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THE HAGUE LINE IN THE GULF OF MAINE: IMPETUS OR IMPEDIMENT TO ECOSYSTEMIC REGIME BUILDING?

*John Alton Duff**

I. INTRODUCTION

In 1984, a Chamber of the International Court of Justice (ICJ), at the behest of the United States and Canada, delineated a maritime boundary between the two nations partitioning the Gulf of Maine.¹ In doing so, the Court did what Solomon would have counseled against, slicing a living system in two. Twenty-five years after the decision, with a wealth of new information about the status, trends, and challenges of the Gulf of Maine ecosystem, a simple question arises: does the Hague Line facilitate or frustrate ecosystemic regime building? This paper examines how, if at all, the ICJ's boundary line has played a role in efforts to engage in ecosystem management in the Gulf of Maine. In doing so, it sets the stage for more detailed presentations on bilateral efforts to manage and maintain ecological components and services that the ecosystem provides.

II. ECOSYSTEM REGIMES: THREE FACTORS

Legal scholars who examine the emergence of legal institutions in response to ecological principles characterize such developments as

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

'ecosystem regime' development.² I employ that term since it reflects this discussion's context and captures what I have considered to be three important interacting factors in terms of marine resource development and law: 1) ecosystem value/capacity/relationships; 2) ocean and coastal use and development; and, 3) ocean and coastal law and policy development (see figure 1).³

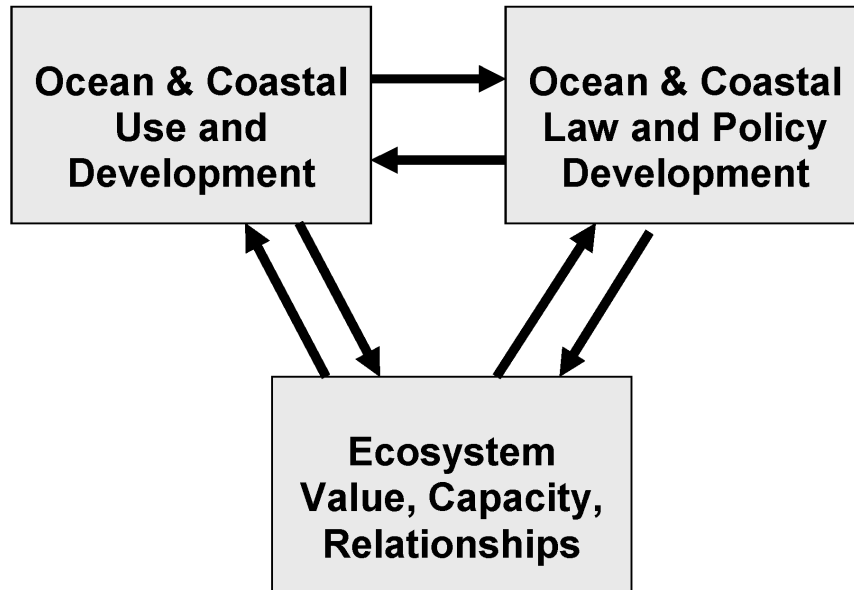


Figure 1. A general depiction of three factors leading to the emergence of ecosystemic regimes.

III. THE THREE FACTORS IN THE GULF OF MAINE

The history of U.S. and Canadian marine resource development in the late twentieth century was significantly influenced by a set of technology and policy linked factors that allowed both nations to extend

2. See RICHARD O. BROOKS, ROSS JONES & ROSS A. VIRGINIA, *LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME* (2002).

