

The United States/Canada Gulf of Maine Maritime Boundary Delimitation

Nora T. Terres

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**THE UNITED STATES/CANADA GULF OF MAINE MARITIME
BOUNDARY DELIMITATION**

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I. INTRODUCTION

On October 12, 1984, a Chamber¹ of the International Court of Justice (ICJ) delivered a judgment in the case *Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area*.² This case involved delimitation of a single boundary³ for both the continental shelf and fisheries zones.⁴ Although the Court had decided two previous cases concerning the delimitation of continental shelf boundaries,⁵ these cases gave little direct guidance as to how the Court would deal with delimitation of boundaries for fisheries zones or exclusive economic zones⁶ or how it would delimit a

1. The Chamber was composed of Judge Ago, President of the Chamber, Judges Gros, Mosler, and Schwebel and Judge *ad hoc* Cohen. Judge Schwebel voted with the majority but wrote a separate opinion. Judge Gros dissented. See *infra* text accompanying notes 51-52 for a discussion of the use of the chamber procedure.

2. Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12), reprinted in 23 I.L.M. 1197 (1984). See generally Charney, *Ocean Boundaries Between Nations: A Theory for Progress*, 78 AM. J. INT'L L. 582 (1984) [hereinafter cited as Charney, *Ocean Boundaries*]; Collins & Rogoff, *The International Law of Maritime Boundary Delimitation*, 34 ME. L. REV. 1 (1982); McRae, *Adjudication of the Maritime Boundary in the Gulf of Maine*, 17 CAN. Y.B. INT'L L. 292 (1979) [hereinafter cited as McRae, *Adjudication*]; Rhee, *Equitable Solutions to the Maritime Boundary Dispute Between the United States and Canada in the Gulf of Maine*, 75 AM. J. INT'L L. 590 (1981) [hereinafter cited as Rhee, *Equitable Solutions*]; Swan, *That Gulf of Maine Dispute: Canada and the United States Delimit the Atlantic Continental Shelf*, 10 NAT. RESOURCES LAW. 405 (1977); Comment, *Boundary Delimitation in the Economic Zone: The Gulf of Maine Dispute*, 30 ME. L. REV. 207 (1979); Note, *International Adjudication: Settlement of the United States-Canada Maritime Boundary Dispute*, 23 HARV. INT'L L.J. 138 (1982) [hereinafter cited as Note, *International Adjudication*].

A bibliography of the literature in this area of the law has been assembled in T. McDORMAN, K. BEAUCHAMP & D. JOHNSTON, *MARITIME BOUNDARY DELIMITATION: AN ANNOTATED BIBLIOGRAPHY* (1982).

3. Judge Gros felt that the Court should have discussed the appropriateness of a single boundary, even though it was stipulated by the parties. *Gulf of Maine*, 1984 I.C.J. at 362-64 (paras. 5, 6) (Gros, J., dissenting). For a discussion of the legality of international adjudication on a basis agreed to by the parties, see C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 604-16 (1964).

4. *Gulf of Maine*, 1984 I.C.J. at 253.

5. North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20), reprinted in 8 I.L.M. 340 (1969); Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Judgment of Feb. 24), reprinted in 21 I.L.M. 225 (1982).

6. The concept of the exclusive economic zone (EEZ) was developed initially by Latin American countries in the early 1970s in response to the threat posed by distant water fishing fleets from more advanced states. Many countries have declared EEZs since then. By declaring an exclusive economic zone, a country claims exclusive jurisdiction over all natural resources in the water column and the seabed in that zone. The 1982 Convention on the Law of the Sea recognizes each coastal country's right to an exclusive economic zone of up to 200 miles. Col-

single boundary for both purposes. In its opinion in the *Gulf of Maine* case, the Chamber states that the fundamental norm in maritime boundary delimitation is that it "is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result."⁷

This formulation is similar to the general principles set forth in the *Tunisia/Libya Continental Shelf* case.⁸ The opinions are similar in other ways. Both state that the choice of equitable principles and delimitation methods varies from case to case and is within the Court's discretion,⁹ and both emphasize geography, including the lengths of coastal fronts.¹⁰

The *Tunisia/Libya Continental Shelf* judgment was criticized by the dissenting judges¹¹ and by some commentators¹² as "lacking in legal principles, verging on an unauthorized determination *ex aequo et bono* and providing little guidance for the delimitation of maritime boundaries in other disputes."¹³ Judge Gros, in his dissent to the Chamber's opinion in the *Gulf*

lins & Rogoff, *supra* note 2, at 3 n.9.

For a discussion of the development of the exclusive economic zone concept, see generally Alexander & Hodgson, *The Impact of the 200-Mile Economic Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 569 (1975); Clingan, *Emerging Law of the Sea: The Economic Zone Dilemma*, 14 SAN DIEGO L. REV. 530 (1977).

National Legislation and bilateral treaties by various countries which declare exclusive economic zones are collected in NEW DIRECTIONS IN THE LAW OF THE SEA (M. Nordquist & K.R. Simmonds eds. 1980).

7. *Gulf of Maine*, 1984 I.C.J. at 300 (para. 112(2)).

8. In the *Tunisia/Libya* case, the Court laid down a general rule that "delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances," *Tunisia/Libya* case, 1982 I.C.J. at 92 (para. 133 A(1)), and undertook to balance the various considerations which it regards as relevant in order to produce an equitable result. *Id.* at 60 (para. 71). Feldman, *The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?* 77 AM. J. INT'L L. 219, 219 (1983).

9. See *infra* text accompanying notes 179-96 for discussion of this issue.

10. See *infra* text accompanying notes 212-20 for discussion of proportionality.

11. *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 143, 153 (paras. 18, 19) (Gros, J., dissenting); *Id.* at 157, 157 (para. 1) (Oda, J., dissenting); *Id.* at 278, 296 (para. 14) (Evensen, J., dissenting).

12. See, e.g., Charney, *Ocean Boundaries*, *supra* note 2, at 584-85; Charney, Remarks, *ICJ Decision in the Libya-Tunisia Continental Shelf Case*, 76 AM. SOC. INT'L L. PROC. 155, 155 (1982). But cf. Christie, *From the Shoals of the Ras Kaboudia to the Shores of Tripoli: The Tunisia/Libya Continental Shelf Delimitation*, 13 GA. J. INT'L & COMP. L. 1, 3 (1983); Feldman, *supra* note 8, at 220. For other discussions of the *Tunisia/Libyan* case, see generally Hodgson, *The Tunisia-Libyan Continental Shelf Case*, 16 CASE W. RES. J. INT'L L. 1 (1984); Stein, Remarks, *ICJ Decision in the Libya-Tunisia Continental Shelf Case*, 76 AM. SOC. INT'L L. PROC. 161 (1982).

13. Feldman, *supra* note 8, at 220. Feldman says that "[W]hile recognizing some merit

of *Maine* case, criticizes it for the same faults and considers the *Gulf of Maine* decision to be a continuation of the result-oriented, arbitrary use of "equity" which began in the 1982 *Tunisia/Libya Continental Shelf* judgment and which has been encouraged by the 1982 Convention on the Law of the Sea.¹⁴

Part II of this note will outline the background of the *Gulf of Maine* dispute. The formation of the Chamber for the case—the first in which the chamber procedure was used—will be briefly discussed in Part III. Parts IV and V will summarize the arguments of the parties and the reasoning of the Chamber, as well as the results reached in the adjudication. Finally, Part VI contains an analysis of the opinion, highlighting its strengths and weaknesses.

II. BACKGROUND OF THE DISPUTE

The Gulf of Maine area¹⁵ consists of a concave, island-fringed coastline where the United States and Canada are situated as adjacent, and in some places arguably opposite, states. (See Map 1.) The Georges Bank, particularly its northeastern third, is the focus of the jurisdictional dispute because of the valuable fisheries and hydrocarbon resources located there.¹⁶

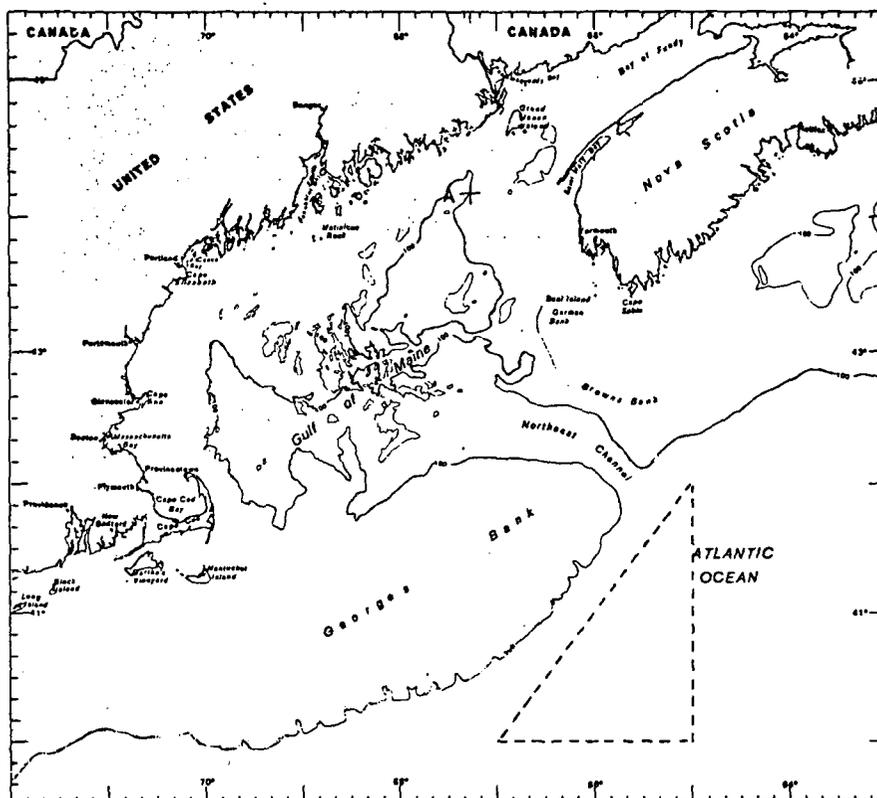
in these concerns, [he] believes the Court has taken a significant step towards the formulation of integrated principles that can be applied to the delimitation of unitary maritime boundaries governing both the continental shelf and the exclusive economic zone." *Id.*

14. *Gulf of Maine*, 1984 I.C.J. at 382-83 (para. 38) (Gros, J., dissenting).

15. The Gulf of Maine covers approximately 25,000 square miles and has an average depth of 150 meters. A major feature in the area is Georges Bank, long a famous fishing ground, now an area of oil and gas potential. Shaped like an oval, Georges Bank is about 180 miles long and 90 miles wide with an area of approximately 12,000 square miles. To the northeast, Georges Bank is separated from Browns Bank by the Northeast Channel or Fundian Channel, about 240 meters deep; to the southwest, the shallower Great South Channel, about 80 meters deep, lies between the Bank and Cape Cod. Most of Georges Bank is 30 to 80 meters deep. For more geographical information, see generally S. APOLLONIO, *THE GULF OF MAINE passim* (1979).

Rhee, *Equitable Solutions*, *supra* note 2, at 590 n.1 (1981). See also D. VANDERZWAAG, *THE FISH FEUD* 1-2 (1983); Comment, *supra* note 2, at 238.

16. The average estimate of recoverable hydrocarbon deposits on Georges Bank as a whole is 0.9 billion barrels, and 4.4 trillion cubic feet of gas, based on the United States Geological Survey. Of this, about 7 to 10% might be deposited in the disputed northeastern third of Georges Bank. See U.S. Geological Survey, North Atlantic District, *Georges Bank Monitor* 2 (No. 1, July 1980). Because of the possible environmental impact upon fisheries, not all of the oil and gas would be recoverable. Hydrocarbon reserves in the undisputed U.S. zone of Georges Bank relating to the Outer Continental Shelf (OCS) Sale No. 42 are estimated to be 123 million barrels of oil and 870 billion cubic feet of natural gas, having a net value of \$588 million. See U.S. Dep't of Commerce, National Oceanic and Atmospheric Administration, *Georges Bank Marine Sanctuary Paper* 24-49,



MAP No. 1

GENERAL MAP OF THE REGION, SHOWING THE STARTING-POINT FOR THE DELIMITATION LINE AND THE AREA FOR ITS TERMINATION

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reprinted in U.S. DEP'T OF THE INTERIOR, OCS SALE No. 42, FINAL SUPPLEMENTAL TO ENVIRONMENTAL STATEMENT 515-20 (1979). Based on the adjusted value of 1978 landings of \$167 million, the value of the fisheries of Georges Bank over the next 20 years would be estimated at \$3.34 billion. [*Id.*] Comparing this figure with the net value of the hydrocarbon deposits, which are likely to be exhausted in one generation, it is fair to conclude that the renewable fisheries resources are much more valuable than the hydrocarbon deposits in Georges Bank.

Rhee, *Equitable Solutions*, *supra* note 2, at 592 n.8. See also D. VANDERZWAAG, *supra* note 15, at 3-35; Comment, *supra* note 2, at 234 n.90 and sources cited therein.

A. *The Continental Shelf Controversy*

The oceanward extension of the territorial sea boundary¹⁷ was not an area of serious controversy for the United States and Canada until the late 1960s. The United States government had issued the Truman Proclamation in 1945,¹⁸ which included a provision that the boundary of the continental shelf was to be determined in accordance with "equitable principles." In 1964, relying on principles of equidistance contained in the 1958 Continental Shelf Convention,¹⁹ Canada issued geological exploration permits to petroleum companies for the Georges Bank area lying on the Canadian side of the equidistance line.²⁰ In 1969, subsequent to the decision in the *North Sea Continental Shelf* cases,²¹ the United States refused to recognize the validity of the Canadian permits.

On November 5, 1969, the United States asserted that the Northeast Channel should be the boundary in the Gulf of Maine and challenged the

17. The territorial sea boundary starts at a designated point in the mouth of the St. Croix River, passes in a southwesterly direction between the U.S. coast of Maine and the Canadian Deer and Campobello Islands to a fixed point in the Grand Manan Channel, and then moves southwesterly through the middle of the Channel until it meets a point where the distance from the nearest base points becomes 3 miles. *See* Treaty concerning the Canadian International Boundary, April 11, 1908, 35 Stat. 2003, T.S. No. 497, 12 Bevans 297. *See also* Treaty concerning the Boundary Line in Passamaquoddy Bay, May 21, 1910, 36 Stat. 2477, T.S. No. 551, 12 Bevans 341; Treaty in regard to the Boundary between the United States and Canada, Feb. 24, 1925, 44 Stat. 2102, T.S. No. 720, 6 Bevans 7.

