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Gulf of Maine Conference Panel Transcript: The Gulf Of Maine Case Revisited

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GULF OF MAINE CONFERENCE PANEL
TRANSCRIPT: THE GULF OF MAINE CASE
REVISITED¹

*Ralph I. Lancaster Jr., Esq. (chair)**

*Ralph Gillis, Esq.***

*David Colson, Esq.****

*Davis Robinson, Esq.*****

*Judge Stephen M. Schwebel******

1. Please note that the speakers from this panel reviewed and edited this transcript. New language appears in brackets, and ellipses indicate omissions of language.

* Ralph I. Lancaster Jr. is Of Counsel at Pierce Atwood's Portland, Maine office. Mr. Lancaster is a trial lawyer whose practice includes civil and criminal matters related to national and international issues. Mr. Lancaster is also actively engaged in public and professional service, having been appointed Independent Counsel to investigate allegations against former U.S. Secretary of Labor Alexis M. Herman, and Special Master by the United States Supreme Court in three original jurisdiction cases: *New Jersey v. Nevada*, 484 U.S. 920 (1987); *Virginia v. Maryland*, 540 U.S. 56 (2003); and *New Jersey v. Delaware*, 552 U.S. 597 (2008). Mr. Lancaster also served as counsel for the United States in the *Gulf of Maine Case*.

** Ralph Gillis is a partner at Gillis & Angley, LLP and an expert in maritime and international law.

*** David Colson is Of Counsel at Dewey & LeBoeuf's Washington office. Mr. Colson's practice focuses on international arbitration and cross-border dispute resolution and legislative and public policy work. Prior to joining Dewey & LeBoeuf, Mr. Colson worked in the U.S. Department of State in the Department's Legal Advisers Office and as deputy assistant Secretary for Oceans. Mr. Colson also served as deputy agent for the United States in the *Gulf of Maine Case* and was a member of the Peace Corps and the United States Marine Corps.

**** Davis Robinson was agent for the United States in the *Gulf of Maine Case*. Mr. Robinson has had a career as a Foreign Service Officer, and spent years in private law practice. President Reagan nominated him to become the Legal Adviser to the United States Department of State in 1981, where he spent four years as general counsel to Secretaries of State Alexander Haig and George Shultz. Mr. Robinson has provided representation in international boundary, investment, and trade matters, and currently serves as an international arbitrator.

***** Judge Schwebel is a former judge of the International Court of Justice and was President of the Court from 1997-2000. He presently acts as an independent arbitrator

Charles Norchi:

On behalf of the Marine Law Institute of the University of Maine School of Law, it is my pleasure to welcome you to this Symposium commemorating the twenty-fifth anniversary of the International Court of Justice decision that delimited the maritime boundary in the Gulf of Maine.² I serve as Director of the Marine Law Institute and professor at the law school. This meeting is co-sponsored and co-organized with the Marine and Environmental Law Institute at Dalhousie University and in particular with its Director Professor David VanderZwaag. We are delighted that you are here to participate in this historic event. You have come to Prout's Neck on the beautiful coast of Maine from as far away as Korea, Hawaii, Washington, as well as from nearby New England. You have all studied this case and the resulting delimitation. Everyone here understands how the case continues to resonate across a range of issues—from specialized maritime boundary law to interdisciplinary dimensions of fisheries, energy, security and other challenges that intersect the continuing evolution of international boundary jurisprudence. Each of these areas will be addressed in the sessions that follow by lawyers, scholars and scientists from Canada and the United States. We will hear from experts who pleaded and decided the case twenty-five years ago in The Hague, and from experts who have been appraising the judgment and its impact during the ensuing twenty-five years. I will now turn the microphone over to David VanderZwaag who would like to welcome you as well on behalf of our Canadian counterparts.

David VanderZwaag:

Thanks, Charles. The Marine and Environmental Law Institute is very glad to co-sponsor this workshop, and almost all the work has been done by Charles and his staff here and we really appreciate it. Twenty-five years have gone by since the Gulf of Maine decision [crafted] the boundary line. I find it absolutely amazing when you look at how time flies. My hair was a lot darker then. I was a lot more handsome then. And actually, when I was a law student up in Canada doing a Master's thesis, I published a book in 1983 called *The Fish Feud*. This is now out

and counsel in Washington, DC, and as a door tenant of Essex Court Chambers in London.

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

of print, the pages are turning yellow. And so, time really has flown by. I'm very glad that we were able to come here today and revisit this whole case.

In a way, it's really old news—twenty-five years. But in a way, I would say that the case is still alive. And, I think that we are going to find out in the next day or so that the case is really alive and well. In many ways, it set a jurisprudential precedent—if you want to call it that—that's still being followed, about the idea of physical features dominating the whole boundary delimitation jurisprudence. Many countries around the world are still looking for lessons to be learned. [A participant] from Korea [has joined us]. Just last year in Taiwan, part of [a maritime boundary delimitation] workshop was [devoted to] lessons learned from the *Gulf of Maine Case*. So, countries are still looking to this case for guidance.

Also, [in the wake of the case considerable transboundary cooperation has occurred, particularly in relation to fisheries]. If we didn't have a boundary, we probably wouldn't be where we are today with cooperation. And, we have many disputes that are [still] left, [such as the disputed zone around Machias Seal Island]. We will be talking [tomorrow] about those issues that are still with us today.

So, thank you very much. It's a wonderful setting here, and we look forward to some really good discussion, very informal discussion, and frank discussion. It will be Chatham House Rules with no real attributions. So feel free to speak out. Thank you.

Charles Norchi:

Thank you, David. By the way, the subtitle of our symposium is “Law, Science, and Policy of Marine Transboundary Management.” That suggests an interdisciplinary and functional approach to maritime boundary law. The title is inspired by legal scholars on both sides of our borders who spawned a policy-oriented inquiry of oceans law, Professor Myres S. McDougal at Yale Law School and his doctoral student from Canada, Douglas Johnston. Professor Johnston would go on to become a great scholar and, as it happens, dissertation supervisor to David VanderZwaag. In that spirit of policy-oriented inquiry, will examine the Gulf of Maine post-delimitation effects from multiple standpoints and disciplines.

For those of you who want to refresh the case, if you look to your left, my stage right, all of those blue volumes—with the exception of two—there on the table, that's the case. If you would like to read the full case, the memorials, otherwise known as briefs, the memorials of

international law, the counter-memorials, the exhibits, and so on—they are all there if anybody can't get to sleep tonight. It is fascinating reading.

I have the pleasure of introducing the first panel, after which I shall turn the microphone over to the chair of that panel. Our first panel is a reflection on the case itself, a revisit and reflection by participants who were able to make the journey here.

Let me start with Ralph Lancaster, who many of you know. Ralph is from Portland, Maine and has been trying cases for more than forty years. His practice includes civil and criminal matters and has handled many cases in national and international law. He is very active in trials and public service on behalf of the community and the legal profession. He was independent counsel to investigate the allegations against former U.S. Secretary of Labor, Alexis Herman, and has been appointed Special Master by the United States Supreme Court in three original jurisdiction cases. And, of course, he served as counsel for the United States before the International Court of Justice in the dispute between Canada and the United States that we now know as the *Gulf of Maine Case*. Ralph has also been President of the Maine Bar Association, member and President of the American College of Lawyers, Chair of the ABA Standing Committee on Federal Judiciary, and is an attorney with the Portland firm of Pierce Atwood. I especially wish to thank Ralph who has been very generous with his time in helping us organize this symposium.

We are happy to welcome back Ralph Gillis. Ralph is a graduate of the University of Maine School of Law. He studied at Edinburgh University, where he took his L.L.M. and subsequently his doctorate. Dr. Gillis has recently published *Navigational Servitudes: Sources, Applications, Paradigm*³ which received many favorable reviews, including in the *Ocean and Coastal Law Journal*.⁴ He is a member of the bar of Massachusetts, of the bar of the District of Columbia, and the United States Supreme Court. He has practiced in maritime and international law, and he was an expert called upon to join the American team early in his career when he was still a student studying at Cambridge University.

We are delighted to welcome David Colson who is an attorney with the firm of Dewey & LeBoeuf in Washington D.C, and was Deputy

3. See generally, RALPH GILLIS, *NAVIGATIONAL SERVITUDES: SOURCES, APPLICATIONS, PARADIGM* (Martinus Nijhoff Publishers 2007).

4. Charles H. Norchi, *Freedom and Servitude in the Public Order of the Oceans: A Review of Navigational Servitudes: Sources, Applications, Paradigms*, 13 *OCEAN & COASTAL L.J.* 369 (2008).

Agent to the team representing the United States. Mr. Colson practices maritime boundary law and boundary issues in the Middle East, Africa, Latin America, and has provided international petroleum companies with advice in all of these areas. Mr. Colson has served in the Peace Corps, the United States Marine Corp, and he is a graduate of the University of California at Berkley School of Law, Boalt Hall. David has close Maine ties.

Davis Robinson also has ties here in Maine. Davis was agent to the United States for the case. He has had a career as a Foreign Service officer, serving in Egypt, Jordan, and Washington. Davis has also spent years in private domestic and international law practice. President Reagan nominated him to become the Legal Adviser to the United States Department of State in 1981. Following his confirmation by the Senate, Davis served four years as general legal counsel to Secretaries of State Alexander Haig and George Shultz. Davis is a graduate of Yale College and Harvard Law School.

We are honored to have with us, Judge Stephen Schwebel. Judge Schwebel has had a distinguished career in government, private practice, and has also served as a law professor. Judge Schwebel was the Assistant Legal Adviser for United Nations Affairs in the Office of Legal Adviser of the United States Department of State from 1961 to 1966. He was appointed Counselor on International Law in that office in 1973, then Deputy Legal Adviser from 1974 to 1980, and served as a member of the United Nations International Law Commission from 1977 to 1980. In 1980, he was elected as a judge of the International Court of Justice (I.C.J.) and served until the year 2000. Judge Schwebel was President of the Court from 1997 to 2000. He remains very active in international law arbitration, and particularly in boundary matters. He is the author of many scholarly articles and books, including *The Secretary General of the U.N.: His Political Powers in Practice*,⁵ *International Arbitration: Three Salient Problems*,⁶ and *Justice in International Law*.⁷ Judge Schwebel is a member of the Permanent Court of Arbitration in The Hague and the ICSID panel of arbitrators and conciliators.⁸

5. See STEPHEN M. SCHWEBEL, *THE SECRETARY GENERAL OF THE UNITED NATIONS: HIS POLITICAL POWERS IN PRACTICE* (Cambridge, Harvard University Press 1952).

6. See STEPHEN M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* (Cambridge University Press 1987).

7. See STEPHEN M. SCHWEBEL, *JUSTICE IN INTERNATIONAL LAW* (Cambridge University Press 1994).

8. ICSID stands for the International Centre for Settlement of Investment Disputes. See ICSID, International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/ICSID/Index.jsp> (last visited, June 10, 2010).

We are delighted to have all of these distinguished guests with us here in Maine. And now it is my duty to turn this microphone over to the chair of the panel, Ralph Lancaster.

Ralph Lancaster:

Thank you, Charles. Let me, as a matter of housekeeping, ask: can those of you in the last row hear me all right?

Voice from the audience:

Yes.

Ralph Lancaster:

Okay, I don't like microphones. And we only have one, which we will pass around. So I'm going to start with that. Secondly, let me say at the outset that although there is no Canadian citizen sitting here, it is not from a want of trying. Unfortunately, Len Legault, who was Davis Robinson's opposite number and head of the Canadian delegation is ill and could not be here. Yves Fortier, who was my opposite number, had committed to come and then had a conflict and could not make it, and so on down the line. So we may direct Canadian questions to my friend Ralph sitting here even though he is from Hingham.

This is going to be unstructured by choice. I'm going to try to frame some questions, and direct them to various members of this group. There are no wallflowers or shrinking violets sitting here, and I fully expect that we are going to have some cross-dialogue as we go along and I invite that, frankly. The real test is going to be trying to squeeze into what is now approximately an hour and a half, an enormous amount of material and still keep your interest.

