inside* the bay then are considered to be internal waters. Thus, the semicircle test in international law concerns primarily the relationship of the coasts of the concavity to the waters inside the concavity, as Canada suggests. However, and this is the point that shows the fallacy in Canada's argument, the test also recognizes that the coast inside the concavity has a connection with the waters outside the concavity. In fact, the territorial sea extends seaward from the closing line and it includes areas that would not fall within the territorial sea limit if measured only from the headlands of the bay.

Nevertheless, Canada asserts that, if the Gulf of Maine is as deep as the semicircle, then "the back of the concavity will *not* control the course of the line in the outer area" (Canadian Reply, para. 333; emphasis in original). This is a perfectly accurate description of the construction of an equidistant line, but it does not justify the result.

What, then, is Canada's justification for denying the back of the concavity any

effect on the boundary beyond the closing line? Canada's rationale appears in paragraph 333 of its Reply, which explains that "the failure of the back of the concavity to control the line is justified by its *comparative remoteness* from the outer area" (emphasis added).

"Comparative remoteness" is the same argument that has been repeated over and over in a remarkable number of ways. But comparative remoteness is just another way of saying that the boundary should be drawn on the basis of proximity, which is just another way of saying that the boundary should be the equidistant line. Once again, this argument merely begs the question. It does not justify the cut-off effect.

The fifth suggested justification of the cut-off effect is that the equidistant line boundary must be equitable because it accurately reflects the physical and political geography (Canadian Reply, para. 342). There are two aspects to this argument. On the one hand, it is asserted that Canada's proposal is equitable because Maine and New Hampshire are given "full effect" in constructing the line. On the other hand, Canada argues that the United States has refashioned geography and "has ignored the presence of a major landmass by treating Nova Scotia as if it did not exist" (*ibid.*, para. 144).

Canada's argument confuses the equidistance method with geography. The equidistant line does not necessarily take account of the actual configuration of the coast, but only of certain salient points or convexities. In particular, we have seen that when the land boundary meets the sea inside and at the corner of a large coastal concavity, the seaward segment of the equidistant line does not reflect the existence of any coast, except the last two protruding points on the Parties' coasts.

Canada has illustrated for us the effect of Nova Scotia, and of Cape Cod and Nantucket, on the course of the equidistant line. Allow us to illustrate the effect of Maine and New Hampshire on the course of an equidistant line.

(231) Figure 21 shows the Gulf of Maine area with New Hampshire and Maine and the land area north of them removed and shaded in as if they had been removed from the map. The line labelled "no effect line" is the equidistant line that would exist in such a situation. You may note that when Maine and New Hampshire are removed, and replaced with ocean area, then the Gulf of Maine area resembles much more closely the Atlantic approaches to the English Channel.

(231) Figure 21 also shows the so-called "full effect" equidistant line. As can be seen, even this line gives little effect to Maine and New Hampshire. Although the Maine-New Hampshire coastal front is 200 nautical miles long, twice as long as the southwest-facing Nova Scotia coastal front, and the land area of Maine and New Hampshire is fairly large, more than 32,000 square nautical miles, the area between the equidistant lines giving full effect and no effect to Maine and New Hampshire is only about 5,500 square nautical miles.

Thus, it is misleading to say that the equidistant line gives "full effect", or that another line gives "no effect". Those words describe the method, but not the result. Since the boundary must produce an equitable *result*, it is more useful to examine the result than the method.

The United States does not ask the Chamber to ignore the existence of the southwest-facing coast of Nova Scotia, but only to reject the equidistant line, which largely ignores the existence of Maine and New Hampshire. As the Court explained in paragraph 91 of the *North Sea Continental Shelf* cases, this is not a question of refashioning geography, but of abating the effects of a special feature – the concavity of the coast.

The boundary proposed by the United States does recognize the existence of Nova Scotia, and, with the land boundary where it is, it gives Nova Scotia full

and equitable treatment. Under the United States proposal, Nova Scotia would receive the full extension of its Atlantic-facing coastal front from Cape Sable to Cape Canso, as well as a large maritime area that lies solely in front of the coast of Maine. This means that Nova Scotia would receive treatment better than that accorded the comparable United States coast of Maine and New Hampshire.

In short, to argue that an equidistant line is equitable because it gives full effect, or that a boundary refashions geography unless it is a full effect equidistant line, confuses method with result. It is merely another way of restating the unfounded proposition that boundaries must be drawn on the basis of closest proximity.

This brings me to the end of the second part of our geography presentation. We have seen that, when the land boundary meets the sea in the corner or on the side of a large coastal concavity, away from the midpoint of the coast forming the concavity, it is the nature, the geometric nature, of the equidistant line to swing inward and cut off the longer coast at the back of the concavity.

The Chamber rose at 6 p.m.

THIRTEENTH PUBLIC SITTING (13 IV 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

Mr. COLSON: Mr. President, distinguished Judges. May it please the Chamber.

Yesterday, in the first part of the United States oral presentation on the geography relating to this case, we discussed six specific geographical circumstances which we believe are relevant in this case. And in the second part of our presentation we discussed the cut-off effect. We saw that when the land boundary meets the sea in the corner or on the side of a large rectangular-shaped coastal concavity, away from the midpoint of the coast forming the concavity, it is the nature, the geometric nature, of the equidistant line to swing inward and cut off the longer coast at the back of the concavity. One may say that the equidistant line encroaches upon the disadvantaged coast, or it cuts off that coast from its natural prolongation, or denies it comparable treatment. But, however the effect is described, the cut-off caused by the equidistant line in this case would be enormous.

III. The Nature of an Equitable Result

We would now like to move on to the third part of our presentation which examines the nature of an equitable result in the geographical circumstances of the Gulf of Maine area.

There is a logical hierarchy of solution and method that governs the sequence of this presentation. The fundamental rule of boundary delimitation dictates that the boundary must achieve an equitable solution. But, although the equitable solution is mandatory, there is no mandatory method of delimitation. The Chamber may use any method or combination of methods that produces an equitable solution. In other words, an equitable solution justifies whatever method may be used to achieve that solution, but no method can ever justify an inequitable solution. For this reason, it is logical to begin by identifying the nature of an equitable solution and then to consider what methods might produce such a solution.

A. State Practice

To assist us in identifying the nature of an equitable solution, we believe that it would be worthwhile briefly to consider the practice of States in similar geographical circumstances. A mere numerical comparison of the number of boundaries that do or do not use equidistant lines is too simplistic an analysis to assist the Chamber in determining the method to apply in this or any other case. Notwithstanding Canada's other arguments, Canada apparently agrees with this view, and concedes that the numerical lists that it has produced have little usefulness, for it acknowledges at paragraph 338 of its Reply **(V)** that: "Analogies with delimitations in other coastal concavities are of no relevance unless they display a similarity with the Gulf of Maine in terms of both political and physical geography."

In the United States Counter-Memorial **(IV)**, the Bay of Biscay delimitation between France and Spain, and the North Sea delimitation between the Federal

Republic of Germany and Denmark and that between the Federal Republic and the Netherlands, were identified as taking place in geographical circumstances similar to that of the Gulf of Maine area (paras. 388 and 376, respectively). Canada attempts to refute this view and asserts that the delimitation in the Atlantic approaches to the English Channel between the United Kingdom and France, the boundary between the coasts of Italy and Yugoslavia, and the boundaries between Sweden, Denmark and Norway in the Skagerrak, present more comparable State practice analogies.

Let me turn first to the two situations that the United States put forward in Part III of its Counter-Memorial – the North Sea. There are three essential geographical and political realities in the Gulf of Maine area: first, the Gulf of Maine is a large coastal concavity; second, the land boundary meets the sea far from the geographical centre of the coastal fronts forming the concavity; and, third, the maritime boundary extends well seaward of the concavity.

(113) Before you is Figure 22 of our presentation, which first appeared as Figure 30 of the United States Counter-Memorial. The European coast facing the North Sea, between the western coast of Denmark and the northern coast of the Netherlands, the coast with which the Court became familiar in the *North Sea Continental Shelf* cases, has these three characteristics. There is a large coastal concavity. The international land boundaries meet the sea far from the middle of the coastline forming the concavity. And, finally, if one imagines a hypothetical line across the mouth of the concavity, it can be seen that the boundaries extend beyond the concavity. Here is the concavity in the coast, here are the land boundaries, far removed from the middle of the coastline forming the concavity, and you can see that the boundary would extend beyond a hypothetical closing-line across the mouth of the concavity.

At paragraph 340 of the Canadian Reply, Canada challenges the geographical similarity between the Gulf of Maine and the North Sea on two grounds. First, Canada states that the North Sea is a two-sided concavity, whereas the Gulf of Maine has more than two sides; and, second, Canada says that the political geography of the North Sea is different, in that there three States are involved, rather than the two in our case. Canada's distinctions are, of course, correct – but are they of any legal relevance in the matter of the equidistant line? We believe not. The equidistant line has the same inequitable properties regardless of whether the concavity is two-sided, three-sided or curved. The issue is not whether two or three States are involved, but the location at which the land boundary, or boundaries, meet the sea in relation to the midpoint of the coastal fronts forming the concavity.

(176) At Figure 31 of the Canadian Reply, now before you as Figure 23 of our presentation, Canada tries to turn what it calls the "conjunction of physical and political" geography in a coastal concavity to its advantage, but fails to do so. At (178) Figure A, Canada presents a geometrical diagram, roughly showing equidistant lines and roughly corresponding to the North Sea situation, which is shown in (176) Figure B.

In Figure C, Canada shifts the land boundary to the corner of the geometrical diagram, arguing that this creates an analogy to the Gulf of Maine area. But this (176) is not a fair comparison to the Gulf of Maine area. Canada's Figure C has moved the land boundary. True, the diagram shows that the land boundary is in the corner of the concavity, as in the Gulf of Maine. But it must be recalled that in the Gulf of Maine the corner of the concavity where the land boundary reaches the sea is about 100 nautical miles from the midpoint of the coastal fronts forming the concavity.

In situations where States share a coastal concavity, a critical consideration in

assessing the effect of the equidistant line is the location in that concavity of the point where the land boundary meets the sea. As we have seen, if the land boundary meets the sea near the midpoint of the coastal fronts forming the concavity, an equidistant line is capable of producing an equitable result. But if the land boundary meets the sea a significant distance from the midpoint, one can expect that the equidistant line will not produce an equitable solution because of the cut-off effect.

In the *North Sea Continental Shelf* cases, the cut-off effect, imposed upon the extension of the German coastal front into the sea by equidistant lines, still would have occurred if only two States were involved, provided that the land boundary between those States was in the same position it now occupies. The same abatement of this cut-off effect that is reflected in the eventual Federal Republic-Netherlands boundary, or Federal Republic-Denmark boundary, would have been required to reduce the inequitable results effected by the land boundary meeting the sea on one of the sides of this two-sided coastal concavity, far from the midpoint of the coastline forming the concavity. Thus, Canada's criticisms of the analogy between the Gulf of Maine area and the North Sea are not valid.

Mr. President, distinguished Judges, the issue in evaluating the equidistance method – for all coastal concavities, regardless of how many sides to that concavity and how many States may share the coast – quite simply is this: where does the land boundary meet the sea in relation to the midpoint of the coastal fronts forming the concavity?

Let us consider for a moment the Bay of Biscay delimitation between France and Spain. Before you now is Figure 24 of our presentation, which appears as Figure 41 of Volume I of the Annexes to Canada's Reply. It depicts the agreed boundary between France and Spain in the Bay of Biscay. This area, like the Gulf of Maine area, and the North Sea, has the three basic characteristics referred to previously. It is a large coastal concavity. The boundary does not reach the sea in the centre of the coastline forming the concavity and the boundary will eventually extend beyond the concavity to the outer limit of the 200-nautical-mile zone or the continental shelf. Here is the large coastal concavity. Here is where the land boundary meets the sea, not in the midpoint of the concavity, and the boundary will eventually have to extend seaward beyond a hypothetical closing-line across the mouth of the concavity.

In the United States Counter-Memorial, these additional similarities between the Bay of Biscay and the Gulf of Maine were mentioned. First, the land boundary in both cases reaches the sea, not in the middle of the coastline forming the concavity, and not on the sides of the concavity, but in a corner of the concavity. Second, the coastal concavity in both cases is roughly three-sided. Third, one side of the concavity belongs to one State alone, and the other two sides belong to another State (United States Counter-Memorial, para. 388).

The United States also noted several differences in the geography of these two concavities. First, the proportions of the lengths of the respective coasts are different. The seaward-facing French coast at the back of the concavity from Pointe de la Negade to the land boundary is proportionately shorter than the United States coasts of Maine and New Hampshire, at the back of the Gulf of Maine concavity. Similarly, the inward-facing sides of the Bay of Biscay are proportionately longer than the corresponding sides in the Gulf of Maine. The Spanish coast facing the Bay of Biscay, for instance, is longer than the corresponding Canadian coast facing the Gulf of Maine. Also, it may be noted that the French coast from Pointe de la Negade to Pointe de Raz is not at right angles with the coast at the back of the concavity. Because of that fact, the

Pointe de la Negade to Pointe de Raz coastline faces, to some extent, outward as well as inward, into the concavity. Thus, the Bay of Biscay has an irregular geometric shape as compared to the more regular classic rectangular shape of the Gulf of Maine. As the United States Counter-Memorial also observed, the Bay of Biscay contains no features of a significance comparable to that of the fishing banks and the Northeast Channel present in this case (para. 389).

It is this latter point that forms Canada's principal criticism of the United States presentation in this respect. Canada states that the United States failed to identify and discuss the Cape Breton Canyon – which is correct. Canada also charges that the United States discussion of the Bay of Biscay disregards – and here we would quote from paragraph 345 of the Canadian Reply – "the fact that it was precisely the physical structure of the sea-bed that dominated the negotiations between France and Spain and provided the essential rationale for the boundary". We would like to comment upon both of these contentions.

The Cape Breton Canyon is a pronounced and significant feature of the sea-bed. It is labelled here on Figure 24, in this corner, by the land boundary terminus. It is not so located as to have much of an effect upon the boundary delimitation; and it is our understanding that France did not press such a position in the negotiations leading to this agreement. Thus, while admitting that the Cape Breton Canyon is a larger geomorphological feature, in absolute terms, than the Northeast Channel, the United States stands by its earlier judgment that this feature does not have a significance for purposes of delimitation that is comparable to that of the Northeast Channel, which divides the fishing banks in the Gulf of Maine area.

The only proof behind Canada's assertion that sea-bed features dominated the negotiations between France and Spain is an article which the United States produced in an appendix to Annex 10 of its Counter-Memorial. The article is by Professor José Luis de Azcarraga, an adviser to the Spanish boundary team. The United States finds his explanation of the Bay of Biscay boundary interesting since, in his view, the boundary is basically equidistant between depth contours of equal depth – in this case the 4,500-metre depth contour. The United States interest in this concept of equidistance between depth contours is keen, because it corresponds to the point that was made in the United States Reply (V) that an equidistant line between dominant bathymetric contours in the Gulf of Maine area – which are the 100-fathom or 200-metre depth contours – would closely approximate the 1976 United States line, extending through the deep water of the Gulf of Maine Basin and then seaward through the Northeast Channel. We would have a line then basically equidistant between the continental shelves as they stood between 1945 and 1958, when the general definition of the continental shelf was expanded to extend beyond the 200-metre depth contour. Furthermore, it is our understanding that during the course of the oral proceedings in the Anglo-French Arbitration, France explained, and here we use Canada's words, the "essential rationale" of the Bay of Biscay delimitation.

Canada's reliance on the article by Professor de Azcarraga is misplaced. At no place does the Professor state that the physical structure and sea-bed of the Bay of Biscay either, once again to use Canada's words "dominated the negotiations" or "provided the essential rationale for the boundary". The Professor never uses these or similar terms to describe the negotiations, and the record that is available would seem to present quite a different picture and quite a different methodology.

What conclusions may be drawn from the boundaries in the North Sea and Bay of Biscay, where the geographical circumstances are similar to the Gulf of Maine area?

Please permit us to demonstrate one conclusion by reference to Figure 25 of (114) (117) our presentation, which is a combination of Figures 31 and 36 of the United States Counter-Memorial.

In the cases both of the North Sea and of the Bay of Biscay, the use of an equidistant line to delimit a part of the boundary was limited to a short portion of the boundary, and that portion of the boundary was located close to the two (114) coasts. In the North Sea, as Figure 31 of our Counter-Memorial showed, the equidistant line extended only 15 per cent of the entire length of the German-Danish boundary, and 22 per cent in the case of the German-Dutch boundary. As may be seen, these same percentages, if applied in the Gulf of Maine area, would stop the equidistant line well within the coastal concavity near the 100-fathom depth contour. In the Bay of Biscay, the equidistance segment of the boundary extends 44 per cent of the distance from the land boundary terminus to the hypothetical closing line across the mouth of the Bay of Biscay. The (117) analogous point in the Gulf of Maine area is shown here on Figure 36 of the United States Counter-Memorial, on the right-hand side of this Figure 25. This point is quite near to the point developed by the analogy to the *North Sea Continental Shelf* cases. Our geographers, in fact, tell us that these two points are within two nautical miles of each other. Thus, one lesson is that State practice in geographically similar situations has terminated the use of equidistance *well* within the coastal concavity. This keeps the equidistant line from swinging out too far across the coastal front of the State at the back of the concavity before the boundary is turned seaward.

The second conclusion is that States have attached a special importance to coastal proportionality in geographical circumstances similar to the Gulf of Maine area. All three boundaries, in the Bay of Biscay and North Sea, delimit the offshore areas in close proportion to the ratio of the lengths of coastal fronts forming the concavity. Mr. Feldman will explore this point further with you in the next United States presentation.

Third, the three boundaries exemplify the principle that a boundary should not cut off the seaward extension of the Parties' coastal fronts. In particular, these situations illustrate the means by which boundaries should reflect the seaward extension of the coastal fronts within and seaward of the coastal concavity. In each case, these boundaries limit the extension into the concavity of the coastal front on the side of the concavity in order to avoid cutting off the seaward extension of the longer coastal front at the back of the concavity.

The United States believes that these principles derived from State practice assist us in identifying an equitable solution in this case. We would like to only make a brief comment about the State practice examples that Canada has raised. The comment is only that Canada's examples bear no reasonable comparison to the Gulf of Maine area.

Canada argues that the Gulf of Venice may be compared with the Gulf of Maine area. Canada, however, does not provide the complete picture of the delimitation between Italy and Yugoslavia, which is, however, discussed by an examination of Canada's State practice annex. Before you is Figure 26 of our (175) presentation, which combines Figure 30 of Canada's Reply – which is these two figures – with Figure 17 of Volume I of the Annexes to its Reply. As you can see, (175) Figure 30B of Canada's Reply does not depict most of the delimitation south from point X, the northernmost point of the continental shelf boundary, between Italy and Yugoslavia, extending through the entire length of the Adriatic Sea. Here is point X, the northernmost point of the boundary. This chart basically shows that much of the Italian-Yugoslav continental shelf boundary. Canada's assessment, then, neglects approximately the southern

80 per cent of the boundary. When the entire Adriatic Sea is viewed, the geography of the boundary area is notably different from that shown in Figure
(175) 30B of Canada's Reply – in fact, it represents a case of two opposite coasts facing each other.

Nonetheless, Canada argues, at paragraph 335 of its Reply, that, if the reasoning of the United States were applied here, it would mean that the northern coast of Italy at the back of the Gulf of Venice should be given its seaward extension presumably through the whole length of the Adriatic Sea despite the opposing Italian and Yugoslav coasts that stretch for over 300 nautical miles. But this, of course, takes our viewpoint much too far. The geographical situation throughout the Adriatic quite clearly is one of predominantly opposite coasts, and it is really absurd to suggest that the much shorter coast at the back of the Gulf of Venice should be extended seaward throughout the entire length of the Adriatic Sea. In this connection, you may wish to recall
(228) Figure 13C which we examined yesterday. It showed that when the sides become longer than the back, the cut-off effect is not as great, and equidistance may be appropriate in some circumstances. The comparison that Canada makes conveniently uses the terms and the ideas the United States has advanced, but applies them to an area that bears no geographical resemblance to the Gulf of Maine area.

Canada also finds a comparison in the geography of the Skagerrak. Once again, it is difficult to understand how the long, opposing coasts of Denmark and Norway that dominate the Skagerrak, and not the short portion of the Swedish coast that faces it, constitute a geographical analogy to our case.

We will not dwell upon Canada's geographical arguments concerning the Anglo-French Arbitration. We believe those arguments were met fully in the United States Reply at paragraphs 192 to 197. Accordingly, although the Canadian State practice presentation applies our terms and analysis, they are applied to geographical areas that bear little resemblance to the area before the Chamber. We are confident of the Chamber's good judgment on this matter.

In the *North Sea Continental Shelf* cases, the Federal Republic of Germany placed before the Court nine examples of geographical situations that resembled the geographical circumstances in that case, that is, situations in which an equidistant line would produce an inequitable result. Figure 27, now before you, shows eight of these situations: the north coast of Hispanola; the Arabian Sea; the Bay of Bengal; the Ionian Sea; the Black Sea; the Gulf of Guinea; the Caribbean Sea off the north coast of Venezuela; and the English Channel in the vicinity of the Channel Islands. The ninth situation was, of course, the Gulf of Maine area. In presenting these charts and examples the German Memorial stated:

> "The equidistance method, by making the distance from the nearest coastal points the absolute criterion, necessarily attributes undue weight to projecting parts of the coast, and so not infrequently leads to inequitable solutions." (*I.C.J. Pleadings, North Sea Continental Shelf*, Vol. I, pp. 42-46.)

Each of these illustrations shows the propensity of the equidistance method to cut off the seaward extension of the coastal front of one or more of the States concerned. As noted in the United States Memorial at paragraph 270, only three of the 32 potential boundaries depicted by the Federal Republic on these nine charts have been resolved to date. With respect to these three, we note first, that the western boundary between the Netherlands Antilles and Venezuela, which was resolved by a negotiated settlement, is not an equidistant line. We refer you

to Figure 22 of the United States Memorial for a depiction of that boundary. Second, we know that the Court of Arbitration found that the equidistance claim of the United Kingdom in the Channel Islands area, which was basically the line shown by the Federal Republic in its pleadings, was not equitable in that geographical situation. For the solution in that case we refer you to Figure 23 of the United States Memorial. Third, of all the 32 boundaries depicted, the only one that has been resolved on the basis of equidistance is that between Italy and Greece, shown on Figure 27D. This was not, of course, the delimitation problem to which the Federal Republic of Germany was calling attention in its chart of the Ionian Sea. A boundary based upon equidistance appears to be a perfectly reasonable method to resolving a boundary between the two comparable, opposite, and facing coasts of Greece and Italy. The Greece-Albania boundary, which was the focus of this particular chart, is another matter entirely, and remains unresolved.

Figure 28 of our presentation, which was Figure 24 of the United States Memorial, shows the chart of the Gulf of Maine area used in the German Memorial as the ninth chart to illustrate the extent to which the equidistance method can produce an inequitable result. Besides the basic fact that this chart appears in that case for this purpose, we would like to point out several specific aspects of this chart.

It is especially noteworthy that in none of the other areas did the German Memorial illustrate the bathymetry of the boundary area. But, on the chart of the Gulf of Maine area, the bathymetry was clearly depicted. Clearly shown, although not labelled, is Georges Bank, the Northeast Channel and the Scotian Shelf, all defined by what appears to be the 100-fathom-depth contour. Also, we find it interesting that in no other of the nine charts did the German Memorial characterize with legal terminology the geographical relationship of the coasts concerned; but on this chart of the Gulf of Maine area, the Federal Republic used the word "lateral" – connoting adjacency not oppositeness – to characterize the United States-Canada boundary relationship.

Finally, we find it interesting that the Federal Republic, in only two of the nine charts, illustrated other lines along with the equidistant lines. In one case, that on the north coast of Hispanola, shown as Figure 27A a moment ago, an equidistant line developed without regard to islands was shown, together with an equidistant line giving effect to islands. The other situation was the Gulf of Maine area, where what appears to be a perpendicular to the general direction of the coast extending from the international boundary terminus is shown. It would seem that this is a line perpendicular to the closing-line from Nantucket to Cape Sable. The chart makes quite clear that the equidistant line in the seaward area deviates some 220 kilometres between the equidistant line and the line perpendicular to the general direction of the coast – 220 kilometres, or 119 nautical miles – an obvious acknowledgement of the significance of both the location of the land boundary and the cut-off effect.

In the *North Sea Continental Shelf* cases, the Court referred to these charts in both paragraphs 24 and 59 of its Judgment. The Court said, at paragraph 24, that the equidistance method

> "partly for reasons that are best appreciated by reference to the many maps and diagrams furnished by both sides in the course of the written and oral proceedings, can under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable". (*I.C.J. Reports 1969*, at para. 24).

At paragraph 59, the Court said:

"As was convincingly demonstrated in the maps and diagrams furnished by the Parties . . . the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out." (*I.C.J. Reports 1969*, at para. 59.)

Without making too much of it, we would note only that, of the maps and diagrams referred to, so far as we are aware, the only one that expressly refers to lateral equidistance lines – as the Court did in paragraph 59 – and the only one that actually shows the main continental shelf area lying farther out, to which the Court also expressly referred, is the chart from the German pleadings showing the Gulf of Maine area.

B. The Gulf of Maine Area

With that examination of State practice, let us describe the nature of an equitable result in the Gulf of Maine area.

We will begin by recalling the relevant coastal fronts in the Gulf of Maine area. These are the coastal fronts from Nantucket Island to Cape Canso. Both end points of the relevant coastal fronts are about the same straight line distance from the international boundary terminus, measured as straight lines along the coast. The coastal fronts are also of approximately equal length. The Maine-New Hampshire coastal front is about 200 nautical miles long, and the coast of Nova Scotia from Cape Sable to Cape Canso is about 200 nautical miles long. Both are basically parallel to the general direction of the coast and face directly on to the Atlantic Ocean. The southwest coastal front of Canada facing the Gulf of Maine is about 100 nautical miles long. The northeast coastal front of Massachusetts is also about 100 nautical miles long. Both of these two lateral coasts are perpendicular to the general direction of the coast, and both face each other laterally across the Gulf of Maine.

In sum, the relevant coasts are comparable in length and comparable in their relation to the open sea. They have been given comparable treatment by nature, except that, because of the concavity of the Gulf of Maine, the equidistance method would deny to the United States coast treatment equal or comparable to that given the coast of Canada. If the equidistance method were to be used, the United States would receive considerably less offshore area merely because more of its coastline lies within the coastal concavity than does that of Canada.

As the Court stated in paragraph 91 of the *North Sea Continental Shelf* cases, "Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created". The Court also said, in the same paragraph, that achieving equity in such a situation is not a question of refashioning geography but of, "abating the effects of an *incidental special feature* from which an unjustifiable difference of treatment could result" (*I.C.J. Reports 1969* at para. 91, emphasis added).

How should the effects of the concavity upon an equidistant line be abated? An equidistant line creates inequity because it swings far across the coast of Maine before eventually turning seaward at the midpoint of the closing line, thereby ignoring the location of the land boundary. Therefore, one characteristic of an equitable boundary is that it will turn seaward sooner, before swinging so far across the front of the coast of the United States. We have seen that the boundaries in the North Sea and the Bay of Biscay have this characteristic. The (232) point is illustrated geometrically in Figure 29 of this presentation, made up of two Figures, 29A and 29B.

(237) Figure 29A illustrates the nature of an equitable solution in the situation of the rectangular concavity with which we have been working. The red line is the equidistant line which, in our view, encroaches in a disproportionate way upon the coast at the back of the concavity. The black line illustrates our view of the nature of an equitable solution. It turns seaward before it swings out too far across the coast at the back of the concavity.

In some respects, the concavity may be compared to an island of one State located offshore the coast of another State. This is the situation shown in (232) Figure 29B. In such a case, the island, because it is located farther offshore, causes the equidistant line to swing out across the front of the mainland coast. We should stress that the size of the island is far less important than its location relative to the neighbouring State. Here, too, the encroachment can be abated by turning the boundary seaward before it swings out so far to the side, while at the same time giving the island State an extension of its seaward-facing coastal front into the open sea. In this way, each State receives most of the area seaward from its coast.

(232) Figure 29A illustrates the general nature of an equitable solution in the geographical circumstances of this case. 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. In this manner, the lateral coastal front of State B receives a uniform belt of maritime jurisdiction that extends to the limit of coastal State jurisdiction seaward into the ocean. Such a boundary accomplishes the following:

It respects the general location of the land boundary.

It respects the relationship between the coasts of the Parties and the maritime areas in front of those coasts, because each State receives most of the area seaward of its own coast.

For the same reason, it satisfies the principle of natural prolongation in its geographical sense. That is, the principle that each State should receive as much as possible of the natural prolongation or extension of its coastal front into the sea.

It abates the cut-off effect and thereby minimizes encroachment.

The boundary gives comparable treatment to the comparable coasts. The primary coastal front of State B receives all the area in front of it. The comparable primary coastal front of State A receives a large portion, although not all, of the area in front of it. Thus, the coast of State A receives less favourable but generally comparable treatment.

The lateral coastal front of State B receives a band of maritime jurisdiction extending seaward, as well as an area directly in its front. Thus, it receives a large area both within and seaward of the Gulf, although this area also lies in front of the coast of State A.

The portion of the coast of State A nearest the international boundary terminus also receives a band of maritime jurisdiction extending seaward. This (232) band is the shaded area, shown here on Figure 29A. This is the portion of the coast that would have suffered the full cut-off effect caused by the equidistant line.

A boundary of this nature achieves a reasonable degree of proportionality between the lengths of the coasts and the maritime areas appertaining to each coast.

This is the nature of an equitable result in the geographical circumstances of the Gulf of Maine area. It is based upon the same equitable principles that the

Court applied in the *North Sea Continental Shelf* cases. In both cases, the cut-off effect must be abated in order to avoid encroachment, to reach a reasonable degree of proportionality and to give comparable treatment to comparable coasts. In both cases this requires that the boundary be turned seaward quickly, rather than swinging across the coast at the back of the concavity.

In analysing the geographical relationships in this case, the United States has used the terms "primary coast" and "secondary coast". Canada has sought to characterize these terms as signifying concepts of our invention. Canada, however, fails to distinguish between the terms, which may be new, and the concepts, which are not.

The United States did evolve the terms to distinguish between seaward-facing coasts and lateral coasts in a concavity. But the concept of such distinctive coasts is drawn directly from the *North Sea Continental Shelf* cases. The concepts imply that the seaward-facing coast, the primary coast, is entitled to receive as much as possible of the area in front of it. Conversely, the shorter, lateral coast, that is, what we have called the secondary coast, cannot receive an area of maritime jurisdiction that extends far across the face of the primary coast because that would create an inequitable cut-off effect. The maritime area appertaining to the secondary coast must extend seaward rather than laterally. The boundary must thrust seaward rather than laterally. This means that the boundary cannot be delimited simply on the basis of proximity to the projecting parts of the coast. In order to achieve an equitable solution, the boundary must leave to the primary coast areas in front of it that are closer to the secondary coast.

Canada claims that the notion of primary and secondary coasts is inconsistent with what it terms "the principle of equality within the same order". Canada discusses its view of this principle in paragraphs 577 and 578 of its Counter-Memorial **(III)**. We would ask that the Chamber study those paragraphs carefully because, in our view, Canada egregiously misinterprets the Court's 1969 Judgment.

Canada begins with a correct statement of the law, but subsequently fails to apply the law. In paragraph 577 Canada states:

> "Even in the case of the continental shelf, as the Court pointed out in the *North Sea Continental Shelf* cases, where States 'have been given broadly equal treatment by nature', it is unacceptable that their continental shelf rights should be considerably different: for then, 'in a theoretical situation of equality within the same order, an inequity is created'. Much of the law of delimitation can be traced to this idea." (Counter-Memorial, para. 577.)

This much of Canada's analysis is correct. Indeed, the only authority Canada has cited, and the source of the phrase "equality within the same order" is paragraph 91 of the *North Sea Continental Shelf* cases. The United States has quoted that same paragraph several times, and we discussed it a few minutes ago, because it illuminates the nature of an equitable solution. In paragraph 91, the Court wrestled with the concept of "equity". It concluded that the equidistant line would be *inequitable* because, in a situation of "equality within the same order", the equidistant line would deny comparable treatment to comparable coasts merely because one coast is concave and the other is convex. This explains why an equidistant line would be inequitable, not only in the North Sea but also in the Gulf of Maine area and in similar situations where the land boundary meets the sea inside a coastal concavity.

Canada has borrowed from this paragraph the phrase "equality within the same order", and has turned it on its head. In Canada's argument "equality within the same order" means that the boundary must be equidistant from the

United States coast and Nova Scotia's lateral or secondary coast. But equidistance is not the same as "equality". And equidistance does not guarantee "equal treatment". Quite to the contrary, as the Court itself explained, equidistance often causes unequal treatment and inequity. In order to avoid inequity, the lateral coast cannot receive the benefit of a full-effect equidistant line. In short, the principle of equality within the same order, as used by the Court, requires in this case that the equidistant line and Canada's proposed line be rejected.

Canada has introduced in its case another concept, that of "radial projections". The concept of radial projections means, in Canada's view, that every State is entitled to the area within 200 nautical miles of its coast, in all directions. The United States agrees that each State is entitled to a zone of maritime jurisdiction comprising all the area within 200 nautical miles of its coast, but only where there are no neighbouring States. When their maritime jurisdictions overlap, one or both of the neighbouring States must receive less than all the area within 200 nautical miles of its coast. This is the very reason there is a need for maritime boundary delimitations.

Canada also states, however, at paragraph 151 of its Counter-Memorial, that the concept of radial projections means that "[N]o one direction is legally more significant than any other" (Counter-Memorial, para. 151). According to Canada, this means that "the extension of a maritime zone outward from the coast is *radial* rather than *perpendicular*" (*ibid.*, emphasis in original) and that concepts such as "seaward extension", "coastal front", and "primary and secondary coasts" have no force. Here, as elsewhere, Canada has confused the determination of the outer limits of the 200-nautical-mile zone with the delimitation of boundaries between neighbouring States and has confused 200 nautical miles as the seaward limits of that zone measured from the coast, with the notion of equal distance from neighbouring coasts.

If no direction is legally more significant than another, then there would be no principles of delimitation, and delimitations would become arbitrary and
(57) subjective. For example, Figure 15 of Canada's Counter-Memorial illustrates "radial extensions" of the United States and Canadian coasts, but arbitrarily limits those projections along the line of Canada's proposed boundary. In a sense, Canada does give preference to one direction over another: Canada prefers a boundary that extends laterally a long way across the coastal front of the United States before it extends seaward, rather than a boundary that extends seaward shortly after it leaves the area close to the coast.

The United States believes that there is a preferred direction. Where two States share a coast that runs in a general direction, such as does the coast of Canada and the coast of the United States along the east coast of North America, the law prefers a boundary that extends outward from the coast, perpendicular to its general direction, rather than across the coast. That is the
(37) meaning of Figure 31 of our Memorial, which we will show here as Figure 30.

Even the equidistance method recognizes implicitly this preference for the perpendicular direction: as explained earlier in my presentation, all equidistant lines that begin in a coastal concavity ultimately become perpendicular to the closing line of that concavity. In situations such as the Gulf of Maine, the North Sea, or the Bay of Biscay, where the land boundary meets the sea at a point that is far from the midpoint of the coastline forming the concavity, the boundary also must extend out from the coast, that is, perpendicular to the general direction of the coast, rather than across the coast. The only question, Mr. President, and distinguished Judges, is where does that perpendicular begin?

The United States has proposed a method of delimitation that is consistent

with the general nature of an equitable solution. The line proposed by the United States achieves the following result:

First, Canada's primary coastal front from Cape Sable to Cape Canso receives its full seaward extension.

Second, Canada's secondary coastal front from the land boundary to Cape Sable receives a large area of maritime jurisdiction lying in front of the coast of Maine, in this area where the coastal fronts overlap.

Third, south of Cape Sable, in the vicinity of Browns Bank, much of the area is left to Canada. This may be justified on the grounds of resource conservation and management and dispute minimization, but also on the grounds of geography. At Cape Sable, the Canadian coast must transform itself from a primary coast that looks to the open sea to a lateral coast that looks across the concavity of the Gulf of Maine. In that transformation, the aspirations of the coastal front of Canada must be reduced. The point at Cape Sable certainly cannot be entitled to a seaward extension that is comparable to that of the 100 nautical miles of Canadian lateral coast within the Gulf of Maine. If Canada wishes to fill in some of this area south of Cape Sable with some blue colour, it may do so – but that single point is entitled, in our view, to much less coastal front extension than the whole lateral coast may generate. Canada's coastal front extension south of Cape Sable could be represented by either a straight or curved line from a given point on the seaward-facing side of the box within the Gulf of Maine to the comparable point on the perpendicular to the general direction of the coast from the international boundary terminus. If the extension of the 100-nautical-mile coast is represented by no more than the area in the square box within the Gulf of Maine, surely the single point at Cape Sable can claim even less beyond the Gulf. If the area within the box must be divided equally, as Canada suggests, so too must such a limited area outside the square be divided proportionately between the Parties, which the United States line more than accomplishes.

Fourth, the cut-off effect is abated by the United States lines, and the United States receives a fair portion of the maritime area in front of the coast.

Fifth, the comparable coasts, from Nantucket to the international boundary terminus and from the international boundary terminus to Cape Canso, receive comparable treatment. Each receives an area of maritime jurisdiction closely proportionate to the length of the coast.

The Chamber adjourned from 11.12 a.m. to 11.37 a.m.

Mr. President, distinguished Judges. May it please the Chamber. The perpendicular method in the abstract is neither inherently equitable nor inequitable. Whether the method produces an equitable result depends upon the particular geographical circumstances, upon the location of the point from which the perpendicular is drawn, and upon how the perpendicular line is adjusted. Nevertheless, there are general attributes to the perpendicular method that render it a useful tool in situations such as the Gulf of Maine.

First, the perpendicular method takes account of the general direction of the coast and leaves to each coast the areas in front of it. The equidistance method, by contrast, often ignores the general direction of the coast and causes the boundary to swing across the coast of one of the Parties.

Second, since the perpendicular is a line of constant bearing, it is not distorted by incidental features such as coastal concavities or convexities. For this reason, it often is useful to delimit areas farther offshore. An equidistant line, by

contrast, often becomes increasingly distorted and inequitable as it is extended seaward. The Federal Republic of Germany stated this to the Court in the *North Sea Continental Shelf* cases. At page 63 of Volume II of the pleadings, counsel for the Federal Republic of Germany stated:

> "I feel that the façade approach that I have just proposed has significance in attempting to draw lines of demarcation for vast areas of the sea because it avoids deriving from the coastal configuration such an *a priori* predominance of one coastal State over the adjacent coastal State as is inherent in the equidistance method.
>
> Therefore, I respectfully submit that we have in the façade method a theory which becomes more useful in the particular circumstances of greater distance from the shore. In contrast to the equidistance method whose value, given an irregular coastline, may decline with the distance, the façade theory provides us with a method which can equitably apportion far-ranging offshore areas." *(I.C.J. Pleadings, North Sea Continental Shelf.)*

Third, the perpendicular method is useful because the line may be adjusted as necessary to take account of relevant circumstances to achieve an equitable solution. The line may be angled a degree or two, as was done in the *Grisbadarna* case, or it may incorporate step-like adjustments, as the United States has proposed, in order to take into account the integrity of the fishing banks. In a delightfully poetic phrase, Canada has called the United States proposal a line of "wandering perpendiculars" (Canadian Counter-Memorial, para. 654). Certainly the United States has adjusted the perpendicular. There is nothing inequitable or otherwise suspect in making such adjustments. On the contrary, it is necessary to adjust the perpendicular or any other line as much as necessary to take account of the relevant circumstances and to achieve an equitable solution.

The perpendicular method may also be used by itself or in a combination of other methods. For example, in the *Tunisia/Libya* delimitation, the perpendicular line delimits the area inshore, and another, but different, line of constant bearing delimits the area farther seaward. Conversely, in the Bay of Biscay, the equidistant line is used for the inshore area, but the boundary extends seaward to the mouth of the concavity along a line of constant bearing, taking into account the configuration of the coast and the location of the land boundary.

In the Gulf of Maine area, an equitable solution could be achieved, in our view, by using the perpendicular method in combination with other methods. Canada correctly points out that the perpendicular cannot be used in the innermost area of the Gulf of Maine landward of the starting point (Counter-Memorial, para. 647). Ultimately, some other method will be used to delimit the boundary from the international boundary terminus to the starting-point specified in the Special Agreement for this delimitation – once the dispute over Machias Seal Island and North Rock is resolved. The perpendicular method is, however, entirely appropriate to delimit the area seaward of the starting-point. Thus, the complete boundary eventually may combine two or more methods, as do many other boundaries around the world.

Canada repeatedly asserts that the United States is claiming a right to the entire area in front of its coast. In this way, Canada mischaracterizes both the method and the line proposed by the United States. For example, the Canadian Reply at paragraph 69 accuses the United States of adopting a theory of "unlimited perpendicularity". Canada's Reply argues that the United States seeks an "unlimited seaward extension" of its coast (para. 77), and that the United States excludes the possibility of overlapping projections in front of the primary coast (para. 69).

The United States has not and does not seek all the area in front of its coast. On the contrary, the United States line leaves to Canada's southwest coastal front a generous band of maritime jurisdiction extending seaward. This encompasses large areas in front of the United States coast, both within and seaward of the coastal concavity, including both Browns Bank and German Bank.

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. Canada's arguments assume that the United States line extends seaward from the international boundary terminus. Such a line would deny any offshore area to the southwest Canadian coastal front and accordingly the United States has never proposed such a line. At the other extreme, the Canadian line, which swings even further across the United States coast than does the equidistant line, would be grossly inequitable for all the reasons that we have discussed.

The United States has proposed an intermediate solution. The United States adjusted perpendicular line extends seaward from the starting-point. In this way, it both abates the cut-off effect caused by the equidistant line and leaves the lateral Canadian coast a band of jurisdiction extending seaward. The line has been further adjusted in Canada's favour to preserve the integrity of the two fishing banks on the Scotian Shelf – Browns Bank and German Bank.

Such a solution will avoid cutting off, in a disproportionate way, the coastal projection of the United States coasts at Maine and New Hampshire across Georges Bank, thereby respecting the Northeast Channel as the boundary naturally separating the fishing banks and their associated fish stocks. The United States believes that this is an equitable solution.

Just last Tuesday, Professor Weil took us for a sail along the Canadian line through the Gulf of Maine and, as he said, to the open sea. With all respect, no sailor would seek to reach the open sea from the starting-point along the course that Professor Weil has charted. A prudent sailor would leave the coasts of the Gulf behind as quickly as possible. He would try to sail the shortest straight line out of the Gulf, or he would look for a deep channel. He would not sail an extra distance to the midpoint of the Gulf if he did not have to. He certainly would avoid the dangerous banks in the area if he could. A prudent sailor, Mr. President, distinguished Judges, would sail the course of the United States line. He would sail straight for the mouth of the Gulf. He would tack – or change direction – to avoid the banks. And as he reached the deeper water of the Northeast Channel he would take it, finding there a favourable passage to the open sea.

ARGUMENT OF MR. FELDMAN

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES

Mr. FELDMAN: Mr. President, distinguished Judges, I am deeply honoured to have the privilege to appear before the Chamber today and to join with our friends from Canada in the resolution of this dispute in accordance with international law. We are divided on the issues that the Chamber must decide today, but we are united in our devotion to the legal process and in our commitment to close relations between our countries.

I would also like to take this opportunity to recognize Mr. Ray Meyer and Dr. Jon Olsson of the State Department, who will be assisting me with the charts later in my presentation.

Last week you heard the Canadian view of the geography of the Gulf of Maine area. Now you have heard the United States view of that geography. Both Parties agree that the most important consideration in this matter is the relationship between the coasts of the Parties and the maritime areas before those coasts. Both accept the maxim that the land dominates the sea. However, quite understandably, each Party argues that the maritime boundary proposed by it best expresses that relationship.

How then is the Chamber to assess the merit of those conflicting claims? How is the Chamber to determine whether the Canadian line or the United States line best represents a delimitation in accordance with equitable principles. 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. In that Judgment the Court laid down the fundamental rule that delimitation is to be effected in accordance with equitable principles taking account of all the relevant circumstances. At the same time, the Court indicated in its *Dispositif* (para. 101 (D) (3)) that one of the critical factors to be considered in any delimitation, in accordance with equitable principles, is:

> "the element of a reasonable degree of proportionality, which a delimitation, in accordance with equitable principles, ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline . . .".

Since the decision in the *North Sea Continental Shelf* cases this legal test of equity has been applied in the *Tunisia/Libya* case and in the Anglo-French Arbitration. The element of proportionality was also a major factor in the settlement negotiated by the Federal Republic of Germany, Denmark and the Netherlands, in the delimitation of their continental shelf boundaries in the North Sea, after the Court's decision, and in the agreement made by France and Spain for the delimitation of their continental shelf boundary in the Bay of Biscay.

Mr. President, distinguished Judges, there have been some disagreements as to whether the element of proportionality should be applied as a principle of delimitation or only as a test of whether a boundary line determined by some other method is equitable. However, there is general agreement in the jurisprudence of maritime boundary delimitation that a proposed boundary is not in

accordance with equitable principles and does not produce an equitable solution, if that boundary produces a result that is disproportionate in relation to the coasts of the Parties. As Professor Malintoppi said "what is unreasonable in terms of proportionality cannot be considered equitable" (p. 208, *supra*).

THE PROPORTIONALITY TEST

The United States respectfully requests that the Chamber apply 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 coasts to the area in front of those coasts. The United States further requests that the Chamber apply the same test to any line it may consider as the maritime boundary between the Parties in the Gulf of Maine area.

In this presentation, the United States proposes to review the positions of the Parties concerning the proportionality test and to consider how that test can be applied fairly in the circumstances of this case. Both Parties have discussed the issue of proportionality in some detail in their pleadings, and the Chamber has also heard a very thoughtful presentation on this subject from Professor Malintoppi. It appears that the two Parties have different conceptions of the relevance of the proportionality test to the delimitation of a single maritime boundary, and they certainly have different views as to the relevance of certain coastlines, particularly as regards the Canadian coasts which face each other across the long, narrow Bay of Fundy.

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, that it has become obvious Canada is fully aware that the proportionality test is a serious problem for its claim. The United States shares that perception. We 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. You can see the disproportionate effect of the Canadian line in the Gulf of Maine area on
(111) Figure 25 of the United States Counter-Memorial, which is Figure 32 of your map book. This is the Canadian line. The disproportionate effect of an
(41) equidistant line can be seen at Figure 35 of the United States Memorial, where a larger area is used for the test, or in Annex 99 to the Memorial, where a smaller area is used.

The United States respectfully submits, Mr. President, that any boundary crossing Georges Bank must produce a disproportionate result because of one very special circumstance in the geography of the Gulf of Maine area. That circumstance is the indisputable fact that the international boundary between the United States and Canada terminates in the corner of a concavity in the coast, far from the midpoint of the coastline forming that concavity. As a result of that fact, more than three-fourths of the coastline of the Gulf of Maine is United States territory. The geographic balance in this case is between the coast of Maine facing the Atlantic Ocean along the back of the concavity, and the coast of Nova Scotia facing the Atlantic Ocean outside the concavity. Within the Gulf, the United States and the Canadian coasts stand in a ratio of at least 3:1.

The United States has approximately 200 nautical miles of coast facing across the Gulf of Maine and towards the open sea.

There is no comparable Canadian coast facing both the Gulf of Maine and the open sea. The Canadian coast that faces the Atlantic lies northeast of Cape Sable

and attracts a huge area of maritime jurisdiction seaward of that coast. Yet, as Mr. Colson has shown, an equidistant line reaches to the midpoint of the closing line across the mouth of the concavity, and extends seaward from there as a line perpendicular to the closing line. An equidistant line would, therefore, divide the area seaward of the Gulf of Maine equally between the two Parties, cutting off the coast of Maine from any extension into the sea. The Canadian claim line would give Canada even more than the strict equidistant line.

Thus, Mr. President, it is no wonder that Canada attempts to raise doubts whether the proportionality test can be applied to the delimitations of the critical area seaward of the Gulf of Maine where Georges Bank is located. In the view of the United States, there is no way a boundary across Georges Bank could pass any properly constructed proportionality test. Canada attempts to overcome this problem by adding the Canadian coasts on the Bay of Fundy to the calculation. In our view, that is a fallacious argument, and underscores the weakness of the entire Canadian position in this case.

In a few minutes, the United States will demonstrate what it believes is a proper application of the proportionality test to the claims of the Parties. First, it may be useful to consider the specific objections that Canada has made to the application of the proportionality test in this case, and to deal with the ideas that Canada has put forward for the construction of a proportionality test that it hopes would serve its interests in this proceeding.

Canada acknowledges the role of proportionality in its Memorial **(I)** "as a test of the equity of a maritime boundary" (para. 367), but it resists the application of that test in this case. Thus, Canada argues in its Counter-Memorial **(II)** that the role of proportionality is "clearly less fundamental" in relation to a single maritime boundary where, in Canada's view, "title is based on a specified distance from the coast, and not upon the extension seaward of the land territory of the coastal State" (para. 488). Moreover, Canada attempts to argue that the test cannot be applied to Georges Bank, which is the area at the centre of the dispute between the Parties, because, Canada asserts, it is difficult to define the coasts and areas relevant to the proportionality test in the area seaward of the Gulf of Maine (*ibid.*, paras. 489-490, and fn. 16). Canada also asserts in its Memorial that a purported overall balance of the relevant Canadian and United States coasts rules out, *a priori*, any element of disproportion in the Canadian claim (para. 374).

In the same spirit, Canada argues in its pleadings that, if the proportionality test is to be used in this case, its application should be modified to take account of Canada's socio-economic arguments (Memorial, para. 369), and that the delimitation should be proportionate only in a general sense that transcends geography (Counter-Memorial, para. 487). Canada boldly suggests that the relevant coasts should be determined by their economic dependence on the resources of the area (Memorial, para. 373). Finally, Canada takes the position that if the normal technique is used, the Court should make its calculations on the basis of an equal length of coastline for each Party *(ibid.)*.

This is a remarkable concoction of arguments. The only unifying theme is Canada's resistance to the proportionality test as it has been applied in all the continental shelf cases and in the delimitations made by agreement in the North Sea and in the Bay of Biscay.

The United States differs with Canada on every point except the last. We believe the proportionality test can be applied fairly, on the basis of equal lengths of coasts, if the proper coastal fronts are used for that purpose. The United States will return to this point. First, however, we would like to address briefly the Canadian points with which we disagree.