Rhee, *Equitable Solutions*, *supra* note 2, at 590 n.2.

18. *See* Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945), *reprinted in* 59 Stat. 884. Before issuing the Proclamation, the United States government contacted the governments of Canada, Mexico, the United Kingdom, and the Soviet Union. There was no challenge, however, from any country. Rhee, *supra* note 2, at 591 n.3. *See* A. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 18-61 (1981).

19. Convention on the Continental Shelf, *done* April 29, 1958, art. 6, 15 U.S.T. 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311. Canada was not a signatory to the convention when it took this action. *See infra* note 84 for text of Article 6.

20. *See* Canadian Dep't of External Affairs, *Canadian View of the Gulf of Maine/Georges Bank Boundary Line*, Press Release (June 10, 1977).

This equidistance line is shown on Map 2. An equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the territorial seas of the two countries are measured. For a detailed explanation of the methods used in delimiting an equidistant boundary, see Hodgson & Cooper, *The Technical Delimitation of a Modern Equidistant Boundary*, 3 OCEAN DEV. & INT'L L.J. 361 (1976).

21. The ICJ had stated that the delimitation clause to the 1958 Convention was not general international law, and thus not binding on non-parties to the convention. The Court held that the continental shelf should be delimited in accordance with equitable principles, taking account of all relevant circumstances. *North Sea Continental Shelf*, 1969 I.C.J. at 384 (para. 101(c)(1)).

eleven-year-old Canadian exploration permits.²² In response, Canada rejected the American claim and acceded to the 1958 Convention on the Continental Shelf—the treaty whose equidistance principle formed the basis of Canada's claim—on February 6, 1970.²³ At this point the parties began negotiations, but no progress was made until the mid-1970s.

B. *Negotiations After the Declaration of 200-Mile Fishery Jurisdiction*

In the mid-1970s declarations of 200-mile zones of jurisdiction and the concept of the exclusive economic zone were a growing trend worldwide.²⁴ On April 13, 1976, the United States Congress enacted the Fisheries Conservation and Management Act,²⁵ which extended the exclusive fisheries zone—an application of the exclusive economic zone concept—from 12 to 200 miles as of March 1, 1977. Canada published its claim to a 200-mile fishery jurisdiction on November 1, 1976. The boundary line claimed was based on equidistance principles and was to become effective on January 1, 1977.²⁶ On November 4, 1976, the United States published its claimed boundary, which roughly followed the mid-channel line of the Northeast Channel.²⁷ (See Map 2 for the parties' claims at this point in the dispute.)

22. The U.S. Department of State issued a public notice on Feb. 12, 1970, concerning its position with respect to the Georges Bank continental shelf, which had already been expressed to Canada in a diplomatic note of Nov. 5, 1969:

[T]he U.S. Government has refrained from authorizing geologic exploration or mineral exploration in the area of the Georges Bank continental shelf. Pending agreement on the delimitation of the continental shelf in the Gulf of Maine, the U.S. Government does not acquiesce in or recognize the validity of permits or other authorizations issued by the Government of Canada to explore or exploit the natural resources of any part of the Georges Bank continental shelf, and reserves its rights and those of its nationals in that area.

Rhee, *supra* note 2, at 591 n.7. See 35 Fed. Reg. 3301 (1970).

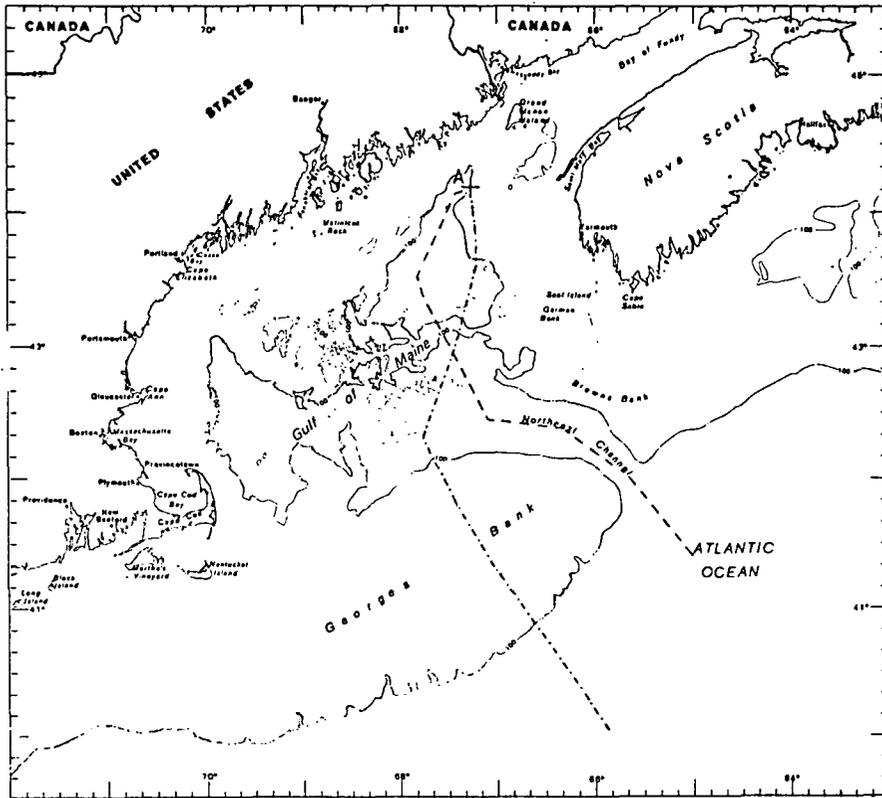
23. See United Nations, *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions* 452, UN Doc. ST/LEG/SER.D./8 (1975). Canada appended a declaration—apparently with the United States claim in mind—stating that it would not consider the presence of an accidental feature such as a depression or a channel in a submerged area as constituting an interruption of the natural prolongation of its land territory.

24. See *supra* note 6.

25. Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1811 (1976). See generally A. HOLLICK, *supra* note 18. For a general discussion of the United States fisheries management system, see D. VANDERZWAAG, *supra* note 15, at 37-67.

26. Rhee, *Equitable Solutions*, *supra* note 2, at 593. See Johnson, *Canadian Foreign Policy and Fisheries*, in *CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA* 52 (B. Johnson & M. Zacher eds. 1977). For a general discussion of the Canadian fisheries management system, see D. VANDERZWAAG, *supra* note 15, at 63-87.

27. See U.S. DEP'T OF STATE, PUB. NO. 506, *MARITIME BOUNDARIES BETWEEN THE UNITED STATES AND CANADA*, reprinted in 41 Fed. Reg. 48,619 (1976).



MAP No. 2

LIMITS OF FISHERY ZONES AND CONTINENTAL SHELF CLAIMED BY THE PARTIES, AT 1 MARCH 1977

United States line - - - - -

Canadian line - · - · - ·

Reprinted from 23 I.L.M. 1197, 1217 (1984).

The parties reached an interim agreement on reciprocal fisheries for 1977 on February 24 of that year.²⁸ On August 2, 1977, special negotiators of ambassadorial rank were appointed to conduct a comprehensive negotiation for fishery resources and maritime boundaries.²⁹ On June 2, 1978, the Canadians suspended the interim agreement.³⁰ Chaos followed. Fishermen from each country were excluded from the other country's zone and the disputed areas were overfished by fishermen from each side.³¹ As the situation worsened, Canada published a revised claim on September 15, 1978, to an additional 2,880 square miles, including 1,500 square miles, or 15 percent, of the Georges Bank.³² (See Map 3.) The United States protested this claim vehemently.³³

Negotiations were resumed. In October 1978, the negotiators determined that, although they had reached agreement on most of the fisheries questions, they were unable to resolve the maritime boundary question, which they recommended submitting to binding third-party settlement. Both governments accepted this recommendation.³⁴ On March 29, 1979, the parties concluded two separate, but interrelated, agreements: the Fisheries Agreement³⁵ and the Boundary Settlement Treaty.³⁶

28. See 76 DEP'T ST. BULL. 274 (1977). See also Message from the President of the United States Transmitting a Proposed Reciprocal Fisheries Agreement Between the Government of the United States and the Government of Canada, H.R. EXEC. DOC. No. 90, 95th Cong., 1st Sess. (1977).

29. Rhee, *supra* note 2, at 594. "The negotiators announced their joint report on Oct. 15, 1977, which specified basic principles for governing the cooperative management of fishing resources and the utilization of hydrocarbon deposits straddling the boundaries." *Id.*

30. See 78 DEP'T ST. BULL. 38 (1978).

31. Rhee, *supra* note 2, at 594.

32. The revised Canadian claim largely based on an assessment of the 1977 award in the *Anglo-French Continental Shelf* arbitration [Concerning the Delimitation of the Continental Shelf (U.K. v. Fr.), 18 R. Int'l Arb. Awards 3 (1977), reprinted in 54 I.L.R. 11 (1979) and in 18 I.L.M. 397 (1979)] was arrived at by drawing a so-called equitable equidistance line that discounted the effect of Cape Cod and the island of Nantucket.

Id.

33. The United States "consider[ed] the new Canadian claim to be without merit" and asserted that "any attempt by Canadians to fish beyond the initial Canadian claim would meet with United States enforcement action." See U.S. Dep't of State, File No. P78 0160-2316, reprinted in 73 AM. J. INT'L L. 132 (1979). See also 78 DEP'T ST. BULL. 43 (1978).

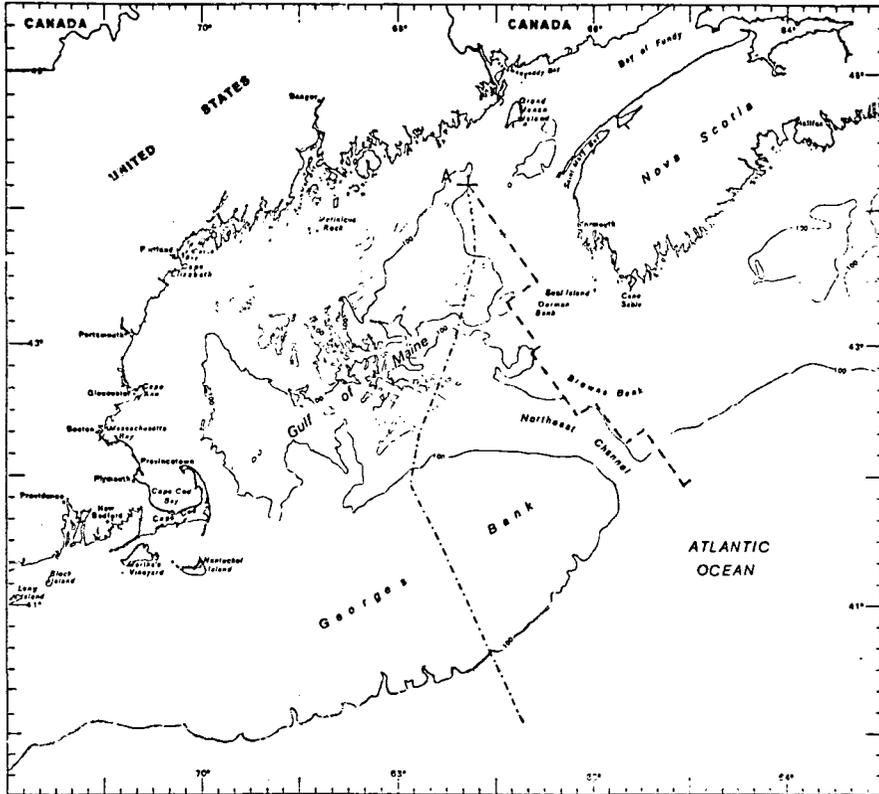
34. Rhee, *supra* note 2, at 595.

35. Agreement Between the Government of the United States and the Government of Canada on East Coast Fishery Resources, Message from the President of the United States Transmitting the Agreement on East Coast Fishery Resources with Canada, S. EXEC. DOC. V, 96th Cong., 1st Sess. (1979), reprinted in 9 NEW DIRECTIONS IN THE LAW OF THE SEA 157 (M. Nordquist & K. Simmonds eds. 1980) [hereinafter cited as Fisheries Agreement].

36. Treaty Between the Government of the United States and the Government of Canada to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the

C. The Demise of the Fisheries Agreement

The Fisheries Agreement set forth detailed rules for harmonious sharing of resources, mutual access and cooperative management of fish stocks. Three categories of management were established: joint management for



MAP NO. 3

DELIMITATION LINES PROPOSED BY THE PARTIES BEFORE THE CHAMBER

- United States line - - - - -
- Canadian line - · - - - -

Reprinted from 23 I.L.M. 1197, 1219 (1984).

Gulf of Maine Area, Mar. 29, 1979, United States-Canada, 80 Stat. 271, T.I.A.S. No. 10204, *reprinted in 9 NEW DIRECTIONS IN THE LAW OF THE SEA* 167 (M. Nordquist & K. Simmonds eds. 1980) [hereinafter cited as *Boundary Settlement Treaty*].

transboundary stocks, primary management for stocks of overriding interest, and independent management for stocks in undisputed areas.³⁷ It also provided for a dispute settlement mechanism³⁸ and a joint fisheries commission.³⁹ The Agreement was meant to be permanent with entitlement to the stocks subject to review.⁴⁰

The Agreement was controversial in the United States.⁴¹ The New England fishing communities lobbied against it at Congressional hearings.⁴² The pertinent committees decided that while the Boundary Settlement Treaty⁴³ was uncontroversial and useful, the Fisheries Agreement should not be ratified because it was unfair to the United States.⁴⁴ On March 6, 1981, President Reagan withdrew the Fisheries Agreement from consideration by the Senate and asserted that "it would be best to uncouple the two

37. See Fisheries Agreement, *supra* note 35, arts. II-XVII, anns. A-D.

38. *Id.* arts. II, IV, VII, IX, XII, XIII, XVIII, and XIX.

