A Tale of Two Islands: An Analysis of the Court of Arbitration's Decision in the Canada-France Maritime Boundary Dispute

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A TALE OF TWO ISLANDS: AN ANALYSIS OF THE COURT OF ARBITRATION'S DECISION IN THE CANADA–FRANCE MARITIME BOUNDARY DISPUTE

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In carrying out the delimitation of the maritime boundary dispute between Canada and the French islands of St. Pierre and Miquelon, the Court of Arbitration was instructed by the parties to apply principles of international law. The majority of the Court interpreted this instruction as demanding the application of equitable criteria to achieve an equitable result. The inconsistencies in the Court's judgment, however, suggest that the majority relied on the principle of proportionality, and not on equitable criteria, in delimiting the boundary. Analyzed from a functional perspective, the decision represents an attempt by the Court to produce both a settlement and a demand for cooperation in the management of the maritime resources at the heart of the dispute.

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I. INTRODUCTION

On June 10th 1992 the Court of Arbitration established by Canada and France to settle their maritime boundary dispute with respect to the islands of St. Pierre and Miquelon rendered its decision, putting an end, on the face of it, to over twenty years of acrimonious dispute. In the agreement which sent the matter to judicial arbitration, the two countries specified that the Court should rule "in accordance with the principles and rules of international law applicable in the matter." It is claimed by the majority of the Court of Arbitration that by using equitable criteria to arrive at an equitable result this requirement has been fulfilled.

This paper is an assessment of the judgment both in light of current international law and juridical thought on maritime boundary delimitation, as well as in terms of its legal and logical coherence. Each step of the decision is analyzed in order to draw out the principles at work, legal or otherwise. To aid in this task use is made of the dissenting opinions of the Canadian and French members of the Court.

While clearly enunciating several equitable criteria upon which to base the delimitation of the maritime boundary, the Court applies them in such a non-rigorous manner as to suggest a decision that is based upon a proportionality concept. In the result the Court balances uneasily between a stated rule of law and a decision rendered ex aequo et bono.

In addition to an analysis based on classical legal principles, the decision of the court, as well as the dispute in general, will be considered from a functional perspective. In this regard discussion will be centred both on the limits imposed on the Court by the compromis, and on any perceived functional aspects of the decision. It will be argued that the boundary produced by the Court is deliberately constructed so as to impede control by any one party of the

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2 Canada–France: Agreement Establishing a Court of Arbitration for the Purpose of Carrying out the Delimitation of Maritime Areas Between France and Canada., 29 I.L.M. 1 (1990), art. 2(1) [hereinafter the compromis]. The compromis also sets out the members of the court: Mr. Jiménez de Aréchaga (pres.), Mr. Arangio–Ruiz, Mr. Schachter, Mr. Weil (France), Mr. Gotlieb (Canada).
resources at the heart of the dispute, thereby increasing the probability and necessity of cooperative management.

The body of the paper consists of four sections. First, a historical and contemporary overview of the islands of St. Pierre and Miquelon and the associated Canada–France dispute. Second, a description of the Court's decision, incorporating an analysis of specific issues raised both by the majority and dissenting opinions. Third, a general analysis of the juridical framework used by the Court to arrive at its decision; and fourth, a functionalist perspective on both the dispute and the judgment.

II. BACKGROUND

1. Historical Context

The dispute over the islands of St. Pierre and Miquelon stretches back almost 400 years to the establishment of the first French settlement in 1604. This was followed by the first British occupation in 1702 with the islands subsequently being ceded to Great Britain by the Treaty of Utrecht in 1713. Under the Treaty of Paris of 1763 France regained the islands as her sole possession in what had become British North America. The islands were granted to France in fulfilment of a request that French fishermen be accorded a place of shelter.

Between 1763 and 1816 the islands were occupied by the British no less than four times, and four times France regained possession under new treaty provisions. The most famous of these being the Treaty of Versailles of 1783 which was accompanied by declarations from Great Britain and France stating that the islands should not become "an object of jealousy between the two nations."

Throughout this period fishing activities by the French were a constant source of aggravation between the two countries, princi-

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3 Treaty of Peace and Friendship, 11 April 1713, France–Great Britain, 27 Parry's TS 475.
4 Encyclopaedia Britannica Micropaedia (1984), vol. 10 at 333.
5 Definitive Treaty of Peace, 10 February 1763, France–Great Britain–Spain, 42 Parry's TS 279.
6 Ibid. art. VI.
7 Definitive Treaty of Peace and Friendship, 3 September 1783, France–Great Britain, 48 Parry's TS 437.
8 Ibid.
pally because the French did not restrict themselves to the waters in the channel between St. Pierre and Miquelon but fished along a considerable length of Newfoundland's coast. More importantly, France was developing a fishery based not in metropolitan France but rather on the islands, with the result that St. Pierre and Miquelon were no longer just a refuge, but rather a fully developed colony.

2. The Present Dispute

The islands of St. Pierre and Miquelon thus have a long and contentious history. The origin of the recent chain of events leading to the Court of Arbitration, however, is found in communications by Canada to France in 1966 proposing a delimitation of the continental shelf boundary between St. Pierre and Miquelon and Canada on the basis of "special circumstances" under art. 6 of the 1958 Convention on the Continental Shelf. In reply, France insisted on the use of equidistance to delimit the boundary, using St. Pierre and Miquelon as base-points with minor changes possible in the light of "special circumstances." This dispute was brought into sharp focus later that year when both countries issued competing permits for offshore oil & gas exploration on the continental shelf south of St. Pierre and Miquelon.

Talks on the delimitation of the shelf occurred periodically over the next several years, with the delimitation of the territorial sea also becoming an issue in 1971 with the extension by Canada and France of their territorial seas to 12 nautical miles. During this period, Canada was attempting to terminate fishing by foreign fleets in the Gulf of St. Lawrence, as a result of which Canada and France entered into the 1972 Agreement Between Canada and France...
on Their Mutual Fishing Relations. The result of this agreement, as it applies to St. Pierre and Miquelon, is threefold. First, it sets a territorial sea boundary in the channel between the islands and the coast of Newfoundland. The line is primarily an equidistance one and consists of eight straight line segments (see Figure 1). Second, the agreement provides for reciprocal fishing rights in both undisputed and disputed national waters, regardless of any subsequent modifications to fishing zones—subject to the caveat that Canada can impose such measures as are needed to conserve the resource, such as quotas. Finally, the agreement contains a “without prejudice” clause enabling either country to make further claims in the area.

While the two countries were agreeing on fisheries, progress was also being made with regard to oil and gas resources. In 1972, a Relevé De Conclusions was arrived at by officials from both countries. In it France agreed to a limited continental shelf claim, not spelled out, but indicated to be a 12 NM zone, in exchange for certain economic concessions on the exploration and exploitation of the offshore oil and gas resources. This compromise was rejected by the Canadian cabinet and died a quick death, but France latter submitted the Relevé to the Court of Arbitration in the Anglo-French Arbitration to support its contention that the Channel Islands should be enclaved.

