

The Duty to Cooperate

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Cooperation Does Not Always Guarantee Agreement--The U.S.-Canada Pacific Salmon Dispute. What happens when states with claims to an overlapping fish stock negotiate in good faith but are not able to agree on how to divide or share the resource? An important case study is provided by the long-running dispute between the United States and Canada over the salmon of the Northeast Pacific.³⁶ These two countries have had a long record of friendship and cooperative solutions to regional problems, but they have not yet been able to resolve this dispute in a satisfactory manner. They agreed upon a treaty in 1985,³⁷ which established an "equity principle" in Article III(1) saying that each country should "receive benefits equivalent to the production of salmon originating in its waters." But the two nations have failed to reach agreement on how to interpret and

³⁶ See generally Schmidt, Robert J., Jr., "International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission," (1996) 26 Environmental Law, p. 95; McDorman, Ted L., "The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit License Measure," (1995) 17 Loyola L.A. International and Comparative Law Journal, p. 477.

³⁷ Pacific Salmon Treaty Between the United States of America and Canada, Jan. 28, 1985, T.I.A.S. No. 11091, 1985 WL 167273 (Treaty). See generally Leich, Marian Nash, "U.S.-Canada Treaty on Pacific Salmon," (1985) 79 American Journal of International Law, p. 423; Yanagida, Joy A., "The Pacific Salmon Treaty," (1987) 81 American Journal of International Law, p. 577.

apply the treaty, and on how to renew it, because of Canada's assertions that U.S. fishing vessels based in Alaska have greatly exceeded their quotas. As of 1994, 52% of the region's salmon stocks spawned in the Province of British Columbia (Canada), while 17% spawned in States of Oregon and Washington (United States) and another 31% spawned in the State of Alaska (United States).³⁸ U.S. fishing vessels were, however, harvesting about 5 million more Canadian-spawned salmon than U.S.-spawned salmon were caught by Canadians.³⁹ This imbalance resulted in part because fewer salmon were being produced in the rivers of Oregon and Washington, and the U.S. fishing vessels focused their energies in the coastal waters adjacent to southeast Alaska, where many of the rivers originate in Canada. The Canadians believe that because they have made great sacrifices to conserve the salmon spawning grounds in their rivers, in contrast to the Oregonians and Washingtonians who have let their rivers deteriorate, they should be rewarded with a greater share of the salmon catch.⁴⁰

To make its position clear and get the attention of U.S. decisionmakers, the Canadians have taken a number of dramatic steps in the past several years. In June 1994, they imposed a fee of \$1,100 per vessel on U.S. fishing vessels traveling (each

³⁸ Associated Press, "USA Fish Boats to Pay Canada," June 10, 1994, 15:27:20.

³⁹ Id.

⁴⁰ Jim Morris, "Alaska Hooks B.C.'s Anger; Fishers Criticize Chinook Quota," Edmonton Journal, June 27, 1996, p. A14.

way) through Canadian waters on the inland passage between the State of Washington and the southeast tip of Alaska.⁴¹ About 300 U.S. fishing vessels paid the fee before the United States and Canada reopened negotiations.⁴² On July 24, 1995, 300 Canadian fishing boats swarmed around an Alaskan ferry to prevent it from docking for three hours at Prince Rupert on British Columbia's north coast.⁴³ International mediation was unsuccessful during those years, and the United States rejected calls for binding arbitration.⁴⁴ In July 1997, more than 100 Canadian fish boats again blocked a U.S. ferry (and its 385 passengers) at Prince Rupert, British Columbia, this time for three days.⁴⁵ The U.S. Senate responded on July 23, 1997 by passing a resolution rebuking the Canadian government for allowing this action to occur and urging President Clinton to respond with "appropriate action,"⁴⁶ such as sending the U.S. Navy to protect Alaskan ferries' "right of innocent passage"

⁴¹ Reuters, "U.S. Fishing Boats Forced to Pay Canada," Honolulu Star-Bulletin, June 16, 1994, p. A-12.

⁴² Williams, Marla, "Fish Fight: What's Behind the Battle Between the U.S. and Canada?" Seattle Times, July 24, 1995, p. A1.

