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## Introduction: Twenty-Five Years Of The Gulf Of Maine Judgment

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## INTRODUCTION: TWENTY-FIVE YEARS OF THE GULF OF MAINE JUDGMENT

*Charles H. Norchi\**

On March 29, 1979 Canada and the United States concluded a Treaty to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area. A Chamber of the International Court of Justice (ICJ) was asked to decide “in accordance with the principles and rules of international law . . . the course of the single maritime boundary that divides the continental shelf and fisheries zones of the United States and Canada.”<sup>1</sup> The resulting decision in the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Gulf of Maine Case)*<sup>2</sup> fixed the maritime boundary between the United States and Canada in the 90,000-square-kilometer Gulf of Maine.

The case would be noteworthy for many reasons, but one reason would stand out:

[T]he . . . aspect which distinguishes this case from all those previously adjudicated is the fact that, for the first time, the delimitation which the Chamber is asked to effect does not relate exclusively to the continental shelf, but to both the continental shelf and the exclusive fishing zone, the delimitation to be by a single boundary [and] that the single boundary line to be drawn should be applicable to all aspects of the jurisdiction of the coastal State, not only jurisdiction as defined by international law in its present state, but also as it will be defined in future.<sup>3</sup>

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1. Memorial of the United States of America, Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.), 1982 I.C.J. Special Agreement 1-28 (Nov. 25, 1981).

2. 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). [hereinafter *Gulf of Maine Case*]

3. *Id.* at 267.

It is the first maritime boundary dispute to reach the Court since the 1982 United Nations Law of the Sea Convention (UNCLOS), yet, neither UNCLOS nor other conventions in force at the time could be applied by the Court to the parties in the dispute. “In a matter of this kind, international law—and in this respect the Chamber has logically to refer primarily to customary international law—can of its nature only provide a few basic legal principles, which lay down guidelines with a view to an essential objective.”<sup>4</sup> And very significantly, this was the first case that would use the Chamber procedure provided in the Statute of the International Court of Justice.

The State parties agreed upon a fundamental norm applicable to the delimitation of the single maritime boundary—that the delimitation must be effected in accordance with equitable principles accounting for all relevant circumstances to achieve an equitable result.<sup>5</sup> The Chamber declared that this norm required that all maritime boundary delimitations, whether through negotiation or dispute resolution, must be achieved “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.”<sup>6</sup> This was the *ratio decidendi* of the decision, and its purpose was to serve as a guideline to achieve a goal.

The elements of decision-making adopted by the Chamber amounted to a departure from established criteria and a methodological shift. The Chamber noted that a single line for both the continental shelf and the superjacent water column “can only be produced 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.”<sup>7</sup> The Court therefore looked to criteria of a ‘neutral character’ derived from the geography of coasts within the delimitation area.

The decision is a milestone in oceans law, and it continues to effect fisheries, oil and gas exploration, alternative energy production, and other issues in Canadian-American relations and beyond. This *Ocean and Coastal Law Journal* issue commemorates the twenty-fifth anniversary of the case. Articles are based on the Symposium, “The Gulf

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4. *Id.* at 290.

5. For a thorough assessment of the use of equitable criteria in the *Gulf of Maine Case*, see D. Pharand, *Delimitation of Maritime Boundaries, Continental Shelf and Exclusive Economic Zone in Light of the Gulf of Maine Case, Canada v. U.S.A (1984)*, 16 REVUE GÉNÉRALE DE DROIT (1985).

6. *Gulf of Maine Case*, 1984 I.C.J. at 300.

7. *Id.* at 327.

of Maine Maritime Boundary Delimitation: Law, Science and Policy of Marine Trans-boundary Management,” which was hosted at Prouts Neck, Maine in Fall 2010 by the Marine Law Institute of the University of Maine School of Law and co-sponsored by the Marine & Environmental Law Institute of Dalhousie University.

The Symposium and the articles in this volume reflect two realities. First, the delimitation was the outcome of a complex process of conflicting claims, born of diverse standpoints from multiple participants beyond the state parties in interest, that gave rise to the litigation before the ICJ. Second, just as Canada and the United States recognized a common interest in submitting the dispute to the ICJ, on both sides of the border there is continuing post-judgment clarification and recognition of common interests across a wide range of issues in the Gulf of Maine area. This reflects the reality that boundary problems are interdisciplinary. And even after a tribunal has ruled, a delimitation has been decided, and lines have been drawn on maps, the process of claims continues.