The United States believes that the proportionality test is just as applicable to the delimitation of a single maritime boundary as it is to the delimitation of a continental shelf boundary. There is no doubt, as Mr. Stevenson has demonstrated, that proportionality is linked to the principle that the land dominates the sea, to the concept of coastal fronts, and, particularly, to the distortions that result from the use of the equidistance method in situations involving concave and convex coasts. These concerns are referred to in paragraph 98 of the Judgment of the Court in the *North Sea Continental Shelf* cases.

Canada concedes that the fundamental rule as stated in the Judgment of the Court in the *Tunisia/Libya* case, and the principle that the land dominates the sea both apply to the delimitation of 200-nautical-mile zones, because the exclusive jurisdiction of coastal States is based on the relationship of the maritime space to the adjacent coast (Memorial, paras. 277, 287). For that same reason, the United States believes that the element of a reasonable degree of proportionality between the length of the Parties' coasts and the areas attributed to those coasts remains a vital test of the fairness of any proposed boundary line.

The essential point, in the view of the United States, is the Court's reaffirmation in paragraph 103 of the 1982 Judgment, that the element of proportionality as formulated in the *North Sea Continental Shelf* cases "is indeed required by the fundamental principle of ensuring an equitable delimitation between the States concerned". The United States understands this statement as indicating that the proportionality factor is related to the extension in geographic terms of the coasts of the Parties. It takes account of the principle that an equitable delimitation must correspond to the basic relationship of the coasts of the Parties to the area to be delimited.

Canada has conceded in these oral proceedings that the geographic relationship between the coasts of the Parties and the areas to be delimited is the most important consideration in the delimitation of a single maritime boundary, in accordance with equitable principles under international law (p. 227, *supra*).

The main difference between the Parties on this issue is Canada's reliance on what it calls the distance principle. The implication of Canada's Counter-Memorial is that the 1982 United Nations Convention on the Law of the Sea repealed the proportionality test by making proximity the basis of title to the exclusive economic zone and equidistance the method for delimitation of maritime boundaries between neighbouring States.

The United States does not agree that title to the 200-nautical-mile zone is based on distance, but even if it were, proportionality would remain a valid test of the fairness of any proposed boundary in the particular geographic circumstances of that case. To suggest, as Canada sometimes seems to do, that the equidistance method should be applied, even if it produces a delimitation that is grossly disproportionate to the length of the relevant coasts, is an attempt to subordinate the result to the method. That is precisely the opposite of the fundamental rule of delimitation. The method must be justified by the equity of the result under law.

Moreover, if an equidistant line is not subject to the element of a reasonable degree of proportionality, the consequence is to eliminate all consideration of special geographical circumstances. The distance principle would become absolute. As Mr. Stevenson has shown, that approach is contrary to Article 6 of the 1958 Convention and to all the jurisprudence on the delimitation of maritime boundaries.

Canada's suggestions for modification of the proportionality test are no more

satisfying. The notion that the relevant coasts are to be defined by reference to economic dependence is to refashion nature in the most extreme sense. That approach would divorce boundary delimitation from geography and substitute a process of distributive justice based on the Court's appreciation of the relative needs of the Parties at a given moment in time. Mr. President, distinguished Judges, proportionality is a test of geographic justice. It measures the relationship of the coasts of the Parties to the maritime areas in front of those coasts. Proportionality cannot measure that relationship if the coasts are refashioned in the light of economic considerations.

The United States has noted, of course, that Professor Malintoppi did not repeat Canada's objections to the proportionality test based on the distance principle and he touched very lightly on socio-economic geography. Indeed, the Professor told us that proportionality "joue un rôle primordial" (p. 209, *supra*). Perhaps Canada has thought better of these points, and now agrees that the proportionality test should apply in the same way to delimitation of a single maritime boundary as it does to the delimitation of the continental shelf. That would be an important step forward.

Unfortunately, Canada's resistance to the application of the proportionality test in this case continues to emerge in a new form. Canada now tells the Chamber that the proportionality test must be applied with flexibility, and that proportionality is not the sole test of equity. Furthermore, Professor Malintoppi does reiterate Canada's argument that even if the proportionality test is applied within the Gulf of Maine itself, the test cannot be applied to the area seaward of the Gulf because, Canada says, there is no single, self-evident set of parameters for defining the area that should be used for the proportionality calculation (Canadian Counter-Memorial, paras. 489-490 and fn. 16). This suggestion is astonishing since it is precisely that area – the northeast portion of Georges Bank – that is the primary object of this dispute. Canada's transparent objective is to restrict the proportionality test in order to avoid its application to the facts of this case.

As pointed out in paragraph 263 of the United States Reply (V), there are few situations where the coasts and areas relevant to application of the proportionality test can be determined precisely without disagreement. There was no such certainty in the *Tunisia/Libya* case, but the Court had no difficulty in making reasonable choices. As the Court stated in paragraph 103 of the Judgment:

> "In a case such as the present one in which the two calculations would produce different results, it is the relevant circumstances of the area which will afford the basis for determining whether it is the comparison between the more restricted, or between the more extensive areas that will determine whether the result is equitable." (*I.C.J. Reports 1982*, para. 103.)

Further, the Court recognized that it had a duty to make the calculations necessary to apply the proportionality test, because it said this element is "required by the fundamental principle of ensuring an equitable delimitation . . .". The United States is confident that the Chamber will have no difficulty in discharging that duty in this case.

The Relevant Coasts and Areas

Respectfully assuming, then, that the Chamber will construct a proportionality test, what coasts and areas should be included? The United States and Canada are agreed that the coasts of both Parties within the Gulf of Maine are relevant as well as the area of the Gulf itself. The Parties also agree that some

part of the Canadian coast facing the Atlantic Ocean and the area off that coast can be included in the calculation of proportionality.

(110) (111) The test proposed by the United States in Figures 24 and 25 of its Counter-Memorial is shown in Figures 31 and 32 of this presentation. While Canada has reservations about applying the test to the area seaward of the Gulf, it has proposed two models in its Counter-Memorial for defining the relevant (76) coasts and areas which include Georges Bank. One of these models, at Figure 51 of Canada's Counter-Memorial, is shown here, as Figure 33 of this presentation. In this Figure, arcs of 200 nautical miles are drawn from the respective coastlines as the seaward limit of the area to be used for the proportionality test. The Figure also has straight lines to define the coasts, and it uses Canada's version of a perpendicular to the general direction of the coast in the Gulf of Maine area to frame the lateral limit of the area to be used in this test.

As the United States sees this problem, Mr. President, the Chamber is in a position to construct a proportionality test which incorporates substantial elements which have been used by both Parties. Although the United States has suggested other seaward limits, it is prepared to work with the seaward limits of the 200-nautical-mile zones. The United States also uses parallel lines perpendicular to the general direction of the coast in the Gulf of Maine area for the lateral limits of the test area, but it disagrees with Canada as to the proper (76) bearing of those lines. The United States believes Figure 51 is slanted unreasonably towards the United States.

Thus, there are three issues as to which the Parties are sharply divided: first is the bearing of the perpendicular lines defining the lateral limits of the area; second is the treatment of the Bay of Fundy; and third is the particular coasts and areas to be included.

The first issue, while important, is not too difficult, in our view. The United States computes the general direction of the coast to be approximately 54°. Thus, the perpendiculars to that general direction extend seaward at 144°. As Mr. Colson has pointed out, Canada computes the general direction of the coast between Nantucket and Cape Sable as ranging between 63° and 65°. Lines perpendicular to that direction would bear at approximately 154°. A difference of 10° projected 200 nautical miles from the coast results in a change in the test area of approximately 3,491 square nautical miles – that is 11,974 square kilometres – that would fall to one Party or the other depending on which of these two perpendiculars is selected.

We have shown, in paragraph 283 of our Memorial **(II)** and in paragraphs 20-22 of our Counter-Memorial **(IV)**, why the United States believes 54° is the proper general direction of the coast. But we have also indicated some flexibility on this point. We 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, as shown on Figure 51 of the Canadian Counter-Me- (76) morial – Figure 33 of your book. The closing line runs at an azimuth of about 56.7°. Thus, the perpendicular lines would extend seaward at 146.7°.

The second issue, the Bay of Fundy, is more basic. The map on the easel is shown as Figure 33A of your book. For the reasons stated in paragraphs 265-269 of our Reply, the United States believes that the coasts of the Bay of Fundy must be excluded from any properly constructed proportionality test. These coasts have no relevance to this delimitation. Canada suggests in its pleadings that the United States has constructed a proportionality test to fit its claim, whereas Canada only seeks the objective truth. The United States is confident, however, that the Chamber will appreciate that the reverse is true. In this

instance, a glance at the map is sufficient to recognize that the inclusion of the coasts of the Bay of Fundy would completely distort any reasonable proportionality test.

The Canadian coasts on the Bay of Fundy face each other across a long, narrow body of water which runs from the side of the Gulf of Maine deep into Canadian territory. Those coasts do not face any United States coast. In fact, they lie to landward of the starting-point for the boundary delimitation.

In the *Tunisia/Libya* case, the Court specifically pointed out in paragraph 85 of the Judgment that it may not be possible to take all the coasts of a Party into account in the delimitation. If the extension of the coast of one Party cannot overlap the extension of the coast of the other Party, the Court said it "is to be excluded from further consideration". The Court went on to say:

> "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." (*I.C.J. Reports 1982*, pp. 61-62, para. 756.)

The United States believes that the Bay of Fundy presents a perfect case to prove the wisdom of the Court's analysis. The Bay extends approximately 105 nautical miles – 194 kilometres – deep into the interior of Canada, a distance almost three times the distance across the mouth of the Bay where it joins the Gulf of Maine. 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, and more than three times the length of the only Canadian coast that fronts on the Gulf of Maine. Excluding the coasts around the Bay of Fundy, the ratio between the United States and Canadian coasts facing the Gulf of Maine is at least 3:1. But if the coasts of the Bay of Fundy are included, the ratio drops as low as almost 1:1.

This distortion is compounded by the fact that the area of the waters of the Bay of Fundy is quite small in relation to the length of its coasts. Adding the Bay of Fundy increases the area appertaining to Canada by only 7 per cent compared with an increase of over 100 per cent in the length of the Canadian coasts. Adding Canadian coastline without also adding comparable water area associated with that coast, means that any water areas attributed to the coast of the Bay of Fundy will come from area associated with the United States coast. Thus, including the coasts of the Bay of Fundy would distort the proportionality test unfairly in Canada's favour.

It was precisely to avoid such a distortion that the Court, when it first formulated the proportionality test in the *North Sea Continental Shelf* cases, prescribed that the coastlines of the Parties should be measured according to their general direction. This is to be done, in the words of the Court

> "in order to establish the necessary balance between States with straight and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportion" (*I.C.J. Reports 1969*, p. 53, para. 98).

And the Court specifically called attention to the possibility of accomplishing this result by "drawing a straight baseline between the extreme points at either end of the coast concerned . . .". The United States believes that the law on this issue is clear. We respectfully submit that, "in accordance with the law

applicable on this matter as between the Parties", the Chamber should draw such a line across the mouth of the Bay of Fundy for the purposes of any proportionality test.

The equities of this issue are equally clear. The coasts of the Bay of Fundy lie behind and parallel to the coast of Nova Scotia facing the Atlantic Ocean. As pointed out in paragraph 269 of the United States Reply, to count these interior coasts would in effect allow Canada to count the same coastal front three times for purposes of proportionality. Professor Malintoppi says the United States would falsify nature by excluding the interior coasts of the Bay of Fundy. We believe it is Canada that would falsify nature by, in effect, moving these coasts to the Gulf of Maine.

Mr. Colson has already explained the United States view that a body of water cannot be entitled to more area than if it were land. That condition is represented in this case by the length of the closing line across the mouth of the Bay of Fundy, and not by the sides of the Bay. In the final analysis, we agree with Ambassador Legault's conclusion:

> "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." (P. 49, *supra.*)

Thus, in the view of the United States, inclusion of the Bay of Fundy in the proportionality test would be unreasonable and inequitable. Furthermore, Canada advances no argument that could support the inclusion of these coasts as a matter of law. The only positive argument put forward by Canada is that the Bay of Fundy is part of the Gulf of Maine itself. If that were true, it would not make any difference. The waters and sea-bed of the Bay of Fundy are not being delimited in this proceeding. Moreover, as we have noted, the International Hydrographic Organization considers that the Bay of Fundy is a distinct body of water and not part of the Gulf of Maine in geographic terms (United States Counter-Memorial, Annex 11, Vol. V).

Canada also makes a negative argument to the effect that the United States is inconsistent in its treatment of the Bay of Fundy, because the United States Memorial includes the Bay of Fundy as part of the relevant area. However, there is no principle of law or equity which requires that the area used for the proportionality test must be the entire area which may be relevant for consideration of the relevant circumstances in the case.

Figure 34 of your map book is a map of Tunisia and Libya, showing the area the Court used for the proportionality test in that case.

As Mr. Colson noted, in paragraph 74 of the Judgment in the *Tunisia/Libya* case, the Court described the area "relevant to the decision of the dispute" as the areas in front of the coasts of one Party or the other. The Court then went on to describe a smaller area which it called "the area in dispute", where the coastal projections of the two Parties overlap. Only that smaller area was used for the proportionality test. The United States believes that in this case, the Bay of Fundy is part of the area relevant to the decision, but it is not part of the area in which the delimitation takes place. The coasts on the Bay of Fundy do not overlap any United States coast.

In the *Tunisia/Libya* case, Tunisia sought to exclude from the proportionality test an area which was directly in front of the only coastline on which it based its claim. In this case, Canada seeks to do the reverse – to include coastlines which have no bearing on its claim. The Bay of Fundy coasts face each other. They do not face the area where the delimitation takes place. In the former case, the Court was satisfied that a fair comparison of like with like would include all the

areas in front of Tunisia's coast as far north as Ras Kaboudia. In this case, a comparison of like with like could not include the coasts of the Bay of Fundy.

Let me make the point a different way. As we will discuss in a few minutes, both the Bay of Biscay and the North Sea boundary agreements produced proportionate results. Imagine, however, if we took away a large area of the Spanish land territory and created a bay about the size of the Bay of Fundy in the Spanish coast, right next to the land boundary between France and Spain. (225) This is shown in Figure 35 of your map book, which Mr. Colson also used in his presentation. Spain would then be 30 per cent smaller; it would resemble more of a peninsula. Would one say that the creation of the bay should cause the boundary to swing north, towards France? Should the now smaller Spain be entitled to more of the Bay of Biscay than the actual delimitation indicated Spain was entitled to? In our view, all other things being equal, reducing a State's land territory does not entitle that State to extend its boundaries further, to the disadvantage of its neighbour.

This brings us, Mr. President, to the issue whether it is appropriate to include coastlines facing the Atlantic area outside the Gulf of Maine, or to apply the proportionality test to a smaller area using only coasts facing the Gulf of Maine. The Chamber also needs to determine whether the coasts will be of equal length, or whether the extent of the coasts will be defined by other criteria.

In principle, the United States believes that the requirement to compare "like with like" can be satisfied by including in the test area both the primary coastal front of each Party facing the Atlantic Ocean and the short coastal fronts which face each other across the Gulf of Maine. It is useful to include part of Canada's Atlantic-facing coastal front in order to compare the treatment received by the comparable coastal front of the United States on the other side of the international boundary. On this basis, the United States sees no justification for including any part of the United States coastline southwest of Cape Cod as suggested by Canada.

Canada has relied primarily on economic criteria to justify inclusion of the southern Massachusetts, Rhode Island and New York coasts. If Canada has dropped the socio-economic theory of proportionality, these coasts become irrelevant. In our view, economic criteria are not consistent with the purpose of the proportionality test to measure the geographic relationship between the coasts and the areas appertaining to those coasts. The United States believes that either geographical criteria should be employed, or the Chamber should use equal lengths of coastal front beginning on each side of the international boundary terminus.

The United States has used geographical criteria to define the lateral limits – the change in direction of the United States coast at Nantucket Island, and the change in direction of the Canadian coast at the Chignecto Isthmus transposed to the Atlantic coastal front of Canada. The tests which the United States (40) (41) displayed at Figures 34 and 35 of its Memorial, and at Figures 24 and 25 of its Counter-Memorial, demonstrate that the United States line produces an equi- (110) (111) table result, while the equidistant line would produce a disproportionate result.

The United States has also applied the proportionality test to the boundary lines proposed by the Parties in 1976 using the coasts of the Gulf of Maine from Nantucket to Cape Sable. The disproportionate effect of the equidistant line within the area in front of those coasts is shown on the chart at Annex 99 to the United States Memorial. Conversely, the 1976 United States line produced a result consistent with the proportionality test. A detailed study of the effects of the two 1976 lines is set out in Annex 34 to the United States Reply.

Canada, on the other hand, has proposed that the Chamber utilize equal

lengths of coastline of each Party for application of the proportionality test. The United States can accept this approach, so long as the Chamber uses the coastal fronts originating at the international boundary terminus. The United States refers to Figure 34 of Mr. Hankey's presentation on 3 April. That Figure compares the treatment received by Nova Scotia's coastal front on the Gulf of Maine with an equal length of the adjacent coast of the United States. This approach has certain advantages. It focuses on the areas directly in dispute, as the Court did in the *Tunisia/Libya* case, and it avoids the issues between the Parties as to the extent of the other Atlantic coasts that should be included.

(230) In this connection, I would like to refer once again to a chart Mr. Colson showed earlier in his presentation, which is before you as Figure 36 of this presentation. As you see on Figure 36, the two coasts have an equal length of 100 nautical miles and are defined in the following manner: the United States coast from the international boundary terminus to the Penobscot Bay area, and the Canadian coast from the international boundary terminus to Cape Sable. Within the 100 nautical mile square box in the Gulf of Maine shown on this chart, the equidistant line leaves approximately 54 per cent of the area to Canada. In the whole area out to 200 nautical miles from the Canadian coast, the equidistant line leaves almost 90 per cent of the area to Canada. The ratio between Canada and the United States is 7.6:1. That means that the coast of Nova Scotia on the Gulf of Maine attracts almost eight times the area that is attributed to the Maine coast of equal length. In Professor Malintoppi's words, that result is "out of proportion".

For the Chamber's information, if this test is applied to the United States line, assuming that the United States line is extended along the course of its last southeasterly segment to the limit of the United States 200-nautical-mile zone, the area would be divided between the United States and Canada in a ratio of 1.6:1. This result is five or six times more equitable than the result produced by the Canadian line. The fairness of this United States line can be appreciated if the Chamber considers the fact that the Canadian coast facing the Atlantic Ocean attracts the entire area seaward of its coast. The United States coast facing the Atlantic Ocean will lose part of the area seaward of its extension, but it should attract as much of that area as possible.

Canada attempts to escape the implications of the proportionality test for this boundary delimitation by arguing that the proportionality test should be used in this case only to measure the extent of the area attracted to a particular feature, such as the Nova Scotia peninsula. Since Nova Scotia is a large feature, Canada reasons that Nova Scotia defines the coastal configuration and cannot, by definition, be a special circumstance with distorting effects. Canada purports to find support for a restricted application of the proportionality test in the Anglo-French Arbitration.

In the United States view, this argument confuses the issue. In the first place, the United States has never asserted that Nova Scotia itself is an incidental feature to be discounted in this delimitation. To the contrary, the United States believes that Nova Scotia's mass is fully reflected in its long coastline on the Atlantic Ocean from Cape Sable to Cape Canso. That coast attracts a huge area of maritime jurisdiction which Canada consistently ignores in this case. As we said earlier, in the United States view, the special circumstance in this case is the particular configuration of the coast in the Gulf of Maine area that places the terminus of the international boundary in the corner of a deep concavity in the coast far from the midpoint of the coast forming that concavity.

Mr. President, it seems odd that Canada accuses the United States of slighting Nova Scotia when Canada would virtually eliminate the State of Maine from

this delimitation. After all, Maine is substantially larger than Nova Scotia, but the Canadian line leaves the Maine coast no extension into the sea. In fact, Canada's position is more ambitious. Canada maintains that the coast of Maine should receive no extension into the ocean, whereas the coastal wing of Nova Scotia should receive a double portion, one in front of that coast, the other in front of the coast of Maine.

In any event, there is nothing in the decision in the Anglo-French Arbitration that suggests that the proportionality test cannot be applied to determine whether a concavity distorts a particular boundary line so as to produce a disproportionate delimitation. To the contrary, the decision of the Court of Arbitration specifically states in paragraph 100 that "*particular configurations of the coast or individual geographical features* may, under certain circumstances, distort the course of the boundary and thus affect the attribution of continental shelf to each State, which would otherwise be indicated by the general configuration of their coasts" (emphasis added).

(77) Before leaving this chart, we should say a word about Professor Malintoppi's discussion of the triangle as used in Figure 52 of Canada's Counter-Memorial. Canada tells the Court that the Parties agreed on the triangle to mark the seaward extent of the delimitation the Chamber is to make in this proceeding. The United States agrees with that statement, although we do not agree with Canada's assertion that the hypotenuse of the triangle represents that limit. We do not understand that argument. The parties agreed on three points, not just two, and, as Canada has stated in paragraph 12 of its Memorial: "The Court in its discretion may fix the seaward terminal point of the single maritime boundary at any point in the triangle defined in Article II of the Special Agreement."

(77) As for Canada's Figure 52 itself, the United States considers the lines that Canada uses to connect the triangle to the coasts of the Parties to be arbitrary and unreasonable. Those lines, in our view, severely distort the proportionality model in favour of Canada.

Before concluding this presentation, Mr. President, the United States believes it might be helpful to the Chamber to describe in some detail the way other States have used proportionality in the boundary delimitations in the North Sea and the Bay of Biscay.

(113) For your reference, we have placed before you Figure 30 from the United States Counter-Memorial which is Figure 37 of this presentation. It shows the agreed boundaries and the equidistant lines in the North Sea. These are the boundaries, these are the equidistant lines. Following the *North Sea Continental Shelf* cases, Denmark, the Federal Republic of Germany and the Netherlands entered into negotiations to determine their respective continental shelf boundaries on the basis of the Court's Judgment. The United States is not privy to the details of the negotiations leading to the agreements. But one thing is evident from an analysis of the final boundaries: the continental shelf areas attributed to the Federal Republic of Germany, to Denmark and to the Netherlands by those agreements better reflect the coastline ratios than would the equidistant lines.

The coastal front ratios presented by Germany and recognized by the Court were approximately 6 for Germany, 9 for Denmark, and 9 for the Netherlands. The equidistant lines proposed by Denmark and the Netherlands would have left continental shelf areas to each State in a different ratio, a ratio of 6 for Germany, 12.42 for Denmark, and 14.44 for the Netherlands (Germany: 7,425 sq. nautical miles or 25,468 sq. km.; Denmark: 15,365 sq. nautical miles or 52,701 sq. km.; Netherlands: 17,868 sq. nautical miles or 61,287 sq. km.). Clearly, that was a disproportionate result.

The final boundary between Germany and Denmark increased the continental

shelf area of the Federal Republic of Germany by 1,653 square nautical miles, that is 5,671 square kilometres, compared to a delimitation based on equidistant lines.

The final German boundary with the Netherlands increased the continental shelf area of the Federal Republic of Germany by 1,516 square nautical miles, 5,200 square kilometres, compared to a delimitation based on equidistant lines. Thus, the final boundaries resulted in a total gain for the Federal Republic of Germany of over 3,100 square nautical miles, or over 10,800 square kilometres.

The boundaries that were negotiated following the case thus resulted in continental shelf areas being left to the three States in the following ratio: Germany 6; Denmark 7.72; the Netherlands 9.26 (Germany: 10,594 sq. nautical miles or 36,337 sq. km.; Denmark: 13,712 sq. nautical miles or 47,032 sq. km.; the Netherlands: 16,352 sq. nautical miles or 56,087 sq. km.). While that ratio does not exactly match the ratio of coastal fronts, which was 6:9:9, it comes reasonably close.

Let us also consider the result of the Bay of Biscay delimitation. Annex 10 to the United States Counter-Memorial offers a detailed explanation of the proportionality calculations which we understand were an important ingredient
(143) in the negotiations leading to this agreement. Before you is Figure 1 from our Annex 10, which is Figure 38 of this presentation.

As we noted in that Annex, a line from point X on the simplified coastline of Spain to point R on the equidistant boundary line to Pointe de la Negade on the French coast encloses an area of approximately 9,657 square nautical miles. The equidistant boundary, based on equal lengths of coast allocates 5,303 square nautical miles of this area to Spain and 4,354 square nautical miles of this area to France. Thus, it appears that the Parties were prepared to accept a significant departure from strict proportionality in the area closer to the international boundary terminus where the distortion is less.

The boundary between point R and point T was not based on the equidistance method and it closely reflects the ratio of the relevant coastlines. This last segment of the boundary was based on the relative length of the simplified coastlines between point X and Cabo Ortegal on the Spanish side and between Pointe de la Negade and Pointe du Raz on the French side. The simplified Spanish coastline is 138.3 nautical miles (256.1 km.). The simplified French coastline is 213.2 nautical miles (394.8 km.). The ratio of these lengths is 1:1.54.

Point T divides the hypothetical closing line across the mouth of the Bay of Biscay between Cabo Ortegal and Pointe du Raz in almost precisely the same ratio. Point T is 114.9 nautical miles (212.8 km.) from Cabo Ortegal, and 173.6 nautical miles (321.5 km.) from Pointe du Raz. This is a ratio of 1:1.51.

The location of point T on the closing line is also such that the boundary from point R to point T divides the area seaward of a line from Pointe de la Negade to point R to point X, out to the closing line, in approximately the same proportion. The line allocates 13,561 square nautical miles to Spain and 22,109 square nautical miles to France. That is, Spain received 46,514 square kilometres, whereas 75,834 square kilometres were attributed to France. This is a ratio of 1:1.63. Thus, while the boundary inshore allocated Spain more than it would have received under a strict proportionality analysis, the boundary as a whole ensured a distribution of areas proportionate to the length of the Parties' coasts. Moreover, the boundary met the closing line at a point that is strictly proportional in relation to the length of the coastal fronts of the Parties in the outer sector.

Finally, Mr. President, I need only remind the Chamber of the proportionality test utilized by the Court in paragraphs 130 and 131 of its Judgment in the

Tunisia/Libya case. There the Court was satisfied that its line, which resulted in an area ratio of 40:60, met the test in a situation where the simplified coastline ratio was 34:66 and the actual coastline ratio was 31:69. In considering this analysis, the simplified coastline is taken to be more significant, because it reduces the coasts to their truer proportions, which, of course, was the criterion specified by the Court in 1969.

We would like to make one point about these ratios in connection with a discussion contained in footnote 66 at page 162 of Canada's Reply (V). Canada there construes its own test to meet what it calls the "parameters" accepted by the Court. Canada's test, of course, only comes close to meeting those parameters because Canada includes the coastlines on the Bay of Fundy in its calculations. Beyond that, however, it must be pointed out that the test area was relatively small in the *Tunisia/Libya* case – about 17,000 square nautical miles. In our case, to use the number at Canada's footnote 66, the test area is considerably larger – 66,000 square nautical miles. The degree of disproportion in a small area will be far less significant than the same degree of disproportion in a larger area. An analogy can be made to the fact that the distortion in an equidistant line that is caused by an irregularity in the coast may be tolerable in the smaller area close to the shore, but intolerable in a larger area where the boundary is extended a long distance from the shore. Thus, in the United States view, a smaller percentage of disproportion should be tolerated where the delimitation involves a large area, as in this case.

Mr. President, distinguished Judges, I want to thank you for the patience with which you have listened to this presentation. Some of it has been technical. That is the nature of the material. But the United States is more interested in fairness than in technicalities.

Canada contends that the equity of this delimitation should be judged by the division of Georges Bank. The United States respectfully submits that the test of this delimitation should be the same test the Court has always used to test the fairness of a maritime boundary line. That is, the proportionality test. An equitable solution under law is one that gives each coast the entitlement it deserves by virtue of its relationship to the area to be delimited. A result that is out of proportion to the relevant coasts of the Parties is neither equitable nor consistent with law.

The Chamber rose at 12.57 p.m.

FOURTEENTH PUBLIC SITTING (16 IV 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

ARGUMENT OF MR. LANCASTER

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES

Mr. LANCASTER: Mr. President, distinguished Judges. This morning I have the privilege of discussing the topic of fishing activities.

I will be assisted by Attorney-Adviser, Ray A. Meyer, and Special-Adviser, Dr. Jonathan T. Olsson. I would like also to express my appreciation to Lt. Brian P. Flanagan, United States Coast Guard, for his very valuable assistance.

This presentation will include both the legal and the factual aspects of those fishing activities of the United States and Canada on Georges Bank which are relevant to this delimitation. The basic facts regarding the Parties' respective records of fishing activities on Georges Bank are, in major part, uncontroverted.

This presentation will, therefore, deal with those issues regarding fishing activities which remain outstanding between the Parties.

It will show that the United States has dominated the Georges Bank fishery from the period when it was the sole country exploiting the Bank to date. It will show that the United States developed every single contemporary fishery on the Bank, including the scallop fishery. It will show that at the present the United States predominates in the fishery of the disputed area of Georges Bank.

The presentation will be divided into four parts.

Part I will address the legal relevance of the fishing activity by the United States and Canada in the context of the Chamber's consideration of all circumstances relevant to the delimitation. This part of the discussion will demonstrate that, as a matter of law, the record of fishing activities must be viewed in its entirety with no period excluded.

Part II will discuss how Canada has attempted to confuse the historical record, in order to diminish the significance of the United States' lengthy history of fishing activity on Georges Bank and particularly the historical and current United States fishery on the northeast portion of the Bank.

Part III will suggest a methodology that this Chamber might employ in its consideration of the respective records of the fishing activities of the Parties and the weight that each record should be accorded as a circumstance relevant to the delimitation.

Part IV, the final part, will demonstrate that, when the methodology discussed in Part III is applied to the basic uncontroverted evidence of fishing activities by the Parties on Georges Bank, a distinct preponderance in favour of the United States will be shown.

Mr. President, I will now discuss each of these parts in greater detail.

The first part, Part I, will show that the entire record of fishing activity by the United States and Canada is a relevant circumstance to this delimitation.

At the outset, I must recall to your minds the words spoken on 2 and 3 April – only a few days ago – by the distinguished Agent of Canada, Mr. Legault. He said, in this regard, that he would "address only the United States argument that established patterns of fishing are legally irrelevant despite their being at the very

heart of the dispute" (p. 24, *supra*). And again he said that "for the United States, fishing activities can only be relevant if they are purely historical" (p. 45, *supra*). That, simply stated, is not now – and never has been – the position of the United States. And you will search in vain for a statement in the pleadings of the United States that says that. To the contrary, the United States specifically listed the Canadian Georges Bank fishery as one of the activities of the Parties which the Chamber should consider in weighing up relevant circumstances (**II**, United States Memorial, para. 298; (**IV**, Counter-Memorial, paras. 58 and 320-325; **V**, Reply, para. 231). It is with regret that we correct the record in this respect, Mr. President.

Regret because we must note that this is not the only instance in which Canada has been driven to excess. We are grateful to Professor Weil for recalling for us Talleyrand's memorable phrase: "Ce qui est excessif devient insignifiant" (p. 188, *supra*), and with apologies to Professor Weil for my New England pronunciation. These excesses will cause more than one digression. Let me apologize now for all of them. As for this one, it is enough to say that we simply point out the inaccuracy and say, again, it has never been the position of the United States that "established patterns of fishing activity are legally irrelevant".

In the view of the United States, the Chamber should consider the entire record of the fishing activities of both Parties on Georges Bank and give no exclusive significance to one selected portion or another.

Canada's view on this matter is to the contrary. Canada asks this Chamber to relegate the long and unbroken record of United States fishing activity on Georges Bank, dating from the early 19th century, to some minor ancillary role: a mirror, if you will, in which historical activities, like some pale reflection of current conditions, may be given only secondary status.

Canada asks that you arbitrarily focus your attention on a relatively recent period of short duration which Canada believes favourable to it – the period 1969-1978. Canada has named this period the "contemporary" fishery. That is, of course, a misnomer.

It implies that the period Canada has selected is the most recent period in the history of the fishery, and this obviously is not the case. To be truly "contemporary", the period would at least have to include the years through 1981.

What the Canadian "contemporary" fishery really amounts to is an attempt to divert attention away from the more than a century-long period during which the United States developed all of the fisheries of Georges Bank while Canada had little or no interest in those fisheries. The hard factual evidence is uncontroverted. Only since the 1950s has Canada fished on Georges Bank. Despite this, Canada has urged you to ignore the entire pre-1950 period. The artificial legal distinction which Canada employs – and asks you to employ – in comparing the record of fishing activities of the Parties on Georges Bank is ill-founded. Reference to other maritime boundary delimitations demonstrates that, as a matter of law, such a distinction would be inappropriate in this proceeding.

For example, in the *Grisbadarna* case, the Arbitral Tribunal was asked to delimit certain marine areas adjacent to the coasts of Sweden and Norway. In determining the final boundary, the Tribunal relied on the fishing activities of the Parties. It modified the boundary-line in favour of Sweden because Sweden's fishermen had fished the area "a much longer time, to a much larger extent and by a much larger number of fishermen" than had the Norwegians (*Grisbadarna*, p. 130).

In *Grisbadarna*, it was the great preponderance of the fishery facts in Sweden's favour, drawn from the records of total fish activity, which prompted the

Tribunal to adjust the perpendicular line in favour of Sweden. The United States respectfully suggests that here, similarly, it is the great preponderance of the fishery facts which should prompt the Chamber to draw the line in its favour.

Again, in the *Fisheries* case, the International Court of Justice considered total fishing activities as a relevant circumstance in a case involving maritime jurisdiction. Norway's use of straight baselines caused fishing banks that had formerly been considered high seas to be included in Norway's territorial sea. Norwegian fishermen had fished those banks for centuries. By contrast, fishermen from the United Kingdom had re-established a fishery on those grounds only a short 40 years prior to the delimitation (*I.C.J. Reports 1951*, p. 124).

The Court relied in part upon a comparison of the Parties' fishing activities. The Court noted the long duration of the Norwegian fisheries and the short-term nature of the English fisheries (*ibid.*, p. 124). The records were considered in their entirety and when they were compared, the long historical usage by Norwegian fishermen prevailed over the short-term English fishery. The United States respectfully suggests that the same result should follow here.

In addition to its attempt to cut off the United States record of fishing activity, Canada also seeks to convince you that its so-called contemporary fishery provides a more accurate depiction of established patterns of use. Canada argues that the boundary line determined by the Chamber will affect only present and future generations of fishermen.

As we shall shortly see, the true contemporary fishery on Georges Bank is different from the Canadian contemporary fishery. Today, New England fishermen, including fishermen from my home state of Maine, fish Georges Bank. They follow the same stocks, on the same Georges Bank fishing grounds, that their predecessors fished many generations ago, and the United States predominates in the current Georges Bank fishery. Even so, it would be as incorrect for the United States to suggest to you that you should use the most recent figures to the exclusion of all others as it is for Canada to make a similar plea for the use of its contemporary fishery.

Fishing activities are but one of a number of relevant circumstances which must be balanced in the application of equitable principles. But, from their sole perspective, to what do you look to accomplish that task? In the United States view, the fair answer is simple. You look at all the evidence of fishing activity by both Parties, and consider it along with all other relevant circumstances.

In fact, each of the Parties has, over time, engaged in some fishing activities on Georges Bank. Unlike Canada, the United States is not afraid to have this Chamber look at all the fishing activities of both Parties. If you are to be guided by the fundamental rule, you must consider each Party's record of fishing activity in its entirety, to determine properly the extent of each Party's equity, if any, in the disputed area. Only by this method will you be able fairly to compare the fishing interests of the United States and Canada and to accord each its proper weight in this delimitation.

Since this summary analysis seems so obviously correct, one well might ask why Canada suggests otherwise. The answer is equally obvious. From 1969 through 1978 Canada caught more fish on Georges Bank than in any comparable earlier period. In addition, during this period, United States catches were relatively low, because of the depredations of the foreign fleets and heavy regulations on the United States catch imposed by ICNAF to protect the fish.

That ten-year fishery is not representative of the present fishing activities of the Parties under their respective 200-nautical-mile régimes, and it bears no similarity whatsoever to the traditional fishing activity of the Parties.

When placed in the perspective of the long history of United States fishing activity on Georges Bank, the Canadian fishery itself becomes, to use Canada's phrase, a distortion resulting from short-term fluctuations (Canadian Memorial, para. 122). It does not recommend that you exclude this ten-year period. It suggests only that you consider it in perspective.

By the same token, it would be wrong to exclude the fisheries of the last five years, as Canada suggests, because the fishing in those years is the only fishing that reflects conditions under the new régime of 200-nautical-mile zones. The period after 1 March 1977 is a far better indication of things to come than the period before that date, because the extension of coastal State jurisdiction has serious implications for the structure of the fishing industry in both countries. American fishermen can no longer pursue the historic fisheries on Browns Bank and the Scotian Shelf and the Canadian scallop boats can no longer come down to the waters off Cape Cod and below, as they did in the late 1960s and 1970s.

But what has Canada done with this truly contemporary fishery – the fishing activities of the Parties from 1979 to date? A discussion of that fishery is conspicuous by its absence in Canada's Pleadings and Canada's oral presentations. Why? Not because, as Canada suggests, it is driven by unregulated overfishing, but because it is very damaging to Canada's case since it shows a substantial current United States fishery on Georges Bank and in the disputed area. In its oral presentation, Canada suggested that recent increased United States fishing on Georges Bank occurred because it was unregulated (p. 96, *supra*). That is simply not the case. Rather, the increase has occurred first because since 1977 United States jurisdiction has been extended to 200 nautical miles and, second, because United States fishing efforts were consolidated on Georges Bank when United States fishermen were expelled from fishing waters off Canadian shores, including Nova Scotia, on 1 June 1978. United States recent catch levels on Georges Bank have grown significantly precisely for these two reasons.

Nevertheless, Canada carves out its ten-year span and christens it "contemporary". Canada is not satisfied, however, with its creation out of whole cloth of an unrepresentative "contemporary" fishery and a total disregard of historical fact. Canada also asks you for a line which would give it more than its own so-called "contemporary" fishery. More than that line would entitle it to were its own "contemporary" fishery the sole criterion.

Today both United States and Canadian scallop and groundfish fishermen fish the disputed area and, as will be shown later in this presentation, the United States takes the overwhelming share. Thus, Canada's claim would neatly exclude United States fishermen from their contemporary fisheries, giving Canada a much larger Canadian fishery right than exists today. Should you adopt the Canadian line, Canada would suddenly be the beneficiary of an area which would encompass both the "contemporary" scallop fishery of the United States and Canada on the northeast portion of the Bank and a large groundfish fishery on the famous Winter Fishing Grounds of Georges Bank which it has never before had exclusively in its control.

Canada has, of course, not mentioned this. Nor has it mentioned the fact that the Canadian line would give Canada a monopoly on a portion of Georges Bank where many of the major groundfish species go to spawn. Canada simply says "The fish will be caught, or not, irrespective of what Party gets this or that area of Georges Bank" (p. 90, *supra*). This ignores the biological realities. The Canadian line would cast a long shadow over the cod, haddock and yellowtail flounder fisheries of the entire Bank. 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. Does Canada really believe that this result would reduce the potential for disputes?

Canada has framed its plea in terms of United States monopolization, claiming that any line other than the one it suggests would totally destroy an established Canadian fishery and not at all affect the United States fishery. Of course the line that the Chamber draws will affect the existing Canadian fishery. The United States has never suggested otherwise. But what of the existing United States fishery on the substantial part of Georges Bank which Canada seeks to claim totally for itself, which Canada, in fact, seeks to monopolize? What of that very substantial United States fishery which includes:

First, the groundfish fishery which was created and developed solely by the United States from the early 19th century to date on the northeast portion of Georges Bank.

Second, the scallop fishery created in the 1930s on Georges Bank solely by the United States and carried out consistently since then, including a United States scallop fishery on the northeast portion which today is as strong as ever.

Third, the offshore lobster fishery created and developed by the United States on the eastern portion of Georges Bank.

What will happen to that United States fishery if Canada has its way? It will be gone for ever. I quote our worthy adversary, Mr. Binnie, quoting from *Grisbadarna*:

> "It is equally well established that a boundary delimitation should refrain as far as possible from modifying a state of things (such as an offshore fishery) 'which actually exists and has existed for a long time'; particularly where extensive private interests are in question." (P. 88, *supra*.)

What Mr. Binnie neglected to say is that one or the other of the Parties will be permanently barred from fishing on the northeast portion of Georges Bank wherever this Chamber draws the line. The party remaining will have a monopoly in that area. The Canadian monopoly will, according to the Special Agreement, extend north and east of the line and the United States monopoly south and west.

But let us not for a moment, Mr. President, distinguished Judges, forget that there is another side to the delimitation coin. On the one side the United States fishery, on the other side the Canadian fishery. The difference is that the United States side is backed by substantial historical reserves. The Canadian side has, using Professor Bowett's felicitous phrase, only an historical reserve of "more than 20 years' duration" (p. 139, *supra*). Canada's coin is not counterfeit but it is substantially undervalued.

Thus it is that we see quite clearly why Canada is so desperately insistent upon its "contemporary" fishery to the total exclusion of both the historical and the current United States fishery. Now both Parties agree that fishing activities on Georges Bank are legally relevant circumstances. The dispute centres on which fisheries. The United States suggests that all fishing activity should be considered with all other relevant circumstances, with the Chamber ultimately to decide what weight each should be given. Canada insists on tunnel vision and without that myopic Canadian focus, the equities preponderate in favour of the United States.

Mr. President, I come now to Part II where I will discuss the facts of the total fishery on Georges Bank, historical and current, including the fishery on the northeast portion and why Canada's contentions are unsupported.

The fishing activities on Georges Bank may be likened to a moving picture

which begins with the first American boat on Georges Bank in the 19th century and which still, even to this date, is playing on the screen of the Gulf of Maine area. Canada suggests that you turn off the projector, and focus on a single frame – 1969 to 1978 – and ignore the rest of the film both past and present. Good common sense tells us how flawed is the Canadian approach and how fair is the United States suggestion that you view the film from start to the present. We need only look, ever so briefly, at both the historical and the complete contemporary evidence to realize the great injustice that would be done were you to follow Canada's lead and consider what is but one brief moment in a vast stretch of fishery history.

Canada has not disputed that New England fishermen, including fishermen from Maine, discovered and then developed all of the major commercial fisheries on Georges Bank. This includes the development of the groundfish fisheries during the mid-19th century and, more recently, the scallop and offshore lobster fisheries. Canada has also not taken issue with the size of the United States Georges Bank fishery during the 19th and early 20th centuries. Even then, New England fishing vessels numbered in the hundreds and conducted a year round fishery for cod and haddock exclusively on Georges Bank. In addition, the location of activities of the New England-Georges Bank fleet was in large part on the northeast portion of the Bank.

While Canada does not dispute the United States historical fisheries facts, a brief rehearsal of those facts is necessary to put the current United States fishery in focus.

United States fishermen exploited the fresh halibut fishery on Georges Bank between 1828 and 1848 and this fishery supplied nearly all the halibut landed by New England vessels during this period and was conducted in the deeper water on the northeast portion of the Bank. Most of the fishing vessels engaged in this fishing activity came from Gloucester, Massachusetts, and Maine, although some came from as far south as New London, Connecticut (United States Reply, Ann. 28, para. 5).

In 1849 and 1850, the majority of those fishing on the Bank began to fish for cod to supply the expanding fresh fish market and shortly thereafter the United States fishermen expanded the fishery to include fresh haddock which consumers preferred over cod (*ibid.*, Ann. 28, para. 7). During the winter and the spring, the fresh groundfish fishery was conducted on the winter fishing ground, located on the northeastern part of Georges Bank (United States Counter-Memorial, paras. 77-81). The groundfish fishery on the northeastern portion of the Bank has been the mainstay of the New England fishing industry for over 150 years.

(100) Figure 39 is a reproduction of Figure 11 from the United States Counter-Memorial. It is a map from George Brown Goode's *The Fisheries and Fishing Industries of the United States* published in 1887. Please notice the location of the Winter Cod Ground, which Goode described as the "favorite fishing ground" of New England fishermen – the Winter Cod Ground. I shall return to this topic shortly.

During other parts of the year the groundfish fishery was more dispersed, covering all of Georges Bank. Many United States vessels fished on the eastern portion of Georges Bank during the summer as well as the winter. Goode, for example, notes that many vessels fished in midsummer in 25 to 40 fathoms east of the main Georges shoal, which is shown on the map at this location, Mr. President. They fished east of the main Georges shoal (Goode, G. B., *The Fisheries and Fishing Industries of the United States*, Vol. I, pp. 2, 37, 38 and 234, deposited by the United States in accordance with Art. 50 (2) of the Rules of Court), and that pattern remains today.

Together with the expansion of the fresh groundfish fishery beginning in the 1850s, a separate United States fishing fleet on Georges Bank evolved. By 1879, the United States fishing fleet was called the Georges Bank fishing fleet. It was based primarily in Gloucester, Massachusetts; it was distinct with respect to its activity and size from the United States fleet that fished the more northerly banks (United States Reply, Ann. 28, para. 8). The Georges Fleet, as it was called, restricted its activities to Georges Bank and the vicinity, and over the last half of the 19th century and the early 20th century this United States "Georges Fleet" grew to form the foundation for the present United States Georges Bank groundfish fleet.

The consolidation of United States fishing effort on Georges Bank continued over the first few decades of the 20th century. The steam-powered trawler and United States improvements in processing and overland transportation brought about a major increase in the Georges Bank catch by United States fishermen during the early 20th century. Although haddock was most sought during this period, other species found on Georges Bank including cod, hake, mackerel and pollock, continued to be of commercial importance. As the Canadian historian Ruth Grant wrote in 1934:

> "Georges Bank was the most important [United States] fishing area, furnishing 42 per cent of the fish landed by vessels over five tons." (United States Reply, Ann. 28, para. 10.)

Now perhaps because these facts are beyond dispute and perhaps because they so clearly and conclusively establish a longstanding traditional United States fishery on Georges Bank, Canada has chosen to respond by suggesting that history is of virtually no significance and that you must use only carefully selected events from a more recent period.

That sort of approach, totally ignoring the substantial fishing history of one of the Parties, would do more than simply skew the result in this one case. It would destroy the equitable base upon which courts have relied for fair resolution of boundary disputes since time immemorial. There is neither precedent nor justification in a delimitation case for arbitrarily discarding an established, historical, traditional fishery.

(97) Mr. President, Figure 40 (a reproduction of Fig. 8 of the United States Counter-Memorial) depicts catch levels of the United States and Canada on the fishing grounds off the east coast of North America from 1893 to 1950. The United States catch is shown in blue, Canada is green. These catch levels are based solely upon information supplied by the Parties to ICNAF. They are segregated into ICNAF's different reporting areas. Subarea 3, off Newfoundland, almost exclusively Canadian; Subarea 4, off Nova Scotia, predominantly Canadian; Subarea 5, off New England (and including Georges Bank) all United States.

There can be no question of the accuracy of these figures since they were co-operatively furnished to an international organization for purposes dissociated from this case. Canada now suggests, however, that those statistics are inaccurate because its statistics on catches in Subarea 5 were incomplete.

Mr. President, there is a substantial negative inference to be drawn from the fact that Canada had good statistics for Subarea 3 and Subarea 4 but none for Subarea 5. The inference: Canadian activities on Georges Bank were of such little significance that their catches went unrecorded. This point could be made in much greater detail. It is unnecessary. The issue is the total fishery, the total fish activity of each Party on Georges Bank. The written non-record of Canada's fishery speaks for itself. The United States is content to lay its record before the Chamber and compare it with whatever record Canada can dredge up.

(97) Figure 40 clearly demonstrates the extensive and substantial United States fishery and that substantial fishing activity by Canada on Georges Bank did not exist before the 1960s.

In 1941 Edward A. Ackerman of Harvard University wrote a comprehensive text on the New England fisheries. And that text contained maps showing the location of catches by United States fishermen of the important commercial (101) species. Two of Mr. Ackerman's maps are reproduced as Figure 41 (Fig. 12 of the United States Counter-Memorial). These maps show generally the scope of United States groundfishing activity. They also show clearly the concentration of United States fishing activity for the two principal commercial stocks, cod and haddock, on the northeastern portion of Georges Bank in 1936. I respectfully suggest that any objective observer, reviewing this equally objective history data, would be compelled to one conclusion: as of 1936, the date of those maps, the United States had a very substantial groundfish fishery on northeast Georges Bank. We will come to the current United States fishery on the northeast portion of Georges Bank shortly.

We first see a recorded appearance of Canadian fishery on Georges Bank in (98) the 1950s. This is Figure 42 (reproduced from Fig. 9 of the United States Counter-Memorial). This Figure shows the United States and Canadian landings (other than scallops) from Georges Bank from 1904 to 1981. Again, this is developed from ICNAF data supplied by the Parties. Now whatever else Canada may say about its poor record-keeping in early years, Canada surely cannot complain about the quality of its own statistics for the period on which it has chosen to rely. Here, the statistics are shown graphically for a much larger period, but including the ten years Canada singles out. This Figure leaves little to the imagination. It shows overwhelmingly the preponderance of the fishing evidence in favour of the United States in the groundfish fishery. It is, of course, subject to the criticism, which I shall anticipate, that it displays the comparative catch from all of Georges Bank. We shall come, shortly, as I promised, to the current catch of the disputed area. Let me, however, before we leave this Figure, simply note that it also includes rather remarkable differences for the most recent period.

In fairness, Mr. President, the Chamber should include in its consideration the development of the Canadian groundfish fishery on Georges Bank in the 1960s and the 1970s. But the Chamber should also note that Canada has never seriously challenged the dominance of the United States in the Georges Bank groundfish fishery in that period or any other.

Let us now turn to the scallop fishery.

(99) You now have before you Figure 43 (reproduced from Fig. 10 of the United States Counter-Memorial), again developed from ICNAF data. As the Chamber can see from this Figure, again, Canada's scallop fishing on Georges Bank did not begin until the early 1950s. That fishing gradually expanded to a point in the mid-1960s when, after the United States scallopers moved their operations south to the mid-Atlantic scallop beds, Canada was able to surpass the United States in landings of this high value resource for a short period between 1966 and 1979. And this, of course, is why Canada seeks to persuade you to rely solely upon the 1969-1978 period. What Canada has ignored, however, is that since 1978 United States scallop fishing on Georges Bank has increased. We will look at current scallop landings in a moment. For the present, it is sufficient to note that in the 1930s the Georges Bank scallop fishery was created by United States fishermen and that Canada did not begin its scallop fishery on Georges Bank until the 1950s.

Mr. President, distinguished Judges, now let us look at the current fishery on Georges Bank.

The United States invites the Chamber's attention to Figure 44 which has been compiled from data supplied by the United States Coast Guard.