3. While this figure may be a novel depiction of the relationship between the factors, legal scholars have used this relational context for quite some time. See William Burke's decades-long contribution to this field from his early work, MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962), to his establishment of the journal *OCEAN DEVELOPMENT & INTERNATIONAL LAW* (ODIL) in 1970, through his textbooks, articles, and other books. [Disclosure: I serve on the editorial board of ODIL].

their research and resource exploitation capacity further offshore, with growing jurisdictional authority and with greater economic efficiency.⁴ Technological advances in navigation and shipbuilding developed during the Second World War, and the benefits of those advances, spread from military endeavors to economic endeavors.⁵ Identification of offshore oil and gas reserves along with new efficiencies in deepwater fishing prompted many coastal states, including the United States and Canada, to deploy their nationals, their technology, and their appetites into heretofore little used ocean areas. States began proffering claims of offshore jurisdiction and authority, such as U.S. President Truman's continental shelf claims in 1945.⁶ Such claims in turn prompted the convening of United Nations sponsored conventions designed to facilitate multilateral agreements over how and to what degree a coastal state might claim exclusive use or authority over offshore space.⁷

In the mid-1970s, Canada and the United States each claimed extended exclusive fishery management zones which overlapped in the Georges Bank region of the Gulf of Maine.⁸ Unable to reach an accord via direct bilateral negotiation, the two countries submitted the dispute to a Chamber of the ICJ. Both countries employed natural systems characterizations of the area in dispute to bolster their respective arguments. The United States argued that Georges Bank represented a distinct ecosystem and, accordingly, it ought to be managed as such by the country with the more proximate claims to its entirety.⁹ Canada

4. See Ted L. McDorman, *SALT WATER NEIGHBORS: INTERNATIONAL OCEAN LAW RELATIONS BETWEEN THE UNITED STATES AND CANADA* 9-32 (2009).

5. Commission on Marine Science, Engineering and Resources, *Our Nation and the Sea, A Plan for National Action* 35 (Jan. 1969), available at <http://www.lib.noaa.gov/noaainfo/heritage/stratton/title.html>.

6. Proclamation No. 2667, 64 Fed. Reg. 48,701 (Sept. 28, 1945), available at oceancommission.gov/documents/gov-oceans/Truman.pdf.

7. See e.g., Convention on the High Seas art. 2, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (relating to high seas "freedoms"); Convention on the Territorial Sea and the Contiguous Zone art. 24, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 (territorial sea and contiguous zone authority); Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 (addressing continental shelf interests); Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285 (regarding living marine resource management rights and responsibilities).

8. See Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1891(2007)) (articulating the U.S. claim). Canada claimed a 200 mile fishery zone on January 1, 1977. See Fishing Zones of Canada Order (Zones 4 and 5) C.R.C., c. 1548 (1977).

9. Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 276 (Oct. 12).

countered that while the area might be characterized as a distinct ecosystem it nonetheless resided within a larger biogeographic region and, accordingly, any judgment based on the smaller scale unit characterization would still result in the severance of a natural system.¹⁰

The ICJ Chamber, confronted with countering natural systems arguments, employed neither. First, the Chamber highlighted the fact that while both countries used ecological characterizations, neither side did so in such a compelling way as to override the other.¹¹ More importantly, noted the Justices, the submission by the two States called for a single delimitation line defining both a continental shelf delineation as well as a water column delineation.¹² Since those two ecospheres were identifiably distinct and to some degree incongruous, the Court highlighted the challenge of using a single set of ecological criteria for a delineation of two distinct, albeit connected, ecological spaces (submerged land and superjacent water column). “[The] Chamber has already pointed out the difficulty, if not the impossibility, of adopting, for the purpose of such a dual delimitation, a [single] criterion disclosed by objective analysis to be essentially ecological.”¹³

The Chamber drew a boundary line—the Hague line—severing Georges Bank by awarding the southwest (and major) portion to the United States and the northeast portion to Canada.¹⁴ In doing so, the Chamber acknowledged the trade-off being constructed: the two states wanted a single line to delimit both continental shelf and water column jurisdiction. Constructing a single line, noted the Chamber, comes at the expense of consideration of ecosystem principles where such principles might suggest one line for the substrate-oriented ecosystem and another for the water-column-oriented ecosystem.¹⁵ Furthermore, the opinion was prescient in its prediction that this trade-off decision of simplicity over system would continue to be attractive.