The dissent—this is the official decision, my copy from twenty-five years ago—pointed out that there were [some] 8000 pages of written material submitted to the Court, and over 2000 pages of oral presentations because we had to submit them in writing as well as deliver them orally.⁹ So, in addition to the memorials, which are over there, there are another 10,000 pieces of paper somewhere that we are going to try to summarize and try to give you some background.

We are going to leave for tomorrow's speakers the present status of the Gulf of Maine, if anybody knows. If you were to take the time to

9. *Gulf of Maine Case*, 1984 I.C.J. at 360 (Gros, J., dissenting).

read the opinion, and I suspect some of the people here in this room have, you would find in the dissent that the issue that was submitted to the Court is phrased as follows, and I want to read this because I want to get it correctly:

What is the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States in the Gulf of Maine area?¹⁰

Clear, simple, direct question which resulted in an opinion of one hundred and six pages,¹¹ a dissent of some thirty pages,¹² and a concurring opinion by the gentleman who sits—I'm sorry, a separate opinion, I don't want to characterize it—a separate opinion by the gentleman who sits to my right, of some seven pages, I believe.¹³ And, let me assure you, of all the time that we spent in The Hague, I was not this close to any of the judges. But, it's nice to have you here with us.

I don't know whether any of these words are going to be thrown around, but I scanned the opinion this morning, and [found the following terms]: “natural boundaries,” “primary and secondary coasts,” “geographical and natural prolongation,” “historical activities,” “adjacency,” “proximity,” “equidistance,” “acquiescence,” “estoppel,” “water column,” “natural resources,” and of course “fisheries,” “scallops,” “lobsters,” and “free swimming fish,”¹⁴—who really didn't care where anybody put the boundary. But all of those terms came to play in all three of the opinions. Now with that brief prelude, let me start, if I may, with David, on my left over here.

David, tell us, give us a little background. And, tell us, if you will, what led to the joint decision of the two countries to submit the matter to the International Court of Justice in the first place?

David Colson:

I think I'm the only one, at least at this table, and maybe in the room, who was involved during the period of time when there wasn't such a thing as a 200 mile zone. It's sort of hard, perhaps, for people to recognize or to appreciate the difficulties that were encountered just out here twelve miles, with large Soviet fishing fleets, and large Japanese

10. *See id.* at 362.

11. *See generally Gulf of Maine Case*, 1984 I.C.J. 246.

12. *See id.* at 360-90.

13. *See id.* at 353-59 (Oct. 12) (Schwebel, J., separate opinion).

14. *See id.*

fishing fleets almost fishing within sight of the coast. And this was the pattern all over the world. Those industrialized fishing fleets put enormous pressures on political systems, in countries like the United States and Canada, to kick them out. And, ultimately, in the United States—after several different attempts—Congress passed the 200 mile law for the United States called the Fishery Conservation and Management Act of 1976.¹⁵ And, shortly thereafter, Canada passed a similar law where they claimed their own 200 mile zone.¹⁶

Now, I want to say, I hope that I say nothing here today that Len Legault would take issue with. I hope that everything I say will be fair to him and his Canadian colleagues who were on that Canadian team. I think it is fair to say that when both countries went to 200 miles, we had our Pacific Coast issues of course, we also had the East Coast issues, but the main focus was to kick the “foreigners” out, and we did not think of each other as foreigners at that time. So we were thinking of the Soviets, the Japanese, the Eastern European fleets, and when we woke up, though, Congress had passed the law and the law applied to foreigners, and that meant Canadians.¹⁷ And, it meant that if a Canadian fisherman wanted to fish off the coast of the United States, there was a very elaborate legal structure that had to be put into place for that to happen.

Well, that might not have been so bad, but then we also discovered that there was a very serious boundary dispute between the United States and Canada, particularly on Georges Bank. Now there had been some discussions, and these had been sort of low key—they weren’t low grade, but they weren’t really serious, focused discussions—that had related to the continental shelf on Georges Bank in the early ‘70s that were pointed at oil and gas issues, with the United States looking at the one case at the time that supported a U.S. view. And that was the *North Sea Continental Shelf Case*,¹⁸ the first major case by the International Court of Justice that dealt with boundaries. There were a lot of words in there about natural prolongation,¹⁹ but no one really knew at the time what that meant. It sounded like a good deal. We could have Georges Bank as the natural prolongation of the United States. There was this little trough out there called the Northeast Channel. It is a [little seafloor] depression,

15. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, §§ 202-203, 90 Stat. 331, 339-42 (1976) (codified as amended at 16 U.S.C. §§ 1822, 1823).

16. Fishing Zones of Canada (Zone 4 and 5) Order, C. Gaz., 1977.II.115; Fishing Zones of Canada (Zone 6) Order, C. Gaz., 1977.II.652.

17. See Fishery Conservation and Management Act of 1976, *supra* note 15.

18. *North Sea Continental Shelf* (F.R.G. v. Den.), 1969 I.C.J. 3 (Feb. 20).

19. *Id.* at 3, 17, 31.

and that seemed like a good place to break the natural prolongation of the United States.

The United States and Canada were also parties, though, to the 1958 Continental Shelf Convention.²⁰ And that Convention, of course, did not have anything to do with fisheries, but it did set forth what is called the Equidistance/Special Circumstance Rule.²¹ Again, lawyers can use that and manipulate it, and a good lawyer can interpret it one way or another way, but it had this vision of equidistance, and that is where Canada was coming from. An equidistance line would cross Georges Bank, giving Canada about a third.

So this is the state of the world in 1977. The United States and Canada claim their 200 mile zone. We have a big dispute on Georges Bank. There is a lot going on. And, in 1977, of course there is a new president who comes into power in the United States. And one of the first things that hits this new President right square in the face, is that there is a big dispute that nobody ever told him about between the United States and Canada on Georges Bank. Well, Presidents in those situations usually turn to a smart man to say, "please help me." And the Carter Administration turned to Lloyd Cutler, who was a very prominent American lawyer. He had been in a lot of big deals. Strong democratic credentials. And Lloyd was asked to see if he could negotiate something that would be a solution to this problem.

On the Canadian side, they brought forward one of their most experienced diplomats, Marcelle Cadieux. And we started then on a fairly long series of negotiations. We don't have time to go through all of that negotiating process, but it ended up in early 1979, [although] it started with a mandate for a three-month period of time. [These negotiations] went on for almost three years. Finally there is a deal, and the deal is a two part deal. There is an East Coast fish agreement that is negotiated. This is an agreement that would have all kinds of management structures put into place for the East Coast fisheries: quotas, allocations, you get this much, we get this much, and so on and so forth. A very complicated agreement. The second agreement is an agreement to go to dispute settlement to decide the location of the boundary. These were linked by their terms. Neither could enter into force without the other. This package of two treaties was signed by the foreign minister and the Secretary of State. It was submitted by President Carter to the U.S. Senate for advice and consent, and lo and behold there was not a

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

21. *See id.*

U.S. senator who would support it. It was dead on arrival in the United States Congress. And Canada took this very badly. Canada felt that the administration was not pulling the political levers that it needed to pull on [Capital] Hill to get something like this through. You may recall that, at the time, the Carter administration was pulling political levers to get the Panama Canal treaties through. And there was really quite an intersection with the Canadians looking at what the administration was doing to get the Panama Canal treaties through. The administration wasn't doing the same sort of arm-twisting to get this East Coast fisheries and boundary agreement through.

That agreement—those two agreements—were submitted to the Hill. I think it was early 1979. It was March. Throughout the remainder of the term of President Carter, things just deteriorated. But—I need to step back for a minute because we had decided some things in putting the boundary treaty package together that survived. Now, we had looked at—when I say we, it was mostly on the U.S. side, but it was a discussion that we had with the Canadian side throughout—if we are going to go to dispute settlement on the boundary, what were our options? Option number one was to take it to the International Court of Justice, the full Court. Now, we both looked at that and—I think, again—it was a common judgment that this would not work politically. And, the reason that it wouldn't work politically in those days, is that both these countries had kicked out fishing fleets for probably half of the countries that were represented by judges on the Court. And, even if the judges on the Court had been one hundred percent fair and above all of this, the idea that either in United States or Canada you could go to the political masters and say that “okay, the judge [from country A] is going to be perfectly fair” when we had just levered the [fishing fleet from that country] away from the U.S. coast, or, “the Soviet judge is going to be perfectly fair” was a political non-starter, in the United States at least. So we pushed aside the idea that we would go to the full Court.

Second option: *ad hoc* arbitration. Now, the United Kingdom and France had just arbitrated their continental shelf boundary in the Atlantic and the Channel,²² and it seemed like that might be an option. We went, though, and spoke to the legal advisers to the U.K. and the French ministries in various conversations. And we learned how difficult the arbitration process had been for both the U.K. lawyers who were handling it for the U.K. and the French lawyers handling it [for France].

22. See generally D. W. Bowett, *The Arbitration Between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South Western Approaches*, 1978 BRIT. Y.B. INT'L L. 1.

And both the United States and Canada separately came to the same view that this would be very hard if we were to try to set up an *ad hoc* arbitration.

So looking around there was this other idea that had not been used. It was a Chamber of the Court. At the same time, you will find [that] a former president of the Court wrote an article in the American Society of International Law. His name was [Eduardo] Jimenez de Aréchaga. He wrote an article at the time that suggested that states could submit disputes to the Court and basically have the ability to make a suggestion to the Court about the way the Chamber would be composed, and the inference of that Article was that the Court would agree with that recommendation.

Now, I am taking too long, but this was the framework (*another member of the panel: "no . . . it's very important"*) we went through and the thinking we went through to formulate what was in the 1979 dispute settlement package. The United States and Canada—and Davis will speak to this after awhile—also agreed at that time, confidentially, about who the judges would be. That would be available in 1979, when we submitted the new special agreement to the Court right after Canada and the United States approved this East Coast linked package. That did not happen of course. But that gives you some of the flavor.

The politics here in New England at the time were: we don't want to have a deal with Canadians on Georges Bank. We have kicked everybody else out, and we are willing to roll the dice. Maybe we won't win it, but we would rather roll the dice than have the federal government tell us what the deal should be. And that, I think, can summarize the attitude here in New England at the time. The fishing industry had prevailed in getting Congress to pass the 200 mile law. The regional council system was new. It was just getting off. They didn't want the federal government messing around with the council system. And, the fishing industry wanted to control its destiny. They didn't want the federal government to come back into it through the backdoor with this East Coast Fisheries Agreement. They weren't so concerned about the arbitration part of the package. They didn't want the fish agreement to go through. So when the Reagan Administration came to power, they looked at the problem and they said this is an unsolvable problem. We have to get rid of it. Canada is really unhappy. We want to have a good relationship between President Reagan and Prime Minister Mulroney, and therefore, let's get rid of this problem. And, how to get rid of it? In a legal sense the way you got rid of it was for the President of the United States to call upon the Senate to return the fisheries agreement to the President. And then at the same time, the President submitted

amendments to the East Coast boundary arbitration package that, if the Senate acted upon, then the Senate would have ratified an unlinked boundary submittal treaty that then, if the Canadians would act unilaterally to do the same thing, we would have taken the same steps and then we could submit the agreement together.

The U.S. side took this action in the first days of the Reagan Administration. It was taken before the President went to Ottawa on his first foreign trip. The Canadian side was very unhappy about it. But, after awhile, the decisions were made in Ottawa that this seemed to be the only way forward. And by the end of 1981, Canada had taken a similar step and we had then a common agreement and we were able to submit the special agreement to the Court asking the Court to form the Chamber.

Davis Robinson:

Well, if it's all right [Ralph], then maybe I should pick up?

Ralph Lancaster:

What if I said that it isn't all right?

Davis Robinson:

Then I won't do it.

Ralph Lancaster:

You are going to do it anyway.

Davis Robinson:

No. But, maybe I should pick up because now you have the history so well articulated by someone who I can only tell you is such a privilege to have worked with. I came into office in the spring of 1981 and I didn't really know very much, to say the least, about maritime boundaries. And even though I had majored in history at Yale, I'm shocked now to say at that point Yale didn't even offer a history course about Canada. And so I knew next to nothing about Canada, which is unfortunately fairly similar for all Americans. And we don't realize how important for us our neighbor in the north is.