This bar graph depicts the relative numbers of United States and Canadian fishing vessels sighted by the United States Coast Guard on the eastern part of Georges Bank during 1981.

As the United States noted in its Memorial, among the many maritime support activities conducted by the United States on Georges Bank is a fisheries enforcement programme by the United States Coast Guard which employs both surface vessel patrols and aircraft surveillance flights (paras. 104-132). The Coast Guard also maintains a very active vessel sighting programme.

As the Coast Guard cutters, and aircraft, patrol active fishing areas of Georges Bank, they record and tabulate the name, nationality, position, and activity of all fishing vessels that they see.

The comparison in Figure 44 is the percentage of individual United States and Canadian fishing vessels sighted during each month of 1981. Now some vessels may have been sighted several times each month. They have been counted only once (United States Coast Guard Sighting Data, deposited by the United States in accordance with Art. 56 of the Rules of Court).

The illustration does not purport to account for every United States and Canadian vessel that may have visited the Bank during each month. It does provide, however, easily comprehensible evidence of the current presence of United States fishing vessels in the area claimed by Canada.

As you can see from the illustration, a higher percentage of individual United States vessels (the United States vessels are shown in the red colour, the Canadian vessels in the blue) were sighted fishing in the disputed area in every month but one – November. We respectfully suggest that this confirms conclusions that are drawn from other evidence submitted by the United States, that United States vessels still frequent the area under dispute.

The illustration which you have just seen was taken from a computer printout. It includes all United States and Canadian vessels sighted on the eastern part of Georges Bank during 1981.

Figure 44A, Mr. President, which for your purposes also has a small reproduction of Figure 44 in the lower right-hand corner, shows the limits of the geographic area from which the data shown on Figure 44 were obtained. The area is bounded by 67° 45′ W, 65° 40′ W, 42° 20′ N, which, incidentally, follows the ICNAF line through the Northeast Channel in part, and 40° N. As you can see, it generally approximates the area claimed by Canada.

Incidentally, even though the result is not shown on these charts, the sighting record confirms that Maine vessels fish in the disputed area. Many of the vessels on the list in Annex 25 to the United States Counter-Memorial appear in the Figures which have been submitted to support this Memorial.

Canada may suggest that our coast guard summary is too narrow, too restrictive – too something. Let us look at other data.

(201) Figure 45 depicts the areas on Georges Bank where United States fishermen currently harvest their catches of haddock, cod and yellowtail flounder. It shows the United States catches for 1981. This is the Georges Bank area. The darker the red, the higher the percentage of the catch. As you will observe, while United States fishermen currently catch groundfish throughout Georges Bank, they continue to concentrate their activities on the northeast portion of the Bank as did their predecessors for 150 years before them. Thus northeast Georges Bank continues to be among the most important current United States fishing areas despite the fact that since the early 1970s the most important cod and haddock grounds have been closed to fishing during the months of March, April and May

of each year, when those stocks aggregate to spawn on the northeastern part of Georges Bank.

Today, the winter groundfish fishery on the northeastern portion of Georges Bank remains one of the mainstays of the New England fishing industry. It is still well marked on the charts, including the United States chart upon which this Chamber will draw the boundary pursuant to Article II of the Special Agreement (I, p. 10). It is this winter ground that would be one of Canada's windfalls should Canada's line prevail.

Canada has not denied that its quite recently established fishery on the northeast portion of Georges Bank has been largely limited to scallops, and that Canadian fishermen never challenged the overwhelming dominance of United States groundfishermen. In fact, Canada referred to scallops as the "major Canadian crop" (p. 97, *supra*). It is more: it is the single reason why Canada went to the northeast portion of Georges Bank. In the short run, a single high-value stock such as scallops can substantially distort fishery statistics, however it is measured. Such single species dependence, however, is subject to massive sudden dislocation, due to forces of nature, changing markets, competition, etc., and such a change is now in process on northeast Georges Bank.

With the extension of United States jurisdiction to 200 miles and the accompanying general revitalization of the United States fishing industry, United States scallop fishermen once again are regaining their traditional dominance of this fishery.

(202) Depicted on Figure 46 are United States scallop landings on Georges Bank for the year 1981 and the yearly average for the years 1957-1962. Again, the darker the area, the greater the share of the harvest for the area. It is clear from these illustrations that the northeast portion of Georges Bank was, prior to the arrival of the Canadian fleet, and continues to be now, the mainstay of the United States scallop fishing fleet.

United States scallop catches on Georges Bank for 1981 surpassed Canadian catches.

Nor do the current fishing activities of Canadian scallop fishermen serve to demonstrate the enduring character of the Canadian fishery. 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. As in the past, much of the United States scallop catch on Georges Bank is now concentrated in the northeastern part of the Bank.

How then, Mr. President, can the distinguished representative of Canada, Mr. Binnie, say, as he did on 4 April, that "The United States line is designed to destroy the established fishing activities of one of the Parties", while "The Canadian line permits the continuation with a minimum of disruption" – with a "*minimum*" *of disruption* – "*of the established fishing activities of the Parties*" (p. 90, *supra*). I suggest that our esteemed friends tell the fishermen from Maine and all the New England area that the proposed Canadian destruction of their fishery on the northeast portion of Georges Bank is a "minimum of disruption", and see what is their response.

Let us now compare the total catch and the scallop catch on Georges Bank by

reference to tables 1 and 2 of Appendix E to Annex 4 of the United States Counter-Memorial, which are shown in Figure 47.

Table 1 shows a comparison of the total reported Georges Bank catch by weight from 1940 to 1981.

Canada's share of the total Georges Bank catch by weight since the early 1960s has fluctuated between 10 and 34 per cent, with the average being in the low 20s.

Table 2 shows that the scallop fishery follows a quite different pattern. I call your attention to the Canadian percentage of the Georges Bank scallop catch during the years 1969-1978. It is clear from these statistics that although the United States dominated the other fisheries of the Bank during the period Canada has labelled "contemporary", Canada surpassed the United States in the scallop fishery.

The equation becomes somewhat confused when the landings by weight are translated to landings by value. Scallops are, of course, a relatively high value species. In fact, 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 (I, Canadian Memorial, Anns., Vol. IV, pp. 75-86).

It is therefore extremely difficult to compare the statistics for finfish catches with statistics for scallop catches for the purpose of analysis. If value is used, the scallop fishery, although small in total size, has a great deal of influence in total comparison. When weight is used, however, the economic significance of the scallop fishery is understated.

The weight of the catch does, however, provide a better indication of the amount of food protein that is harvested in the fishery. This, in fact, is why the United States considers meat weight to be an indicative measurement of the scallop fishery. The United States is not, however, alone in its use of meat weight as a measure.

This requires, Mr. President, one more regrettable but necessary digression. After criticizing the United States for using the catch for all of Subarea 5 in its statistics, Canada took the United States to task for using meat weight (139) for scallops, particularly in Figure 1 of Annex 4 to the United States Counter-Memorial. I quote now from the record of the Canadian oral presentation of 3 April:

> "The Canadian chart consistently uses 'round weight' for all species, because that is the form in which the catch is taken from the sea. The United States has adopted an inconsistent approach using 'round weight' for all species except scallops, which is the major Canadian crop. The United States includes scallops in a semi-processed form called meat weight. In my submission, mixing non-processed weights and semi-processed weights in this way is misleading because, as the Chamber will readily appreciate, the processing operation not only subtracts weight but also adds value, and value is not reflected anywhere in the United States presentation." (P. 97, *supra.*)

This is indeed a serious charge, but a fragile construct. It is worse, it is, in words which my Maine fishermen friends would understand and use, a red herring.

In its Memorial, Canada said:

> "[w]hen scallops are measured in terms of meat weight without their shells (as they are in the statistical system currently in use), Canada took over one-third by weight of the average coastal State harvest of all species from

> Georges Bank during the 1969-1978 period. If, on the other hand, scallops are measured like all other species of fish in terms of 'round weight' – i.e., in the form in which they are taken from the sea – the Canadian share of the coastal State fishery on the Bank during this period amounts to over 60 per cent of the total by weight" (para. 133).

That was Canada speaking, Mr. President. We should also note that in Volume IV of the Annexes to the Canadian Memorial, Canada presented catch data for itself and the United States for Canada's "contemporary" fishery period, and – yes – reported the scallop catches in meat weight.

So it was Canada which recognized that meat weight is the proper measure in (170) the current statistical system, but which switched to round weight in Figure 25 of its Reply because it made the Canadian catch figures look better. And it was also Canada which used figures for the entire Bank, not just the disputed area, while criticizing the United States for using figures from an area larger than the (139) disputed area. We submit that the chart originally prepared as Figure 1 in Annex 4 of the United States Counter-Memorial is correct. It is Figure 25 to the (170) Canadian Reply which requires correction. There is an obviously good reason for the statistical use of meat weight. 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: and it is particularly striking that Canada has to rely on such a distortion even in the very period it urges this Chamber to use as a sole yardstick.

All of these charts, diagrams and figures unequivocally demonstrate that the United States fishermen have compiled a long and distinguished record of fishing activity on Georges Bank – including the northeast portion of the Bank. They further demonstrate that Canada's fishery is of comparatively recent origin and that the years of the Canadian "contemporary" fishery, upon which Canada relies so heavily, are but a short aberration in the long history of the Georges Bank fishery. And, once again, Mr. President, let me call your attention to the fact that in 1981 the United States scallop catch exceeded that of Canada.

Let me conclude this part of the presentation, Mr. President, by simple summary. Canada does not disagree with the extent or dominance of the United States historical fishery on Georges Bank.

It has, however, asked you to ignore it and to concentrate instead on its own devised "contemporary" fishery. It has suggested that any line but its own will destroy that "contemporary" fishery but somehow not affect the substantial United States fishery in the disputed area or, at worst, disrupt it minimally. But what Canada has neglected to mention, and what we have tried to make clear, is that the United States historic fishery continues to the present on the northeast portion of Georges Bank.

Today's current fishery is but tomorrow's historical fishery and all fishing activity on Georges Bank deserves your thoughtful consideration.

Let us now turn to Part III and a suggested frame of reference in which the Chamber may consider the Canadian and United States records of fishing activity.

You now have before you two separate records of fishing activity, one from the United States, one from Canada. Both Parties agree that some or all of these fishing activities are a relevant circumstance to this delimitation. Your task, we suggest, is, first, to assess the pertinent facts of each Party's record, and, second, to compare those records to determine how much weight should be accorded to each in your final balancing of all the relevant circumstances.

In the view of the United States, this task need not be difficult. If the Chamber

selects an appropriate frame of reference, within which to consider the Parties' fishing activities, the results should follow almost as a matter of course.

Neither the United States nor Canada is claiming a prescriptive historic title to the Georges Bank in this area. If they were, the mere presence of fishermen from each State might weigh heavily in the Chamber's assessment of that record. This is not the case, however, and the Chamber must look beyond mere presence to distinguish and weigh respective records of fishing activity. The Chamber must look beyond simple catch statistics in its comparison of the records.

In point of fact, the Chamber must search for a method of assessing the records which will allow it to take account of the entirety of each record in its final determination of a boundary "in accordance with equitable principles" that take into account "all relevant circumstances".

Now, a simple method to do this is simply to step back from the myriad facts that each Party has submitted, and to look more at recurring themes in each Party's record of activity. Viewing the record in this manner will cause the similarities in the records to begin to disappear and the distinctiveness of each record to become more evident.

The first such theme that might be considered is the discovery and the initial development of each of the major commercial fisheries on Georges Bank. By attention to this material, the Chamber gains insight into subsequent developments in the Georges Bank fishery as a whole, and the factors that led to the various changes in that fishery in the last 150 years.

Second, the Chamber might consider the continuity and duration of patterns of use by each Party – the permanence of the fishery, if you will – for this will give better understanding of the present realities of the fishery. It is essential in making this analysis to broaden the view beyond what Canada has suggested, for if consideration is limited to the 1969-1978 period, there will be no true understanding or application of the entire Georges Bank fishery.

To determine the patterns of use, consideration should be given not only to the duration of each Party's fishing activity on Georges Bank but also to the level of participation in the fishery, the stocks sought by the fishermen and the location of the fishing activities. It is the continuity of these aspects over time that will yield an understanding of the relationship of the present to the past and the past to the present, and thus enable the Chamber to give appropriate weight to the fishing activities of each Party.

A third theme to look for in the consideration of the Parties' fishing activities is the extent to which each Party has recognized its interest in the fisheries of Georges Bank, and has undertaken responsibility for developing and supporting those interests. This may include consideration of a wide variety of actions, such as technological developments in fishing vessels and processing methods, the provision of maritime services for fishermen such as search and rescue facilities, and the research for and publication of nautical charts and, of course, governmental involvement in fisheries conservation and management.

Consideration of these types of activities will aid the Chamber in appreciating the importance each Party attached to its fishing interest by expanding its resources to develop, preserve and protect that interest.

Professor Bowett has suggested that these activities are irrelevant, because they are not State conduct involving a claim of sovereign rights or jurisdiction (pp. 138, 139-140, *supra*). With respect, we suggest that our learned friend has misunderstood the purpose for which this evidence is offered. His major premise seems to be that since this is a jurisdictional dispute, only conduct which asserts or recognizes jurisdiction is relevant. Since this is a maritime delimitation proceeding, and since Professor Bowett cited no authority for applying his

Canada, in its oral presentation, has repeated its contentions and suggested that the United States has abandoned any reliance on these activities (p. 18; p. 141, *supra*).

The United States continues to maintain that it is only natural for a coastal State, as it defines and develops its fishery and other interests in the adjacent maritime areas, to support those interests, and that its activities in this regard may be relevant to the delimitation of a single maritime boundary. To be sure, by providing evidence to the Chamber regarding these and other activities, the United States is not claiming historic rights based upon those activities or, as Professor Bowett says a "mare nostrum" (p. 139, *supra*). Rather, as my colleague, Mr. Stevenson, has demonstrated, these activities are relevant evidence of the reality and the extent of the interests of the Parties in the area in which the delimitation is to take place. Indeed, as Mr. Stevenson noted, the Arbitral Tribunal in the Anglo-French Arbitration specifically concluded that the activities of governments in support generally of their maritime interests may be relevant to show a predominant interest of one of the States in the area to be delimited (Anglo-French Arbitration, para. 188).

As a review of these government activities demonstrates, beginning in the early 19th century, the United States recognized the extent and importance of its fishing and other interests in the Gulf of Maine area, particularly Georges Bank and since that time has methodically supported development of those interests. Thus, the activities that Canada has undertaken in support generally of its maritime interests in the Gulf of Maine area have, until recently, been directed almost entirely at the Scotian Shelf. In fact, the extension by Canada of these services to Georges Bank generally coincides with the comparatively recent development of the Canadian scallop fishery (United States Memorial, paras. 119 and 120).

Surveying and charting of the sea provides a striking example of the manner in which the activities of the Parties in support generally of their fishermen, and others, reflect the predominant interest of the United States in the Gulf of Maine area. Indeed, Canada, while on the one hand denying the relevance of such activities, on the other acknowledges their relevance. Thus, in speaking of the relevance of the conduct of the Parties to maritime delimitations, Canada, during its oral presentation, commented favourably on the relevance of navigational aids to the maritime boundary delimitation in the *Grisbadarna* case, referring specifically to what Canada called "the lighting of the Banks" (p. 137, *supra*).

Canada objects that no pattern may be drawn from the charting and surveying activities of the Parties in the Gulf of Maine area. Mr. President, the United States must sharply disagree with this conclusion. At least beginning from the latter half of the 19th century, if not before, and continuing to the present, the United States has conducted extensive hydrographic research and produced numerous nautical charts of varying scales depicting Georges Bank and the entire Gulf of Maine area. The extent of such activities is reflected in part by the names of the many features on the Bank, such as canyons, that refer to the United States oceanographic vessels that conducted those surveys (United States Memorial, p. 70, fn. 2). Annex 28 to the United States Memorial contains three charts that depict the many survey lines run in the area by the United States between 1842 and 1975 (Vol. II).

Displayed to my right is an enlargement of one of those charts. It depicts the surveys that were conducted in the Gulf of Maine area during the 1930s and illustrates the extensive surveying activities of the United States on Georges Bank. You will find a copy of this chart as Figure 48 in your book of maps.

The nautical charts that the United States has produced on the basis of these extensive surveys, and others, have been used widely by both United States and Canadian fishermen as well as by other mariners navigating these areas. As Annex 29 to the United States Memorial shows, in the early part of this century, the United States began publishing special charts of Georges Bank specifically for the fishing industry (Vol. II).

Canada did not assume responsibility for hydrographic research from the British Admiralty until 1904. Annex 30 to the United States Memorial indicates that between that time, 1904, and at least 1980, Canada has not conducted any hydrographic research across the Northeast Channel (Vol. II). Thus, Annex 30 contains a chart included in the Canadian Hydrographic Service 1980 Activities Report.

That chart indicates the areas in which Canada has conducted hydrographic surveys. The chart indicates four categories of Canadian activities distinguished on the chart by different types of colouring and shading. One category is "not surveyed to modern standards". Canada uses this category, which refers entirely to Canadian activities alone, to describe that part of Georges Bank claimed by both the United States and Canada. As that same chart confirms, Canada has confined its activities to the area of its traditional interest, to the Scotian Shelf across the Northeast Channel.

Mr. President, distinguished Judges, as the United States has demonstrated in its Memorial, each of the governmental activities that the United States has discussed in its written pleadings, like the fishing activities they support, reflect the traditionally predominant interest of the United States throughout Georges Bank and that of Canada throughout the Scotian Shelf.

The United States will now turn to the activities of the Parties in relation, first, to ICNAF and, then, to the failed 1979 fisheries agreement.

II. ICNAF Introduction

ICNAF is important because it has been the principal institution for conserving and managing the fisheries of the Gulf of Maine area since 1950, throughout the enormous expansion of fishing by third States in the Gulf of Maine area, until both Parties extended their exclusive fishery jurisdiction to 200 nautical miles. The United States maintains that the activities of the Parties under ICNAF mirror the historically predominant interest of the United States in the fisheries of Georges Bank – the United States assuming the leadership role on matters relating to Subarea 5, including Georges Bank, and Canada assuming the leadership role on matters pertaining to Subareas 2, 3 and 4 covering the entire Scotian Shelf.

Displayed to my right is a chart depicting the subareas, divisions and subdivisions of ICNAF. You will find a copy of this chart as Figure 49 in your book of maps.

In its pleadings, Canada has attempted to characterize the relationship of the Parties under ICNAF, with regard to Subarea 5, as a "partnership" (United States Memorial, para. 425). Canada bases this characterization principally upon its charter membership in Panel 5, and its status as a coastal State in regard to Subarea 5 for the purpose of occasional national catch allocations. It is evident that Canada seeks to use the term "partnership" to define a relationship that would legally entitle Canada to a share of the fisheries of Georges Bank or, in the terms of this adjudication, to a portion of Georges Bank.

The United States has replied to most of Canada's arguments in its written pleadings, particularly in Annex 3 to its Counter-Memorial (IV, United States

Counter-Memorial, paras. 91-96 and Ann. 3, Vol. II). As was demonstrated there, nothing in Canada's pleadings establishes a "partnership" between the Parties in ICNAF in regard to the fisheries of Georges Bank. Quite to the contrary. Canada and the United States did work together in a common effort to protect their respective interests in the Gulf of Maine area, and throughout the Northwest Atlantic region, against the intrusion of distant-water fishing fleets.

However, their activities throughout the entire 27-year history of ICNAF reflect a distinct geographical division of interests, with Canada focusing on the areas off its coasts, in Subareas 2, 3 and 4, and the United States focusing on Subarea 5, off its coast. Canada's activities in regard to Subarea 5 were basically those of a distant-water fleet, comparable to the activities of the United States in regard to Subarea 4 off Canada.

Neither Canada's charter membership on Panel 5 nor Canada's status as a coastal State for catch allocations in regard to Subarea 5 are evidence of a partnership between the United States and Canada in regard to the fisheries of Georges Bank. Nor were these matters viewed as such by the United States or Canada at the time they were determined.

Canada's Charter Membership on Panel 5 Is not Evidence of a Significant Canadian Interest in the Fisheries of Georges Bank

Canada maintains that its Charter membership on Panel 5, reflected its substantial fishing activities on Georges Bank, as well as its status as a coastal State in regard to that area (V, Canadian Reply, para. 254). Canada bases this assertion, almost entirely, on a brief exchange between the Canadian and the United States representatives to the conference convened by the United States in 1949 to establish ICNAF. At one point during that conference, the Canadian representative, Mr. Bates, stated that Canada was fishing intensively in proposed Subareas 3, 4 and 5 (pp. 140 and 141, *supra*).

Canada contends that a passing comment by the United States representative, Dr. Chapman, at the conclusion of Mr. Bates' remarks, establishes not only Canada's status as a coastal State for purposes of occasional national catch allocations, but also that its membership on Panel 5 was based on extensive Canadian fishing on Georges Bank (Canadian Reply, para. 254). Canada is wrong on both counts.

In the first instance, the notion of a "coastal State", as used in ICNAF, arose only in 1969 and 1970 when the Convention was amended in order to provide authority to allocate catch quotas among member States (United States Counter-Memorial, Ann. 3, Vol. II, paras. 57-62). Consequently, Canada's charter membership in Panel 5 could not conceivably have been based on its status as a coastal State in any legal sense, however Canada might now interpret that notion.

Nor is it likely that Mr. Bates' comments were based on his understanding that Canadians fished extensively on Georges Bank. While Mr. Bates stated that Canada fished intensively in Subarea 5, it is more likely that he was referring to the traditional Canadian fisheries for inshore stocks that ranged along the Bay of Fundy and the Maine coast than that he was referring to Georges Bank. This understanding of Mr. Bates' remarks is consistent with Canada's first reported catches in Subarea 5 under ICNAF, in 1953. At that time, Canada reported catches in Subarea 5 only in Division 5Y, inside the Gulf of Maine, not on Georges Bank, which is located in Division 5Ze. Moreover, as Mr. Lancaster has demonstrated, Canadian fishermen did not even begin a sustained fishery on Georges Bank until the 1950s and did not begin to report significant catches until the early 1960s.

Nor did Dr. Chapman's passing comment during the conference recognize the existence of any extensive Canadian fishing in Subarea 5.

In the first instance, a close reading of the exchange between Mr. Bates and Dr. Chapman reveals that Dr. Chapman's passing remarks, so carefully and emphatically quoted by Canada, were simply acknowledging an intervening statement by Mr. Bates regarding the status of Newfoundland on panel membership under ICNAF. In this regard, the United States would refer the Chamber to the minutes of the relevant session of the conference (**I**, Canadian Memorial, Anns., Vol. II, p. 101).

In any event, it is clear from other remarks by Dr. Chapman at the Conference that he did not believe that there was any significant Canadian fishery in Subarea 5.

Thus, in explaining the reasons for convening the conference, Dr. Chapman made the following statement in regard to Subarea 5:

> "The fishery in this area is almost entirely a United States fishery at the present time. To the best of my knowledge, Canadian vessels have seldom fished in the area in recent years, and the vessels of other nations have seldom if ever, worked in the area." (United States Counter-Memorial, Ann. 3, Vol. II, paras. 10 and 11.)

Canada's Status as a Coastal State for Purpose of Occasional Allocation under ICNAF Is not Evidence of a Significant Canadian Interest in the Fisheries of Georges Bank

The United States now turns to Canada's contentions that its coastal-State status for occasional Subarea 5 catch allocations is evidence of Canada's legal right to a portion of Georges Bank.

In ICNAF, the United States and Canada were sometimes designated as coastal States for purposes of catch allocations, thereby entitling them to a preference to be determined by the panel. Canada received preferences in Subarea 5 and the United States received some preferences in Subarea 4. Canada suggests that the allocations to Canada as a coastal State in regard to Subarea 5 are proof of a partnership between the two countries in regard to the fisheries of Georges Bank. To the contrary, those allocations, like the other actions of the Parties in ICNAF, demonstrate the predominant interest of the United States in all of the fisheries of Georges Bank (Canadian Reply, para. 254).

National quotas were instituted in ICNAF for the first time in 1972. Both the scope and the size of the national allocations confirm that the United States had the predominant interest in Subarea 5.

Thus, while the United States received an allocation in Subarea 5 for every stock of fish subject to quota regulations, Canada received allocations for only a few of those stocks. For example, the United States received an allocation in 1974 for each of 12 stocks subject to quotas, while Canada received allocations for only three of these stocks.

For 1975, the United States, on the one hand, received allocations for 18 of the 19 Subarea 5 stocks subject to quotas. The 19th stock, the haddock fishery, was closed for the season. Canada, on the other hand, received allocations for only two, that is, two of the 19 stocks that were subject to allocations. In 1976, Canada received allocations for only three of nine categories subject to quota regulation, while the United States received quota allocations in all the other categories (United States Counter-Memorial, Ann. 3, Vol. II, para. 61).

Coastal-State preferences overall amounted to only a small percentage of the

catch, usually around 10 per cent, to be divided between the designated coastal States. These allocations were often unimportant both to the United States and to Canada, because the stocks allocated were not fished in commercial quantities on Georges Bank by their fishermen.

The allocations of the Georges Bank herring and mackerel stocks, relied upon by Canada as recognition of its coastal-State status in Subarea 5 (Canadian *Memorial*, para. 199; *Counter-Memorial*, para. 425), illustrate well this point. For example, in 1973 Canada harvested only 53 metric tons of its 22,500 metric-ton allocation of mackerel in Subarea 5 (ICNAF, *Stat. Bull.* 1973, p. 46). By contrast, the Soviet Union and Poland received allocations of 148,000 metric tons and 130,000 metric tons, respectively, for the same species.

It is also interesting to note that the coastal-State preferences which Canada received in Subarea 5 were not considered very important to Canada in relation to its fisheries in other subareas. For example, at a special meeting in October 1973, ICNAF proposed to allocate to Canada 8,000 metric tons of the Georges Bank stock of herring.

Four months later, at a January 1974 special meeting of ICNAF, Canada traded 5,000 metric tons of that 8,000-metric-ton proposed allocation to the Soviet Union in return for the support of the Soviet Union for a higher allocation for Canada in Subdivision 4XWb on the Atlantic coast of Nova Scotia (ICNAF *Proceedings*, 1973-1974, p. 51, No. 14; p. 52, No. 19; p. 74, No. 25).

The United States will make one final comment on Canada's arguments regarding the relevance of its coastal-State status in Subarea 5. Professor Bowett noted that Canada never contested the United States legitimate interest in Subarea 4, where the United States was an original panel member and a coastal State for purposes of some allocations. And Professor Bowett asks how the United States can contest Canada's legitimate interest in Subarea 5 (p. 141, *supra*).

Mr. President, the United States submits the answer is quite simple. The United States agrees with Canada that Canada's interest in Subarea 5 is similar to the United States interest in Subarea 4. This is why the United States proposes to treat Canada, in regard to Subarea 5, in the same manner that Canada treated the United States in regard to Subarea 4. As this Chamber will recall, Canada, on the basis of its 200-mile exclusive fishery zone, terminated 200 years of United States fishing in Subarea 4. The United States asks only that this Chamber confirm the right of the United States to bring Canadian fishing in Subarea 5 under United States control.

The History of the Activities of the Parties under ICNAF Demonstrates the Predominant Interest of the United States in the Fisheries of Georges Bank

In the end, the significance of Canada's membership on Panel 5, and its status as a coastal State for purposes of occasional catch allocations, can only be appreciated in the context of the activities of the Parties in ICNAF over its 27-year history. That history confirms two important points (United States Counter-Memorial, Ann. 3, Vol. II, Tables B1-B25).

First, it confirms the predominant interest of the United States throughout Subarea 5, and particularly throughout Georges Bank. During its 27 years in ICNAF, the United States was responsible for almost every major initiative taken by that body in regard to Georges Bank (*ibid.*, Ann. 3, Vol. II, paras. 23-56).

Moreover, that history shows that the true focus of Canada's interests

throughout those years was on the extensive fishing grounds stretching to the north and east of Georges Bank, encompassing the rich fishing banks along the Scotian Shelf and the Grand Banks of Newfoundland. These fishing grounds were included within ICNAF Subareas 2, 3 and 4. Just as the United States assumed a leadership role in ICNAF with regard to Subarea 5, Canada assumed a similar leadership role in regard to Subareas 2, 3 and 4. The vast majority of the major management proposals and scientific research and enforcement activities of Canada were concerned with those Subareas, and not with Georges Bank (*ibid.*, Ann. 3, Vol. II, paras. 50, 53, 54, 66, 67, 77 and Tables B1-B25).

The United States will not burden the Chamber with a review of the activities of the Parties under ICNAF during its 27-year history. The United States has set out a summary of those activities in Tables B1-B25 of Annex 3 to the United States Counter-Memorial and the United States would refer the Chamber to that summary.

One example will suffice to illustrate the relative interests of the Parties in the Gulf of Maine area under ICNAF – the enforcement activities of the Parties. The United States and Canada were the only members of ICNAF that became seriously involved in the enforcement of regulations.

The enforcement activities of the United States and Canada in ICNAF demonstrate two points. First, an enforcement scheme was implemented, the actual operations carried out by the enforcement agencies of the United States and Canada, and these activities generally reflected the traditional predominance of the Parties within the different subareas. The vast majority of the United States enforcement activities ranged from the Northeast Channel south and west to the mid-Atlantic region, whereas those of Canada ranged from the Northeast Channel, north and east along the Scotian Shelf, and off Newfoundland (United States Counter-Memorial, Ann. 3, Vol. II, para. 77).

(138) Displayed to my right is an enlargement of Figure 5 to Annex 3 of Volume II of the United States Counter-Memorial. You will find a copy of this chart as Figure 50 in your book of maps.

That figure depicts the enforcement activities of the Parties during 1976, the last full year of United States and Canadian participation in the ICNAF enforcement programme. In that year, each State conducted in excess of 500 boardings; each one of those boardings is represented on the chart by a coloured dot, red dots for the United States enforcement actions, green dots for the Canadian enforcement actions. As you will observe, the Northeast Channel provided a clear dividing line for the primary concentration of each State's enforcement activities.

This *de facto* division of enforcement activities by the United States and Canada is easily understandable. During the crisis in the northwest Atlantic fisheries throughout most of the 1970s, each State naturally sought to direct its resources towards protecting those fisheries that were of the greatest importance to it. For the United States, this meant enforcing regulations concerning the cod and haddock stocks on Georges Bank. For Canada, this meant enforcing similar regulations concerning the stocks along the Scotian Shelf and off Newfoundland.

Mr. President, distinguished Judges, the United States submits that, when viewed as a whole, the management proposals, the scientific research, and the enforcement activities of the United States and Canada under ICNAF demonstrate the traditional predominant interest of the United States throughout all of Georges Bank, and Canada's predominant interest in the fisheries of the Scotian Shelf in Subareas 2, 3 and 4. Neither Canada's charter membership in Panel 5 nor the occasional catch allocation to Canada, as a coastal State in regard to

Subarea 5, are evidence of any partnership between the United States and Canada in regard to the fisheries of Georges Bank, or were viewed as such by the Parties at the time those particular matters were determined.

1979 East Coast Fisheries Agreement

This brings us to Canada's contentions regarding the 1979 East Coast Fisheries Agreement.

With the advent of 200-nautical-mile exclusive fishing zones in 1977, the United States and Canada sought to create a new institution to conserve and manage the fisheries of the northwest Atlantic area, including the Gulf of Maine area. This effort culminated in the East Coast Fisheries Agreement of 1979, which, as this Chamber is well aware, the United States did not ratify.

Throughout these proceedings, Canada has made repeated reference to the failed 1979 agreement. Canada contends that the 1979 agreement provides objective evidence of what the Parties themselves considered an equitable solution in the fisheries dimension of this delimitation (Canadian Reply, para. 391). Canada, in its oral presentations, reiterates its contentions in this regard (p. 143, *supra*).

The United States has shown that the 1979 agreement was not ratified by the United States; that it, therefore, does not create legal obligations or rights; and that it cannot be invoked to the prejudice of the United States in this delimitation (Counter-Memorial, paras. 330-339). The United States has also shown that the failed agreement is irrelevant to this delimitation because it did not purport to delimit the area or to be a basis for any delimitation of the area (*ibid.*, para. 331). Indeed, as the United States has already noted, the failed agreement addressed the fishing relations of the Parties within an area that extended far beyond any of the area claimed in this litigation. These positions remain the positions of the United States.

This morning, there are one or two points about this 1979 agreement that Canada has omitted and that the United States would like to bring to your attention.

The proposed agreement was essentially a bilateral follow-on to ICNAF. It was an effort by the United States and Canada to avoid, or put off, the implications of the 200-nautical-mile zone. Its theory, in other words, was that third States would be subject to the new régime, but that a different legal structure would be created to permit the fishermen of the United States and Canada to go about their business as usual. Pending a determination of the boundary, this was the arrangement that the Parties had hoped to negotiate. Thus, the agreement reflected a policy decision to attempt to resolve the resource question before the question of jurisdiction was settled. In the end, that decision proved to be the wrong decision. As a result, the Parties are now before you so that you can determine the question of jurisdiction in accordance with law.

Canada has focused the Chamber's attention on the entitlements that Canada would have received for Georges Bank stocks in the agreement. Canada has failed, however, to accurately describe for the Chamber the management authority for the Georges Bank fisheries. Under the agreement, the fisheries of Georges Bank, in almost every instance, would have been managed by the United States as a single stock throughout their range. Thus, the proposed agreement assumed the reality of the stocks and the division between the stocks in the Gulf of Maine area at the Northeast Channel, in direct contradiction to the positions that Canada has taken in these proceedings.

The agreement specifically referred to 16 individual species and many different

stocks of most of those species. The entire management structure of the agreement is based upon the need for single-State management of each stock, wherever possible, and, except in cases of transboundary stocks, the agreement provided for such management (Agreement between the Government of Canada and the Government of the United States of America on East Coast Fishery Resources, reproduced in Canadian Memorial, Anns., Vol. I, p. 252). (Hereinafter cited as 1979 agreement.)

Allocation of management responsibility and catch was addressed in the four annexes to the failed agreement. The first three annexes contained lists of fish stocks. Under each stock there was normally set out the percentage of that stock that could be caught by the United States fishermen and by Canadian fishermen, as well as the area in which the fishing could take place for that stock by the fishermen of either side. Other terms or conditions were also set out.

The fourth annex, Annex D, described in geographical terms the Subareas, Divisions, and Subdivisions referred to in the agreement. In all respects these areas corresponded to the comparable areas under ICNAF (1979 agreement, Ann. D).

Thus, the 1979 agreement used the ICNAF line, which divided Subarea 4 and Subarea 5 by a line through the Northeast Channel.

The stocks listed in the first three annexes were known by the letter of the annex in which they were listed.

Annex A stocks were those that were generally regarded as transboundary resources, no matter where the maritime boundary might be located. These transboundary stocks were to be jointly managed. Annex A identified four transboundary stocks – mackerel, pollock, cusk, and lobster. Lobster, however, was to remain in the annex only until the boundary was decided, at which time it was to be transferred to Annex C, which provided for the exclusive management of one or the other of the States (1979 agreement, Ann. A (4) and Ann. C (14)).

Annex B stocks were those in which it was recognized that one Party or the other clearly had a primary interest. Annex B specifically addressed 12 stocks of species of commercial importance in the Gulf of Maine area: these stocks included three stocks of herring – a Canadian in-shore stock, a United States in-shore stock, and of course the Georges Bank stock. The other nine stocks were: the Georges Bank scallop stock; the Georges Bank cod stock; the Georges Bank haddock stock; the Georges Bank silver hake stock; the Georges Bank red hake stock; the stock of argentine that ranges between New York and Newfoundland; and the Scotian Shelf stock of white hake; it also provided for the stock of white hake that lives on Georges Bank and in the Gulf of Maine basin, as well as the illex squid stock which in truth is a transboundary stock that ranges along the coast of most of North America.

Under the terms of the agreement, the Party of primary interest was responsible for implementing the management plans for the stocks identified in Annex B. While Canada calls the Annex B management system "qualified joint management" (Canadian Counter-Memorial, para. 387, and p. 144, *supra*), this characterization is flatly contradicted by the terms of the agreement. The management provisions for Annex B stocks differed dramatically from those for Annex A, which provided for true joint management.

Under Annex B procedures, the Party of primary interest was to propose the management measures for such stocks within the Commission. The Commission was then to consider that proposal against a list of principles set forth in Article X of the agreement.

These principles provided, among other things, that management measures should be designed to achieve optimum yield from each stock, to prevent

overfishing, to allow the rebuilding of depleted stocks, and to avoid irreversible or long-term adverse effects on the fishery resources and the environment. The agreement provided that a proposal of the Party of primary interest could only be challenged if it were "clearly inconsistent" with the principles laid down in Article X (1979 agreement, Art. V (2) and Art. VI (4)).

Annex C identified stocks that the coastal State would manage without restraint upon its prerogatives, but for which the Commission was to function as a forum for consultation. Annex C contains a number of the traditionally important cod stocks: cod in Divisions 4Vs and 4W; cod in 4X; cod in the Gulf of Maine in 5Y; haddock in 4W and 4V; haddock in 4X; redfish in 4V, 4W and 4X; redfish in 4R, S and T; redfish in 3-0; redfish in 3P; redfish in 5; and the so-called "Other Groundfish" category in Subareas 3 and 4. This "Other Groundfish" category included species which were not specifically identified in the annex (1979 agreement, Ann. C).

Under Annex C, all of those stocks were to be managed on a single stock basis and basically without reference to the management concerns of the other Party. At the same time, each of the Parties would have allowed the other to catch the percentage entitlement of that stock provided for in the agreement.

(23) Mr. President, before you is a chart which corresponds to Figure 7 of the United States Memorial. A copy of this chart is found at Figure 51 in your book of maps. Figure 51 is identical in all respects to Figure 7 of the United States Memorial except for the addition of the boxes on the right-hand side of the chart. Figure 7 illustrates the ranges of stocks of 16 commercially important species in a zone extending from Block Island, Rhode Island, across Georges Bank and across the Northeast Channel, thence across Browns Bank all the way to LaHave Bank, located far off the coast of Nova Scotia on the Scotian Shelf.

A glance at this chart reveals that 12 species are divided into stocks at the Northeast Channel, while four are transboundary – those four being mackerel, pollock, illex squid and argentine.

(23) A comparison of the information displayed in this Figure 7 from our Memorial with the terms of the 1979 agreement shows that in regard to the existence of stocks and the division among those stocks in the Gulf of Maine area, the failed 1979 agreement was almost entirely consistent with the United States Figure 7 in its Memorial.

The Chamber rose at 12.21 p.m.

FIFTEENTH PUBLIC SITTING (16 IV 84, 3 p.m.)

Present: [See sitting of 2 IV 84.]

Mr. RASHKOW: Mr. President, distinguished Judges, at the conclusion of this morning's session I was about to demonstrate, through a comparison of the terms of the failed 1979 fisheries agreement with the information contained in (23) Figure 7 of the United States Memorial, that in regard to the existence of stocks and the division among those stocks in the Gulf of Maine area, that the failed 1979 agreement is almost entirely consistent with the positions of the United States in this case, and in direct contradiction to the positions of Canada on those very same issues.

If you will bear with me, the United States will use these blocks, on the right (23) side of Figure 7 from the United States Memorial, to demonstrate this point. I will check the boxes where the failed agreement is consistent with the information contained in Figure 7.

Under the 1979 agreement, the United States would have managed the silver hake stock on Georges Bank, under Annex B, while Canada would have managed the silver hake stock on the Scotian Shelf, under Annex C, as an "Other Groundfish" stock (1979 agreement, Ann. B (10) and Ann. C (12)).

(23) Figure 7 shows silver hake as being divided at the Northeast Channel. Consequently, the 1979 agreement is consistent with Figure 7.

Under the 1979 agreement, the United States would have managed the herring stock on Georges Bank and Canada would have managed the herring stock on the Scotian Shelf (1979 agreement, Ann. B (1-6)).

(23) Figure 7, which shows herring divided at the Northeast Channel is, therefore, consistent with the management of the herring stocks under the 1979 agreement.

(23) Figure 7 shows mackerel as a transboundary stock. Under the failed agreement, mackerel would have been managed as such a transboundary stock under Annex A. The agreement is therefore consistent with Figure 7 (1979 agreement, Ann. A (1)).

(23) Figure 7 shows stocks of haddock and cod divided at the Northeast Channel. Under the 1979 agreement the United States would have managed the cod and haddock stocks on Georges Bank pursuant to Annex B, while Canada would have managed those stocks on the Scotian Shelf under Annex C (1979 agreement, Ann. B (8 and 9), and Ann. C (12)). Thus, with respect both to cod and haddock, the 1979 agreement is consistent with Figure 7.

(23) Figure 7 shows pollock as a transboundry resource. Pollock would have been managed as such a transboundary resource under Annex A (1979 agreement, A (2)). The 1979 agreement is, therefore, consistent with the information displayed in Figure 7 in the United States Memorial.

(23) Figure 7 shows that longfin, or loligo, squid is limited by the Northeast Channel. The 1979 agreement recognized that fact, placing that stock under Annex C, under United States management (1979 agreement, Ann. C (15)). Thus, the agreement is once again consistent with the information displayed in Figure 7 of the United States Memorial.

(23) Figure 7 shows red hake as being divided by the Northeast Channel. Under the failed 1979 agreement, the United States would have managed the Georges Bank red hake stock under Annex B, while Canada would have managed the Scotian Shelf stock as "Other Groundfish" under Annex C (1979 agreement,

Ann. B (11) and Ann. C (12)). Therefore, the 1979 agreement is once again consistent with Figure 7.

(23) In Figure 7, yellowtail flounder is shown divided into stocks at the Northeast Channel. Yellowtail was lumped together in the "Other Groundfish" category under Annex C of the agreement which includes a number of stocks. These "Other Groundfish" were divided at the Northeast Channel, with Canada obtaining authority over the stocks in Subareas 3 and 4 and the United States obtaining management authority over the stocks in Subarea 5 (1979 agreement, Ann. C (12 and 13)). Thus, with respect to yellowtail flounder, the 1979 agreement is once again consistent with the information displayed in Figure 7 of the United States Memorial.

(23) Figure 7 shows shortfin or illex squid and argentine both crossing the Northeast Channel. The 1979 agreement recognized this fact, dealing with illex squid in Subareas 3, 4, 5, and 6 as one stock (1979 agreement, Ann. B (12 and 16)). The Parties agreed that, in light of the lack of knowledge about the stock and the limited fishing effort on it, the management of this stock could be divided and that each could manage on its own side of the eventual boundary under Annex B procedures. As for argentine, since the largest part of this stock is found on the Scotian Shelf and since the United States interest in it was not strong at the time of the negotiations, the agreement gave Canada primary authority over that stock throughout its range (1979 agreement, B (12)). Thus, the agreement in regard to both argentine and illex squid is also consistent with the information displayed in Figure 7 of the United States Memorial.

(23) Figure 7 shows redfish divided at the Northeast Channel. Under Annex C of the 1979 agreement, Canada would have managed the redfish in Subareas 3 and 4, and the United States would have managed the redfish in Subarea 5. Thus, in regard to redfish, the 1979 agreement is consistent once again with the information displayed in Figure 7 of the United States Memorial (1979 agreement, Ann. C (6-11)).

(23) Scallops are shown in Figure 7 divided by the Northeast Channel. Under the 1979 agreement, the scallop stock on Georges Bank would have been managed as a single unit under a combination of Annexes A and B management procedures (1979 agreement, Ann. B (7)).

Thus, scallop, under the 1979 agreement, is also consistent with the information displayed in Figure 7 of the United States Memorial.

(23) Figure 7 shows white hake divided at the Northeast Channel. Under Annex B, Canada would have managed the white hake on the Scotian Shelf and the United States would have managed the white hake in Subarea 5 (1979 agreement, Ann. B (13 and 15)). Therefore, the white hake, under the 1979 agreement, is consistent with the information displayed in Figure 7 of the United States Memorial.

(23) Figure 7 shows lobster divided at the Northeast Channel. This division has been established in Annex 21 to the Reply of the United States, which responded to Canada's contentions regarding this issue. However, because the division between the stocks of lobster on Georges Bank and Browns Bank was controversial during the negotiations, the United States was prepared to agree that management of lobster would be determined by the boundary, since the United States was confident of its boundary position. Consequently, pending determination of the boundary, the treatment of lobster under the agreement is inconsistent with the information displayed in Figure 7 of the United States Memorial, and I will not check that box.

(23) Finally, Figure 7 shows cusk divided by the Northeast Channel. Under Annex C of the 1979 agreement, the cusk in Subarea 4 would have been under

Canadian exclusive management authority as part of the "Other Groundfish" category (1979 agreement, Ann. C (12)). The cusk stock on Georges Bank, however, was to be jointly measured under Annex A (1979 agreement, Ann. A (3)). This distinction under the failed 1979 agreement in the management régimes is, therefore, consistent with the treatment of cusk in Figure 7 of the United States Memorial.

(23) Mr. President, as this review demonstrates, the failed 1979 agreement differs from Figure 7 of the United States Memorial with respect to stock divisions in regard to only one of the 16 species that Figure 7 describes.

In the view of the United States, this comparison is striking proof not only of the positions taken by the United States in this case regarding the existence of stocks in the Gulf of Maine area and their division at the Northeast Channel but also as to the utility of single-State management.

As my colleague, Mr. Colson, will explain later, these stock divisions are critical to the conservation and management of Georges Bank and are an important circumstance to be considered in delimiting this boundary.

Canada, however, ignores these aspects of the 1979 agreement, relying upon the monetary value of its past landings, primarily of one stock from Georges Bank, scallops. Canada suggests, on that basis, that the agreement provides evidence of what the Parties themselves considered an equitable solution in the fisheries dimension of this delimitation (III, Canadian Counter-Memorial, para. 391).

The 1979 agreement, however, did not only address the Gulf of Maine area, but the entire east coast of the United States. Canada would dismiss this distinction arguing that the agreement applied to areas outside of Georges Bank only in a marginal way, that the interests outside Georges Bank were, in the words of the oral presentation, "trivial" (p. 143, *supra*).

In fact, some of the strongest support for and the harshest criticism of the 1979 agreement related to such "trivial" matters. For example, some of the strongest support for the agreement came from those New England fishermen who wished to fish in Canadian waters in the Gulf of Maine area (Hearings before the Committee on Foreign Relations, United States Senate, 96th Cong., 2nd Sess., on Ex. U.: Maritime Boundary Settlement Treaty with Canada, and Ex. V.: Agreement on East Coast Fishery Resources with Canada, 15 and 17 April 1980, pp. 78-79. Previously deposited by the United States in accordance with Art. 50 (2) of the Rules of Court). (Hereinafter cited as 1979 Agreement Hearings.) On the other hand, even the small allocation to Canada of loligo squid, which was to be harvested throughout the area, provoked strong opposition of other fishermen (1979 Agreement Hearings, pp. 119 and 153).

In the end, the failed agreement cannot be viewed as evidence of what the Parties considered an equitable solution. The agreement was fundamentally unfair to the United States.

As the Agent for the United States stated in his opening remarks, the central problem with the 1979 agreement was that, while at the outset it had been negotiated as a temporary agreement, the proposed text called for a permanent agreement.

Thus, generous concessions that had been agreed upon early in the negotiations as temporary concessions became, under the 1979 agreement, permanent. In addition, an important incentive for that agreement, access to Canadian waters, largely disappeared as a result of a unilateral Canadian termination of United States fishing in 1978 in the midst of the negotiations.

At the outset of the negotiations in 1977, the United States and its fishermen were prepared to accept an arrangement that, for a limited period, allocated fish

to Canada on a generous basis reflected in the failed agreement, on the assumption that a favourable boundary would ultimately be negotiated.

Thus, throughout the negotiations, the United States pressed for a temporary agreement. The position of the United States in this regard was reflected in the 15 October 1977 Joint Statement of Principles, which was negotiated by the two States as the framework for the 1979 agreement (**II**, United States Memorial, para. 335; **I**, Canadian Memorial, para. 251; and p. 29 *supra*). This is the Cutler-Cadieux report to which Professor Bowett made reference in his presentation. Article XIII of the Joint Statement specifically called for a provision in the proposed agreement for withdrawal from the agreement upon notice (Canadian Memorial, Ann. 36, p. 262).

In other words, as originally contemplated, the United States and its fishermen viewed the proposed fisheries agreement as a bridge to exclusive jurisdiction at some time following the determination of a favourable boundary.

Mr. President, distinguished Judges, it is apparent that, in this context, the United States decision to reject the 1979 agreement was not the *volte-face* that Canada charges (p. 148, *supra*). While the United States may have been prepared to accept for a term of years the allocation of fish and the complex management provisions agreed upon by the special negotiators as originally contemplated, it was not prepared to accept such an allocation in perpetuity, as was finally negotiated.

As Congressman Studds, of Massachusetts, testified in the Senate:

> "The question facing the United States negotiating team . . . was, pending the resolution of the international boundary dispute, what kinds of interim arrangements can be made until such time as by international arbitration the dispute can be resolved." (1979 Agreement Hearings, p. 120.)

Congressman Studds expressed the frustration of his New England constituents, a frustration shared by him and other congressmen and senators, when he added, somewhat sarcastically:

> "Well, lo and behold, the Senate has been presented with a treaty that does not seek interim arrangements, but seeks to impose a permanent solution in a number of respects, regardless of the outcome of the arbitration."

Congressman Studds went on to vigorously object to ratification of the failed agreement as unfair to the fishermen of New England and to the interests of the United States (1979 Agreement Hearings, p. 12).

In regard to the allocation of fish stocks on Georges Bank, while the harshest criticism was directed at the scallop provisions, there was a consensus that the allocations generally were unfair. Those allocations were based, in large part, upon the average annual catches of the Parties over the 10 to 13 year period that preceded the negotiations in 1977. As my colleague, Mr. Lancaster, has demonstrated, that period ignores the long history of almost exclusive fishing on Georges Bank by United States fishermen and the resurgence of United States fishing since the extension of the 200-nautical-mile exclusive fishing jurisdiction. As Congressman Studds said at the hearings "There is no way on earth they [referring to the negotiators] could have picked 12 years more favorable to the Canadian fishery" (1979 Agreement Hearings, p. 14).

The permanent agreement also proposed, as it were, to "set in stone" a complex management system for the entire East Coast fisheries. Canada, in its presentation last week, made much of the provisions in the failed agreement relating to management. Canada asked why, in view of those provisions, does

the United States now argue that co-operation in management is impractical, or inefficient, and is likely to lead to disputes? (P. 146, *supra*.) The short answer is that the management provisions in the agreement were, in fact, widely recognized to be impractical and inefficient. While the United States fishermen and others were prepared to accept such complex procedures for a short period, as part of a temporary agreement, they were not prepared to accept them on a permanent basis. Once again, as Congressman Studds said:

> "Let me finally say, I do believe that it is the permanence of the treaty that is most offensive. It is a very complex agreement, the two treaties. There are all kinds of fine points and complexities." (1979 Agreement Hearings, p. 14.)