[I]t can be foreseen that . . . *an increasingly general demand for single delimitation* [of the continental shelf and superjacent waters] so as to avoid as far as possible the disadvantages

10. *Id.* at 275-76.

11. *Id.* at 277.

12. *Id.* at 267.

13. *Id.* at 326.

14. *Id.* at 326. In addition, a variety of illustrations of the maritime delimitation line are viewable on the web by employing the search term “Gulf of Maine delimitation.” See e.g., *Delimitation of Maritime Boundary in the Gulf of Maine Area* (Technical Report) (Mar. 30, 1984), available at www.state.gov/documents/organization/125437.pdf.

15. *Gulf of Maine Case*, 1984 I.C.J. at 326-27.

inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation.¹⁶

The “Hague Line” boundary was accordingly established eschewing ecologically detailed criteria for more neutral criteria. Simplicity having won the day, ecosystem-oriented management would have to wait.

IV. THE EFFECTS OF SPLITTING THE BABY

Having suggested above that the ICJ Chamber employed non-Solomonic behavior in “splitting the baby,” my further reflection on the judgment and its effects suggests that it was deeply insightful, instructively informative, and wise even when constrained in its scope of decision-making. The Chamber’s insight is evident in its thorough review and consideration of the ecosystem factors that might be considered in delimiting ocean space. The decision was instructive in that it explained why it could not employ ecosystem factors effectively in the case at hand while putting prospective maritime boundary claimants and the legal community at large on notice of the importance of considering such factors. And finally, the Chamber’s decision, while constrained by the request of the parties to delineate a single boundary, may have constructed a line that, due to its system-splitting effects, would require the two states to reach across that line from time to time to engage in joint custody of the ecosystem; ecological assemblages that would not be constrained by the application of human map-making.

The challenges left in the wake of the Gulf of Maine case have been addressed over the course of the last twenty-five years in a variety of ways. A few ‘joint custody’ examples follow.

Not long after the Hague Line came into effect, government, nongovernment, and private sector stakeholders recognized the need for collaborative efforts to engage in research and information sharing endeavors to facilitate intelligent joint custody of the Gulf of Maine. In 1989, the Gulf of Maine Council on the Marine Environment (the Council) was established to “maintain and enhance environmental quality in the Gulf of Maine to allow for sustainable resource use by existing and future generations.”¹⁷ The Council began as a coalition of

16. *See id.* at 327 (emphasis added).

17. Gulf of Maine Council on the Marine Environment, About the Council, Overview Mission Statement and Principles, <http://www.gulfofmaine.org/council/mission.php> (last visited June 10, 2010).

U.S. states (Maine, New Hampshire, and Massachusetts) and Canadian provinces (New Brunswick and Nova Scotia) and thereafter gained the attention and membership of federal agencies from both countries. Over the course of the last two decades, the Council has provided grant funding to engage in research, conservation, and management efforts, developed ecosystem monitoring programs, served as an information portal for a variety of Gulf of Maine stewardship endeavors, and facilitated cooperative arrangements between and among public, private, and nongovernmental actors.¹⁸

In 1991, a more research oriented group focusing on Gulf of Maine issues coalesced to form the Regional Association for Research on the Gulf of Maine (RARGOM).¹⁹ Since its inception, RARGOM researchers from universities and resource management agencies have worked together to examine a wide variety of Gulf-wide issues including, ecosystem dynamics,²⁰ circulation modeling,²¹ habitat,²² and ecosystem stressors.²³ These research efforts are indicative of RARGOM's boundary spanning efforts to bring together researchers from both sides of the Hague Line.

From time to time a particular Gulf of Maine boundary-spanning concern will prompt researchers from the United States and Canada to work together. Concerns related to the impacts associated with harmful algal blooms served as the impetus for the development of the Gulf of Maine Ecology of Harmful Algal Blooms (ECO HAB) project in 1997.²⁴ Commonly referred to as "red tides," harmful algal blooms (HABs) can induce paralytic shellfish poisoning in humans.²⁵ The health effects of

18. Gulf of Maine Council on the Marine Environment, <http://www.gulfofmaine.org> (last visited June 10, 2010).

19. See RARGOM, Regional Association for Research on the Gulf of Maine, <http://www.rargom.org/> (last visited June 10, 2010).