Ralph Lancaster:

Davis, let me interrupt you for a minute because I'm going to get to that. But I thought that we ought to go to the Court. We got to the threshold of the Court. I thought we ought to get to the Court.

Davis Robinson:

Ok.

Ralph Lancaster:

Ok. Let me just say in response to what David told you. You can read the memorials that are over there and you can read the 8,000 odd pages that I referenced before. You won't find what he just said anywhere unless you were part of it. And none of the rest of us were at that time, it isn't documented in that vein.

And now we are at the Court. We are going to the Court. So let's turn to the Court. What is this International Court of Justice? How is it composed? How are the judges chosen? What was it in 1981? And, who better than the man who was there?

Judge Schwebel:

Thank you. The International Court of Justice is the principal judicial organ of the United Nations (U.N.). It is the successor to the Permanent Court of International Justice, which began operations in 1922 and was linked to and elected by the League of Nations. An American sat on that Court, but the United States never ratified the Court's statute, despite the efforts of every U.S. President of the 1920s and '30s. But, all members of the U.N. are automatically parties to the statute of the International Court of Justice.²³ It is composed of fifteen judges elected for nine-year terms. The big five members of the Security Council traditionally have a national elected if they nominate one, and the other ten seats are hotly contested. The elections take place both in the General Assembly and Security Council. And a simple majority is required in both. It's a unique vote in the Security Council. It is the only issue that is carried by a simple majority of that kind. The veto does not apply.

23. U.N. Charter art 93, para. 1 ("All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.")

At the time in question of which David spoke, the judges were from the big five and there were judges from Western Europe, notably, Roberto Ago of Italy, who was to become president of the Chamber, though he was not the choice of the parties for that position; more about that later, perhaps. David has well explained why the full Court was not attractive to the United States and Canada. In the end, the Chamber was constituted not as originally contemplated in 1979, but as the Court stood in 1981. The United States and Canada took great care to specify exactly who the judges should be and made very plain to the Court that if the Court did not elect those very judges the case would be withdrawn from the Court and sent instead to arbitration. The United States and Canada, to ensure that [they were] clearly understood, attached an alternative agreement to go to arbitration to the papers that were submitted to the Court. That perhaps was not the most tactful way to approach the Court, but it certainly made the position clear.

The Court had a very bitter debate about constituting the Chamber. I'm going to speak in more detail about that this evening,²⁴ so I won't go into it now, except to say that in the end, the Chamber was constituted according to the prescription of the parties.

Ralph Lancaster:

Am I correct that this was the first time that that provision for a Chamber had been used?

Judge Schwebel:

Yes, the statute of the Court was amended in 1945 in San Francisco to provide for the establishment of a Chamber for a particular case.²⁵ It hadn't existed in the earlier days. But that provision had never been implemented before the *Gulf of Maine Case*.

Ralph Lancaster:

You also alluded to the fact that there is a political—if I may use that word—a political process by which these judges are selected. Am I

24. Judge Schwebel's remarks regarding the composition of the Chamber are included later in this volume.

25. See Statute of the International Court of Justice art. 26, June 26, 1945, 59 Stat. 1055, 3 Bevens 1153.

correct in that? There is actually some lobbying among different peoples at different times?

Judge Schwebel:

Well, the judges of the International Court of Justice are certainly elected in a political process. The U.N. General Assembly is a great political organization, and so is the Security Council for that matter. The judges are nominated not by states, but by so-called “national groups,” designated pursuant to a Hague Convention of 1899 that is meant to depoliticize the process somewhat, but it hardly does. That considered, I would say the judges of the Court, for a U.N. organ, are of the higher level of competence, and most of them are very able, but nevertheless they are certainly there as a result of a political process.

Ralph Lancaster:

For those of you who are interested in this process, I suggest that over cocktails tonight, you talk to Professor Norchi who has been actively involved in that process and can give you more detail.

One final question before I turn to Davis. Is my memory correct that the United States judges receive an income which is not taxed if they are on the International Court of Justice?

Unknown voice:

Don't answer that. (*Laughter*)

Judge Schwebel:

By the terms of the statute, a treaty binding on the United States, the compensation of the judges of the Court is not subject to taxation, but it is a very modest compensation.

Ralph Lancaster:

You now know why I lusted to get elected to the job, but never succeeded. (*Laughter*)

Davis—okay, let's turn now—we know about the composition of the Court in 1981, we know the background, and we know why a Chamber was chosen. How were the members of the Chamber selected? What was the negotiation process, because you were involved in that?

Davis Robinson:

I'd like to go back—if I could Ralph—just a bit, and say [something], first of all, in response to Steve's point about the Court. The Court is extraordinarily political. And, indeed, when I came into office, in those days it was widely rumored that a lot of the judges would take their instructions from their foreign ministries as to how they should vote. That was widely known.

Ralph Lancaster:

Some of them.

Davis Robinson:

Some. Not a lot. But some. So I came into office, and I get into the office and I was there one day, and I remember someone came in to see me and said “now there are two things that you absolutely have to do right away. You have to set up the Iran-U.S. claims tribunal for the United States and you have to deal with the Gulf of Maine Case. And there are very, very few months left, because we have to act on these two things right away.” Well, they were both absolutely overwhelming. And, thanks to David and the wonderful team he had assembled, I very, very swiftly got into the ins and outs of the case. And, I was told that under the Administration of President Carter, in the middle of the negotiations between the United States and Canada, that Canada had suddenly made their claim larger. They had expanded their claim. As a former Foreign Service Officer, it was my understanding that that was a kind of a no-no when you are in the middle of negotiations. And it came about because of the Anglo-French case that was mentioned by David.²⁶ So the Canadians made the decision that there should be no “effect” on an equidistance line that would be given to Nantucket, Martha's Vineyard, and Cape Cod.

I'm from an old New England sea-faring and fishing family, and I said to myself, “I don't think I want to go along with a situation that is saying that Nantucket, Cape Cod, and Martha's Vineyard don't exist.” So I said, “what did we do [in the negotiations in the 1970s]?” What did the United States do when our friends from the north made the decision that they would expand their claim? Well, under President Carter, they didn't do anything. So then I said, well what is the line that we have—

26. See *supra* note 19 and accompanying text.

and maybe if we can put on screen the larger map—because I think this is one of the only substantive things I personally added to the U.S. case in a big way.

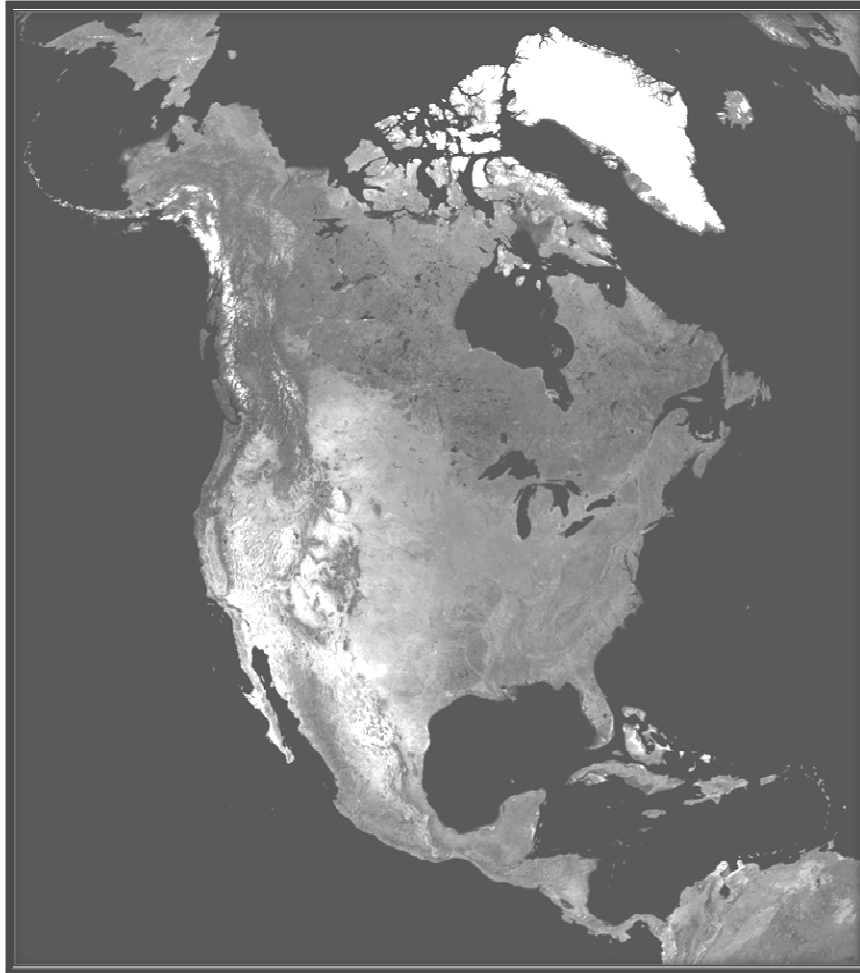


Figure 1: Image of North America including the entire eastern seaboard of the United States.²⁷

It struck me that the U.S. should do something in response to what I was told about this [by] this outstanding group of career professionals.

27. NASA, Visible Earth, Blue Marble: Land Surface, Shallow Water, and Shaped Topography, http://visibleearth.nasa.gov/view_rec.php?vev1id=11656%20%22Blue%20Marble%22 (last visited May 20, 2010).

Apparently, the Northeast Channel was selected as the course of the original proposed U.S. boundary a result of what's called the "thalweg theory." In the domestic situation in rivers when you have a boundary between two states that are side by side—adjoining states—the thalweg—the line of deepest water—would often be used for the boundary. Well, that principle had never been applied in the ocean before. As I understand it, the *Gulf of Maine Case* was really the first environmental case that was brought into the World Court. So environmental factors were very important, [such as] the fish and the resources on the shelf. The thalweg was used because it would [lead to use of] the Northeast Channel. But the area in dispute is this small indented area if you look at the eastern seaboard as a whole, and I was told that the Canadians, in 1978, had expanded their claim to take account of the Anglo-French case. And, knowing that the briefs of the U.S. and Canada before the Chamber would be filed simultaneously—which is a very important factor here because under the special agreement between the two countries, there was no plaintiff and there was no defendant, so in that situation in the World Court the briefs are filed simultaneously—the situation can become dangerous because you don't know what the other side will say and, therefore, what you say on your side may be falling into a trap. So I said to myself, "since we are filing simultaneously, why don't we try to surprise the Canadians just like they had surprised us in the middle of the negotiations under President Carter, and where we failed to make any kind of a response in terms of expanding or otherwise changing our own claim." We were not in a position where we could expand [the extent of the claim] because we were already claiming one hundred percent of the Bank. So that was a problem.

So then I said to myself (*laughter*) because we are already after one hundred percent—let's put up the second map—"why just look in this relevant small area that is in dispute?"