39. *Id.* arts. II-IV.

40. *Id.* art. IX.

41. See generally Rhee, *The Application of Equitable Principles to Resolve the United States-Canada Dispute Over East Coast Fishery Resources*, 21 HARV. INT'L L.J. 667 (1980).

42. See *Maritime Boundary Settlement Treaty and East Coast Fishery Resources Agreement: Hearings on S. Exec. Docs. U, V Before the Senate Comm. On Foreign Relations*, 96th Cong., 2d Sess. (1980) [hereinafter cited as 1980 Senate Hearings]; *Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. (1979) [hereinafter cited as 1979 House Hearings].

43. See *infra* notes 51-53 and accompanying text for discussion of its provisions.

44. See generally, H.R. SUBCOMM. ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT OF THE COMM. ON MERCHANT MARINE AND FISHERIES, 96TH CONG., 2D SESS., OVERSIGHT REPORT ON THE U.S.-CANADA EAST COAST FISHERY AGREEMENT AND BOUNDARY TREATY 18-21 (Comm. Print 1980) [hereinafter cited as 1980 HOUSE REP.].

Opponents of the Fisheries Agreement asserted that the entitlement for fish stocks was generally unfair to the United States. For example, the shares for fish stocks in the Georges Bank area (5Ze)—including scallops: Canada, 73.35%, United States, 26.65%; cod: Canada, 17%, United States, 83%; haddock: Canada, 21%, United States, 79%; and after 6 years, herring: Canada, 33.33%, United States, 66.67%—were unfair to the United States because if there is a split decision in the boundary settlement, Canada would have less than one-sixth of Georges Bank or one-eighth of the Georges Bank area (5Ze). See 1980 Senate Hearings, *supra* [note 42.] at 172-73. They particularly complained about the 26.65% entitlement to scallops in Georges Bank, because this share, based on historical averages from 1965 to 1977, did not take into account U.S. scallopers' interests in Georges Bank before 1965 and accorded too much weight to the Canadians' interest in the Bank, which had begun only in the early 1960's. They also pointed out that the average failed to take into account that in recent years the U.S. share had risen from 26.9% in 1977 to 40% in 1979. See 1979 House Hearings, *supra* [note 42.] at 54-60 and 146. See also 1980 Senate Hearings, *supra* [note 42.] at 56-58 and 200-18.

Rhee, *supra* note 2, at 597 n.45.

treaties and proceed with ratification of the Boundary Settlement Treaty."⁴⁵ On March 25, the Senate Foreign Relations Committee agreed to propose a resolution endorsing this approach,⁴⁶ which the full Senate adopted on April 29, 1981.⁴⁷

Canada was displeased with the United States' decision to accept the Boundary Settlement Treaty and yet to reject the Fisheries Agreement.⁴⁸ The two agreements had been negotiated together and were intended to be accepted or rejected together. Canada, which had already ratified the two agreements, had to separately consider ratification of the Boundary Settlement Treaty alone. On October 8, 1981, the Canadian Governor General authorized the Secretary of State for External Affairs to ratify the modified agreement.⁴⁹ Following the provisions of the Treaty, Canada and the United States subsequently filed this case with the International Court of Justice, asking that a Chamber of the Court delimit a single maritime boundary dividing both the continental shelf and fisheries zones of the two countries.⁵⁰

III. THE BOUNDARY SETTLEMENT TREATY AND THE USE OF THE ICJ CHAMBER

The Boundary Settlement Treaty contains four articles with two annexed agreements, the Special Agreement⁵¹ and the Arbitration Agree-

45. See SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE MARITIME BOUNDARY SETTLEMENT TREATY WITH CANADA, S. EXEC. REP. NO. 5, 97th Cong., 1st Sess. 2 (1981) [hereinafter cited as 1981 SENATE REP.] For a concise discussion of the Fisheries Agreement and the reasons for non-ratification, see D. VANDERZWAAG, *supra* note 15, at 89-94. VanderZwaag discusses ten factors which contributed to the demise of the agreement, including the belief that the scallop allotment was unfair to the United States, the fear of a new layer of regulations, and a willingness to gamble on a favorable decision by the ICJ on the boundary settlement issue.

46. 1981 SENATE REP., *supra* note 45, at 8.

47. See *Senate Approves Treaty on Sea Border with Canada*, N.Y. Times, Apr. 30, 1981, at A9, cols. 1-2.

48. See *Reagan Removes Canada Fishing Treaty From Senate on Eve of Trip to Ottawa*, Wall St. J., Mar. 9, 1981, at 16, cols. 1-2.

49. See McRae, *Proportionality and the Gulf of Maine Maritime Boundary Dispute*, 19 CAN. Y.B. INT'L L. 287, 287 (1981) [hereinafter cited as McRae, *Proportionality*]

50. Following this judgment, the fisheries management issues which had been worked out in the rejected Fisheries Agreement were left unresolved and will have to be worked out between the parties at a later date. For a discussion of various ways the United States and Canada might resolve these problems now that the boundary issue is settled, see D. VANDERZWAAG, *supra* note 15, at 95-112.

51. Boundary Settlement Treaty, *supra* note 36, Annex I - Special Agreement between the Government of the United States and the Government of Canada to submit to a Chamber of the International Court of Justice The Delimitation of the Maritime Boundary in the Gulf

ment.⁵² In Article I of the Treaty the parties agree to submit the dispute to a Chamber of the ICJ according to the provisions of the Special Agreement. Article II stipulates that if the Chamber has not been constituted within six months of the entry into force of the Treaty, either party may terminate the Special Agreement, which activates the Arbitration Agreement. Article III provides that either party may terminate the Special Agreement if a vacancy on the Chamber is not filled to its satisfaction. Article IV contains the terms for the entry into force of the Treaty.⁵³

The Special Agreement sets forth the procedure for submitting the dispute to a Chamber. Article I of the Special Agreement states that the Chamber shall consist of five persons chosen after consultation with the parties, pursuant to Articles 26 and 31 of the Statute of the Court. Article III defines the issue for the Chamber and stipulates that the parties shall accept the decision as final and binding.⁵⁴

As originally drafted and signed in 1979, the Treaty enabled the parties to "maintain a virtually absolute veto power over the composition of the Chamber."⁵⁵ This was accomplished by the interaction of the provisions of the Treaty with changes in the rules of the Court⁵⁶ made in 1972 and 1978. In general, the changes in the rules had the effect of allowing the parties to influence the composition of an *ad hoc* chamber of the Court.⁵⁷ For exam-

of Maine Area [hereinafter cited as Special Agreement], Mar. 29, 1982, *reprinted in Gulf of Maine*, 1984 I.C.J. at 252-55.

52. Boundary Settlement Treaty, *supra* note 36, Annex II [hereinafter cited as Arbitration Agreement].

53. 1981 SENATE REP., *supra* note 45, at 3.

54. *Id.* at 3-5. Article II of the Special Agreement limits the scope of the Chamber's decision by asking that they delimit a single boundary for both the subsoil and the water column and by asking that the boundary begin at a designated point and end within a designated area. Article VI provides for later negotiations—and, if necessary, a binding decision by the ICJ Chamber or a Court of Arbitration—on the seaward extension of the boundary. *Id.* See *supra* note 3.

The Arbitration Agreement would have entered into force if either party had terminated the Special Agreement in accordance with Articles II and III of the Treaty. The Arbitration Agreement is similar to the Special Agreement, except that the dispute would be submitted to an arbitration tribunal composed of five persons mutually agreed upon by the parties, rather than to an ICJ Chamber. *Id.* at 5-7.

55. Note, *International Conflict Resolution: The ICJ Chambers and The Gulf of Maine Dispute*, 23 VA. J. INT'L L. 463, 481 (1983) [hereinafter cited as Note, *ICJ Chambers*]; McRae, *Adjudication*, *supra* note 2, at 292-94.

56. See Rules of Court, INTERNATIONAL COURT OF JUSTICE, ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, No. 4 (1978), *reprinted in* 73 AM. J. INT'L L. 748 (1979) [hereinafter cited as 1978 Rules of Court].

57. Jiménez de Aréchega, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT'L L. 1, 1-4 (1973); S. ROSENNE, *PROCEDURE IN THE INTERNATIONAL COURT: A COMMENTARY ON THE 1978 RULES OF THE INTERNATIONAL COURT*

ple, in 1972 a requirement was added that the President of the Court consult with the parties on the composition of the chamber⁵⁸ and inform the Court of their preferences.⁵⁹ The Court, however, votes by secret ballot for the members⁶⁰ and can ignore the parties' wishes. Prior to the *Gulf of Maine* case, commentators felt that, in general, the Court would implement these provisions in such a manner as to respect the parties' wishes.⁶¹

The version of the Treaty which the parties first signed avoided the risk that the Court would not constitute the Chamber according to the parties' wishes. The Special Agreement originally provided that the members of the Court would elect three of the five judges on the Chamber after consultation with the parties, and the parties would choose two judges *ad hoc* who were not nationals of either party. Article I of the Treaty stated that the Chamber would not be deemed constituted until the parties notified the Court of the two judges they had selected.⁶² Accordingly, a party dissatisfied with the Court's selection of judges could choose to allow the six-month termination period of Article II of the Treaty to pass before notify-

OF JUSTICE 38-47 (1983); Note, *ICJ Chambers*, *supra* note 55, at 476-79.

The Rules were revised to answer criticisms of the Court by making procedures more flexible and informal and, hopefully, to make the chambers procedure authorized by Article 26 of the I.C.J. statute more attractive to potential litigants. Article 26 states that "[T]he Court may at any time form a chamber for dealing with any particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties." International Court of Justice Statute, 59 Stat. 1055, T.S. No. 993, at 25, 3 Bevens 1179 [hereinafter cited as ICJ Statute].

58. 1978 Rules of Court, *supra* note 56, art. 17, para. 2.

The language providing that the President of the Court "shall consult the agents of the parties regarding the composition of the chamber," 1978 Rules of the Court, *supra* note 56, art. 17, para. 2, was apparently:

a compromise between those who wanted to give the parties the power to decide for themselves on the composition of the chamber and those who wished to preserve the power of the Court to make the actual selection, and it was a matter on which the Court itself was divided.

McRae, *Adjudication*, *supra* note 2, at 296-97 (footnotes omitted).

59. 1978 Rules of Court, *supra* note 56, art. 17, para. 2.

60. *Id.* at para. 3.

61. See Note, *ICJ Chambers*, *supra* note 53, at 479; Jiménez de Aréchega, *supra* note 57, at 3. McRae, *Adjudication*, *supra* note 2, at 297. But see S. ROSENNE, *supra* note 57, at 44-45. Rosenne feels it may be too optimistic to expect that the Court or even a powerful minority of the Court (Article 18 of the Rules requires a majority of the Court to elect members of the chambers) will never use its power to block the composition of the chamber desired by the parties.

62. The original versions of the provisions are presented in the footnotes of the Boundary Settlement Treaty, *supra* note 36. These provisions are analyzed in Note, *ICJ Chambers*, *supra* note 55, and McRae, *Adjudication*, *supra* note 2. Neither of these articles discusses the ratified and final version of the Treaty.

ing the Court of its choice for an *ad hoc* judge. The Special Agreement would then no longer be operative and the Arbitration Agreement would be triggered.⁶³ The original version of the Treaty, thus, ingeniously took advantage of the Court's provisions for formation of an *ad hoc* chamber, giving the parties the advantages of adjudication before the International Court of Justice with the added benefit of a degree of control, otherwise unavailable in that forum, over the makeup of the body which would decide the case.⁶⁴

The United States Senate deleted the provision in the Special Agreement allowing each party to select a non-national judge, apparently because of the possibility that the original provision was not compatible with the Statute and Rules of the ICJ.⁶⁵ Because of these amendments, the Treaty did not provide a clear escape route for the parties to withdraw the case from the Court if they were displeased with the judges selected by the Court for the Chamber. The parties were, however, at least guaranteed that each would have a judge of their nationality on the Chamber, or, alternatively, a judge *ad hoc* of their choice, on the Chamber.⁶⁶

On January 20, 1982, the ICJ constituted the Chamber which would hear the *Gulf of Maine* case.⁶⁷ The Chamber was constituted entirely in accordance with the wishes of the parties.⁶⁸

63. McRae, *Adjudication*, *supra* note 2, at 295. The Treaty as ratified still allows the parties to withdraw if a vacancy arising in the Chamber is filled with a judge unacceptable to either party. *See supra* text accompanying note 53.

64. An adjudication before the ICJ is desirable for several reasons. A decision by the ICJ is generally regarded as more prestigious than an arbitration award. It is also less expensive because the United Nations pays a large portion of the Court's costs. Finally, using the ICJ promotes international law and justice or at least gives states an opportunity to appear to promote these ideals. Note, *ICJ Chambers*, *supra* note 55, at 474-76.

65. 1981 SENATE REP., *supra* note 45, at 8; Note, *International Adjudication*, *supra* note 2, at 140.

The amendment states that the Chamber will be constituted in accordance with Articles 26 and 31 of the Court's Statute. Boundary Settlement Treaty, *supra* note 36. Technically, a party only has the power to elect a judge if none of the members of the chamber selected by the Court are of the party's nationality. ICJ Statute, *supra* note 57, art. 31, para. 4.

On the other hand, the predominant view among commentators prior to this case was that the Court would, in normal circumstances, elect the judges suggested by the parties. Jiménez de Aréchega, *supra* note 57, at 3; McRae, *Adjudication*, *supra* note 2, at 297. McRae suggested that the Treaty, as originally drafted, probably was not only compatible with the ICJ Statute and Rules but was "an approach . . . contemplated at the time of the revision of the Rules of Court and anticipated by the Court itself." *Id.* at 295-97.

66. ICJ Statute, *supra* note 57, art. 31. The parties may have had ideas for other ways to withdraw if the chamber chosen had been unacceptable.

67. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1982 I.C.J. 4 (Constitution of Chamber Order of Jan. 20), *reprinted in* 21 I.L.M. 69 (1982).