Reflecting the views of the Senate and almost the entire fishing industry of New England, Senator Chafee of Rhode Island declared, "The management procedures, as was touched [upon] by Senator Cohen [who is from Maine], appear to me to be very cumbersome and bureaucratic". He went on to assert that the ideal way to proceed in regard to these problems is to define the boundary first (1979 Agreement Hearings, p. 8).

The unilateral termination by Canada of United States fishing in Canadian waters in the Gulf of Maine area in 1978 also contributed to the rejection of the agreement. Canada finds the suggestion that such Canadian action could erode support for the agreement "extraordinary" (p. 147, *supra*). The United States submits it is quite understandable from the viewpoint of the United States. The United States had for decades exploited the waters within the Gulf of Maine and on the Scotian Shelf. The whole purpose of the negotiations beginning in 1979, from the viewpoint of the United States, was to protect those fishermen. Once those fisheries were terminated, United States fishermen began to undergo economic adjustments. Once those adjustments began, interest in shifting back to the more traditional patterns of fishing declined.

As a practical matter, the fishermen who previously fished for groundfish in Canadian waters in the Gulf of Maine area either went out of business entirely or switched to other fisheries. A good number switched to groundfish or scallops on Georges Bank. These fishermen, who previously supported an agreement, no longer did so. Indeed, many now actively opposed the agreement.

The termination of United States fishing in Canadian waters primarily affected fishermen from Maine, but the impacts of that action went beyond Maine. There was a wide perception based upon newspaper reports from Nova Scotia that one of the reasons Canada terminated reciprocal fishing rights was a negotiating ploy to force a quick approval of the fishery agreement (1979 Agreement Hearings, p. 3).

Thus, a Canadian fisheries official was quoted at the time of the termination of the fisheries as saying that the termination of United States fishing in Canadian waters, plus increased Canadian fishing in the Georges Bank area, should "hasten a move by the United States to finalize a long-term agreement" (Fleming, M., "All-out Fishing Expected", Halifax *Chronical Herald*, 3 June 1978, p. 1. Reproduced at **IV**, United States Counter-Memorial, Ann. 40, Vol. V).

This perceived strong-arm tactic was itself sufficient to erode support for an agreement in the region.

In the end, the 1979 fisheries agreement was rejected precisely because it was viewed as allocating to Canada fisheries to which the United States was entitled as a legal right under the recently implemented 200-nautical-mile exclusive fishing zone. The United States and its fishermen believed it was fundamentally

unfair to sacrifice those rights for the sake of good relations with our neighbour to the north.

As the Agent of the United States noted in his opening statement, Senator Javits of New York put it more succinctly. When the then Deputy Secretary of State sought to defend the fisheries agreement as necessary to prevent harm "to our vitally important bilateral relationship", Senator Javits replied as follows:

> "We must not confuse the idea that we have to ratify a treaty which we may not consider a fair treaty just because we are friends. The Canadians would not do it, and they should not expect us to do it." (V, United States Reply, para. 36.)

The 1979 agreement did not equitably reflect the rights of the United States under the new 200-mile jurisdiction. Mr. President, distinguished Judges, I submit there could be no better basis for rejecting that agreement.

III. Continental Shelf Activities

Mr. President, at this time, the United States with your permission will now discuss continental shelf activities of the United States and Canada in the Gulf of Maine area. The Parties agree that these activities are relevant circumstances to be taken into account in the delimitation of the single maritime boundary. They disagree sharply both as to the nature and scope of those activities and as to their legal implications in this delimitation.

As to the nature and scope of those activities, the United States maintains that the facts establish the following five points.

First, the United States, in the Truman Proclamation of 1945, publicly asserted exclusive jurisdiction and control over the natural resources of the seabed generally out to the 100-fathom-depth contour which, as it happened, encompassed Georges Bank.

Second, for approximately the next 20 years, neither the United States nor Canada took any specific action in regard to the exploration or exploitation of the mineral resources of the continental shelf in the Gulf of Maine area.

Third, beginning the mid-1960s, both Parties began to issue permits that authorized geophysical exploration activities on the northeast portion of Georges Bank.

Fourth, since the 1960s, both Parties have conducted geophysical exploration on the northeast portion of Georges Bank.

Fifth, and finally, neither Party has authorized drilling on the northeast portion of Georges Bank during the pendency of this dispute.

It is principally in regard to the details of the third and fourth points that the Parties disagree. Concerning those points, however, they disagree sharply.

The position of the United States is that its continental shelf activities are consistent with the single maritime boundary that it now proposes and inconsistent with any suggestion that the United States acquiesced in a Canadian claim to the northeastern portion of Georges Bank in the 1960s.

These United States activities are also inconsistent with any so-called *modus vivendi* or *de facto* maritime line and do not constitute indicia that the Parties considered an equidistant boundary equitable.

At paragraphs 265-285 of its Counter-Memorial, the United States demonstrated that it is not barred from challenging Canada's equidistant or modified equidistant lines on seven separate and distinct grounds. In paragraph 209 of its

Reply (V), Canada rejects what it characterizes as the following five main arguments of the United States.

First, Canada's issuance of offshore permits lacked "notoriety" and constituted unilateral acts that cannot support claims of acquiescence and estoppel.

Second, there was no clear conduct by the United States to establish acceptance of Canada's exercise of jurisdiction on the basis of an equidistance line.

Third, the official upon whose conduct the claims of acquiescence and estoppel are founded did not have the authority to bind the State.

Fourth, the acquiescence of the United States was not of sufficient duration.

Fifth, Canada did not rely to its detriment upon the acquiescence of the United States.

With one important exception, the United States does not object to Canada's reformulation of the United States positions. That exception is Canada's casual dismissal of the United States position that Canada's allegations of acquiescence and estoppel ignore the fisheries and other dimensions of this case. Indeed, the continental shelf activities of the Parties ignore what Canada asserts is the most important aspect of this delimitation, the fishing activities of the Parties.

In this presentation, the United States will demonstrate, in turn, that each Canadian response to the five main arguments of the United States has misconstrued the facts and misapplied the law. We shall then briefly address Canada's separate but related arguments that the continental shelf activities of the Parties also establish a *modus vivendi* or *de facto* maritime limit or are indicia that the Parties themselves consider an equidistant line to be an equitable boundary in this case.

We shall turn first to Canada's response to the showing by the United States that the issuance of Canada's permits lacked notoriety and constituted unilateral acts that cannot support any claim of acquiescence and estoppel in this case.

A. Canada's Issuance of Offshore Permits Lacked Notoriety and Constituted Unilateral Acts that Cannot Support Claims of Acquiescence and Estoppel

There appears to be no disagreement between the Parties concerning the general legal principle that, in order to establish acquiescence, the conduct of both States must be clear and unambiguous. A claim must be made in such a manner, and under such circumstances, as to place the other State unequivocally on notice of that claim.

In its Reply, Canada asserts that, beginning in 1965, the United States had both actual and constructive notice of Canada's permits and of Canada's use of the equidistance method (paras. 212, 213). In fact, the United States did not have either actual or constructive notice of Canada's purported claim until August of 1966.

The United States did not receive actual notice of Canada's purported claim

With respect to actual notice, Canada asserts that its purported claim was communicated initially in the form of a letter of a Mr. Hunt, in Canada, in response to an inquiry from a Mr. Hoffman, in the United States. Both Mr. Hunt and Mr. Hoffman were mid-level government officials, neither of whom was vested in any manner with the responsibility for determining international boundaries, or for receiving claims relating to such boundaries on behalf of their Governments. Moreover, based upon the long-established practices of the two

Parties, there was no reason to conclude that this communication was intended to or, in fact, would put the United States on notice of any claim by Canada to the continental shelf in the area of Georges Bank.

As the United States demonstrated in its Counter-Memorial, the established practice was then, and remains today, to communicate messages of a diplomatic character to the United States Department of State and the Canadian Department of External Affairs.

Indeed, as the United States noted in its opening statement, this was the practice in regard to other matters involving the claims of the Parties to maritime jurisdiction, both during, and prior to, and subsequent to the relevant period. For example, Canada followed this practice in regard to its claims to a 12-nautical-mile exclusive fishing zone in 1964 (Joint Communiqué of President Kennedy and Prime Minister Pearson 27 May 1963, *State Department Bulletin*, Vol. XLVIII, No. 1248, Canadian Reply, Ann. 2). It followed the established practice with regard to its adoption of its straight baselines in 1967 (Note verbale from Department of External Affairs to the Embassy of the United States, dated 11 October 1967, Canadian Counter-Memorial, Ann. 34). It followed this practice in its claim to special "fisheries closing lines" in 1969 (see House of Commons of Canada, Debate on the Arctic Waters Pollution Bill, 16 April 1970, pp. 5952-5953), as well as its claim both to a 12-nautical-mile territorial sea and to special jurisdiction over Arctic waters in 1970.

Canada's argument that this letter from Mr. Hunt was sufficient to notify the United States of a claim to thousands of square miles of continental shelf, in effect, would have this Chamber ignore the established practice of diplomatic communication on sensitive and important matters.

The United States did not receive constructive notice of any purported Canadian claim

The United States did not receive constructive notice of any purported Canadian claim either. Canada argues that, apart from the purported communication of its claim to Mr. Hoffman, the United States received constructive notice of that claim through Canada's so-called "manifest public activity" of issuing permits (Canadian Reply, para. 213). Canada, however, issued no proclamation or other public notice, such as a Truman Proclamation of 1945, that might have informed the United States of Canada's position with regard to the northeastern portion of Georges Bank. Canada did not even publish notice of its permits in its official *Gazette*, as was the standard practice concerning other actions regarding its maritime jurisdiction in this area (see, e.g., Canadian Memorial, Anns., Vol. II, Anns. 20 and 21).

Indeed, Canada, at paragraph 213 of its Reply, makes the extraordinary claim that the "alleged requirement of 'notoriety' adds nothing to the normal legal requirement of 'public activity'". Notoriety, perhaps, may add nothing to the legal requirements relating to actual notice. As the decision in the *Tunisia/Libya* case demonstrates, however, notoriety is essential to establish constructive notice of a claim that is purported to have been made through public activity.

The International Court of Justice in the *Tunisia/Libya* case concluded that unilateral acts far more publicized than the actions upon which Canada relies were not sufficient to evidence an unambiguous claim to a boundary position. The Court found that a published Libyan law and regulation, including specifically a map that depicted the limits of the so-called oil development zones claimed by Libya, were purely internal legislative acts, intended to identify domestic zones for petroleum exploration and exploitation and could not be

considered even as a unilateral claim for a maritime lateral boundary with Tunisia (*I.C.J. Reports 1982*, para. 92).

Inasmuch as the Libyan law and regulation did not constitute "an act of delimitation", even for the purpose of defining a claim at the international level, then, *a fortiori*, the issuance of permits by Canada cannot be considered a claim.

The laws pursuant to which the Canadian permits were issued did not, on their face, apply to maritime areas and did not, as in the *Tunisia/Libya* case, contain a map. Contrary to the statement at paragraph 364 of Canada's Counter-Memorial, Canada has not shown us, and we have not found, where these regulations expressly apply to submerged lands. Those laws and regulations applied simply to oil and gas activities conducted on "Canadian lands" (see United States Memorial, Ann. 11).

Nor is this surprising. Even as late as 1964 and 1965, when Canada issued the permits upon which it now relies, Canada had made no official claim to the continental shelf under its domestic laws, and had not ratified the 1958 Convention on the Continental Shelf.

Indeed, as recently as 1980 one Canadian commentator was critical of these Canadian laws for their failure clearly to authorize oil and gas activities on the sea-bed underlying the seas adjacent to Canada.

> "These regulations, originally intended for application *only on land territory*, as a matter of administrative procedure have come to be applied to the Canadian offshore, though nothing either in the Regulations themselves or in the Acts under which they were made seems to provide legal authority for such application." (United States Counter-Memorial, Ann. 43.) (Emphasis added, footnotes omitted.)

In the light of the decision of the Court in 1982 that the legislative acts of Libya, which applied on their face to the maritime area there at issue, were not sufficient to provide notice of a claim, the purely administrative act of issuing permits to private parties under Canada's ambiguous laws and regulations, without more, were not sufficient for such purposes.

Canada also suggests that the United States received notice of Canada's purported claim to the northeastern portion of Georges Bank through the receipt of a report published monthly by Canada's Department of Northern Affairs and National Resources. That report, which Canada claims was distributed to the United States Embassy in Ottawa and to a broad range of other recipients, contained lists of Canadian permits issued and a brief description of drilling activities authorized throughout all of Canada in May 1964 (Canadian Counter-Memorial, para. 362). A copy of that report is found in Appendix 5 in Volume III of the Annexes to Canada's Counter-Memorial. Canada has provided no evidence that this report was, in fact, received by the United States Embassy, and we have no evidence that it was.

In any event, the permits listed in that report are identified in relation to large geographical areas of the Canadian mainland, such as "Yukon Mainland" or with reference to two general categories entitled simply "Water" or "Coastal Water". The report lists 37 permits under the category "Coastal Waters" but does not describe the coasts off which these permits were issued. It merely lists the co-ordinates. Without locating each of these co-ordinates on a map, none of which was included in the report, there is no way of knowing to what areas the permits applied.

Unlike the decrees issued by the Government of Norway, discussed in the *Fisheries* case, and the acts of similar notoriety described in the *Temple of Preah Vihear* case *(I.C.J. Reports 1962)*, the so-called public activity of Canada in

issuing permits did not, and cannot be held to, provide notice to the United States of any claim by Canada sufficient to require a protest by the United States.

As was explained in the United States Reply and by the United States Agent in his opening statement, it is difficult to imagine that, given the circumstances, Canada could have contemplated a claim to any part of Georges Bank. From 1945 until the mid-1960s, Canada evinced no protest to the publicly announced assertion of exclusive jurisdiction and control by the United States in the Truman Proclamation to an area of sea-bed that would necessarily have encompassed Georges Bank (United States Memorial, Ann. 3).

B. There Was no Clear Conduct by the United States to Establish Acquiescence in Canada's Exercise of Jurisdiction on the Basis of an Equidistance Line

This brings me to the second of what Canada has identified as the five main arguments of the United States: that there was no clear conduct by the United States leading to acquiescence in Canada's exercise of jurisdiction on the basis of an equidistance line. In this regard, Canada maintains that the United States acquiesced in Canada's claim, both explicitly, through Mr. Hoffman's correspondence with his Canadian counterparts, and tacitly, through the conduct of the United States in administering its own permit programme.

In international law it is accepted that the conduct alleged to constitute acquiescence in a claim, like the conduct alleged to constitute the claim itself, must be definitive, consistent and unequivocal. The satisfaction of this dual requirement is not to be inferred lightly (United States Counter-Memorial, para. 238).

The United States shall deal first with the issue of express consent. The Hoffman correspondence, which has been discussed in each of the Parties' written pleadings, is the foundation of Canada's arguments. Canada's reliance on such correspondence, which even contains a disclaimer of authority to determine boundaries, underlies, in our view, the weakness of Canada's position (United States Memorial, Ann. 53). The United States intends to say nothing more here than that the United States did not acquiesce in Canada's permits or a purported Canadian boundary claim by Mr. Hoffman in either of his letters.

Second, the United States did not, in the conduct of its exploration programme on Georges Bank, tacitly consent to any purported Canadian claim to the northeastern portion of Georges Bank.

As the record in this case demonstrates, the United States began to issue permits authorizing geophysical exploration on the northeast portion of Georges Bank in 1965 and since then has conducted approximately 20,000 line miles of such exploration.

In its Reply, Canada has asserted that, with one possible exception, geophysical surveys were neither authorized nor conducted on the northeastern portion of Georges Bank under the United States permits issued prior to 1972. Canada repeated these assertions during its oral presentation last week (pp. 150-156, *supra*).

A detailed review of the information relating to those permits confirms that the United States did in fact issue permits authorizing exploration on the northeastern portion of Georges Bank as early as 1965 and that exploration was, in fact, conducted there pursuant to such permits.

The first permit authorizing exploration was issued to Shell Oil Company in 1965 (El-65, enclosure 46 to letter from Davis Robinson, Agent of the United

States of America to the Registrar dated 9 April 1984) (hereinafter Letter of 9 April 1984). Shell's request for a permit specified an area of operation that extended well beyond any median line across Georges Bank. That request was approved on 31 March 1965.

During the period between 1965 and 1972, a total of 14 permits were issued authorizing geophysical exploration on the northeastern portion of Georges Bank. Under eight of those permits, exploration was, in fact, conducted in the area (Attachment 1 to the letter from Davis Robinson, Agent of the United States of America, to the Registrar dated 27 February 1984) (hereinafter Letter of 27 February 1984). One of those permits was issued in 1967 (E3-67), three in 1968 (E1-68A, E2-68, E3-68B), one in 1969 (E4-69), one in 1970 (E1-70) and two in 1971 (E1-71 and E2-71). Close to 4,000 line-miles of exploration were conducted under those eight permits.

The other six permits authorized exploration in the area prior to 1972, but did not result in exploration being conducted for a variety of reasons unrelated to any purported Canadian claim to the area. One of these permits was issued in 1965 (E1-65), two in 1966 (E1-66 and E5-66), one in 1967 (E1-67), and two in 1969 (E2-69 and E3-69) (Attachment 2 to Letter of 27 February 1984).

Copies of the documentation that constitute each of these 14 permits have been provided to the Court and to the Agent for Canada (Enclosures 5-12 and 46-51 of Letter of 9 April 1984).

The United States submits that the issuance of these 14 permits, even though no exploration was conducted under six of them, demonstrates that the United States did not acquiesce in any purported Canadian claim to the northeastern portion of Georges Bank during the period selected by Canada, that is, between 1965 and 1972.

Canada claims that United States oil companies and the United States Department of the Interior assumed that an equidistant or median-line boundary was appropriate for Georges Bank and acted upon that assumption. In this regard Canada refers to a number of permits issued between 1969 and 1975 to support its claim that all permits were sought and approved with reference either to a so-called "BLM line" or to a so-called "company median line".

The 14 permits that the United States issued between 1965 and 1972 clearly indicate that neither the United States oil companies nor the Department of the Interior accepted or assumed any equidistant boundary line on Georges Bank during that period.

Nonetheless, in order to clarify and correct the record of these matters before the Chamber, the United States has reviewed the documentation relating to United States permits (Enclosure 1 to Letter of 27 February 1984). That review revealed only that the companies requesting permits either considered the northeastern portion of Georges Bank to be subject to the jurisdiction of the United States or, at most, to be in dispute between the United States and Canada. In each instance, the United States geological survey approved the issuance of a permit covering the northeastern portion of Georges Bank notwithstanding any Canadian claim to that area. Moreover, with respect to those permits that extended to that area, but under which no operations were conducted, the reasons proffered for cancellation of operations related to weather conditions or environmental concerns and not to any concern for any purported Canadian claim (Enclosures 46-52 to Letter of 9 April 1984).

During its oral presentation (pp. 152-154, *supra*), Canada suggested that there was some significance to the fact that some of the exploration conducted on the northeastern portion of Georges Bank was conducted pursuant to authority requested by the oil companies as extensions to earlier requests. Initially, the

United States submits that whether exploration was authorized or conducted in the area pursuant to an original request, or pursuant to an extension under such original request, is irrelevant. What is relevant is simply whether the United States authorized such activities.

Moreover, in each of the instances discussed by Canada, the companies sought authorization for further activity on the northeastern portion of Georges Bank, and the Department of the Interior granted it, and, in most instances, the exploration was in fact conducted. For example, this was true in regard to Digicon's 1972 permit (E2-72), discussed by Canada in its oral presentation (see (218) Figure 77 of Canada's oral presentation).

Canada also relies upon a reference by an employee of the United States Department of the Interior to the so-called "BLM line", in correspondence relating to a 1969 permit, E2-69, to establish that the Department of the Interior assumed an equidistance boundary. This reference is found in a memorandum designated as "Attachment V" in the file of that permit (Enclosure 50 to Letter of 9 April 1984).

At the outset, it is important to note that the application for permit E2-69 requested authority to conduct geophysical exploration in an area extending northward from "Cape Henlopen" – in Delaware – "to Cape Sable" – in Maine. Attached to the permit application was a map with numbered "pre-plot" lines, two of which extended beyond either of the Canadian equidistant lines across Georges Bank.

For the information of the Chamber, pre-plot lines are lines depicting the actual location of the proposed exploration surveys. Post-plot lines depict the location of the geophysical survey after they have actually been conducted.

In the end, permit E2-69 was issued for the entire area requested, and was not restricted in terms of any median line, or even in terms of the "pre-plot" lines designated on the application for the permit.

Although operations under this permit were suspended prior to reaching the northeastern portion of Georges Bank, the very same memorandum that refers to the so-called "BLM line" indicates that those operations were suspended due to weather conditions – not because of any concern for, much less acquiescence in, any Canadian median line.

Nonetheless, in paragraph 238 of its Reply, Canada contends that the reference to the "BLM line" in Attachment V evidences United States acquiescence in Canadian permits. Attachment V states that portions of the two lines "extend to the Canadian side of the BLM line". The memorandum bore the initials of Harry A. Dupont, an employee of the Department of the Interior, who was responsible from the latter part of 1967 until 1977 for the review and issuance of permits to conduct geophysical exploration on the "outer continental shelf" off the east coast of the United States.

In the course of our recent review, we discovered two additional references to the so-called "BLM line". These references are two pencilled notations containing the words, "Point on the BLM line" (Enclosure 100 to Letter of 9 April 1984). According to Mr. Dupont, he also made these two pencilled notations.

These two notations appear on a pre-plot map accompanying an application for a permit by the same company that obtained permit E2-69, which I have just discussed. The second application, for permit E3-69, was made at about the same time as the application for E2-69, and covered the same general area as that earlier permit.

These three references are the sole references to a "BLM line" that have been found in the voluminous material relating to United States exploration permits issued in relation to the northeastern portion of Georges Bank.

Mr. Dupont recalls that these three isolated references to a "BLM line" were nothing more than his personal abbreviated description of the limits of the permits issued by Canada on Georges Bank, as described to Mr. Dupont by the Bureau of Land Management. He states that these references did not connote that, in any respect, he accepted a median line as an appropriate boundary. As I have already noted, the seismic survey lines he specifically approved in regard to permit E2-69 covered all the areas requested and extended well beyond any median line (Attachment 4 to Letter of 27 February 1984).

Mr. Dupont confirms that the reason for his three references, or notations, was simply his noting the limit of Canadian permits on Georges Bank and his awareness that he was issuing United States permits for an area covered by Canada's permits (Attachment 4 to Letter of 27 February 1984). According to Mr. Dupont, a median line was never an influence in his granting of permits for exploration of any part of Georges Bank, or the Gulf of Maine basin.

Canada, not surprisingly, has sought to discredit Mr. Dupont's account of the history and meaning of the so-called "BLM line". We shall briefly respond to Canada's objections.

Initially, we wish to note that we have been unable to discover any map actually depicting the so-called "BLM line" in the original records of the (167) Department of the Interior. Indeed, as the caption to Figure 21 of Canada's Reply makes clear, the so-called "BLM line" appearing on a number of Canadian graphics apparently is derived from a number of unspecified docu- (167) ments. Neither Figure 21 nor the Figures used by Canada in its oral presentation make clear, however, that the line shown 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.

In the end, both the so-called BLM line, to the extent that it existed, and the company median lines, were merely lines used to identify the area of the Canada permits on Georges Bank, not the acceptance of any purported claim by either the Department of the Interior or United States oil companies.

Now the United States will turn briefly to Canada's criticism of Mr. Dupont. Canada appears to be amazed at the presumption of Mr. Dupont that any maritime boundary "would have taken advantage of the Northeast Channel beyond Georges Bank", because Mr. Dupont's presumption purportedly predated what Canada characterizes as the "Northeast Channel tactic" of the State Department.

In the first place, the correspondence upon which Canada has focused occurred within the first six months of 1969. If the Chamber will recall, on 10 May 1968, the United States, in a diplomatic communication to Canada, put Canada on notice of the objections to its permit activities on Georges Bank.

Secondly, Mr. Dupont's presumption is not at all remarkable. As the oil and gas supervisor for the eastern region of the Conservation Division of the Geological Survey, Mr. Dupont was familiar with the sea-bed in the Gulf of Maine area, including the Northeast Channel, not as a "tactician" but as a working geological technician.

To Mr. Dupont, Georges Bank was defined, as Canada itself has acknowledged, by the Northeast Channel. Moreover, Mr. Dupont granted a number of permits for geophysical operations throughout Georges Bank. We might recall in this regard the Truman Proclamation and the long-standing description of the continental shelf of the United States extending to the 100-fathom-depth contour.

Canada has also attacked Mr. Dupont's memory, in particular his statement that he never considered any median line between the United States and Canada

to be a boundary. Canada bases its criticism of Mr. Dupont upon a letter written by him in 1974 responding to an inquiry from the United States Department of State regarding United States permit activity on Georges Bank.

In that letter, Mr. Dupont asserted that Digicon had permission to run a survey line in 1974 under permit E1-74, which was described "to be in the Georges Bank area and to the east (on the Canadian side) of the median line between the United States and Canada" (Canadian Reply, Anns., Vol. II, p. 620). Canada contends that the statement by Mr. Dupont is evidence that Mr. Dupont considered this median line to be a boundary.

Canada, however, neglects two important considerations. First, the statement itself reflects nothing more than Mr. Dupont's awareness of the fact that Canada had issued permits along the median line between the two States, and that Digicon had proposed to conduct operations beyond that line. Second, Mr. Dupont approved E1-74 and Digicon's requested extension under that permit beyond any median line. Indeed, the proposed survey line across the northeast portion of Georges Bank, as well as several others, subsequently were run under that permit beyond any median line (Enclosure 70 to Letter of 9 April 1984).

It is clear that neither the United States oil companies in applying for permits, nor the Department of the Interior, in granting them, assumed an equidistant boundary on Georges Bank.

C. The Official upon Whose Conduct the Claims of Acquiescence and Estoppel Are Founded Did not Have the Authority to Bind the State

This brings us to Canada's response to what it identifies as the third main argument of the United States – that the official upon whose conduct the claim of acquiescence and estoppel is founded must have the authority to bind the State. Canada argues that the requirement of such authority is an invention of the law of acquiescence and a mis-statement in the law of estoppel (Canadian Reply, para. 221).

Even more extraordinary is the assertion raised in Professor Brownlie's presentation to the effect that the authority of the official whose conduct is said to have bound the State is immaterial in that the law treats governments as integral units, with "no curtains . . . drawn between different departments of government or between senior and junior officials" (p. 132, *supra*). The United States would only ask does he, in fact, seriously contend that a relatively minor United States official can bind the entire United States Government?

Under international law, the official whose conduct is in question must have either express or implied authority to bind his State (United States Counter-Memorial, para. 243). Thus, Canada's assertion that, "[I]n the context of official correspondence, the presumption is that each official has the appropriate authority and speaks for the Government concerned . . ." (Canadian Memorial, para. 418) is without support. As the United States has demonstrated in its Counter-Memorial, international law recognizes no such presumption.

In this regard, Canada's reliance upon the *Russian Indemnity* (*Hague Ct. Rep.* (Scott), 1916, p. 297) and *Yukon Lumber* (*R. Int'l. Arb. Awards* (United Nations Series), Vol. VI, p. 17) cases is misplaced. The decisions in those cases confirm the requirement to establish the authority of an official to bind his government (United States Counter-Memorial, paras. 244-247).

As the decisions in the cases of the *Legal Status of Eastern Greenland* (*1933, P.C.I.J., Series A/B*, No. 53, p. 22) and the *Arbitral Award Made by the King of Spain on 23 December 1906* (*I.C.J. Reports 1960*, p. 192) illustrate, in determining whether an official has authority to bind his State – authority which is the

sine qua non of acquiescence – the official's level and area of substantive responsibility are also important considerations.

Canada's position in this case bears no resemblance whatsoever to those cases. There is absolutely no basis, in the circumstances of this case, for Canada's claimed inference of Mr. Hoffman's authority to bind the United States in a boundary matter.

In this regard, Canada has cited a recent notice published by the United States Department of the Interior regarding the recovery of mineral resources on the sea-bed off the Pacific coast as evidence of the purported authority of the Department of the Interior to determine the limits of jurisdiction for the United States (Canadian Reply, paras. 226-228). As Canada well knows, and as has been demonstrated recently in regard to those very events, the Department of the Interior has no authority to determine the limits of United States jurisdiction internationally.

Canada did, indeed, protest that notice – not to the Department of the Interior, but to the Department of State. Even before that protest, however, the Department of State had already initiated action to cause the Department of the Interior to rescind the objectionable aspects of the notice.

These events thus confirm that the Department of State – not the Department of the Interior – is responsible for the foreign relations of the United States, including matters pertaining to its maritime boundaries.

Quite apart from the lack of authority of the Department of the Interior in matters relating to territorial or jurisdictional claims, it was unreasonable for Canada to expect that a person in Mr. Hoffman's position could bind the United States in such a sensitive and important matter as the delimitation of the continental shelf. As we have previously demonstrated, other matters of this nature were discussed at the very highest level of diplomacy (see, e.g., United States Reply, Ann. 2).

With respect to the matter before us, however, Mr. Hoffman worked for one division, the Bureau of Land Management, within the Department of the Interior. Even within that division, he occupied a position that was six administrative levels below the level of authority that the Court in other cases has found sufficient to be binding upon the State involved (United States Counter-Memorial, paras. 277-278). Moreover, as we previously noted, Mr. Hoffman explained in his letter of 14 May 1965, in express terms, that his Bureau had no authority to undertake the negotiation of a boundary position for the United States.

D. The Acquiescence of the United States Was Not of Sufficient Duration

The United States will now turn to Canada's response to the fourth of what Canada has characterized as the five main arguments of the United States, that the purported acquiescence of the United States during the mid-1960s was not of a sufficient duration to establish acquiescence. As the United States demonstrated in its Counter-Memorial, acquiescence and estoppel can apply only after the passage of a substantial period of time. Canada argues that the requirement of a passage of a substantial period of time is another invention of the United States and that a failure to protest "even in the short run" may be sufficient (Canadian Memorial, para. 414; Reply, para. 229).

The length of time necessary for acquiescence to take effect, the commentators generally agree, varies with the facts of a given case (United States Counter-Memorial, paras. 252-253). As the United States demonstrated in its Counter-Memorial, there is substantial agreement, however, that acquiescence based upon tacit acceptance requires the passage of a substantial period of time.

Those cases suggest that silence or lack of protest for a comparatively short time is simply not sufficient to establish acquiescence in cases involving claims of sovereignty over territory or of jurisdiction for maritime purposes.

Thus, in the *Fisheries* case the period was 60 years. In the *Temple of Preah Vihear* case it was more than 50 years. In the *Island of Palmas* case it was over 200 years, and in the *Alaskan Boundary Dispute* case it was over 60 years.

Nor is this surprising. There may be many reasons for a brief period of silence other than acquiescence in a purported claim, such as an act of political restraint (*Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, pp. 200-201). It is clear that peaceful international relations would not be well served if every instance of temporary silence were susceptible to the drastic consequences of acquiescence.

Only 14 months passed from Mr. Hoffman's initial expression of concern – in 1965 – until the matter entered diplomatic channels in August of 1966. It was at that time that the United States enquired of Canada concerning Canada's offshore oil and gas programme (United States Memorial, Ann. 54, Vol. IV).

The Canadian response of 30 August 1966 was the first Canadian correspondence involving the Gulf of Maine to be transmitted through appropriate and normal diplomatic channels *(ibid.)*.

Only 21 months passed between the time the matter entered diplomatic channels, in August of 1966, and this formal United States response of 1968.

Thus, in an aide-mémoire dated 10 May 1968, the United States called for a moratorium on all United States and Canadian oil and gas activities on Georges Bank until the boundary in that area could be settled (United States Memorial, Ann. 55, Vol. IV).

This aide-mémoire was a formal written communication to Canada, transmitted through appropriate diplomatic channels. It expressly requested consultation with Canada in order to "delineate the boundary between the United States and Canada on the continental shelf in the Gulf of Maine area . . .".

The periods in question, anywhere from 14 months to three years, are to be compared to the 60 years that passed in the *Fisheries* case, so heavily relied upon by Canada, and to similar, or even longer periods found in other cases cited in the Canadian Memorial and in the United States Counter-Memorial. Such a comparison demonstrates that any allegation that the United States silence constituted acquiescence is misguided and premature.

The Chamber adjourned from 16.12 p.m. to 16.38 p.m.

Just before the break, the United States had demonstrated that the length of time of any purported acquiescence is an important if not critical element in relation to claims to sovereign territory or maritime jurisdiction.

Professor Sperduti has clearly stated the considerations underlying the requirement for passage of time in these kinds of cases:

> "[A] situation arising from the *de facto* exercise of a right which is by its very nature of long duration, like the right of territorial sovereignty, will normally require a much longer period for consolidation than that which might be necessary to legitimize a situation arising from [a] one-time violation of a subjective right as, for instance, the [unlawful] expropriation of the property of foreign subjects." (United States Counter-Memorial, Ann. 33, p. 17, of translation.)

With respect to this passage of time, just to conclude our argument on this point, we would note that only 14 months passed from Mr. Hoffman's initial

expression of concern – in 1965 – until the matter entered diplomatic channels in August of 1966. Only 21 months passed between that time and the time in August of 1968 when the matter entered into formal diplomatic consultations regarding the delimitation of the boundary.

The periods in question – anywhere from 14 months to three years – as I have indicated before, are to be compared to the periods of 50, 60, or even 200 years found in the cases that are discussed in regard to this point in the pleadings of both Parties.

E. Canada Did Not Rely to Its Detriment Upon the Acquiescence of the United States or Inaction

The United States will now turn to Canada's response to what it characterizes as the fifth main argument of the United States: that Canada did not rely upon the purported acquiescence of the United States.

The *Temple of Preah Vihear, Merits, Judgment* case *(I.C.J. Reports 1962)* and the *North Sea Continental Shelf, Judgment* case *(I.C.J. Reports 1969)* illustrate that a change in the relative position of the States involved must be shown in support of a claim to estoppel.

Canada first argues that it acted to create legal relationships in reliance upon the purported acquiescence of the United States. Many, if not most, of the Canadian oil and gas permits on Georges Bank, however, were issued before Mr. Hoffman initiated his correspondence. Canada began to issue the permits for the northeastern portion of Georges Bank up to an equidistant line on 20 May 1964, a year before Mr. Hoffman even wrote to Mr. Hunt enquiring about Canadian activities (Canadian Memorial, para. 204). Indeed, Canada asserts that it had already issued the permits that straddled this equidistant line by the beginning of 1965, months before Mr. Hoffman wrote his letter to Canada enquiring about Canadian activities (*ibid.*, para. 205). Accordingly, there is no basis for Canada's assertion that:

> "The Canadian Government for a substantial period was placed in the position of assuming a rightful power to create legal relationships with Canadian and foreign persons and corporations by the grant of permits." (*Ibid.*, para. 424.)

Canada proceeds to argue that it suffered detriment in that it was placed in a position of "disarmament" as a result of the alleged acceptance of the equidistant or median line by the United States. Canada contends that, to protect its legal position, it took only those positive and public steps that were appropriate in the absence of any protest by the United States to its purported claim. This ignores Canada's failure to take the positive and public step that would have avoided entirely the misunderstanding in this case. Following the standard practice, Canada in 1964 and 1965 could have and should have notified the United States, through diplomatic channels, of its claim, or at least notified us of its proposed activities. Failing that, Canada could have and should have responded to the information that Mr. Hoffman gave to Mr. Hunt concerning possible exploration permits that the United States had issued at that time for the northeastern portion of Georges Bank.

Thus, the very correspondence upon which Canada relies to show that the United States was aware of Canadian permits demonstrates that Canada was, or should have been, aware of United States exploration activities. In response to Mr. Hunt's enquiry regarding leasing off the east coast of the United States, Mr. Hoffman, in his letter of 14 May 1965, informed Mr. Hunt that no federal leases

had been issued on the outer continental shelf off the east coast of the United States. However, Mr. Hoffman added that "certain seismic permits had been issued" (United States Memorial, Ann. 53). In contrast to Mr. Hoffman's request for additional information regarding Canadian permits, neither Mr. Hunt nor any other Canadian official requested further information from the United States Government after Mr. Hoffman had informed those Canadian officials about possible United States activities.

Had Canada followed through on the information provided by Mr. Hoffman, as Mr. Hoffman had followed through on the information provided by Canada, Canada would have identified United States permits, like permit E1-65, that authorized exploration on the northeastern portion of Georges Bank, and could have lodged at that time a protest. Canada did not take this action. Canada, instead, took no exception to the permits that the United States issued between 1965 and 1970.

Whatever the detriment or benefit alleged – that is whatever the change in the relative position of the two States – estoppel must rest upon the principle of good faith.

Viewed in light of the circumstances that I have just described, Canada's claim stands in clear contravention of the requirement that estoppel ultimately be based on good faith.

The Continental Shelf Activities of the United States Provide no Indicia that an Equidistant Boundary in the Gulf of Maine Area is Equitable

The United States will now turn to Canada's argument that the conduct of the United States oil companies and the Department of the Interior concerning exploration permits furnishes indicia that the United States viewed an equidistance boundary in the area as equitable under the criteria identified in the *Tunisia/Libya* case. As a comparison of the two cases demonstrates, the conduct that the Court found to be indicia of the line or lines the Parties viewed as equitable in that case is not comparable to the conduct of the Parties in this case.

The conduct that the Court relied upon in the *Tunisia/Libya* case consisted in the first instance of a line developed by Italy to regulate sponge fishing in the area seaward of Libya's land boundary. Italy proposed a line drawn perpendicular to what was considered to be the direction of the coastline at the land boundary between the two countries (*I.C.J. Reports 1982*, para. 93). The Court noted during oral proceedings that both Parties recognized that a *de facto* compromise or provisional solution had been achieved by means of the line that the Court had found had "operated for a long time without incident and without protest from any side" (*ibid.*, para. 94). The Court described this *de facto* compromise as "tacit *modus vivendi*" (*ibid.*, para. 95).

The other conduct the Court found to be evidence of indicia of the view of the Parties was the tacit respect the Parties afforded, for a number of years, to a line drawn generally perpendicular to the coast from the land boundary, the 26° line, in granting petroleum concessions in the area in dispute (*ibid.*, paras. 96, 117). The critical fact in the *Tunisia/Libya* case was that both Parties had used the 26° line as the limit of oil and gas concessions. Moreover, Tunisia was the first to do so. Because of this circumstance, which is totally absent from the Gulf of Maine case, the Court in the *Tunisia/Libya* case was able to describe that 26° line as a *de facto* maritime limit that constituted a circumstance of great relevance for the delimitation (*ibid.*, paras. 96, 118).

The Court also noted that the *de facto* oil concession line was neither arbitrary nor without precedent, referring not only to the earlier *modus vivendi* fishery

delimitation between the Parties, but also to the recognition that the Committee of Experts for the International Law Commission in 1953 gave to the continuation of the land frontier and to the perpendicular to the coast as methods to delimit the boundary (*ibid.*, para. 119).

The Court, however, rejected two other lines proposed by the Parties: a fishery boundary unilaterally advanced by Tunisia and a line unilaterally asserted by Libya as the limits of its petroleum zones (*ibid.*, para. 117). The Court held that the fishery line upon which Tunisia relied, the ZV45° line, was a purely internal legislative measure which was never the subject of agreement by Libya.

Similarly the Court concluded that the Libyan petroleum development line was also a purely internal legislative measure and could not be considered even as a unilateral claim for maritime lateral boundaries with Tunisia.

As the United States demonstrated earlier, the conduct of the United States oil companies, in applying for exploration permits, and that of the Department of the Interior, in issuing those permits, contradicts any notion that the United States viewed the equidistance line as equitable or acted upon such a view. This conduct demonstrates that in the Gulf of Maine area there is no single line relating to geophysical exploration comparable to either the *de facto* compromise or provisional solution used by Italy to govern sponge fishing or to the *de facto* line, the 26° line, that both Libya and Tunisia tacitly respected in granting oil and gas concessions over a number of years.

Rather, the equidistance line that Canada used in granting its permits in the 1960s more closely resembles the ZV45° line proposed by Tunisia and the "due north line" asserted by Libya, both of which the Court in the *Tunisia/Libya* case refused to take into account. Indeed, as previously noted, the Canadian line, like the Libyan "due north line" was promulgated by purely internal administrative acts, intended only to identify domestic zones for petroleum exploration activities. As the Court in *Tunisia/Libya* found with regard to that Libyan line, so too, the Canadian permits in this case do not constitute a claim at the international level.

The conduct of the United States in issuing permits refutes rather than confirms the existence of a *modus vivendi* or *de facto* maritime limit respected by both Parties. Whereas United States companies and the Department of the Interior may occasionally have acknowledged that Canada purported to assert a claim to the northeastern portion of Georges Bank, they in fact ignored that claim. Thus, the United States companies requested authorization to conduct exploration on the northeastern portion of Georges Bank and the Department of the Interior granted that authority, irrespective of any Canadian claim.

The United States has shown that its continental shelf activities are consistent with the single maritime boundary it has proposed. In this respect the United States has shown that the facts and the relevant law clearly establish that the United States did not acquiesce in Canada's alleged sovereign rights in Georges Bank and that the United States is not now estopped from contesting Canada's equidistant boundary.

The United States has further shown that the same facts refute the existence of a *modus vivendi* or *de facto* maritime limit and that the conduct of the United States contradicts the view that the United States regarded Canada's alleged assertion of rights to the northeast portion of Georges Bank as equitable.

ARGUMENT OF MR. FELDMAN

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. FELDMAN: Mr. President, distinguished Judges, I am honoured to have the opportunity to come before you a second time, and I would like to take this opportunity to thank Mr. Ray A. Meyer and Dr. Jonathan T. Olsson for the contributions they have made to this presentation.

My responsibility today is to present the views of the United States concerning the argument made by Canada that certain communities of southwest Nova Scotia are in a condition of "special" economic dependence upon the fisheries of Georges Bank. Canada argues that this condition justifies a maritime boundary which will terminate the important fishery that the United States has maintained on the northeast portion of Georges Bank for the better part of two centuries.

Contrary to what Canada implies, there is no way the Chamber can preserve the fisheries of both Parties by dividing Georges Bank. The inescapable fact is that the fishermen of both countries are fishing in the same space and frequently for the same stocks of fish.

In this presentation, the United States will address the socio-economic arguments put forward by Canada. We will demonstrate that Canada's theories are both inconsistent with international law and unsupported by the facts. The truth is, Mr. President, that the picture Canada has painted of the economic structure of Nova Scotia bears little resemblance to the actual state of things in that province.

Ambassador Legault explained to the Chamber last week that Canada's socio-economic argument has three distinct dimensions: first, Canada's presence on Georges Bank; second, Canada's claim that southwest Nova Scotia is in a condition of "special" economic dependence on the fisheries of Georges Bank; and third, the comparison Canada asks the Chamber to make between "the relative degree of impact that the boundary could have on the economic life of each party". Canada often confuses these three concepts in its pleadings, and the United States believes it is crucial that the distinctions among them be fully understood if the Chamber is to appreciate the implications of the argument Canada is making in this case.

By fishing presence, the United States understands the activity of nationals of both Parties engaged in the harvesting of fish in the disputed area of Georges Bank. Economic dependence, as the United States understands the phrase, is a very different concept. Economic dependence involves two elements: first, the importance of the activity as measured by employment or income or both, and, second, the extent to which economic alternatives are available at the present time and in the future. The second element is essential because present dependence is reduced to the extent there are reasonable alternatives today, and future dependence is reduced, or eliminated, to the extent the economy is able to absorb the loss of the activity in the future. Further, it is important to note that Canada asserts a "special economic dependence" (p. 91, *supra*), which implies an acute reliance on the disputed fishery for economic development. Canada does so because that was the situation of Iceland that the Court concluded was relevant in the particular circumstances of the *Fisheries Jurisdiction* case.

Finally, the third concept, "the relative degree of impact" on the Parties

implies a comparison of economic opportunities in the territories of the two Parties that we regard as indistinguishable from the argument of relative wealth that Canada denies making in this case.

Contrary to what Canada sometimes tells the Chamber, the United States does not maintain that all economic considerations are irrelevant to the delimitation of a single maritime boundary. However, we make a sharp distinction between fishing activities on the one hand and economic dependence and relative economic impact on the other hand. We know that Canada conducts a fishery on the Georges Bank and we have never said that fishery is irrelevant. As Mr. Lancaster emphasized in his presentation, the United States position is that all the fishing activities of both Parties in the area both past and present are relevant circumstances that should be balanced up by the Chamber.

Mr. Lancaster has presented the statistics on the American fisheries on Georges Bank and there is no need for me to repeat that material today.

I will now turn to Canada's claim of special economic dependence. In the final part of this presentation we will comment on Canada's argument of relative economic impacts.

Mr. President, the main thrust of Canada's socio-economic argument is the assertion that a number of small towns in five counties of southwest Nova Scotia are in a condition of "special" economic dependence on the fisheries of Georges Bank. The United States will demonstrate that this contention is both irrelevant as a matter of law and unsupported by the facts. First, we will discuss the law.

Canada invokes the *Grisbadarna* case (*Hague Ct. Rep.* (Scott), 1916, p. 121), the *Fisheries* case (*I.C.J. Reports 1951*, p. 116) and the *Fisheries Jurisdiction* cases (*I.C.J. Reports 1974*) in support of its position that economic dependence is legally relevant to the boundary delimitation. I will discuss each of these cases in turn.

The United States agrees that the *Grisbadarna* decision is an important precedent. It is the only case involving lateral boundary delimitation where fisheries interests were at the heart of the dispute. As the United States has pointed out in its pleadings, this case stands for the following three propositions:

(1) maritime territory is an essential appurtenance of the land territory;
(2) this relationship is best expressed, not by an equidistant line, but by a line perpendicular to the general direction of the coasts of the two countries in the vicinity of the land frontier; and
(3) fishing banks exploited by two States should not be divided, but should be attributed to that State whose fishermen have fished the area "a much longer time, to a much larger extent, and by a much larger number" (II, United States Memorial, paras. 179-180).

Contrary to Canada's assertion, the Tribunal did not examine the economic dependence of the two countries on the fishery at issue. There was no discussion in the judgment of the economic impact of the loss of the fishery to either party.

The United States also agrees that the *Fisheries* case has some relevance to this dispute. While that case did not involve the delimitation of maritime jurisdiction between adjacent or opposite States, it did involve the delimitation of coastal State jurisdiction with consequences for the established fisheries of other States. In that case the International Court of Justice concluded that Norway was justified in defining its territorial sea by reference to straight baselines and in excluding British fishermen from that area even though they had fished there for more than 40 years.

There were two principal grounds for the decision. First, the Court concluded that straight baselines were justified by the geographic circumstances of the case,

and the Court's statement of the controlling geographic criteria were later adopted in the Treaties on the Law of the Sea. Second, the Court concluded that the United Kingdom was estopped from protesting the use of straight baselines, because it had acquiesced in the Norwegian straight baseline system for at least 60 years (*Fisheries, I.C.J. Reports 1951*, p. 138). The Court did make a reference to "economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" (*ibid.*, p. 133). This was not a necessary ground for the decision. In view of the importance the Court attached to the geography of the coast and to estoppel, this case cannot be said to support the legal relevance of economic dependence in the very different context of lateral maritime boundary delimitation.

Moreover, the Court recognized that Norway had fished these waters from time immemorial and it gave weight to traditional "rights founded on the vital needs of the population and attested by very ancient and peaceful usage" (*ibid.*, p. 142). Canada has no such "vital need" or "ancient usage".

In fact, in our view, Canada's position is more akin to that of the United Kingdom than to Norway in the *Fisheries* case. The Court favoured the long-term interests of Norway over the 40-year fishery of the United Kingdom in that case.

The *Fisheries Jurisdiction* case is another matter entirely. In that case, the Court held that Iceland could not oppose its extended fishery jurisdiction as against the United Kingdom or the Federal Republic of Germany but the Court recognized the extraordinary dependence of Iceland on the high seas fisheries near its coast and concluded that the Parties had a duty to negotiate an equitable apportionment of the fishery resources, taking account of Iceland's preferential rights. As pointed out in the United States Counter-Memorial (IV) (paras. 174-175), the concept of preferential rights has been overtaken by the recognition of 200-nautical-mile exclusive fishery zones.

The *Fisheries Jurisdiction* case was the Court's response to the need, in the absence of coastal State jurisdiction, for conservation of high seas resources important to several nations. Those fisheries were common resources, and the Court concluded that if limitations were necessary to protect the stocks, the catch should be apportioned by the Parties. In this case, the Chamber is not addressing resources of the high seas available to all. The resources here fall under the exclusive jurisdiction of the Coastal State. The issue here is not apportionment of resources: it is the delimitation of jurisdiction.

The United States respectfully submits that there is no legal authority that would support a delimitation of exclusive fisheries zones based on economic dependence. In delimitation cases, such as the *Grisbadarna* and the *Fisheries*, the Courts have favoured the Party having the predominant use of the resources over a long period. In this case, Canada's recent and limited fishing on Georges Bank is completely outweighed by the historic American fishery throughout the Bank.

Mr. Stevenson has also pointed out that the Court in the *Tunisia/Libya* case excluded both economic dependence and relative wealth as factors extraneous to delimitation. In that case, Tunisia made both arguments. First, it urged the Court to take account of the fact that it needed the hydrocarbon resources of the area more than its oil-rich neighbour. Second, it argued that the fisheries resources, which it had exploited from time immemorial, were a necessary supplement to its "economy in eking out its survival as a country" (*I.C.J. Reports 1982*, para. 106). The Court rejected both contentions. It stated:

> "that these economic considerations cannot be taken into account for the delimitation ... They are virtually extraneous factors since they are

> variables which unpredictable national fortune or calamity . . . might at any time cause to tilt the scale one way or another. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource." (*Ibid.*, para. 107.)

Canada attempts to escape the force of the Court's holding in the *Tunisia/Libya* case in two ways. Canada argues first that a new law of delimitation, founded upon the basis of title to 200-nautical-mile zones, has superseded the traditional law of delimitation. Second, Canada seems to think that because it makes its argument based on regional dependence, instead of on national dependence, the holding of the Court in *Tunisia/Libya* does not apply.

The first argument leads Canada to conclude that

> "The economic dependence of a coastal State upon an area of the sea adjacent to its coast should be given a particular weight . . . The economic interests and dependence of the present and future population are central to the entire legal issue . . ." (**III**, Counter-Memorial, para. 580).