20. Regional Association for Research on the Gulf of Maine, *Proceedings of the Gulf of Maine Ecosystem Dynamics: Scientific Symposium and Workshop*, RARGOM Reports 97-1 (1997).

21. Regional Association for Research on the Gulf of Maine, *Gulf of Maine Circulation Modeling: Workshop Proceedings*, RARGOM Reports 94-1 (1994).

22. Regional Association for Research on the Gulf of Maine, *Proceedings of the Gulf of Maine Ecosystem Dynamics: Scientific Symposium and Workshop*, RARGOM Reports 97-1 (1997).

23. Regional Association for Research on the Gulf of Maine, *The Health of the Gulf of Maine Ecosystem: Cumulative Impacts of Multiple Stressors: Workshop Report*, RARGOM Report 96-1 (1996).

24. See ECO HAB – Gulf of Maine, <http://www.whoi.edu/ecohab/> (last visited June 10, 2010).

25. *Id.*

HABs prompt shellfish harvesting shutdowns and can severely impact local economies. For a dozen years, researchers have shared information and arranged cooperative scientific activities to examine the drivers and impacts of HABs in the region by way of the Gulf of Maine ECOHAB effort.²⁶

A turn of the millennia effort designed to increase the understanding of the various components of the Gulf of Maine ecosystem can be seen in the form of the Gulf of Maine Census of Marine Life.²⁷ It is one of seven regional programs coordinated under the macro-level enterprise Census of Marine Life (CoML).²⁸ As its census appellations suggest, the primary focus of the research at the macro and regional levels is to construct population and resource inventories of marine life and conditions. The basic premise being that any and all monitoring of marine systems will result in characterizations and status reports that would be of little use without baseline or relational understandings of the regions being examined. The Gulf of Maine Census of Marine life, like the CoML effort generally, is designed to produce, “enough knowledge to enable ecosystem-based management in a large marine environment. The program will advance knowledge of both biodiversity and ecological processes over a range of habitats and food-chain levels, from plankton to whales.”²⁹

While not all of the above-related cross-boundary efforts can mandate ecosystem management, they all offer methods and approaches to facilitate transboundary stewardship.

V. CONCLUSION

While neither Canada nor the United States seemed interested in shared management of the Gulf of Maine when they brought their dispute to the ICJ Chamber, they both understood, at least to some degree, the ecological underpinnings of the variety of goods and services that they garnered from the area. And while some may lament that as late as the 1980s developed states and learned international tribunals continued to draw incision like boundary lines through natural systems, it seems as though the basic three factor relational structure linking

26. *See id.*

27. *See* Gulf of Maine Area Census of Marine Life, <http://www.usm.maine.edu/gulfofmaine-census/> (last visited June 10, 2010).

28. Census of Marine Life, Gulf of Maine Area Program (GoMA), <http://www.coml.org/projects/gulf-maine-program-goma> (last visited June 10, 2010).

29. *Id.*

ecology, resource development, and the evolution of law and policy ultimately responds in an almost organic way. Potentially frustrating ecosystem-slicing boundaries seem to, over time, produce ecosystem-oriented responses that may result in collaborative management by stakeholders enlightened by the mutual benefits of collaborative research and management.

This assessment is merely a first glimpse into ecosystemic regime building in the Gulf of Maine region. It raises many more questions than it addresses. Indeed many of the collaborative efforts referred to above, while possibly serving as foundations for legal regime development, do not amount to legal principle development and institution building as those regime-oriented terms are commonly employed. This presentation is but a start. Future legal research is contemplated that will examine if and where cross-border efforts more appropriately characterized as legal regime building exist in response to ecosystem characteristics.