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The Gulf of Maine Boundary Dispute and Transboundary Management Challenges: Lessons to be Learned

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THE GULF OF MAINE BOUNDARY DISPUTE AND TRANSBOUNDARY MANAGEMENT CHALLENGES: LESSONS TO BE LEARNED*

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I. INTRODUCTION

One might be cynical about the usefulness of trying to draw legal guidance from a judicial determination of a United States-Canada dispute admitted by the judges themselves to be geographically unique. As stated by the majority of the judges in the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Gulf of Maine Case*) decision:

> Although the practice is still rather sparse, owing to the relative newness of the question, it too is there to demonstrate that each specific case is, in the final analysis, different from all the others, that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined in relation to each particular case and its specific characteristics.[1]

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1. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 290 (Oct. 12) [hereinafter *Gulf of Maine Judgment*].

However, this Article, after providing a brief historical overview of the Gulf of Maine dispute, suggests six general lessons to be extracted from the *Gulf of Maine Case*. Those lessons include: the *utility* of binding dispute resolution and the International Court of Justice (ICJ) Chamber procedure; the *flexibility* in establishing the parameters for binding dispute resolution; the possible *linkability* of a binding dispute resolution agreement with other marine management and entitlement issues; the possible *variability* of maritime boundary claims over time; *the divisibility* of the line drawing task; and *the advisability* of pursuing the binding dispute resolution alternative.

Two additional lessons have emerged in the wake of the case. First is the *continuity* of transboundary ocean and coastal governance challenges, even after an ocean boundary is drawn. Second is the *evolutionary nature* of maritime boundary methodology where subsequent cases have further clarified the rather murky delimitation approach set out in the *Gulf of Maine Case*.

II. HISTORICAL OVERVIEW OF THE GULF OF MAINE DISPUTE

Surrounded by the states of Maine, New Hampshire, and Massachusetts, and the Canadian provinces of New Brunswick and Nova Scotia, the Gulf of Maine, located off the northeast coast of the United States, began to become an offshore "turf battle" in the 1960s and early 1970s because of varying continental shelf claims. In 1964 Canada issued oil and gas exploration permits on Georges Bank,[2] the thumb-shaped underwater plateau rich in fisheries resources.[3] Relying on the 1958 Geneva Convention on the Continental Shelf,[4] Canada considered the equidistant line as the proper ocean boundary.[5] While the United States also began to issue geophysical exploration permits on Georges Bank in 1964,[6] the United States did not formally protest the Canadian

2. *Id.* at 279.

3. For a review of abundance of market and non-market species on Georges Bank, *see* Edward B. Cohen & Richard W. Langton, *The Ecological Consequences of Fishing in the Gulf of Maine*, *in* THE GULF OF MAINE, NOAA COASTAL OCEAN PROGRAM REGIONAL SYNTHESIS SERIES 45, 58-60 (David W. Townsend and Peter F. Larsen eds., Washington, DC: National Oceanic and Atmospheric Administration 1992).

4. Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.

5. *Gulf of Maine Judgment*, 1984 I.C.J. at 279.

6. Memorial submitted by the United States of America in Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area 58 (Sept. 27, 1982).

claim until November 1969,[7] when the United States requested a moratorium until the exact continental shelf boundary could be agreed upon. On December 1, 1969, Canada refused to accept a moratorium,[8] and during subsequent negotiations in 1970, the United States first made its boundary position clear. All of Georges Bank was claimed, with the deep Northeast Channel, off the tip of the Bank, viewed as a natural dividing line.[9]

A "fish feud" emerged in light of the adoption of 200 nautical mile fishing zones in 1977 by both the United States and Canada.[10] With Canada's fisheries zone becoming effective on January 1, 1977, and the United States' fisheries zone coming into force on March 1, 1977, overlapping fisheries zones occurred.[11] Canada at first claimed an equidistant line, but on November 3, 1977 it enlarged its claim. The claim changed due to the special circumstances of Cape Cod, Nantucket Island, and Martha's Vineyard, which, Canada argued, should not be considered part of the United States coastline due to their distorting effect.[12] The United States claimed all the fisheries of Georges Bank.[13] Through interim arrangements, the countries agreed to allow fishing to continue by nationals of both sides in the disputed areas subject to flag state enforcement and in accord with pre-existing fishing patterns and efforts.[14]

Following negotiations in 1977-1978, the feud appeared to be nearly over in March 1979. A package of two linked treaties, one attempting to ensure a permanent fisheries access and management regime in the transboundary region, regardless of the eventual boundary line,[15] and a second agreeing to send the dispute to binding resolution by a Chamber

7. *Gulf of Maine Judgment*, 1984 I.C.J. at 280-81.

8. *Id.* at 281.

9. *Id*.

10. For a review of the history *see* David L. VanderZwaag, THE FISH FEUD: THE US AND CANADIAN BOUNDARY DISPUTE (Lexington: Lexington Books 1983).

11. *Gulf of Maine Judgment*, 1984 I.C.J. at 282-83.

12. *Id.* at 284.

13. *Id*.

14. Reciprocal Fisheries Agreement Between the Government of the United States of America and the Government of Canada, U.S-Can., Feb. 24, 1977, 28 U.S.T. 5571; *Gulf of Maine Judgment*, 1984 I.C.J. at 283.