68. 1982 I.C.J. at 10. For final composition of the chamber, see *supra* note 1. All judges

The *Gulf of Maine* case was the first case to utilize the chambers procedure. Accordingly, it will have important implications for the future of ICJ adjudication.⁶⁹ Other nations may be encouraged to bring cases before the ICJ because the parties to the *Gulf of Maine* case were successful in persuading the Court to approve the composition of the chamber which they desired. Some members of the Court did, however, voice vigorous dissents against the influence over the composition of the chamber which the parties wielded in this case.⁷⁰

In the future, the attractiveness of the chambers procedure to potential litigants will depend upon how much weight the Court decides to give to the preferences of the parties in selecting the judges to sit on a chamber. If the Court gives weight to the litigants' preferences, states may be encouraged to use the ICJ. On the other hand, the use of a regional chamber — such as the group in this case composed entirely of western judges — could cause a split in the law, particularly when important issues of first impression arise, and, thus, the development of international law and respect for international judicial proceedings could be undermined.⁷¹

IV. THE ARGUMENTS OF THE PARTIES

The arguments of the parties as presented to the Chamber will be briefly set forth.⁷² Surprisingly, the parties' formulations of the applicable general principles of law were very similar to one another. The United

were western judges. Judge Oda, a respected scholar on law of the sea, who wrote a vigorous and learned dissent in the *Tunisia/Libya Continental Shelf* case reviewing the law of maritime boundary delimitation, was not on the Chamber.

69. For fuller discussion of the ICJ chambers procedure and the future implications of the use of that procedure in the *Gulf of Maine* case, see Note, *ICJ Chambers*, *supra* note 55; Note, *International Adjudication*, *supra* note 2.

70. 1982 I.C.J. at 11-13 (Morozov, J., and El-Khani, J., dissenting). The dissenters argued that the parties could not formally decide and propose the names of judges to sit on the chamber and that such a proposal was an "ultimatum" which negated the Court's sovereign right to elect judges independently of the wishes of the parties. In addition, Judge El-Khani stated that selecting judges exclusively from industrialized Western states controverts the basic and essential universality of the Court. See S. ROSENNE, *supra* note 57, at 45. Rosenne believes the ICJ opinion, read with the dissents, shows some indication that the Court may determine the composition of an *ad hoc* tribunal without considering exclusively the desires of the parties.

71. Note, *International Adjudication*, *supra* note 2, at 142-43. The author of the note suggests that the Court will need to circumscribe carefully the scope of the chamber's procedure.

72. For a more extended discussion of the arguments, see *McRae, The Gulf of Maine Case: The Written Proceedings*, 21 CAN. Y.B. INT'L L. 266 (1983) [hereinafter cited as *McRae, Proceedings*]. The synopsis of the arguments of the parties which follows is drawn from *McRae's* article.

States memorial stated the rule of law as follows: "The cardinal principle in delimiting a single maritime boundary is that the delimitation shall be in accordance with equitable principles, taking account of the relevant circumstances in the area to produce an equitable solution."⁷³ The Canadian memorial stated: "[T]here is an underlying and fundamental norm or rule of law to be applied to all maritime boundary delimitations . . . that maritime boundaries are to be determined in accordance with equitable principles, taking account of all relevant circumstances, in order to achieve an equitable result."⁷⁴ From this common beginning, however, the parties diverged to present widely differing specific arguments for distinctly different boundaries.

A. *The Boundaries Claimed*

The United States had previously claimed a line which followed the Northeast Channel.⁷⁵ Before the Chamber, however, the United States brought forward a claim to a new boundary "perpendicular to the general direction of the coast, as adjusted to take account of relevant circumstances of the area."⁷⁶ The adjustments were to avoid crossing two major fishing banks on the Scotian Shelf-Browns Bank and German Bank.⁷⁷ The United States line therefore was "a series of lines, some perpendicular and some parallel to the general direction of the coast, constructed to enclose the 50-fathom depth contour and thus to avoid the fishing banks on the Scotian Shelf."⁷⁸

The Canadian line was the one claimed in 1978,⁷⁹ that is, "an equidistance line on which every point is an equal distance from basepoints on the coast of the two parties."⁸⁰ In its "outer reaches," however, "a basepoint located at the north end of Cape Cod Canal has been used instead of the attenuated coastal projection of Cape Cod and the off-lying islands of Nantucket and Martha's Vineyard."⁸¹ The Canadian line was therefore an equidistance line adjusted to take account of the special circumstances of Cape Cod.⁸² (See Map 3 for the claims of the two parties.)

73. United States Memorial, para. 8.

74. Canadian Memorial, para. 278.

75. See *supra* note 22 and accompanying text.

76. United States Memorial, para. 301.

77. *Id.* at 303.

78. *Id.* at 304.

79. See *supra* note 32 and accompanying text.

80. Canadian Memorial, para. 6.

81. *Id.*

82. This adjustment in the equidistance line is justified in the Canadian Memorial on the ground that "the elongated protrusion of Cape Cod, separated from the Massachusetts main-

B. *Canada*

The Canadian position was based on several propositions. First, equitable principles should be "identified and applied on the basis of applicable law."⁸³ Accordingly, Article 6 of the Geneva Convention on the Continental Shelf,⁸⁴ to which both states are parties, "is directly relevant to the continental shelf as a component of the single maritime boundary, and it is indirectly relevant by way of analogy to the boundary in its entirety,"⁸⁵ and the "sources of law respecting the exclusive economic zone and the 200-mile fishing zone"⁸⁶ must also be considered. Second, the boundary must respect the basis of coastal title to the area delimited. In the Canadian view, the emergence of the exclusive economic zone represents a trend toward the distance principle as the basis of title.⁸⁷ Third, "the boundary should respect the basic purposes of the rights and jurisdiction in issue."⁸⁸ Since the essential purpose of the exclusive economic zone is economic, then "the economic dependence of a coastal state upon an area of the sea adjacent to its coasts should be given particular weight."⁸⁹ Fourth, "the boundary should take account of legally relevant circumstances."⁹⁰ To Canada this meant the contemporary reality of the fisheries, not its historic evolution, since the

land by the Cape Cod Canal, is indisputably an irregularity of the eastern North American coastline, and its eastward thrust is wholly out of alignment with the general direction of the Massachusetts coast within the Gulf of Maine." McRae, *Proceedings supra* note 72, at 267 n.7 (quoting Canadian Memorial, para. 346).

83. Canadian Counter-Memorial, para. 545.

84. *See supra* notes 19 and 23 and accompanying text. Article 6 of the 1958 Geneva Convention in the Continental Shelf provides:

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

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured

85. Canadian Counter-Memorial, para. 549.

86. *Id.* at 229.

87. McRae, *Proceedings supra* note 72, at 269.

88. Canadian Counter-Memorial, para. 558.

89. *Id.* at para. 580.

90. *Id.* at para. 545.

former is most relevant to the purposes of the zones being delimited.⁹¹ Finally, the result of applying these principles must be equitable, in light of "all the relevant circumstances."⁹²

Applying these principles, Canada made several specific arguments. First, it was contended that equidistance was the most appropriate method to apply. Equidistance is mentioned in the 1958 Geneva Convention,⁹³ and it most closely reflects proximity or the distance principle which Canada claimed was the primary basis for title. Second, Canada contended that the United States was aware that Canada utilized the equidistance line in issuing oil and gas exploratory permits during the 1964-69 period. Because the United States had nonetheless acquiesced to that Canadian action, it was claimed that the United States was now estopped from protesting the use of the equidistance principle.⁹⁴ In addition, it was argued that the United States and Canada had been partners in relation to the fisheries of the Georges Bank for years, as the United States recognized in negotiating the 1979 Fisheries Agreement with Canada, and that it would be inequitable to throw Canada out of Georges Bank now.⁹⁵ In a third related argument, Canada claimed the United States had used a modified equidistance line itself in the 1960s and 1970s.⁹⁶ The Bureau of Land Management used this line in issuing geophysical survey permits. This, the Canadians asserted, established a *modus vivendi* or *de facto* boundary similar to that relied on by the Court in the *Tunisia/Libya Continental Shelf* case.⁹⁷ Finally, the Canadians argued that Canada has built up, in the post-World War II period, an intensive scallop and groundfish fishery⁹⁸ and that "the fishery is the main pillar of the southwest Nova Scotia economy, and the resources of the Georges Bank are vital to its prosperity."⁹⁹ According to Canada, this economic dependence should given special weight if the result is to be equitable.¹⁰⁰

C. *United States*

The United States identified four specific "equitable principles" which

91. McRae, *supra* note 72, at 270.

92. Canadian Counter-Memorial, para. 545.

93. See text of Article *supra* note 84.

94. Canadian Memorial, para. 427.

95. *Id.* at para. 322.

96. Canadian Reply, para. 242.

97. *Id.* at para. 244.

98. Canadian Memorial, para. 190-94.

99. *Id.* at para. 200.

100. *Id.* at para. 311.

applied.¹⁰¹ First, “the boundary must respect the relationship between the coasts of the parties and the maritime areas in front of those coasts.”¹⁰² This principle encompasses three subsidiary principles: non-encroachment, proportionality, and natural prolongation.¹⁰³ Encroachment occurs “when the method of delimitation leaves to one State an area that is off, or in front of, the coast of another.”¹⁰⁴ The proportionality test, which “requires that a delimitation take account of the relationship between the extent of the maritime area appertaining to the States concerned and the lengths of their respective coastlines”¹⁰⁵ was said to apply to a single maritime boundary “because the rights to be delimited derive from the relationship of the areas in question to the abutting coasts.”¹⁰⁶ Natural prolongation, a third principle derived from earlier cases delimiting the continental shelf was thought to apply, even though it was admitted that the area was basically continuous shelf, because geomorphological features like the Northeast Channel, even where they do not divide an area into “two natural prolongations, may nonetheless be among the relevant circumstances to be considered in determining an equitable solution.”¹⁰⁷

The second general “equitable principle” identified was that “the boundary should facilitate conservation and management.”¹⁰⁸ The third such principle was that “the boundary should minimize the potential for international disputes.”¹⁰⁹ The final “equitable principle” asserted was that “the boundary must take account of the relevant circumstances of the area.”¹¹⁰

Several specific arguments flowed from these principles. First, the United States argued for what might be called geographical—as opposed to geological—natural prolongation. Viewing the North American continental coastline in the vicinity of the land boundary as a whole, the U.S. identified a single general direction of the coast.¹¹¹ Then, they concluded that the coasts of Canada and the United States that accord with the general direction are “primary” coasts. The coast of Nova Scotia facing onto the Gulf of Maine was said to be a “secondary” coast, because it is the only coast that

101. McRae, *Proceedings*, *supra* note 72, at 270-72.

102. United States Memorial, 140.

103. *Id.* at para. 239.

104. *Id.* at para. 240.

105. *Id.* at para. 242.

106. *Id.* at para. 244.

107. *Id.* at para. 246.

108. *Id.* at 142.

109. *Id.* at 143.

110. *Id.* at 145.

111. *Id.* at para. 283.

departs radically from that general direction.¹¹² Accordingly, the United States argued that the Georges Bank lies off Maine and New Hampshire, rather than off Nova Scotia to which it is more proximate. Thus, a line equidistant from the "primary" coast of Maine and "secondary" coast of Nova Scotia cuts off the former, but not the latter.¹¹³

Next, the United States argued that, despite the unity of the continental shelf, certain natural boundaries should be recognized. The Northeast Channel is described as "a significant break in the surface of the continental shelf."¹¹⁴ In addition, the United States claimed that the marine environment of the Gulf of Maine is divided into three principal ecological regimes,¹¹⁵ two of which, Georges Bank and the Scotian Shelf, are divided by the Northeast Channel. Accordingly, the United States asserted that a boundary that divided these ecological regimes and the separate stocks of fish and shellfish within them would both facilitate conservation and management and minimize the potential for international disputes, since the management of any one stock would not have to be divided between two governments.¹¹⁶

Finally, the United States argued that it had historical rights in the area. The United States claimed a history of United States activities in the entire Gulf of Maine area—or at least up to the Northeast Channel—for over 200 years. The United States took credit for mapping and surveying the area,¹¹⁷ for providing electronic and other aids to navigation,¹¹⁸ for scientific research,¹¹⁹ for search and rescue,¹²⁰ and for defense.¹²¹ These activities were said to demonstrate the predominant interest of the United States. The intensification of Canadian fishing in the area over the last few decades was said to be too recent to establish historical rights. The United States also denied that Nova Scotia was economically dependent on the Georges Bank and asserted that such dependence would not be legally relevant if it existed.¹²²

In sum, the parties presented a number of arguments, which were complex and varied, and produced thousands of pages of briefs, annexes and

112. *Id.* at para. 287.

113. McRae, *Proceedings*, *supra* note 72, at 275.

114. United States Memorial, para. 30.

115. *Id.* at para. 38.

116. McRae, *Proceedings*, *supra* note 72, at 276.

117. United States Memorial, paras. 104-13.

118. *Id.* at paras. 114-20.

119. *Id.* at paras. 121-28.

120. *Id.* at paras. 129-30.

121. *Id.* at paras. 131-32.

122. United States Counter-Memorial paras. 187-90 and paras. 340-48.

technical reports. The Chamber, however, rejected all the arguments of the parties in its decision.

V. THE JUDGMENT

A. *The Special Agreement—What Did the Parties Ask the Chamber to Decide?*

The parties requested in Article II of the Special Agreement that the Chamber:

decide, in accordance with the principles and rules of international law applicable in the matter between the parties, the following question:

What is the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States of America from a point in latitude 44° 11'12"N, longitude 67° 16'46"W to a point to be determined by the Chamber within an area bounded by straight lines connecting the following sets of geographic coordinates: latitude 40° N, longitude 67° W; latitude 40° N, longitude 65° W; latitude 42° N, longitude 65° W?

The point of commencement of the boundary has been designated by the parties as Point A, and the area within the stipulated coordinates in which the Court is to terminate the boundary forms a triangle. (See Map 1 for the locations of Point A and the triangle.)

In the first part of the decision the Court sets forth the limits placed on it by the parties and accepts them.¹²³

B. *Description of the Gulf of Maine Area*

In the second part of the judgment, the Court extensively describes the Gulf of Maine area and rejects certain factual contentions of the parties regarding it. First, the geography of the area is described.¹²⁴ In the course of the description the Court rejects the United States' distinction between primary and secondary coasts¹²⁵ and Canada's discounting of Cape Cod in constructing its modified equidistance line.¹²⁶ Second, the Chamber describes the geology of the seabed in the area,¹²⁷ concluding that there is one

123. *Gulf of Maine*, 1984 I.C.J. at 263-67 (paras. 14-27). See *supra* note 3.