The delimitation dispute became somewhat more complicated in 1977 when Canada and then France proclaimed a 200 NM fishing zone (EFZ) and economic zone respectively (EEZ). Negotiations between the two countries commenced again in 1978, after the end of the Anglo-French Arbitration, with France now claiming a strict

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15 Agreement Between Canada and France on Their Mutual Fishing Relations, supra note 12, vol. 1 at Annex D–13 [hereinafter the 1972 Agreement].
16 Whether it is the territorial sea or a fisheries zone which is being delimited is unclear.
17 1972 Agreement, supra note 15, art. 2.
18 Ibid. art. 9.
19 Relevé de conclusions, supra note 12, vol. 1 at Annex B–2 [hereinafter Relevé].
20 Ibid. arts. I & II.
equidistance line as the proper method of delimitation and Canada insisting that France was entitled to no more than a 12 NM enclaved zone around the islands.\textsuperscript{23}

Over the next decade, talks were started on numerous occasions only to break down. While this period was marked by considerable tension between the two countries, worse was yet to come. In the mid-1980s, Canada started setting quotas for the cod catch in the 3Ps fishery subdivision, which included both the disputed zone as well as undisputed Canadian waters.\textsuperscript{24} Together with a private 1984 agreement that provided for national fisheries laws not to be reciprocally applied in the disputed area, the imposition of quotas was sufficient to bring the two countries back to the bargaining table in 1987. Canada in particular was eager to resolve the boundary dispute as it was concerned about the effects of unrestrained French fishing—as allowed by the 1984 agreement—on the cod stocks that migrated through the disputed waters.\textsuperscript{25}

The 1987 talks lead to an agreement in principle to send the boundary dispute to arbitration, as well as setting quotas for undisputed Canadian waters and laying down a process for the joint development of quotas in the disputed zone pending resolution of the dispute.\textsuperscript{26} This last aspect of the agreement proved to be a complete failure, resulting in Canada closing its ports to French fishing vessels and France recalling its ambassador.\textsuperscript{27} A mediator was called in and in 1989 agreement was reached on quotas. In addition, France agreed to send the boundary dispute to arbitration on the basis of the compromis of March 30th, 1989 in return for a greater allowable catch in undisputed Canadian waters.\textsuperscript{28}

3. Geographic and Political Environment

To fully understand the dispute and the judgment it is necessary to understand the unique geographical and political situation of St. Pierre and Miquelon. The islands are situated west and south of the mouth to Fortune Bay, opposite the western coast of Newfoundland’s Burin Peninsula. The grouping consists of two main

\textsuperscript{23} Memorial, supra note 10 at 116–117, paras. 262–6.
\textsuperscript{24} McDorman, supra note 13 at 161–2.
\textsuperscript{25} Memorial, supra note 10 at Figure 9.
\textsuperscript{26} McDorman, supra note 13 at 163.
\textsuperscript{27} Ibid. at 164.
\textsuperscript{28} Ibid.
FIGURE 1

Delimitation as per 1972 Agreement on Mutual Fishing Practices

FIGURE 2
The Court Line and the Parties’ Claims

Adapted by Olivier Fuldauer from map by Dr. Galo Carrera, Professor Dawn Russell, Professor Hugh Kindred, and Professor Phil Saunders, with permission of Professor Phil Saunders.
islands. The northern island, Miquelon, is actually two islands, Grande Miquelon and Langlade\textsuperscript{29} joined together by a sandy isthmus. Neither of these islands have a significant population, the total being approximately 800 people. Together, Grande Miquelon and Langlade stretch for approximately 22 NM and are almost 7 NM wide for an area of 215 square kilometres. The southern island, St. Pierre, is the main population centre with a population of approximately 6300. The island is 3 NM south-east of Miquelon and has an area of 27 square kilometres. At its narrowest the channel between the Burin peninsula and St. Pierre is 9 NM wide.\textsuperscript{30}

The political situation of St. Pierre and Miquelon has changed considerably since the dispute first arose between Canada and France. Until 1976, the islands were considered to be French overseas territories. From that point until 1985, they were classified as a département of France, a change which brought them within the European Economic Community legal regime. In 1985 their status was changed once again to that of a territorial collectivity of France. This change removed the islands from EEC jurisdiction\textsuperscript{31} and can be interpreted as being the first step on the road to independence, though it should be noted that there is no other evidence to suggest any great likelihood of this happening.\textsuperscript{32}

III. DESCRIPTION AND ANALYSIS

1. The Relevant Area

The Court's first step is to describe the geographical area that it considers relevant to the delimitation process. It does this before addressing the international law applicable to the dispute (as dictated by the terms of reference). The proclamation of a relevant area has the greatest impact on the Court's final resolution of the dispute. As stated by the Court, "[g]eographical features are at the heart of the delimitation process."\textsuperscript{33} This is especially true in this

\textsuperscript{29} Indicated on some charts as Petite Miquelon.
\textsuperscript{30} Supra note 4.
\textsuperscript{33} Supra note 1 at 1160, para. 24.
The concept of proportionality seems to play a decisive role. 34

The Court starts by noting that both parties agree that the relevant area is the approaches to the Gulf of St. Lawrence, namely the concavity formed by the coasts of Newfoundland and Nova Scotia. The parties do not agree, however, on which coasts should be taken account of to arrive at the total coastline lengths for Canada and St. Pierre and Miquelon. These figures are of fundamental importance as they are one of the two legs upon which proportionality rests, the other being the relevant areas.

In the eyes of the Court the relevant coasts are the coast of Nova Scotia from Cape Canso to Cape North, the closing line across the Cabot Strait from Cape North to Cape Ray, and almost the whole southern coast of Newfoundland. 35 All these "face the area where the delimitation is required, generating projections that meet and overlap" 36 those of St. Pierre and Miquelon. In particular, the Court explains that the rational for including the Cabot Strait closing line in the calculation is that it represents Canadian coasts that are less than 400 NM away from St. Pierre and Miquelon and whose projections would also therefore "meet and overlap." 37

The portion of the Newfoundland coast which the Court excludes is that lying north and east of the islands, including the closing line across Fortune Bay. The Court justifies this omission by analogy to the north and east coasts of St. Pierre and Miquelon, also excluded, which it says do not face on the area of dispute and have already been taken into account by the 1972 opposite-coast delimitation between points 1 and 9. 38 The logic of this determination is difficult to accept, as noted by Mr. Gotlieb the Canadian judge in his dissent. 39 The problem lies in the fact that not only do the south and west coasts of Newfoundland that are excluded face the area to be delimited, but there is no support for the idea that the effect of one coast (here Newfoundland) is limited to delimiting the boundary between it and the other coast (here the French islands), such that it has no effect on the delimitation of the seaward

34 See discussion below.
35 Supra note 1 at 1161, paras. 28–30.
36 Ibid. at 1161, para. 29.
37 Ibid.
38 Ibid. at 1161, para. 30.
39 Ibid. at 1184–85, paras. 18–25.
coast of the French islands. The Tribunal in the *Anglo-French Arbitration* made it clear that the coastal zone of France could leapfrog the Channel Islands and exist on their far side.\(^40\) However, while the Court ignores this leapfrog effect with respect to Newfoundland coasts facing the French islands, the Court accepts this concept when it recognizes the existence of Canada’s 200 NM EEZ on the “far side” of the French zone where it must be created by a leapfrogging effect (see Figure 2).