15. Agreement Between the Government of Canada and the Government of the United States of America on East Coast Fishery Resources, U.S.-Can., March 29, 1979, *reprinted in* Annexes to the Memorial submitted by Canada, Vol. 1, Annex 20, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.) (Sept. 1982) [hereinafter East Coast Fishery Resources Agreement].

of the International Court of Justice,[16] were concluded on March 29, 1979.

Because of substantial opposition from U.S. fishing interests and industry representatives to the 1979 East Coast Fisheries Agreement,[17] only a delinked boundary settlement treaty was ratified by the United States. Canada and the United States exchanged instruments of ratification of the amended boundary settlement treaty on November 20, 1981 and notification to the International Court of Justice of a reference was given on November 25, 1981.[18]

On October 12, 1984 a Chamber of the International Court of Justice drew a single maritime boundary for the Gulf of Maine/Georges Bank region. Canada received jurisdiction over approximately one-sixth of Georges Bank,[19] and some commentators have described the decision as essentially "splitting the difference" between the Canadian and United States' claims.[20]

III. SIX LESSONS TO BE LEARNED FROM THE CASE

A. The Utility of Binding Third-Party Resolutions and the ICJ Chamber Procedure

While a negotiated settlement of an ocean boundary dispute is generally preferable to international litigation for cost, creativity, and control reasons, the United States-Canada Gulf of Maine dispute shows the useful "final say" function of third-party binding dispute resolution. After over a decade of negotiations, the two states were still unable to resolve the maritime boundary and management disputes through negotiation, and politicians, bureaucrats, and lawyers found themselves stalemated.[21] With so many socioeconomic interests at stake, including those of the United States fishing industry, who saw Georges Bank as "belonging to America,"[22] both countries saw the need for an

16. The Agreement is reproduced in Gulf of Maine Judgment, 1984 I.C.J. at 252-55.

17. For a review of some of the grounds for opposition, including a belief that the scallop allotment was inequitable to the United States, *see* VanderZwaag, *supra* note 10, at 90-92.

18. *Gulf of Maine Judgment*, 1984 I.C.J. at 287.

19. Jan Schneider, *The Gulf of Maine Case: The Nature of an Equitable Result*, 79 AM. J. INT'L L. 539 (1985).

20. *Id.* at 541.

21. *See* Lewis Alexander, *The Gulf of Maine Case: An International Discussion*, 21 STUD. TRANSNAT'L LEGAL POL'Y 71 (1988) (statement of Davis Robinson).

22. VanderZwaag, *supra* note 10, at 91-92.

authoritative decision by a prestigious institution to which local constituencies would listen.[23] Conciliation was viewed as unworkable because general words of guidance would likely not be accepted by vested interest groups.[24]

The Gulf of Maine dispute also highlights the possible attractiveness of sending a boundary dispute to a Chamber of the ICJ rather than to the full 15-member Court or to an independent *ad hoc* arbitral tribunal.[25] Through the Chamber procedure, both countries were able to select five judges[26] with experience in the area and who posed no major political sensitivities.[27] The Chamber was chosen over an international arbitration because the parties saw numerous benefits of an established institution where judges' salaries, courtrooms, registry, translation, interpretation, and reproduction were independently provided and funded.[28]

B. Flexibility in Establishing the Parameters for Binding Dispute Resolution

The *Gulf of Maine Case* shows that parties choosing to go to binding dispute settlement have considerable flexibility in directing what is to be settled and how. Parties have leeway in requesting partial versus full settlement of boundary disputes, asking a tribunal to actually draw a boundary line versus declaring general legal guidance, and opting for a single line versus multiple lines.

1. Partial vs. Full Settlement

The Gulf of Maine dispute demonstrates how parties may withhold some parts of a boundary conflict from binding resolution in favor of pursuing direct negotiation or further settlement at a later date. Canada

23. *See* Alexander, *supra* note 21, at 16-17 (statement of Leonard LeGault).

24. *Id.* at 20.

25. For a good discussion of the perceived benefits, *see* Davis R. Robinson, David A. Colson & Bruce C. Rashkaw, *Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case*, 79 AM. J. INT'L L. 578, 581-82 (1985).

26. The judges appointed by the Court as requested by the parties included: Roberto Ago (Italy), Herman Mosler (Federal Republic of Germany), Andre Gros (France), Stephen Schwebel (United States), and Maxwell Cohen as judge *ad hoc* (Canada). *Id.* at 582.

27. For example, a United States' representative expressed concern over how the U.S. systems would have reacted if a Soviet judge had some bearing on determining the fate of New England fisherpersons. *See* Alexander, *supra* note 21 at 17-18 (statement of David Colson).

28. Robinson et al., *supra* note 25, at 581.

and the United States reserved from judicial delimitation a section of approximately thirty-nine miles, the boundary area nearest the coasts.[29] Because of sovereignty disputes over Machias Seal Island and North Rock,[30] the parties chose to ask the Court to begin its delineation exercise at the agreed point seaward of the disputed lands.[31] The parties also did not wish to have the Court determine a boundary line out to the edge of the continental margin, and therefore restricted it to terminating the boundary in a triangle drawn seaward of Georges Bank[32] (see Fig. 1). In the Special Agreement to resort to adjudication before a Chamber of the World Court, the parties agreed that after the decision, either party could request negotiations on a seaward extension of the maritime boundary. If no agreement was forthcoming, either party could require binding third-party settlement.[33]

29. *Id.* at 584-85.