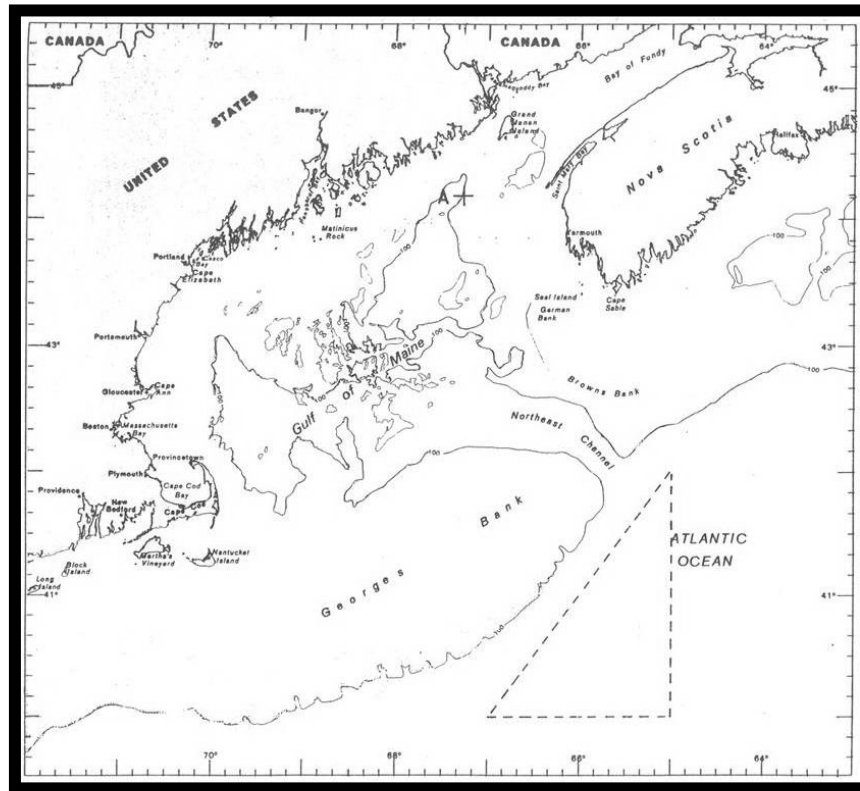


Figure 2: Map of the Gulf of Maine area indicating the delimitation line starting point and area for its termination.²⁸

One of the big issues in the Court is that you have to define the area in dispute so then you can do the geometric computations and you can measure the length of the coast and all of these things my friend David here is an absolute genius at. And I said, “But wait, I want to look at the larger coast.” If Nantucket and Cape Cod are an aberration that should be given no effect for setting an equidistance line under the rational of the Anglo-French Case, and then you look at the whole coast, what about Nova Scotia? It’s really kind of an aberration, too. It’s a little larger, obviously, than Cape Cod, so, that was a little bit of a push, but then I started to read all of the cases and really get into all of this—and David and I began to focus on the notion of general direction of the coast. And

28. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246, 269 (Oct. 12). The starting point is indicated by the “+” symbol on the map and the area of termination by the broken-line-triangle.

if you had a perfectly straight line for a coast and you had two states that are side by side, well, the equidistant line is going to be the same as the line that is perpendicular to the general direction of the coast. So it seemed to me that there was a macro general direction of the coast, which you can see here on the larger map (*indicating map*). And the perpendicular would come out fairly straight. And if we can have the second map, please? So, the thought was, if you look at the map of the whole eastern seaboard of the U.S. and Canada, why shouldn't the U.S. get its coastal front, and Canada will get its front also? These are really two similar so-called "primary coasts," we decided to argue. Nova Scotia is an aberration, and Cape Cod is too. It's not in keeping with the general direction of the coast. So to me, because I really hadn't been in this field [of law before], it seemed rather simplistic. Well, those side portions should be a secondary coast. They are really not the same as the primary coast where Canada has its front and the U.S. has its front. And then the Chamber will have to take into account how much of an effect it should give to something that was not in keeping with the general direction of the coast. So that's what we should argue about, I thought. So, you also have the fact that the land boundary terminus is up in the northwestern corner. It's not opposite Boston. It's way up here. Then you have Nova Scotia, [whose effect, if fully recognized], is going to pull the line way down south. So if you give one hundred percent effect to Nova Scotia, you are going to have a line that would go all the way down to opposite Philadelphia. That is where the line [would end up]. So, that is a little [indication] of where I came from as a novice [at the time in the field of maritime boundary law].

So we decided that we are going to go with an adjusted perpendicular line. We took the general direction of the coast, we took the perpendicular, then we made adjustments to it. Well, when we filed our simultaneous Memorial with the Chamber, apparently, our friends up in Ottawa were furious and then they even wrote a song based upon the very popular movie *The Graduate*. (*Singing*) "Here's to you, Mrs. Robinson." Instead [the Canadian team, I later learned, prepared news words to the song]: (*singing*) "Here's to you, Mr. Robinson." They were totally surprised by this. And I'm glad we did it. I don't know whether it helped us or hurt us, but it made the United States feel good politically. I think it made the fishermen feel good politically, because the Canadians had expanded their claim and we had never responded. The thalweg, as I understood it, was not an international boundary law theory that had ever been accepted by anybody. Whereas the general direction of the coast was acknowledged as was a perpendicular to the general direction of the

coast, so it seemed to me that that principle was more weighted in the international law.

Now, and I want to say one more thing and then I will sit down. I want to tell one story about the composition of the Chamber because Leonard Legault is not here—and I can't tell you what a wonderful human being he is, he is going blind and he was not able to be here. We became not only adversaries in the Court, but we became great friends. It was one of these life kind of lessons where your adversary in the afternoon had better be your partner in the morning. What happened was—when we got to form the Chamber, people involved started dying. To not make it too long, when I came in, the U.S. judge on the Court who had a conflict—he had died. Steve Schwebel who then had been named as a replacement on the Court as the U.S. national judge, had not worked on the case, he did not have any conflict. Once he's on the Chamber, there has to be an *ad hoc* judge for Canada, so that's how we ended up then with the wonderful man Maxwell Cohen. So then we had [to agree on] three other judges. As I recall, when I came into office, Mosler and Ago had already been agreed upon. But, the fifth one was very, very difficult for both of the nations. I started going to Ottawa to meet with Len over this issue and we came to an agreement on someone—well, we came to an initial agreement—and that individual died suddenly. Then, we are only now two months from when the term of the Court was to end. So we start going through the list of all the other sitting judges, and the only one—within the four walls of this room—the only one who was acceptable to us both, but with many, many questions was the French judge, André Gros. We immediately, on our side, had enormous problems, because at the same time the island St. Pierre et Miquelon was in dispute between France and Canada.²⁹ So with our team, we learned as much about St. Pierre et Miquelon than even the French and the Canadians knew about it, because we were not about to say yes to a French judge when there was another major boundary dispute [with Canada unless we knew about all of the ins-outs of that dispute as well]. Again, I'm saying things that maybe I shouldn't say because it is my nature [to be forthright]. I knew darn well that he would not rule in the U.S.-Canada case in a way that would adversely impact the French case with Canada. So that was one thing. So we looked at this very carefully.

And then, of course, you have the fact that at this point there was the separatist movement going on, and how do we deal with the whole

29. See *Delimitation of Maritime Areas Between Canada and the French Republic (St. Pierre and Miquelon) (Can. v. Fr.)*, June 10, 1992, 31 I.L.M. 1145.

French Canadian issue. Is this something that will be in our favor? Or, is it not in our favor if we agree to a French judge as the fifth member? So it was extremely delicate. So, we finally agree—Len and I agree—and we're so happy about this. All right, we'll roll the dice, this is the Chamber. Then we learn that the other judges on the Court—in the four walls—they purportedly couldn't stand this man Andre Gros, and Andre Gros' term ended in February [of the coming year]. And under the rules of the Court, he could only sit on the Chamber after his term ended if he was formally appointed in advance of the end of his term. So he had to be named before his term was up. The major complaint was: is he going to get his pension as a former member of the Court? Or, is he going to be paid per diem when he serves on the Chamber? Or, is he going to get both? So, Len and I ended up having to go to New York to the U.N. headquarters and deal with the United Nations administration as to what we are going to do with André Gros' salary. How much is he going to be paid? So we sorted that out, and it finally goes to a vote [in the full Court as to whether to approve the proposed composition of the Chamber], and Steve will get into this, I guess, this evening, but, as I understand it, the vote was very close despite the fact that these two countries together contribute thirty-five percent of the budget of the United Nations. And, Steve will explain this evening that the full Court almost chose not to accept the case. Now I will sit down.

Ralph Lancaster:

Thank you very much, Davis. As Davis was talking, I was reminded of a judge I was once before who said, "Will you answer the question, please?" (*Laughter*) You should not draw from Davis' presentation the erroneous conclusion that there was any connection between the attempt to select members of the panel and their deaths. (*Laughter*) Davis, you needn't worry about things being said in the four corners of this room [because] we have a tape recorder in front of us, and we do because we are going to transcribe this and publish it.

Ok, finally we have a panel.

David, tell us a little bit—just a little bit please—about the issues. I read the actual language of the issues that were submitted, but tell us a little bit about the issues that the Court was faced with and what, if anything, was unique about the case and the issues to be decided.

David Colson:

Well, what was unique about the case at the time was that it was the first case that was going to grapple with the delimitation of a 200 mile zone. In the first case in 1969, the Court had looked at the continental shelf in the North Sea.³⁰ And in the Anglo-French case it had been about the continental shelf of the eastern Atlantic. Suddenly, the world had had this revolution, really, of creating 200 mile zones, and depending on what your particular focus might have been, most of that 200 mile zone was fish related. The reason you were doing it was because of fishery interest and issues mostly. So, what did that mean then for lawyers or judges who were going to deal with delimiting a 200 mile zone that now had this fisheries element in it? We didn't know. You could take the view, it was basically the Canadian view, let's look at this simply as a geographical perspective and let's draw the equidistance line. That word has been used. I hope you all understand what that means. An equidistance line is a line that is always half way between the base points on the two sides. So if I say, "what is the equidistance line in this room?" It's the line going down the center half here. It's a simple concept when you're in an adjacent state situation like the United States and Canada, but the line begins to do funny things depending on rocks, islands, and coastal protrusions. And, that is why it was very favorable to the Canadian side in this particular piece of geography that we had to deal with in the Gulf of Maine. Anyways, that's just background.

But we had to deal with [the fact that] we were going to delimitate a fishery zone for the first time. We did not have an economic zone. Neither the United States nor the Canada at the time had accepted the concept of an economic zone. The United States and Canada had continental shelves, and we had 200 mile fishing zones. Both states did. It was open to us to say, "let's have two boundaries." Let's have a boundary for the continental shelf and let's have a boundary for the fishery zone, and the Chamber can decide that. But it was obvious to both sides that that would be a disaster in the United States/Canada context if suddenly we had two lines for different purposes out there; if we had one country with jurisdiction over the oil and the other country with jurisdiction over the fish. That would have maybe started a war. We used the term "single maritime boundary." When we used the term "single maritime boundary" we didn't think about it too much. It was just the obvious thing that we wanted one boundary. We wanted the Chamber to give us one boundary that would divide the continental shelf

30. North Sea Continental Shelf (F.R.G. v. Den.), 1969 I.C.J. 3 (Feb. 20).

and the fishery zones of the two countries. Now if you look through that judgment and particularly look at the dissent, you will see that the Chamber struggled mightily with the legal concept of what is this thing that the two countries have asked for.

I submit to you that it was the most natural thing in the world for these two countries to ask for this because it was the only thing that made sense to us, but from the point of view of the jurisprudence, particularly at the time, it was a novel idea. But if you follow these things, you'll find that everybody in the world today does single maritime boundaries and the Court is quite familiar with this and doesn't seem to have any trouble with it.

Now just one more addition, since we were going to delimit a fishery zone, we had to come with some ideas about why it's important—what are the legal elements that would be the foundation of the argument that would say the boundary ought to be here? The U.S. side took from the North Sea case reference to unity of the deposits which is in that judgment.³¹ And we took the view that that should mean unity of fishery resources—it should be something that the Court should look to try to do: not divide up a common pool. We looked at the history of fisheries relationships. We developed the concept that single state management is what the 200 mile zone is all about. These were all developed with a vision of trying to support the line that we wanted. Canada reacted to that and brought in socio-economic considerations, saying that a boundary line being developed by the Court at the end of twentieth century should not play a role of totally destroying local fisheries communities and interests and have the socio-economic impacts that the U.S. line would have had on the Canadian side. Now, we argued about all of this. Ultimately, none of it had any weight or does not appear to have any weight in the judgment. I think at the time we were making it up because we didn't have anybody to guide us.

Today, if we were arguing it again—if we were to go to the Arctic and argue the United States/Canada dispute—we would argue a very different case today. But in the end of the '70s and early '80s when we're dealing with this, we had two precedents in front of us: the North Sea case and the Anglo-French case. That's all we had. So we were drawing on those [few precedents]. We didn't get the Libya/Tunisia case³² until we were well into the drafting of the second round of pleadings. So, we were having trouble figuring out how to make the argument. We knew what our position was, but we were having

31. *See id.*

32. *Continental Shelf (Tunis. v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18 (Feb. 24).

difficulty trying to figure out how to make people like Judge Schwebel pay attention to us in a legal context.