With regard to the islands of St. Pierre and Miquelon, the Court considers them to have a coast made up of two straight-line segments: down the west coast of Miquelon all the way to the southwest corner of St. Pierre and from there to the south-east corner of the island.\(^41\) This contrasts with the Canadian position which represented the St. Pierre and Miquelon coast as a single north-south straight line segment.

The significance of the Court’s decision not to follow the suggestion of the parties is twofold. First, the Canadian to French coastline ratio, as calculated by the Court is 15.3:1, this contrasts to ratios of 21:1 and 6.5:1 put forward by Canada and France respectively.\(^42\) With a net change of only 68 NM in the Court’s calculation of coastal lengths from the Canadian position a significant change in the ratios has been achieved via the questionable reasoning described above. From this observation comes the second point, strongly lead by Mr. Weil in his dissenting opinion,\(^43\) that the calculation of ratios based on coastal lengths is so open to variation so as to be an exercise of discretion rather than law. For this reason, some have seen recent delimitation decisions as limiting the role proportionality should play while at the same time recognizing its utility.\(^44\)

The final determination of the Court is that St. Pierre and Miquelon are in a relationship of adjacency with the south coast of Newfoundland. This is an important finding as there is a general acceptance of the idea that equidistance is less applicable to lateral

\(^{40}\) *Anglo-French Arbitration*, supra note 21 at 91-92, paras. 192-194.

\(^{41}\) *Supra* note 1 at 1162, para. 31.


\(^{43}\) *Ibid.*

boundaries between adjacent coasts than it is to boundaries between opposite ones.45

2. Terms of Reference and International Law

The second step the Court takes is an examination of the terms of reference contained in the compromis. These terms create the Court, delimit the question before it, and set the boundaries within which the Court must operate. Two key terms shape the judgment are the specification of the applicable rules which must govern the delimitation, and the requested result.

The rules which the court is to operate under are given in art. 2(1) of the compromis where it states that the Court shall come to a decision “[r]uling in accordance with the principles of international law applicable in the matter.”46 The requested result is given in arts. 2(1) and 2(2) where the court is asked to “establish a single delimitation which shall govern all rights and jurisdiction which the parties may exercise under international law”47 and further that “[t]he court shall describe the course of this delimitation in a technically precise manner.”48

The second of the two key terms, the desired result, is straightforward and requires no elaboration by the Court. Canada and France take the same road travelled by the United States and Canada in the Gulf of Maine Case,49 and look to the Court to produce a single boundary for both the water column and the seabed. While the wisdom of this request is debatable, it places some important limits on the Court which are discussed later in this paper.

The Court identifies the fundamental principle of international law to be applied to the case as one that “requires the delimitation to be effected in accordance with equitable principles, or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result.”50 This is no more than a rewording by

46 Compromis, supra note 2, art. 2(1).
47 Ibid. art. 2(1).
48 Ibid. art. 2(2).
49 Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgement, ICJ Rep. 1984 at 246 [hereinafter the Gulf of Maine Case].
50 Supra note 1 at 1163, para. 38.
the Court of the "fundamental norm" enunciated by the Chamber in the *Gulf of Maine Case*.\(^{51}\) As has been noted this is one, and perhaps the only, true common denominator of every maritime delimitation.\(^{52}\)

Two more findings which have a significant impact on the shaping of the decision are made by the Court at this point. The first of these is the rejection of the French contention that art. 6 of the 1958 *Convention on the Continental Shelf*,\(^{53}\) which stipulates an equidistance method, is applicable to the dispute. The Court's reasoning is lifted directly from the Chamber's decision in the *Gulf of Maine Case*\(^{54}\) and emphasizes that conventional law having to do with the continental shelf has no place in an all purpose delimitation; it would have the effect of making the water column above the shelf "a mere accessory of the shelf."\(^{55}\) Moreover, the Court points out that even if applicable, art. 6 is in no way a rule of equidistance but rather a rule of equidistance and special circumstances.\(^{56}\)

As this case and the *Gulf of Maine Case* are the only two examples of judicial "all purpose" delimitations,\(^{57}\) it is impossible to draw a definitive conclusion but it is apparent that the accepted law is that the 1958 *Convention* has no role to play in a single delimitation of both the shelf and water column.\(^{58}\)

The second finding of the Court is that the decision of the Tribunal in the 1977 *Anglo-French Arbitration* with respect to the treatment of the Channel Islands, where a 12 mile boundary was created on the seaward side of the islands effectively enclaving them,\(^{59}\) does not have precedential value with respect to the case at hand.\(^{60}\) The latter is distinguished on the grounds that there is no proximate metropolitan French coast involved in the manner the

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\(^{51}\) *Gulf of Maine Case*, supra note 49 at 300, para. 112.

\(^{52}\) Weil, supra note 44 at 160.

\(^{53}\) *Supra* note 11.

\(^{54}\) *Gulf of Maine Case*, supra note 49 at 301–303, paras. 116–125.

\(^{55}\) Ibid. at 301, para. 119.

\(^{56}\) *Supra* note 1 at 1163, para. 41.

\(^{57}\) The boundary drawn in the *Guinea/Guinea-Bissau Case*, 25 I.L.M. 252 (1986), was only in part a single all-purpose boundary.

\(^{58}\) However, this may not be true in the situation where the parties have agreed to the construction of more than one boundary line where necessary. In such a situation it is possible that art. 6 might be found to apply to the continental shelf delimitation.


\(^{60}\) *Supra* note 1 at 1164, para. 42.
English coast was with the Channel Islands. The Court holds that because of this difference St. Pierre and Miquelon cannot be seen as incidental features.

The Tribunal, however, was willing to treat the Channel Islands as incidental features because they accepted France's argument that not only were they on the "wrong side" of the median line but that they were "wholly detached geographically from the United Kingdom."61 Ironically, on the basis of this argument France then held up the 1972 Relevé reached between itself and Canada as a precedent for enclaving the Islands. It is true that the 1977 Tribunal accepted this analogy with some reservations, noting that the two situations were somewhat different, but in essence the Tribunal found that the Channel Islands are distant islands in the same sense as St. Pierre and Miquelon and thus were subject to being enclaved.

If an island grouping only tens of kilometres from its metropolitan coast is "detached geographically," then one several thousand of kilometres from its metropolitan coast must be as well. Considered in this manner St. Pierre and Miquelon are even more of an incidental feature than the Channel Islands are. The Court, however, ignores this reasoning and rejects any similarity with the Anglo-French Arbitration on the grounds that it involved "a delimitation between two mainland, and approximately commensurate, coasts."62

In discussing the applicable principles of international law, the Court upholds the primacy of equitable principles and affirms the limited role of equidistance in an all purpose delimitation. In addition the Court rejects the precedential value of the 1977 Anglo-French Arbitration with respect to the possibility of enclaving remote islands, even though there is a stronger argument for such a treatment of the islands of St. Pierre and Miquelon.