⁴³ Wood, Chris, "Northern Defiance: Tempers Flare in the Pacific Salmon War," Maclean's, July 24, 1995, p. 12.

⁴⁴ Associated Press, "Canada Wants a Salmon Panel," Columbian, May 17, 1996.

⁴⁵ Associated Press, "Official Urges Calm in Salmon Dispute," Honolulu Advertiser, July 23, 1997, p. B9.

⁴⁶ "Senate Scolds Canada Over Salmon Fracas," N.Y. Times, July 24, 1997, p. A4 (nat'l ed.).

through Canadian waters. The State of Alaska then canceled its scheduled ferry stops at Prince Rupert, dealing an economic blow to this Canadian region, and adding more ferry service between Ketchikan, Alaska, and Bellingham, Washington.⁴⁷ The State of Alaska filed suit against the Canadian fishers and the Canadian government for damages of \$2.8 million said to have resulted from the ferry blockade.⁴⁸ The following week, President Clinton appointed William Ruckelshaus, former administrator of the Environment Protection Agency and now a Seattle entrepreneur, to facilitate a solution, and Canada named retiring University of British Columbia President David Strangway to represent its interests.⁴⁹

Also in July 1997, Governor Glen Clark of British Columbia canceled the lease that allows the United States to test torpedoes at the Nanoose Bay Torpedo Range near Vancouver to retaliate against U.S. overfishing.⁵⁰ Not wanting to further antagonize the United States, the Canadian government filed suit in August 1997 against the Province of British Columbia for

⁴⁷ Seattle Times News Service, "Alaska Retaliates in Salmon Conflict," San Diego Union-Tribune, July 24, 1997, p. A16.

⁴⁸ Wood, Chris, and John DeMont, Ruth Abramson, and Andrew Phillips, "Darn Yankees: Ottawa Fashions a Truce in the Salmon War, but Victoria Sees Only an Empty Gesture," Maclean's, Aug. 4, 1997, p. 12.

⁴⁹ Editorial, "Getting Fish Talks on Track," Portland Oregonian, July 28, 1997, p. D06.

⁵⁰ DePalma, Anthony, "In Salmon War, a New Broadside as British Columbia Sues the U.S.," N.Y. Times, Sept. 9, 1997, p. A3 (nat'l ed.).

breach of contract regarding the lease for the base.⁵¹ But then in September 1997, British Columbia, along with Canadian salmon fishers, filed suit in the U.S. District Court in Seattle against the United States and the States of Alaska and Washington accusing the United States of violating international law by ignoring the terms of the 1985 treaty and seeking compensation for the lost salmon that are not available to Canadians.⁵²

This unresolved dispute has also taken its toll on the depleted fish stocks. In 1994, the Canadian government urged Canadian fishers to harvest "aggressively along the west coast of Vancouver Island and in the Strait of Juan de Fuca in order to intercept Fraser River sockeye before they entered U.S. waters."⁵³ Canadian fishers "also continued to harvest fragile coho and chinook stocks heading south to spawn in U.S. rivers despite the fact that conservation concerns had led Washington and Oregon to close their own offshore coho and chinook fisheries."⁵⁴ Fishing interests in Oregon and Washington disagree with those in Alaska, and lawsuits have been filed in U.S. courts that led to an injunction in August 1995 blocking the chinook harvest in southeastern Alaska.⁵⁵

⁵¹ Id.

⁵² Id.

⁵³ Miller, Kathleen A., "Salmon Stock Variability and the Political Economy of the Pacific Salmon Treaty," Contemporary Economic Policy, July 1, 1996, p. 112.

⁵⁴ Id.

⁵⁵ Id.

In July 1997, the Canadian government sent a strong diplomatic note to the U.S. government saying that Alaskan fishers had caught more than three times the sockeye permitted, accusing the United States of violating the 1985 treaty, and calling for an immediate end to fishing for salmon in Alaskan waters to preserve Canadian-bound sockeye stocks.⁵⁶

What can one conclude from this awkward confrontation between two nations that have maintained cooperative relations for so long? They have "cooperated" by meeting regularly and exchanging data. The dispute has the attention of the country's leaders, and high-level negotiators have been appointed to seek a resolution. But the dispute continues to fester.