The logic of this position, Mr. President, 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. Canada asserts that this logic is consistent with the basis of coastal State title to the exclusive economic zone and with the purpose of the zone. Nothing could be further from the truth. The existence of the coast, regardless of economic exploitation by any State, is the sole basis for recognition of exclusive jurisdictional rights in the 200-nautical-mile zone.

The second argument Canada makes in its attempt to avoid application of the Court's ruling in the *Tunisia/Libya* case is an argument of scale. Canada argues in effect that because it is focusing on a small subregion of Canada, southwest Nova Scotia, instead of the entire nation, the Court's reasoning does not apply. But how can this be so? The Court said in the *Tunisia/Libya* case that economic dependence was not to be taken into account in the delimitation because "a country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable resource" (*I.C.J. Reports 1982*, para. 107). It said that "unpredictable national fortune or calamity might at any time cause to tilt the scale one way or another" *(ibid.)*.

Does this reasoning lose any of its force or cogency if the words "region" or "regional" are substituted for the words "country" or "national"? Of course not. In fact, a regional economy is subject to even greater swings from poverty to wealth. The discovery of natural gas off Sable Island, Nova Scotia, for example, though an event of minor importance to the Canadian economy as a whole, is of major importance to Nova Scotia.

Canada argues that the subregional level is the proper level for analysis because that is where the supposed impacts will be concentrated (p. 100, *supra*). In the submission of the United States, the relevant economy for the measure of dependence is the economy that will respond to the impact. The economy that will respond to the impacts in this case is not southwest Nova Scotia. It is the whole province, and all of Canada.

The national Government of Canada is deeply involved in the Atlantic fishing industry, including the fishing industry of southwest Nova Scotia. Hundreds of millions of dollars have been directed to strengthen and to shape that industry.

Canada also cites the Anglo-Norwegian *Fisheries* case for the point that regional economic dependence is legally significant (**V**, Reply, para. 300). The United States has just reviewed the controlling circumstances present in the

Fisheries case that are absent here, and we explained why that case does not support Canada's argument as a matter of law. Moreover, the facts of the two cases are entirely different.

Indeed, if we examine the coasts of Norway involved in the *Fisheries* case, shown in Figure 52 of your map book, we can see that the straight baselines protested by the United Kingdom extended across about one-half of Norway's coast. These are the baselines north of the Arctic Circle shown as the upper portion of this chart submitted by Norway as part of its pleadings. In contrast, Canada invokes the alleged dependence of a small portion of the coast of one province, a tiny fraction of the coastline of Canada. Further, at the time of the *Fisheries* case, 70 to 80 per cent of the adult male population in the affected area of Norway was employed in fishing (United States Counter-Memorial, Ann. 4, para. 17, fn. 6). In the case of Nova Scotia, 0.4 per cent of the workforce is directly employed by the Georges Bank fishery (*ibid.*, Ann. 4, Fig. 8).

Canada also invokes the *Fisheries Jurisdiction* case as authority for the legal relevance of the economic dependence "of whole communities" (p. 100, *supra*). We have explained why the United States believes that case has no relevance to the delimitation of maritime boundaries between neighbouring States.

The United States further submits that the *Fisheries Jurisdiction* case cannot be invoked to support the legal relevance of economic dependence at the regional level. Once again, the facts in this case do not begin to resemble the facts in the *Fisheries Jurisdiction* case.

In the *Fisheries Jurisdiction* case it was agreed by the Parties that Iceland was in an "exceptional" situation of dependence on the high seas fisheries at issue in that case. In fact, the Court took judicial notice of the "exceptional dependence of the Icelandic nation upon coastal fisheries" for its livelihood and for economic development (para. 44). Further, it was noted that Iceland's situation was "unique in the world" in terms of the "absolute dependence of a State on fisheries" (*I.C.J. Reports 1973*, diss. op., Gros, para. 31).

In these circumstances, it would be surprising if Canada could equate its situtation with that of Iceland, and the facts, Mr. President, do not contain any such surprise. As one can see in Figure 53 of your book, which is before you, in 1973 Iceland was dependent on the fisheries for 12.5 per cent of its national employment. The corresponding figure for Canada's dependence on fisheries is miniscule. In 1978 Canadian employment directly related to fishing and fish processing was four-tenths of 1 per cent – 31 times smaller. This figure includes all Canadian fishing and processing on both coasts. The employment generated by Canada's Georges Bank fishery in 1980 amounted to about one one-hundredth of 1 per cent of total Canadian employment in that year if the estimates calculated by the United States are used, that is one one-hundredth of 1 per cent. And to about double that if Canada's estimates are used. Similarly, as shown in Figure 54 of your book, which will shortly be on the easel before you, Iceland was dependent on fisheries for 73.7 per cent of its export trade in 1973. Export of fish and fish products represented only 1.4 per cent of all Canadian exports in 1978. Thus, the *Fisheries Jurisdiction* case does not support Canada's argument. The United States believes it proves that Canada is not in a condition of special economic dependence upon the fisheries of Georges Bank.

Mr. President, there is another important issue of scale involved in the Court's holding in the *Tunisia/Libya* case. That is the issue of temporal scale. The Court uses the terms "at any time", "today" and "tomorrow" in its holding. Clearly, the Court was cognizant of the fact that the economic fortunes of nations and regions change unpredictably over time. The Court was clearly looking at the

broad sweep of time which is appropriate in the context of boundary delimitation, since boundaries are long-term features of the political landscape.

Canada, however, restricts the temporal scale in which the Chamber would be called upon to assess economic impacts. Canada has continually equated the current level of dependence with the impact that will occur should the United States prevail. In fact, the impact would equal the current level of activity only for a moment in time. Thereafter, the impact will begin to decline, just as it did as the United States fishermen displaced from the Scotian Shelf in 1978 adjusted to the changed circumstances. Canada would exclude the adjustment process from consideration. Only by doing this can it argue, as Mr. Binnie did, that coastal communities in southwest Nova Scotia would be "irreparably damaged" (p. 90, *supra*).

THE FACTS DO NOT SUPPORT CANADA'S CLAIM OF ECONOMIC DEPENDENCE UPON THE GEORGES BANK FISHERY

So far, Mr. President, we have discussed the reasons why the claim of special economic dependence put forward by Canada is not legally relevant to this delimitation. Now we propose to demonstrate that the facts do not support Canada's claim of economic dependence upon the Georges Bank fishery. Canada's argument is intended to appeal to the emotions, and it is based on a considerable exaggeration of the economic consequences of a judgment that confirms United States jurisdiction over Georges Bank.

Both Canada and the United States are highly developed countries. Both are fortunate to have an abundance of natural resources, a well-educated population and a skilled workforce. Both countries enjoy a high standard of living.

Furthermore, both countries have long coastlines on the sea, rich resources of the continental shelf and abundant fisheries. Both countries have benefited from the extension of exclusive fisheries jurisdiction to 200 nautical miles from the coast. In these circumstances, it is out of place for either country to plead poverty and desperate need for the resources that are at issue in this proceeding.

Reading the Canadian pleadings and listening to the arguments in this Courtroom, one could form the impression that Nova Scotia is a picturesque but poor region which consists of nothing but small fishing villages and farms with limited economic opportunities. The statistical evidence, and the Canadian documents in the record of this case, reveal a very different picture – the picture of a modern civilization with excellent schools and universities, a skilled workforce and a diversified economy with considerable emphasis on sophisticated financial services and high technology research and development.

Canada seeks to obscure the economic and social reality of Nova Scotia by constant references to agriculture, mining and fishing, which have relatively less importance for the economy, and by failing to mention the services sector, including banking, transportation and government, which accounted in 1980 for 72.1 per cent of all employment and 71.3 per cent of provincial gross domestic product. The distribution of income in Nova Scotia by sector and subsector is shown at Figure 55 of your book which is now before you. This figure first (141) appeared as Figure 9 in the Socio-Economic Annex to the United States Counter-Memorial. This is the services sector with public administration accounting for 15 per cent, finance, insurance and real estate 13 per cent, trade 13 per cent, transportation, communication and other public utilities 11 per cent. This is the primary sector. Fish and processing based on northeast Georges Bank is this tiny little sector here of blue and yellow.

For the same reason – to obscure the realities – Canada focuses on the small

communities along the south shore of Nova Scotia and rarely mentions metropolitan Halifax, which is a major urban centre and the focus of all economic activity in the entire Atlantic region of Canada.

Mr. President, Halifax is only about 60 miles from Lunenburg, the centre of Canada's Georges Bank fishery. Thirty-five per cent of all the people of Nova Scotia live in Halifax county, yet Canada has virtually eliminated Halifax from the Nova Scotia scene in presenting its case to the Chamber.

As was noted earlier, Canada's claim of special economic dependence must rest on two basic assertions. The first assertion is that the Georges Bank fishery is of major economic importance. The second assertion is that those affected could not adjust to the loss of that fishery because there are no reasonable economic alternatives, now or in the future. Both assertions are essential to Canada's argument, and neither can be sustained. We will first consider the economic importance of the Georges Bank fisheries to Canada.

Economic importance

Before addressing Canada's specific assertions, the United States would respectfully point out that if the Chamber wished to consider a theory of economic dependence, it would be necessary to examine and to resolve a number of difficult questions of theory, definition and measurement. Economic analysis always depends on a choice of assumptions and of methods. The Chamber would have to determine which data are relevant and which assumptions are appropriate. No doubt the Chamber would have to resolve disputed issues of fact and of expert opinion as well.

As a starting point, let us examine the economic data presented by Canada and the United States. The Parties are generally agreed that the best measures of the economic significance of the Georges Bank fishery are the employment and income generated by that fishery. The United States first estimated the employment and value added produced by the Parties' fisheries on the northeast part of Georges Bank in its Counter-Memorial (Ann. 4, App. B, Intro., Tables 1 and 2). It did so not because it believed economic dependence is relevant in this case, but in order to rebut the Canadian assertions made in Canada's Memorial (I) about the reliance of the Parties on these fisheries (paras. 152, 177). Canada responded with its own estimates in its Reply (paras. 295, 299). The United States used data from 1980 because that is the latest year for which data are available. Canada also used 1980 data in its computations. However, the Parties used different assumptions and procedures for computing that employment and income. As a result, the figures differ considerably.

The United States estimated the total number of Canadian jobs attributable to the Georges Bank fishery, directly or indirectly, to be around 1,700 full-time positions in 1980. We also computed the Canadian income (gross domestic product) attributable to the Georges Bank fishery to be of the order of 100 million Canadian dollars.

Canada estimated that 3,600 Canadian jobs were generated by the Georges Bank fishery, directly or indirectly, in 1980. It attributed income of 146 million Canadian dollars to that fishery in that year. The United States believes that the Canadian figures are inflated substantially.

One of the major sources of the disagreement between the Parties as to employment levels and income is Canada's assumption that all 77 licensed offshore scallop vessels in southwest Nova Scotia fished exclusively on Georges Bank in 1980 (Canadian Reply, Anns., Vol. II, Part I, Table 8, fn. 2). Canada has produced no evidence to support that assumption. In fact, the evidence is to

the contrary. In 1980, only 67 per cent of southwest Nova Scotia's scallop catch came from Georges Bank, not 100 per cent, as would have been the case if Canada's assumption were correct. 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. For example, if the United States is correct, 729 jobs will have to be subtracted from the Canadian total of 3,600 to account for this one discrepancy.

It should be noted that the figures for 1980 are not a fluke. The proportion of southwest Nova Scotia's scallop landings taken from Georges Bank increased somewhat in 1981. But in 1982 it fell to 62 per cent. In 1983, it fell further, to 59 per cent. These statistics are taken directly from official Canadian sources (doc. 124 deposited by the United States, 28 June 1983, and doc. 116 deposited by the United States on 9 April 1984) and reports issued by the North Atlantic Fisheries Organization.

Canada refuses to acknowledge these facts because they undermine its argument that the southwest Nova Scotian fishing industry is almost entirely dependent upon Georges Bank for scallops.

Perhaps this explains why Canada maintains in its Reply that 97 per cent of total Canadian scallop landings in 1981 came from Georges Bank (Anns., Vol. II, p. 21, fn. 38), although this assertion is demonstrably incorrect. The United States invites the Chamber to examine the evidence that Canada has presented to support this number. Figure 56 of your book is Table 13 of Volume II of the Annex to Canada's Reply, which can be found at page 43 of that volume. Table 13 displays Nova Scotia's scallop landings from Georges Bank, Browns Bank and German Bank, and a column described as "total landings". The problem, however, is that that final column only sums the catches in the three other columns. It is not, in fact, equal to total scallop landings in either Canada or Nova Scotia because it does not include landings from all the other scallop grounds in addition to Georges, Browns and German. Without that data, the table is incomplete and misleading.

The graph in Figure 57 of your map book shows the difference between the scallop catches described in Table 13 of the Canadian Annex and the full figures which the United States has derived from ICNAF and NAFO sources for the years 1964-1981. The pink represents the difference between the catches reported by Canada in Table 13 and the full catch according to the ICNAF and NAFO statistics. The Canadian table fails to include on the average 21 per cent of Canada's yearly scallop landings for the period shown.

The next chart in your map book, Figure 58, is a bar graph that shows the amount of scallops that has been landed in Canada from Georges Bank, which is shown in grey, and from other scallop beds shown in red for the years 1977-1983. The green line in each bar indicates the level of southwest Nova Scotia landings, and we assume that all the Georges Bank catch was landed in southwest Nova Scotia. As you can see, scallop beds in Canadian waters north of Georges Bank are becoming more and more important for Canada as a whole and for southwest Nova Scotia as well. In 1981, the year Canada claims that only 3 per cent of its scallops came from areas other than Georges Bank, it turns out that 26 per cent actually came from other areas. In 1983, to choose the latest example, 52 per cent of all scallops landed in Canada, and 41 per cent of those landed in southwest Nova Scotia, came from undisputed Canadian waters.

Mr. President, the United States wonders, and the Chamber is entitled to wonder, how Canada can square this evidence with its argument that southwest

Nova Scotia currently relies almost exclusively on Georges Bank for scallops (Canadian Reply, Anns., Vol. II, Part I, para. 38).

The scallop table is just one example of the liberties Canada takes with the data in this case. In the larger picture, however, the United States believes that these details are only of secondary importance. Even if we accepted all of Canada's figures they would not support Canada's claim of special economic dependence on the fisheries of Georges Bank.

The 3,600 jobs claimed by Canada would represent less than four-hundredths of 1 per cent of the Canadian workforce and only 1.3 per cent of employment in the province of Nova Scotia. Seventeen hundred jobs, the United States estimate, would represent less than two-hundredths of 1 per cent employment for Canada and six-tenths of 1 per cent for Nova Scotia. The income ratios are also very small. One hundred and forty-six million Canadian dollars would represent only five-hundredths of 1 per cent of Canadian GDP in 1980 and about 2.3 per cent of GDP for Nova Scotia. The United States estimate of Canadian income attributable to Georges Bank is about two-thirds of the Canadian figure, and the percentages would be reduced proportionately.

Thus, even if Canada were correct that none of this employment and income could be replaced – and the United States does not accept that contention for one minute – the losses would be small in both absolute and relative terms.

In recent years, all industrial countries have had to cope with fluctuations in employment and income on a much larger scale. In my prepared statement I have a number of examples. Just to cite a few examples, according to statistics recently published by the OECD, the Federal Republic of Germany lost over a million jobs in the manufacturing sector during the five years from 1973-1978. The United Kingdom and Switzerland each lost 200,000 manufacturing jobs in the same period. Indeed, a good many communities in many countries have had to cope with sudden plant closings which have caused much larger impacts than Canada projects in this case. In 1979 British Leyland cut its workforce by 25,000. In 1980, Fiat cut its workforce by 10,000. In 1979 US Steel closed operations involving 13,000 jobs (*Job Losses in Major Industries*, deposited as doc. 114 by the United States on 9 April 1984).

Furthermore, Mr. President, the United States pleadings have pointed out a number of devices Canada has used to create the impression that the Georges Bank fishery is of greater economic importance that it really is. For instance, Canada frequently refers to "the fishery" without specifying which fishery it is talking about. Often Canada is not referring to the Georges Bank fishery but to all the fisheries of Nova Scotia, which are much larger. By confusing the small fishery with the larger, Canada gives an exaggerated impression of the importance of the Georges Bank fishery.

This technique crops up again in Mr. Binnie's statement where Canada estimates "that about 15 per cent of the labour force in southwest Nova Scotia work in fish harvesting and fish processing" (p. 99, *supra*). No mention is made of Georges Bank because most of the employment cited has nothing to do with Georges Bank.

Similarly, Canada usually compares employment and income in fish harvesting with the primary sector only – that is the raw material sector – and it compares fish processing with the manufacturing sector alone. No comparison is made to the Nova Scotia economy as a whole which, as we have seen, includes an enormous services sector. Thus, the Canadian Memorial states that "fishing" represents 36 per cent of employment in the primary sector in Nova Scotia, but this figure is meaningless. The relevant fact is that fishing on Georges Bank represented only two-tenths of 1 per cent of employment in Nova Scotia in 1980.

Canada takes the technique of inappropriate comparison a step further in (172) Figure 27 of its Reply (Fig. 59 of your map book) which purports to make comparisons with the wine industry in France and the steel industry in the (172) Federal Republic of Germany. Figure 27 is designed to imply that the Georges Bank fishery is more important than, for example, the wine industry is to France. However, this figure is seriously misleading in three different ways.

First, the cross-hatched area of the bar representing the Nova Scotia economy does not represent the Georges Bank fishery. The portion indicated for fish harvesting and processing includes all of Nova Scotia's fisheries of which *Georges Bank is only a fraction.*

Second, the fishing industry is compared with the economy of one province – Nova Scotia – while the French wine industry, which is shown as this barely visible cross-hatched area, is compared to the whole French economy. Similarly, the German iron and steel industry is compared with the national economy of the Federal Republic of Germany.

A true comparison of the importance of the Georges Bank fishery to Canada with the importance of the wine industry to France or the steel industry (233) to Germany produces a very different bar graph. That is shown as Figure 60 of your map book, and that is the figure before you. Anyone can see that Canada's dependence on the Georges Bank fishery is much smaller than (172) Canada's Figure 27 implies. A more realistic comparison would be the closing of one textile mill.

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.

Southwest Nova Scotia, and especially the Lunenburg-Riverport area, is closely tied to the regional economic centre of Halifax. As you can see on Figure 61, which is now before you, Lunenburg is about one hour's drive away from Halifax on a modern expressway. In North America that is commuting distance. Interestingly, Canada has chosen to leave Halifax out of the analysis, but it has not failed to include Boston in its definition of eastern Massachusetts, the area Canada compares to southwest Nova Scotia, even though New Bedford, the United States port most comparable to Lunenburg, is farther from Boston than Lunenburg is from Halifax.

Adjustment

Now, Mr. President, I will address Canada's second assertion: that southwest Nova Scotia could not adjust to the loss of that fishery of the Georges Bank fishery because, according to Canada, it has no economic alternatives now or in the future.

This assertion is a major premise of Canada's argument and Canada cannot expect either the United States or the Chamber to accept it without proof. In lieu of proof, Canada offers a thesis based on the discredited theory of environmen*tal determinism. Canada wants the Chamber to believe that the Nova Scotia* fisheries on Georges Bank are the product of environmental conditions, and that these conditions would leave Nova Scotia no alternatives today, or in the future.

If Nova Scotia really were locked into an economy based only on resource exploitation, its labour force would be employed principally in the primary sector – that is in the production of raw materials – and the proportion of the labour force in that sector would remain relatively constant. That, however, is not the case. In 1891, 54 per cent of Nova Scotia's labour was in the primary

sector. By contrast, in 1981, only 7 per cent of its labour force was in the primary sector (doc. 117, deposited by the United States, 9 April 1984). Today, almost three-fourths of the Nova Scotia labour force is found in the services sector.

On 4 April 1984, Mr. Binnie told the Chamber:

> "Owing in part to its proximity as well as to the lack of alternative employment opportunities ... southwest Nova Scotia has traditionally enjoyed advantages over eastern Massachusetts in harvesting the fishing grounds on the eastern half of Georges Bank ... The economic advantages of proximity, whatever they may be, will continue for so long as Georges Bank and Nova Scotia remain where they are ..." (P. 89.)

Mr. President, the United States would understand this argument better if Canadian fishermen had fished the Georges Bank throughout the 19th century and if Canadian fishermen were the fishermen who developed the scallop fishery on the northeast part of Georges Bank in the 1920s. If the Nova Scotia fisheries on Georges Bank were the inevitable result of environmental conditions, why is it they never existed until a few years ago? If proximity gives Nova Scotia fishermen a decisive edge, where were they during the first 150 years of the fishery, and why are the American vessels fishing the northeastern part of Georges Bank today in greater numbers than vessels from Nova Scotia?

The fact is, Mr. President, that Canadian fisheries on the Atlantic Coast are controlled more by Ottawa than they are by nature. At this very moment, the Canadian Government is implementing major changes in the structure of the Atlantic fishing industry and over 100 million dollars has been appropriated for that purpose just this year.

Canada has many other fisheries that could be made available to Nova Scotia fishermen. The waters surrounding Nova Scotia in NAFO area 4 are teeming with fish.

Between 1975 and 1980 Canada's Atlantic catch increased from 789,000 metric tons, including the Georges Bank catch, to over 1 million metric tons excluding the fish taken on Georges Bank (United States Counter-Memorial, para. 347, fn. 6), and prospects for the future are even better. Canada's task force on Atlantic fisheries estimates in the Kirby Report that the groundfish harvest that rose to 779,000 metric tons by 1981 will increase to 1,100,000 metric tons by 1987 (V, United States Reply, Ann. 31, para. 41). As pointed out in Annex 31 to the United States Reply, these increases far exceed Canada's Georges Bank catch in both volume and value (Ann. 31, pp. 2-3).

To the extent the growth in Canada's Atlantic fisheries is unable to absorb the fishing effort redirected from Georges Bank, new jobs generated by the rapidly expanding economy of Nova Scotia should fill the gap. Employment in Nova Scotia increased by 100,000 jobs between 1961 and 1981. If it continues to increase at the same rate, it will generate 70,000 new jobs between 1981 and 1991. The ability of Nova Scotia's workforce to adapt itself to the requirements of the future is questioned by no one except the Canadian Government, and then only in the context of this case.

As we have pointed out in our pleadings, Mr. President, significant discoveries of natural gas have recently been made near Sable Island which is located on the Scotian Shelf. The report prepared for the government of Nova Scotia has estimated that the development of these resources will generate up to 6,000 jobs in the development phase and up to 1,100 permanent jobs. Nova Scotians are expected to fill 40 per cent of the former and 90 per cent of the latter (United States Counter-Memorial, Ann. 4, para. 62).

The premier of Nova Scotia said in a speech this January that

> "[T]he most recent estimates of the geological survey of Canada show a 50 per cent probability the gas reserves off Nova Scotia are at least 13 trillion feet" (doc. 105, deposited by the United States, 9 April 1984).

Canada cannot pretend that the development of offshore hydrocarbons will fail to have benefits for southwest Nova Scotia's economy. Development of these resources will provide employment throughout Nova Scotia, both directly and through the operation of the multiplier effect.

In the final analysis, it is highly probable that most Canadian workers who could be affected by the confirmation of United States jurisdiction over Georges Bank will find other employment in a reasonable time.

Relative Economic Impact

Finally, Mr. President, we would like to turn our attention to the third Canadian argument, to what Mr. Binnie describes as "the comparative impact of the boundary delimitation on eastern Massachusetts and southwest Nova Scotia" (p. 102, *supra*).

Canada recognizes that the Court in the *Tunisia/Libya* case firmly excluded comparisons of relative wealth and poverty from consideration in the delimitation of maritime boundaries. Therefore, Canada is quick to assure the Chamber that it does not rely on considerations of relative national wealth. The Canadian Memorial is, however, inconsistent on this point.

In paragraph 318 Canada makes the strong assertion that "The great dependence of southwest Nova Scotia on that fishery for its well-being give[s] the area a special economic significance to Canada that is entirely without parallel in the United States". The argument is stated in its most extreme and unsupportable form in paragraphs 301 and 303 of the Canadian Counter-Memorial:

> "The income lost and jobs eliminated in southwest Nova Scotia could not be replaced . . . The Canadian line would impose no real hardship on the United States, while the United States claim would have a devastating impact on the Nova Scotia fishery."

Apparently Canada hopes once again to avoid the ruling in the *Tunisia/Libya* case by shifting the focus from the national to the regional level. Thus, Mr. Binnie argues that southwest Nova Scotia is "certainly more dependent than is New England generally, and eastern Massachusetts in particular, on the area in dispute" (p. 101, *supra*).

The fact of the matter is that New England has very nearly the same number of jobs at stake in the northeast portion of Georges Bank as does Nova Scotia. Under United States assumptions the numbers are 1,700 for Canada and 1,100 for New England.

The only difference, then, as Mr. Binnie told the Chamber, is the relative size of the economies in the two areas compared by Canada. In Mr. Binnie's words: "Because of the major difference in the size of the two economies, the *relative* contribution which Georges Bank makes to each of the two regions is more significant." (P. 101.)

There can be no doubt that Canada is arguing relative need. Relative need is the other side of the coin of relative wealth, and the Court has dismissed that factor as a consideration in boundary delimitation. As we have shown in our discussion of economic dependence, Canada cannot escape the holding of the Court by focusing upon the needs of a few communities.

There are two compelling reasons why this is so. First, in juridical terms, the

delimitation is not between competing communities in two countries. The delimitation marks the international boundary between two sovereign States. As Canada points out in paragraph 76 of its Reply "There is no basis in international law for attributing particular entitlements to the political subdivisions of a sovereign State". Second, in economic terms the interested localities do not exist in isolation. They are part of larger economic entities. If economic adjustments are required, the framework for solution includes the resources of the country as a whole, both private and public. In any event, Mr. President, the responsibility for the needs of the citizens of Nova Scotia lies with the Government of Canada, not with the United States and not with the Chamber.

The only duty of the Chamber is to delimit the maritime boundary in the Gulf of Maine area in accordance with law.

The Chamber rose at 17.57 p.m.

SIXTEENTH PUBLIC SITTING (18 IV 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

ARGUMENT OF MR. LANCASTER

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. LANCASTER: Mr. President, subject to your control, it will be my privilege today to introduce and question Dr. Robert L. Edwards as an expert on the marine environment, including the oceanography and ecology of the Gulf of Maine area and, particularly, the division of species and stocks in the area.

In order to apply the equitable principles that are applicable to this delimitation proceeding, it is necessary to understand the nature of the marine environment of the Gulf of Maine area. Thus, the oceanography and ecology of the Gulf of Maine area, particularly the extent to which the fishery resources are divided into separate stocks, are relevant to the application of the principles that delimitation should facilitate conservation and management of resources and minimize the potential for disputes. Because of its uniqueness, the marine environment of the Gulf of Maine area is also pertinent to the application of the principle that an equitable delimitation take account of all relevant circumstances.

Both the concept of a "stock" and the identification of separate stocks in the Gulf of Maine area have been established for decades. Canadian scientists have long recognized the existence of separate stocks of commercially important fish and of natural barriers that discourage their passage from one location to another in the Gulf of Maine area. With each successive pleading, however, Canada has backed further away from the recognition of these facts. And therefore the United States has had to develop the record evidence concerning subjects that should have been beyond dispute – the stock divisions and the natural barriers in the Gulf of Maine area are the two principal subjects of which I speak, and it is this need which has led the United States to produce expert testimony in this proceeding.

Accordingly, Mr. President, with your permission, the United States proposes to ask Dr. Edwards a series of questions about the marine environment of the Gulf of Maine area. The purpose of these questions is to provide the facts relating to the marine environment, particularly with regard to the subject of stock divisions and the reasons for those divisions in the Gulf of Maine area. It will be necessary to deal with fairly elemental science, in order to show the basic underpinnings of what should be the undisputed scientific conclusions.

The examination will be as follows: first, we will discuss the physical characteristics of the marine environment.

Next, the questions will concern the way in which natural divisions in the ocean affect the distribution of marine organisms.

We will then turn to the Gulf of Maine area specifically, and we will deal with the topography of the sea-bed, the pattern in which the water circulates through the area and the temperature and composition of the water in different parts of the area.

Lastly, my questions will turn to the effect of the physical oceanography of the area on its ecology, notably on the development of separate stocks of fish and shellfish.

Dr. Edwards will refer in some of his answers to the illustrations which were distributed to you this morning, and large versions of those illustrations will be placed on the easel beside Dr. Edwards. He will be assisted in this process by Lieutenant Neil Gitin and by Dr. Jonathan Olsson.

Mr. President, I would like at this point to express my appreciation to attorney adviser Mary Wild Ennis, who has been of great assistance in the preparation of this presentation.

I hope to conclude my examination of Dr. Edwards before the end of this morning's session and then, with your permission, I propose to tender Dr. Edwards for cross-examination by Mr. Fortier, able counsel for Canada. The Parties have agreed that there will be no redirect examination. As we proceed, the United States encourages the Chamber to itself ask questions of Dr. Edwards if at any time a response is unclear or incomplete or prompts a further question in the minds of any member of the Chamber.

EVIDENCE OF DR. EDWARDS

WITNESS AND EXPERT CALLED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA

The PRESIDENT: The Agent of the United States has already notified his intention to call Dr. Robert Edwards as an expert within the meaning of Article 63 of the Rules of Court and has supplied the information required in Article 57 of those Rules. Dr. Edwards will first make, at the speaker's desk, the declaration which Article 64 of the Rules requires every expert to make before being questioned. After that, Mr. Lancaster may put his questions. Subsequently, in accordance with Article 65 of the Rules, I shall give an opportunity for the cross-examination of Dr. Edwards to counsel for Canada. It is also possible, need I add, and as you said, Mr. Lancaster, that members of the Chamber may wish to avail themselves of their rights to examine Dr. Edwards under the same Article 65.

Dr. EDWARDS: I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth, and that my statement will be in accordance with my sincere belief.

The PRESIDENT: I take note that Dr. Edwards has duly made the declaration.

Mr. LANCASTER: I will first ask Dr. Edwards a few preliminary questions regarding his education and experience and I will then move to a series of questions that will elicit answers in the substantive areas on which he has been called to testify.

Dr. Edwards, would you please describe for the Chamber your education and your teaching experience since you completed your secondary education.

Dr. EDWARDS: I entered college in 1939. My education was interrupted by the war. In 1945 I resumed my studies. I received my Bachelor of Science Degree in biology from Colgate University in 1947. I received my Masters Degree in biology from Harvard University in 1949, and my Doctorate in biology in 1951, also from Harvard University.

I was an instructor on the staff of Colgate University during my last two years as an undergraduate and I taught biology at Tufts College in Medford, Massachusetts, from 1949 to 1950 and at Brandeis University in Waltham, Massachusetts, from 1950 to 1953.

In addition to this teaching experience, from 1979 to 1980 I was a lecturer at Yale University in New Haven, Connecticut, in the subject-matter of conservation and management of natural and marine resources. I remain an adjunct professor at the University of Rhode Island, Providence, Rhode Island, in the Department of Oceanography.

Mr. LANCASTER: Dr. Edwards, would you please describe your post-schooling employment.

Dr. EDWARDS: I joined the United States Fisheries Service in 1955. In 1970 the Fisheries Service was incorporated into the then newly established National Oceanic and Atmospheric Administration, better known as NOAA. I have been with NOAA and its predecessor institution since 1955, a total of 29 years.

Mr. LANCASTER: Dr. Edwards, would you please tell us the positions which you have held while you were employed by NOAA and its predecessor institutions.

Dr. EDWARDS: In 1955 when I joined the Fisheries Service, I joined as a Programme Chief at the Woods Hole Laboratory, in Woods Hole, Massachusetts. I was put in charge of a research programme studying the ecology of fishes of southern New England. In 1960 I became the Assistant Laboratory Director at the Woods Hole Laboratory. My responsibilities included scientific leadership and technical co-ordination of research programmes in the northwest Atlantic including the Gulf of Maine area. Early in 1970 I became the Acting Associate Director for Resource Research for the United States in the headquarters of the Bureau of Commercial Fisheries in Washington, D.C. In 1972, after the formation of NOAA, I returned to Woods Hole, to be the Director of the newly established Northeast Fisheries Center. As the Director of that institution, I was responsible for supervising the work of a group of laboratories that formed the Center.

I remained Director of the Northeast Fisheries Center for over ten years, from 1972 to 1982. In 1982 I was appointed to my current position as Technical Assistant to the Assistant Administrator of Fisheries, in NOAA.

Mr. LANCASTER: During most of your 29 years with NOAA you have been associated with the Northeast Fisheries Center. Would you tell the Chamber, please, what the Northwest Fisheries Center is.

Dr. EDWARDS: The Northeast Fisheries Center is made up of marine fisheries biological laboratories located in Woods Hole, Gloucester (Massachusetts), Narragansett (Rhode Island), Milford (Connecticut), Sandy Hook (New Jersey), Oxford (Maryland), and the National Systematics Laboratory in the Smithsonian Institution in Washington, D.C., as well as the Atlantic Environmental Group in Narragansett.

The Woods Hole laboratory is the oldest fisheries hydrographic research laboratory in the world. It was established in 1871 to study the biology of fishes and other marine resources of the northwest Atlantic Ocean and the institution has been studying the area, including the Gulf of Maine area, since that time.

Mr. LANCASTER: Dr. Edwards, how many people are involved in these activities?

Dr. EDWARDS: Approximately 400 people are employed in the various laboratories combined. The Woods Hole laboratory itself employs an average of over 100 people. The Woods Hole laboratory also operates for the benefit of the Center two large research vessels (the *Albatross IV* and the *Delaware II*). Each of these vessels is at sea approximately 200 to 250 days of the year, including 30 to 40 people on board, collecting extensive data, including data on temperature, salinity, phytoplankton, zooplankton, eggs and larvae of fish, benthic organisms, and fish themselves from the southern end of the Scotian Shelf to south of Cape Hatteras, North Carolina.

Many members of the Center are on the staffs of the University of Rhode Island and the University of Massachusetts. The members of the staff of the Northeast Fisheries Center write extensively on the physical oceanography and ecology of the Gulf of Maine area. Over the years, as experts, its staff has taken part in similar studies all over the world.

Mr. LANCASTER: Dr. Edwards, during your years at NOAA did you have any special responsibilities with regard to international scientific co-operation?

Dr. EDWARDS: Yes, from 1966 until 1982 when I took my current position

(and this is except for the period when I was in Washington, D.C.), I was responsible for the planning and co-ordination of the joint scientific works with the Center of foreign research vessels including those from the Soviet Union, Poland, East and West Germany, French and Japanese vessels, working with our own vessels gathering data on fishery stocks and other relevant topics in the Gulf of Maine area.

Since 1974 I have been the United States Government Co-ordinator for joint US-USSR studies of the biological productivity and biochemistry of the world's oceans. Since 1975, I have been the United States delegate to the International Council for the Exploration of the Seas (ICES). From the early 1960s until 1977, I was scientific adviser in ICNAF. ICNAF as I am sure you know was involved in managing the fishery resources of the northwest Atlantic including the Gulf of Maine area.

Mr. LANCASTER: Dr. Edwards, finally, would you state for the record please the professional associations to which you belong.

Dr. EDWARDS: Yes, there are many such including the American Fisheries Society, the American Society of Parasitologists, the American Society of Mammalogists, the Wilson Ornithological Society, the Scientific Advisory Board of the Sea Education Association, the International Union for the Conservation of Nature and Natural Resources, and I am presently Chairman of the Marine Fisheries Committee of the Marine Technical Society.

Mr. LANCASTER: Mr. President, that concludes the series of questions relating to Dr. Edwards' qualifications. I would now proceed to a series of questions relating to the substantive areas of his testimony.

Dr. Edwards, Canada has stated: "Unlike the land, the sea is not marked by geographically fixed discontinuities or boundaries." (V, Canadian Reply, para. 179.) Do you agree with that statement?

Dr. EDWARDS: No, I do not. There are geographically fixed discontinuities or boundaries in the sea, just as there are on the land. In fact, in some cases, discontinuities or boundaries in the sea may be even more fixed than those on land.

Boundaries and/or discontinuities are formed where two dissimilar areas meet. Dissimilar areas, and boundaries between them, exist in the sea as well as on the land. Such boundaries and areas exist in the topography, which can also be referred to as geomorphology, in the climate, and in the biota. Furthermore, areas and boundaries based on factors such as these frequently coincide.

Mr. LANCASTER: Dr. Edwards, in what way are the land and the sea marked by "geographically fixed" geomorphological areas and boundaries?

Dr. EDWARDS: To the extent that the phrase "geographically fixed discontinuities or boundaries" means geomorphological features such as mountains, valleys and shorelines, that separate or bisect plains and plateaux, then obviously comparable boundaries exist in the sea. The sea surface is seemingly flat and uniform compared with the land surface, although a fisherman at sea in a storm might think differently. Beneath the surface, the sea is much like the land. It is only necessary to glance at a standard nautical chart to see that there are counterparts to mountains, canyons, plateaux and plains.

Mr. LANCASTER: How does climate affect or create dissimilar areas and boundaries between them and how does this affect the biota?

Dr. EDWARDS: On land, climatic zones and boundaries between them, to a large extent, are the consequences of differences in air temperature. Air

temperature varies in response to air currents, air masses and altitude and, of course, the position of the sun. Climatic zones and boundaries are in turn mirrored in the zonation of the earth's flora and fauna.

Air masses move across land and play a role in the creation of climatic, floral, and faunal zones and the boundaries between them.

A practical application of man's recognition of the biological significance of climatic zones on land is found in seed and plant catalogues in the form of charts indicating "hardiness" zones. Such charts guide the gardener in the selection of plants that are suitable for specific regions. If a gardener disregards such information he risks selecting plants that cannot grow, or at least flower, in his garden.

Mr. LANCASTER: Dr. Edwards, why does temperature vary from latitude to latitude?

Dr. EDWARDS: Because of the change in the position of the sun, air temperature generally increases as one moves from the poles towards the equator. Consequently, in the northern hemisphere, as one moves from north to south on the land, one encounters a series of zones, beginning at the far north with ice and snow, then tundra, followed by spruce forests and tiagas, broad-leaved deciduous forests or temperate plains and, ultimately of course, tropical forests and mangroves.

Mr. LANCASTER: How does altitude affect temperature?

Dr. EDWARDS: Air temperature decreases with altitude, which in turn results in a series of life zones. Everyone is aware of the progressive changes in plant and animal communities as one climbs mountains.

Mr. LANCASTER: Would you please give us an example of such zonal changes.

Dr. EDWARDS: Mount Kilimanjaro in Africa is a classic example. It is almost 6,000 metres high. Between its base and top is an array of zones that resemble those that you might encounter on a trip from the tropics to Antarctica. On the rainy side of the mountain, such a journey would begin on the plains in a tropical scrub and, as the altitude increased, would change first to a tropical rain forest with bamboo groves, then a temperate forest, followed by ever smaller trees and shrubs and other plants more adapted to a colder climate; and then, finally, a tundra-like zone – in aspect similar to that seen in the northern hemisphere but with very different species of plants and animals. Of course, at the top ice and snow and even some small glaciers; and I think, as everyone realizes, this mountain is almost on the equator.

Mr. LANCASTER: Dr. Edwards, we have been talking about the land. Are there similar zones and boundaries in the ocean?

Dr. EDWARDS: Yes, there are. They are also marked by changes in flora and fauna. There are cold arctic areas and warm tropical areas, deserts supporting little life and contrasting regions with high levels of biological productivity. As I said, on land, air temperature, latitude, altitude, air currents and air masses are instrumental in the creation of climatic zones and the boundaries between them. Similarly, in the ocean, the temperature and salinity of the water, its latitude, depth, water currents and water masses, all play a critical role in the creation of natural zones and boundaries.

Mr. LANCASTER: Dr. Edwards, how precisely fixed and geographically fixed are the geomorphological fixtures and climatic boundaries or barriers, whether on land or in the ocean?

Dr. EDWARDS: Geomorphological features in the ocean are as "fixed" as are those on land. The term "geographically fixed", whether on land or in the sea, of course, is one that should be used only loosely. Everyone is aware that all these features or boundaries, even in terms of time periods as short as a man's lifetime, are not rigidly fixed. Rivers do change their courses, volcanos erupt, mountains are slowly eroded and the shape of continents is constantly being modified. Geomorphological features in the ocean have a comparable fixity. Climatic boundaries vary in their precision and in their geographic breadth, but they are at least as precise and "geographically fixed" in the sea as they are on land. Natural boundaries indicate the general limits of identifiable zones. Absolutely precise floral and faunal boundaries on land and in the ocean exist only as lines on a map. Some natural boundaries are narrow and even observable with the naked eye and fundamentally consistent in their geographic position. Others are marked but move seasonally while others are broader and less clearly defined seasonally or geographically.

Mr. LANCASTER: Are land boundaries more clearly defined than ocean boundaries?

Dr. EDWARDS: Conditions in the ocean are such that its natural boundaries can be more sharply defined and directly observable by eye or with instruments than those on land. For example, some boundaries between water masses are manifested at the surface of the water by changes in wave form or in the colour of the water. This can happen at the edge of the continental shelf or at the edge of a warm core ring. A "warm core ring" is, incidentally, a round pocket of water that breaks away from the Gulf Stream.

Mr. LANCASTER: Do the boundaries that you describe mark absolute divisions between communities?

Dr. EDWARDS: No, of course not. Boundaries are not impenetrable walls. In the ocean, as on the land, geomorphological as well as climatic boundaries may discourage passage, but they are not absolute obstacles to the passage of organisms.

Mr. LANCASTER: How are climatic boundaries in the sea distinguished from those on land?

Dr. EDWARDS: The most obvious distinction between land and sea boundaries stems from the differences in the properties of air and water. Water masses are commonly defined by their temperature and salinity. Air masses are commonly defined by their temperature and air pressure. Air is less dense than water and its movement more highly variable. As a result, the boundaries that delimit air mass regions over continents vary much more widely in location than the boundaries that delimit water masses in the ocean. Lines on a map that purport to show air mass boundaries represent, by necessity, long-term averages of highly variable boundaries. Lines on a map that purport to show water mass boundaries are much more likely to correspond to the shorter term or seasonal reality. Some water mass boundaries are visible to the naked eye. This is not usually true of air mass boundaries.

Mr. LANCASTER: Dr. Edwards, Canada has said that "nature . . . is by nature untidy" (*III*, Counter-Memorial, para. *209*) and implied that there are no environmental patterns in the Gulf of Maine area. Do you agree with the characterization of the marine environment of the Gulf of Maine area?

Dr. EDWARDS: No, I do not. In the first place, these are non-scientific comments. They imply that nature is haphazard and this is far from being the

case. Environmental conditions are not simply random. There are, for example, major oceanographic subdivisions or régimes in the Gulf of Maine area.

Mr. LANCASTER: How many major oceanographic régimes and ecological régimes exist in the Gulf of Maine area?

Dr. EDWARDS: Three. They are associated with Georges Bank, the Gulf of Maine Basin and the adjacent Nova Scotian Shelf.

Mr. LANCASTER: And what creates these régimes, Dr. Edwards?

Dr. EDWARDS: Environmental factors.

Mr. LANCASTER: And, specifically, what are the environmental factors that create these régimes?

Dr. EDWARDS: The environment is the result of a number of interacting factors. Geomorphology and climate, including water currents, temperature, salinity and density, are instrumental in the creation of the separate oceanographic régimes associated respectively with Georges Bank, the Gulf of Maine Basin and the adjacent Scotian Shelf. Where these zones, or régimes, meet boundaries are created.

Mr. LANCASTER: Dr. Edwards, what are the features of the geomorphology of the Gulf of Maine area that are instrumental in the creation of these three régimes?

Dr. EDWARDS: In this Figure (United States oral presentation Fig. 62, Counter-Memorial, Ann. 1, Fig. 3) we display an illustration of the geomorphology of the Gulf of Maine area. It was produced on a computer. The green area represents the land surface, and the blue areas that part of the geomorphology which is beneath the sea surface. This is the Nova Scotian peninsula and here is Cape Cod. There are three general geomorphological régimes to note in this image.

First of all, Georges Bank – a relatively flat, sandy, plateau or cuesta, as the geologists say – connected to the continental shelf going to southern New England and beyond.

Second, the Gulf of Maine Basin in here which is a large, relatively deep bowl-shaped area.

Third, the Scotian Shelf. The Scotian Shelf is different from the southern New England Shelf in that it is relatively deep near the inshore area and somewhat shallower offshore where it is margined by a series of relatively small banks. The critical feature, of course it is interesting and important so far as this case is concerned, is the Northeast Channel which divides Georges Bank, on the west, from Browns Bank in the southwestern part of the Nova Scotian Shelf on the east.

Mr. LANCASTER: Dr. Edwards, I take it that that computer-generated figure shows the area as if the water had been drained out of it. Is that correct?

Dr. EDWARDS: That is correct, Sir.

Mr. LANCASTER: Dr. Edwards, Canada described this figure as "the most striking use of exaggeration in the United States Counter-Memorial" (Reply, para. 189). Canada went on to say:

> "when the seafloor relief is exaggerated five times, the Northeast Channel is barely perceptible. Without any vertical exaggeration whatever, the continental shelf – and indeed the entire continental margin – would be seen as pratically featureless."

Dr. Edwards, in these passages Canada implies that there is something

misleading about the kind of exaggeration used in this figure. Do you agree with that characterization by Canada?

Dr. EDWARDS: No, Sir, I do not. Exaggeration, or scaling, is a standard tool of scientists and other professionals seeking to convey information in an illustration. It is often necessary to expand a scale in order to convey visually the significance of relevant factors. Many charts, graphs and other illustrations are exaggerated in this sense. After I first read the passage you quoted I made it a point to check the illustrations in a number of scientific papers portraying data from the Gulf of Maine area. In particular, I considered the papers of several Canadian physical oceanographers. In order to portray, what they considered to be, relevant information, the vertical exaggeration they used varied from 600 to 1 to 1,200 to 1. I might add that Canada has used vertical exaggeration in its own figures.

Mr. LANCASTER: Dr. Edwards would you give us an example of the use by Canada of vertical exaggeration in its own figures in this case?

(61) Dr. EDWARDS: One example of this is found in Figure 19 of Canada's Counter-Memorial. It shows cross-sections of the Gulf of Maine Basin and Georges Bank with a vertical exaggeration which is in the order of 1,000 to 1.

Mr. LANCASTER: Dr. Edwards, now by use of the figure that has just been placed on the easel will you please give us an example that will illustrate the importance of the use of vertical exaggeration?

(234) Dr. EDWARDS: This is Figure 63. It is derived from a standard chart of North America. There are four profiles displayed here. In this first profile we have illustrated the region from the west coast of British Columbia to Nova Scotia – a distance of approximately 3,100 miles. In the first line there is no vertical exaggeration and for all practical purposes one might assume that you can drive from one end of the country without ever encountering a bridge or a tunnel or anything of the sort. The second line contains the same information, except now the vertical scale has been exaggerated five times. This, incidentally, (59) is the same scale used by Canada in Figure 17 of its Counter-Memorial in which I might point out the Northeast Channel was perceptible. By the same token the Rocky Mountains are perceptible in this particular line.

The third line shows the vertical scale exaggerated 75 times and now things are really becoming quite clear, particularly if you are interested in comparing the elevations of different parts of Canada.

The fourth line has the vertical scale exaggerated 300 times. If one is interested in the coast range and the Rocky Mountains, the plateau plain region of Alberta and Saskatchewan and so forth and so on, a great deal of information is contained here. I question whether or not this particular degree of vertical exaggeration, or even this one, is a more honest expression of the reality of the factors that we are talking about than is this.

Mr. LANCASTER: And when you said "this" Dr. Edwards you referred to the last line of that figure. What, again, is the scale that is used in that line?

Dr. EDWARDS: That is 300 to 1.

Mr. LANCASTER: And what was the scale that was used on the figure which Canada criticized?

Dr. EDWARDS: 300 to 1, Sir.

Mr. LANCASTER: So it was the same scale.

Dr. EDWARDS: Yes, Sir.

Mr. LANCASTER: Had you finished your answer, Dr. Edwards?

Dr. EDWARDS: Well, I should add that depth is a particularly important factor from the standpoint of the oceanographer and the marine biologist and that it is standard practice to use vertical exaggeration in illustrations that do intend to show this factor in depth with reference to other relevant features accurately to the mind's eye. It is simply necessary to use exaggeration to show what is relevant and to make reasonable comparisons.

Mr. LANCASTER: Dr. Edwards, why is depth so important to the oceanographer and the marine biologist?

Dr. EDWARDS: Increments of depth in the ocean have a more significant effect on the climate and biology than equal increments of depth or height on dry land. This is simply because air is so much less dense than water. Air at the surface of the earth is about 1,000 times less dense than sea water. Air pressure only decreases at a rate of about 10 per cent starting at sea level for each 1,000 metres of increase in altitude. By contrast, for only 11 metres increase in depth, water pressure doubles. From the viewpoint of some of the organisms living in the ocean each increment of depth is far more significant than an equal increment in altitude is to an organism that lives on dry land.

Mr. LANCASTER: Dr. Edwards, you have just indicated that variations in geomorphology affect depth. Are there any other reasons why geomorphology is important to oceanographers and marine biologists?

Dr. EDWARDS: The geomorphology of the sea-bed is also important because its undulations affect the patterns in which water flows through an area. As Canada pointed out in its Counter-Memorial "the direction of the mean flow is nearly parallel to the bottom contours throughout much of the Gulf of Maine area" (para. 49, Ann. 1).

Furthermore, geomorphology – and remember, depth is a function of geomorphology – affects the extent to which the water column is heated, cooled, and vertically mixed. The water over much of Georges Bank is shallow and, as a consequence of tidal action, well mixed from top to bottom. This means that the temperature and salinity will be more uniform there throughout the water column. By contrast, the water in the deeper Gulf of Maine Basin is more stratified so that the top and the bottom layers have different temperatures and different salinity characteristics. The Scotian Shelf is stratified also to varying degrees – the water over the deeper parts being more stratified than the water over the banks. Differences in vertical mixing and stratification are important because they affect the ecology of the area.

Mr. LANCASTER: Dr. Edwards, you've spoken of the geomorphology. What features of the water circulation pattern contribute to the creation of the régimes and boundaries between them in the Gulf of Maine area?

Dr. EDWARDS: Water circulates through the area following a serpentine path that divides the area into three major régimes. This circulation pattern in the Gulf of Maine area has been described, both by the United States and Canada.

(22) This is Figure 64 (United States Memorial, Fig. 5; IV, Counter-Memorial, Ann. 1, paras. 11-17). It is, of course, a simplified illustration of the circulation patterns in the area. In this particular graphic we have illustrated the surface current – the direction and flow, more or less of the surface current – with the blue arrows, and the flow at deeper layers, using red arrows.