124. *Gulf of Maine*, 1984 I.C.J. at 268-73 (paras. 29-42).

125. *Id.* at 271 (para. 36).

126. *Id.* at 271 (para. 37).

127. *Id.* at 273-75 (paras. 44-47).

continuous continental shelf in the area and rejecting the contention of the United States that the Northeast Channel is a significant division in that shelf.¹²⁸ Third, the Chamber describes the ecology and stocks of fish and shellfish in the area, considers the claim of the United States that there are "natural boundaries" in the water column¹²⁹, and concludes that the water column in the area is one continuous mass¹³⁰—in fact, doubting that there could ever be "natural boundaries" in "so fluctuating an environment as the waters of the ocean."¹³¹ Finally, the Chamber summarizes Canadian and United States claims of historical rights in, and economic dependence on, the fisheries in the area,¹³² and concludes that these matters are not directly relevant, saying that:

The Chamber is . . . convinced that for the purposes of such a delimitation operation as is here required, international law, as will be shown below, does no more than lay down in general that equitable criteria are to be applied, criteria which are not spelled out but which are essentially to be determined in relation to what may be properly called the geographical features of the area. It will only be when the Chamber has . . . [tentatively drawn] a delimitation line, that it may and should . . . bring in other criteria which may also be taken into account in order to be sure of reaching an equitable result.¹³³

This quotation provides an excellent preview of the process followed by the Court in reaching its result.

The third part of the decision details at length the history of the dispute and describes the boundary lines claimed by each of the parties.¹³⁴

C. Definition of the Fundamental Norm of Customary International Law Governing Maritime Delimitation

In the fourth part of the judgment, the Chamber reviews the general principles of customary international law applicable in the case.¹³⁵ The Chamber distinguishes such general principles from the various equitable criteria and practical methods that may be used in applying such principles.

128. *Id.* at 275 (para. 47).

129. *Id.* at 275-77 (paras. 48-55).

130. *Id.* at 277 (para. 55).

131. *Id.* at 277 (para. 54).

132. *Id.* at 278 (paras. 57, 58).

133. *Id.* at 278 (para. 59).

134. *Id.* at 278-88 (paras. 60-78).

135. *Id.* at 288-302 (paras. 79-112).

Such criteria and methods can only be determined in relation to each particular case and thus cannot rise to the level of a rule of customary law.¹³⁶ The Chamber also distinguishes special international law, bilateral and multilateral, which may apply between particular parties due to a treaty or principles of estoppel.¹³⁷

Then, the Chamber briefly identifies several potential sources of law and extracts general principles from them. First, the 1958 Convention on the Continental Shelf is considered.¹³⁸ The Chamber states that the provisions relating to equidistance and special circumstances are only equitable criteria and practical methods and, as such, are not customary international law. However, the Chamber does extract a general principle requiring good faith negotiation toward an agreement.

Next, the Chamber reviews the cases: the *North Sea Continental Shelf* cases, the *Anglo-French Continental Shelf* arbitration, and the *Tunisia/Libya Continental Shelf* case. All of the cases stress the two concepts of mutual agreement, where possible, and decision in accordance with equitable principles.¹³⁹

The last source considered is the 1982 Convention on the Law of the Sea.¹⁴⁰ The Chamber admits that the Convention has not entered into force but states that this "cannot invalidate the observation that certain provisions of the convention concerning the continental shelf and the 'exclusive economic zone, which may, in fact, be relevant to the present case, were adopted without any objections."¹⁴¹ The Chamber then goes on to discuss Articles 74 and 83¹⁴² relating to delimitation of the exclusive economic zone and the continental shelf. The Chamber notes that these provisions are "limited to expressing the need for settlement of the problem by agreement and recalling the obligation to achieve an equitable solution" and that the same language is employed in each article.¹⁴³

136. *Id.* at 290 (para. 81).

137. *Id.* at 290 (para. 82).

138. *Id.* at 291-92 (paras. 84-90). For text of Article 6 of the Convention, see *supra* note 84.

139. The *Anglo-French Continental Shelf* arbitration court states that "failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles." 18 R. Int'l Arb. Awards at 45, 54 I.L.R. at 55 (para. 70). See *Feldman*, *supra* note 8, at 219.

140. U.N. Convention on the Law of the Sea, UN Doc. A.CONF. 62/122, reprinted in 21 I.L.M. 1261 (1982) and in *The Law of the Sea* (1983) [hereinafter cited as 1982 Convention on the Law of the Sea].

141. *Gulf of Maine*, 1984 I.C.J. at 294 (para. 94).

142. For the text of the delimitation provisions in Articles 74 and 83, see *infra* text following note 186.

143. *Gulf of Maine*, 1984 I.C.J. at 294-95 (paras. 95-96). For discussion of reasons the

Next, the Chamber refers to the parties' arguments.¹⁴⁴ It accepts their virtually identical statements of the applicable fundamental norm and rejects the more specific equitable principles suggested by the parties¹⁴⁵ as not rising to the level of customary international law.

Part four ends with the Chambers' reformulation of the general international law applicable in every maritime delimitation between neighboring states:

(1) No maritime delimitation between states with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

(2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.¹⁴⁶

D. Determination of Whether Any Special International Law Applies Specifically Between These Parties

Having determined that the only applicable general customary international law is the above-stated rather broad and indefinite "fundamental norm," the Chamber goes on to examine possible sources of obligation between these particular parties.¹⁴⁷ Under this heading the Chamber rejects many of the most important arguments of the parties. The Chamber begins by asking whether any treaties or conventions apply in this case, particularly the 1958 Convention on the Continental Shelf.¹⁴⁸ After a protracted discussion the Chamber concludes that the equidistance/special circumstances delimitation method prescribed in the Convention is not a general

Chamber may be in error in extracting a norm of customary law from these provisions, see *infra* notes 185-86 and accompanying text.

144. *Gulf of Maine*, 1984 I.C.J. at 295-99 (paras. 97-111).

145. For a discussion of the competing claims of the United States and Canada, see *supra* text accompanying notes 72-122.

146. *Gulf of Maine*, 1984 I.C.J. at 299 (para. 112).

147. *Id.* at 300-15 (paras. 113-63).

148. *Id.* at 301 (para. 116).

norm of customary law.¹⁴⁹ Further, they conclude that, although it is admittedly in force between the parties, the convention does not apply because the delimitation at issue involves fisheries zones and the continental shelf rather than the latter alone.¹⁵⁰

Next, the Chamber considers whether the conduct of the parties has raised any obligations between them affecting this case.¹⁵¹ Canada's arguments of acquiescence by the United States in the equidistance line and resulting estoppel are rejected¹⁵² because "the conduct of the United States, because of its unclear nature, does not satisfy the conditions prescribed in the 1969 [*North Sea*] Judgment, either for estoppel or for acquiescence."¹⁵³ Canada's *modus vivendi* argument is also rejected on the ground that 1965 to 1972 is too short a time in which to establish a *de facto* boundary.¹⁵⁴

E. *Choice of Equitable Criteria and Practical Delimitation Methods to be Used*

The Chamber asserts, in effect, that there are no limits on the criteria and methods which it may use in any particular case. The Chamber does list several equitable criteria¹⁵⁵ and several delimitation methods¹⁵⁶ which have been used in the past. It refuses to undertake, however, a complete listing or evaluation of these criteria and methods in the abstract, saying:

[T]heir equitableness or otherwise can only be assessed in relation to the circumstances of each case, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases. The essential fact to bear in mind is, as the Chamber has stressed, that the criteria in question are not themselves rules of law and therefore mandatory in the different situations, but "equitable", or even "reasonable", criteria, and that what international law requires is that recourse be had in each case to the criterion, or the balance of different criteria, appearing to be most appropriate to the concrete situation.¹⁵⁷

149. *Id.* at 303 (para. 124).

150. *Id.*

151. *Id.* at 303-12 (paras. 126-54).

152. *Id.* at 303-10 (paras. 126-48). For a summary of these arguments, see *supra* text accompanying notes 94-95.

153. *Id.* at 309 (para. 145).

154. *Id.* at 310-11 (paras. 149-51).

155. *Id.* at 312-13 (para. 157).

156. *Id.* at 313-14 (para. 159).

157. *Id.* at 313 (para. 158).

Having established virtual total judicial discretion in the choice of equitable criteria and delimitation methods, the Chamber considers and rejects the lines proposed by both the parties.¹⁵⁸ The United States' reliance on "natural boundaries" in the water column is inappropriate because it is relevant only to delimitation of the fisheries zone, not the continental shelf.¹⁵⁹ The United States' use of a perpendicular to the general direction of the coast is inappropriate because the coast is too irregular.¹⁶⁰ The Canadian equidistance line, if used, would have to be corrected for proportionality—or the respective lengths of the parties' coastlines in the area,¹⁶¹ but is probably inappropriate anyway because the use of that method is designed for adjacent states and the Canadian and United States coasts are more nearly opposite in certain parts of the area to be delimited.¹⁶²

Having rejected the lines proposed by the parties, the Chamber proceeds to the heart of the decision—its determination of the equitable criteria and practical delimitation methods to apply and the actual construction of the delimitation line. The Court first makes a preliminary decision, stating that:

[A] delimitation which has to apply at one and the same time to the continental shelf and to the superadjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and, at the same time, is such as to be equally suitable to the division of either of them. ¹⁶³

The Chamber then determines summarily that the kind of criteria which fit that description are geographical criteria and that "within [that] framework, it is inevitable" that the Chamber's main criterion would be that "one should aim at an equal division of areas where the maritime projections of the coasts of the States . . . converge and overlap."¹⁶⁴

The Chamber then states that the situation in this case requires that the application of this base criterion must be adjusted to correct for the effects of three "auxiliary criteria"—specifically the difference between the respective lengths of the countries' coastlines in the area (proportionality), the desirability of avoiding cutting off coastlines from their appropriate pro-

158. *Id.* at 316-25 (paras. 164-89).

159. *Id.* at 316-17 (paras. 166-68).

160. *Id.* at 317-20 (paras. 169-77).

161. *Id.* at 322-23 (paras. 184-85).

162. *Id.* at 323-25 (paras. 186-89).

163. *Id.* at 327 (para. 194).

164. *Id.* at 327 (para. 195).

jections (non-encroachment), and the necessity of giving some effect, although not necessarily full effect, to islands or groups of small islands lying off a coast.¹⁶⁵

F. *The Delimitation*

Next, the Chamber discusses the actual line to be constructed and the methods to be used in constructing it. It decides that the line in the Gulf must be in two segments to reflect the change in orientation of the coasts from adjacency to oppositeness.¹⁶⁶ The first segment must begin at Point A, chosen by the parties. The Chamber states that in this part of the boundary the basic criterion of equal division of areas of overlap should be effected as far as possible, and it claims that no special circumstances require consideration of the auxiliary criteria in this segment.¹⁶⁷ An equidistance line would seem to implement that basic criterion; it is impossible to construct one, however, that goes through Point A. Also, an equidistance line might over-emphasize minor islets and low tide elevations which might serve as basepoints. In addition, there is a dispute over the sovereignty of Machias Island, which should form a basepoint for one of the parties.¹⁶⁸ Accordingly, the Chamber decides not to use equidistance. Instead, two lines are drawn from Point A perpendicular to the basic coastal lines relevant to this segment of the line. The boundary line's first segment is the bisector of the angle formed by those two lines and it approximates an equidistance line.¹⁶⁹ (See Map 4.) The first segment will end where it intersects the second segment.

The second segment delimits a boundary between opposite coasts. The Chamber finds that a median line best accomplishes an equal division of overlapping areas. It decides not to use a median line constructed from basepoints, however, and instead constructs a median approximately parallel to the approximately parallel lines of the two opposite coasts.¹⁷⁰ In constructing this segment, it is decided that the line requires adjustment.¹⁷¹ The Chamber calculates the respective lengths of the coastlines of Canada and the United States in the relevant area. It counts the coasts of the Bay of Fundy only where that Canadian bay is wider than 24 miles—and thus contains water beyond the territorial waters. On this basis the Chamber

165. *Id.* at 327-28 (para. 196).

166. *Id.* at 331 (paras. 206-07).

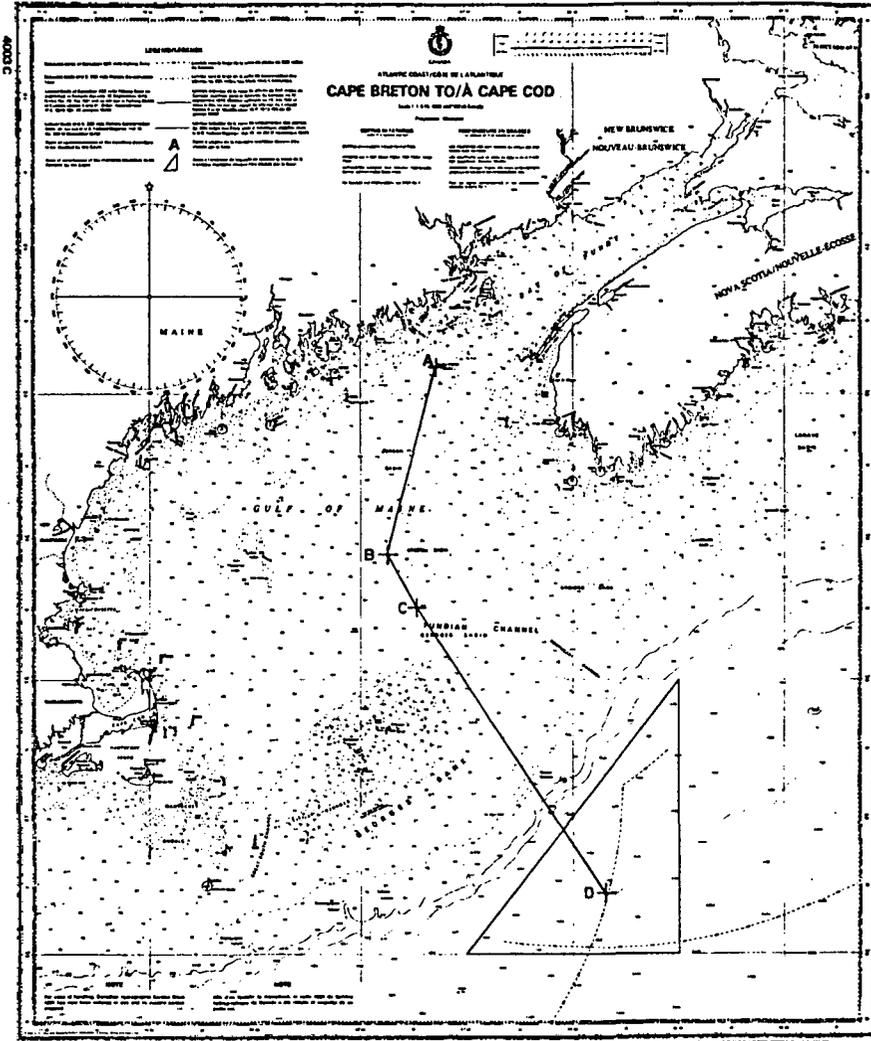
167. *Id.* at 331-32 (para. 209).