30. For a further review of the dispute, *see* Sue Nichols, *The Gulf of Maine Boundary: Reviewing the Issues,* 4-6, Occasional Paper No. 12 (Fredericton: Cadastral Studies, 1982); Beverly Cook, *Lobster Boat Diplomacy: the Canada-US Grey Zone* 29 MARINE POLICY 385, 385-90; Ted L. McDorman & David L. VanderZwaag, *American-Canadian Boundary Dispute, and Cooperation*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Max Planck Institute for comparative public law and international law: heidelberg and oxford university press 2010), *available at* http://www.mpepil.com.

31. Termed point A, the location is the first point of intersection of the two lines representing the limits of the fishing zones respectively claimed by Canada and the United States. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 265 (Oct. 12).

32. *Id.* at 266.

33. Article VII of the Special Agreement of 29 March 1979. The Agreement is reprinted in the Gulf of Maine Judgment. *Id. at* 252-55.

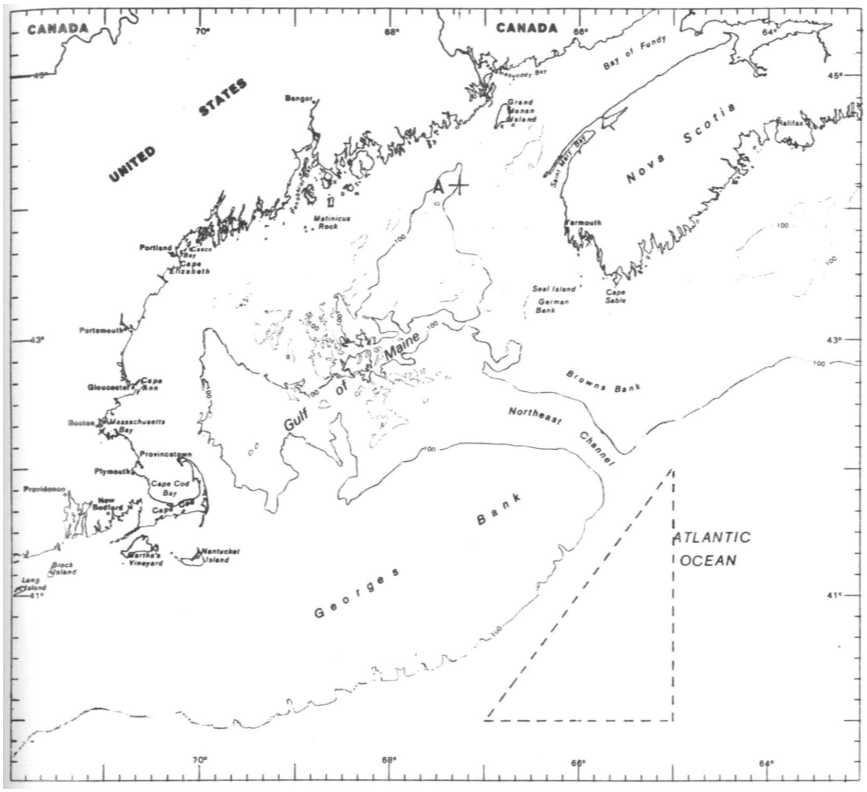

Figure 1: general map of the Gulf of Maine region, showing the starting-point for the delimitation line and the area for its termination.[34]

2. Actual Line vs. General Guidance

The *Gulf of Maine Case* emphasizes the choice parties have to ask a tribunal to actually draw a boundary line or to simply declare relevant principles, rules, and methods for future demarcation guidance. While in the two previous cases before the ICJ involving maritime boundary delimitations parties had requested only judicial guidance,[35] Canada and the United States asked the Chamber to draw a delimitation line itself.[36]

34. *Id.* at 269.

35. North Sea Continental Shelf Cases (F.R.G. v. Den./F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20); Continental Shelf (Tunis. v. Libyan Arab Jamahiriya*)*, 1982 I.C.J. 18 (Jan. 20).

36. *Gulf of Maine Judgment*, 1984 I.C.J. at 267.

The *Gulf of Maine Case* portrays the difficult trade-off which states may face in making the choice between actual line and general guidance. States wishing to retain control over negotiating a final boundary alignment by requesting merely a "declaratory" judgment may risk further dispute in the subsequent demarcation negotiations.[37] Because Canada and the United States wished to resolve the boundary issue "once and for all," and to avoid further negotiations, they chose to request an actual delimitation.[38]

3. Single Line vs. Multiple Lines

The *Gulf of Maine Case* also demonstrates the flexibility countries encounter in whether to request a tribunal to delimit a single maritime boundary or to allow judicial discretion for the drawing of separate continental shelf and water column lines. The case also shows why most countries would probably prefer a single boundary. Canada and the United States asked the ICJ Chamber to draw a single maritime boundary, as the parties wished to avoid the potential "managerial nightmare" resulting from separate fisheries and seabed lines. For example, if Canada were granted seabed jurisdiction but no fisheries jurisdiction over Georges Bank, it might be tempted to proceed with hydrocarbon exploration without concern for U.S. fishing interests.[39]

While the Chamber accepted the legal feasibility of drawing a single line,[40] it also noted the legal implications of a single-line request. A single-line delimitation was viewed as forcing a tribunal to give preference to "neutral" geographical criteria, such as equal division of areas off converging and overlapping coastal projections, length of coastlines, and the effect of offshore islands.[41] Criteria for division exclusively based on only one of the natural realities to be delimited, such as natural separation of ecosystems or a distinct geological feature on the continental shelf, are ruled out.[42]

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37. Interestingly, in the Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen, where Denmark desired a delimitation line while Norway wished to have a declaration, the ICJ proceeded to draw a line in order to completely "discharge [ ] its duty to determine the dispute." Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den, v. Nor.), 1993 I.C.J. 38, 78 (June 14).