This volume opens with a verbatim transcript of an historic panel in which original case participants, including a World Court Judge, share behind-the-scenes analysis of the Case and the events and that led Canada and the United States to bring the delimitation of the maritime boundary in the Gulf of Maine to a Chamber of the ICJ. Attorneys Ralph I. Lancaster, Ralph Gillis, David Colson, and Davis Robinson, together with Judge Steven M. Schwebel, reveal the challenges and choices faced by politicians and lawyers in both Canada and the United States as they sought to identify a mutually acceptable fishing regime and maritime boundary. The teams representing the State parties confronted issues of first impression in maritime delimitation and international dispute practice. They explain the strategies they adopted and how they presented their case to the Chamber of the ICJ whose decision would ultimately establish a maritime boundary in the Gulf of Maine.

As noted, the case was the first in which the Chamber procedure of the ICJ was invoked and applied. The Court typically discharges its duties as a full court. However at the request of the parties, *ad hoc* Chambers may be established to decide specific cases. The resort to the Chamber procedure, as well as its constitution, involved some controversy, including the revision of a relevant provision of the Rules of Court. In his address on the constitution of the Chamber and its future use, Judge Stephen M. Schwebel, the American judge on the panel, describes the bumpy road to its establishment and composition.

In his article appearing in this volume, *The Gulf of Maine Boundary Dispute and Transboundary Management Challenges: Lessons to Be*

*Learned*, Professor David L. VanderZwaag explains the technical aspects of the case and the strategic choices available to parties in boundary disputes. He places the decision in context twenty-five years later and emphasizes the process nature of the delimitation owing to its ongoing effects; the contemporary and prospective guidance that the decision provides; the evolutionary nature of maritime boundary delimitation method; and the predictability of the law.

Following those detailed analyses of the *Gulf of Maine Case*, a Symposium session under the guidance of Professor William Dunlap of Quinnipiac University School of Law considered *Maritime Delimitation Problems in Comparative Perspective*. Brian Van Pay of the Office of Ocean Policy and Polar Affairs, U. S. Department of State, explained *United States Maritime Zones and Boundaries*, and Professor Betsy Baker of Vermont Law School drew on her extensive field research to present *Gulf of Maine to the Beaufort Sea: Marine Ecosystems and Boundary Disputes in the Arctic Ocean*. Panelists considered outstanding maritime boundary issues from North America to Asia. Four maritime boundaries remain to be delimited between the United States and Canada: Machias Seal Island, the Beaufort Sea, Juan de Fuca Strait, and the Dixon Entrance. Yet there is substantial cooperation and collaboration between Canada and the United States in tasks such as data collection in support of determining the outer extent of the continental shelf through joint cruises in Arctic waters, and joint moratoriums on oil and gas exploration in the disputed area in the Beaufort Sea. It was noted that a general acceptance in both Canada and the United States of the ecosystem approach and precautionary principles is reflected in various ocean policies and action plans that emphasize a post-delimitation search for shared solutions to common problems.

Professor Peter Dutton of the United States Naval War College drew on Gulf of Maine principles and his extensive work on East Asian maritime matters in his presentation, *Carving Up the East China Sea*. Taking the most recent maritime delimitation decided by the ICJ, Professor Jon Van Dyke of the University of Hawaii School of Law considered *The Romania-Ukraine Decision and Its Effect on East Asian Maritime Delimitations*. East Asian maritime problems are especially intense and, as in the *Gulf of Maine Case*, involve the treatment of islands and the issue of special circumstances. Writing in this volume, Professor Van Dyke explains how this Black Sea delimitation, in which sovereignty over a stark island and its effect on the delimitation under the UN Law of the Convention were at issue, could be relevant to conflicting East Asian and South China Sea claims.