168. *Id.* at 332-33 (paras. 210-22).

169. *Id.* at 333 (para. 213).

170. *Id.* at 333-34 (para. 216).

171. *Id.* at 334-35 (paras. 217-19).



MAP No. 4

DELIMITATION LINE DRAWN BY THE CHAMBER

Reprinted from 23 I.L.M. 1197, 1247 (1984).

determines that the coastline of the United States in the area is 1.38 times that of Canada.¹⁷² Accordingly, the median line previously constructed should be moved back towards the coast of Nova Scotia, along a line between the closest points of the United States coast and the coast of Nova Scotia to adjust for "proportionality." In addition, the Chamber decides to adjust for another "auxiliary criterion." Seal Island, off the coast of Nova Scotia, should, they conclude, be given half-effect. Thus, the ratio of U.S. coastline to Canadian is adjusted from 1.38:1 to 1.32:1.¹⁷³ Therefore, the second segment will be this adjusted median line, from the point where it intersects the first segment outward. (See Map 4.)

The third and longest segment passes through the Georges Bank. It begins at the imaginary "closing line" of the Gulf which the Court has constructed crossing from the easternmost tip of Nova Scotia to the United States coast. The Chamber asserts that this segment must depend upon the previous ones and that the most appropriate method is to construct a perpendicular to the "closing line" of the Gulf.¹⁷⁴ The Chamber gives virtually no reason for this decision. Then, it states that the starting point of that perpendicular must be the point where the second segment—constructed with reference to the configuration of the coasts—intersects the closing line of the Gulf because "the land dominates the sea."¹⁷⁵ Actually, this third line looks virtually identical to the continuation east of the second segment. (See Map 4 for the line constructed by the Chamber.)

G. *Consideration of Socio-Economic Factors*

In the last part of the judgment,¹⁷⁶ the Court evaluates the line it has constructed to determine whether it is equitable "in light of all the circumstances which may be taken into account for purposes of that decision."¹⁷⁷ The Chamber again reviews the claims of historical rights and economic dependence, deciding that these considerations do not render the line inequitable. In fact, the Chamber states that "nothing less than a decision which would have assigned the whole of Georges Bank to one of the Parties might possibly have entailed serious economic repercussions for the other."¹⁷⁸ The Chamber therefore approves of the line which it has constructed, in its judicial discretion, and sees no necessity for adjusting it in

172. *Id.* at 335-37 (paras. 221-22).

173. *Id.* at 336-37 (para. 222).

174. *Id.* at 337-38 (para. 224).

175. *Id.* at 338 (para. 226).

176. *Id.* at 339-44 (paras. 230-41).

177. *Id.* at 339-40 (para. 230).

178. *Id.* at 343 (para. 238).

light of socio-economic factors.

VI. COMMENTARY AND ANALYSIS

A. *The Role of Equitable Principles*

A major legal controversy in the area of maritime boundary delimitation focuses on the role of equitable principles.¹⁷⁹ In one view, the general principles of equity should be supplemented by more specific legal rules.¹⁸⁰ In the other view, the only rule should be that "equitable principles" apply and the choice of principles to be applied and delimitation methods to be used should be completely within the discretion of the decisionmaker.¹⁸¹ The *Gulf of Maine* judgment supports the latter position, asserting that a broad fundamental norm of equity is the only applicable principle of customary international law.¹⁸²

The Chamber relies, among other things, on the provisions of the 1982 Convention on the Law of the Sea relating to the delimitation of the exclusive economic zone and the continental shelf. The Chamber states that "these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question."¹⁸³ The Chamber apparently bases this opinion on its characterization of these provisions as having been adopted "without any objections."¹⁸⁴ This characterization is misleading.

In reality, the question of delimitation of maritime boundaries in the continental shelf and the exclusive economic zone between opposite and adjacent states was one of the most intractable, hard-core issues in the entire proceedings.¹⁸⁵ A battle was fought repeatedly between two groups, those

179. Commentators agree that equitable principles are part of the general principles of international law. See *infra* note 233.

180. *Gulf of Maine*, 1984 I.C.J. at 385-86 (para. 41) (Gros, J., dissenting); *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 156 (para. 24), 157 (para. 1) (Gros, J., and Oda, J., dissenting); Blecher, *Equitable Delimitation of Continental Shelf*, 73 AM. J. INT'L L. 60, 88 (1970); Charney, *Ocean Boundaries*, *supra* note 2, at 600; Collins & Rogoff, *supra* note 2, at 6-11.

181. *Gulf of Maine*, 1984 I.C.J. at 278, 313 (paras. 59, 158); *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 92 (para. 133(A)(1)). See *supra* note 8.

182. See *supra* text accompanying notes 135-37 and 156-57.

183. *Gulf of Maine*, 1984 I.C.J. at 295 (para. 94).

184. *Id.*

185. Brown, *Delimitation of Offshore Areas: Hard Labour and Bitter Fruits at UNCLOS III*, 1981 MARINE POL'Y 172, 179-80 (reporting on the work of the Ninth Session).

Negotiations were conducted in a 20-member body called Consultations on Delimitation, composed of equal numbers of states from the two opposing groups, the 'equidis-

favoring an "equidistance" formulation and those favoring a more general "equitable principles" formulation. Finally, in the last days of the 10th Session, the President of the Conference proposed an entirely new formula of Article 74, paragraph 1, and Article 83, paragraph 1, which mentioned neither the word "equidistance," nor the words "equitable principles," and, thus, because the proposal avoided using the formulations advocated by either group, it was eventually accepted as a compromise solution by both.¹⁸⁶ The 1982 Convention finally provided that:

The delimitation of the exclusive economic zone [continental shelf] between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.¹⁸⁷

In light of the controversy surrounding these provisions, it cannot be assumed that acceptance by consensus of this provision as a compromise and as part of the package of the total 1982 Law of the Sea Convention means that the provision has passed into general customary international law which would be binding outside the context of delimitations by parties between whom the Convention is in force.¹⁸⁸

...tance' group headed by Spain, and the 'equitable principles' group, headed by Ireland. The task was to reach a compromise between the following formulae favoured by the 24-member 'equidistance' group and the 30-member 'equitable principles' group respectively:

Formula favoured by equidistance group

The delimitation of the Exclusive Economic Zone/Continental Shelf between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified.

Formula favoured by equitable principles group

The delimitation of the exclusive economic zone between adjacent or/and opposite States shall be effected by agreement, in accordance with equitable principles taking into account all relevant circumstances and employing any methods, where appropriate, to lead to an equitable solution.

The difficulty of agreement on any one text as a basis for the negotiations was avoided by focusing the debate on the elements of the problem rather than on any particular formula.

Id. at 180.

186. Evensen, *The Delimitation of Exclusive Economic Zones and Continental Shelves as Highlighted by the International Court of Justice*, in *THE NEW LAW OF THE SEA* 107, 117 (C.J. Rozakis & C.A. Stephanou eds. 1983).

187. 1982 Convention on the Law of the Sea, *supra* note 140, arts. 74 and 83.

188. The 1982 Convention will enter into force 12 months after it has been ratified or acceded to by 60 states. Ma, *Legal Problems of Seabed Boundary Delimitation in the East*

A stronger basis for the Chamber's decision not to explicitly formulate more specific rules is the 1982 *Tunisia/Libya Continental Shelf* judgment. That case is the latest of the three landmark cases on the delimitation of continental shelf maritime boundaries between opposite and adjacent states.¹⁸⁹ The Court in that case expressly stated that the result should dominate the decision,¹⁹⁰ and that the equitable principles to be applied in each case must be selected according to their appropriateness for reaching an equitable result.¹⁹¹

The dissenting judges¹⁹² and commentators, such as Jonathan Charney, criticized the judgment in the *Tunisia/Libya Continental Shelf* case as verging on an unauthorized determination *ex aequo et bono* and as providing little guidance for the delimitation of maritime boundaries in other disputes.¹⁹³ These critics felt that more specific principles should be formulated. In fact, some commentators contend that more specific rules and principles of customary international law concerning maritime boundaries already exist and that these rules and principles are applicable to single maritime boundary delimitations.¹⁹⁴

Judge Gros, in his dissent to the *Gulf of Maine* case, criticizes it as being, like the *Tunisia/Libya Continental Shelf* case, very nearly a decision *ex aequo et bono*, saying that "what is today called equitable, as in the 1982 Judgment, is no longer a decision based on law but an appraisal of the

China Sea, OCCASIONAL PAPERS/REPRINTS SERIES CONTEMP. ASIAN STUD. No. 3, at 107 (1984). It is unlikely that the convention will enter into force between the parties. The United States has not signed the convention, and it appears that the Reagan Administration does not intend to sign or ratify it.

189. The others are the North Sea Continental Shelf cases and the *Anglo-French Continental Shelf* arbitration.

190. *Tunisia/Libya Continental Shelf* case, 1982 I.C.J. at 59-60 (para. 70).

191. *Id.*

192. Judges Oda, Evensen, & Jiménez de Aréchega.

193. Charney, *Ocean Boundaries*, *supra* note 2, at 583-85, and other sources cited in notes 12 and 180. See Ma, *supra* note 188, at 111-12. For a discussion of the distinction between a decision *ex aequo et bono* and the application of equitable principles as part of international law, see *infra* notes 230-33 and accompanying text.

194. See Collins & Rogoff, *supra* note 2, at 12-14. Collins and Rogoff survey state practice in negotiating single multi-purpose maritime boundaries and analyze decisional law. They conclude that primacy must be given to geographic factors, and that non-geographic factors play a subsidiary role and may justify slight variances from a line determined by geographic factors in exceptional situations. They also find strong support for the use of an equidistance line adjusted, if necessary, to reflect proportionality, to give effect to geographic factors. See *infra* notes 244 and 249. See also *Tunisia/Libya Continental Shelf*, (Oda, J., dissenting); Blecher, *supra* note 180; Ma, *supra* note 188, at 109-10; Rhee, *Equitable Solutions*, *supra* note 2. Cf. Charney, *Ocean Boundaries*, *supra* note 2, at 597, which suggests a five-step factor analysis. See *infra* note 242.

expediency of a result, which is the very definition of the arbitrary if no element of control is conceivable."¹⁹⁵

The Chamber claims complete discretion to determine the equitable criteria and delimitation methods to be used, with the only limit being that those chosen must be "capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result."¹⁹⁶ Critics of the *Tunisia/Libya Continental Shelf* case who hoped that the next significant maritime boundary delimitation case would begin to develop more explicit specific rules of applicable law will be disappointed with the result in this case.

B. *The Gulf of Maine Case as Precedent*

Because this is the first case delimiting a single maritime boundary for both the continental shelf and the fisheries zone—and by extension has implications for delimitations involving the exclusive economic zone—the most important question to ask is what guidance it provides for the delimitation of such boundaries in other disputes.¹⁹⁷ That question must be answered on two levels. In theory, this decision, like the *Tunisia/Libya Continental Shelf* case, provides little or no guidance for parties to such disputes. The Chamber claims that decisions in this area of the law depend upon the particular facts of each case and that there are no transferable rules beyond a general requirement of the application of equitable criteria and the utilization of practical methods capable of implementing them.¹⁹⁸ In practice, however,

195. *Gulf of Maine*, 1984 I.C.J. at 382-83 (para. 38) (Gros, J., dissenting).

196. *Gulf of Maine*, 1984 I.C.J. at 300 (para. 112(2)).

197. As of 1978, it was estimated that if 200-mile resource zones became universal, 331 maritime boundaries would have to be delimited. At that time there were over 70 disputed boundaries and over 240 that either had not undergone negotiation, were in the process of negotiation, or were disputed. Collins & Rogoff, *supra* note 2, at 10 n.32 (citing Hodgson, *International Oceans Boundary Disputes*, 1 OCEANS POL'Y STUD. No. 4, 37, 38 (1978)).

198. *Gulf of Maine*, 1984 I.C.J. at 278, 313 (paras. 59, 158).

It must also be remembered that international courts do not follow the strict common law doctrine of *stare decisis*. The ICJ "has not committed itself to the view that it is bound to follow its previous decisions even in cases in which it later disagrees with them." H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 13 (1958). In fact, judicial decisions are listed as a subsidiary, not primary, source of law in the ICJ Statute, 59 Stat. 1055, T.S. 993, 3 Bevans 1179, art. 38, para. 1. In practice, however, the ICJ often relies upon and follows its previous decisions. Lauterpacht states that the general rule is the constant and normal operation of precedent in the jurisprudence of the Court. H. LAUTERPACHT, *supra* at 20. For an extended discussion of the ICJ's use of precedent and its role in the development of international law, see *id.* at 3.

Under Article 27 of the ICJ Statute, a judgment given by a Chamber "shall be considered as rendered by the Court." Therefore, its impact on the development of international law

the Chamber does offer a decision which may apply to the entire class of cases delimiting single maritime boundaries for the continental shelf and the fisheries zone. Specifically, the Chamber states that only geographic criteria should be considered in the initial delimitation of such boundaries, uses approximations to an equidistance line, applies proportionality directly as one geographic criterion, and considers non-geographic criteria in determining whether a boundary line already constructed is "intrinsically equitable."