38. Alexander, *supra* note 21, at 20 (statement of David Colson).

39. *Id.* at 27-28.

40. *Gulf of Maine Judgment*, 1984 I.C.J. at 267.

41. *Id*. at 327-28.

42. *Id.* at 326-27.

While the United States argued that the Northeast Channel, sometimes over 200 meters deep, represented a natural boundary,[43] the Court rejected the argument on two main grounds. First, the seabed itself did not show major geological divisions.[44] For example, sand, mud, gravel, and underlying hydrocarbon deposits ran across from the Canadian Scotian Shelf to Georges Bank.[45] Second, the "geomorphological accident" of the Northeast Channel did not divide the marine resources and ecosystems of the adjacent water column.[46]

The *Gulf of Maine Case* thus suggests a practical question for countries pondering third party boundary adjudication in the future. Is the possible wider scope for arguing ecological and geological criteria in a multiple-line request worth the ocean management complexities which would be likely to accompany a plurality of lines?

C. Linkability of a Binding Dispute Resolution

The *Gulf of Maine Case* also highlights the possibility for parties engaged in a maritime boundary dispute to make an agreement to litigate conditional on the settlement of at least some closely linked issues. Canada and the United States at first agreed to link the Treaty to Submit to Binding Dispute Resolution with the Agreement on East Coast Fishery Resources, where both would have to be ratified before either came into effect.[47] The East Coast Fisheries Agreement[48] (the Agreement) promised to establish a joint fisheries management commission and to ensure fisheries access to both countries for certain fish stocks, regardless of where a boundary might eventually be drawn. The Agreement also provided an "insurance policy" to Canada in particular, which faced the possibility of losing all of Georges Bank through judicial recourse.[49] When political opposition in the United States to the Fisheries Agreement made acceptance impossible, Canada only agreed to ratify the Boundary Settlement Treaty upon assurances that the United States would refrain from enforcement activities against Canadian fishing

43. *Id.* at 276.

44. *Id.* at 275.

45. *See* Gulf of Maine Case, Annexes to the Canadian Memorial Submitted by Canada, Vol. I, 1-22.

46. *Gulf of Maine Judgment*, 1984 I.C.J. at 277.

47. *Id.* at 287.

48. East Coast Fishery Resources Agreement, *supra* note 15.

49. For reviews of the complex and detailed fishery management arrangements negotiated, *see* VanderZwaag, *supra* note 10; Memorial submitted by Canada in the Gulf of Maine case (Sept. 1982), 111-14.

vessels in all areas claimed by Canada pending the conclusion of adjudication.[50]

D. Variability of Maritime Boundary Claims Over Time

The *Gulf of Maine Case* also shows how national claims can vary during negotiations and even within adjudication. While Canada at first claimed an equidistant line on Georges Bank in 1977, amid negotiations to resolve the dispute, Canada expanded its claims through an argument of "equitable equidistance" whereby Cape Cod would be disregarded in determining the equidistant line and an additional 2900 square miles would be gained.[51] While the United States initially claimed a line through the Northeast Channel generally following the deepest water, the United States added to the claim in 1982 at the memorial stage before the Court. An adjusted perpendicular line to the general direction of the coast of Maine was argued[52] (see Figure 2). The United States, in shifting the line to within some twenty-five nautical miles of Yarmouth, Nova Scotia, was trying to take a position of maximum legal advantage.[53]

50. *Gulf of Maine Judgment*, 1984 I.C.J. at 287.
51. Robinson et al., *supra* note 25, at 591.
52. *Id.*
53. Alexander, *supra* note 21, at 47 (statement by Davis Robinson).