Does the Duty to Cooperate require that Canada and the United States take the next step, which would be to appoint third-party mediators? And then if the mediation does not produce a resolution, must the two nations submit the dispute to binding arbitration or a judicial tribunal? Does the Duty to Cooperate inevitably include the duty to reach an accommodation or resolution, through third-party procedures if necessary? Although some states would resist this conclusion, especially when matters of transcendent national security are at stake, the answer in most cases must be YES. The Duty to Cooperate must include the duty to reach an agreement, and if compromise becomes impossible (usually because of domestic political pressures),

⁵⁶ Associated Press, "Canada Angrily Accuses the U.S. of Violating Salmon Treaty," Portland Oregonian, July 19, 1997, p. A14.

then the states must turn to an outside mediator or arbitrator to produce a solution.⁵⁷

What Are the Components of the Duty to Cooperate? The Duty to Cooperate is not just a vague and meaningless commitment. It has specific components that must be followed in situations where the actions of one state have a substantial likelihood to affect the resources, security, environment, or well-being of another state.

(1) The state planning an activity that is likely to affect the resources or environment of another state has a Duty to Inform or Notify the other state about the action being contemplated. This responsibility includes providing as much technical detail and policy analysis as the other state needs to evaluate the potential impacts. In many cases, it will include preparing a full environmental impact assessment.

(2) The state contemplating the activity then has a Duty to Consult with the other affected state. This responsibility requires listening to and understanding the position of the other side. It requires allowing the other side sufficient time to

⁵⁷ A classic example of this scenario is the boundary dispute in the Gulf of Maine. The United States and Canada negotiated a treaty to resolve this matter, but it was rejected by the fishing interests in both countries. Because the diplomats and political leaders on both sides found it to be politically impossible to compromise further, the nations submitted the dispute to a chamber of the International Court of Justice for resolution. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada v. United States, [1984] ICJ Reports 246.

prepare whatever factual data may be relevant and to examine this new information with an open mind.

(3) If differences continue, each state has a Duty to Negotiate in Good Faith, with the goal of reaching an agreement acceptable to both states. This Duty to Negotiate is similar to the responsibility of good-faith negotiations that exists in a labor-management dispute, and many judicial decisions and statutes give specific meaning to this requirement. It includes being willing to come to meeting after meeting, to explore alternatives, and to consider possible solutions. Most importantly, it requires each side to consider compromise solutions with an open mind in order to solve the impasse.

(4) Each state has a Duty to Address the Issues at the Highest Level of Decisionmaking. If mid-level negotiators cannot reach an agreement, then the countries' leaders must become personally involved or appoint personal representatives to address the controversy and seek a resolution.

(5) If the conflicts remains unresolved, then the states have a Duty to Seek Third-Party Dispute Resolution, through nonbinding mechanisms such as conciliation or mediation or binding devices such as arbitration or an international tribunal. The Duty to Cooperate includes somehow finding an appropriate resolution, and if direct negotiations do not succeed then assistance from third-party procedures becomes obligatory.

The Environmental Impact Assessment Requirement (Articles 204-206).

- A. The Environmental Impact Assessment Should Discuss the Following Subjects:**
- 1. The Probable Impact of the Proposed Action on the Environment**
 - 2. The Adverse Environmental Effects that Cannot Be Avoided If the Proposal Is Implemented**
 - 3. An Analysis of Alternatives to the Proposed Action (Including the Alternative of No Action) and a Comparison of the Costs and Benefits of Each Alternative with the Proposed Action**
 - 4. The Relationship Between Local Short-term Uses of the Environment and the Maintenance and Enhancement of Long-Term Productivity**
 - 5. Any Irreversible and Irretrievable Commitments of Resources That Would Be Involved in the Proposed Action If It Is Implemented**
- B. The Environmental Impact Assessment Should Be the Product of Interdisciplinary Analysis--the Scientific Data Should Be Analyzed in Conjunction with the Impact on the Human Society that Will Be Affected by the Proposed Project--Ultimately the Scientific Data Are Being Collected and Analyzed to Provide Answers for Social and Political Questions**
- C. Ample Opportunities Should Be Provided for Public Input During the Process of Developing an Environmental Impact Assessment--Both Written and Oral Comments Should Be Encouraged and Responses Should Be Provided to Each Comment**