1. *Geographic Criteria*

First, the Chamber states that such decisions "can only be carried out" by the application of criteria equally suitable to the division of the subsoil and the water column and decides that only geographic criteria fit that description.¹⁹⁹ Also, in formulating its fundamental norm of equity, the Chamber includes the phrase "with regard to the *geographic* configuration of the area and other relevant circumstances."²⁰⁰ (Emphasis added.) The language used strongly suggests that it is setting up a rule to apply in future cases, not merely deciding that geographic criteria are the most appropriate in this particular case. It is, of course, much simpler to limit such decisions to consideration of geographic criteria. It is also less expensive.²⁰¹ The United States and Canada produced thousands of pages of memorials, technical reports and annexes in presenting complex factual arguments.²⁰² Smaller countries could not afford to devote such large amounts of money and manpower to the resolution of one dispute. In light of the combination of language suggesting strong precedential value *and* the practicality of limiting the criteria considered, this judgment is likely to be read as setting forth a rule that only geographic criteria will be considered in the initial delimitation of maritime boundaries for both the subsoil and the water column.²⁰³

should be the same.

199. *Gulf of Maine*, 1984 I.C.J. at 327 (para. 194).

200. *Id.* at 300 (para. 112(2)).

201. See text preceding note 73 in Chiu, *Some Problems Concerning the Application of the Maritime Boundary Delimitation Provisions of the 1982 United Nations Convention on the Law of the Sea Between Adjacent or Opposite States*, 9 MD. J. INT'L L. & TRADE 1 (1985).

202. They submitted approximately 7,600 pages of pleadings and 2,000 pages of oral arguments supplemented by 300 supporting maps, sketches, or diagrams. More than 12 meters of shelving is taken up by the volumes deposited in the ICJ Library by the parties. *Gulf of Maine*, 1984 I.C.J. at 360 (para. 2) (Gros, J., dissenting).

203. In addition, commentators have supported the idea that the delimitation of a single maritime boundary for the EEZ and the continental shelf should be based primarily on geo-

2. *Equidistance*

The Chamber clearly holds that the equidistance principle is not part of general customary international law.²⁰⁴ In addition, although the 1958 Convention on the Continental Shelf is in force between the parties, the Chamber decides that it does not apply because the continental shelf *and* the fisheries zone—not the continental shelf alone—are being delimited.²⁰⁵ Therefore, the Chamber is not required to use or even to consider using the equidistance method in its delimitation.

The Chamber does, however, use approximations to the equidistance method in constructing the boundary. The Chamber chooses as its basic criterion one:

long held to be as equitable as it is simple, namely that . . . having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap.²⁰⁶

The Chamber had earlier stated that the equidistance method is inspired by and derived from this same criterion.²⁰⁷

In constructing the first segment of the boundary, the Chamber considers using a lateral equidistance line, but rejects this method for various reasons.²⁰⁸ The method the Chamber does use, however, that is, constructing a bisector to the angle formed by the general directions of the two coasts,²⁰⁹ closely approximates an equidistance line. (See Map 5. The first segment of the ICJ line is almost identical to the equidistance line claimed by the Canadians.)

graphical factors. *See supra* note 194 and *infra* note 244; Collins & Rogoff, *supra* note 2, at 51.

204. *Gulf of Maine*, 1984 I.C.J. at 300 (para. 114). *But see* Collins & Rogoff, *supra* note 2, at 24, 51-54 and other sources cited *supra* note 194. Collins and Rogoff find equidistance *is* part of customary international law. *See supra* note 194.

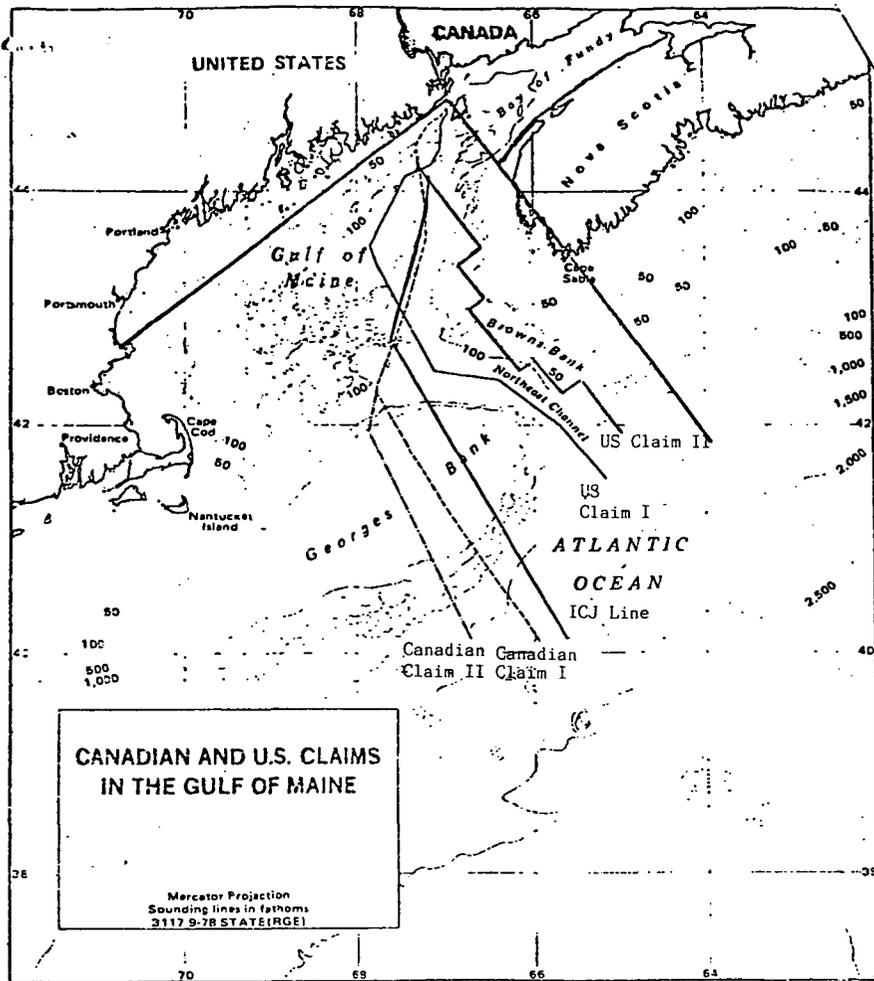
205. *Gulf of Maine*, 1984 I.C.J. at 301-03 (paras. 116-25).

206. *Id.* at 327 (para. 195).

207. *Id.* at 300 (para. 115).

208. *See supra* notes 167-69 and accompanying text.

209. *Gulf of Maine*, 1984 I.C.J. at 333 (para. 213).



MAP NO. 5

In constructing the second segment of the boundary, the Chamber starts with an approximate median line which is then adjusted.²¹⁰ Although the median line used is not constructed from basepoints, it is an approximation to an equidistance line. Because the Chamber emphasizes the equitable criterion of equal division of areas of overlap and uses approximations to the equidistance method to implement its delimitation, this judgment may be read as encouraging the use of lateral and median equidistance lines despite its insistence that the equidistance method is neither required nor preferred over other methods.²¹¹

3. *Proportionality*

Another aspect of the decision which may have precedential value is the use of proportionality. Having decided to focus on geographic criteria, the Chamber was operating on familiar ground. One of the "auxiliary" geographic criteria which is applied by the Chamber is that "a fair measure of weight should be given to a by no means negligible difference within the delimitation area between the lengths of the respective coastlines of the countries concerned."²¹² This factor, known as proportionality, has been dealt with differently in all three of the primary continental shelf delimitation cases.²¹³

Proportionality was recognized as relevant in the 1969 *North Sea Continental Shelf* cases. The *North Sea* Court emphasized that it referred only to "a reasonable degree of proportionality."²¹⁴

In the 1977 *Anglo/French Continental Shelf* arbitration, the tribunal recognized that proportionality should be considered in determining whether a given boundary line was equitable; but stressed that it is not a

210. *Id.* at 333-37 (paras. 214-23). This line is adjusted to allow for the difference in the lengths of the coastal fronts of the parties in the delimitation area (proportionality) and to discount the effect of Seal Island. *Id.*

211. Judge Gros criticizes this judgment and the 1982 judgment in the *Tunisia/Libya Continental Shelf* case as giving too little importance to the equidistance method. 1984 I.C.J. at 387-88 (para. 46) (Gros, J., dissenting). He applies the equidistance method directly in constructing the boundary he recommends. *Id.* at 386-87 (paras. 42-45).

Professor Hungdah Chiu interprets the *Gulf of Maine* judgment as suggesting the use of median or equidistance lines in multipurpose delimitation cases. See text preceding note 73 in Chiu, *supra* note 201.

212. *Gulf of Maine*, 1984 I.C.J. at 327-28 (para. 196).

213. The discussion of the history of proportionality is drawn from Evensen, *supra* note 186, at 132-35, and McRae, *Proportionality*, *supra* note 49. See Ma, *supra* note 188, at 158-63.

214. Evensen, *supra* note 186, at 133 (quoting *North Sea Continental Shelf*, 1969 I.C.J. at 52 (para. 98)).

“general principle providing an independent source of rights to areas of Continental Shelf.”²¹⁵ Some commentators welcome this restrictive treatment of proportionality;²¹⁶ others have argued against the tribunal’s rejection of the “concept of proportionality as a general principle.”²¹⁷

In the *Tunisia/Libya Continental Shelf* case it seems that the Court attached greater importance to proportionality than in the previous cases.²¹⁸ The Court tested the equitableness of the line it had constructed against a mathematical ratio of proportionality, practically elevating proportionality to the status of a principle of international law.²¹⁹

The Chamber in the *Gulf of Maine* case has gone even further towards elevating the status of proportionality. Proportionality is characterized as an “auxiliary equitable criterion” which is applicable to the present case but which is not a principle of general international law. No doubt aware of the controversy surrounding the evolution of proportionality, the Chamber defensively claims that it “in no way intends to make an autonomous criterion or method of delimitation out of the concept of ‘proportionality.’”²²⁰ The Chamber did, however, apply a mathematical formula based on pro-

215. More specifically, the tribunal observed that:

[I]t is *disproportion rather than any general principle of proportionality* which is the relevant criterion The equitable delimitation of the Continental Shelf is not . . . a question of apportioning . . . the . . . shelf amongst the states abutting upon it, nor is it a question of simply assigning to them areas of the shelf in proportion to their coastline, for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares.

Based on this observation, the Court concluded:

Proportionality, therefore, is to be used as a criterion or facts relevant in evaluating the equities of certain geographical situations, *not as a general principle providing an independent source of rights to areas of continental shelf.*

Evensen, *supra* 186, at 134 (quoting approvingly *Anglo-French* arbitration, 18 R. Int’l Arb. Awards at 58, 541 I.L.R. at 67-68 (para. 101)) (emphasis in original).

216. McRae, *Proportionality*, *supra* note 49, at 297-301. See Bowett, *The Arbitration Between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and Southwestern Approaches*, 49 BRIT. Y.B. INT’L L. 1, 17 (1978); Evensen, *supra* note 186, at 132-35.

217. Blecher, *supra* note 180, at 73-77. See also Rhee, *Equitable Solutions*, *supra* note 2, at 619.

218. The Court calculated mathematical ratios for the respective lengths of the coastlines of the two countries in the area being delimited and compared them to the portions of the continental shelf which each country received. *Tunisia/Libya Continental Shelf* case, 1982 I.C.J. at 91 (para. 131). *But see* Feldman, *supra* note 8, at 232.

219. See 1982 I.C.J. at 91 (paras. 130-31). Evensen says that the Court almost elevates the proportionality test to the status of a principle of international law and also for the first time applies it as a mathematical formula which is, in his opinion, “another unfortunate development.” Evensen, *supra* note 186, at 135.

220. *Gulf of Maine*, 1984 I.C.J. at 334-35 (para. 218).

portionality in its initial delimitation of the boundary line.

The Chamber has, in the face of the *Anglo-French Continental Shelf* arbitration, used proportionality as an independent source of rights. The Chamber has clearly taken the position that proportionality need not be relegated to consideration as a rough indicator of equitableness as suggested by the *Anglo-French Continental Shelf* arbitration, but that it may, when appropriate, be directly applied as an independent source of rights. Having clearly taken a position in the controversy, however, the Chamber uses language which implies that it has, in fact, not changed the law. Once again, the Chamber avoids explaining the reasons for its conclusions. In fact, the legal controversy surrounding the issue of proportionality is not even mentioned.

4. *Equitable Evaluation of the Line Constructed*

Finally, the Chamber continued the practice established in the *Tunisia/Libya Continental Shelf* case of evaluating the line it has constructed for inequity. While the *Tunisia/Libya* Court considered proportionality as the litmus test in making its final determination,²²¹ here the Chamber considered socio-economic factors.²²² The judgment states that the line it has drawn by applying geographic criteria must be evaluated to determine whether it is "intrinsically equitable in light of all the circumstances which may be taken into account for purposes of that decision."²²³ The Chamber then reconsiders the "historical rights" and "economic dependence" factors raised by the parties and decides that they do not make the Chamber's line inequitable, stating that "nothing less than a decision which would have assigned the whole of Georges Bank to one of the Parties might possibly have entailed serious economic repercussions for the other."²²⁴

The Chamber implies that non-geographic factors may, in exceptional circumstances, justify some adjustment to a line initially determined by reference solely to geographic criteria. Although the Chamber here considered only socio-economic factors in determining whether an adjustment was justified, the broad language used can easily be read to allow a court to consider any non-geographic criteria it finds significant in making this determination. The Chamber makes it clear, however, that an adjustment will not be justified unless the boundary drawn is found to be grossly inequitable.²²⁵

221. *Tunisia/Libya Continental Shelf*, 1982 I.C.J. at 91 (paras. 130-31).

222. See *supra* notes 177-78 and accompanying text.

223. *Gulf of Maine*, 1984 I.C.J. 339-40 (para. 230).

224. *Id.* at 343 (para. 238).