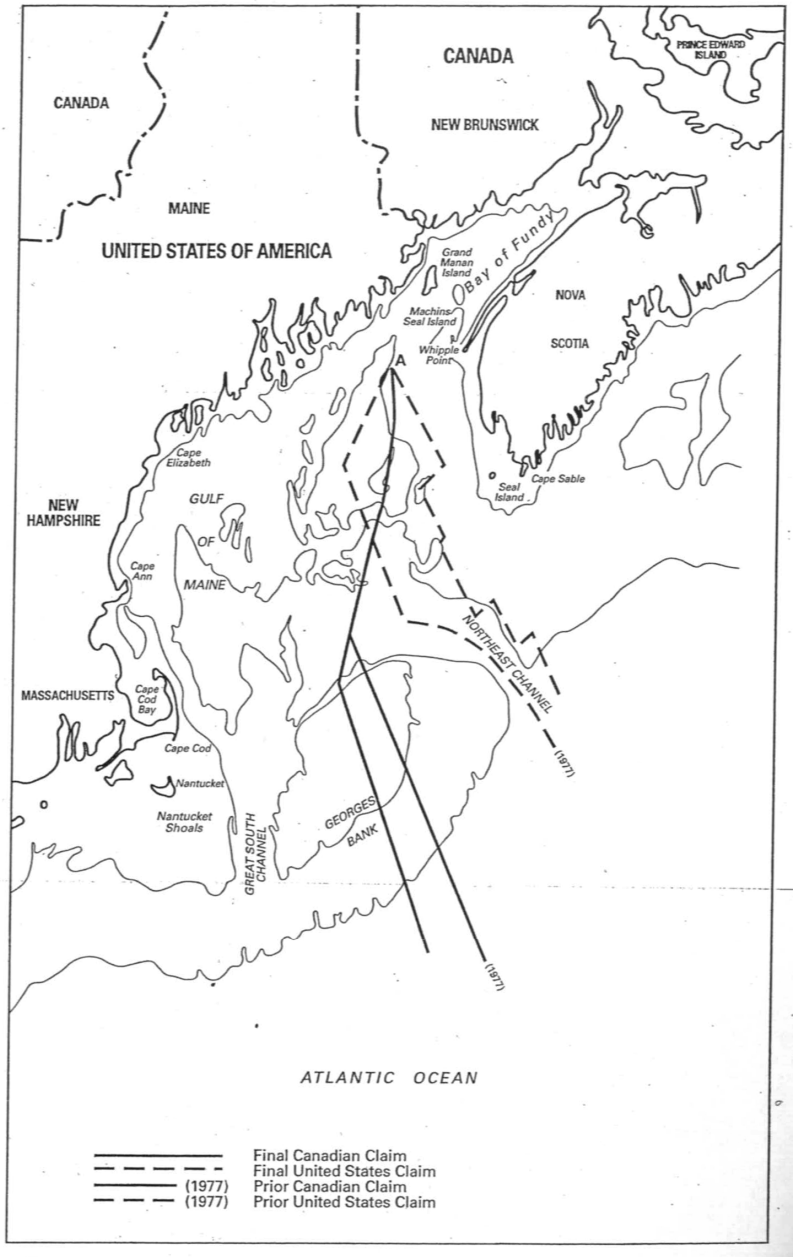

Figure 2: Claims of the Parties in the *Gulf of Maine Case*.[54]

54. Reproduced from Jan Schneider, *The Gulf of Maine Case: The Nature of an Equitable Result*, 79 AM. J. INT'L L. 539, 547 (1985).

E. The Divisibility of the Line-drawing Task

The *Gulf of Maine Case* highlights a "division by segments" approach to boundary-making which is likely to be common given the varying geographical circumstances arising in many boundary conflicts. The Chamber in the *Gulf of Maine Case* chose to draw a boundary line in three segments to reflect the changing geographical relationships between the United States and Canada as one moves seaward from the delimitation starting point chosen by the parties. The first segment reflected the lateral adjacency relationship of the countries at the back of the Gulf.[55] The second segment, reflecting the oppositeness of coast-lines, was a median line corrected to account for the longer American coastline (284 miles to 206 miles or a 1.38 to 1 ratio), and to give half effect to the presence of Seal Island and a smaller island (Mud Island) located some thirteen miles off the mainland of Nova Scotia.[56] The third segment was drawn into the open ocean as a perpendicular line to the closing line of the Gulf with a termination at the last point of overlap between the parties' 200 nautical-mile fishing zone claims.[57] (see Figure 3).

55. Donat Pharand, *Delimitation of Maritime Boundaries: Continental Shelf and Exclusive Economic Zone, in Light of the Gulf of Maine Case, Canada v. United States (1984)*, 16 REVUE GENERALE DE DROIT 363, 381 (1985).

56. *Id*. at 381-82.

57. *Id.* at 382.