Davis Robinson:

I'd like to add if I could Ralph, one brief further vignette which may be amusing to everybody. When I got into this in a big way, I asked David at one point, "why aren't we settling all four of the maritime boundaries between the United States and Canada? Why are we only doing this one on the East Coast?" Then he related a big saga about negotiations over the years between the two nations where there were efforts to solve more than the one single boundary in the north Atlantic. But then there was the problem that the East Coast fishermen will figure that you're somehow trading them off against the West Coast fishermen. So the decision was made that no, we really cannot do that, and, furthermore—and this is what I found very amusing—the arguments that the United States and Canada are respectively going to make in this case so vociferously on the East Coast are exactly the opposite of the arguments that they will make on the West Coast. So that if, in the World Court on the Gulf of Maine Case, it is Canada that will die on its sword over the notion of an equidistance boundary, in the West Coast, we, the United States, will be the ones who will go on our sword over the notion of equidistance. So, that was one of the reasons why we only did one single boundary at a time. And as you may know, it is now twenty five years later, and the three other maritime boundaries still are not settled.

Ralph Lancaster:

The complications that David mentioned [above] about trying to establish the boundary underscore the uniqueness of this issue that was presented to the Court for the first time. When we began, I mentioned the fact that the fish don't care where the boundary is, and you sort of chuckled, but stop and think for a minute. You've got scallops on the end of Georges Bank, closest to Canada, but the cod migrate. The fish go back and forth. So, if you analogize to a boundary dispute in the state of Maine between two neighbors, and you draw a line down, the Court says "here is the line—trees are on one side and trees are on the other side and the fence is here." You can see where those things are, but nothing is moving. Now, when you are talking about a single boundary line, and that's what it was in the Gulf of Maine, you are talking about fixed assets—oil, gas, mineral resources—that are under the soil, and

you are talking about a water column, and you are talking about a moveable feast—fish going back and forth. Am I correct, David, that that's what was the complication with the Court and what we were trying to do?

David Colson:

And we were trying to get all the fish. (*Laughter*)

Ralph Lancaster:

Exactly, exactly.

Of course, Davis alluded a little earlier to the strategy and the selection of the panel and the presentation of the issues before the Court. Let's turn to the Canadian strategy now and the Canadian expert from Hingham, Massachusetts who is going to—Ralph, good name Ralph—tell us about what, from your perspective, the Canadian strategy was here.

Ralph Gillis:

Well, let me start with two housekeeping things. Orlando, good to see you. I haven't seen you since 1969.

Ralph Lancaster:

He hasn't changed.

Ralph Gillis:

Well, he still has hair, which is an interesting point. David, being from Dalhousie, I'd like to point out as a graduate as St. F.X [St. Francis Xavier University, Antigonish, Nova Scotia], that it was kind of a dirty thing for you to get up here and brag about having hair. There is a certain level of competition amongst the Canadian universities, especially in Nova Scotia.

I'm guessing as to what the Canadians did, but I will tell you why I think there is some validity to what I'm guessing. Derek Bowett, who was one of their advisors, and Robbie Jennings, who eventually became president of the ICJ, were both advising the Canadians. Bowett was named and [he and] Jennings [had] some sort of *ad hoc* relationship. At the time that they were developing their case, I was actually doing a PhD

under Robbie Jennings at Cambridge. During that time, Don McRae, who was another one of their experts, came through the same Cambridge mill. But the British, there is a real emphasis and understanding of the concept of jurisprudence and a jurisprudential approach, which is something I don't think that we had really grasped on the American side. Now, why that is important, I think you can see in the dissent of Judge Gros who took a strict positivist approach to how he was going to handle the case. And you can also see it in Ago, because Ago got tripped up in the concept of equity. And the concept is of course equitable principles, not equity. Equity gets too close to *ex aequo et bono*, which was exactly what was not supposed to happen. Now the problem with dealing with equitable principles is that it can work for you and it can work against you.

[. . .]

The Canadians took the exact position that Davis described. That is, they tried to narrow down the point of dispute in order to identify where any potential equitable benefits would arise in their behalf. In dealing with equitable principles that is where they got into the discussion of economic dependence. We sort of characterized it on the American side as Appalachia North. It isn't quite Appalachia North, but that is what they would have made it out to be. The other side of this is that, the Canadians had the concept in their mind of an *uti possidetis*, or condominium, almost a Gulf of Fonseca kind of analysis as to what the Gulf of Maine should be with the shared resources. And, they, like us, were trying to grab as much of it as they could possibly get their hands on, which is where they went with the concept of the equidistance line and moving it around.

There are a couple points that they were at risk on there. One, they would have considered the Bay of Fundy as internal waters. With that, it excludes the Bay of Fundy and the shoreline of the Bay of Fundy, from Grand Manan, from any consideration as to what coastline is involved. They also would have ignored Cape Cod, which raises an interesting question, because Cape Cod has a closing line that runs from the tip of Cape Cod over to Marshfield. And Cape Cod Bay is internal waters of the United States. It should be treated exactly the same as dry land. So that Cape Cod is not just the narrow band of territory that you see there, but does include, for juridical purposes, the enclosed area of Cape Cod Bay. So the risk they had in making their arguments about Cape Cod is that while accepting that the Bay of Fundy should be excluded, Cape Cod would remain in the game. Whether Cape Cod is in or whether the islands appertain as being potential headlands, the real risk that is run here is in the projection argument that Davis was describing and where it

sets up—if you look at the Massachusetts coastline as opposed to the southern Nova Scotia coastline—that is what gives you an equidistance turning point. Those two coastlines, as they are projected seaward, essentially offset each other. And that’s when the boundary does indeed start to become perpendicular on an equidistance approach.

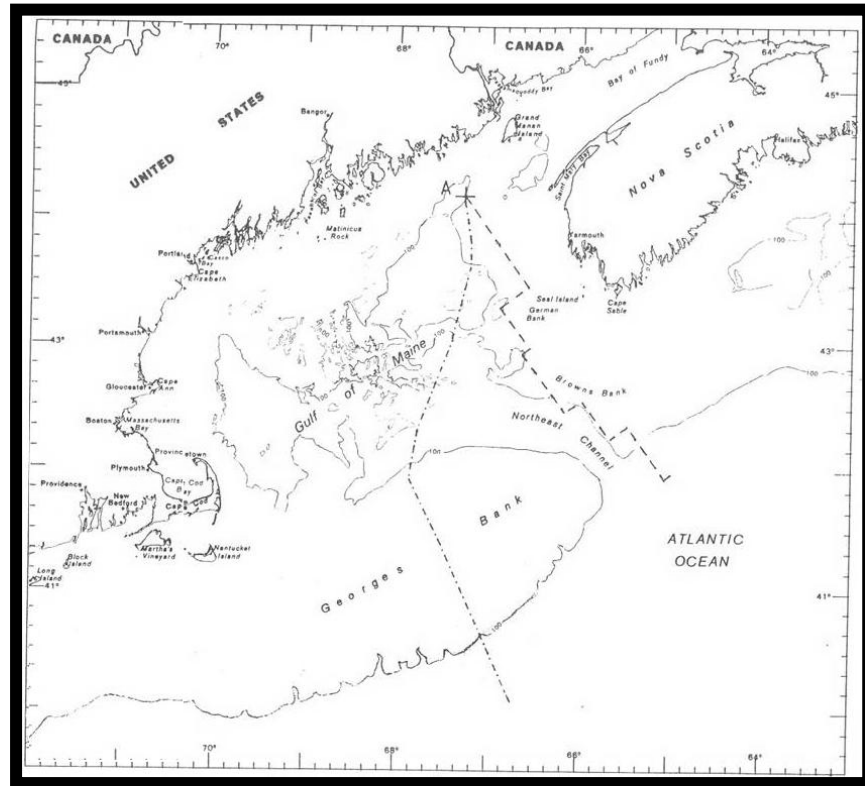


Figure 3: Delimitation lines proposed by the United States and Canada.³³

But when you do that—well, if you don’t know—there is still an undecided boundary section here with North Rock and Machias Seal Island, so we skipped over that. But if you take a look at that equidistance boundary and you then look at the Maine coastline, what happens is that the equidistance boundary cuts off approximately half of the Maine coastline seaward projection. And what the Canadians had to

33. *Gulf of Maine Case*, 1984 I.C.J. at 289. The United States’ line is the easternmost of the two, while the Canadian line is to the west.

do was to argue that that didn't create an inequity. The concept is not to establish that you have equity, it's to establish that there is nothing inequitable in what has happened. That is where they start to fall back on the economic arguments and on the common resource arguments and the other arguments, which are essentially going to a super management/unitary management kind of situation which would support an equidistance line. The weakness that they had was that the boundary could essentially be given half-effect and moved north. And if you do that, what you get is a line not too dissimilar from the one that the United States proposed. But if you go with the equidistance line as the Canadians proposed it and you separate those two lines—the one proposed by the United States and the one that the Canadians proposed—you will find that the decisional line is kind of a bi-sector. And it goes back to a phrase that shows up in the decision about “equal.” I think they backed into the decision. I think that they decided to bisect the line. I think that they decided to come up with something to rationally say that it's equal and all the rest of it is a construct. It has very little to do with the established boundary delimitations. And in the U.S. there is a significant jurisprudence which was set in the U.S. Supreme Court [decisions] on boundary delimitation. We apply international law in our boundary delimitations. *Texas v. Louisiana*.³⁴ *New Hampshire v. Maine*, where the thalweg was important.³⁵ There are a variety of others that have gone on. Some negotiated, others litigated, usually in front of a special master. So when we came to the table to put our case together, our jurisprudence was out there and is recognized in the international community as having validity.

There is also a tremendous history of disputes between the U.S. and Canada on fishery issues. In the Bay of Fundy and also others arising in the north Atlantic fisheries cases. And, if you really want to have some fun with boundaries, take a look at the original 1783 Mitchell Map, which was attached to the 1783 peace treaty and has two wonderful lines drawn right through the middle of the Bay of Fundy. I'm sorry, from the Bay of Fundy down through the Gulf of Maine. One for fisheries, the other for islands. It's an interesting issue that has been ongoing since 1776. And I think the Canadian point of view would be that it didn't become an issue in 1776; it is a joint package of resources out here and it should not have been a problem to jointly manage it. I think that's what they were after.

34. *Texas v. Louisiana*, 426 U.S. 465 (1976).

35. *See New Hampshire v. Maine*, 426 U.S. 363 (1976).

Ralph Lancaster:

Thank you very much, Ralph, my Canadian friend.³⁶

Now, Davis and David, do you want to talk a little bit more about the U.S. strategy, or have we talked too much about...

Davis Robinson:

I'd like to add a bit, if I could, [about] what I understood as the Canadian strategy. It will give me the opportunity to tell the film story.

Ralph Lancaster:

I knew this was coming.

Davis Robinson:

The United States was on new territory, so to speak, in arguing the separation of the fish stocks at the Northeast Channel. In other words, we were making an environmental argument that was very factually dependent. The Canadians had a similar situation with their economic dependence argument. They argued that their Nova Scotian citizens were very, very poor, and were very, very dependent upon the fisheries at the northeast peak of the Bank. And that was very factually driven also. Unfortunately, in those days—I don't know whether it has now significantly changed—any major issue of fact becomes a problem for the Court because they don't have the resources [necessary to deal with such complex matters]. In those days, the judges on the World Court didn't even have a law clerk. So unfortunately those two arguments ended up, I think, in the Chamber's mind as: "well, we will simply allow them to cancel each other out." The U.S. has this big argument about the fisheries stocks and the Northeast Channel: if you have a Scotian halibut and I have a Georges Bank halibut, as I understand it, you can go to the Boston fish market and someone will be able to tell you which is the Scotian halibut and which is the Georges Bank halibut. That is what we were arguing, in effect. And so they were able to say "well we just cannot really deal with this whole economic dependence argument from Canada."