The Symposium continued with a session devoted to *Marine Living Resource Management and Challenges* under the guidance of Dr. William Brennan, Former Administrator of NOAA and President of the Maine Maritime Academy. Dr. Moira W. Brown, of the New England Aquarium, in Boston presented *Minimizing Vessel Strikes to Endangered North Atlantic Right Whales: A Crash Course in Conservation Science and Policy*. Patrice McCaron, Executive Director of the Maine Lobstermen's Association, described ongoing demands and conflicting claims in the Gulf of Maine area, especially near Machias Seal Island, with her presentation, *The Gray Zone: Détente Among Lobstermen in Disputed Waters*. Professor David VanderZwaag and Emily Pudden of the Marine & Environmental Law Institute, Dalhousie University, described *Canada–USA Bilateral Fisheries Management in the Gulf of Maine: A Three Part “Cruise.”* Professor John Duff of the University of Massachusetts at Boston considered *The Hague Line in the Gulf of Maine: Impetus or Impediment to Ecosystem Regime Building*, and, in this volume he elaborates on his presentation by appraising three interacting factors leading to the emergence of ecosystemic regimes. Professor Duff assesses these factors as potentially bearing on outcomes in the Gulf Maine where the Chamber's judgment resulted in what he calls “splitting the baby.”

This conclusion was supported by various panelists who considered the wide-range ecosystem impact of the delimitation. As noted, twenty-five years after the Chamber divided the marine ecosystem between the two States, there remains a need for a joint recovery plan to deal with endangered species, for an agreement to establish a network of marine protected areas, and for integrated management planning at the bilateral level. The fragmented nature of trans-boundary arrangements (complicated by the federal/provincial/state jurisdictional splits) and overlapping jurisdiction with regional fisheries marine organizations are a further complication. The future of trans-boundary fisheries management in the Gulf of Maine was characterized as “fragmented incrementalism.” While a formal regional treaty supporting an integrated ecosystem approach remains a possibility, there seems to be no political will to move in this direction. Informal bilateral initiatives, such as a cooperative scientific project to reduce the potential for lethal vessel encounters with the endangered North Atlantic right whale in the Gulf of Maine region, are currently the strategies of choice for the protection of the marine environment in the Gulf of Maine.

One critical outcome of the delimitation is that the area surrounding Machias Seal Island remains a “gray zone.” Canada and the United States have yet to delimit a boundary here, and the area is now the center

of conflict between Canadian and American lobstermen, whose fleets fish the waters. Since 2002 there has been a bilateral working group in place that includes lobstermen, but it has been unsuccessful in fashioning a resolution. Proposals include formal assertion of territorial claim in the disputed area and settlement of the maritime boundary, implementation of trade restrictions on the Canadian lobster fishery, and the establishment of a conservation area.

In the final Symposium session, *Ocean Jurisdiction and Energy Production*, panelists turned to opportunities for partnership in energy creation, distribution, and supply in the New England and Maritime Provinces region. Panelists concluded that there will be opportunities for collaboration on development of renewable energy resources and distribution networks in the region as stakeholders on both sides of the border have significant design, engineering, and manufacturing capabilities for renewable energy resources in place and a common desire to reduce their dependency on fossil fuels for energy generation.

Panelists suggested two bilateral energy-related initiatives. First, an unanticipated benefit of the decision was the characterization of the Bay of Fundy as internal waters, thus suggesting that the area would fall under provincial jurisdiction in Canada. In Nova Scotia, the first in-stream tidal power turbines have been deployed in the Minas Basin to determine if this is a viable energy source. Second, Canada and the United States have adopted a moratorium on oil and gas development on Georges Bank on the basis of complementary unilateral decisions by the two countries.

In energy and fisheries policy, the panelists noted numerous bilateral options for the Gulf of Maine. Canada and the United States have demonstrated support for common trans-boundary policy objectives in diverse marine activities. Increased awareness of the need for principled ocean governance, along with growing recognition of the potential trans-boundary effects of an increasing number of offshore renewable energy developments, suggest that cooperative bi-national energy policy options could be considered for the Gulf of Maine.