225. The Chamber suggests that a boundary assigning the whole of the Georges Bank to one of the parties might have been sufficiently economically inequitable to justify such an

C. *The Reasoning of the Chamber*

1. *Necessity for a Reasoned Opinion*

The greatest weakness in the Chamber's opinion is its failure to carefully explain the reasoning behind the conclusions it reaches. This problem is evident in the Chamber's choice of which equitable criteria to apply, its implementation of those criteria in delimiting the boundary, and its final determination that non-geographic criteria do not render the line chosen intrinsically inequitable. Courts have an obligation to fully elaborate their reasoning, step by step.²²⁶ Providing such reasoning serves several purposes. First, it creates a check on arbitrary decision-making because it provides a basis for criticism by scholars, the bar, and the international community.²²⁷ Second, it establishes greater certainty, making it easier to understand what the law is and to predict what the court will do in analogous situations.²²⁸

adjustment. *Id.*

226. H. LAUTERPACHT, *supra* note 198, at 37-49. For a discussion of the necessity for reasoned opinions in the common law context, see W. REYNOLDS, *JUDICIAL PROCESS IN A NUTSHELL* 55-67 (1980).

227. This informal review is particularly important in the international context where no appellate review is available and the uncertainties of customary law create many opportunities for the exercise of judicial latitude. Further, a clear explanation of reasons, by avoiding the suspicion of "wide and inarticulate discretion" on the part of the tribunal, increases the acceptability of the judgment to the parties. This also is especially important in international adjudication, which is impossible without some form of consent by all parties and where compliance is essentially of a voluntary character. H. LAUTERPACHT, *supra* note 198, at 37-43. See W. REYNOLDS, *supra* note 226, at 58-59.

228. A decision cannot contribute to the development and clarification of the rules and principles of international law if it does not explain the principles on which it is based, identify the relevant facts, and apply the law to the facts. See Charney, *Ocean Boundaries*, *supra* note 2, at 584. See W. REYNOLDS, *supra* note 226, at 59.

In addition, certainty and clarity of the law encourages parties to settle disputes through negotiations, in accordance with settled law, instead of going to the time and expense of judicial decisionmaking.

It has been posited by those closely involved with the case that by, in effect, "splitting the difference" between the parties claims and refusing to delineate specific legal principles of maritime boundary delimitation, the ICJ attempts to discourage litigation. According to this theory, specific legal principles may encourage litigation if parties cannot tell what decision the law will dictate in their situation. Each party may feel that the law supports its position. This idea grew out of discussions at a presentation of the Center for Oceans Law and Policy entitled, "The Decision of the International Court of Justice in the Gulf of Maine, Georges Bank, Case" (Dec. 5, 1984).

"Splitting the difference" would be acceptable in an *ex aequo et bono* decision, but cannot be justified in a case supposedly decided according to the rules and principles of international law. For a discussion of the distinction between these two types of decisions, see *infra* notes 230-33 and accompanying text.

Third, the quality of a Court's decision-making is improved by the process of exploring, in writing, for review by a critical audience, its own analytic processes.²²⁹

In international law, a distinction is drawn between equity in the sense of total judicial discretion to achieve a "fair" result and equitable principles applied as part of the general principles of international law. The Statute of the ICJ provides for two different kinds of adjudication. The first is adjudication on the basis of law.²³⁰ The second is decision *ex aequo et bono*.²³¹ A decision *ex aequo et bono*, available only by agreement of the parties, is legislative in nature and completely within the Court's discretion.²³² Equitable principles in a wider sense, however, are part of the general principles of international law.²³³

This case is clearly not a decision *ex aequo et bono*.²³⁴ In fact, the

229. If a judge has difficulty writing a reasoned opinion in support of a given result, he may be encouraged to re-examine the result. See W. REYNOLDS, *supra* note 226, at 59-60.

230. ICJ Statute, *supra* note 57, art. 38, para. 1. Article 38 of the Statute of the Court provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 (b) international custom, as evidence of a general practice accepted as law;
 (c) the general principles of law recognized by civilized nations;
 (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto.

231. *Id.* art. 38, para. 2. *Ex aequo et bono* is "[a] phrase derived from the civil law meaning in justice and fairness, according to what is just and good, according to equity and conscience." BLACK'S LAW DICTIONARY 500 (5th ed. 1979).

232. H. LAUTERPACHT, *supra* note 198, at 213-23. Lauterpacht states that adjudication *ex aequo et bono* "amounts to an avowed creation of new legal relations between the parties." *Id.* at 213. See C. JENKS, *supra* note 3, at 158-59 and 319-21.

233. What is widely known as principles of equity has long been considered to constitute a part of international law, and as such they have often been applied by international tribunals. . . . A sharp division between law and equity, such as prevails in the administration of justice in some states, should find no place in international jurisprudence.

Evenson, *supra* note 186, at 127 (quoting approvingly *Diversion of Water from the River Meuse (Belg. v. Neth.)*, 1937 P.C.I.J., ser. A/B No. 70, at 76) (Hudson, J., concurring). See 1982 I.C.J. at 60 (para. 71).

Commentators agree that equitable principles are part of general international law either under article 38, paragraph 1, or independently of that article. See, e.g., C. JENKS, *supra* note 3, at 316-427; H. LAUTERPACHT, *supra* note 198, at 213.

234. Special Agreement, *supra* note 51, art. II, para. 1.; *Gulf of Maine*, 1984 I.C.J. at 253.

Chamber admits that it is bound by the statute and required by the parties to achieve a result on the basis of law.²³⁵ The Chamber accordingly states that the fundamental norm of maritime boundary delimitation is that is "is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result."²³⁶ The Chamber also claims, in effect, total discretion to choose the criteria and methods appropriate to each particular case.²³⁷

This standard does not, however, relieve the Chamber of its obligation to explain why the particular criteria chosen are appropriate in this case and how the methods used and the result reached implement those criteria. In fact, in decisions not controlled by well-defined rules of law, it is even more important to carefully explain the reasoning behind the results reached. Otherwise, decisions on the basis of law and decisions *ex aequo et bono* become indistinguishable.²³⁸ Here the Chamber clearly does not adequately elaborate its reasoning.

2. *Specific Problems*

The most glaring instance of the Chamber's use of conclusory language occurs when the Chamber chooses the equitable criteria it considers appropriate. The *Gulf of Maine* case is the first case delimiting a single maritime boundary for both continental shelf and fisheries zones.²³⁹ The Chamber states that delimitations applying to both the continental shelf and the superjacent water column "can only be carried out by the application of . . . criteria . . . which [do] not give preferential treatment to one of these two objects to the detriment of the other, and, at the same time [are] equally suitable to the division of either of them."²⁴⁰ The Chamber continues by

235. *Gulf of Maine*, 1984 I.C.J. at 278 (para. 59).

236. *Id.* at 300 (para. 112 (2)).

237. *Id.* at 313 (para. 158). For a discussion of the Chamber's choice of criteria, see *supra* text accompanying notes 135-36 and 155-57. For a discussion of the controversy surrounding the exercise of such broad judicial discretion, see *supra* text accompanying notes 179-96.

238. Evensen emphasizes that the distinction between the two types of decisions is a very delicate one which should not be blurred and that, accordingly, "equitable principles should not operate in a void so as to make the court's decision-making process seem totally discretionary." Evensen, *supra* note 186, at 128-29.

239. Although the Chamber claims that there are no specific transferable rules in maritime boundary delimitation, some of the principles set forth by the Chamber are likely to be applied to all cases delimiting a single multipurpose maritime boundary. See *supra* notes 197-225 and accompanying text.

240. *Gulf of Maine*, 1984 I.C.J. at 327 (para. 194).

saying summarily that it "feels bound to turn" to geographic criteria, and that "within this framework it is inevitable" that the Chamber's basic choice should be the equal division of areas of overlap.²⁴¹

The Chamber fails to explain any of these conclusions or to examine alternatives. The Chamber could, for example, have decided to consider all criteria relevant to the subsoil, the water column, or both, but given different weight to these factors.²⁴² That possibility is never considered. Perhaps the Chamber felt that such a detailed analysis would be unnecessarily complicated. Certainly it will be less expensive for countries to litigate maritime boundary delimitation cases if the pleadings are limited to geographic factors.²⁴³ However, the Chamber does not give this reason or any reason for considering *only* factors equally relevant to subsoil and the water column, or for saying, in essence, that geographic criteria are the only ones fitting that description.²⁴⁴

241. *Id.* at 327 (para. 195).

242. See Charney, *Ocean Boundaries*, *supra* note 2, where a five-step factor analysis is suggested.

(1) The functions served by coastal state jurisdiction in the specific ocean zone to be delimited should be identified.

(2) All the facts concerning the instant boundary area that reflect the functions to be served by the zone should be identified.

(3) To the extent possible, each piece of information identified in the prior paragraph should be used to construct a line or range of lines that best suits the function to which it relates.

(4) These alternative lines and previously identified factors should be studied and weighed according to their importance. In a process that might even approach vector analysis, a line that best reflects all the relevant factors in light of their importance to the zone should be sought.

(5) A cartographical method should be selected to describe the line accurately and reliably.

Id. at 597 (footnote omitted).

243. Professor Chiu suggests this as a possible reason for limiting the factors considered. See text preceding note 73 in Chiu, *supra* note 201.

244. In their article *The International Law of Maritime Boundary Delimitation*, Edward Collins and Martin Rogoff provide the kind of reasoned analysis which the Chamber failed to provide. After exhaustive analysis of the law, they determine that geographical factors should predominate in delimiting a single maritime boundary for the continental shelf and the exclusive economic zone. Collins & Rogoff, *supra* note 2 at 51-54. They state that:

The fundamental principles for delimitation of this recently emergent zone must be gleaned from the legal theory of coastal state entitlement to all off-shore zones, from conventional and customary law relating to other maritime zones, and from judicial pronouncements that elucidate general principles, which underlie state jurisdiction over sea areas for purposes of exploitation, management, and conservation. All of these sources point to an approach that is based essentially on geographical factors and that is similar to the approach used to delimit continental shelf boundaries.

Id. at 51.

The Chamber also fails to explain adequately the results of its implementation of the chosen criteria to delimit the boundary. The Chamber generally does explain the choices it makes in constructing the first two segments.²⁴⁵ In constructing the third and longest segment, however, the Chamber's reasoning is extraordinarily brief. This is by far the most important segment of the boundary for it passes through the Georges Bank area. The Chamber asserts that this segment must be perpendicular to the "closing line" of the Gulf, starting at the point where the second segment intersects that line.²⁴⁶ The only reasons given for this result are the equal division of areas of overlays and the fact that "the land dominates the sea."²⁴⁷ It is unclear how these principles dictate the choice of a perpendicular. In fact, the third segment is virtually identical to a continuation of the median.

Finally, although the Chamber has refused to consider socio-economic factors in its initial delimitation, it does consider them later. The Chamber decides that it must evaluate the line it has constructed to determine whether it is equitable "in light of all the circumstances which may be taken into account for purposes of that decision."²⁴⁸ In making this evaluation the Chamber reconsiders the "historical rights" and "economic dependence" arguments of the parties. The decision does not explain why these arguments are relevant at this stage in any greater detail than it explained why they were not relevant to the initial delimitation.²⁴⁹ It also fails to ex-

Although the Chamber's conclusions are similar to those of Collins and Rogoff, they are not based on thorough consideration of the relevant law. In particular, Collins and Rogoff consider cases beyond the three recent continental shelf decisions, cases more specifically relevant to fisheries jurisdiction. They also consider state practice. *See id.* at 14-24, 54-61. *See also Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116 (Judgment of Dec. 18); *Grisbadarna case (Nor. v. Swed.)*, Hague Ct. Rep. (Scott) 1221 (Perm. Ct. Arb. 1909) (where a boundary based on geographical factors was slightly adjusted to recognize historical rights); *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3 (Judgment of July 25). For books and articles discussing these cases, see sources cited in Collins & Rogoff, *supra* note 2, at 54-61.

For a survey of state practice in negotiating single boundary agreements, see Collins & Rogoff, *supra* note 2, at 14-24. For maps and analyses of delimited international maritime boundaries, see OFFICE OF THE GEOGRAPHER, U.S. DEP'T OF STATE, LIMITS IN THE SEAS (multipamphlet series).

245. An exception is the Chamber's treatment of proportionality. The Chamber claims that it is not making an autonomous criterion or method of delimitation out of proportionality, but it clearly does so. *See supra* text accompanying notes 212-20.

246. *Gulf of Maine*, 1984 I.C.J. at 337-38 (para. 224).

247. *Id.* at 338-39 (paras. 226-28).

248. *Id.* at 339-40 (para. 230).

249. Collins and Rogoff reach the same conclusions the Chamber reaches as to the way in which historical use and economic dependency should be considered in delimiting a multipurpose maritime boundary, but they undertake an exhaustive analysis of the relevant international law. Collins & Rogoff, *supra* note 2, at 54-61. *See supra* notes 194 & 244.

plain why it considers only socio-economic factors, and not the other non-geographic arguments of the parties, in making this final evaluation. In sum, the Chamber repeatedly comes to conclusions without explaining how they were reached, leaving the significance and precedential value of the decision uncertain.

VII. CONCLUSION

In summary, in the *Gulf of Maine* case the Chamber applied and extended the principles of the law of maritime boundary delimitation as they were formulated in the *Tunisia/Libya Continental Shelf* case. A broad fundamental norm of equity was set forth as the only applicable principle of customary international law, allowing the Chamber broad discretion to decide the case based on whatever equitable criteria and delimitation methods it found appropriate. This fact-intensive approach will undoubtedly be criticized by those who lamented this trend that began with the *Tunisia/Libya Continental Shelf* case.

In spite of claims to the contrary, however, the Chamber does formulate specific rules which are likely to be applied in future cases. The Chamber determines that only geographic criteria will be considered in initially delimiting single maritime boundaries for the subsoil and the water column; it uses approximations to an equidistance line; it applies proportionality directly as an independent source of rights; and it decides that non-geographic criteria may be considered in evaluating the equitableness of a line after it has been constructed. Because these principles are likely to be applied in other disputes, it is particularly unfortunate that the Chamber failed to elaborate carefully the reasoning behind them, making it difficult to assess the meaning, significance, and future application of the decision.

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