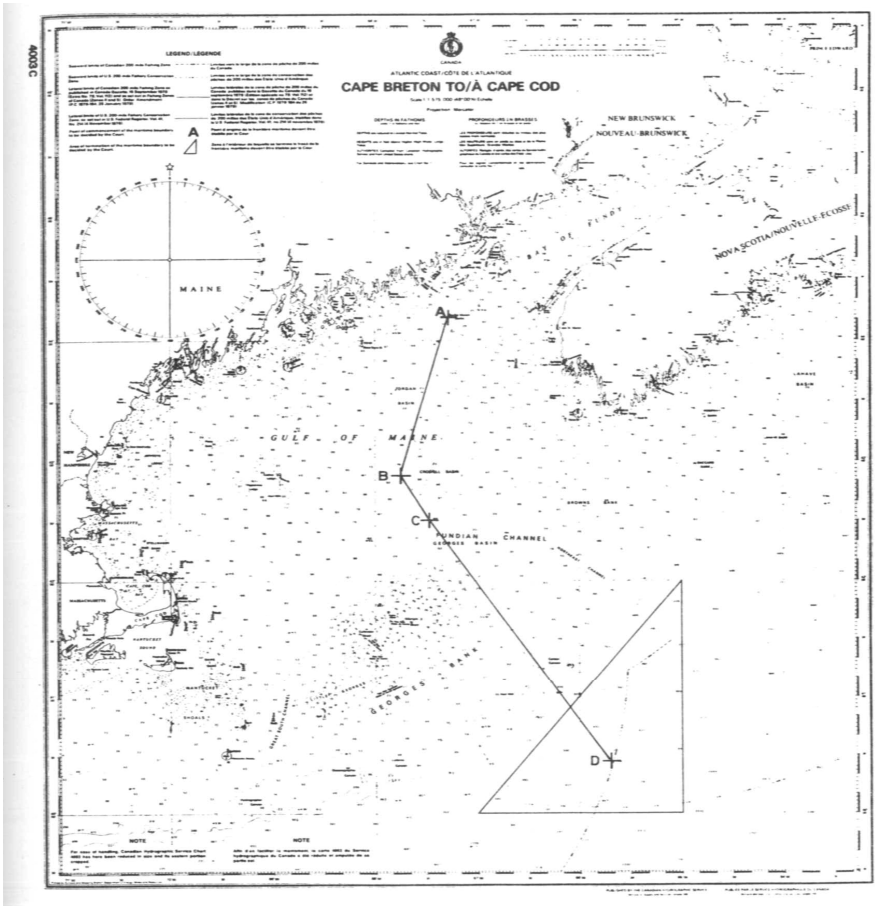

Figure 3: Delimitation Line Drawn by the Court.[58]

58. Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can. v. U.S.), 1984 I.C.J. 246, 346 (Oct. 12).

F. The Advisability of Pursuing the Binding Dispute Resolution Alternative

The *Gulf of Maine Case* stands as a caution to countries considering binding dispute resolution as the legal "reductionism" likely to be faced. While the Gulf of Maine dispute was primarily about fisheries access and historical fisheries dependencies, the Court downplayed examination of socioeconomic and historical factors. The Court put on "blinders" and reduced criteria for application to the delimitation process itself to geographical ones. The main criterion is equal division of areas where the maritime projections of the coasts of the states converge and overlap.[59] Auxiliary criteria, applied as corrective measures, are giving effect to the difference between the lengths of the respective coastlines (proportionality) and to the presence of islands.[60] While not eligible to be used as official criteria in the delimitation process, human and economic geography may be relevant to help ascertain whether an equitable result was achieved.[61] Socioeconomic aspects would only be given weight in case of radical inequitability involving "catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."[62]

The *Gulf of Maine Case* also raises the question of whether parties should be willing to risk litigation when even the concept of "neutral geography" is laden with subjectivity and discretion. An example of the wide scope for geographical interpretation was shown by differing judicial views in the case over relevant Bay of Fundy coastal lengths in calculating proportionality. While the majority was willing to include coasts up to the point where the Bay narrows to contain "only maritime areas lying no further than 12 miles from the low water mark,"[63] Judge Schwebel in a separate opinion would only include the New Brunswick coast actually fronting on the Gulf of Maine, and the length of a closing line running across the Bay to Nova Scotia.[64] Judge Schwebel noted that it "is to be expected that differences of judgment on the application of equitable principles will arise which at times may not admit of confident conclusions of law."[65]

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59. *Id.* at 327.
60. *Id.* at 327-28. *See also* Pharand, *supra* note 55, at 380.
61. *Gulf of Maine Judgment*, 1984 I.C.J. at 340.
62. *Id.* at 342.
63. *Id*. at 335-36.
64. *Id.* at 355 (Schwebel, J., separate opinion).
65. *Id.* at 357.

Judge Gros, in dissent, lamented over the lack of legal certainty represented by the use of equitable principles to reach an equitable result approach to boundary delimitation:

> It is, in short, a law unto itself, where each case is exposed to the application of any imaginable criteria, methods and corrections conducive to a result which the disappearance of rules leaves to the discretion of each tribunal.[66]

In light of the vagaries of adjudication, various commentators have questioned the advisability of binding dispute resolution. The model of the Torres Strait Agreement between Australia and Papua New Guinea[67] has been invoked as exemplifying the more creative solutions available through direct negotiations.[68] There the parties were able to deal creatively with a complicated political geography involving Australian islands near the coast of Papua New Guinea through various innovations. The innovations included restricting the Australian islands to three-mile territorial seas; using multiple boundary lines with Australia receiving a fisheries zone extending seaward from the Australian islands near the PNG coast, while Papua New Guinea was granted rights to the seabed beneath the extended fisheries zone; and the establishment of a protected zone to protect traditional harvesting rights.[69]

IV. TWO ADDITIONAL LESSONS EMERGING IN THE WAKE OF THE GULF OF MAINE CASE

A. The Continuity of Transboundary Ocean and Coastal Governance Challenges

The *Gulf of Maine Case* demonstrates that a maritime boundary delimitation is not an endpoint but a starting point for longer-term

66. *Id.* at 385 (Gros, J., dissenting).

67. The text is reprinted in Australia-Papua New Guinea: Treaty on Sovereignty and Maritime Boundaries in the Area Between the Countries, December 18, 1978, 18 I.L.M. 291-331 (1979).

68. Jon M. Van Dyke, *The Role of the Islands in Delimiting Maritime Zones: The Boundary Between Turkey and Greece*, *in* THE AEGEAN ISSUES: PROBLEMS AND PROSPECTS 263 (Ankara: Foreign Policy Institute 1989).