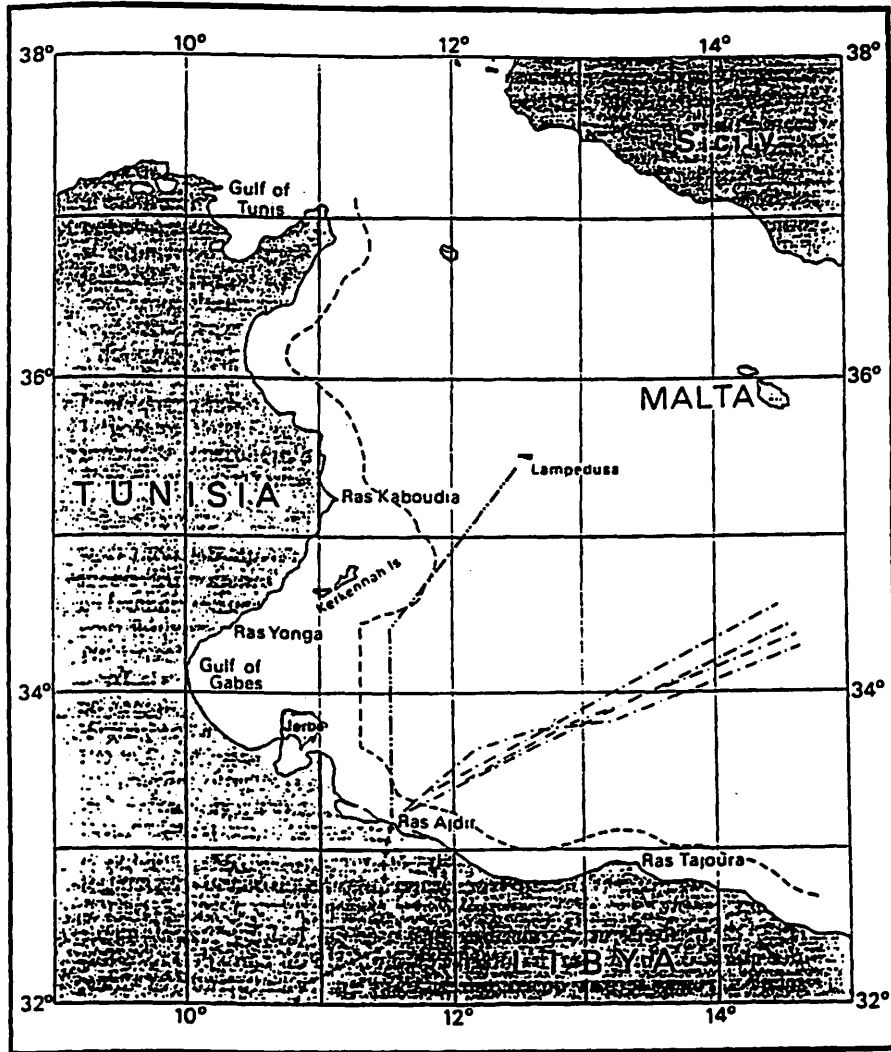
Environmental Issues

6. Article 192 says that "States have the obligation to protect and preserve the marine environment." U.S. Ambassador Elliot L. Richardson stated that if this and its accompanying environmental provisions survived in a treaty that was widely ratified, it "would represent one of the most significant accomplishments in the history of international environmental law." (Press conference, Geneva, Switzerland, April 27, 1979). No international organization to monitor environmental problems is created in the Convention, however, and most of the burden of pollution regulation is imposed on the nations themselves. Examine Articles 207-20. Can a coastal nation regulate pollution from vessels in its exclusive economic zone? See Article 211. How can such regulations be enforced? See Articles 217-20. Were the compulsory dispute resolution provisions (Articles 279-99) essential to the acceptance by the coastal states of reduced jurisdiction over environmental protection and navigation in their EEZs? If the treaty does not come into force, will coastal states assert greater jurisdiction over their 200-mile zones?
7. Are the powers of the coastal nations to adopt laws to control pollution in Article 211 new powers, or a codification of previously recognized rights? Can the careful (precarious) balance between coastal state jurisdiction and navigational freedoms in the exclusive economic zone as developed in the Convention be incorporated into customary international law, or is this series of compromises doomed to eventual collapse?
8. Which of the environmental protection provisions in the Convention codify existing customary international law and which introduce new norms for the world community? Is the obligation in Article 192 "to protect and preserve the marine environment" a new or previously-existing obligation? Is the Article 235 obligation of international responsibility for environmental harm a codification of existing norms or a new obligation?
9. Is "port-state jurisdiction" a developing customary norm or is it a new principle of international law introduced by the Convention? (Article 218) Can a non-signatory nation assert "port-state jurisdiction" today?
10. Is there any procedure whereby a non-ratifying nation could use the dispute-resolution mechanisms in the Convention? To what extent are these mechanisms in the Convention improvements on existing methods of resolving disputes?

**How Should Maritime Boundary Disputes Be Resolved?
(Articles 74 and 83)**

1. Is "Natural Prolongation" Still a Relevant Concept?
2. What Does It Mean to Reach an "Equitable Solution"?
What Are the "Equitable Principles" Relevant to Reaching Such a Solution? What Is the Relevance of the Equidistance or Median Line?
3. What Is the Role of Isolated and Uninhabited Islets in Boundary Delimitations? (Article 121(3))
4. The Joint Development Option