Within the region there are two separate kinds of general water-flow patterns. On the Scotian Shelf and from Nantucket Shoals further to the south in general

we have a pass-through system, or system through which the water moves without too much diversion. As water moves along the coast of Nova Scotia it turns to the north, up through the Bay of Fundy, and then proceeds around the Gulf of Maine, around the periphery, then to the east, along the northern edge of Georges Bank, around the northern edge, and then on to the south. Within the Gulf of Maine Basin a large, rather slowly moving gyre is set up. It moves in a counterclockwise direction. On Georges Bank another relatively clearly defined gyre occurs, moving in a clockwise direction.

An important issue here, of course, is the significance of the Northeast Channel. The water from the slope moves into the Northeast Channel year round and fills the bottom of the Basin, gradually mixing up through the water to the top, mixing with the surface waters from the Scotian Shelf, and changing the character of what follows from that point on.

Mr. LANCASTER: Dr. Edwards, what can you tell us about the characteristics of water retention in this area, following the discussion that you have just given us about water currents?

Dr. EDWARDS: Oceanographers tend to speak of this in terms of half-life; the half-life of the water here is usually expressed as being about one year, and within the gyre on Georges Bank, from two to three months.

Mr. LANCASTER: Does Canada disagree with this description of the pattern in which water circulates through the Gulf of Maine area that you have just told us about?

Dr. EDWARDS: Canada and the United States essentially agree on the circulation pattern that I have just described (Canadian Counter-Memorial, (62) Fig. 20).

However, in a number of instances, Canada drops all mention of the critical detour the water takes from the Scotian Shelf as it moves around the Gulf of Maine Basin before reaching Georges Bank. Canada repeatedly refers to water passing from the Scotian Shelf to Georges Bank. If the reader is not careful, this can leave a false impression of direct passage from the Scotian Shelf to Georges Bank.

Mr. LANCASTER: In your earlier answer you told us about the source of the water flowing into the Gulf of Maine area, now would you tell us please how much of that water originates from the Scotian Shelf and how much originates through the Northeast Channel?

Dr. EDWARDS: Considerably more water enters the Basin via the Northeast Channel than enters from any other source. The surface water from the Scotian Shelf accounts for 30 to 40 per cent of the water which enters into the Gulf of Maine Basin annually. Incidentally, the surface flow from the Scotian Shelf virtually ceases during the warmer months. The bulk of the water, however, that is to say, 60 to 70 per cent, that circulates in the Gulf of Maine Basin and over Georges Bank, enters this area through the Northeast Channel.

Canada agrees that slope water enters through the Northeast Channel and fills the bottom of the Gulf of Maine Basin. Although the United States and Canada may disagree on the magnitude and rate of that influx, they both agree that it is substantial (Canadian Counter-Memorial, Ann. 1, para. 50).

Mr. LANCASTER: To what extent is there a relationship between the water circulation pattern you have just described and the three régimes of the Gulf of Maine area?

Dr. EDWARDS: Even a cursory examination of this water circulation

pattern shows that the three régimes described earlier are distinguished from each other by the water circulation pattern. The water above the Scotian Shelf flows over the Shelf from the northeast to the southwest. Although there are minor eddies and gyres over the banks and basins of the Scotian Shelf, they are not of the magnitude of the gyres that distinguish the other two régimes. This flow-through pattern differentiates the oceanography of the Scotian Shelf from that of the Gulf of Maine Basin and Georges Bank. The latter two are each characterized by a major gyre – one counterclockwise, the other clockwise. Furthermore, the water entering the Basin from the continental slope through the Northeast Channel sets up an additional, and ecologically very significant, contrast between the Scotian Shelf and the other two régimes. In short, there are three distinct components to the pattern in which water circulates through the Gulf of Maine area and these three components play a role in the creation of the three distinct oceanographic régimes in the area.

Mr. LANCASTER: Dr. Edwards, does the extent to which the water in each régime comes from either the Scotian Shelf or from the continental slope through the Northeast Channel affect the climate in each of the oceanographic régimes that you have described?

Dr. EDWARDS: Yes, the waters in each régime differ from one another in terms of their temperature and salinity characteristics, and these differences stem, in large measure, from differences between the sources. The water from the Scotian Shelf derives principally from the Labrador current and the Gulf of St. Lawrence. Fresh water from the St. Lawrence River also feeds into the Scotian Shelf régime. A limited amount of slope water enters that régime where the topography permits. These northern origins and the northern latitude, coupled with the relative absence of higher salinity water influx, cause the water over the Scotian Shelf to be colder and less saline than the waters in the other two régimes of the area.

Mr. LANCASTER: Dr. Edwards, why is this so?

Dr. EDWARDS: The reason that these other two régimes are more saline and have different temperature characteristics is largely because of the water that enters the Gulf of Maine Basin through the Northeast Channel. This flow has
(22) been pointed out before. It is represented by the red arrows (Fig. 64.) Because this water comes from the continental slope, it is more saline than the water over the Scotian Shelf that enters the Gulf of Maine area and its temperature does not vary as much with the seasons. This very different water is constantly injected into the depths of the Gulf of Maine Basin, where it mixes with the surface water that has originated from the Scotian Shelf. As a consequence, the water in the Gulf of Maine Basin is of a higher salinity and a different temperature than the water over the Scotian Shelf.

Mr. LANCASTER: What about the water over Georges Bank?

Dr. EDWARDS: Because the water over Georges Bank comes from the Gulf of Maine Basin, it also is a mixture of slope water and Scotian Shelf water, and is thus different in temperature and salinity from the Scotian Shelf water. The degree to which the Gulf of Maine Basin and Georges Bank régimes are more saline than the Scotian Shelf régime is a testimony to the proportionately larger volume of higher salinity water that flows into the area through the Northeast Channel.

In the Gulf of Maine Basin, the water is deeper and stratified, with the fresher, less saline water on top, the denser, highly saline water on the bottom, and an intermediate layer, which is a mixture of the other two, in the middle. It is a sort

of three-layered cake. The water over Georges Bank is, however, different from the water in the Gulf of Maine Basin. It is a mixture of the intermediate and surface waters of the Gulf of Maine Basin and of course it is shallow and well mixed from top to bottom.

Mr. LANCASTER: Dr. Edwards, would you please use the next Figure which has been put on the easel to show us an illustration of the temperature differences among the three régimes.

Dr. EDWARDS: To my right is a reproduction of a satellite image that illustrates some of the temperature differences at the immediate surface that we (121) have been discussing. This is Figure 65 (Fig. 11C from the United States Counter-Memorial, Ann. 1). This image was derived from data received by the NOAA 5 satellite on 14 June 1979. This satellite has a censor that receives temperature data which are then transmitted back to earth and reassembled to provide a graphic illustration of the surface temperatures of the ocean. In this image, the cooler colours indicate colder temperatures and the warmer colours warmer temperatures. We are moving somewhere in the range between 3 to 24 degrees centigrade in this image.

You can see here Georges Bank as a relatively cool fish-shaped object sitting in the lower left-hand part of the picture. The Scotian Shelf régime shows that the water is more or less contiguous with the slope water – in fact, is gently moving off in that direction in this area of warmer temperature; relatively cold temperatures near shore up into the Bay of Fundy and then on into the Gulf of Maine Basin. The Gulf of Maine Basin itself at the surface is more or less evenly temperatured and relatively warm.

Mr. LANCASTER: Dr. Edwards, how are the temperature gradients that show a rapid change in temperature shown on that chart?

Dr. EDWARDS: In this graphic, areas where the temperature change is fairly rapid in terms of movement horizontally, these gradients are shown in black.

You can see the Georges Bank régime is marked by gradients. The water that exists on the continental shelf is separated from the slope water as well by rather clearly marked gradients, and in addition one can see gradients here that margin the Scotian Shelf water from the Gulf of Maine Basin water. These are clear all the way down, including a gradient both on the eastern tip of Georges Bank and one on the western side of Browns Bank. These two gradients, of course, are bordering the Northeast Channel.

Mr. LANCASTER: Dr. Edwards, you have talked about surface temperatures. What about bottom temperatures? You may also in this instance again refer to the Figure which is being placed on the easel.

Dr. EDWARDS: We have just looked at the immediate surface temperatures, and now we are going to look at bottom temperatures of course.

The bottom temperatures also reveal the differences between regions. In this (120) case, this is Figure 66 (Fig. 10 of the United States Counter-Memorial, Ann. 1), it shows average bottom temperatures. These are 40-year average values. This Figure shows the average bottom temperature for the area, both for the coldest and the warmest seasons of the year, as well as the differences in average bottom temperature between these two periods.

In the first graphic on the left, we have the cold season of the year, in the middle the warm season, and on the right the difference between the cold and warm seasons. Once again, the scale moves from warm colours to cool colours indicating warmer temperatures and colder temperatures, and in this instance the range is between 20 and 2 degrees centigrade. For this particular graphic, the

scale represents the differences in temperature. As one moves into the cooler colours, the differences are on the negative side, to the warmer colours, on the positive side.

There are just a few things to notice here. During the cold season it is worth noting that the bottom pretty much everywhere is cool, cold even, the Gulf of Maine Basin is somewhat warmer, the Scotian Shelf is a bit more cut up in the distribution of temperature than the other areas. During the warm season clearly, quite clearly, from the eastern tip of Georges Bank, on down south, the bottom temperatures are comparatively warm. The Gulf of Maine Basin once again is cool and not very different from the temperature that it was at during the winter.

The difference chart is equally interesting, and particularly because it shows a spine of cold water running all the way from the eastern tip of Georges Bank down across the southern New England Shelf to Cape Hatteras. This particular feature plays a very significant role in the responses of fishes as the seasons change.

Mr. LANCASTER: Canada, as you know, dismisses the relevance of temperature and salinity differences, those that you have in part just described, with the following statement referring to United States figures displaying those temperature and salinity data:

> "Yet these figures hardly can be said to demonstrate the existence of 'separate and identifiable ecological régimes'. Rather, they show that the oceanographic régime on Georges Bank is part and parcel of a northeast to southwest continuum. They support the Canadian view that there is a progressive modification of the waters of the Gulf of Maine area in their southwestward course along the Scotian Shelf to Georges Bank and beyond, and that the significant differentiation is between shelf water and warmer slope water further offshore." (Canadian Reply, para. 188.)

Do you agree with these remarks by Canada, and if not, why not, Dr. Edwards?

Dr. EDWARDS: No, I do not. It is an oversimplification to describe the oceanography of the Gulf of Maine area as a "continuum". That gives the false impression of a steady and gradual increase in temperature and salinity as one moves from Cape Canso to Cape Hatteras. The temperature and salinity differences between the waters of the Scotian Shelf and those of the Gulf of Maine Basin and Georges Bank cannot be explained away by references to a "continuum". It is the year-round injection of slope water – water of a very different character – into the Gulf of Maine Basin, through the Northeast Channel, that fundamentally alters the character of the waters in the Basin and over Georges Bank and differentiates them from the waters over the Scotian Shelf.

There is a second point in the Canadian passage you just quoted to me that is troubling. In the last sentence, they asserted that the "significant differentiation", in terms of temperature and salinity, among the water masses of the Gulf of Maine area is found between the waters of the continental shelf and those of the continental slope further offshore. This is a recurring theme in the Canadian pleadings, but Canada does not indicate in what way these differences are "the significant" ones.

Mr. LANCASTER: Dr. Edwards, are these differences "significant"?

Dr. EDWARDS: In my opinion, the significance to the oceanography of the Gulf of Maine area, of the higher salinity and more consistently temperatured slope water, is that it is injected into the Gulf of Maine Basin through the

Northeast Channel, radically altering the character of the water of the Basin and subsequently that of Georges Bank. By virtue of the injection of slope water through the Channel, a dichotomy is set up between the waters of the Scotian Shelf and the waters of the Gulf of Maine Basin and Georges Bank.

Canada does not disagree that there are temperature and salinity differences among the water masses of the three régimes of the Gulf of Maine area. As the United States pointed out (V, Reply, Ann. 25), the illustrations in Annex 1 to Canada's own Counter-Memorial showed temperature and salinity differences among the régimes. In other words, the basic scientific facts are not in dispute. Nevertheless, Canada's pleadings frequently pass over the significant differences among the three oceanographic and ecological régimes by taking a global perspective. To put it in an extreme manner, pointing out that a tropical water mass is more different from the water masses of the Gulf of Maine than are those water masses among themselves does not negate the existence of or the significance of the differences between the water masses of the Gulf of Maine area. Similarly, the fact that the slope water in the Gulf of Maine area is different from the water in each of the three régimes does not mean that there are no differences among the water masses in each of the three régimes. There are significant differences among the water masses of the three régimes, but in order to understand their significance, one must be willing to examine them at the level at which they occur.

Mr. LANCASTER: Dr. Edwards, how does ocean climate affect ecology?

Dr. EDWARDS: Climate, both on land and in the sea, has a profound effect on ecology. Organisms, be they plant or animal, respond to environmental clues and conditions. For the most part, these responses are conceptually similar, whether one is talking about a marine or land organism. Furthermore, these responses, such as the migratory movements of many kinds of fish, are and have been predictable for a very long time. For hundreds of years, fishermen have depended upon predictability to guide them to concentrations of fish.

Even before people could explain how or why any particular environmental factor prompted fish behaviour, it was recognized that certain events on land coincided with the migratory movements of fish.

Mr. LANCASTER: Dr. Edwards, would you please give us an example of man's reliance on this predictability?

Dr. EDWARDS: One quaint example of this is contained in the statement of Mr. W. E. Whalley of Newport, Rhode Island, made almost exactly 100 years ago today. The statement was made in response to a series of questions put to American fishermen by the first United States Commissioner of Fisheries, Spencer F. Baird, and his representatives. The questions were posed as part of Mr. Baird's efforts to identify and set up research programmes that would aid fishermen. In this connection, Mr. Whalley stated:

> "I always judge by the dandelions; when I see the first dandelion, scup [which is a type of fish] come in; I watch the buds, and when the buds are swelled full, then our traps go in. When the dandelion goes out of bloom and goes to seed, the scup are gone, that is true one year with another, though they vary with the season. I am guided by the blossoms of other kinds of plants for other fish. When high blackberries are in bloom, we catch striped bass that weigh from twelve to twenty pounds; when the blue violets are in blossom – they come early – you can catch small scoot-bass. That has always been my rule, that has been handed down by my forefathers." (R. L. Edwards, "Relation of Temperature to Fish Abundance

and Distribution in the Southern New England Area", reprinted from *ICNAF Special Publication No. 6*, 1965, p. A-1.)

The principal problem faced by marine biologists has not been that of determining whether or not there is regularity or predictability in what fish and other marine organisms do from season to season and place to place but rather to understand more exactly what generates these repetitive patterns of behaviour and distribution, and of course, to specify the degree to which they are consistent. All this has been and still is being studied, of course, to predict more effectively changes in fish population size and structure.

Mr. LANCASTER: What kinds of environmental clues affect marine organisms?

Dr. EDWARDS: Marine organisms, like organisms on land, generally respond to or are guided initially by the most reliable, in other words, predictable and consistent, clues provided by the environment. The most reliable provider of clues is understandably the sun. The length of day can determine whether or not a particular plant species will bloom and the sun angle or its relative position in the sky is believed by many to be a guide for migrating organisms, and so it goes.

Directly related to the sun and its position relative to any point on earth is the amount of heat received from it. The sun heats the ocean in much the same manner that it heats the earth. Thus the upper layers of the water column increase or decrease in temperature seasonally, in a predictable and understandable manner.

Mr. LANCASTER: Would you please explain how this affects fish?

Dr. EDWARDS: Fish, like most marine organisms, are cold-blooded. Their functional rates, as for example rates of growth or the duration of time spent in the egg stage, are directly related to temperature. Many cases of reaction by fish to changes in temperature and to temperature gradients have been documented in the scientific literature. One of these papers, that of Brandt and Wadley, discussed the responses of fish to a front in the Great Lakes, to an eddy system in the Tasman Sea, and to the Gulf Stream front off Cape Hatteras (United States Reply, Ann. 25, fn. 1). As a general rule of thumb, the functional rates of organisms such as hatching times and growth increase two or three times for each 10° change in temperature. An example of this is provided by a study of the temperature effects on growth and yolk utilization of yellowtail flounder. The overall efficiency of yolk utilization prior to hatching at temperatures of 12°, 10°, 8° and 4° centigrade was respectively 86 per cent, 77 per cent, 74 per cent and 46 per cent. In other words, the yolk is used more slowly – less efficiently – as the temperature of the water decreases (W. H. Howell, 1980, *Fishery Bulletin 78* (3), pp. 731-739).

The responses of fish and shellfish to temperatures and temperature change depend very much on the adaptations of each particular species to the environment. Some species move very little, provided that temperatures and other conditions necessary for continued existence stay within certain bounds. Others migrate seasonally to stay within certain thermal limits.

In summary, like fishermen, marine organisms depend upon the predictable, repeating, elements of the environment to guide them throughout their lives. They proceed to feeding-grounds, aggregate for spawning, or carry out other activities by responding to the appropriate environmental clues. These clues are critical. Populations of any species simply will not survive if, for example, they spawn at random. Thus it is that organisms are observed to aggregate at

particular times in particular places to spawn, a fact appreciated and taken advantage of by every competent fisherman.

A very significant consequence of environmental differences within the marine environment is that they encourage the development of population subdivisions. Fishery biologists refer to such population subsets as stocks.

The Chamber adjourned from 11.15 a.m. to 11.35 a.m.

Mr. LANCASTER: Dr. Edwards, when we recessed you had been telling us about the predictability of marine organisms and, specifically, fish in their responses to repetitive environmental elements; and you had just noted the consequence of environmental differences in encouraging the development of population subdivisions; and, in fact, had just mentioned the word "stocks". Would you please define the term "stock".

Dr. EDWARDS: Yes, Sir. A "stock" is a subpopulation of fish or shellfish that, under normal circumstances, is capable of maintaining itself without immigration from other subpopulations of the same species. Stocks are both biological realities and a fundamental tool in fisheries conservation and management. The "stock" concept has been recognized for decades, including by Canada. Annex 20 to the United States Reply provides numerous examples of Canadian reliance on the concept of stocks.

Mr. LANCASTER: And how, Dr. Edwards, are stocks distinguished from one another?

Dr. EDWARDS: There are a number of different indicators one can examine to determine whether or not there are separate stocks of a given species. These indicators include meristics – that means such as the number of vertebrae or fin rays –, morphometrics – these are measurements, results of tagging studies, parasite infestations, growth rates, peak spawning times, egg and larval distributions, age at maturity, recruitment, biochemistry, distributional patterns and abundance trends. On a practical plane, both the fishermen and even fish dealers for that matter, can often distinguish haddock taken from Georges Bank from those taken from Browns Bank, just by looking at them. Even as far back as 1899 the market sometimes paid different prices for cod or haddock, depending upon whether they were caught on Browns Bank or Georges Bank.

Mr. LANCASTER: Dr. Edwards, how does the marine environment affect the development of separate stocks?

Dr. EDWARDS: The degree to which separate subpopulations, races, subspecies or stocks, ultimately even species, develop depends in part on the adaptive strategy of each species to the marine environment and the separateness of environmentally suitable breeding areas.

It should be emphasized that the term "separateness" means more than just a matter of distance. It can be termed as ecological separateness in the case of those species that are adapted to very specific and different environmental conditions. Such species tend to develop separate stocks more readily, even within a relatively small area. This is particularly the case with anadromous species like the salmon and alewives that return to specific spawning grounds in particular river systems, and those marine species closely associated with estuaries, such as the blackback flounder. The sea herring in the Gulf of Maine area may also be included in this general class. In many instances such species will fix their eggs to the bottom to prevent them from drifting away.

Many of the commercially important marine species, however, are more

broadly adapted than this. These species tend to subdivide on the basis of large, environmentally coherent régimes associated with certain types of water current patterns such as gyres. Such systems keep eggs and larvae within a certain distance of their prime habitat, or at a minimum help them to remain in touch with it through environmental clues that can be sensed and successfully responded to.

Mr. LANCASTER: Dr. Edwards, does Canada recognize the relationship between environmental factors and the development of separate stocks?

Dr. EDWARDS: Yes it does. An example of Canada's recognition of this relationship is found in a paper which Canada submitted to the Third Law of the Sea Conference (United States Counter-Memorial, Ann. 91, pp. 172 and 173). In that paper Canada stated that individual fish

> "tend to be grouped into separate populations or stocks, often associated with particular oceanographic features, such as current systems or distinct shelf areas, with little interchange between the separate groups ... The areas inhabited by such stocks will vary in size, but for coastal species are usually well-defined."

Mr. LANCASTER: Dr. Edwards, have environmental factors contributed to the development of separate subpopulations of stocks in the Gulf of Maine area?

Dr. EDWARDS: The factors that I have mentioned as encouraging the development of separate stocks have resulted, in the Gulf of Maine area, in the development of numerous separate stocks of fish. In particular, a separate fish stock is more likely to develop in areas where eggs and larvae are retained by water currents in an area suitable for their survival. A prime example of this phenomenon is provided by the gyre over Georges Bank.

Mr. LANCASTER: Dr. Edwards, in an earlier answer to one of my questions you described for the Court the location and the configuration of that particular gyre. Now, using the illustration that has just been put on the easel, would you please explain how this gyre encourages the development of separate stocks.

Dr. EDWARDS: This gyre helps to retain the eggs and larvae of species such as haddock and cod, over Georges Bank. If it were not for the gyre, these eggs and larvae would be swept southwestward along the New England shelf, into waters eventually that were too warm or otherwise unsuitable for their survival. The role of the Georges Bank gyre can be seen in the larval distributional charts contained in Annex 1 of the United States Counter-Memorial. This figure is Figure 67 (Fig. 36 of the Annex). This figure summarizes the results of research vessel cruises made in May and June of 1981. In this instance the vessels were using gear called Plankton gear. This is a fine mesh net. The dashed black line indicated here is the limit of the cruise to the northeast. The cruise stopped once the shelf slope head was reached. What one sees here is the aggregation of eggs and larvae on Georges Bank. The scale, incidentally: yellow means 1 to 10 of these organisms for each Plankton net haul; orange – 11 to 100; and pink – 101 to 1,000. These haddock were spawned in March in this general area here and subsequently had moved down into this region. By this time they were almost old enough now to control their own destiny.

Mr. LANCASTER: And what does that illustration and particularly the location of the larvae show, relative to Georges Bank?

Dr. EDWARDS: This of course is the 100-metre line around Georges Bank.

The gyre system is in this region, and were these larvae to continue to be carried by the gyre, incidentally, they would tend so to move up to the north and then ultimately back east along the northern edge of Georges Bank.

Mr. LANCASTER: You have told us and used that illustration to show haddock larvae. Would you please now use the figure that is being put up to show us the same information relative to cod larvae? Relative, that is, to its location and the development of separate stocks.

(123) Dr. EDWARDS: This is Figure 68 (United States Counter-Memorial, Ann. 1, Fig. 31) and it shows the distribution of cod larvae in April and May of three different years. Again, the northern limit of the cruise tracks is indicated by a dashed black line. In this case we are looking at April and May 1974, April and May 1977, April and May 1980. To repeat the scale again the lightest yellow 1 to 10, orange 11 to 100, pink 100 to 1,000, red 1,000 to 10,000, and this very dark colour, black almost, 10,000 to 100,000.

Once again, we see pretty much what we saw in the haddock figures. Cod spawn out here, the larvae tend to be entrained along the southern margin of the gyre carried around Georges Bank. April and May 1977 was obviously a good spawning year. Again, notice that while the cruise did not go very far up on the Scotian Shelf, it also picked up the aggregations of cod eggs and larvae that resulted from spawning on Browns Bank in the nearby region.

Mr. LANCASTER: Is the Georges Bank gyre the only example in the Gulf of Maine area of a region in which the development of separate fish stocks is encouraged by the water circulation pattern?

Dr. EDWARDS: Although the Georges Bank gyre is a notable example of such a region it is not the sole one. As Canada itself noted (Counter-Memorial, Ann. 1, para. 49) regarding the water circulation pattern of the area: "there is a tendency for water to re-circulate around the banks and basins." There are also other regions in the Gulf of Maine area in which the development of separate stocks is encouraged.

(122) These were identified in Figure 28 of Annex 1 of the United States Counter-Memorial, which is our Figure 69.

Mr. LANCASTER: Would you please explain to the Chamber what that Figure shows.

(122) Dr. EDWARDS: This particular Figure is a synthesis of the available data and shows the major areas and subareas in which the development of separate stocks is encouraged by environmental factors. The basic structure of this Figure was developed a very long time ago, in fact decades ago. Over 50 years ago people realized that the Laurentian Channel and the Northeast Channel were barriers worth noting in so far as the movement of groundfish species was concerned. This chart does not deal with the areas where the high seas pelagics spawn, nor does it deal with anadromous species. It deals simply with groundfish and other important commercial species that are more or less resident in the area. The green area is the Scotian Shelf area, black the Gulf of Maine area, and red the Georges Bank régime.

Indicated here (dotted areas) are areas within the larger areas (striped areas) where there is a possibility that stocks may develop. Each of these areas has some oceanographic phenomenon associated with it which tends to retain the larvae for a sufficient period of time. So on the Scotian Shelf area we are looking at a hierarchy. One species may form a stock which simply occupies this region, or a separate stock that occupies this region. Under other circumstances, a particular species may have two or three stocks within a region of this sort.

Mr. LANCASTER: Dr. Edwards, at the beginning of this question I asked you to identify other gyres or similar water movement which would encourage that development, and you have in general done that. Could you be a little more specific by pointing out the areas in which these gyres or slow-moving areas occur.

Dr. EDWARDS: Yes. First of all, of course, there are the gyre in the Gulf of Maine Basin and the gyre régime on Georges Bank. Shelf slope frontal regions also provide a mode of retention which some fish take advantage of. One can refer to certain other phenomena such as the eddy currents behind islands or around headlands as having a retention function, and you can often see this when you look at the distribution of stocks of certain kinds of species. The simple fact is that even a great deal of mixing by the tide taking place over a large enough area can of itself create a sort of retention area.

Mr. LANCASTER: Dr. Edwards, what are some of the major commercial species that have separate stocks associated with one or the other of the three major oceanographic régimes in the Gulf of Maine area?

Dr. EDWARDS: Most of the major commercial species have separate stocks associated with one or another of the three régimes, including haddock, cod, herring, yellowtail flounder, sea scallops and lobsters.

Mr. LANCASTER: Let's take those one by one. In the case of haddock, for example, how well recognized is the existence of haddock separate stocks?

Dr. EDWARDS: It has been recognized literally for decades that there are separate haddock stocks associated respectively with the Scotian Shelf and Georges Bank. The conservation and management of the separate haddock stocks of the Gulf of Maine area was one of the primary reasons for the creation of ICNAF.

A classic paper on the topic of haddock stock structure was written by the distinguished Canadian scientist and statesman, Dr. W. E. Needler in 1930. He points out in this article that the future supply of resources from the sea was even then becoming a matter of serious concern, and that:

> "In any attempt to predict the continuance of the supply or to introduce sane measures for conservation it is important to know the migrations of the haddock, and the degree of distinctness of the stocks in the various localities."

He also states:

> "The haddock's range in North American waters is divided by the Fundian and Laurentian Channels [the 'Fundian' Channel is the Northeast Channel] (both over 185 metres deep) into the 'New England', 'Nova Scotian' and 'Newfoundland' regions. Marking experiments and comparisons of the age composition of stocks and of the growth rates *show that there is practically no interchange between the first two.* To the haddock, which are bottom-loving fish and never abundant below 185 metres (100 fathoms), the channels are barriers producing three divisions of the population corresponding to the divisions of the shallow water area." (*The Migrations of Haddock and the Interrelationships of Haddock Populations in North American Waters*, pp. 243 ff. Emphasis added.)

Mr. LANCASTER: May I interrupt you for a minute, Dr. Edwards. Did I correctly understand that the author of that paper was a distinguished Canadian?

Dr. EDWARDS: Yes.

Mr. LANCASTER: And did I also correctly understand the quotation which you have just read to us to say that in the New England and Nova Scotian régimes, as he has identified them, those stocks of haddock have practically no interchange?

Dr. EDWARDS: Yes, that is correct.

Mr. LANCASTER: And what he described is in part at least because the channels are barriers producing divisions?

Dr. EDWARDS: Yes.

Mr. LANCASTER: Thank you. I am sorry for the interruption.

Dr. EDWARDS: Similarly, the Canadian researcher W. R. Martin, in a paper previously deposited with the Chamber, noted: "[h]addock are more restricted to bottom than cod and for this reason Subarea 4 haddock are even more sharply separated from those in Subareas 3 and 5 than noted above for cod". Of the Browns Bank haddock stocks, he noted: "[t]his population differs sharply from that of Georges Bank to the west" ("Identification of Major Groundfish Stocks in Subarea 4 of the Northwest Atlantic Convention Area", in *ICNAF Annual Proceedings*, Vol. 3, Part 4, 1953, p. 59).

Annex 1 of the United States Counter-Memorial discussed the evidence supporting the identification of these separate stocks (paras. 84 and 85). Further, Table B of that Annex indicated the areas of research which led to this identification (Ann. 1, p. 97). The information on haddock contained in this particular table was based on some 19 different research papers, many of them by Canadians.

Mr. LANCASTER: That discussion concerned haddock. Now, how well recognized is the existence of separate stocks of cod in the Gulf of Maine area?

Dr. EDWARDS: As with haddock, it has been recognized again for decades that there are one or more separate cod stocks associated respectively with the Scotian Shelf, the Gulf of Maine Basin and Georges Bank. One of the papers that recognizes the separation of cod stocks at the northeast channel is the 1953 paper that I just mentioned and quoted by the Canadian biologist, W. R. Martin. In that paper he notes:

> "The deep-water Fundian Channel between Georges and Browns Bank and the still deeper Laurentian Channel between St. Pierre Bank and Banquereau are barriers to the movement of cod." (*Op. cit.*, p. 57.)

Recent Canadian studies make the point that cod have fairly restricted home ranges and that only a few individual cod, if any, wander, for example, from the Bay of Fundy region and adjacent areas to the Scotian Shelf and from the Scotian Shelf to Georges Bank.

Other examples of works that recognize the separateness of the cod stocks in the Gulf of Maine area are provided in Annex 21 of the United States Reply (paras. 2-6) and in Annex 1 to the United States Counter-Memorial (paras. 76-78). Table B (p. 97) of that Counter-Memorial Annex indicated the areas of research that led to the recognition of the separateness of these stocks. The information on cod stocks contained in that table was based on some 33 different research papers, many of them by Canadians.

Mr. LANCASTER: You have discussed the development of separate haddock and cod stocks. Is the stock structure of the herring similar to those of haddock and cod?

Dr. EDWARDS: The sea herring, more than haddock or cod, is a coastal species, at least in the Gulf of Maine area. There are separate stocks associated with the inshore area of the Scotian Shelf, the periphery of the Gulf of Maine Basin and Georges Bank. These stocks are, to some extent, further subdivided. In terms of its stock structure, the herring's response to the environment in the development of population subdivisions is in the middle ground between the response of typical groundfish species and that of anadromous species.

Much definitive work on sea herring of the area has been carried out by Canadian colleagues of mine who have noted the responsiveness of the species to unique and smaller scale environmental phenomena as, for example, the well-mixed waters above Georges Bank and the front along its northern edge, as well as the well-mixed area on the southwestern end of the Scotian Shelf and the front that is formed where the Scotian Shelf régime and the Gulf of Maine Basin régime meet. The often-noted further subdivision of herring stocks is, in part, related to the fact that herring attach their eggs to the bottom of the sea-bed and restrict their spawning to very particular bottom types.

Mr. LANCASTER: Dr. Edwards, has the stock structure and spawning behaviour of the herring been the subject of much research?

Dr. EDWARDS: Very definitely. The herring is of particular interest to marine biologists because of the geographical discreteness of its spawning areas. In particular, scientists in Canada and the United States have paid a lot of attention to herring. A recent paper by the Canadian biologists, Drs. Iles and Sinclair, is worth noting in this regard. In a 1982 article in *Science* entitled "Atlantic Herring: Stock Discreteness and Abundance", these authors noted:

> "The number of genetically distinct herring stocks is determined by the number of distinct, geographically stable larval retention areas. Spawning sites in these areas may be highly localized or dispersed. Absolute population size mostly depends on the retention area available to the density-dependent larval-post larval stage." (P. 627.)

Parenthetically, it should be noted that these authors identify some of the same environmental features that the United States has identified as significant in promoting the development and maintenance of separate stocks. Further, Iles and Sinclair state: "The associated biological concept is that the (distinct) gene pool is made up of all those spawning groups whose larval-post larval stages come to share the same area of distribution." (*Ibid.*, p. 269.) In other words, if herring spawn in separate locations but at the same time of the year and in an area that has a single hydrographic retention feature or mechanism, like the gyre on Georges Bank, they form only one stock. The authors also noted "the suggestion that the hydrographic features of an area that result in retention act as a focusing device for the homing instinct of herring" *(ibid.)*.

Annex 1 to the United States Counter-Memorial discussed some of the evidence supporting the identification of separate herring stocks (paras. 79-83). Table B of that annex indicated the areas of research which lead to this identification (*ibid.*, Ann. 1, p. 97). The information on herring contained in that table was based on some 80 different research papers, many of them by Canadians. This subject was further discussed in Annex 21 to the United States Reply (paras. 7-15).

Mr. LANCASTER: Dr. Edwards, let me just ask you to focus again on one portion of that answer if I may. Did I correctly understand you to say that this article by the Canadian authors indicated that if herring spawn in separate locations, but at the same time of the year and in an area that has a single,

hydrographic retention mechanism, such as the Georges Bank gyre, they will form one stock?

Dr. EDWARDS: Yes, Sir, that is correct.

Mr. LANCASTER: Dr. Edwards, would you now please tell us about the stock structure of the yellowtail flounder in the Gulf of Maine area.

Dr. EDWARDS: There are also separate stocks of yellowtail flounder on Georges Bank and on the Scotian Shelf. This flounder is a comparatively sedentary species. Within the Gulf of Maine area it undergoes small-scale seasonal movements and aggregates in relatively shallow water for spawning as, for example, on the outer portions of the shoals on Georges Bank and on the banks of the Scotian Shelf. Yellowtail flounder have been studied for years by both American and Canadian scientists. The stock geography is clear cut because of the relatively sedentary nature of the fish and has not, to my knowledge, ever been the subject of significant scientific debate. The various stocks have been identified by most of the traditional techniques, including parasite studies, distributional data, tagging studies, growth studies, morphometrics and so on. The information contained in Table B (p. 97) in Annex 1 to the United States Counter-Memorial regarding yellowtail was based upon some 41 different research papers. In general, for example, the yellowtail stocks on the Scotian Shelf grow at a very different rate from those on Georges Bank in the area to the south and west.

Mr. LANCASTER: Dr. Edwards, would you now please tell us about the structure of the sea scallops in the Gulf of Maine area?

Dr. EDWARDS: Separate sea scallop stocks exist on the Scotian Shelf, including on Browns Bank and German Bank, on Georges Bank and elsewhere, as for example in the Gulf of St. Lawrence, around Prince Edward Island. Detailed scientific studies of the sea scallop are not as voluminous as are those for fish, in good part simply because sea scallops do not migrate. They can move about, flitting like inept butterflies over the bottom. Smaller ones are more apt to move than larger ones. Once they achieve a moderate size, around ten centimetres, they actively create small crater-like depressions in the bottom, which, as the scallops grow, also increase in size. An area occupied by a large number of larger sea scallops looks very much like a moonscape. Other creatures, as for example lobsters and red hake, often join the scallop in its hole. The major offshore scallop beds tend to be isolated geographically, but sea scallop eggs and larvae are planktonic and are transported, like the eggs and larvae of fish, by the water currents during their pelagic phases. Larvae spawned on Georges Bank tend to be retained over the Bank by the Georges Bank gyre. For the most part, studies of the sea scallop have focused on growth studies, the distributional patterns of the sea scallop, abundance trends and recruitment. The information contained in Table B (p. 97) in Annex 1 to the United States Counter-Memorial regarding sea scallops, was based upon some nine different research papers.

Mr. LANCASTER: Dr. Edwards, finally, in this series of questions would you describe for us the stock structure of the lobster in the Gulf of Maine area?

Dr. EDWARDS: There are four principal lobster stock areas in the Gulf of Maine region. Starting at the southern end of the area, there is a southern New England stock, a Georges Bank stock, a northern Gulf of Maine Basin stock and another stock complex in the southeastern part of the Nova Scotia Shelf. Because they are so valuable they have been intensively studied and many papers written about them. Tagging studies by United States scientists and Canadian

scientists have been particularly useful in clarifying the stock structure of the lobster. The lobster stock identifications in Table B of the United States Counter-Memorial, Annex 1 (p. 97), were based on 24 research papers.

Out of all of these studies emerges a picture of an animal that is markedly territorial, retreats to deeper water as it gets larger and can, and does, migrate annually from deeper areas, including the continental slope, to shallower areas, for the purpose of spawning. For example, lobsters in the Georges Bank stock retreat to the Georges Bank slope and canyons during the winter and then return to the shallower spawning areas on Georges Bank in the spring and summer.

Mr. LANCASTER: Dr. Edwards, Canada criticizes (Canadian Reply, para. 183) the United States use of illustrations (United States Counter-Memorial, Annexes) of larval distribution to support the argument that stocks are divided by the Northeast Channel throughout the year, or through their life cycle. As a basis for this criticism, Canada states: "spawning location has no necessary bearing on the distributional range or migratory habits of the stock throughout the rest of the year or during the life cycle as a whole."

Do you agree with Canada's conclusion?

Dr. EDWARDS: No, I certainly do not. The United States did not present that information for the purpose of suggesting that it had relevance with respect to the distributional range or migratory habits of the stock throughout the rest of the year or during the life cycle as a whole. As I already mentioned, spawning location is only one, albeit a very important one, of the factors that are considered in identifying a stock. As I also indicated, the separate stocks of commercially important species that have been identified as being associated with Georges Bank have, in each case, been identified on the basis of many factors, not just on the basis of spawning grounds and larval distributions. The fact that a stock forms a *particularly* dense aggregation during the spawning season, does not mean that it leaves Georges Bank during the rest of the year.

Mr. LANCASTER: What does it mean to say that there are separate stocks associated with Georges Bank?

Dr. EDWARDS: To say that there are separate stocks associated with Georges Bank does not mean that every individual member of that stock remains on Georges Bank throughout its life history, from the egg stage on through adulthood. The three régimes of the Gulf of Maine area are not surrounded by walls. Nevertheless, these stocks spawn on Georges Bank, their eggs and larvae tend to be retained on Georges Bank, and if an individual fish of that species, for example haddock, is caught on Georges Bank, there is only a very small chance that that haddock is from a Scotian Shelf haddock stock. Individual fish do wander away from the bulk of the stock of which they are a member, but these are the exception rather than the rule. Georges Bank haddock and cod stocks tend to stay within the confines of Georges Bank during the year. The Georges Bank cod aggregate to spawn on the northeast peak in February and March, and Georges Bank haddock aggregate there from March to April. These stocks spread out over the Bank as a whole during the rest of the year, favouring different parts of the Bank depending upon the season.

Mr. LANCASTER: Dr. Edwards, would you give us an example of what you have just been talking about, please?

Dr. EDWARDS: One of the most dramatic examples of the separateness of the Georges Bank stock from those of neighbouring régimes, is that of the Georges Bank stock of sea herring. Herring on Georges Bank used to be very plentiful. Their seasonal movements were extensively studied by the Soviet

scientist, Zenkevich. He showed that herring on Georges Bank begin aggregating to spawn, particularly along the northern edge, in the summer, becoming very strongly aggregated in October. After spawning, they break up again into smaller schools, move along the southern flank of Georges Bank, down the edge of the southern New England shelf, and then return home to Georges Bank by early summer. The Georges Bank herring stock was severely overexploited during the 1970s with the consequence that the population was quickly reduced below what most biologists considered to be the minimum size necessary to maintain the stock. Herring, for all practical purposes, have disappeared from Georges Bank since that time (United States Counter-Memorial, Ann. 1, (125) para. 82 and Fig. 33). Several years ago I sent a research vessel out deliberately to attempt to catch herring on Georges Bank just prior to the time of spawning. As any fisherman knows, when herring gather to spawn they are easy to catch and in fair number. This vessel, after several weeks of effort, came home having caught only three herring. The herring have not yet recovered to a point where it would be feasible to suggest a commercial fishery for herring on the Bank. There are some indications that the recovery is beginning at the present time, but even under the best of circumstances we cannot expect to see the Georges Bank herring stock recover in the near future. By contrast, the Scotian Shelf stock are flourishing. This is a compelling illustration of the separateness of the Georges Bank stock from those of the Scotian Shelf. If the Georges Bank and Scotian Shelf herring stocks intermingled indiscriminately, they would have been depleted at the same time as the herring on Georges Bank. Similarly, if herring from the Scotian Shelf routinely migrated to Georges Bank, the Georges Bank herring population would have been well on the road to recovery by now.

Mr. LANCASTER: The stocks that you have been discussing as being associated with Georges Bank have been primarily groundfish and shellfish. Now Canada asserted (Counter-Memorial, Ann. 1, para. 121) that seven "migratory" species needed to be considered along with the species the United States considered as commercially important. Are there Georges Bank stocks of these "migratory" species?

Dr. EDWARDS: No. The migratory species that Canada said were important were bluefin tuna, Atlantic salmon, swordfish, spiny dogfish, alewife, American shad and saury. There are no Georges Bank stocks of these species, nor separate stocks of these species associated with any offshore portion of the Gulf of Maine area. The anadromous species, shad, alewife and salmon, of course, spawn in or near fresh water. The saury is a slope water species, frequently found along the outer margin of the continental shelf and only erratically near shore. Individual fish of these species are sometimes caught on Georges Bank, but they do not form separate stocks there. Most of these species are highly migratory and range over great distances. These fish cannot be managed on the basis of the Gulf of Maine area as a whole.

These "migratory" species were discussed more fully in Annex 22 to the United States Reply. With the exception of one or two species of high seas pelagics, the principal species of commercial interest for which fisheries are feasible on Georges Bank include haddock, cod, yellowtail flounder, silver hake, sea scallops, and a few others of lesser importance. No one has yet suggested that salmon, alewives, shad, even mackerel for that matter, and other similar species that migrate through the Gulf of Maine area should, or even perhaps could, be the object of a serious commercial fishery on Georges Bank. Each of the species that is a significant object of commercial interest on Georges Bank is represented by a separate Georges Bank stock.

Mr. LANCASTER: Dr. Edwards, Canada asserts (Reply, paras. 193-195) that almost any region or area could be chosen for treatment as, in Canada's words, an "ecological régime" or an "ecosystem", and Canada argues that the choice for identifying such régimes is left entirely to the discretion of the examiner. Do you agree with those Canadian assertions?

Dr. EDWARDS: No, Sir, I do not. Although, theoretically, one could argue that ecology should be discussed individual organism by individual organism, from the point of view of fishery biology, not to mention fishery management, it is not necessarily helpful or reasonable to deal with the biology of the Gulf of Maine area at or even near this level.

Fisheries management is difficult enough as it is. It is clearly impractical to manage fisheries at the level of individual fish. It would be ideal if one could identify large areas within which each species is represented by only one separate stock. At the latitude of the Gulf of Maine region, with its attendant ecological complexity, this is not possible. But one can get very close to this ideal, if one deals with this region at the level of the three ecological régimes that I have discussed.

Mr. LANCASTER: Dr. Edwards, could one further subdivide this area?

Dr. EDWARDS: Certainly. An ecologist without concern for fisheries management, and depending upon whether he is prone to subdivide or to group, could subdivide the Gulf of Maine area into several, even many, identifiable ecological units. But it would not be sensible from either a biological or fisheries management point of view.

The three separate oceanographic and ecological régimes that I have already described are discernible in almost any body of data bearing on the region. Certainly the distribution of fish eggs and larvae reveals the role played by the current pattern of each régime. The geomorphological data, temperature and salinity data, and the stock data, all of these and much more besides, make it clear that there are the three basic discernible physical oceanographic régimes within the region that influence and shape the ecology of the region. The next lower level of synthesis would result in about a dozen units requiring a strained series of criteria for identification that would not apply similarly to all.

Mr. LANCASTER: Dr. Edwards, Canada (Reply, para. 193) has asserted – and I apologize for the length of this quotation:

> "Statistical units 5Zeh and 5Zen in subdivision 5Ze of the Northeast Atlantic Fisheries Organization (NAFO) could just as legitimately or illegitimately be described as 'ecological régimes' as the three 'régimes' proposed by the United States. Similarly, the line that divides statistical units 5Zeh and 5Zen from statistical units 5Zej and 5Zem could just as legitimately or illegitimately be present as a 'natural boundary' as the line that separates . . . Subarea 5 from Subarea 4."

Do you agree with the assertions that Canada has made?

Dr. EDWARDS: No, I do not agree with those assertions. As I have indicated, the three oceanographic and ecological régimes previously identified represent from the biological and management perspective the smallest practical breakdown of the Gulf of Maine area. Georges Bank is a single integrated ecological entity. The units to which Canada refers, 5Zeh and 5Zen are statistical subdivisions of Georges Bank which do not correspond to ecological or environmental entities. They were established for statistical purposes so that as a fleet moved round Georges Bank during the year, statistics would be reported from different areas of the Bank.

Mr. LANCASTER: Dr. Edwards, in a sense I am going to ask you now to retrace some ground that we have previously walked over. I would like you now to take the environmental features which we discussed before – geomorphology, water circulation patterns and so forth – and show how these subunits, that were mentioned in Canada's quotation and which you have just described, and which were clearly established for purely statistical purposes, relate to each of these environmental features. Would you please start first with geomorphology? Do the statistical units identified by Canada correspond to the geomorphological features of the Gulf of Maine area?

(235) Dr. EDWARDS: This is chart No. 70. The chart indicates the slope of the bottom. It is another way to express geomorphological features. The flattest areas – those with minimal slopes – are indicated in white. The areas with slopes over 1 per cent are indicated in the dark red colour. The division between Subarea 5 and Subarea 4 is, of course, this heavy black line. Statistical subdivision 5Zeh is this area here, and 5Zen is this area here. The dividing line between Subarea 5 and Subarea 4 goes up through the Northeast Channel, through the deep Georges Basin – this gets down to depths of approximately 400 metres – and then goes through the Gulf of Maine Basin on up to the international terminus.

This particular subunit cuts across the steeply sloped – in oceanographic terms – edge of Georges Bank, as does as well the eastern margin of 5Zen. In essence, what it does is make a kind of arbitrary jigsaw puzzle out of what is otherwise a large, flat, reasonably coherent geomorphological structure.

(235) Mr. LANCASTER: Dr. Edwards, before we leave Figure 70, would you point out again to the Chamber the three separate oceanographic régimes that we have been talking about on that Figure.

Dr. EDWARDS: First of all, this is the Gulf of Maine Basin which can be likened to a deep, rounded bowl; the Scotian Shelf, deeper inshore as indicated by the slopes to the bottom, bisected along its outer margin by a series of smaller banks; and then Georges Bank and the continental shelf to the west and south.

Mr. LANCASTER: Now, again, having discussed geomorphology, may I ask you please, do the NAFO subunits that Canada made reference to correspond to the patterns in which water circulates through the Gulf of Maine area?

Dr. EDWARDS: No, they do not.

(236) This is Figure 71; again, the boundary between Subarea 5 and Subarea 4, Georges Bank, here; statistical subdivision 5Zeh, here; and 5Zen beneath it. If you focus on the eastern margin of these two statistical subdivisions, they simply cut across the current régimes. Cutting across the current régime, of course, is not all that important, but what they do in fact do is cut across coherent régimes bounded by these current patterns.

The Subareas 5-4 boundary line goes up through the Northeast Channel into Georges Basin on the eastern side and then on up to the international terminus.

Mr. LANCASTER: Dr. Edwards, in earlier testimony you made reference to gyres in the Gulf of Maine Basin and on Georges Bank. Would you show us, please, what effect those subunit lines have with respect to those two gyres.

Dr. EDWARDS: In the case of the Gulf of Maine Basin gyre, the dividing line between Subarea 5 and Subarea 4 cuts across the eastern margin. In the case of the Georges Bank gyre, the statistical subdivisions, of course, bisect it. Beyond that there is little effect.

Mr. LANCASTER: You have now discussed both geomorphology and water

circulation patterns in regard to those subunits. Do the NAFO subunits identified by Canada correspond to the patterns in which water circulates through the Gulf of Maine area? You have just told us about that; the next question is: do those units correspond to water temperatures in the Gulf of Maine area?

Dr. EDWARDS: No. If we look at the surface temperature and gradient (237) Figure that I showed earlier, overlaid with Canada's NAFO lines (Fig. 72), we see the same story. Again, the division between Subarea 4 and Subarea 5 – it is difficult to see the statistical subdivisions in this chart – 5Zeh is here and 5Zen here. The statistical subdivisions in this instance take arbitrary chunks out of this Georges Bank-Nantucket shoals régime which we refer to as the "fish" – as you can see it looks like a fish.

This line – the Subarea 4-Subarea 5 line – courses up through the Northeast Channel, along the eastern margin of the Gulf of Maine Basin, and then on to the international terminus, and reasonably well segregates out the three régimes.

Mr. LANCASTER: You have now touched upon geomorphology, water patterns and water temperatures. Do the NAFO subunits which Canada listed correspond to the distribution of marine organisms in the Gulf of Maine area?

Dr. EDWARDS: No. Let me give you just one example. Figure 73 is an illustration showing the distribution of bottom-dwelling hermit crabs, overlaid with the NAFO lines and units suggested by Canada. In this case, the graphic was taken directly from a professional paper by Williams and Wigley and they illustrated their distributional patterns with charts that do not have north exactly at the top. To make it correct, we would have to move it, like this. (This (198) Figure, without the overlays, appeared as Figure 4 in Annex 24 to the United States Reply.)

This is Georges Bank: again, the dividing line between Subarea 4 and Subarea 5, the two statistical units here. You will notice that the statistical unit margins cut across obvious distributional patterns of this organism, and I might add that while it is a hermit crab it does, in fact, very nicely mirror some of the features we examined earlier – geomorphological, climatic and so forth – and its distributional pattern is not unlike that of some fish.

Mr. LANCASTER: Now that you have mentioned that, I was struck, as I looked at this illustration, by the fact that this is of the hermit crab and we have been discussing fish. Why did you happen to select the hermit crab for this particular illustration?

Dr. EDWARDS: In this instance, of course, these distributions – the distribution of the hermit crab and other invertebrate species – were included in (198) the United States Reply. There were eight such, and they appear in Annex 24. They were in response to the bar graphs presented by Canada in the Canadian (83)-(88) Counter-Memorial, Annex, Volume I, Figures 25 -30. We provided them simply to make a very different point. If one were to say, does this hermit crab occur on Browns Bank, on Georges Bank and on the Nantucket shoals, one must answer yes. The bar graph in a sense simply drew a line through the area implying that this animal, for example, was sort of randomly and generally distributed. It was prepared for that purpose.