36. It should be noted that Mr. Gillis is, in fact, American.

Well, in the middle of all this, we get a letter from Len, as I remember, saying that he wants to introduce a film for presentation before the Chamber. And, the Chamber you will recall, in addition to one American citizen and one Canadian citizen, had one Italian, one German, and one Frenchman. And if you look at the list of the team members from Canada, you will notice that very, very prominently in the list is a very well known French law scholar and expert, a very well known Italian law scholar and expert, and a very well known German law scholar and expert. So I'm sitting in Washington, the novitiate, and I'm saying to myself, "well gee, maybe we better get some Germans and some French and some Italians on our team." And then I said, "well, maybe I really shouldn't do that in a country of 800,000 lawyers." We Americans have 800,000 lawyers and if I go into the World Court with a team of oral arguers not from the United States of A, I think I would be very fast run out of town.

But, in any event, I said to Len, "I would like to see the film." And then he wrote a letter, as I recall, to the President of the Chamber, and the film was all about how poor Nova Scotia is, about the French influence in Canada, Acadia, all of this goes on and on. And so I watched this movie prepared at considerable expense, I'm sure, by Canada. [. . .] It was a beautiful movie, [it] played the Marseillaise and other wonderful French songs, it was just terrific. It showed Canadian-Italian restaurants as I remember, and there were German beer halls. It was really quite a wonderful, and moving movie. So I said to David, "do you think we could look without having to spend a cent to see whether maybe Canada—maybe Nova Scotia has produced a movie of its own?" So low and behold after a search, we find a movie that had been prepared by the Nova Scotia Chamber of Commerce and this movie touted Halifax as a major North American banking and financial center with a state of the art airport. So I then went to Len and I said, "you know, we have a movie that we will show ourselves. If you want to show yours then we will show ours." And he said, "well, what is yours going to show?" And I said, "oh, we have one that we found was made by your own Nova Scotia Chamber of Commerce." There was no movie shown in the World Court. (*Laughter*)

Ralph Lancaster:

Judge Schwebel, without trespassing on the talk that you are going to give us tonight, will you tell us a little bit about the dissent and about your separate, not concurring, but separate opinion or would you rather wait until tonight?

Judge Schwebel:

Well, let me say this much—the parties not only specified the names of the members of the Chamber in the way I earlier described, but also indicated that the president of the Chamber should be Judge Gros. Now, as was indicated earlier, Judge Gros was not a popular figure in the Court. He was popular with me. We got on fine. But he was not liked by a number of other members of the Court, particularly those from developing countries. And he was not on speaking terms with the then President of the Court, Judge Elias—the acting President who became the President as of February '81. And so it seemed to me that it would be impossible to run the Chamber, which one had to run in consonance with the operations of the Court as a whole, if the president of the Chamber and president of the Court were not on speaking terms. And they were not. It was that bad. So I talked with the Canadian *ad hoc* judge, Professor Cohen, and we agreed that this was simply unworkable. And, when it came to the vote in the Chamber for the president of the Chamber—because the Chamber itself had to elect its president just as the Court elects its president—Judge Ago, who was innocent in this—Judge Gros never believed it, but he was innocent in this—was elected president and Judge Gros was not. Judge Gros reacted to this very bitterly and brought an end to his longstanding friendship with Judge Ago, which was rather a pity. But it wasn't a pity otherwise, because if Judge Gros had been president of the Chamber—and I did not know this at the time, I did this without any regard to a guess about what his views on the merits were. I had no idea. But I did know about his relations with the president of the court. If he had been president of the Chamber, it probably would have come out to have been a judgment of a strict equidistance type as Canada sought, because that is what you see embodied in his dissent, which is a strong attack on the judgment as being one that is essentially corrected by equitable considerations, indeed, as even *ex aequo et bono*, a compromise rather than one that is legally adjudicated in response to legal principle. I say this without a criticism of Judge Gros who was an extraordinarily able man and a first class jurist. He had been on the Court for a long time. He had personality difficulties. He had managed to antagonize many members of the Court. His opinion, as you see, is a very able one.³⁷ He was a very able man indeed.

My [separate opinion] was a very minor thing. I essentially concurred with the award as Judge Ago wrote it, and he wrote it, I cannot

37. See *Gulf of Maine Case*, 1984 I.C.J. at 360-90 (Gros, J., dissenting).

recall, I may not recall now after all these years, I don't recall really debating with him in the Chamber what the content of the judgment should be. He essentially drafted it as he wanted to draft it. I don't know to what extent he consulted with Judge Mosler. He was not then consulting with Judge Gros because of this rift I described, even though they had been such great pals before. My belief is that he regarded the U.S. national judge and the Canadian *ad hoc* judge as incidental, rather than essential to the decision. We didn't have a great deal to do with it, except for voting to adopt it. My opinion essentially went along with his judgment, but in the way he modified the equidistance line—by taking account of the lengths of the coast of the parties bearing on the area of the dispute—there was room for difference of opinion as to whether one counted this bit of coast or not, and on that I differed. My difference would have given the United States a somewhat larger slice of Georges Bank than the Chamber's decision did, while Judge Gros' dissent would have given the United States markedly less than Judge Ago's line.

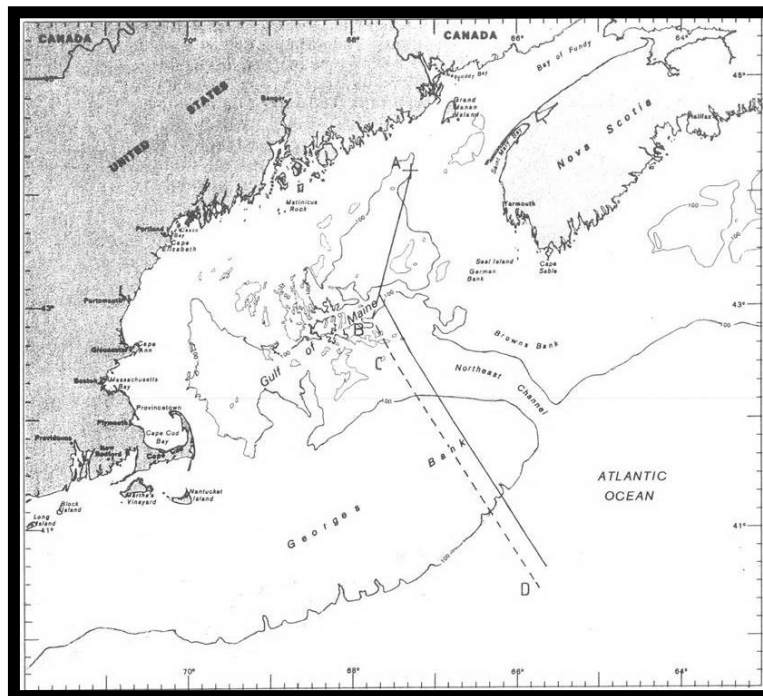


Figure 4: Showing the line indicated in the separate opinion of Judge Schwebel as well as the line ultimately selected by the Court.³⁸

38. *Gulf of Maine Case*, 1984 I.C.J. at 359 (Schwebel, J., separate opinion). The Chamber's line is indicated by the broken line, while Judge Schwebel's line is unbroken.

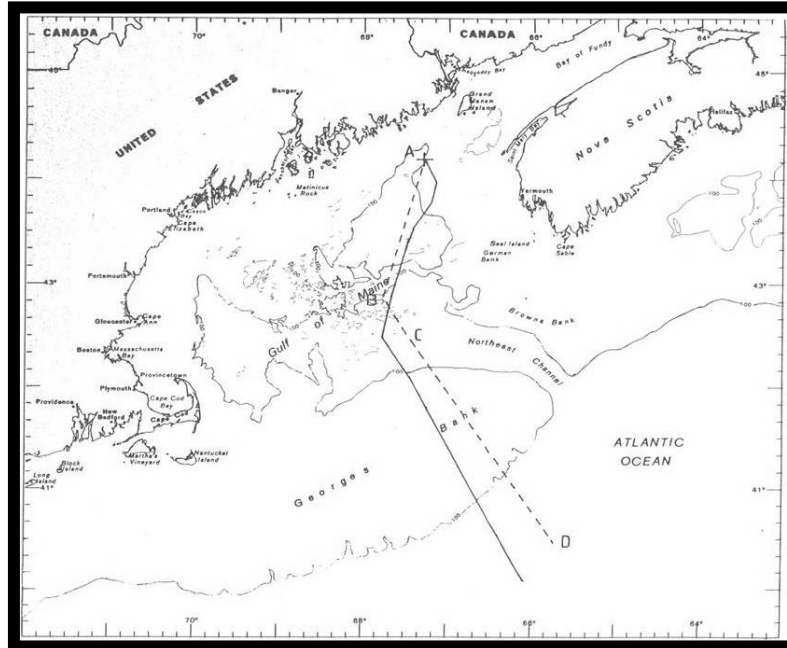


Figure 5: Showing the line indicated in the dissenting opinion of Judge Gros as well as the line ultimately selected by the Court.³⁹

As I look back on it now—and I scanned the opinions last week—I think there is much merit in Judge Gros’ dissent if one approaches it strictly on the basis of hard legal principle. It’s not all that easy to see why and on what basis Judge Ago arrived at his line. Clearly his instinct was to reach a compromise, which very much was his manner in his period of service to the Court and otherwise, in his career. He wanted to arrive at a decision that he thought both sides could swallow, not unreasonably. That didn’t concern Judge Gros. He was quite convinced that in this case, and in all cases, his view was the right view and that was that. In all, I think it is a defensible decision, but it is not all that clear just why the line is where it is.

Davis Robinson:

If I might, Ralph, I would like to say just two things about what Steve just said . . .

39. *Gulf of Maine Case*, 1984 I.C.J. at 390 (Gros, J., dissenting). The Chamber’s line is indicated by the broken line, while Judge Gros’ line is unbroken.

Ralph Lancaster:

One.

Davis Robinson:

And maybe Dave will want to add to this. If you look at the map, it becomes very apparent that the length of the coast inside the Bay of Fundy becomes fundamental. If you can close off the Bay of Fundy then the United States coastline in terms of the distance of the coastline is many times that of the Canadian coastline in the area that is in dispute. Now the Canadians—in the four walls—as you may know, make very extreme maritime claims, in my judgment. For example, the Northwest Passage. Things that are very sensitive between our two nations. They had, as I understand it, claimed the Bay of Fundy as internal waters, and thus a closing line could go across the Bay of Fundy. Now, the United States had never recognized the claim of the Bay of Fundy as internal waters because it was way, way beyond any internal waters that would be recognized by the state of the law. So I said to myself, “well look, why don’t we go to the Defense Department, in an effort not to upset our friends from Canada” [because] we have—by the way—a very, very special relationship.

And when—I’m going to digress—when we had the case, there was only one hotel in The Hague that would take not only one of the two national teams but would take both of the teams. So, both of the Canadian and American teams ended up staying [and working] in the same hotel [but in opposite wings]. We went down to get breakfast every single morning together, and then we went into the Court and we verbally fought like stink. Len and I had made an agreement that these two great friendly nations, no matter what we said on the merits, we were going to set a very good example for the rest of the world [by our behavior towards each other]. We were going to act as decent human beings and we were going to treat each side with tremendous respect. And I think that we did that. And I’m very, very proud of that.

But in any event, I went to the Defense Department and I said, “look, you are not sending your ships up there because you do not want to irritate our friends from Canada. We do not recognize the internal waters claim; but on the other hand you are not sending the ships up there to challenge it. Maybe what we should do is just say, “ok, you can have your internal waters claim and, ah-ha, there will be the closing line and then your coastline will be very, very short and the United States will get

a much larger chunk of Georges Bank.” But, unfortunately, it didn’t sell in the Pentagon. (*Laughter*)

Ralph Lancaster

. . . [The maps from the decision show] you clearly where the line was finally placed and where it would have been placed by Judge Gros and where it would have been placed by Judge Schwebel. You [see] that the line that is actually drawn by the Court is about midway on George Bank between the two other lines.