Tunisia/Libya I

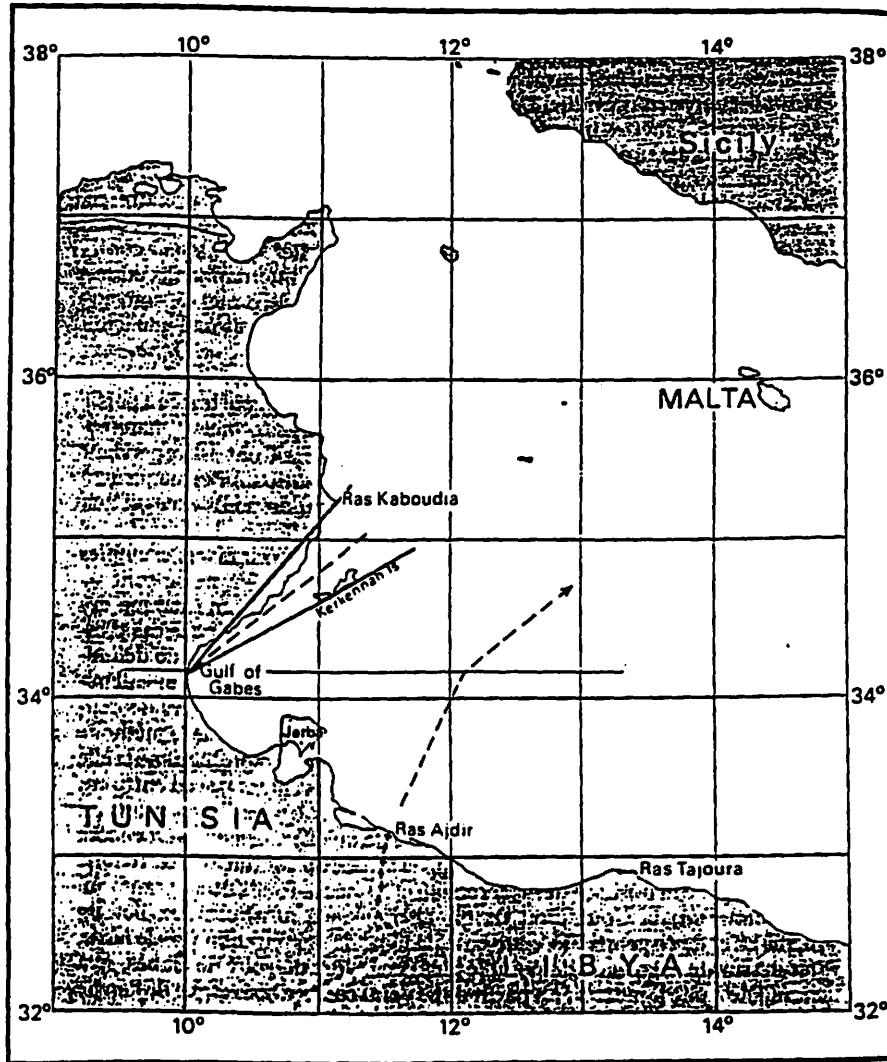


Tunisia/Libya Maritime Boundary Claims
Figure 5-9

- Limit of territorial waters claimed by each Party
- - - Line resulting from Libyan method of delimitation