Mr. LANCASTER: In fact, are they also bottom dwelling, Dr. Edwards?

Dr. EDWARDS: Yes they are.

Mr. LANCASTER: Geomorphology, water patterns, water temperature,

marine organisms: Dr. Edwards, do the NAFO subunits identified by Canada correspond to the larval distributions in the Gulf of Maine area?

(238) Dr. EDWARDS: No, they do not. This is Figure 74, the one that you saw earlier, showing the distribution of haddock larvae in May and June of 1981, but once again overlaid with the NAFO units and the lines mentioned by Canada. Once again, the dividing line between Subarea 4 and Subarea 5 – the statistical subdivisions 5Zeh, here, and 5Zen, down here – simply replicates a pattern which shows that these statistical units, if treated as ecological units, are simply arbitrary chunks taken out of a clear, coherent general picture.

Mr. LANCASTER: Finally, in this series of questions, do the NAFO subunits which have been identified by Canada correspond to the stock development areas which you mentioned earlier and described for us?

(122) Dr. EDWARDS: No, they do not. This is Figure 75 which you also saw earlier as an illustration of the stock development areas, with Canada's suggested NAFO units and lines superimposed. Here again, with the exception of the line between Subareas 4 and 5, the NAFO units and lines put forward by Canada cut across the stock development areas on Georges Bank. Once again, this is the dividing line between Subarea 4 and Subarea 5, statistical division 5Zeh is this block here, 5Zen is this block here. It is fairly obvious that in this case one simply cuts across coherent régimes, whereas the 4-5 line makes very good sense with respect to the general structure of the environment and the ecology of the region.

Mr. LANCASTER: That completes that series of questions. I would ask you now a question in another area. Canada asserts that the United States has not cited any scientific work on the Gulf of Maine area that describes three separate and identifiable régimes in the Gulf of Maine area or that describes the Northeast Channel as a "*natural boundary*". Is Canada correct in this regard?

Dr. EDWARDS: 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". However, scientists who deal with the area as a matter of course recognize the Scotian Shelf, Georges Bank and the Gulf of Maine as distinct areas for a variety of scientific and management purposes. It is also not correct to suggest that people have not recognized the Northeast Channel as a natural boundary or barrier. For example, remember our previous references to papers by the Canadian scientists Needler and Martin, where they explicitly used the word "barrier". However, should anyone care to peruse the literature, it is clear that people have recognized these régimes and the boundaries between them many times over.

This literature includes the work by Garfield *et al.*, cited in the Canadian Counter-Memorial (see United States Reply, Ann. 25, paras. 3-8). This work discusses the water of the Gulf of Maine Basin and distinguishes it from the separate water masses of Georges Bank and the Scotian Shelf. In their paper, the authors describe the oceanographic consequences of the combination of the Scotian Shelf surface water and the warmer, more saline, deeper water which enters the Gulf of Maine Basin through the Northeast Channel. The authors also mention the fact that the water in the Georges Bank régime is very different from the other two water masses for a number of reasons. Similarly, if one examines papers such as that of Merrill *et al.*, concerning the distribution of starfish in the Gulf of Maine area, one finds that he recognizes the Northeast Channel in his Figures showing the compression of isotherms around Georges Bank – including, of course, the Northeast Channel (see United States Counter-

Memorial, Ann. 1, para. 110). The Canadian oceanographer Lauzier, in a study of bottom currents in the Gulf of Maine area, clearly identified the Northeast Channel in a figure in which he drew a heavy black line down the middle of the Channel, with arrows going outward from the line in opposite directions, either to Browns Bank or to Georges Bank, to show that the bottom currents diverge along the length of the Channel (L. M. Lauzier, *Bottom Residual Drift on the Continental Shelf Area of the Canadian Atlantic Coast*, p. 1856). We should note that the Scotian Shelf was carefully defined and described geomorphologically and oceanographically by several well-known Canadian oceanographers in many papers beginning in the 1930s. Their description of it could as well be that of the United States. They did not feel the necessity to include the Basin, Georges Bank, or the Northeast Channel in their treatment of the Scotian Shelf.

Recently, the Canadian geologists King and McLean, describing the "geology of the Scotian Shelf", separately described Georges Basin and the Northeast Channel, Georges Bank and the Scotian Shelf. It should be noted that their topic – that is, geology – required a further subdivision that they entitled the Bay of Fundy and the Eastern Gulf of Maine (L. H. King and B. MacLean, *Geology of the Scotian Shelf*, deposited with the United States Counter-Memorial). Notably missing from their description was any discussion of the Great South Channel. Notably remarked upon was the Northeast Channel.

Finally, 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.

The existence of separate stocks in one or more of these three régimes has been recognized for decades by both Canada and the United States, and has been a cornerstone of all attempts to conserve and manage the marine resources of the area. This recognition was reflected in the major subdivisions of the area established by NACFI in 1931, confirmed by ICNAF in 1950, and still used by NAFO.

Mr. LANCASTER: Have you been present in the courtroom during the presentation of the relevant portions of the Canadian case?

Dr. EDWARDS: Yes, Sir.

Mr. LANCASTER: Has anything which you have heard in any way changed your opinion that the Northeast Channel does form a natural boundary or barrier, and that there are separate stocks on Georges Bank?

Dr. EDWARDS: No, Sir.

Mr. LANCASTER: Mr. President, this concludes the direct examination of Dr. Edwards. He is now available for questioning either by the Chamber or, of course, by Mr. Fortier on behalf of Canada.

The Chamber rose at 12.43 p.m.

SEVENTEENTH PUBLIC SITTING (18 IV 84, 3 p.m.)

Present: [See sitting of 2 IV 84.]

The PRESIDENT: Mr. Fortier would you come to the rostrum and proceed with the cross-examination of Mr. Edwards?

M. FORTIER: Monsieur le Président, Messieurs les juges, c'est un grand honneur de me lever à nouveau dans cette noble enceinte pour vous adresser la parole. C'est aussi un grand honneur pour moi d'être autorisé à interroger l'éminent scientifique américain membre de la délégation des Etats-Unis *M. Robert Edwards. Tout comme mon confrère et ami M. Ralph Lancaster* je chercherai cet après-midi, en profane que je suis, à comprendre certains faits et je le souhaite ainsi à faciliter le travail de la Chambre dans le domaine fort complexe du milieu marin dans la région du golfe du Maine. Il est bien entendu, Monsieur le Président, que le contre-interrogatoire auquel je me livrerai est sans préjudice à la position juridique du Canada en ce qui concerne la thèse américaine de la frontière naturelle et des trois régimes écologiques distincts, séparés et identifiables dans la région.

Maintenant pour ne pas retarder indûment le travail de la Chambre et pour m'assurer d'une bonne compréhension par M. Edwards de mes questions, je m'adresserai à lui dans la langue de Shakespeare plutôt que dans la langue de Molière, ma langue maternelle.

Dr. Edwards, allow me first to congratulate you on a masterful pedagogic presentation this morning. I was very impressed, as were all of my colleagues on the Canadian side of the room. I notice, as a matter of fact, from your very impressive currriculum vitae that you have been teaching for close to 35 years, have you not?

Dr. EDWARDS: No, Sir, I think my teaching experience as listed there was considerably less than that. Much of my time has been spent either in doing research or in directing a research programme.

Mr. FORTIER: You started teaching in 1946 at Colgate and I understand that you are still teaching at the University of Rhode Island today. Is that correct?

Now, since 1955, Dr. Edwards, you have been an employee of the United States Government.

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: You have been employed by one of the two Parties in this case.

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: When did you start becoming involved in the drafting of the written pleadings in this matter, Dr. Edwards?

Dr. EDWARDS: To the extent that I was involved in that process, Sir, about 18 months ago.

Mr. FORTIER: About 18 months ago? When would that be? Can you be more precise? Was this at the Memorial stage, the Counter-Memorial stage or . . .?

Dr. EDWARDS: Pretty much following the Memorial stage, Sir, but I did help somewhat in the Memorial stage.

Mr. FORTIER: I presume in matters pertaining to the offshore environment.

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: So before the United States Memorial was filed with the Court in September of 1982 you were, to use your words, consulted with respect to those passages having to do with the offshore environment?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: And you approved of them?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: Without any reservation?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: And I presume the same holds true for the Counter-Memorial also?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: And, of course, the Annexes to the Counter-Memorial some of which indeed bear your name as being one of the contributors.

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: And, finally, you approved of those chapters in the Counter-Memorial and those Annexes to the Counter-Memorial having to do with the offshore environment, did you not, Sir?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: And, finally, with respect to the United States Reply, here again I presume for good reason that the distinguished counsel for the United States consulted with you with respect to the offshore environment.

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: And all of those chapters which we find in the Reply having to do with the offshore environment bear your stamp of approval?

Dr. EDWARDS: To the extent of the factual material in there, certainly, Sir.

Mr. FORTIER: And the same holds true again for the Annexes to the Reply?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: I do not believe that I would be exaggerating, I do not want to abuse of your modesty, but I do not think I would be exaggerating, Dr. Edwards, if I stated that in the area of the offshore environment in the United States case relating thereto, yours was the major intellectual contribution.

Dr. EDWARDS: I do not think that would be fair to all of the people who assisted in this, Sir. My role was one of co-ordination, oversight and so forth, but to say it was largely mine, I think, would be unfair.

Mr. FORTIER: The team which you directed made a major contribution, a major intellectual contribution to the theory of the three ecological régimes and the natural boundary in the Gulf of Maine area.

Dr. EDWARDS: Yes, Sir, they did.

Mr. FORTIER: Now, I would like to turn, if I may, to an area which you touched on this morning in the field of biogeography. You talked about land boundaries being affected by climatic conditions and you also talked about boundaries in the water also being affected by various factors such as temper-

ature and salinity and so on. Would you please turn to Annex 1, Volume I, Chapter 2, Section 2, page 154, paragraph 107. I am referring, Mr. President, at this point to Annex 1, Volume I, to the United States Counter-Memorial (IV), which I asked the Registrar to put before you and your colleagues. And I would like to turn to page 154. You do have the volume with you Dr. Edwards?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: O.K. I draw your attention to paragraph 107 on this page which I would like to read into the record:

> "It is well recognized that there is a major faunal boundary that runs at about 42 degrees North Latitude from Cape Cod, northeastward along the northern edge of Georges Bank, and through the Northeast Channel. This faunal boundary has been recognized, e.g., in studies of the distribution of fish, starfish, and molluscs. In his book *Natural Communities*, Dice recognized the division that extends from Cape Cod along the northern edge of Georges Bank through the Northeast Channel."

You will note, of course, that there is a footnote after the words "Northeast Channel", which gives us the reference to Dice. For the convenience of the Chamber, the *op. cit.* is found at page 75 of this same volume, footnote 3. Page 75 is the other reference to this volume by Dice entitled *Natural Communities*. I refer to page 75 of the same volume, at the bottom of the page, "L. R. Dice, *Natural Communities*, 1952".

You are familiar with that book, Dr. Edwards. As a matter of fact, I have read with much interest many of your distinguished writings, and I have found extensive references to "Dice" in them. You are familiar with Dice?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: And a piece which reads as follows:

> "Although he was concerned principally with terrestrial environments, Dice recognized two provinces in the area: the first north and east of Georges Bank, and the second to the south."

(239) I have gone to the 1952 volume of Dice. I have gone to page 444, I have looked at Figure 50 – I have it before me at the moment – and I would like to hand it to you and to your distinguished counsel three copies of a little compendium which we have prepared, and which includes various documents which I shall be referring to in the course of my examination this afternoon.

Mr. President, distinguished Judges, this is item 1 in the thinner of the volumes which were handed to you during the noon recess, and which of course I have now handed to my confrères on the other side.

(239) Please turn to item 1, Dr. Edwards. You see the reproduction there of page 444, Figure 50. Would you please explain in which way Mr. Dice – this illustrious author – on this Figure 50,

> "recognized the division that extends from Cape Cod along the northern edge of Georges Bank through the Northeast Channel. Although he was concerned principally with terrestrial environments, Dice recognized two provinces in the area: the first north and east of Georges Bank, and the second to the South."

The PRESIDENT: Would you kindly indicate the page in the volume?

Mr. FORTIER: I am sorry, Mr. President. It is the volume entitled *Selected Material*, the thinner of the books.

The PRESIDENT: On which page?

Mr. FORTIER: Tab No. 1. We have reproduced the cover page of the book (239) *Natural Communities*, and then we have reproduced page 444, Figure 50.

Dr. Edwards, my question is, in which way does this Figure 50, at page 444 of Dice's book, recognize a division that extends from Cape Cod along the northern edge of Georges Bank through the Northeast Channel?

Dr. EDWARDS: As I see it, Sir, he has drawn a line separating two of his biotic provinces, that exits from Cape Cod to the east, along the northern edge out to the Northeast Channel.

Mr. FORTIER: So your answer is that this line, which extends seaward south of the Cape Cod-Nantucket area in the Gulf of Maine area, is the basis of your affirmation in paragraph 107 that although Dice was concerned principally with terrestrial environments he recognized two provinces in the area, the first north and east of Georges Bank and the second to the south? Is that correct?

Dr. EDWARDS: One small correction Sir, I believe you said that the line exited south of Cape Cod –

Mr. FORTIER: I meant north.

Dr. EDWARDS: Thank you.

Mr. FORTIER: I will be making many of those mistakes: I apologize in advance. I am in your area, not in mine.

As you correctly point out, it is north. It is the extension of this line between the two provinces that is the justification for your statement in paragraph 107 that I have just read.

Dr. EDWARDS: It is the justification for the statement that was made.

(239) Mr. FORTIER: You will notice, of course, that Figure 50, which is before you, contains the mention in brackets underneath the Figure, after "Dice, 1943, by permission of the University of Michigan Press". What does that mean for you?

Dr. EDWARDS: That this plate that Dice reproduced was based on a plate that he had used earlier, in 1943.

Mr. FORTIER: And you are familiar with Dice's earlier book, published in 1943?

Dr. EDWARDS: I have read it: at the moment I do not recall it, but I am sure I have seen it at some point.

Mr. FORTIER: I have a copy of the book here, which has already been handed to the Members of the Chamber. I am now handing you two copies, one for yourself and one for Mr. Lancaster. It is a reproduction, Mr. President, of a book: Lee R. Dice, *The Biotic Provinces of North America.*

I now ask you, Sir, to turn to the text on page 4 of this book, the penultimate paragraph. I would like to read into the record the paragraph which starts:

> "Each biotic province comprises both the climax communities and all the successional stages within its geographic area, and it thus includes the freshwater communities. It does not, however, include the marine communities that may lie adjacent to its shores. These communities are assumed to belong to marine biotic provinces, not described here."

Did you hear my reading of this paragraph?

Dr. EDWARDS: Yes, Sir, I did.

Mr. FORTIER: And you have thus noted that Dice, in developing this (239) Figure 50, which is reproduced in the little booklet, made it very clear that the provinces did not include the marine communities that may lie adjacent to its shores. I thus ask you the question: on what basis, Dr. Edwards, did the United States of America say in paragraph 107 at page 154 of its Annex that Dice had recognized the division that extends from Cape Cod along the northern edge of Georges Bank, through the Northeast Channel; and although he was concerned principally with terrestrial environments, Dice recognized two provinces in the area, the first north and east of Georges Bank, and the second to the south. On what basis now do you so allege?

Dr. EDWARDS: I think the point was that it was felt that this line really reflects what most individuals feel is the appropriate zoogeographic line.

Mr. FORTIER: Is that what Dice says in the 1943 book, a passage of which I read to you?

Dr. EDWARDS: No, it is not.

Mr. FORTIER: In fact, he says quite emphatically that: "It does not include the marine communities that may lie adjacent to its shore. These communities are assumed to belong to marine biotic provinces not described here."

Dr. EDWARDS: That is correct, Sir.

Mr. FORTIER: Would you agree with me, Dr. Edwards, that this assertion in paragraph 107, which we have referred to, may be scientifically incorrect?

Dr. EDWARDS: The assertion is certainly not scientifically incorrect. It certainly does not reflect Dice as he himself states the case.

Mr. FORTIER: Thank you. You were here, Dr. Edwards, as you answered Mr. Lancaster this morning, when Canada presented its case during the first two weeks, and I am not incorrect in stating that you were also here when the United States presented its case.

Dr. EDWARDS: Yes, Sir. I have missed very few sessions.

Mr. FORTIER: You have been very assiduous. I commend you. In particular, you heard one of the distinguished counsel for the United States, (23) Mr. Rashkow, refer extensively on Monday to Figure 7 of the United States Memorial. Do you remember this exercise, Sir?

Dr. EDWARDS: Yes, Sir, I do.

Mr. FORTIER: I ask the President of the Chamber and the distinguished Judges to refer to the United States Memorial at page 37. There is, of course, the (23) reproduction of this Figure 7 about which much was made on Monday. You are very familiar with Figure 7, of course, Dr. Edwards?

Dr. EDWARDS: I am familiar with it.

Mr. FORTIER: In paragraph 57 on page 36, immediately opposite Figure 7, there is a sentence which I would like to read to you, towards the end of the paragraph. It is the third sentence from the bottom:

(23) "In all, the chart [that is, Figure 7] shows sharp stock divisions at the Northeast Channel in 12 of the 16 species. Regardless of the season, most species are not found in fishable quantities in the Northeast Channel, thus the Northeast Channel is a natural boundary between fishing activities, as well as a natural division between the stocks of Georges Bank and the stocks of the Scotian Shelf."

(23) Now, this morning, answering questions put to you by my learned friend, Mr. Lancaster, you referred to six of the species which we find on Figure 7. They are haddock, cod, herring, yellowtail flounder, sea scallops and lobster. You did not refer specifically to any other species included in the 12 for which the chart shows sharp stock divisions at the Northeast Channel. But what I would like to do with you in the next little while is try and ascertain why no reference was made this morning to some of the other species in respect of which the United States in its Memorial says that Figure 7 shows sharp stock divisions.

(23) Let us start, if I may, with the longfin squid. The longfin squid, Mr. President, distinguished Judges, is the seventh species from the top of Figure 7. We see that the bar pertaining to the longfin squid does not reach the Northeast Channel and in fact you make the point in footnote 1, on page 36, that a stock of longfin squid is found in the Georges Bank régime but not in the Scotian Shelf régime. Dr. Edwards, my question to you, Sir, is whether it is scientifically exact for the United States to state, as it does in paragraph 57, that the chart shows "sharp stock divisions at the Northeast Channel for longfin squid".

Dr. EDWARDS: The longfin squid for all practical purposes does not go across the Northeast Channel. Other than that, Sir, I am not quite sure what point you wish to make.

(23) Mr. FORTIER: If it is not clear I apologize. I will try again. In paragraph 57, Dr. Edwards, in referring to the chart, Figure 7, you say "the chart shows sharp stock divisions at the Northeast Channel" in 12 of the 16 species depicted. One of these 12 is the longfin squid. And the last sentence is to the effect that the Northeast Channel is a natural boundary between the stocks of Georges Bank and the stocks of the Scotian Shelf. Is that correct in so far, Sir, as longfin squid is concerned?

Dr. EDWARDS: Your point being, Sir, that the bar does not extend to the Channel?

Mr. FORTIER: Are there stocks of longfin squid on the Scotian Shelf, Sir?

Dr. EDWARDS: To my knowledge, no Sir.

Mr. FORTIER: So how could there be a division between stocks of longfin squid in the Northeast Channel, between Georges Bank and the Scotian Shelf?

Dr. EDWARDS: The title of this is "ranges of stocks" and it refers to a zone Block Island, across Georges Bank, the Northeast Channel and Browns Bank to LaHave. It is talking about these stocks in terms of fishable quantities, so I am not sure exactly which point it is you wished me to respond to.

(23) Mr. FORTIER: I was trying to obtain from you that you accept to refer to the sentences in paragraph 57 which I have read to you, which state that the chart (Fig. 7) shows sharp stock divisions at the Northeast Channel in respect of, amongst others, longfin squid, and that the Northeast Channel is a natural division between the stocks of Georges Bank and the stocks of the Scotian Shelf for longfin squid. And now, Sir, if there are no stocks of longfin squid on the Scotian Shelf, how could there be a division between the stocks?

Dr. EDWARDS: You are quite right, Sir. If you wish me to say that there is no stock on the other side of the Northeast Channel, we are in complete agreement. I am sorry if this was misconstrued to lead you to that particular interpretation.

Mr. FORTIER: As a matter of fact, Sir, I wonder if you could refer to page 87 of the Annex to which we referred earlier (p. 87 of the United States Technical Annex). I just came across a sentence which I found rather intriguing,

in the course of this discussion which we are having. I want to ask you a question. Do you have it, Sir, on page 87? You see paragraph 60 – you can satisfy yourself that paragraph 60 on page 87 of the Annex refers amongst other species, to longfin squid. I invite you to read the preceding paragraph, Sir, if you wish; and it says "These species have not developed separate stocks within the Georges Bank régime". How do you reconcile that with the assertion in footnote 1 of page 36 of the United States Memorial (II) that "A stock of longfin squid is found in ... Georges Bank"?

Dr. EDWARDS: Well, a stock of longfin squid is certainly found on Georges Bank. I am not sure that there is any implication here that this is isolated to or confined on Georges Bank.

Mr. FORTIER: Is there not a contradiction, Sir? Again, I come to this line of questioning very much as a layman and I am looking for guidance from you, but to read in one written pleading that there is a stock of longfin squid in the Georges Bank régime and then to read in a subsequent written pleading that the longfin squid have not developed separate stocks within the Georges Bank régime, seems to me to be a contradiction.

Dr. EDWARDS: I think I do understand the general point that you are trying to make, Sir. I am just trying to read through this and make sure that what you are implying is, in fact, what was intended.

Mr. FORTIER: Please take all the time you require, Sir.

Dr. EDWARDS: As little as possible, Sir.

I think about all I can do, Sir, is to repeat that, from our experience, the longfin squid which, as far as we are concerned, represent a stock, is found on Georges Bank and extends to the Northeast Channel. This reference to your earlier comment about why the bar ends short of the Northeast Channel – as I recall this chart was constructed in terms of fishable quantities, and that may be the reason, Sir.

Mr. FORTIER: We will move to another species, having dealt with longfin squid. But before I do, I would like to hand to you a couple of papers which have already been filed with the Chamber in this case, and copies were handed to members of the Chamber during the noon recess. I now have copies for you as well as for my learned friends.

One, Sir, is the paper by Messrs. M. D. Grosslein and S. H. Clark, entitled "Distribution of Selected Fish Species and Status of Major Fisheries in the Northwest Atlantic". You are familiar with that document?

Dr. EDWARDS: I think so, Sir.

Mr. FORTIER: You remember that this was prepared by these two scientists who work under you at Wood Hole?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: As we see on the title page it was prepared to assist with the Bilateral Negotiations going on at that time between the United States and Canada with respect to the famous, or infamous, fisheries agreement. Right?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: Mr. President, distinguished Judges, that is the document by M. D. Grosslein and S. H. Clark, and it is for your convenience that we have made copies because it has already been filed, and the other one is the Draft Environmental Impact Statement on the Agreement between the United

States and Canada on East Coast Fishery Resources. Are you also familiar, Dr. Edwards, with this document?

Dr. EDWARDS: I have read it. It would be unfair to say that I was familiar with it.

Mr. FORTIER: What I should have asked is: you know in what context it was prepared?

Dr. EDWARDS: I think so, Sir.

Mr. FORTIER: All right. Would you please hand a copy to my distinguished witness and his counsel.

Just so I understand: the Grosslein and Clark paper was prepared in the course of the negotiations between the United States and Canada? Is that correct, Sir?

Dr. EDWARDS: The preparation of this document happened to coincide with these negotiations. I do not think it was prepared explicitly for that, except in so far as the larger document they prepared was extracted for this purpose.

Mr. FORTIER: I am sorry for interrupting. Have you finished your answer?

If you look at the second page you will see Technical Reference Document for Bilateral Negotiations between USA and Canada, July 1976. You see?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: Fine. After the fisheries agreement was agreed to by the negotiators in 1979 there was then a Draft Environmental Impact Statement which was prepared by the United States Department of State and it is the March 1980 document of which you have a copy here. Right, Sir?

Now, having identified these two documents, let us move to another species (23) which is represented on Figure 7, as being one for which there are sharp stock divisions at the Northeast Channel and for which the Northeast Channel is a natural division between the stocks of Georges Bank and the stocks of the Scotian Shelf. You will have noticed that I have read again those words found in paragraph 57, and I am referring to cusks, which is, Mr. President and distinguished Judges, the last species on Figure 7, at the bottom of the page – cusks.

Could you please refer to the United States Technical Annex at page 138, paragraph 98, which refers to "cusks". I will read this first sentence, I am sure you will wish to read all that is to be found under the heading of "Cusks":

> "The spawning and distributional evidence strongly suggests that separate stocks of cusk exist in the western part of the Gulf of Maine Basin and on the Scotian Shelf, including Browns Bank and German Bank."

Where is the reference, Dr. Edwards, to separate stocks of cusk existing on Georges Bank?

Dr. EDWARDS: You mean a specific published reference, Sir?

Mr. FORTIER: We can break down your answer as you wish. This is in the chapter to be found in the technical annex where the details are provided for (23) each of the various species which are found on Figure 7. Figure 7 – I don't want to belabour the point – but Figure 7 says that the chart shows sharp stock divisions at the Northeast Channel in 12 of the 16 species, including cusk: and I suggest to you – very delicately and very respectfully – that there has never been identified, by scientists, stocks of cusk on Georges Bank, Sir.

Dr. EDWARDS: In terms of the published record, Sir, I believe you are right.

This statement says the spawning and distributional evidence strongly suggests *that separate stocks of cusk exist.*

Mr. FORTIER: So it is – and I'm going to be careful with my use of words – it is inexact; I don't want to make it into a major case, but it is inexact thus to say, as we read in paragraph 57 of the United States Memorial, that the Northeast Channel is a natural division between the stocks of Georges Bank cusk and the stocks of the Scotian Shelf.

Dr. EDWARDS: It sounds to me, Sir, as though you and I can have some arguments about this.

Mr. FORTIER: What would be the nature of the argument, Dr. Edwards?

Dr. EDWARDS: Well, it might be worthwhile, although I doubt it, Sir, if we review the distributional evidence, which I suppose we could get our hands on if we want to.

Mr. FORTIER: Well, why don't we do that. I have handed you a copy of Grosslein and Clark. Would you please turn – it's a Grosslein and Clark paper, Mr. President – to page 46. If you look at page 46, these distinguished scientists, who work under you at Woods Hole, in 1976 asserted – under the heading of "cusk": "We do not have sufficient knowledge to delineate separate stocks for this species in the northeast Atlantic."

Has the state of the art developed since 1976 to the point where Dr. Edwards can now affirm that the Northeast Channel is a natural division between stocks of cusk on Georges Bank and stocks of cusk on the Scotian Shelf?

Mr. LANCASTER: I think Dr. Edwards would care to go back to the original data and assure himself of this, Sir, but as you say, it is precisely as they stated in this volume as of that date.

Mr. FORTIER: Let us turn, Sir – having dealt with cusk – let us turn to yet another species. I will not spend a considerable amount of time on this figure, but I just thought it would be useful to set the record straight since you dealt with six species this morning – so we've seen what we have seen about longfin squid – we've seen what we have seen about cusk – let us turn to white hake now.

(23) You see that white hake is another species, which is represented on Figure 7 – it is the third species from the bottom – it is represented as being a species for *which there is a natural division between its stocks* on Georges Bank and its stocks on the Scotian Shelf. Do you maintain in the light of the scientific evidence, Dr. Edwards, that this is a valid statement?

Dr. EDWARDS: May I turn to the text, Sir? Is that page 125, Sir?

Mr. FORTIER: *The reference to the white hake is indeed at page 125 in the* Annex. That is correct, page 125 at paragraph 88. We read, towards the end of the paragraph, "it is reasonable to assume that white hake has a similar stock structure to red hake". Are we to understand, Sir, that it is on the basis of an assumption that you have made a scientific finding that stocks of white hake were to be found on Georges Bank and stocks of white hake were also to be found on the Scotian Shelf?

Dr. EDWARDS: It is reasonable to assume, Sir, that I was so informed by the assessment group and I saw no reason to disbelieve it.

Mr. FORTIER: *Let us turn please, in respect of white hake, to the* 1976 Grosslein and Clark paper. You see, Sir, the last paragraph at page 45 of the Grosslein and Clark paper, it is stated: "At present we do not have sufficient information to delineate stocks in this area."

Dr. EDWARDS: Yes, Sir, I see that.

Mr. FORTIER: And does this lead you to make the same scientific conclusion as that which is found in paragraph 57 of the United States Memorial, that there is a natural division between the stocks of white hake on Georges Bank and the stocks of white hake on the Scotian Shelf, Sir?

Dr. EDWARDS: This document, Sir, was prepared in 1976 and I think the statement in here – that it is reasonable to assume that the white hake is similar in stock structure to red hake – is reasonable.

Mr. FORTIER: You mean to say, and I am pleased to hear you so state, that since 1976 the state of science in respect of white hake has progressed, and you can now affirm that there are separate stocks – is that correct?

Dr. EDWARDS: Right at the moment, Sir, I am trying to remember where I have seen a Canadian publication, so separating the white hake. I am sorry to say at the moment I don't recall where it was – but there has been further evidence in 1976. The best I can do at the moment is to suggest – and I am certainly not sure – that I may have seen such a figure in Hare.

Mr. FORTIER: Well, let me assist you, Sir. Let us move from 1976 to 1980. Let us turn to the Draft Environmental Impact Statement – and I invite you to turn to page 102 – this is four years later.

You will note, Sir, that under the heading, "Management", it is stated in this official United States document "White hake have been included as 'other finfish' in Subarea 5 and Statistical Area 6 under ICNAF" – and then, the important sentence, at page 102, Mr. President: "On the basis of all the information currently available, including United States and Canadian survey results, it appears that white hake in the Gulf of Maine-Georges Bank area should be considered as a single stock."

Is that the state of the scientific evidence pertaining to white hake today?

Dr. EDWARDS: I should point out to you that there seems to be something missing here, Sir. I thought we were talking about the Scotian Shelf. If this means the Scotian Shelf as well, this certainly is a fairly late reference. But I think in this graph, which is dealing with Georges Bank and Browns Bank, we had better be certain that that in fact means Browns Bank as well.

Mr. FORTIER: To assist the Chamber, would you give us a reference to scientific work which makes it possible for the United States to assert that there are different stocks of white hake on Georges Bank and on the Scotian Shelf?

Dr. EDWARDS: I certainly cannot at this moment, Sir.

Mr. FORTIER: Thank you.

(23) Let us turn to yet another species, which is represented on Figure 7 of the United States Memorial as being one in respect of which there are sharp stock divisions at the Northeast Channel, and for which the Northeast Channel is a natural division between the stocks of Georges Bank and the stocks of the Scotian Shelf. I am referring to redfish.

Dr. Edwards, would you please tell us which is the scientific evidence on the basis of which the United States assert, as they do . . .

Dr. EDWARDS: Specific paper, Sir?

Mr. FORTIER: Yes.

Dr. EDWARDS: I am afraid I cannot dredge them off the top of my head at the moment: a great deal has been written about redfish, as I am sure you are aware . . .

Mr. FORTIER: Don't be so sure!

Dr. EDWARDS: . . . and the Gulf of Maine. The redfish is well known for its tendency to form separate subpopulations, and much has been written about this. But off the top of my head, I cannot give you a specific useful reference at this moment.

Mr. FORTIER: We are aided by your very elaborate and detailed technical annex, which gives extensive references to major scientific works, on the basis of (23) which this representation on chart No. 7 in the United States Memorial is made. I refer the President of the Chamber and the distinguished Judges to page 126 of your technical annex, Dr. Edwards; under the heading "Redfish", paragraph 90, we read:

> "Redfish in the Gulf of Maine Basin and on the Scotian Shelf consistently have been treated as separate stocks. This species exhibits little, if any, migratory behaviour. The evidence of parasite studies indicates that Gulf of Maine Basin redfish are distinct from those of the Scotian Shelf."

I see no reference here, Dr. Edwards, to separate stocks of redfish on Georges Bank. I may have missed it . . .

Dr. EDWARDS: That is your point, Sir. This chart, I believe, refers to a large area, relatively speaking, from Block Island to Browns Bank, and it is dealing with the fisheries that are associated with these areas. I do not think this is necessarily as explicit in terms of the question you just raised concerning Georges Bank *per se* and redfish stocks. No one alleges that there is a stock of redfish on Georges Bank *per se*.

Mr. FORTIER: Thank you for that answer. So in so far as redfish are concerned, the United States is not alleging or postulating that there are separate stocks on Georges Bank . . .

Dr. EDWARDS: . . . Of redfish? That is correct, Sir. There are few redfish on Georges Bank.

Mr. FORTIER: They are really deep-water fish, are they not?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: I think I will stop here, as far as this litany of species (23) represented on Figure 7 of the United States Memorial is being divided at the natural boundary of the Northeast Channel, and turn to another area.

I was very interested this morning, Dr. Edwards, to hear your most eloquent and very convincing explanations about herring in the Gulf of Maine area. You made much reference to the fact that spawning of herring in the so-called ecological régimes in so far as herrings were concerned was a major factor that should be taken into consideration in identifying the separate stocks.

Dr. EDWARDS: I think I understand you – yes, Sir.

Mr. FORTIER: I am having a little trouble – I am sorry.

I return to the United States Memorial, and I am referring again to page 36. There is the assertion, on page 36, in paragraph 56, that of the 16 so-called "commercially important species" in the Gulf of Maine area, there are four which may migrate from one ecological régime to another: the mackerel, the pollock, the shortfin squid and the argentine may migrate from one ecological régime to another.

I came across a finding in the Environmental Impact Statement, of which you have a copy, which I would like you to comment on, Dr. Edwards. It is at

page 103 of that Statement. The second paragraph, under the rubric "Atlantic herring", reads as follows:

> "It is generally understood that the Georges Bank, Gulf of Maine and southwest Nova Scotia stocks are separate reproductive entities associated with well-defined, specific spawning areas but that the stocks are not isolated genetically from each other. At various times of the year, fish from all three stocks may be expected to overlap geographically in varying proportions and become seasonally subject to capture in the various commercial fisheries."

Do you agree with that statement, Sir?

Dr. EDWARDS: No, Sir, I do not agree with it. First of all, it has to be demonstrated to me, and it certainly has not, that these stocks in fact interact as much as is implied here. No, I do not agree with that, Sir.

Mr. FORTIER: Thank you. This morning, Dr. Edwards, we heard you develop the argument that there were geographically fixed boundaries in the sea just as on land. Is that not correct?

Dr. EDWARDS: Yes, Sir.

Mr. FORTIER: And that your very words connote the idea of fixed boundaries? Is this a view that you have always held, Sir?

Dr. EDWARDS: I have a view that the boundary or the shoreline of a river or an ocean is a boundary, and I think when we were talking about geographically fixed boundaries we were talking about features of that sort.

Mr. FORTIER: My question is whether you, Dr. Edwards, have always held the view that there were geographically fixed boundaries in the sea and, indeed, that these sea boundaries were even more clearly defined than the land boundaries in some instances?

Dr. EDWARDS: There seem to be two thoughts mixed up there. First of all, the point was made that geomorphological features are comparable to the land and they in fact are fixed. The second thought in there is slightly different. I am not quite sure what you wish me to respond to, but as I hear you I think now we are talking about a different thing, perhaps the boundary between climatic zones. I do think the point was made rather carefully that they are not geographically fixed.

Mr. FORTIER: May I refer you, Dr. Edwards, to an article which you wrote in 1978 which is entitled "North Atlantic Fisheries: Recent Changes in Population and Outlook". It is item No. 5, Mr. President, distinguished Judges, in the book which you were provided with earlier this afternoon. Do you remember writing this article, Sir?

Dr. EDWARDS: Yes, Sir, I do.

Mr. FORTIER: It is a very impressive article. In fact, there is a reference to Dice in it. Would you turn, please, to page 5. In the left-hand column you wrote in 1978: "All ecosystems change continuously." At the bottom of the page, the last paragraph starts: "Land and marine ecosystems are very different." And finally, in the right-hand column, in the first full paragraph, you wrote in 1978:

> "Terrestrial ecosystems are relatively stable in their geographic boundaries and in their persistence. The beech-maple forest, once established, does not move much, and by its very existence creates microclimates allowing considerable specialization of animals and plants living within that forest.

In the ocean, boundaries and distribution of ecosystems change constantly."

Was this what Dr. Edwards believed in 1978?

Dr. EDWARDS: We have a famous saying, Sir. At this point in time, given what we are dealing with, I could bite my tongue. I would have to read this carefully to try and recreate the ambiance in which that was written. May I find it and read it?

Mr. FORTIER: Please. It is page 4 or 5, Mr. President. My question is a very simple one, whether in 1978 you believed that in the ocean boundaries and distribution of ecosystems changed constantly?

Dr. EDWARDS: No, sir, I do not. That is why I am trying to read it and understand exactly what it was I intended to say.

Mr. FORTIER: I have no further questions, Mr. President, distinguished Judges.

The Chamber rose at 16.15 p.m.

EIGHTEENTH PUBLIC SITTING (19 IV 84, 10 a.m.)

Present: [See sitting of 2 IV 84.]

Le PRÉSIDENT DE LA CHAMBRE: Avant de donner la parole à M. Colson, je voudrais indiquer que certaines juges et moi-même voudrions poser des questions aux Parties. Ces questions, s'il y a le temps, seront lues à la fin de la séance de ce matin.

I will repeat this in English. Some Judges desire to put some questions to the Parties. Those questions will be addressed to the Parties at the end of this morning's hearing if there is time, otherwise they will be delivered to the Parties in writing.

It is quite clear that the Parties are not requested to reply today. The same applies to some questions that some Judges would like to put to the expert, Dr. Edwards, so they will also be delivered to the expert for further reply.

ARGUMENT OF MR. COLSON

DEPUTY-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. COLSON: Mr. President, distinguished Judges, may it please the Chamber.

The Conservation of the Resources of Georges Bank

The United States turns today to a discussion of the integrity of Georges Bank and the critical need to conserve its resources. Our purpose will be to examine the principles of resource conservation and management and dispute minimization as they relate to the facts of this case and with respect to the boundaries that the Parties have proposed. In accordance with Article 60 of the Rules of Court, we will not restate arguments previously made, but instead will seek to illuminate the issues remaining between the Parties on this subject.

I will be assisted today by Mr. Richard Davis of the National Ocean Survey of the Department of Commerce and Lt. Neil Gitin of the Judge Advocate General's Corps of the United States Navy who will co-ordinate the movement of the charts. 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 and Ms. Mary Wild Ennis of the Legal Adviser's Office of the Department of State, who have assisted me in the preparation of this presentation.

Mr. Stevenson has set forth the reasons that the United States believes that, as a matter of law, the principles of the facilitation of resource conservation and management and the minimization of international disputes are applicable here. Dr. Edwards has demonstrated persuasively that there are three separate and identifiable ecological régimes existing in the Gulf of Maine area. There is a logical relationship between the law and the facts in this case. In our view, this relationship dictates that, to the extent possible, a boundary should not divide the ecological régimes associated with fishing banks.

The Canadian Reply (V) responds to the position of the United States in a chapter entitled "The myth of the natural boundary" (paras. 162-200). In that

chapter, Canada relies upon rhetoric rather than substantive analysis. If the rhetoric is set aside, one is left with four major areas of difference between the Parties.

We will organize this presentation around these four differences, which are still with us following Canada's oral presentation. First, Canada purports not to acknowledge that stocks of commercially important species of fish and shellfish are divided at the Northeast Channel (see, e.g., Canadian Reply, para. 183). Second, Canada asserts that fish stocks on Georges Bank do not have the characteristics of a common-pool resource (*ibid.*, para. 199). Third, Canada portrays the principle of resource conservation and management as one of unilateralism, monopoly, administrative convenience, and isolation and, having so marked it with pejorative terms, finds it inapplicable to this delimitation (*ibid.*, para. 196). And, fourth, Canada argues that prospective oil development on the northeast portion of Georges Bank would threaten the Canadian coast alone – in other words, that the United States has nothing to fear from the prospect that Canada's line would leave it to Canada to make oil development decisions for the northeast portion of Georges Bank (*ibid.*, paras. 178, 200).

After some introductory remarks, we propose to address, and to refute, these four Canadian contentions.

Conservation of resources is not merely a technical or abstract scientific concept. Although science is clearly involved, conservation of resources is a political, economic and, ultimately, a legal matter that contemplates the selection of various alternatives for the use of a resource. The essence of conservation is restraint – and this restraint is imposed through political, economic and legal choices. This is especially the case for fisheries and for hydrocarbon resources.

It is the function of management to prevent over-exploitation resulting in the waste or destruction of resources. Exploitation of a resource by parties with different social and economic objectives, and legal régimes, has proved in the past to cause special problems leading to over-exploitation. Consequently, in the view of the United States, the delimitation of a single maritime boundary should avoid, whenever possible, dividing the responsibility for conserving and managing a resource between two governments. In other words, single stocks of fish or single pools of oil should not be subjected to joint management whenever it is reasonable not to do so.

The principle of conservation, as it applies to the continental shelf, was first articulated in the Truman Proclamation on the continental shelf. The Proclamation identified the need for the conservation and prudent use of the deposits of oil and gas as one reason for extending coastal-State jurisdiction over the natural resources of the continental shelf. Subsequently, in citing the unity of deposits as a factor for delimiting the continental shelf, the Court in the *North Sea Continental Shelf* cases underscored the need to conserve and to manage continental shelf resources for their efficient – efficient is the word the Court uses at paragraph 97 – use. Neither Party here argues that there is a single oil or gas pool in the Gulf of Maine area that should be taken into account in this delimitation. Too little is known of the possible hydrocarbon resources of the disputed area for them to be a factor in this case.

The principle of conservation is particularly important in protecting the renewable living resources of the sea. Only through proper conservation and management can the living resources of the sea be preserved and best used for the benefit of the coastal State and the international community alike, for now and for the future. Unlike the case of speculative assessments of oil and gas deposits, the fisheries resources of the Gulf of Maine area are abundant and well

known. The United States believes that the law requires that the facilitation of the conservation and management of these fishery resources be considered as a principle in establishing an equitable boundary. It is particularly important to do so in a case, such as this, where the integrity of a fishing bank, and its associated stocks, are at stake.

The establishment in international law of 200-nautical-mile fishing zones was largely a reaction to the failure to protect the world's fishery resources by international agreement. The history of fisheries management demonstrates that, whenever more than one State fishes the same stock, conflicts over the distribution of fishing rights, as well as scientific and technical issues, management objectives and techniques, and enforcement efforts will prevent or inhibit agreement of those States with regard to implementing and enforcing conservation measures.

Mr. Stevenson recounted how the extension of coastal-State fishing jurisdiction to 200 nautical miles sought to deal with this international conservation problem by lodging in the coastal States management authority over most stocks of fish. Similarly, the United States believes that the delimitation of the boundaries between neighbouring States should facilitate conservation, where practical, by not dividing unit stocks of fish between two jurisdictions. In other words, the delimitation, where practical, should leave separate stocks entirely within the management jurisdiction of one State or another, rather than within multiple jurisdictions, in order to minimize the need to rely upon international agreements for fisheries conservation.

Having said this, let the United States be clear on two aspects of its position. First, the United States does not maintain that this principle necessarily can be applied in all situations. As an equitable principle, there is flexibility in its application. In this case, however, part of one of the world's richest, internally coherent, and self-contained fishing banks, a fishing bank whose characteristics and fisheries are well known to fishermen and scientists, is in dispute. Because of the known integrity of Georges Bank and its resources, the fact that part of the Bank is in dispute means that the resources of the entire Bank are at issue. For such reasons, the United States believes that this principle has particular importance in this case.

Second, application of the principle of resource conservation and management in a boundary delimitation does not disregard international co-operation any more than did investing 200-nautical-mile jurisdiction in coastal States. The extension of legal fisheries jurisdiction to 200 nautical miles established the legal framework for co-operation between coastal States and other States. For instance, third-party fishing continues in the undisputed 200-nautical-mile zones of the United States and Canada today with the coastal State and the third-party fishing States co-operating to their mutual advantage pursuant to well-defined jurisdictional rules.

Whatever the boundary that this Chamber may decide, Canada and the United States will seek to co-operate in the conservation and management of transboundary stocks. However, as we know from the theory and experience, there is no assurance that the efforts at co-operation will prove successful. It is far safer not to make these important fishery stocks dependent upon successful, annual negotiations. There is nothing in the law of delimitation that requires that all the resources of Georges Bank be shared. On the contrary, the principle of resource conservation and management points conclusively to a boundary in this case that does not split Georges Bank.

Canada, nonetheless, finds the United States espousal of the principle of resource conservation and management as a boundary principle applicable in

this case, in the words of its Counter-Memorial (III) "almost perverse" (para. 497). It further casts this principle as "monopolistic" *(ibid.)* and reflecting mere "administrative convenience" *(ibid.)* and "a novel kind of national isolationism" (*ibid.*, para. 538). Minister MacGuigan called it "a new form of isolationism, and no form of law" (p. 18, *supra*).

These words and phrases are calculated to imply that our point of view is trivial and self-serving. But the difficulties inherent in reaching agreement on conservation and management measures was a central reason why the world has turned to 200-nautical-mile fisheries jurisdiction. It is not a trifle. Canada, at paragraph 497 of its Counter-Memorial, acknowledges that the proper conservation and management of resources of the sea is a valid objective and an important rule of behaviour. But Canada refuses to acknowledge that the Chamber should take it into account here.

Canada's reasoning is straightforward but incorrect. Canada claims that the law does not provide for, nor encourage, single-State stock management. Rather, Canada claims that international law provides a different means of achieving resource conservation – namely, international co-operation. Indeed, Canada argues that "contemporary international law simply assumes the existence of transboundary natural resources and prescribes international co-operation in their management" (Canadian Counter-Memorial, para. 502).

Canada's arguments, as they so often do, beg the very question at issue here. In fact, the United States does not disagree with the Canadian statement just quoted.

It is quite clear that States are required by international law to seek to co-operate in the conservation and management of transboundary resources. It is also quite clear, however, that international law prescribes the exclusive jurisdiction of States over resources residing solely within national boundaries.

The flaw in Canada's reasoning is its assumption that all resources are transboundary and therefore must be shared. Whether, in fact, the resources of Georges Bank are to be treated as transboundary is for the Chamber to decide. Through its simple assertion of a claim, Canada cannot render these resources transboundary when an equitable boundary would, in the view of the United States, confirm that these resources are under the jurisdiction of a single State alone.

The Chamber must choose between the perspectives of the United States and Canada. Any division of Georges Bank would render virtually all the commercially important fisheries of the Bank transboundary, necessitating numerous and complex bilateral management programmes, year after year, for ever and ever. Any boundary that does not divide the Bank will reduce the number of transboundary resources to the absolute minimum. The United States will be given the sole responsibility for the conservation of the resident stocks on Georges Bank. Co-operation between the fisheries programmes of the United States and Canada then could be based upon a clear jurisdictional understanding.

Canada believes that the application of the conservation and management principle in this case is both inequitable and unworkable. But taking account of resource conservation respects the integrity of the Bank and, in the circumstances of this case, is coincident with a boundary based upon other equitable principles, particularly the equitable principle that the land dominates the sea. Canada's claim that application of the principle of resource conservation and management is inequitable is nothing more than a complaint that the application of this principle would subject Canada's fishery on Georges Bank to United States jurisdiction.

Actually, Canada's strong words against the application of this principle is an acknowledgment that, if respect for resource conservation and management is a legally cognizable principle, United States jurisdiction over Georges Bank must be confirmed.

Such a result is not inequitable. Canada apparently saw no inequity in its expulsion from the grounds off Canada of fishermen from many States, including the United States, who long had fished those grounds prior to Canada's extension of 200-mile fisheries jurisdiction. These fishermen were immediately subject to Canadian jurisdiction. Subsequently, United States fishermen were expelled from the Canadian zone with only a few days' notice. They have already had to adjust to the realities of the 200-nautical-mile jurisdiction, and yet Canada would have them make another adjustment – to below the equidistant line on Georges Bank.

In seeking to discredit the United States position on conservation of resources and dispute minimization, Canada places itself in the awkward stance of disregarding its avowed position on stock management. Stock management is central to Canada's domestic management programme. It is also at the heart of its international position, advanced at the Third Law of the Sea Conference, in ICNAF, and in the present multilateral fisheries organization, NAFO.

Canada's normal devotion to stock management is deep seated, for it is Canada's principal means of arguing for its right to protect coastal-State stocks that range seaward of the 200-nautical-mile limit on the Grand Banks of Newfoundland. Mr. President, distinguished Judges, Canada's attack on the integrity of Georges Bank stocks and the principles of stock management is, at least to the United States, one of the most startling aspects of Canada's case.

Thus it is that we come to the first Canadian contention we wish to discuss today. Canada is wrong. Commercially important fisheries stocks are resident on Georges Bank and are divided by the Northeast Channel from other stocks of the same species.

I. Commercially Important Fisheries Stocks Are Resident on Georges Bank and Are Divided by the Northeast Channel from Other Stocks of the Same Species

In its Reply, and in its oral pleadings, Canada insists that fish stocks in the Gulf of Maine area are not divided by the Northeast Channel (para. 183). That, of course, would mean that there are no resident stocks of fish on Georges Bank. Yet, we know that is not the case. In few parts of the world are the stock structures of the fisheries as thoroughly understood as they are in the Gulf of Maine area. These fisheries have been studied since the 19th century. Since the 1930s, the stock division at the Northeast Channel has been used by fisheries scientists and managers in promoting the conservation and management of these resources. Long before that time, Georges Bank and Browns Bank were regarded as different fishing grounds by fishermen and early statisticians. NACFI, ICNAF, and NAFO all have used the line through the Northeast Channel for purposes of fisheries management, a fact that cannot easily be dismissed in considering a delimitation in accordance with equitable principles in this case.

(23) Yesterday, paragraph 57 and Figure 7 of the United States Memorial (II) became the subject of part of Mr. Fortier's cross-examination of Dr. Edwards. We would note that had Canada read paragraph 55 together with paragraph 57, its questions on at least one of the stocks or species, longfin squid, would have been answered. In Figure 7 the United States illustrated that the Northeast Channel divides – and here I will use the word, or limits – separate stocks of 12

and 16 commercially important species in the Gulf of Maine area. You may call this a natural boundary if you wish, or you may simply refer to it as a stock division. Whatever it is called, the Northeast Channel limits the range of stocks of these 12 species. The 12 species so divided, or limited, are: cod, haddock, yellowtail flounder, longfin squid, herring, scallops, red hake, white hake, silver hake, redfish, lobster and cusk. The remaining four stocks shown at Figure 7 of the United States Memorial, mackerel, pollock, argentine and shortfin squid, range throughout the Gulf of Maine area and beyond.