3. The Equitable Criteria

As the Court recognizes, it is in the choice of equitable principles or equitable criteria that the two parties diverge. Not surprisingly Canada and France suggest different equitable criteria from which the Court can arrive at what each consider an equitable result. France argued for the principle of sovereign equality of States and the

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61 Anglo-French Arbitration, supra note 21 at 94, para. 199.
62 Supra note 1 at 1164, para. 42.
principle that both mainland and island coasts have the equivalent ability to generate coastal zones, and Canada argued for the principles of non-encroachment and proportionality. For each principle the Court discusses the relevant law as well as the objections of the opposing party.

i. Sovereign Equality of States

This principle of sovereign equality of states is raised by France to discount two Canadian arguments. The first of these two arguments is that St. Pierre and Miquelon are entitled to no continental shelf of their own as the islands are superimposed on the Canadian shelf. This is a modification of the natural prolongation argument first articulated by the International Court of Justice (ICJ) in the *North Sea Continental Shelf Case*. The Court rejects this approach, adopting the reasoning of the Chamber in the *Gulf of Maine Case*: the eastern shelf of North America is a physiographical continuum which cannot be divided on a physical basis between nations. Furthermore the Court emphasizes that the shelf is a juridical concept, an argument first recognized in the *Anglo-French Arbitration*. This approach is now dominant and defines the shelf by a distance measure instead of according to geo-morphological factors. As a juridical concept defined by distance, every coastal State has an equal claim to a continental shelf. Finally, the Court repeats its argument that as the parties have requested a single all-purpose delimitation, factors that pertain solely to the shelf are not applicable.

The second argument raised by Canada is that the political nature of St. Pierre and Miquelon, as a dependent territory of France, requires that it be treated in a different manner from an independent State. In response, the Court accepts France's position that the

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63 *North Sea Continental Shelf*, ICJ Rep. 1969 3 [hereinafter *The North Sea Case*].
64 *Gulf of Maine Case*, supra note 49 at 273, para. 45: This line of argument was first used by the Tribunal in the *Anglo-French Arbitration* to reject French claims with regards to the Channel Islands, supra note 21 at 91, para. 193.
65 *Anglo-French Arbitration*, supra note 21 at 91, para. 191.
67 *Libya/Malta*, supra note 45, Section II, "Terms of Reference and International Law."
equality of states demands that the French islands not be treated in a prejudicial manner. 68 Firstly, the decision of the Court in this regard disagrees with Canada’s interpretation of the *Libya/Malta Case*, correctly in this writer’s view. 69 More importantly, the Court distinguishes Canada’s second argument based on the *Anglo–French Arbitration* treatment of the Channel Islands 70 by stating that all coasts in the present case are non-independent island coasts, (i.e. from a juridical viewpoint neither Newfoundland or Cape Breton are considered part of mainland Canada any more than St. Pierre and Miquelon are part of metropolitan France). While true in a strict physical sense, a simple glance at any chart makes it clear that Newfoundland (which politically includes Labrador) and Cape Breton (politically, and by roadway, an integral part of Nova Scotia) are in a fundamentally different situation than two islands several thousand kilometres from their mainland coast. This appears to be more a simple reluctance on the part of the Court to “open a can of worms” by discussing political criteria, when an equitable result based solely on geographical criteria is possible. This approach is consistent with prior case-law that has generally glossed over the finer points of political and socio-economic status of islands in favour of geography. 71

### ii. The Equal Capacity of Islands and Mainlands to Generate Zones

France asserts the equal capacity of islands and mainlands to generate coastal zones in order to rebut the Canadian contention that coasts have relative capacities to generate zones proportionate to their length. The Court rejects this, stating that a coast, no matter

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68 *Supra* note 1 at 1165, paras. 48–52.

69 *Libya/Malta*, *supra* note 45 at 51, para. 72 and also at 42, para. 53 where political status is seen as a factor affecting geography. cf. McDorman, *supra* note 13 at 187.

70 *Anglo–French Arbitration*, *supra* note 21 at 90, para. 190.

how short, projects a 200 NM EEZ\textsuperscript{72} and that the proper role for proportionality is as an \textit{a posteriori} test to ensure that a given result is equitable. As discussed below, it is questionable whether the Court in practice rejects this concept of "relative reach" to the extent it says.

\textit{iii. Non-Encroachment}

This is the first of two equitable criteria put forward by Canada and, as noted by the Court, is one outgrowth of the well established natural prolongation principle.\textsuperscript{73} The Court seems to accept Canada's argument that due to the concavity of the relative area, a line based on equidistance would lead to excessive cutoff beyond the southern coast of Newfoundland, the key coast due to the concept of frontal projections.

In dissent, Mr. Weil takes exception to this theory of frontal projection stating that there is no basis for it at international law. He argues that the concept of arcs of circles upon which most boundary lines are constructed, that are in turn founded upon the more ancient "cannon-shot rule," is evidence of a radial theory of coastal projection.\textsuperscript{74}

The difference between the two approaches seems to be more apparent than real. Since any curve can be approximated by a large enough set of straight lines, an identical result can be obtained from either method, avoiding the absurd result suggested by Mr. Weil for an L-shaped coast.\textsuperscript{75} The concept of frontal projections simply seems to support the point that a longer coast (disregarding indentations) must by necessity produce a zone of greater area than a shorter coast, regardless of the method used.

\textit{iv. Proportionality as an Equitable Principle}

The second equitable criteria put forward by Canada is that of proportionality, not merely as check on the equity of the final decision, but as a criteria upon which to base that decision. In response, the

\textsuperscript{72} \textit{Supra} note 1 at 1164, para. 45. Though not quoted, the basis for this is clearly art. 121(2) of \textit{LOSC}, \textit{supra} note 66, which states that islands generate zones in the same manner as other land territory.

\textsuperscript{73} \textit{Libya/Malta, supra} note 45 at 39, para. 46; Weil, \textit{supra} note 44 at 62: "the non-encroachment principle lies at the very heart of the delimitation process."

\textsuperscript{74} \textit{Supra} note 1 at 1201, paras. 12–14.

\textsuperscript{75} \textit{Ibid.}
Court reiterates its position that the proper use of proportionality is the former and not the latter. It sends mixed signals, however, by quoting from the *Libya/Malta Case* wherein it is stated that:

> It is however one thing to employ proportionality calculations to check a result; it is another thing to take note, in the course of the delimitation process, of the existence of a very marked difference in coastal lengths, and to attribute the appropriate significance to that coastal relationship, without seeking to define it in quantitative terms which are only suited to the ex-post assessment of relationship of coast to area.

This passage does not proscribe proportionality as an equitable criteria, instead it advocates limiting the use of proportionality to a qualitative role. This contrasts with the quantitative role that proportionality assumes when used as a test of equitable results. Thus by deliberately using this quote the Court appears to give with one hand what it had just taken with the other, by first stating that proportionality should be used only as a quantitative check, and then suggesting that it may also have a qualitative role.

In the end, the Court accepts all four equitable principles put forward by Canada and France as at least relevant to the achievement of an equitable result. The analysis in the following section will examine how these four criteria are used in the Court's solution, and to what extent any of them dominate the others.