- - - - Sheaf of lines resulting from Tunisian methods of delimitation

Source: *I.C.J. Reports*, 1982, p. 81.

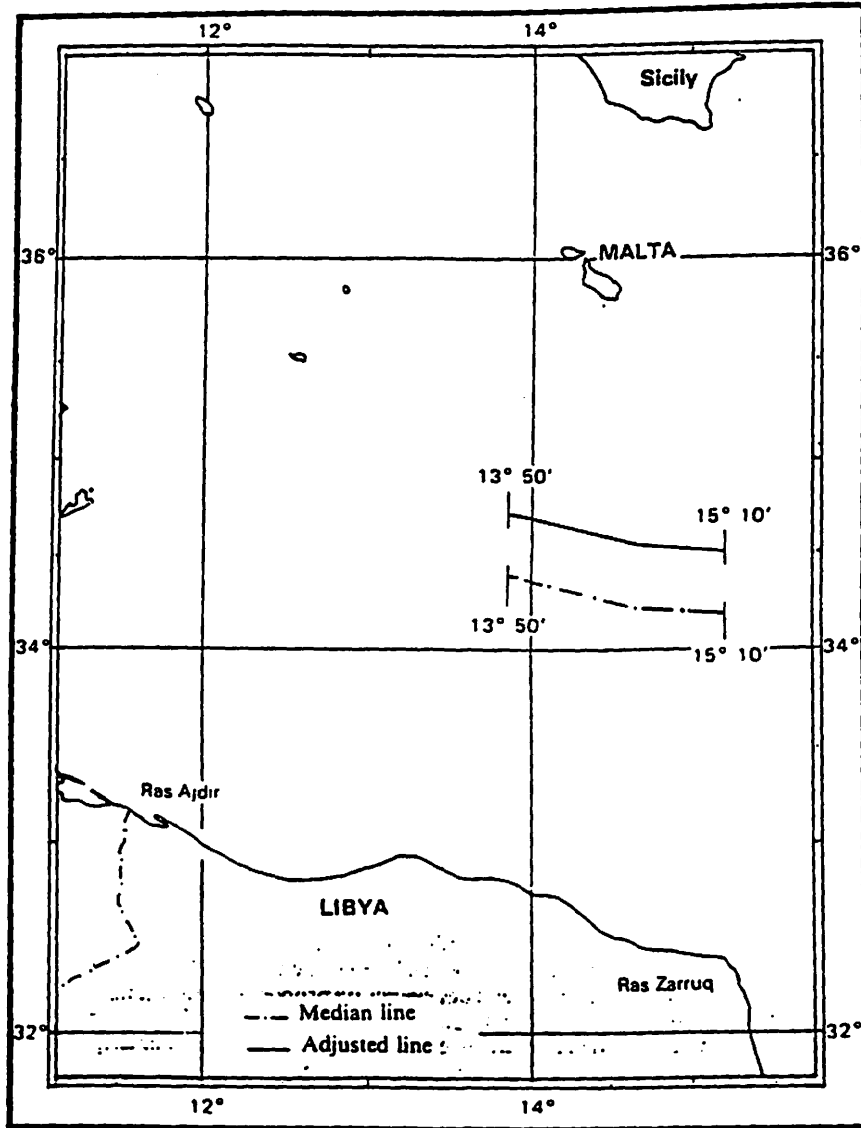
Tunisia/Libya I



Tunisia/Libya Continental Shelf Boundaries
Figure 5-10

Source: *I.C.J. Reports*, 1982, p. 90.