(23) Mr. Fortier sought to discredit Figure 7 by reference to four of those stocks. He called Dr. Edwards' attention to longfin squid, cusk, white hake and redfish. Perhaps, on the basis of that limited inquiry then, we can assume that Canada does not seriously dispute the other information shown on Figure 7 of the United States Memorial.

The United States would bring to the attention of the Chamber that the Canadian Memorial, and technical papers upon which it relies, discuss and identify a division at the Northeast Channel for 11 of the 12 affected stocks referred to by the United States, including three of the four that were discussed yesterday. At paragraph 100 of its Memorial (I), Canada recognizes that the Northeast Channel is the northern limit of the range of longfin squid:

> "There are only two major species for which the northern limit of distribution in the Gulf of Maine area appears to be the Northeast Channel: loligo (long-finned) squid and sea robin."

At paragraph 103, Canada notes the "discrete" – that is the word that Canada uses – stocks of haddock, cod, yellowtail flounder, and Atlantic herring found on Georges Bank. At paragraph 106, Canada refers to the "resident" stock of (23) scallops on Georges Bank. Thus, 6 of the 12 stocks that are shown in Figure 7 of the United States Memorial are referred to expressly by Canada in its Memorial. With respect to five of the six remaining stocks, the *Atlas of the Major Atlantic Coast Fish and Invertebrate Resources Adjacent to the Canada-United States Boundary Areas*, a technical report by G. M. Hare – published by the Canadian Department of the Environment, Fisheries and Marine Service, cited in the Canadian Memorial at paragraph 106, note 27, and deposited with the Registry – besides dealing with other fisheries, states clearly that there are stock divisions at the Northeast Channel for silver hake (p. 3), and redfish (p. 2). With respect to redfish, which was a species of interest yesterday, the Hare report states: "For management purposes, redfish on the Scotian Shelf are assessed as an individual stock as are those in Subarea 5." The Northeast Channel, of course, divides Subarea 4 from Subarea 5.

The report's discussion of red hake is conclusive as to its stock division at the Northeast Channel (pp. 3-4). The report's discussion of white hake *(ibid.)* is more tentative, but it indicates the close relationship between red hake and white hake and thus assumes stock divisions at the Northeast Channel as well. Although the Hare report discusses lobster in terms of "concentration" rather than stocks, it identifies the Northeast Channel as a division between the lobster "concentration" on Browns Bank and that on Georges Bank. Thus the Canadian Memorial itself acknowledges the basic information contained in (23) Figure 7 of the United States Memorial. The only stock Canada does not deal with is cusk. Here we will only note that, as Mr. Rashkow demonstrated a few days ago, the 1979 agreement assumed the integrity of a stock of cusk on Georges Bank: that is – and here I would like to clear up some possible confusion – the 1979 agreement dealt with cusk in ICNAF division 5Ze. The Parties throughout this case have been referring to Georges Bank and ICNAF

These closed-area regulations to protect the spawning groundfish stocks have become an integral part of fisheries management in the Gulf of Maine area. Although minor refinements have been made since their implementation in 1969, the basic concept and areas delimited have not been changed. For example, the closure period in Subarea 5 was extended, beginning with the 1973 fishing season, through May. The United States also proposed, and ICNAF adopted, minor modifications to the shape of the closed area adjacent to Cape Cod, as did Canada with respect to the closed area in Subarea 4 (ICNAF, *Proceedings* 1974-1975, Annual Meeting, June 1975, No. 10, App. IV; No. 11, App. IV).

Since its withdrawal from ICNAF and the extension of its fisheries jurisdiction to 200 nautical miles in 1977, the United States has retained the closed-area regulations in its domestic fisheries law, although the closed area adjacent to Cape Cod again has changed in shape to a minor degree. We would note that the closed area that covers most of the northeastern portion of Georges Bank remains the same as when first established by ICNAF in 1969.

In summary, there clearly is a stock division at the Northeast Channel, one that is reflected in the line dividing Subareas 4 and 5, used by the international institutions that have played a role in the conservation and management of these stocks over many years. Canada's denial of this fact, to us, rings hollow.

II. The Fish Stocks of Georges Bank Are a Classic Example of a Common-Pool Resource

We now turn to the second Canadian assertion we wish to take up. At paragraph 199 of its Reply, Canada states that the Georges Bank stocks do not have the characteristics of a common-pool resource. Let me quote from that paragraph, lest there be any mistake: "While Georges Bank is an area of concentrated biological abundance, the fish that are there do not represent a 'common pool' as alleged by the United States." It should be noted that Canada makes this statement without any evidence in its support.

In fact, there is a relationship between stocks and fisheries conservation, and this is especially the case in the Gulf of Maine area and particularly Georges Bank.

Any boundary crossing Georges Bank, including the Canadian line, would relegate all the resident stocks of Georges Bank to the status of common-pool fishery resources.

Fishing on a stock in part of its range will negate conservation measures imposed on fishing on the stock in the other part of its range. Historically, fishermen have taken as much of a common-pool resource as practicable because they believe that if they do not, fishermen from another State will nonetheless do so. That competitive attitude, if not regulated, leads to the depletion and reduced productivity of stocks. Transboundary stocks can be conserved only if the Parties fishing those stocks are able to agree on conservation measures. The Canadian line, by ensuring Canada access to Georges Bank stocks, creates such a competition between the United States and Canada.

This common-pool problem, which impedes resource conservation, is compounded in the case of Georges Bank because the stocks are highly concentrated in different areas of the Bank at certain times of the year, and because of the various seasonal movements of different important stocks. Before you is Figure 79 of our presentation, which appeared as Table C of the United States Counter-Memorial found at page 219.

This table shows the percentages of cod, haddock, and yellowtail flounder

stocks taken on the northeastern portion of Georges Bank, and on the remainder of the Bank, during the bottom trawl survey cruises conducted by the United States National Marine Fisheries Service in the spring, summer, and autumn of 1980. We note that Canada has not contested the accuracy of this information.

Let me explain the table. Here, for cod, you will see the per cent of the cod stock on Georges Bank that during the spring is found on the northeastern portion of the Bank. So in the spring, 47.8 per cent of the stock is found on the northeastern portion of the Bank. Thus, 52.2 per cent of the stock is found on the remaining portion of the Bank.

As you will note, at certain seasons of the year, fishermen on the northeastern portion of Georges Bank have access to a high percentage of important Georges Bank stocks. Thus, if the Canadian line had been a boundary in force between the Parties in 1980, United States fishermen would not have had access to an area in which two-thirds of the haddock stock were to be found, regardless of the season. This stands in direct contradiction of Canada's argument that there is a resource base on the remainder of the Bank sufficient for the United States to maintain its traditional catch levels.

It also should be noted that over 60 per cent of the Georges Bank yellowtail flounder stock would have been subject to intensive Canadian fishing efforts during the spring, whereas 99 per cent of that stock would have been available to United States fishermen during the summer.

The chart does not show, however, that most of the United States catch of yellowtail flounder is taken on the northeastern portion of the Bank in the winter, when the stocks are concentrated there. That fact is confirmed by the statistics in Annex 3 of Volume IV of the Canadian Memorial. Similar patterns are shown in the cod fishery.

This table is the essence of the common pool. Were the Canadian line to prevail in this case and Canadian fishermen to catch all of which they were capable, they would reduce greatly the fish available to United States fishermen. Similarly, heavy United States fishing could reduce the stocks and pre-empt the Canadian fishery on Georges Bank.

Although the percentages vary from year to year, the patterns shown here are quite common, and, moreover, apply to other stocks as well. Large percentages of the same stocks are available in different parts of Georges Bank, depending upon the season. Annex 38 of the United States Counter-Memorial treats this matter in some detail.

In order for United States fishermen to maintain their traditional catches of these stocks, they must have access to them throughout their range, particularly in locales where the stocks congregate seasonally, such as on the northeastern portion of Georges Bank.

Thus, Canada's statement in paragraph 118 of its Memorial, that Georges Bank groundfish stocks "range over large areas of the Bank and become available for capture in the undisputed waters of the United States zone" is an erroneous and misleading view of the Georges Bank ecological régime and the fisheries it supports. Canada simply is mistaken when it states, at paragraph 140 of its Memorial, that: "The undisputed part of Georges Bank gives the United States an ample resource base to sustain a healthy fishery and allow potential for future growth." Mr. President, distinguished Judges, if that were true, United States fishermen would not have been going to the northeastern portion of Georges Bank, year after year, for a century and a half.

To demonstrate that Canada, outside the context of this case, also accepts that it is the nature of fishing stocks to have the characteristics of a common-

pool resource, we would like to read to you portions of a paper that Canada distributed at a United Nations Food and Agriculture Organization conference in Rome just last fall in 1983. That paper, entitled "Background Paper – The Management of Shared Stocks – The Canadian Experience", was prepared and distributed by the Canadian Department of Fisheries and Oceans. It has been submitted to the Chamber as a new document pursuant to Article 56 of the Rules of Court.

Although the paper does not use the words "common pool" to describe fisheries stocks, it aptly describes the unique conservation problems that long have been associated with common-pool resources:

> "The very definition of a 'stock' implies that fishing in part of the range will affect the population in another part of the range. This means that such stocks must be managed as a whole, or at least that management must be consistent throughout their range. The application of two different management systems in different parts of the range results in effects on the population approaching those due to the less conservative management system. Overfishing in one part invalidates conservative management measures in the other part, so that those fisheries subject to the more conservative approach wind up paying the price of restricted catches, and being subject to regulation, without obtaining anticipated long-range benefits of higher catch rates, larger fish and more stable populations." (P. 2.)

Fish stocks are common-pool resources. Canada's unsubstantiated statement that the stocks on Georges Bank do not have this characteristic must, in our view, be rejected.

The common-pool problem means that competing governments will pursue incompatible objectives, namely, the interests of their citizens in maximizing their share of the common pool. Given any uncertainty – and there is always a great deal of uncertainty about the near-term abundance and behaviour of fish stocks – negotiating differences are invariably resolved by recourse to optimistic estimates of resource availability. In other words, we pretend that there is enough for everyone – as the experience of ICNAF, the Common Fisheries Policy of the European Economic Community and other international management institutions has shown. The result is a continuing resource conservation problem.

The Chamber adjourned from 11.05 a.m. to 11.40 a.m.

III. The Matter of "Administrative Convenience"

We now turn to the third matter that we wish to discuss: the difficulties inherent in establishing fisheries conservation and management by agreement between the United States and Canada with regard to Georges Bank. One might ask why two responsible governments would not be able to reach such agreement and thereby avoid disputes. To anyone who has been involved with the interests of fishermen and fishing management, fisheries conservation, and fisheries allocation, between competing States, the difficulties would be apparent.

The United States Memorial and Counter-Memorial describe some of the conservation and management problems associated with common-pool resources (Memorial, paras. 316-319; Counter-Memorial, paras. 350-357). The management objectives of States that share stocks often are contrary

and difficult to reconcile. One State, for example, may prefer to accept large reductions in current catches in the hope of ensuring larger future harvests. The other may not be willing to accept the short-term dislocation inherent in such an approach. One State, as a matter of nutritional or employment policy, may prefer to harvest the maximum sustainable yield of a given stock; the other may prefer to maximize profit by catching fewer fish, but a greater catch per unit of effort. One State may wish to maximize the yield of a single valuable species in a mixed-species fishery, whereas the other State may prefer to accept lower yields of that species in order to maximize the yield of the entire fishery, or of another species. There may also be disagreements over management techniques, such as basic choices between gear types, setting the seasons for fishing, the imposition of quotas, and the decision between limited entry or free competition; as well as disputes over the interpretation of scientific data concerning such matters as the status of the stock, the amount of allowable catch, and the effect of proposed management measures. These disagreements reflect more than mere technical differences: they affect how much is caught, when, where and by whom.

The United States and Canada differ sharply in their basic policies of fisheries management, adding significantly to the complicated task of reaching and maintaining agreement on the conservation and management of any transboundary stocks. These policies largely followed the extension of national fisheries jurisdiction to 200 nautical miles, and were necessitated by the need to establish goals and priorities once the United States and Canada had responsibility for managing the resources within their respective 200-nautical-mile zones. In some measure, it was the clash of these policies that made it impossible for the United States to ratify the failed 1979 East Coast Fisheries Agreement. The Canadian line would bring the national fishery policies and practices of the two States into direct conflict with respect to the resources of Georges Bank.

The Canadian Reply dismisses these differences. In response, we would like once again to read from the document which Canada distributed at the FAO Conference in Rome last fall. It indicates that Canada believes these differences are real. Of course, the document presents a Canadian viewpoint and, in our view, unfairly characterizes some United States management objectives. Nonetheless, we propose to read to you a part of it because it refutes the Canadian argument that there is no difficulty in reconciling United States and Canadian management approaches. It is a long quote, but we believe you will find it interesting.

> "In the case of Canadian and American shared stocks on the Atlantic coast, marked differences in management philosophy are apparent. In order not to deny fishing opportunities, the United States has permitted unlimited fishing effort on scallops, subject only to a recently imposed meat count limit, and has recently removed catch restrictions on the main groundfish species, subject to minimum permitted fish sizes. The Canadian approach has been to restrict entry to the various fisheries in an attempt to maintain viable enterprises on a sustained basis. These radically different approaches produce quite different effects on the fisheries. Under the USA approach, fishing pressure will tend to be irregular, with more and more effort being exerted on stocks that are producing economically attractive catch rates, up to the point that the population is depressed and the fishery ceases to be economically viable. Given other conservation measures, such as minimum fish sizes, the stocks are unlikely, however, to be depressed to the point that their reproductive potential is threatened. Under the Canadian approach, the tendency for new effort to be attracted to the healthy stocks is resisted,

> so that pulses of strong recruitment to the fisheries are allowed to remain in the population for a longer period and catch rates will fall less during periods of poor recruitment." (Pp. 8-9.)

The divergent management policies of the United States and Canada are rooted deeply in their different historical experiences, cultures and political structures. Both States are committed to the conservation of fisheries resources. Nevertheless, to the extent that these different systems are required to be accommodated in the management of transboundary stocks, there is an increasing probability of disputes. Poor conservation of the resources, and the resultant loss in benefits for the users of the resources, are the likely results.

For example, the Canadian system of licensing vessels only for specific areas and species as a means of managing its fisheries and fishermen is an attempt to reconcile fishing pressure with Canada's social and economic objectives. For instance, the system is used to protect the interests of inshore fishermen of Nova Scotia and New Brunswick, by denying larger offshore Canadian vessels access to the inshore fishery. It is also used to prevent Nova Scotia vessels from fishing waters off Newfoundland. Thus, despite the scepticism Canada has expressed here about stocks (p. 116, *supra*), the Canadian licensing system in fact requires annual predictions of stock size, fishing effort, catch, and an annual allocation among different types of fishermen. Once in place, it is not a flexible system. Vessels are often prevented from switching to other fisheries, although there may be an unexpected abundance in those fisheries.

Following the extension of fisheries jurisdiction to 200 nautical miles in 1977, the United States began to manage the New England fisheries with a system of individual species yields or allowable catch quotas and individual vessel-trip quotas similar to the Canadian system, which largely was inherited from ICNAF. Within two or three years, however, it became apparent that this regulatory approach was unworkable in the New England fisheries. It required annual predictions and rapid and accurate assessment of the effects of current fishing upon stocks, as well as allocations among the various fishermen, all of this often leading to unintended results. Beginning in 1978, the United States began to turn to an alternative form of managing the New England fisheries – one more closely attuned to the natural distribution and availability of stocks. This system relies upon the natural tendency of fishermen to adapt to changes in the relative abundance of the various species within the system. It regulates by restricting the age and size of the fish that may be harvested and the areas and the times of that harvest.

The United States approach to the conservation and management of the fisheries of Georges Bank thus is predicated upon the fact that the Georges Bank stocks tend to be variable and unpredictable, whereas the total biomass of the Georges Bank ecological régime is relatively stable.

Thus, United States fishermen are allowed, and even encouraged, to switch from stock to stock, depending upon their relative abundance. This method of fishing tends to reduce fishing pressure on stocks of low abundance when reproductive potential is jeopardized by fishing. The United States approach de-emphasizes the intractable problem of predicting yearly variability of individual stock yields and of allocating among fishermen on the basis of such predictions. Conservation is achieved by constraining fishing on immature fish through regulation of mesh sizes and other fishing gear, minimum fish sizes, and by establishing closed areas during the spawning season.

In brief, the United States and Canada both have developed reasonable but different approaches to the management of East Coast fisheries. Nevertheless,

the two systems cannot be used simultaneously for the management of Georges Bank stocks. To the extent that the United States and Canada are forced to accommodate each other's practices, disputes, delays, and impaired conservation can be expected.

For example, let me recall an example from our Counter-Memorial. It is doubtful, in light of the experience from the early 1960s to the present, that the abundance of the scallop stock on Georges Bank can sustain high levels if it is subjected to simultaneous fishing by a Canadian fleet that, by virtue of Canadian Government regulations, has no other choice but to fish for scallops on offshore banks, and by a United States fleet that may fish either the scallop or other fisheries, depending upon their relative abundance.

If the Georges Bank scallop stock had to be managed jointly, Canada undoubtedly would seek to have the New England fleet limited in a manner similar to that of Canada, especially when the availability of scallops is high. It can be predicted that a United States governmental effort to establish a permanent United States offshore scallop fleet of limited numbers would be strongly resisted in New England, particularly at times of scallop abundance. The United States, in all likelihood, in turn would prefer that Canada allow the Canadian scallop vessels the freedom to leave the Georges Bank scallop fishery for the inshore grounds off the Nova Scotia coast, the offshore groundfishery on the Scotian Shelf or on the Grand Banks of Newfoundland, or elsewhere, particularly when the availability of scallops is low. This likely would be resisted, however, by Canada, because it would upset the balance of social and economic objectives sought to be balanced by Canadian fisheries managers.

The matter becomes more complicated when all the groundfish and other stocks are considered. Because of their seasonal movement, groundfish may be subjected to heavy fishing pressure on either side of any Canadian line splitting Georges Bank. The area and quota approach of Canada, which focuses upon the management of single species, and the flexible approach of the United States, which focuses upon the management of stocks within the total ecosystem, are fundamentally incompatible ways to manage the fisheries of Georges Bank.

The divergent management systems of the Parties have evolved to the point where straightforward solutions to joint-management problems are not foreseeable. This problem exists independent of the will of the Parties. It is intrinsic to the situation. The Canadian line or other lines crossing Georges Bank would bring our two different systems into direct conflict, because such lines maximize the number of stocks requiring joint management. By contrast, the potential for disputes and the risk to conservation are minimized by a line that respects the Northeast Channel.

In this connection, we would like to point out, once again, that, regardless of where the boundary is drawn, there needs to be some co-operative effort between the United States and Canada on East Coast fishery-management issues. If, however, the Chamber decides that the law requires that the boundary should run through the Northeast Channel, bilateral co-operation will need only to address the conservation and management issues associated with four major commercial species. On the other hand, if the Chamber decides that the boundary should cross the Bank, bilateral co-operation must address the conservation and management of all 16 commercially important species.

It might be argued that, since the Parties must co-operate in any event, the Chamber need not be concerned with minimizing the extent of such co-operation. Such an argument ignores the differences in the degree of co-operation needed, depending upon the location of the boundary. The difficulties in managing 16 stocks jointly are not simply four times as great as those

associated with the management of four stocks. Although even that increase itself would create major problems, the increased difficulties, in fact, would be multiplied several-fold.

To take a simple example, assume that the management of one stock requires that four decisions be made – who fishes, where do they fish, when do they fish, how much do they fish – who, where, when, and how much. If we were to add but one additional stock, these four decisions must be made for each stock – and thus, a total of eight decisions now must be made. If, however, we assume that there is the usual relationship between the two stocks in the same area, that decision-making process is further compounded – almost exponentially.

Joint management becomes an increasingly complicated task with the inclusion of each extra species to be managed. This is because each species is related to every other species, and each of the interrelationships needs to be taken account of as the responsible nations try to come to agreement. Species interrelationships occur in a variety of ways: ecologically, particularly in terms of predator-prey relationships; in fishing practices, which create important incidental by-catch problems; and economically, through relative prices. Rational management requires decisions concerning each of these relationships between every species being managed. That is why joint management of all the commercially important fisheries of Georges Bank would be immensely more difficult than joint management of the four species that the United States agrees will be transboundary in all events.

IV. Oil and Gas and Fish

The fourth matter we would like to take up to conclude today's conservation and dispute minimization discussion is the relationship between oil and gas development on Georges Bank and its fisheries. The United States maintains that any boundary that would permit Canada to undertake the development of any potential oil and gas resources beneath Georges Bank would increase the likelihood of significant disputes between the United States and Canada. Indeed, we will go further: should there be such a boundary and should such development take place, a serious problem in the bilateral relations of the two countries is inevitable.

Hydrocarbon development on Georges Bank poses a risk to the fishery resources found in the waters throughout the Bank. Because of the characteristics of the marine environment of Georges Bank, activities undertaken even only on a small portion of the Bank, would expose the resources throughout the Bank to the risk of marine pollution. Lines that divide the Bank would mean that the United States would be exposed to the risk and concomitant costs of marine pollution, without retaining any control over the oil and gas development that generates such risks, and without enjoying any of the benefits from that development. Such a result inevitably would be productive of disputes.

In preparing its Memorial, the United States considered making a detailed presentation on this subject, but elected not to do so because it would have been based upon predictions of the results of oil spills, which inevitably must rest on speculative assessments. The fact is that there is no certain knowledge with respect to the effects of a spill on the northeast portion of Georges Bank, inasmuch as there has been no drilling there and thus no resulting pollution. Assessments of what would happen in the event of a spill on the northeast portion of the Bank, therefore, must be based upon estimates of water currents and wind directions rather than on past experience with oil spills in the area.

Notwithstanding these uncertainties, Canada opened the door to this subject

in its Memorial at paragraph 175. On the basis of a scientific model prepared in the United States, which focused upon a potential *surface* oil slick, Canada unequivocally asserted that it would bear the brunt of any pollution that might occur from hydrocarbon development on the northeastern portion of the Bank, because only Canada's coastline would be reached by that oil slick. Canada stated:

> "Unless the hydrocarbon resources are developed by Canada, the fishermen of southwest Nova Scotia would find themselves exposed to a risk for which no commensurate benefits would accrue to Canada."

That model indicated only that, after 60 days, a surface oil slick, in one season of the year, the spring, given the constancy of prevailing wind and current (163) conditions, *might* reach the Canadian coast. Canada, in its Reply at Figure 16, put forward another surface oil slick model which showed basically the same thing. The prevailing winds during the spring months would blow the slick northwards. Perhaps between 40 and 60 days would pass before that slick *might* reach the coast.

Three aspects of Canada's argument bear some consideration. First, Canada fails to disclose that there is only a low probability that oil on the surface would come ashore, and the fact that if the oil did reach the coast after so long a time, the effect would be insignificant.

Before you is Figure 80 of our presentation, depicting the 20-day surface (163) trajectories taken from Figure 16 of Canada's Reply. These red lines are taken from the Canadian Figure and show where the oil slick would go in the first 20 days following the oil spill. As can be seen, nearly all the oil on the surface would remain over Georges Bank during the first 20 days following a spill. By the time 20 days have elapsed, the surface slick may begin to disperse beyond the gyre of the Bank. By that time the toxicity of the oil has decreased greatly.

Thus, even if Canada's models are correct, and surface oil might reach the coast in one season, after 40 or 60 days, the damage that could result would be relatively insignificant.

Two other aspects of Canada's argument warrant further consideration. In assessing the effects of oil pollution, one must distinguish between a surface oil slick and oil that is carried in the water column. One also must distinguish between the effect of pollution upon a coastline and its effect upon the marine environment before the pollution reaches the coast.

In the view of the United States, all marine pollution is a serious matter, and we are confident that Canada shares this view. Nonetheless, the reliance upon a surface oil slick alone and the focus upon the possible pollution of the coastline from activities on Georges Bank are serious deficiencies in the Canadian assessment of this issue. This is because, in the view of the United States, there is only a slight possibility that oil from a blowout on the northeastern portion of the Bank would reach either the United States or Canadian coast. Such an event would be regrettable – but the effects could be overcome. What is far more likely – and with effects potentially far more devastating – is that such pollution would damage the Bank itself – that is, the living resources of the Bank.

In Annex 2 of the United States Counter-Memorial, we sought to address the deficiencies in the Canadian presentation. To our knowledge, although the experts had acknowledged the potential effects on the water column of an oil-well blowout on Georges Bank, none had developed a model to assess the path that oil would follow within the water column itself. To respond to the shortcomings in the Canadian Memorial, we initiated studies of this question by the same experts who constructed the surface model to which Canada refers in

its Memorial. The results of that work are found in Annex 2 to the United States Counter-Memorial – with the modelling techniques described in Appendix C thereof.

In its Reply, although Canada refers cryptically to the so-called "scientific deficiencies" in this model, Canada does not dispute or even address the evidence supporting the environmental-risk analysis contained in Annex 2 to the United States Counter-Memorial. Nor does Canada dispute the conclusions that the United States has drawn from that evidence. Rather, in its Reply, Canada asserts that the "fatal scientific defect" in the United States analysis is that it takes account of only oil within the water column and ignores oil on the surface of the water (para. 178). That, exactly, is what we intended to do. Thus, in fact, Canada simply ignores this work.

Canada retreats to its surface model, which, at most, shows that, in the spring, if the winds are right, some oil might reach the coast of either Canada or the United States after a long period of time.

There are a number of reasons why focusing upon surface pollution, rather than that of the water column, presents a significantly incomplete picture of the possible costs of development of oil and gas on Georges Bank, and of who will bear the burden of such costs. Oil that floats at the surface of the sea is "weathered" with the passage of time. It is driven by a combination of wind and water currents. It is more exposed and therefore more affected by the winds than is oil in the water column. Except for a few months of each year, oil floating on the surface over Georges Bank would be driven out to sea by prevailing winds. Even if we accept for the sake of argument the examples of oil discharges to (61) which Canada refers in its various pleadings, including Figure 19 of its Counter-Memorial and Figure 16 of its Reply, there is less than a 10 per cent chance that (163) oil from such a distance would reach the shores of Nova Scotia, and even then only after several months of weathering and only if the discharge occurred during the spring months. Canada never acknowledges that, in one of its (61) examples, Figure 19 of its Counter-Memorial, the United States coast bears greater risk than those of Canada, and that the coast of Maine would also be hit (163) by an oil slick if Figure 16 of Canada's Reply is correct.

Let us consider the oil within the water column. Some oil in the water, whether on the surface or in the water column, will evaporate; some will be dissolved into the water column; and some will be subject to microbial degradation and photo-oxidation. The most acutely toxic fractions of the oil, that is, the parts that kill eggs and larvae of marine fish and shellfish, are those that dissolve and evaporate.

Mr. President, distinguished Judges. Counsel for Canada stated, on 4 April before this Chamber, that "I think I would be right in saying that neither of the Parties is particularly interested in micro-organisms".

The United States is interested in micro-organisms, particularly phytoplankton and the somewhat larger eggs and larvae of the marine fish and shellfish of Georges Bank.

The study summarized in Annex 2 and its appendices shows that the threat of serious marine pollution of Georges Bank stems from the risk posed to the micro-organisms that Canada claims no interest in – to the eggs and larvae of Georges Bank fish stocks caused by those volatile toxic fractions of oil. The serious harm that could befall the eggs and larvae would occur for most stocks during the first five to ten days following the discharge of the oil.

The study in Annex 2 of our Counter-Memorial shows, however, that adult scallops and lobster would be exposed to serious risks over a longer period of time, since the degradation period for oil in the sea-floor sediments, where

scallops and lobster are found, is slower than that for oil remaining in the water column.

Thus, Chapter II of Annex 2 to the United States Counter-Memorial recounts with some specificity what in all likelihood would occur to many of the commercially important species on Georges Bank were an oil well to "blow out" or otherwise discharge oil, on the Bank. We will not recount that information once again, but would ask the Chamber to recall that the pattern in which the water circulates in the Georges Bank ecological régime, the Georges Bank gyre, the reality of which even Canada acknowledges (Canadian Memorial, para. 93 (10) and Figure 20), and the productivity of the régime arising in part from the vertical mixing of the water, makes Georges Bank particularly susceptible to damage from hydrocarbon discharge, especially during the spawning season.

Annex 2 of the United States Counter-Memorial contains a series of illustrations of the distribution of fish larvae on which are superimposed oil-spill trajectories. Those illustrations show the oil in the water column cutting across concentrations of larvae of major commercial stocks. Before you is Figure 81 of our presentation, which superimposes the 20-day surface oil-spill trajectories from Figure 16 in Canada's Reply on a haddock-larval distribution chart from Annex I of the United States Counter-Memorial. Once again, the oil and the larvae are shown to coincide. One can imagine the devastation to the haddock larvae that would occur were an oil spill on the northern portion of Georges Bank to happen during, or shortly after, the haddock spawning season.

From the outset, the development of the potential hydrocarbon resources of Georges Bank has been a highly controversial and litigious matter in the United States. The first diplomatic communication from the United States to Canada concerning this dispute, dated 10 May 1968, which requested a moratorium on oil and gas exploration, focused in large measure upon this environmental concern. In that aide-mémoire, the United States stressed the need for protection of "the living resources of the sea against the pollution and disturbance which might result from mineral exploration and exploitation". The aide-mémoire referred specifically to the need to protect the fishery resources of Georges Bank (United States Memorial, Ann. 55).

United States law has developed elaborate and protracted procedures to ensure the prior assessment, as well as the public disclosure and debate, of the environmental effects of drilling on the continental shelf. Pursuant to these procedures, proposals by the United States Federal Government to authorize such development often have been opposed by the fishing and other private interests, by environmental organizations, as well as by state and local governments. What has been sufficient protection for other parts of the continental shelf, has never been sufficient protection for Georges Bank.

The history of the United States continental shelf programme on Georges Bank has been fraught with litigation and other disputes stemming from environmental concerns. Federal programmes for nominating and assessing areas of potential hydrocarbon resources have been suspended on a number of occasions as a result of litigation instituted by state and local governments and other interests. This has been the case particularly in the New England states where the possibility of drilling on Georges Bank has aroused opposition of the fisheries and recreational interests in the area.

The first sale of oil and gas leases on Georges Bank, Lease Sale 42, initially proposed for August 1976, was postponed on a number of occasions and for a period of over three years as a result of challenges by state and local governments, fishermen, public interest groups, and others concerned for the safety of the marine environment.

As is required for all offshore lease sales, before the decision to go forward with the first Georges Bank lease sale could be made, a draft, and subsequently a final, environmental impact statement were prepared by the Federal Government. All interested parties participated in the preparation of these statements through the submission of comments and attendance at public hearings. Procedures were adopted to facilitate the exchange of pertinent information among the Department of the Interior, fishermen, conservation groups, state and local governments, and other interested agencies of the Federal Government.

In response to the findings of the various technical studies conducted or commissioned by the Department of the Interior, and the comments received during the environmental review process for Georges Bank, safeguards were added in lease stipulations and through the implementation of regulations.

For example, the leases that the United States sold on the undisputed part of the Bank included stipulations requiring the identification of biologically-important areas prior to the placement of any structures and the use of the best and safest technology available. The leases also included provisions to protect fishermen, such as the requirement that offshore structures should not interfere with commercial fishing, as well as the provision mandating that underwater pipelines be shrouded and that offshore equipment be marked permanently so that the liable party could be identified should the equipment foul fishing gear. These special conditions for Georges Bank are found in the final notice for Outer Continental Shelf Sale 42, at Annex 42 of the United States Memorial.

Notwithstanding these and many other safeguards provided in the leases by the Department of the Interior, Lease Sale 42 was delayed by the challenge of state and local governments and environmental groups for over two years. By the time the sale was finally held, a total of 35 tracts had been deleted, in response to concerns raised by environmental and fisheries groups to protect the coral, lobster and other fish populations, as well as to reduce the possibility of conflict between the fishing and hydrocarbon communities within the United States. Moreover, the sale proceeded only after the Department of the Interior took numerous additional steps to prevent risks to the marine environment of the area.

The public concern in the United States over the fact that the fishery resources throughout the Bank could be damaged as the result of hydrocarbon development anywhere on the Bank continues to reverberate throughout the highest echelons of the United States Government. Just last fall, the Congress, by law, imposed a one-year moratorium upon any expenditure of funds for planning for future oil and gas leasing for much of Georges Bank. We have deposited the pertinent Statute under Article 56 of the Rules of Court.

Mr. President, distinguished Judges, let me end this discussion of resource conservation and management and dispute minimization with one final comment.

The United States harvest of the stocks on the northeast portion of Georges Bank is important, but the stocks themselves contribute much more to the total United States harvest on Georges Bank, because these same stocks are the ones that are harvested farther south. Thus, a decline in the stocks on the northeast portion of the Bank reflects a serious decline in the stocks throughout the Bank. On the other hand, because these stocks do not cross the Northeast Channel, their decline or disappearance would not affect Canada's or Nova Scotia's fish harvest significantly. Thus, making the Georges Bank stocks transboundary, as Canada's line does, puts the United States at risk without putting Canada at much risk. Canada can engage in aggressive fishing behaviour and have little to

lose. Canada can engage in aggressive bargaining behaviour, since the Canadian line gives Canada a negotiating leverage far out of proportion to the area it would have jurisdiction over. Given the unrestrained common-pool fishing situation, Canada is in a position to overfish stocks of much greater importance to us than we might be able to do to them. Add to this the fact that Canada would be in a position to develop oil on Georges Bank, having virtually no effect upon the Canadian coast or the Canadian stocks on the Scotian Shelf, but on the stocks of importance to the United States, makes us gravely concerned; that is why we here suggest that the principles of resource conservation and management and dispute minimization are of special importance in the establishment of an equitable delimitation. We believe that Georges Bank is an entity, a legal, governmental, geomorphological and biological entity. Within the United States, the fishing communities, the oil and gas industry, the state and local governments, and the environmental groups, have recognized this integrity in seeking both to protect and to accommodate their interests in Georges Bank. Within the United States there are legal and governmental mechanisms for addressing these disparate interests and for making choices between them. These mechanisms do not exist across international borders. In the future, there must be a vehicle for variable communities of interest to reconcile their competing interests effectively. This can only be done pursuant to a boundary that respects the ecological integrity of Georges Bank. Its fisheries need to be husbanded by one party, and thus, any development of oil and gas on the Bank must be guided by that same party. That, in our view, is what international law requires; it is where common sense leads, and that is what, in our view, an equitable boundary must do.

Mr. President, distinguished Judges, this concludes our presentation on the conservation of the resources of Georges Bank. It has been my high honour once again to appear before you and to express to you the position of my country.

STATEMENT OF MR. ROBINSON

AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. ROBINSON: Mr. President, distinguished Judges. May it please the Chamber.

This first round of the United States oral argument is now coming to a close. It is my privilege to address the Chamber once again to offer some abbreviated concluding remarks. The United States will not repeat the many points that counsel have made. The United States wishes instead to use this opportunity to synthesize the elements of an equitable solution that we believe have clearly emerged from the United States oral presentations. As expressed in my opening statement, the United States reiterates its view that when all is said and done, the issues in this case are straightforward and the law and evidence overwhelming.

The United States confirms the fundamental rule in the delimitation of a single maritime boundary. 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. It is clear that Canada disagrees with this analysis. Herein lies what is perhaps the greatest conceptual difference between the Parties in this case.

The distinguished Agent for Canada has cited the equidistance method as inherently equitable. Canada sees the equidistance method as the preferred norm of delimitation in the context of a single maritime boundary. Canada argues that the established principles governing delimitation must now be redefined because of a purported new distance principle. In this regard, Canada espouses a concept of geographical adjacency that for Canada means the same as proximity. Canada regards the consistent application of equidistance as the essence of an equitable solution, except, of course, that in this case, equidistance is to ignore completely Nantucket and Cape Cod. The United States finds nothing, old or new, to support this Canadian thesis.

Let me summarize what, in the United States view, are the elements of an equitable solution for a single maritime boundary as specified in the Special Agreement (I) between the Parties. In this connection, the United States refers to the conclusions that Mr. Stevenson expressed regarding the law applicable to a single maritime boundary and to the balancing-up of the relevant circumstances in this case.

The United States believes that under the applicable law, the relevant circumstances entitled to the most weight in this case are the geographic realities of the Gulf of Maine area. The principal of these circumstances are the following:

First, the coastal configuration of the Gulf of Maine area, including the coastal concavity that is the Gulf of Maine.

Second, the location of the land boundary and the international boundary terminus between the United States and Canada in the northern corner of that coastal concavity.

Third, the general direction of the coast in the Gulf of Maine area and the fact that the coasts of Maine and New Hampshire follow that general direction.

Fourth, the extension seaward of the coasts of Maine and New Hampshire so as to embrace all of Georges Bank.

And, *fifth*, the ratio of three-to-one in the relative lengths of the respective United States and Canadian coastal fronts that face upon the Gulf of Maine.

These relevant geographic circumstances bring into focus the first equitable principle identified by the United States. As the Chamber will recall, this principle requires respect for the relationship between the coasts of the Parties and the maritime area in front of those coasts. This principle is particularly relevant in the delimitation of a single maritime boundary since it relates with equal force to both the continental shelf and the superjacent water column.

The equitable solution called for by these relevant geographic circumstances is confirmed independently by the marine environment in the Gulf of Maine area. As highlighted by the testimony of Dr. Edwards and in this morning's presentation by my colleague and Deputy-Agent, Mr. Colson, the relevant circumstances of this marine environment include the separate fishing banks of Georges Bank and the Scotian Shelf that are divided at the Northeast Channel and the important stocks of commercial fish that are associated with these respective fishing banks.

These environmental circumstances are particularly relevant to the second and third equitable principles identified by the United States. These are the principle of facilitating the conservation and management of natural resources in the area and that of minimizing disputes between the Parties.

Next, the activities of the Parties and their nationals in the Gulf of Maine area are relevant circumstances in this case. These activities provide further support for the confirmation of United States jurisdiction over all of Georges Bank. In the United States view, however, these activities are not entitled to as much weight as the geographic and environmental circumstances of this case.

Messrs. Lancaster and Rashkow have demonstrated the predominant and long-standing interest of the United States in Georges Bank. They have done so by noting the large number of resource and resource-related activities of the United States and its nationals on Georges Bank. In our view, these activities clearly outweigh Canada's comparatively recent interest in a single scallop fishery on one portion of Georges Bank. Thus, Canada's limited challenge to the predominant interest of the United States on Georges Bank falls far short under the applicable law. We believe that the activities of the United States and its nationals lend additional weight to, but do not control, an equitable delimitation based upon the fundamental and even unique geographic and environmental circumstances of this case.

In applying these principles and relevant circumstances, Mr. Stevenson has urged the Chamber not to engage in an exercise of distributive justice. The United States finds no basis for giving effect to the concept of relative economic dependence as a relevant circumstance (or, as Canada has proposed, as an equitable principle). Mr. Feldman has shown that there is no jurisprudential support for the relevance of economic dependence in the delimitation of maritime boundaries between neighbouring States. Mr. Feldman also has demonstrated that, even were this consideration legally relevant, Canada has failed as a factual matter to establish its assertion that it is in a position of special economic dependence with regard to the fisheries of Georges Bank.

The United States has asked the Chamber to disregard Canada's attempt to introduce into the delimitation of the single maritime boundary the new concept of human geography. It is on this unfounded basis that Canada seeks to replace, or at least to influence, the physical geography to which the jurisprudence historically has granted such critical importance in maritime delimitation.

In summary, it is the United States position that an equitable solution in this

single maritime boundary delimitation must give effect to the coastal projection of the States of Maine and New Hampshire so as to embrace all of Georges Bank. Such a solution respects the natural boundary separating Georges Bank from the fishing banks of the Scotian Shelf at the Northeast Channel. Moreover, in meeting these requirements, such a boundary recognizes the predominant interest of the United States in Georges Bank. The equitableness of such a solution is confirmed when tested by the principle of proportionality.

The United States line reflects that three-fourths of the coastal fronts of the Parties facing on the Gulf of Maine are United States coasts. And last, but not least, such a solution bears witness that the true geographic axis of this case is the location of the land boundary and the international boundary terminus in the northern corner of the coastal concavity that is the Gulf of Maine.

Mr. President, distinguished Judges, the issue then becomes what method or methods will produce an equitable solution in the delimitation of a single maritime boundary in this case.

In its opening statement, the United States described the construction of the United States line. My colleague, and able Deputy-Agent, Mr. Colson, has explained why such a line leads to an equitable solution that applies the equitable principles discussed by Mr. Stevenson and takes into account the (224) relevant circumstances outlined by other United States counsel. Figure 82 before the Chamber shows this proposed United States line in red. Mr. Colson's treatment of the geographic circumstances pointed out that the United States line achieves, among others, the following results:

First, the United States line gives effect to the general delimitation principle of respect for the relationship between the coasts of the Parties and the maritime areas in front of those coasts. The United States line assures that each Party receives most of the area seaward of its coast.

Second, the United States line satisfies the subsidiary delimitation principle of natural prolongation in its geographic sense, thereby also assuring that each State will receive as much as possible of the extension of its coastal front into the sea.

Third, the United States line gives effect to another subsidiary delimitation principle – that of non-encroachment – by abating the unreasonable, unnatural, and extraordinary cut-off effect caused by both the original Canadian equidistant line and the modified Canadian line that totally disregards Cape Cod and Nantucket. These Canadian lines also are shown on (224) Figure 82 before the Chamber.

Fourth, the United States line satisfies the third subsidiary delimitation principle requiring a reasonable degree of proportionality between the lengths of the coasts of the Parties and the marine areas lying in front of such coasts.

The United States respectfully submits that neither of the Canadian lines would lead to a solution in the circumstances of this case that would accord (224) with the applicable equitable principles. As shown in Figure 82, both Canadian lines would cut off the state of Maine from its coastal projection, within and seaward of the Gulf of Maine concavity, to Georges Bank and beyond. Both Canadian lines would run to the midpoint of the hypothetical closing-line across the mouth of the concavity before extending farther seaward and crossing Georges Bank, despite the fact that three-fourths of the coastline forming the concavity belongs to the United States. Furthermore, neither Canadian line would meet the proportionality test.

Both Canadian lines would disregard the natural boundary at the Northeast Channel that divides Georges Bank and the Scotian Shelf and the important

commercial fishing stocks that are associated with the respective separate fishing banks.

Both Canadian lines would in addition overlook the predominant interest of the United States and its nationals in Georges Bank.

The United States would add that each of these Canadian lines would ignore important affirmative conduct of the Parties. With respect to the continental shelf, the Truman Proclamation and its accompanying terms remained unchallenged by Canada for 20 years. With respect to fisheries, the line dividing Subareas 4 and 5 of ICNAF has been used by the Parties, with but minor modifications, since 1931. This division, as the Chamber will recall and
(25) as is shown on Figure 83, runs through the Northeast Channel. Interestingly, the line equidistant between the 100-fathom contour of the continental shelf cited in connection with the Truman Proclamation and the line representing these ICNAF subarea divisions are basically one and the same as far as Georges Bank and the Northeast Channel are concerned. Throughout its history, ICNAF used this line as an integral part of its management of the separate fish stocks of Georges Bank and those of the Scotian Shelf. As Mr. Colson stated earlier this morning, even today, the North Atlantic Fisheries Organization, the successor to ICNAF, continues to use this same line for purposes of fisheries management.

This pattern of conduct, by which the Parties gave legal significance in their relations to the integrity of Georges Bank and to the natural division at the Northeast Channel, is inconsistent with a Canadian claim to any part of Georges Bank.

In this sense, the ICNAF line dividing Subareas 4 and 5 is comparable to the 26° line that the Court found in the *Tunisia/Libya* case to be "a circumstance of great relevance for the delimitation" (*I.C.J. Reports 1982*, para. 96). To the extent that any line – I repeat, any line – in the Gulf of Maine area has been used notoriously by both Parties and by affirmative written agreement, for the same purpose and for a long time, that line is the ICNAF line and the ICNAF line alone.

Mr. President, distinguished Judges. The United States ends as it began. In applying equitable principles in the light of the relevant circumstances, the Chamber has the right, indeed the responsibility, of considering which method alone or which combination of methods will produce the most equitable single maritime boundary in this case. The Chamber is not confined, in achieving an equitable solution, to lying in the procrustean bed of the single method of equidistance – applied by Canada not merely as a method but rather as a principle – that is, what Canada sees as the new "distance principle" of giving controlling effect to proximity, which now is described by Canada as identical with adjacency.

The United States has suggested the equitable principles to be applied within the law. The United States has suggested the relevant circumstances to be taken into account. And the United States has suggested the elements of a method or methods to give effect to these principles and circumstances.

We believe that these principles, circumstances and elements, individually, and comparatively, and cumulatively, can only serve to confirm United States jurisdiction over all of Georges Bank.

The United States wishes to take this opportunity to thank the Chamber and, indeed, our distinguished Canadian friends and colleagues, for your patience and your attention. It has been an honour and a great privilege to have appeared here before you, and on behalf of the entire United States delegation we would like to thank you for this first, opening round of the United States oral argument.

The PRESIDENT: Considering the hour at which we have arrived, I think that the questions that some Judges and myself would like to address to both Parties, or to one of them, cannot be read in the time that we still have. We will give them, in writing, to the Parties for reply at their early convenience[1].

This now concludes the first round of the oral hearings in the case concerning the Gulf of Maine. These hearings are now adjourned, and the date for the opening of the second round will be communicated as soon as possible to the Agents of both Parties.

The Chamber rose at 12.55 p.m.

---

[1]The texts of the questions are annexed to this record.

QUESTIONS POSÉES PAR LE PRÉSIDENT DE LA CHAMBRE ET PAR MM. GROS, MOSLER, SCHWEBEL, JUGES, ET M. COHEN, JUGE *AD HOC*

QUESTION DU PRÉSIDENT DE LA CHAMBRE

Au cas où une méthode déterminée ou une combinaison de méthodes paraîtrait appropriée pour la délimitation du plateau continental et une autre pour celle des zones exclusives de pêche, quels sont selon les Parties les motifs juridiques que l'on pourrait invoquer en faveur de l'une plutôt que de l'autre pour la détermination d'une ligne unique? (**VII**, p. 139 et 186.)

QUESTIONS DE M. GROS

Première question, posée aux deux Parties:

Le point A et le triangle sont-ils des 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? (**VII**, p. 35 et 180.)

1. En ce qui concerne le point A les Parties reconnaissent-elles 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? (**VII**, p. 36 et 180.)

2. La même question se pose à propos de la réserve faite en cas d'arbitrage sur la souveraineté de l'île Machias Seal et du North Rock (cf. pour les Etats-Unis, V, réplique, par. 238 et la note 4). (**VII**, p. 36 et 181.)

Deuxième question, posée aux deux Parties:

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? (**VII**, p. 38 et 181.)

Troisième question, posée aux Etats-Unis:

1. Les textes adoptés par la troisième conférence des Nations Unies sur le droit de la mer, pour le plateau continental et la zone économique exclusive, ont-ils des effets juridiques sur la convention de 1958 sur le plateau continental et sur l'état actuel du droit coutumier? (**VII**, p. 189.)

2. Selon le Gouvernement des Etats-Unis, quelle interprétation convient-il de donner par rapport à la présente affaire:

a) à la déclaration du président des Etats-Unis d'Amérique du 9 juillet 1982:

> «Ayant achevé l'examen des dispositions de cette convention, nous reconnaissons qu'elle contient un grand nombre d'éléments positifs et très importants. Les longs passages ayant trait à la navigation et au survol des

Si je ne me trompe, le bassin du golfe du Maine n'a pas joué un très grand rôle dans les plaidoiries. En examinant la carte, j'ai l'impression que cette zone n'est pas une entité aussi homogène que les deux autres paraissent l'être. Les Etats-Unis auraient-ils l'obligeance de nous indiquer quelles sont les caractéristiques du bassin du golfe du Maine qui le distinguent des deux autres régimes ou systèmes? (**VII**, p. 250.)

QUESTIONS BY JUDGE SCHWEBEL

1. Question for the United States:

Would the United States please set out 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 a maritime boundary should be drawn in the Gulf of Maine? (**VII**, p. 270.)

2. Question for Canada:

With respect to whether a bay closing line in the Bay of Fundy should be regarded as part of Canadian coastal frontage on the Gulf of Maine, as argued by the United States, would Canada please comment on the significance, if any, of the facts (if indeed they be facts) that substantial areas of the Bay of Fundy have either been incorporated into Canadian internal waters by drawing straight baselines, or engulfed by the expansion of the territorial sea of Canada from 3 to 12 miles; and that Canada has exercised exclusive fishing jurisdiction since 1970 in the Bay of Fundy by drawing closing lines in the mouth of the Bay? With further regard to the Bay of Fundy, why does Canada maintain that the Bay of Fundy is part of the Gulf of Maine to be encompassed in any calculation of proportionality or disproportionality, while it does not so include Chignecto Bay and the Minas Basin? (**VII**, p. 133.)

(If the United States wishes to comment, it is equally welcome to do so.)

QUESTIONS BY JUDGE COHEN

The four questions are addressed to both Parties

1. 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? (**VII**, pp. 39 and 185.)

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? (**VII**, pp. 74 and 233.)

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? (**VII**, pp. 75 and 237.)

4. 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 1959 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.? (**VII**, pp. 123 and 258.)

The publications of the INTERNATIONAL COURT OF JUSTICE may be ordered from any bookseller. For information regarding the sale of the Court's publications please write to the *Distribution and Sales Section, Office of the United Nations, 1211 Geneva 10 (Switzerland)*, or the *Sales Section, United Nations, New York, NY 10017 (USA)*.

The publications of the PERMANENT COURT OF INTERNATIONAL JUSTICE (1920-1946) are obtainable from Kraus Reprint Co., Kraus-Thomson Organization Limited, Route 100, Millwood, NY 10546 (USA), to which all requests should be addressed.

On peut acquérir les publications de la COUR INTERNATIONALE DE JUSTICE auprès des librairies spécialisées du monde entier. Pour tous renseignements, prière de s'adresser à la *Section de la distribution et des ventes, Office des Nations Unies, 1211 Genève 10 (Suisse)* ou à la *Section des ventes, Nations Unies, New York, NY 10017 (Etats-Unis)*.

On peut acquérir les publications de la COUR PERMANENTE DE JUSTICE INTERNATIONALE (1920-1946) auprès de Kraus Reprint Co., Kraus-Thomson Organization Limited, Route 100, Millwood, NY 10546 (Etats-Unis). Pour tous renseignements, prière de s'adresser à cette société.

PRINTED IN GREAT BRITAIN