4. The Court’s Result

The Court states clearly that neither “of the proposed solutions [Canada’s or France’s] provides even a starting point for the delimitation.” With this the Court rejects both equidistance and an enclave as methods by which to implement the equitable criteria it has identified.

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77 *Libya/Malta, supra* note 45 at 49, para. 66.

78 *Supra* note 1 at 1169, para. 65.

79 Note, however, that while not accepting a 12 NM zone around the islands as proposed by Canada, the final boundary created by the Court is in fact an enclave; France’s zone is completely surrounded by the 200 NM EFZ of Canada.
i. The Western Sector

The Court's solution lies in constructing two zones around the islands (see Figure 2). The first it labels the west sector, comprising an area from point 9 of the 1972 delimitation to a point off the south-west tip of St. Pierre. In discussing this sector, the Court underscores the importance of limiting the cut-off of Newfoundland's south-coast projection by encroachment of any zone belonging to St. Pierre and Miquelon. To this end the Court grants the islands a 24 NM zone by analogy to the contiguous zone spelled out in art. 33 of the *United Nations Convention on the Law of the Sea*.

Even this amount is not fully given as the zone is not allowed to cross the equidistance line where that line is less than 24 NM from the islands, a situation found in the north-west part of the sector.

The strangest aspect of this reasoning is that the Court approaches the problem from the perspective that the zone around St. Pierre and Miquelon should encroach as little as possible on the projection from south coast of Newfoundland, but not vice-versa! This bias is evident when the Court states that:

A limited extension of the enclave beyond the territorial sea in this western sector would meet to some degree the reasonable expectations of France of title beyond the narrow belt of territorial sea, even if causing some encroachment to certain Canadian seaward projections.

Thus while the Canadian projection is protected from severe encroachment, the French projection does not seem to enjoy the same privilege. This is at odds with the Court's acceptance of the principles of the sovereign equality of States and the equal ability of mainland and island coasts to generate zones. These criteria mandate that equal weight be given to the concern of Canadian encroachment on French projections, yet nowhere in the majority judgment is this recognized.

Mr. Prosper Weil, in dissent, is particularly outraged by this attitude which he interprets as an unjustified prejudice on the part of the Court, towards France. It is not the Court's job, he asserts, to

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start from the axiomatic position that the whole of the region is Canadian from which some portion should be assigned to France.83

ii. The Southern Sector

In the southern sector, there is no concern about encroachment as the relevant coasts are parallel (leaving out for the moment any consideration of Cape Breton). It is therefore possible to give St. Pierre and Miquelon a full 200 NM zone to the south. The Court calculates the width of the Southern zone as 10.5 NM based on the distance between the westernmost and easternmost points of the island grouping.84 The Court makes no mention of why it does not consider the length of the south coast it had previously defined, at 8.25 NM, as the basis for the corridor. Using this previously defined coastal length would seem a more logical choice given the emphasis the Court places throughout the decision on the principle that it is coasts that generate maritime zones.

The Court does not give a rationale for its delimitation of the remainder of the southern sector, the area from the north-east tip of the corridor to point 1 of the 1972 delimitation. It simply states that "the delimitation shall be a twelve nautical miles limit measured from the nearest points on the baseline of the French islands."85 No reasons are given as to why a 24 NM zone is not used here, as it is in the western sector. There is no equidistance line to limit the boundary, and no alternative explanation is put forward to limit the French claim in this manner. It is this apparent arbitrariness of the decision which most deeply concerns Mr. Weil.86

With respect to the corridor, the Court is quick to dismiss any argument that it is an encroachment on the projection of Cape Breton. In the words of the Court, the coast of Cape Breton has "open oceanic spaces for an unobstructed seawards projection towards the south . . . the direction in which they face."87 This comes across as a somewhat original reworking of geography, as noted by Mr. Gotlieb in dissent,88 evidently to suit the ends of the Court. From Cape North to Scatarie Island the coast follows a general

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83 Ibid. 1203, para. 19.
84 Ibid. 1170, para. 71.
85 Ibid.
86 Ibid. 1199 para. 7.
87 Ibid. 171, para. 73.
88 Ibid. 1189, para. 41.
south south-east direction and it is only from Scatarie Island to Cape Canso that the coastal direction is south-west. Thus the majority has effectively ignored the seaward projection of Cape Breton's coast from Cape North to Scatarie Island.

It is suggested that the true principle at work in this particular instance is to be found in the separate opinion of Justice Jiménez de Arechaga in the *Tunisia/Libya Case* where he states:

> It is true that there may be geographical configurations in which a boundary line cannot avoid "cutting across" the coastal front of one State.... If the above-described geographical situation occurs, then the "cutting-off" effect should be allowed to take place at a point as far as it may be possible to go, seawards, from the coastal front of the affected State [emphasis added].

Applying this principle, the minimum cut-off is achieved by a north-south corridor, deviation either west or east would involve cut-off of Newfoundland's south coast.

5. A Return to Proportionality

The Court returns to proportionality at the end of its decision in order to carry out the test that it feels is permitted by law when the circumstances are appropriate, as it finds they are in this case. The Court does this by comparing the proportionality of the coasts with that of the areas as determined by the delimitation. Central to this exercise is the determination of the relevant total area. The Court deals with this in a few short lines, finding the relevant area as not just the Gulf Approaches but the much wider area defined loosely by a 200 NM projection from the south-coast of Newfoundland and from St. Pierre and Miquelon. In the result a ratio of 16.4:1 is arrived at, a figure that the Court compares favourably to its coastline ratio of 15.3:1.

With this result the majority of the Court considers that an equitable result has been achieved. The two dissenting members however reach exactly the opposite conclusion, though for somewhat

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89 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgement*, ICJ Rep. 1982, 119, para. 69 [hereinafter *Tunisia/Libya Case*].

90 *Supra* note 1 at 1175, para. 92.

different reasons. Mr. Weil's objections are those discussed earlier having to do with the arbitrariness of deciding on a relevant area:

The identification and measurement of the relevant coasts and the relevant area remind one of what has been said of love, or of a Spanish inn; each one finds in them what he brings to it.\(^{92}\)

This attitude, while expressed rather poetically, is borne out by the dissent of Mr. Gotlieb who, while also disappointed in the arbitrariness of the majority's determination of the relevant area, suggests several different methods for arriving at what he considers the "correct" relevant area.\(^{93}\) It is a clear example of the discretionary nature of proportionality, the calculation of widely divergent relevant areas on what each person considers reasonable grounds.

IV. GENERAL ANALYSIS AND THE HIDDEN \textit{Ratio}

1. The Juridical Framework

There is a continuing debate among international jurists over what the law of maritime delimitation actually consists of. It has been suggested that true legal rules have not yet evolved and that decisions are on the whole decided \textit{ex aequo et bono}.\(^{94}\) It is argued that this is not only a trend in fact but is also a necessity of any given maritime delimitation. Legal rules are not suited to the exercise of maritime boundary delimitation as every problem occurs in a unique geographical situation that calls for unique treatment and a unique solution, a \textit{unicum}.\(^{95}\)

Perhaps one of the most helpful classifications of the law involved in delimitations has been put forward by Prosper Weil in his non-judicial role as an international jurist.\(^{96}\) Weil's classifications are based on the degree of normative content in the approach used to

\(^{92}\) \textit{Ibid.} 1206, para 24.