69. For overviews of the treaty provisions, *see* H. Burmester, *The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement*, 76 AM. J. INT'L L. 321 (1982); STUART KAYE, AUSTRALIA'S MARITIME BOUNDARIES 101 (Centre for Maritime Policy, University of Wollongong ed. 1995).

cooperation in managing the marine environment.[70] Various issues beyond drawing lines at sea remain to be addressed, including: whether to grant foreign fishing access regardless of a line; allocation and management measures for transboundary fish stocks; surveillance and enforcement over illegal fishing; harmonization of standards for marine and coastal pollution; environmental impact assessment arrangements for proposed projects threatening to cause significant adverse transboundary impacts; safety of navigation; protecting habitats of threatened or endangered species; and promoting sustainable development in coastal communities.

The *Gulf of Maine Case* provides an example of how even "good neighbours" with a "good fence" may still have many "miles to go" in meeting marine management challenges of a shared sea. Nearly twenty five years after the ICJ Chamber drew a line across Georges Bank, Canada and the United States have yet to develop comprehensive transboundary management arrangements for the Georges Bank and Gulf of Maine region, and a fragmented array of cooperative arrangements, mostly informal, have evolved.[71] In September 1990, Canada and the United States, concerned over the growing number of fishers illegally crossing the boundary line to fish, signed a reciprocal Fisheries Enforcement Agreement.[72] The Agreement obliged each country to enact domestic prohibitions making it illegal for its nationals to violate the fisheries laws and regulations of the other state while within the jurisdiction of that country,[73] and penalties for fishers illegally fishing across the maritime boundary have been harmonized.[74]

Bilateral fisheries management has largely followed an informal path. The Canada-USA Transboundary Steering Committee, established

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70. *See* Ted L. McDorman, Phillip M. Saunders & David L. VanderZwaag, *The Gulf of Maine Boundary: Dropping Anchor or Setting a Course?*, 9 MARINE POLICY 90 (1985).

71. *See* ACZISC SECRETARIAT AND MARINE & ENVIRONMENTAL LAW INSTITUTE OF DALHOUSIE UNIVERSITY, OVERVIEW OF CURRENT GOVERNANCE IN THE BAY OF FUNDY/GULF OF MAINE: TRANSBOUNDARY COLLABORATIVE ARRANGEMENTS AND INITIATIVES, OCEANS AND COASTAL MANAGEMENT REPORT 2006-05 (Fisheries and Oceans Canada 2006); TED L. MCDORMAN, SALT WATER NEIGHBORS: INTERNATIONAL OCEAN LAW RELATIONS BETWEEN THE UNITED STATES AND CANADA 148-155 (New York: Oxford University Press 2009).

72. Canada-United States: Agreement on Fisheries Enforcement, September 26, 1990, 30 I.L.M. 419.

73. *Id.* at 419.

74. *See* Emily J. Pudden & David L. VanderZwaag, *Canada-USA Bilateral Fisheries Management in the Gulf of Maine: Under the Radar Screen*, 16 REV. EUR. COMMUNITY & INT'L ENVTL. L. 36, 40 (2007).

in 1995 and co-chaired by the Director-General for the Maritimes Region, Department of Fisheries and Oceans (Canada) and the Northeast Regional Administrator of the U.S. National Marine Fisheries Service, serves as the overall consultative and oversight forum for discussing transboundary resource management issues.[75] Under the auspices of the Steering Committee, the Transboundary Assessment Committee (TRAC) was established in 1998 to evaluate the status of three shared groundfish stocks on eastern Georges Bank (cod, haddock, and yellowtail flounder) and to provide annual stock assessments.[76] In 2000, the Transboundary Management Guidance Committee (TMGC) was formed to recommend harvest strategies and develop a resource sharing formula for the three transboundary groundfish stocks.[77] The TMGC subsequently developed a Resource Sharing Formula which, taking effect in 2003, provided for a way to allocate annual quotas between the Canada and the United States for groundfish stocks. The TMGC Sharing Formula allocates percentages of harvest based upon historical fisheries landings (for the period 1967-1994) and fisheries resource distribution with the two weightings shifting over a seven-year period. The sharing formula initially assigned a weighting of 60% to resource distribution and 40% to historic landings for the year 2003, transitioning to a weighting of 90% for resource distribution and 10% for historical landings by 2010.[78]

The Canada-USA Transboundary Steering Committee has been attempting to broaden its overall focus on transboundary fisheries to more of an ecosystem approach. Working Groups on Species at Risk, Fish Habitat, and Oceans Management have been formed, and an

75. *Id.* at 37. The Committee is also sometimes referred to as the U.S./Canada Transboundary Steering Committee and even as the U.S./Canada Transboundary Resource Management Steering Committee. *See* Fisheries and Oceans Canada (DFO), History of the Bilateral Steering Committee, http://www.mar.dfo-mpo.gc.ca/science/SC/SC(2)-e.html (last visited June 15, 2010).

76. *Id.* TRAC assessments have subsequently been undertaken for herring, mackerel and spiny dogfish as well. Personal Communication, Stratis Gavaris, St. Andrews Biological Station, Fisheries and Oceans Canada, March 9, 2010.

77. Fisheries and Oceans Canada, *Transboundary Management Guidance Committee Guidance Document 2007/01* (Sept. 2007).

78. Transboundary Management Guidance Committee [TMGC], *Development of a Sharing Allocation Proposal for Transboundary Resources of Cod, Haddock and Yellowtail Flounder on Georges Bank*, Fisheries Management Regional Report 2002/01, Fisheries and Oceans Canada, Maritimes Region (Jan. 2002); Pudden & VanderZwaag, *supra* note 74, at 38-39.