Professors Rita Heimes and Lucia Fanning participated in that final Symposium session and contributed *Ocean Planning and the Gulf of Maine: Exploring Bi-National Policy Options* to this volume. They review the complex and conflicting claims that gave rise to the case, as well as the continuing challenges for ocean utilization of fisheries and energy resources. Based on regional experiences, they examine ocean planning trends in the United States and Canada, then go on to appraise and propose options for the Gulf of Maine Area. Their article breaks new ground in clarifying Canadian-American common interests in the

Gulf of Maine. It is a fitting contribution and conclusion to the shared management spirit of this Symposium.

The decision continues to have an impact on maritime delimitation praxis and the decisions of international tribunals. As scholars have noted, “the legal standards applied by the Chamber, while leaving certain latitude of the exercise of judgment, are as objective as possible under the circumstances.”<sup>8</sup> “[T]he Chamber’s focus on geographical factors,” these scholars conclude, “was correct.” This was the first decision of the Court concerning the delimitation of a single maritime boundary for both the continental shelf and the superjacent water column,<sup>9</sup> and scholars continue to mine it for its bearing on contemporary delimitation practice.<sup>10</sup>

The Gulf of Maine judgment is a continually relevant optic because it has shaped subsequent claims for the use and exercise of coastal state authority over ocean zones. More than twenty-five years later, the judgment generates a distinctive prism for contemporary maritime boundary delimitations. As the late Professor Jonathan Charney observed:

The message of the Court is clear. It does not hold out the possibility that a clearly determinative black-letter rule of law will be established. Nor should the maritime boundary law devolve to the point where it is so indeterminate that each delimitation is decided on an ad hoc basis comparable to a decision *ex aequo et bono*. Rather, in the common-law tradition as understood by the realists, the continuing series of judgments and awards should progressively refine the legal rules and their objectives. Over time, the essential normative objectives of this

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8. E. Collins & M. A. Rogoff, *The Gulf of Maine Case and the Future of Ocean Boundary Delimitation*, 38 MAINE L. REV. 7 (1986). See also J. Schneider, *The Gulf of Maine Case: The Nature of an Equitable Result*, 79 AM. J. INT’L L. 539 (1985) (assessing the equitable result of the delimitation in light of Canadian and American arguments).

9. See L. H. Legault & B. Hankey, *From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case*, 79 AM. J. INT’L L. 961 (1985) (appraising the significance of the *Gulf of Maine Case* and the *Guinea/Guinea Bissau Arbitration*, and the roots of single boundary delimitation in the international law governing the EEZ and continental shelf).

10. See S. Kaye, *Lessons Learned from the Gulf of Maine Case: The Development of a Maritime Boundary Delimitation Jurisprudence since UNCLOS III*, 14 OCEAN & COASTAL L.J. 73 (2009).



law may be better understood, notwithstanding the fact that they may not be adequately captured in a codification.<sup>11</sup>

The Canadian scholar, Professor Douglas Johnston, urged a functionalist theory of maritime delimitation that he called a “contextualist, problem-oriented, and interdisciplinary approach to ocean boundary-making.”<sup>12</sup> This approach recognizes that every maritime boundary delimitation decision is a culmination of a complex process of authoritative decision whose outcome implicates the values of coastal states and many other participants. As is evident in the pages that follow, the emerging functional delimitation approach in which the law is continually refined is, in large measure, the jurisprudential heir of the Gulf of Maine judgment that continues to bear on the oceanic jurisdiction of states.

Maritime boundary delimitation stakes are high because, as Professors Myres McDougal and William Burke observed, “[T]he demands of states adjacent to the sea embrace the protection and promotion of all the values of a territorially organized body politic.”<sup>13</sup> While the ICJ is a critical adjudicative arena, as this Symposium underscores, use of the Court is preceded by a process of interactions through which the oceans are enjoyed and exploited, and a process of claims by which interests are asserted. An international tribunal is one phase in the deeper process of the assertion of state competence of authority and control over ocean zones. The culmination of the processes are maritime boundary delimitations that are authoritative for the world community. Readers of this issue of the *Ocean and Coastal Law Journal* will understand that a maritime delimitation is not a destination, it is a continuing journey.

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11. J. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L L. 227 (1994).

12. D. JOHNSTON, *THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING* 285 (1988).

13. M. S. MCDUGAL & W. T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 9 (1962).