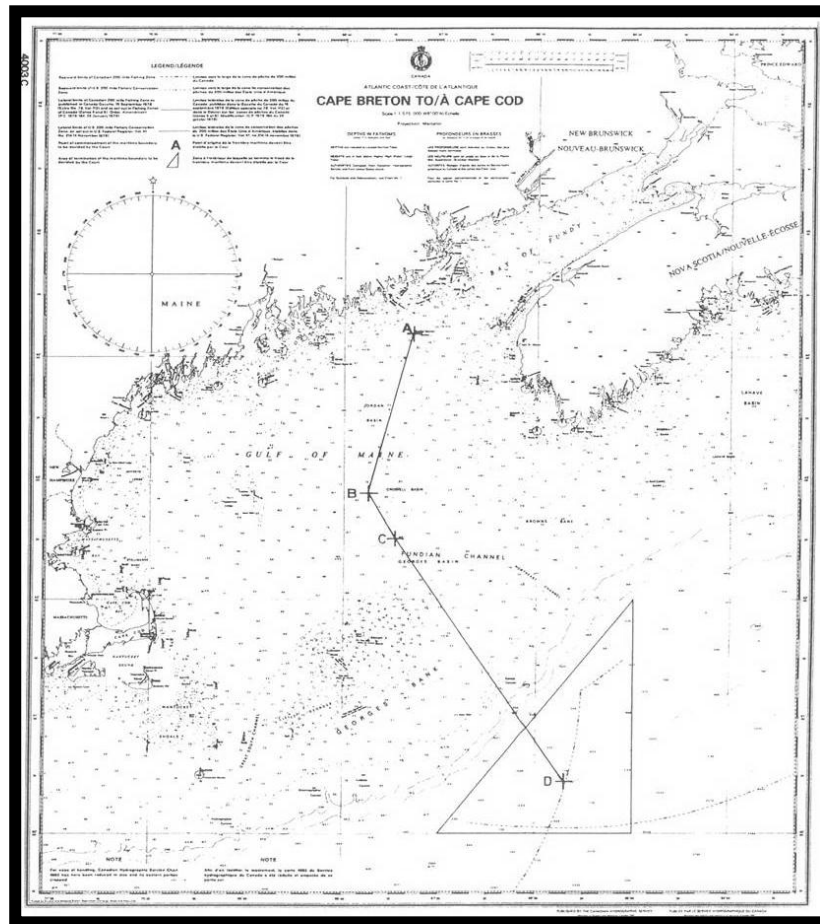


Figure 6: The boundary delimitation line ultimately established by the Court.⁴⁰

40. *Gulf of Maine Case*, 1984 I.C.J. at 346.

We are going to run out of time here, I want to save a little time for questions if there are any from the audience, but first let me throw this one out—David, Ralph—who won?

Davis Robinson:

Well, the fish lost. (*Laughter*)

David Colson:

I don't know, I don't think there is a winner and loser in something like this. From the U.S. side, having sort of formulated our position based on one hundred percent, if you don't get one hundred percent, ninety percent is sort of a loss. If that is the way that you look at things, there has been quite a lot of feeling that maybe the U.S. didn't do as well as it should have done. I don't really know how the Canadian side looks at it. My feeling is that since they basically achieved the northern peak of Georges Bank, which was the area of principal interest for the scallop fishermen, they probably felt that they got what they needed to get. I guess that's the way I would put it.

What I was satisfied with at the end of the case was that we had made an enormous effort to keep the U.S. constituent interest involved throughout the whole case. They had rejected the fisheries treaty in 1980. The last thing that we wanted was an I.C.J. judgment that would result in such a groundswell in New England that it should be rejected because it had been unfair, or something like that. We didn't want that. The way to manage that was to keep everybody informed throughout the case, so they knew what was going on, so they wouldn't be surprised when they didn't get what they wanted. It was hard, always, to have those conversations with people because you can't go make a talk to a group of people like this with a reporter in the room and say, "hey guys, we aren't going to get what we want." But we had enough meetings in closed sessions with the Regional Fisheries Management Council. I'd come up almost every month to meetings in New England with groups to let them know about it and keep them informed. After the judgment was issued I got to go to a meeting in Boston—the fish expo, the New England fish expo. There were 500 guys in that room. It wasn't pleasant, but we got through it. And what was particularly important was that the leaders of the interest groups were all there and after awhile they all stood up and they didn't say "hooray" for the State Department, but basically said, "we took our shot and let's move on." It was sort of that attitude that began to emerge and I think that we were able to

demonstrate that the 200 mile zone and again I use the word “revolution”—it was a revolution—[caused] fishermen all over the world to go home. Whether you were a Russian fisherman or whether you were a Japanese fisherman—this caused you to go home. We had enormous shrimp fleets in Texas which fished off the coast of Mexico which had to go home. We had fishermen off the coast of South America who had to go home. These were U.S. fishermen. The guys in New England had sort of had a break for almost nine years. They were able to fish where they had traditionally fished and now that they got a boundary line they were going to have to live with it. And that was sort of way that it went down.

I remember very well, right after the judgment, Senator Paul Tsongas from Massachusetts gave a tremendous floor speech about how the United States Senate had rejected the fish agreement, had put it in the hands of the lawyers, the lawyers went off and had done their thing, and now we had an award and we were going to have to live with it. It was a good statement. So I don’t know if it is a won/loss, I don’t know what is going on in Georges Bank today. There may be a PhD student out there somewhere who has done this, but I’d be very interested in seeing an economic assessment comparing the Culter-Cadieux fish package to what has emerged in the last twenty-five years. I have no idea what it would show. But, I’m sure with economic modeling and all of that, that people could figure that out fairly well and it would be quite interesting.

Davis Robinson:

I would like to add...

Ralph Lancaster:

Let me turn to Ralph, please.

Davis Robinson:

Oh, okay, please.

Ralph Lancaster:

Ralph?

Ralph Gillis:

I think in terms of implications beyond the decision, I think one of the great ironies about this is that the argument that Cape Cod should be a base point or should be ignored came home to bite Nova Scotia in its dispute with Newfoundland, because Sable Island was just wiped out as being irrelevant in that boundary, and of course that shifted things far from the area that Nova Scotia wanted. It's one of those [situations where] you have to be careful what you argue. It may come back to get you.

I have two [additional] points. Number one: David, I think you will agree with this, one of the things the United States consistently tried to do, in all of its efforts, in its domestic municipal litigation on boundaries, on the positions that we have taken on where our baselines are, is to be conservative, and to try to set a principled approach that is a model that can be followed by the rest of the world. I think the U.S. and Canada together have combined to establish the rule of law. Both sides probably went home and said that they weren't happy. And I think the second point is that both sides got more than they deserve. Davis brought it up earlier. Let me quote a man who had the same opinion that Davis had—Sir Robbie Jennings—who eventually became the president of the ICJ, and who made the point when asked “why go through producing all of these memorials and hiring all of these lawyers and all of these experts, what do you achieve?” His answer was: “we prevent wars.” That is what it is all about.

Davis Robinson:

Ralph, if I might, first of all, this had been on every single agenda of every single [meeting between the] President and the Prime Minister for forty years. When the award was issued, the issue was no longer on the agenda. Three minor things to say that I hope are also of interest. Judge Ago, after the award was issued, gave a lovely reception for both of the parties and their teams and he pulled me aside, and he said “now, my dear Robinson, you must not be upset with the award, you have to realize that I only had one objective [in the case from the very beginning], and that was equal disappointment.”

From my own viewpoint, I believe that the judgment was better than the fisheries treaty that was turned down. I think, indeed, that actually the New England fishermen may have been better off, but maybe, David, we need a study to show that. The last thing I would say, where I think that the Chamber did the wrong thing and where Steve in his separate

opinion would have done the right thing—they basically split the baby fifty-fifty between the extreme claim of Canada and the U.S. line. This gave Canada an extra nine miles after the 1977 Anglo-French award and Canada's resulting new argument that there is no Nantucket and there is no Cape Cod [as far as determining the equidistance line is concerned]. If the United States had been given nine extra miles of the bank, and, as I understand it, those nine extra miles did not contain a lot of scallops or lobsters or other fish stocks, then I think the award would have been a very good one. But in fact, what the Chamber has done, unfortunately, is to encourage sovereign states to make the most extreme claims that they can make in a maritime boundary dispute, and that is very unfortunate.

Ralph Lancaster:

Thank you, Davis.

The program says that this panel is supposed to stop at five o'clock. But, Charles said that we have some more time because we have an hour break before the reception. I don't want to stand between you and the cocktail hour, but if there are questions, the panel has indicated that they would be happy to try to respond.

Male Speaker:

The question that you raised is one that I had, and that is "who won?" But, I think, winning in terms of determining the allocation of this space is one thing—it seems like everyone here has indicated that it is a trade off—not between space versus space, but space versus a desire to solve a relationship problem between the two nations. So let me ask you this, had this not been submitted, someone play out the scenario for the overlapping claims and the overlapping access employed by both countries fishermen. What would have happened?

David Colson:

We had—this is, again, for the lawyers here, an interesting set of constitutional issues—in 1977, the 200 mile law put into effect. The United States and Canada had been fishing off each other's coasts for 200 years. The Canadians are down off of Georgia fishing and U.S. guys are up off of Newfoundland fishing. And so in that first year, what to do? Well, we've got this dispute we are negotiating, so we took the position that as long as we are negotiating the President has the constitutional authority to allow the status quo to continue. And, we took

that view and did an agreement, which was sort of like the old kinds of fish agreements—Canada can fish here, the U.S. can fish there—and it was kind of a continuation of the status quo. That was '77 West Coast. In '78—not for reasons on the East Coast, but for reasons on the—the federal government got sued and we lost. The federal government lost. And thus the reciprocal fishing arrangement that had gone on forever was terminated by the federal courts. Now we still had the disputed area. And we were able to maintain the position, with the Department of Justice's support, that as long as the area was in dispute the president had the constitutional authority not to enforce U.S. law against whomever he wanted to not enforce U.S. law against—in this case, Canadian fishermen. If the Russians had shown up in there, the U.S. would have enforced. So we lived with that, and we lived with that point of view all through the case. And I assume that if we had not gone to Court and we still had a disputed area, which the United States and Canada still do in Dixon Entrance and which we still do in the Artic, we would deal with it the same way. And as far as I know, that's the attitude of the United States and Canada. We don't enforce against each other in those areas. Now, in those other areas, it is perhaps not as big of a deal as it would be on the northern half of Georges Bank where you have so much fishing activity. But in the disputed area I think the United States and Canada managed that pretty well, and we didn't have any fisticuffs during the case in the disputed area. We didn't have any law enforcement problems by the coast guard; one coast guard or the other.

Just to elaborate on what Davis said about the expanded Canadian claim, and just to defend the Carter Administration a little bit. When the Canadians expanded their claim on Georges Bank in 1978 the U.S., of course, couldn't say "you can't do that," but what we could say is "we will arrest you in that area of expanded claim." The Carter Administration continued to take that view. But when we got to the Court, though, we had to take the view—and the Canadians insisted on this—that so long as we were before Court, the United States could not be arresting Canadians in an area that Canada was claiming before the Court. And while I don't recall exactly how we may have articulated our position vis-à-vis Canada, we knew that we did not want to have a squabble in front of the Court about the U.S. arresting Canadian boats in an area. So we didn't. The U.S. law enforcement policy, once the case was before the Court, was to not arrest Canada in the area of expanded claim.

Ralph Lancaster:

Are there other questions? Yes, Orlando?

Orlando Delogu:

This is both a question and an observation. Wasn't the real winner in this Gulf of Maine Boundary Settlement Case the concept of process—painstaking but peaceful resolution of differences? Ralph's tongue in cheek remark that we avoided war between the United States and Canada is undoubtedly correct (as unlikely as that outcome seemed). Doesn't legal process give rise to the possibility of avoiding war in parts of the world, and with respect to disputes that are far more contentious—disputes that are ongoing, and have been unresolved for longer periods of time than the U.S./Canadian boundary dispute? I think it does.

As global warming continues there will be more coastal areas exposed; larger north and south polar land areas will be exposed, and a northern sea route (the so-called Northeast Passage) between the Atlantic and Pacific will almost surely be open water for large portions of the year. All of these realities are fraught with the potential for dispute between nations. Even attenuated process—process that does little more than split the difference, but does so in a manner that all sides have been heard, that brings to bear some sense of reality, fairness and underlying principles, and rules of law—process that ultimately is acceded to, will be welcome. The alternative is certainly far less acceptable.