\(^{93}\) \textit{Ibid.}, see generally at 1186–88, paras. 26–37, specifically at 1188, para. 36 where Mr. Gotlieb considers that the relevant area can only consist of areas of ocean that are "near" areas claimed by France.


\(^{95}\) Nelson, \textit{ibid.} 838–839.

\(^{96}\) Weil, \textit{supra} note 44 at 159–167.
reach a decision. At the lowest end of Weil’s classification scheme are those decisions that are based solely on the “fundamental norm” of an equitable result. In this approach, both the criteria and the method to be used fall outside the legal sphere and the result is determined by what will create an equitable result in the particular problem at hand. This is the concept of the unicum carried to its logical conclusion: what is equitable in one decision has no bearing on what is equitable in the next.

Carrying out a delimitation via such an approach, it can be argued, is to truly proceed ex aequo et bono as the content of equity is at the discretion of the adjudicator. Yet, insofar as equity is a legal concept, international law is still being applied.97

In the middle of Weil’s scale is the approach that demands an equitable result through the use of equitable criteria. With this approach, equity achieves a normative value to the extent that its contents are defined by the equitable criteria. However, since the methods used to move from the criteria to the result are still outside of the “rules,” and since what is to be considered an equitable result is still at the discretion of the court, the end result of applying this approach might well differ very little from a decision based solely on the “fundamental norm” of an equitable result, save to clothe the exercise in an air of objectivity. As the Chamber in the Gulf of Maine Case observed: “for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases.”98

The final classification is that of the highest normative content, and exists when international law spells out the need not only for equitable criteria leading to an equitable result, but also sets the method(s) to move between the two. This approach is fundamentally different from the those described above as the court no longer has the same freedom to arrive at any boundary it feels is appropriate in the circumstances; rather it must follow the legal method from a factual starting point and move toward a reasoned conclusion. This method admits much less scope for judicial discretion.

An example of this approach is the mandatory application of equidistance, followed by adjustments in the resulting boundary to account for special circumstances. Mr. Weil is one of the strongest

97 Tunisia/Libya, supra note 89 at 60, para. 71.
98 Gulf of Maine Case supra note 49 at 313, para. 358.
advocates of this approach, usually known as the combined rule, which state practice has strongly endorsed though adjudicators have not.

2. The Majority Judgment

On the face of it the majority judgment fits into the second category laid out above. The Court is at pains to justify its decision in terms of the equitable criteria it has recognized. Yet, there is in the present case a wide and obvious gap between the reasoning of the majority, where it exists, and the result. If sovereign equality of States is an applicable criteria, where did it disappear to? If non-encroachment is of such importance, why is the coast of Cape Breton ignored as far as it impinges on the corridor? What rationale can there be for the 12 NM limit between point 1 of the 1972 Agreement and the north-east corner of the corridor? In the words of Jiménez de Arechaga:

> Often, even, a regrettable but doubtless inevitable gap can be observed between the arguments expounded in a judicial decision and the concrete finding as regards the choice of delimitation line adopted. . . . The finest legal dissertations on equity will never succeed in completely eliminating what is perhaps an irreducible core of the judicial subjectivism . . . .

It seems clear that either the true rationale behind the judgment is an overriding criteria of proportionality, in denial of the Court’s express position to the contrary, or after arriving at what it considers an equitable result, the court is attempting an *a posteriori* application of equitable criteria to justify its decisions. In truth, it is hard to separate these two positions. Jiménez de Arechaga stated in his separate opinion in the *Libya/Malta Case*.

> In the writer’s eyes, there can be no equity without proportionality. The principle of proportionality, with that

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99 *Supra* note 1 at 1209–13, paras. 30–37.
101 *Tunisia/Libya*, Separate Opinion of Jiménez de Arechaga, *supra* note 89 at 90, para 37.
of equivalence and finality, is one of the three principles on which equity is built. 102

Thus, if the boundary is arrived at for no other reason than because it appears equitable in the eyes of the court, proportionality is still a factor in arriving at that view.

A theory that would explain the piecemeal application of other listed criteria is the overriding application of proportionality, but if proportionality is the key to the decision, why is the Court so unwilling to acknowledge this fact in its reasons? Perhaps because the preponderance of judicial opinion has dismissed proportionality as an equitable criteria. 103 Weil picks up on this in his dissent, and makes much of the fact that the majority bases its decision on criteria other than proportionality:

[E]ven though in some quarters some may think there is an impression that this is how the majority of the court approached the problem, the fact remains—and this alone matters from the legal standpoint—that the proportionality between the lengths of the coastlines and the corresponding maritime areas is not the only factor on which the Decision bases its solution . . . .

. . . [T]he decision is drafted with unfailing orthodoxy with regard to proportionality, since it does not make proportionality the operative principle for purposes of the delimitation and since the line drawn is not claimed to be a proportionality line. One cannot but welcome this fact. 104

It is disappointing that if proportionality was the underlying criteria it was not articulated as such. Certainly this approach is open to the charge that the Court rendered a decision ex aequo et bono, but to have done so would have recognized what surely is one of the axiomatic tenants of maritime delimitation, the principle of the unicum. 105 Every delimitation is a unique problem, not only in

102 Libya/Malta, Separate Opinion of Ruda, Bedjaoui, Jiménez de Aréchaga, supra note 45 at 84, para. 23.
103 See Raileanu, supra note 44 at 696–698; McDorman, supra note 13 at 182–183.
104 Supra note 1 at 47, para. 20 and at 52, para. 26.
105 Gulf of Maine Case, supra note 49 at 290, para. 81. See Libya/Malta, supra note 45 at 39 where the ICJ states: “[Equity’s] application should display consistency and a degree of predictability.”
the geographical sense but also considering the associated political, sociological, economic, and ecological factors. While a general set of rules applicable to most if not all situations is seen by many as a more secure approach and one more aptly suited to the concept of international law,\textsuperscript{106} it is in truth ill-suited to the practice of maritime delimitation. As L. D. M. Nelson states:

[Ever since the introduction of the doctrine of the continental shelf it has been maintained that the "infinite variety" of geographical situations effectively rules out the application of a general rule . . . . The persistence of this viewpoint leads one to conclude that the law here seems to be faced with a stubborn fact of nature. Inevitably, it will be the law that will have to accommodate itself to this phenomenon, perhaps shedding in the process what some consider its most fundamental characteristic, its universality, at least as far as a the delimitation of maritime boundaries is concerned.\textsuperscript{107}]

One need look no further than state practice to find evidence of the need for flexibility and compromise that maritime delimitation demands.\textsuperscript{108} The functional approach is an example of a dispute resolution framework that recognizes these realities and attempts to address them.