Integration Committee oversees and coordinates the activities occurring under the umbrella of the Canada-USA Steering Committee.[79]

The Gulf of Maine Council on the Marine Environment (the Council) was established in 1989 by the governors of Massachusetts, New Hampshire, and Maine and the premiers of New Brunswick and Nova Scotia, as a forum for fostering cross-border discussions and collaborations. The Council, involving representatives of state, provincial, and federal agencies as well as non-governmental organizations and the private sector, is administered through a Secretariat that rotates annually among the five Gulf jurisdictions. The Council has set goals, outcomes and activities through five-year Action Plans with the most recent covering 2007-2012.[80] Implementation of the Action Plan is facilitated through projects and initiatives developed under the auspices of five committees (Habitat, Contaminants, Maritime Activities, Ecosystem Indicator Partnership, and the Climate Change Network).

To date cooperative activities have involved mostly talk and studies with little management action other than in the area of fisheries. Harmonization of environmental standards and the establishment of a regional network of marine protected areas remain challenges.[81]

B. The Evolutionary Nature of Maritime Boundary Methodology

In the *Gulf of Maine Case*, the Chamber highlighted the still rather nascent and unconsolidated nature of international law and practice relating to maritime boundary delimitation,[82] and summarized the general and rather vague reality in terms of a "fundamental norm":

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79. Pudden & VanderZwaag, *supra* note 74, at 43. For a further review of cooperative arrangements, *see* Emily J. Pudden & David L. VanderZwaag, *Canada-United States Bilateral Fisheries Management in the Gulf of Maine: Struggling Towards Sustainability Under the Radar Screen*, *in* RECASTING TRANSBOUNDARY FISHERIES MANAGEMENT ARRANGEMENTS IN LIGHT OF SUSTAINABILITY PRINCIPLES: CANADIAN AND INTERNATIONAL PERSPECTIVES (D.A. Russell and David L. VanderZwaag eds., The Hague: Martinus Nijhoff, forthcoming).

80. Gulf of Maine Council on the Marine Environment Action Plan 2007-2012, http://www.gulfofmaine.org/actionplan (last visited June 15, 2010).

81. For a review of activities pursuant to the agreement, *see* Aldo Chircop, David VanderZwaag & Peter Mushat, *The Gulf of Maine Agreement and Action Plan: A Novel But Nascent Approach to Transboundary Marine Environmental Protection* 19 MARINE POLICY 317 (1995).

82. Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can. v. U.S.), 1984 I.C.J. 246, 299 (Oct. 12).

> (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 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.[83]

More recent international cases have crystallized a quite consistent methodology. After identifying the relevant area, tribunals have first provisionally drawn an equidistant line and then considered whether there are relevant circumstances that require adjustment or shifting of the line in order to achieve an "equitable result."[84] Relevant circumstances, among others, may include coastal configurations, like concavity, presence of islands and relative length of coastlines.[85]

V. CONCLUSION

In many ways the *Gulf of Maine Case* speaks with a very general voice. The Chamber of the International Court of Justice emphasized that only general criteria and an open-ended list of practical methods exist under present international law for guiding maritime boundary delimitation.

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83. *Id.*

84. For a review of the *Jan Mayen*, *Qatar v. Bahrain*, *Eritrea/Yemen*, and *Cameron v. Nigeria* cases, *see* DAVID ANDERSON, MODERN LAW OF THE SEA: SELECTED ESSAYS 403-606 (Martinus Nijhoff Publishers 2008). For territorial sea delimitation, the approach has been similar with a provisional equidistant line subject to adjustment in light of special circumstances. However, there still may be situations where a tribunal may not follow the equidistant method, for example, when it is impossible to identify base points due to a dynamic changing delta and coastline. *See* Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), October 8, 2007, *available at* http://www.icj-cij.org/docket/files/120/14075.pdf.

85. For a further review of the methodology, *see* Stuart Kaye, *Lessons Learned from the Gulf of Maine Case: The Development of Maritime Boundary Delimitation Jurisprudence Since UNCLOS III,* 14 OCEAN & COASTAL L.J. 73 (2008).

Although the specific circumstances of each boundary dispute make regional comparisons of limited use, the *Gulf of Maine Case* offers at least six basic lessons that may be learned. Those lessons include: the potential *utility* of resorting to binding dispute resolution and the ICJ Chamber procedure; the *flexibility* open to countries in establishing the parameters for binding dispute resolution; the *linkability of* binding dispute resolution with other marine resource entitlement and management issues; the possible *variability* of maritime boundary claims over time; the *divisibility* of the line drawing task; and the *advisability* of pursuing the "legal reductionism" inherent in adjudication.

Two additional lessons may also be learned in the wake of the case. First is the *continuity* of transboundary ocean and coastal governance challenges even after an ocean boundary is drawn. Second is the *evolutionary nature* of maritime boundary delimitation methodology. The two-part methodology of first drawing a provisional equidistant line followed by possible adjustment in light of relevant circumstances should be viewed as a positive development. The law is more predictable although considerable uncertainties still surround what are relevant criteria for deciding to shift the line.[86] The learning process in relation to maritime boundary delimitation is an ongoing saga.

86. Anderson, *supra* note 84, at 406.