Ralph Lancaster:

I think we can all agree that anything that results in a peaceful resolution of disputes is a good thing.

Are there other questions?

Davis Robinson:

That is where—if I might add . . .

Ralph Lancaster:

Is this a question?

Davis Robinson:

[The use of a Chamber was a] major development, because the Chamber system allowed these two states who really didn't want to have their boundary determined by certain judges from certain countries because of bias, or phone calls from the foreign ministries, or whatever, to proceed. This was a way to use the World Court, which had already been paid for, and to get the imprimatur of the World Court on the judgment, and to have a Chamber according to the wishes of the parties. So let's say that two Arab countries want to have an all-Muslim Chamber. Well god bless them, that's a wonderful thing as far as I go. And then, if the rest of the world says "well maybe we shouldn't adhere to the judgment because it didn't have a judge from every single civilized group in the world," well, so what, at least the dispute has been solved. So to me, the first use to of a Chamber represented a major, major advance.

Ralph Lancaster:

Are there other questions?

Jon Van Dyke:

Yes, Jon Van Dyke, University of Hawaii. Can you tell us how many Americans were at this hotel? How many Canadians? How long the whole event took place?

Davis Robinson:

Well, we were there for about two months. And, there were about fifty Canadians and fifty Americans. And, then, of all awful things, in the middle of the *Gulf of Maine Case*, Nicaragua filed its application in the mining of the harbors case.⁴¹ So I became known as "double agent," because I suddenly had two cases rather than one. Well, what was so wonderful was, thanks to David and all of the team, we had this wonderful set up in the Korhaus hotel. So what we did was—we [asked the American and Canadian teams]—"will you please go home? And we are going to bring in the Nicaragua Case team into the Korhaus." And all of the secretaries were already there and we had the photocopy

41. See generally *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

machines and the faxes and the telephones and as David I think will attest—it was so bad in terms of work overload that I will never, frankly, personally forget those two or three months. There were secretaries there while I was [working] at four in the morning because in the Court you have to submit in writing what it is you are going to say in advance—no surprises is what they want. So you work all day long in the Court. You get the transcript [of the day's hearings] at around eleven o'clock at night. And then you've got to start to write what you are going to say at ten the [next] morning. So at four o'clock in the morning I would be there writing away and the secretaries would be sleeping on the floor waiting for Robinson to finish the draft. Anyway, it was a remarkable experience.

David Colson:

If I could just say about the intersection between the Nicaraguan Case and the *Gulf of Maine Case*, this was a bureaucratic nightmare because we had fifty U.S. people there—forty or fifty, whatever the number was. Canada had forty or fifty. All of a sudden under the rules of Court the provisional measure request of Nicaragua takes precedent.⁴² So the full Court is going to hear Nicaragua's request, and everybody who is on the U.S./Canada team [has] to go on hold. Now on the U.S. side, from a government perspective—with per diem, travel, and all of the things that governments must consider—what do we do with our fifty U.S. government people that are suddenly going to be doing nothing for the next ten days? We don't have enough money to send them back to the states and bring them back, so we basically just told everybody, "you are on per diem, do what you want. You are in Europe, get out of here. We are going to use your rooms for the U.S./Nicaragua team that is coming in." So we sort of hot-bedded that. But the Canadians side just had to sit, and they were not happy about it. They just had to sit and wait and wait and wait until the Nicaraguan proceedings were over.

Ralph Lancaster:

Was there a question back there? Yes, there was.

42. International Court of Justice, Rules of Court art. 74(1) (1978) (amended 2005)).

Male speaker:

In hindsight, having the benefit of the review of the decisions and the other opinions, was there anything that the United States could have done to get a larger share of the pie? Should the United States have taken a more extreme position? Would that have been tenable? Or was it just that the fix was in that that was where the line was going to be drawn?

David Colson:

You know, I participated in this case in my formative years, shall we say, and I learned one thing—and I don't know if all of the lawyers in the room would agree—but one of the things I learned was that in cases like this, it pays to let the judges know that you might be a little bit more flexible than you have been in your argument. I remember clearly at the end of oral argument that we had a grand debate within the U.S. team as to whether or not we should begin to indicate some flexibility to the Chamber. And we had maps made. And I had it in my presentation how we were going to do it. And of course we weren't going to say that we were going to take a different line, but we were going to subtly suggest that there might be another approach here that we would be comfortable with.

Well, we argued, argued, argued, and we took it out at the last minute. And so we came in there hardnosed on the last day just like we were hardnosed on the first day. And we didn't give a hint about something that we might have been more comfortable with. The hint that we were going to give—Congress had just passed a budget bill that had taken money away from the Department of Interior to do environmental impact assessment on oil and gas leases on certain parts of Georges Bank, and when you look at what Congress had taken away from the Department of the Interior, it had actually made a nice little line that would have gone through Corsair Canyon, which would have been very consistent with the ultimate separate opinion that Judge Schwebel wrote, but we didn't do it.

Ralph Lancaster:

And the answer to that question is: who knows?

Davis Robinson:

Well, I think, again, that David said earlier . . .

Ralph Lancaster:

Davis knows. (*Laughter*)

Davis Robinson:

No, I don't know anything. No, I don't know. We had the problem that we were already claiming one hundred percent of the Bank. We were claiming it on the basis of the fact that we were there first. We had fished there for one hundred and fifty years. We had—what David?—3,000 U.S. ships over the one hundred and fifty years that had actually gone down over Georges Bank. And if you look at these wonderful books over there (*indicating a table on one side of the room containing the Gulf of Maine Case decision and related documents*), here is a list of every ship that went down over Georges Bank. Well, there wasn't one single Canadian I don't think, until the 1940s or so. We were already claiming one hundred percent, so you can't really claim more than that. But that's what led us then to make the change [in our rationale]. We couldn't expand because we were at one hundred percent, but that is why we went from the thalweg into the adjusted perpendicular, so that Canada would be surprised [by a new line of reasoning]. And they did make some arguments in their simultaneous first filing, which, as I recall, after we asserted the new U.S. claim theory, they were very sorry that they had said what they had said in the Memorial because they had assumed that we were going to make the same thalweg claim. And we did not have the same claim, and I'm glad that we did not have the same claim.

Ralph Lancaster:

You can tell where Davis was on that side of the argument. (*Laughter*) Are there other questions for the panel? Yes.

Male Speaker:

I am from Korea. Twenty-five hours just to ask one question.

Davis Robinson:

Not about the rock that is in the middle of the sea between Japan and Korea. (*Laughter*)

Male Speaker:

There was an island issue at the time when the U.S. and Canada made the decision resorting to the I.C.J. So I'd like to know how you'd treat the island issue that was going on?

Ralph Lancaster:

Are you talking about Machias Seal Island?

Male Speaker:

Yes.

David Colson:

Well, [there is a] reason that the Chamber was requested to start its delimitation line at a particular point. That point is seaward of Machias Seal Island and its one of these things that's sort of sad, and I agree with everybody here who said process. It would be nice if the U.S. and Canada could go on and resolve another one of these disputes one way or another. But, Machias Seal Island—the United States and Canada could not get the political concurrence to include reference to the dispute regarding Machias Seal Island to the Court at the same time that we were doing the Gulf of Maine. The way to finesse that and protect both sides' positions was with what was regarded as a neutral point, and I think you can see that on the map.⁴³ There is a point A. That point A is the point that is seaward of Machias Seal Island. If you wish, you can visit Machias Seal Island during the summer on some of the puffin boats that go out there. It's largely a bird watching area. And the United States and Canada have—I've been out of this for some time but my understanding, I think, is still correct—that the Fish and Wildlife Services of both countries coordinate and cooperate so tour operators that take bird watchers out to the island Monday, Wednesday, and Friday, leave from the New Brunswick ports, and on the other days they leave from Maine ports. It's an unfortunate dispute. It should be solved. It does not need to be around. It could be resolved in any number of ways. There hasn't been much imagination put to it. Just like there hasn't been much imagination put to the other three U.S./Canada boundaries.

43. *See supra* pp. 36.

Ralph Lancaster:

David, did you have a question?

David VanderZwaag:

As I recall, maps and charts played a major role, at least their presentations did. If you look into those volumes, there are [graphics]. And I remember one in particular; the U.S. [portrayed] the Northeast Channel almost as a bottomless pit. And the Canadians [surveyed] . . . all the troughs and deep canyons [around the globe and made the Northeast Channel look like a dimple in comparison]. It was an amazing use of graphics.

A few questions: to what extent did you rely on that? To what extent did it have an impact at the end of the day? Is there any way to measure that in any way?

Judge Schwebel:

Well, the Chamber's decision gives no weight to the Northeast Channel. Judge Ago just brushed that off. It was one of the factors he said were not entitled weight.

Ralph Lancaster:

I guess the question really was: what impact did the maps have, if any? They were very pretty, very expensive.

Davis Robinson:

Well, wasn't the decision, David, at the end of the day, really based upon geography because that is the one subject that was not in dispute? We had our official map, and Canada had their map, and they were fundamentally one and the same. So the Court, rather than get into arguments over facts of economic dependence or the scallops and the lobsters and where do they live and so on and so forth, they decided to just simply go with the map. Isn't that about right?

David Colson:

Well, I think that graphics play a big role in these cases. And they played a big role in both the U.S. and Canadian presentations. They

were both important parts, and a lot of energy was put into them. I can tell you that that is still a practice before the Court. There is a tremendous amount of effort put into the graphics used to explain these arguments. What has happened over the years is that the technology has changed in such a dramatic way. Way back in the stone age the graphics that were used in the U.S.-Canada case, compared to what is used these days before the Court, are very different. I think that I mentioned to somebody—my memory is that the biggest part of the budget that we had on the U.S. side pertained to graphics because it was so hard back in those days to prepare all of this stuff. You had to have all these special people who knew how to do these things. Now all you need are a few graphic people with good computers and good software who know how to do it. They turn this stuff out all the time. That part of the World Court case has changed in a dramatic way I would say.

Ralph Lancaster:

[Further Questions?] No. No. No. Going? Charles?

Charles Norchi:

Ralph, I wonder if you would reflect for a moment on being the only trial lawyer with this team before the Chamber. Will you tell the podium story?

Ralph Lancaster:

The question for those of you in the rear is: would I reflect on being the only trial lawyer on the U.S. side and tell the podium story. Let me tell the podium story and then we are done I guess.

I don't know what is there now, but when we were there the courtroom was ornate, spectacularly beautiful, and had the most wonderful podium I've ever seen in my life. It went up, it went down, it went sideways, it tilted, it had lights, it was absolutely perfect. We made a decision on the U.S. side that we were going to present a live witness, which I think was probably the first time that had been done. We had one podium, a live witness, and my counterpart Fortier is going to cross examine the witness we present. The way the courtroom was structured, the witness was going to be in the middle and we needed another podium. So I went to the registrar, who was a delightful human being, I think he was from Brussels. He had a marvelous English accent, and I explained to him that we were going to present a live witness, which sort

of caused his eyes to open up like this. And I said that we were going to need another podium. And he said “two podia? In the . . . in the courtroom? It’s impossible.” It wasn’t impossible, and we managed to get another podium and it worked very well. (*Laughter*)

I didn’t feel out of place. I certainly had no particular expertise in either international law or the law of the sea, but I make my living in the pit presenting witnesses, direct and cross examination, and I leave it to others as to whether I made any contributions beyond that.

If there are no other questions, I will say to the lawyers in this room, what do you think about having an opportunity to select and name your judges? (*Laughter*)

Thank you all for coming. Thank you for being so patient with us. Charles?

Charles Norchi:

It is for us, on behalf of the law schools at Maine and Dalhousie, to thank you for making this contribution. By the way, have the five of you ever sat together on a panel in the twenty-five years since the case was decided?

Ralph Lancaster:

No. I haven’t seen David in twenty-five years. I didn’t even know he had a place in Rockport and he drives right by me and doesn’t stop. (*Laughter*) (*Applause*)