V. THE FUNCTIONAL APPROACH

The functional approach to maritime boundary delimitation is a recent development in the law of the sea and has been advocated primarily by Doug Johnston.\textsuperscript{109} The heart of this approach is the recognition that maritime boundaries are primarily "resource-oriented rather than area-oriented."\textsuperscript{110} A few simple examples include

\textsuperscript{106} See generally Weil, supra note 44; Johnston, supra note 45.

\textsuperscript{107} Nelson, supra note 94 at 842.

\textsuperscript{108} Examples include the Australia—Papua New Guinea Torres Strait Treaty, 18 I.L.M. 291 (1979); Iceland—Norway: Agreement on the Continental Shelf Boundary Between Iceland and Jan Mayen, 21 I.L.M. 1222 (1982); the Netherlands—Venezuela 1978 Boundary Accord, Limits in the Seas, No. 105 (1986); the French—Venezuelan 1980 Boundary Accord, 1983 Recueil des Traités No. 6(13); the 1971 Italy—Tunisia Agreement, Limits in the Seas, No. 89 (1980).


\textsuperscript{110} Beauchamp, Ibid. at 630.
the British objection to the Norwegian practice of straight baselines; the North Sea continental shelf delimitation between Germany, Denmark and the Netherlands; and the Gulf of Maine delimitation between Canada and the United States. In each of these cases the true dispute was over the partitioning of resources in the disputed area, whether it be fish, oil, or scallops. The aim of the functional approach is to arrive at a solution to the delimitation problem which deals with the conflict over exploitation of the resource(s) in question. To quote Beauchamp: “Boundaries drawn on a functional basis anticipate purposes and consequences.”\textsuperscript{111} In short the aim is to have form follow function, not geography.

In contrast, the “legal” approach analyzed in the previous section focuses solely on geography to the exclusion of almost all other factors.\textsuperscript{112} The Court is quick to emphasize that “economic dependence and needs were not taken into account in the process of delimitation.”\textsuperscript{113} This is not to say that all non-geographic factors are ignored but the exceptions tend to be limited to security and shipping concerns.\textsuperscript{114} The rationale behind such a limiting rule is twofold. First, the courts are not seen as having sufficient expertise in these areas, and second, to allow such considerations would remove all certainty from the delimitation process by moving away from accepted normative values and instead applying a \textit{unicum} approach.\textsuperscript{115}

It should be emphasized that not all disputes are open to a functional interpretation. A classic example of one which at least started off in this category is the Beagle Channel dispute between Argentina and Chile. Though resources, specifically oil and gas, came to play a key role, the problem was in essence territorial and political in nature.\textsuperscript{116}

\textsuperscript{111} Ibid.
\textsuperscript{112} See general discussion in Weil, \textit{supra} note 44 at 258–264 and McDorman, \textit{supra} note 13 at 184. Concerning the exclusion of economic development arguments in particular see \textit{Libya/Malta, supra} note 45 at 41, para. 50.
\textsuperscript{113} \textit{Supra} note 1 at 1173, para. 83.
\textsuperscript{114} See Weil, \textit{supra} note 44 at 264–66.
\textsuperscript{115} \textit{Supra} note 1 at 1212, para. 36; \textit{Libya/Malta, supra} note 45 at 90, paras. 35–37.
1. The Dispute From a Functional Perspective

In its emphasis on the function of boundaries, the functional approach stresses the importance of negotiation over third party adjudication. With third party adjudication, invariably greater emphasis is placed on legal rules and issues rather than the functional issues at the heart of the boundary dispute.\(^{117}\)

Recognition of the importance of negotiation can be found in the 1958 *Convention on the Continental Shelf*\(^{118}\) and the *LOSC*,\(^{119}\) both emphasize that negotiation is the preferred method of resolving boundary disputes/delimitations. As has been pointed out by Russell,\(^{120}\) both Canada and France seemed well aware of the advantage of a negotiated solution, and pursued this avenue until the late 1980s. However, when a decision was made to send the dispute to a Court of Arbitration the countries deliberately limited the role of the Court, both by demanding that a single boundary be established for the shelf and the water column and by asking the Court to follow principles of international law. The second condition effectively limits the Court to considering geographical factors while ignoring the functional concerns.\(^{121}\) The first condition meanwhile severely curtails the extent to which any solution can address both of the fundamentally different management concerns of the two resources in dispute: fisheries, and oil & gas. One resource being highly migratory in nature while the other is at fixed locales on the seabed.

Johnston and Saunders have commented on the greater flexibility inherent in arbitration as compared to the ICJ (or a chamber thereof).\(^{122}\) This arises because the parties to a dispute are free to establish any terms of reference they see fit for an arbitral tribunal: they are not bound by the strictures of international law. Having said that, it is clear that in the present dispute Canada and France

117 Johnston, *supra* note 45 at 237.
118 *Supra* note 11, art. 6.
119 *Supra* note 80, arts. 15, 74, 83.
121 *Supra* previous section.
deliberately limited the discretion of the Court via the terms of reference by mandating the application of principles of international law. By limiting the terms in this way it appears as though the parties have attempted to achieve a procedure with somewhat predictable, and especially dispositive, results. Such an approach is attractive because it permits los politicos to return to their constituents with a judgment in their pockets and the problem apparently solved.

2. The Decision From a Functional Perspective

The need to arrive at a functional solution has lead Johnston to emphasize the desirability of constructs such as shared management zones to accompany any boundary delimitation. This is the concept of settlement and arrangement: a given decision should not only lead to a settlement of the boundary based on relevant criteria (those at the heart of the boundary’s function) but should also provide for a functional arrangement, usually some type of cooperative management agreement. 123 Such an arrangement may be integral to the settlement, but it is more often the case that it must be negotiated separately at a later date. It is for this reason that a boundary arrived at through third party adjudication is often only the first step in arriving at a functional solution. 124

As noted, the parties ruled out the possibility of the Court arriving at a functional solution directly. It remains to be seen what evidence can be found in the decision of the Court nonetheless attempting to recognize the functional philosophy, both in terms of a consideration of relevant factors and with regards to an arrangement to accompany the settlement. 125

As between Canada and France there is no question that it was serious disagreements over resource exploitation and management, in particular the cod fisheries, 126 that were at the heart of the dispute.

123 Johnston, supra note 45 at 228.
124 Russell, supra note 120 at 489.
125 At least one member of the majority, Oscar Schachter, has written on such functional themes as regional cooperation and international organization. See O. Schachter, Sharing the World’s Resources (New York: Columbia University Press, 1977).
126 Though certainly given less weight on the face of it, the hydrocarbon resource is undoubtedly of longer term interest to France, a country with almost total dependence on foreign oil. See generally N. Lucas, Western European Energy Policies (New York: Oxford University Press, 1985) at 1–62.
Although oil & gas exploration concerns initiated the debate, it was the inability of the parties to agree on management of the cod fishery that led ultimately to the Court of Arbitration. The Court is willing to recognize this fact but limits itself to applying the *a posteriori* test set out by the Chamber in the *Gulf of Maine Case*: the delimitation should not be so radically inequitable so as to lead to catastrophic economic repercussions for one of the parties concerned.

The Court states that the delimitation will not have a radical impact as the 1972 *Agreement* will still govern the fishery resource between the two countries. Of course, in saying this the Court is forced to acknowledge the problems which have been encountered by the two countries in applying this agreement, but the Court goes on to state:

>This Court is confident that by abiding in good faith with the 1972 Agreement, the Parties will be able to manage and exploit satisfactorily the fishing resources of the area.

This appears to be the Court’s response to any argument for an “arrangement:” the 1972 *Agreement* is already in place, and all it requires is the parties’ cooperation.

As for considering relevant functional criteria in delimiting the boundary, criteria based on ecological, biological, and socio-economic factors, the Court expressly denies taking them into account. These protestations are suspect, however, when one considers the dominant role that proportionality seems to have played in arriving at a solution. It is difficult to imagine how a consideration of the proportionality of certain geographical factors (such as disproportionate coastal lengths) cannot help but snare certain associated socio-economic factors related to the resource in question (e.g. more coast = more coastal communities = greater population = more of a demand on the resource). In addition, considering the gap between reasons and result, and the express recognition of the fisheries as an area of concern, it would seem naive to argue that such factors did not enter into the Court's consideration.

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127 Supra note 1 at 1173–74, paras. 83–87.
128 *Gulf of Maine Case*, supra note 49 at 342, para. 237.
129 Supra note 1 at 1174, para. 87.
130 Ibid.
131 Supra note 1 at 1173, para. 83.
Nonetheless, on the face of it the Court abides by the terms of reference that preclude any recourse to a functional approach. It is satisfied with using the broad brush of proportionality to justify its conclusions, while at the same time emphasizing to the parties the need to cooperate in their continuing implementation of the 1972 Agreement.

Such a conclusion, however, is insufficient to fully explain the strange shape of the boundary which the Court arrives at. Certainly the area is dictated by proportionality, but there is evidence of another concern in the construction of the shape of the delimited area, specifically in the creation of the 200 NM corridor. It is not difficult to imagine that this feature raises serious fisheries management concerns, particularly for Canada. The corridor represents a 10.5 NM wide swath of French jurisdiction where the French are free to fish at will. An endangered cod stock that transverses the boundaries of the original disputed area will traverse this zone. On the French side, a corridor only 10.5 NM wide makes the probability of violating the boundary during fishing operations very high. In short, the existence of the corridor will require either a ridiculous level of scrutiny to enforce and avoid confrontation, or the two countries will be forced to adopt a more cooperative stance, an imperative that the Court has recognized. It is suggested that it is with this functional result in mind that the Court has set the shape of the boundary.132

If this is true, has the Court, albeit through indirect means, reached a functional solution? Johnston and Saunders have the following to say about the required test:

The new conceptual framework for ocean boundary making should require the analyst to ask one all-important question: is the boundary functional or dysfunctional?133

It is suggested that within the limits imposed by the parties, the decision of the Court is functional to the degree that it favours the possibility of a cooperative management of the fisheries. However, considering the history of the dispute there is likely an equal, if not greater, probability that relations between Canada and France will spiral even further downwards. There is certainly no evidence to

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132 This possibility was brought to the attention of the author through communication with D. Johnston.
133 Johnston & Saunders, supra note 122 at 332.
suggest that a new day of cooperation has dawned between these two nations.\textsuperscript{134}

With respect to oil \& gas resources in the region, there is no evidence to suggest any recognition by the Court of the concerns surrounding their future management and exploitation. Indeed, the Court states that it "has no reason to consider the potential mineral resources as having a bearing on the delimitation."\textsuperscript{135} This seems a cavalier attitude to take when in the eyes of many, the main reason that France has remained committed to St. Pierre and Miquelon is not because of the fishery but rather the potential hydrocarbon reserves beneath the shelf.\textsuperscript{136}

However, the reasoning applied above with respect to the corridor and the fisheries may be equally applicable to the hydrocarbon resource. While it is true that some of the profitable reserves may be located under that part of the shelf caught by the corridor, it is likely that any field in the area will straddle the boundary. This suggests that any future development of a given straddling field will involve exploitation by both countries, thus increasing the probability of cooperative management of the resource.

Evidence of the willingness of the two parties to compromise on this issue is somewhat more conspicuous than it is with the fisheries. While summarily dismissed by the Court,\textsuperscript{137} the significance of the \textit{Releve} is not minimal. It is an indication of the importance that France ascribes to the hydrocarbon resources that they were willing to concede large areas of their continental shelf claim (most of which has no oil \& gas potential) in return for exploration and exploitation guarantees. This indicates that a negotiated settlement in this area may be possible. In light of this, it is disappointing that the Court did not, at a minimum, stress the need for cooperative management of both fisheries and hydrocarbon resources.

\textsuperscript{134} For a single example among many, see John C. Crosbie, Minister of Fisheries and Oceans, News Release NR-HQ-93-04, (14 January 1993), commenting on French misinformation on reduced cod quotas.

\textsuperscript{135} Supra note 1 at 1175, para. 89.


\textsuperscript{137} Supra note 1 at 1175, para. 91.
VI. CONCLUSION

The decision of the majority of the Court of Arbitration in the Canada–France maritime boundary dispute claims to be based on the application of equitable criteria to arrive at an equitable result. The four listed equitable criteria are the sovereign equality of states; the equal ability of island and mainland coasts to generate coastal zones; and the principle of non-encroachment. Of these the principle of non-encroachment is relied upon primarily to limit the entitlement of France to an EEZ, in apparent defiance of the principle of sovereign equality.

The Court rejects both an equidistance line as a starting point as well as a limited enclave around the islands. In their place the Court constructs a two-sector boundary consisting of a 24 NM zone about the western side of St. Pierre and Miquelon and a 200 NM long 10.5 NM wide corridor extending to the south of the islands. The result is justified as being equitable through a comparison of the proportionality of coastal lengths to resulting areas.

The apparent degree of inconsistency on the face of the judgment forces one to conclude that the Court arrives at its decision using proportionality as the unstated, but overriding criterion. Such an approach is very close to the line separating equity as a legal norm from a decision rendered _ex aequo et bono_. In following this path the Court implicitly applies the concept of the _unicum_, and accepts the limitation this imposes on the application of normative rules of maritime delimitation law.

An alternative to the classical mode of maritime boundary delimitation is the functional approach. With this method the aim of the delimitation exercise is to arrive at a boundary that is assessed not on territorial concerns but rather on the resources that form the basis for the boundary’s function.

When viewed in light of the functional approach, the decision of the majority reflects an effort, within the bounds set by the parties, to arrive at both a settlement and an arrangement (by creating a boundary configuration that encourages cooperation between the parties in the management of both the marine and hydrocarbon resources).

Like the jurisprudence that has preceded it, this decision will be a disappointment to those with a unitarian view of international law. Notwithstanding several limited exceptions, the Court does not take a declarative role towards the rules of law to be applied to
maritime boundary delimitation. Once again, the unique nature of this type of exercise has forced a Court to exercise flexibility in order to satisfy "the primordial requirement of achieving an overall equitable result."\textsuperscript{138

\textsuperscript{138} Tunisia/Libya, supra note 89 at 82, para. 114