Libya/Malta



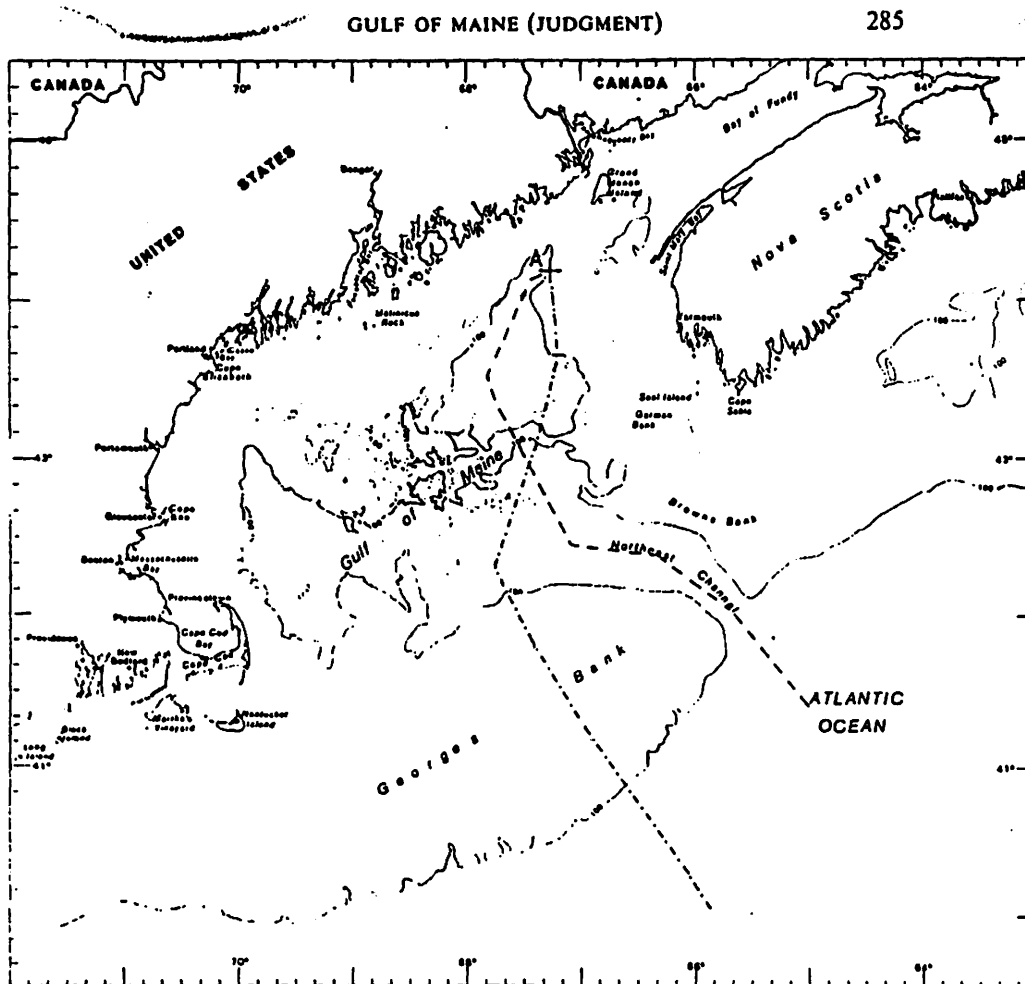
Libya/Malta Continental Shelf Boundaries
Figure 5-11

Source: *I.C.J. Reports, 1985, p. 54.*

Case Concerning Delimitation of the Maritime Boundary
in the Gulf of Maine Area (Canada v. United States),
1984 I.C.J. 246, 23 Int'l Legal Materials 1197 (1984)

Canada and the United States submitted by special agreement their dispute over the maritime boundary in the Gulf of Maine to a specially constituted "chamber" of the International Court of Justice. The judges in this chamber were designated by the parties and consisted of Judges Ago (Italy), Gros (France), Mosler (Federal Republic of Germany), Schwebel (United States), and Judge ad hoc Cohen (Canada).

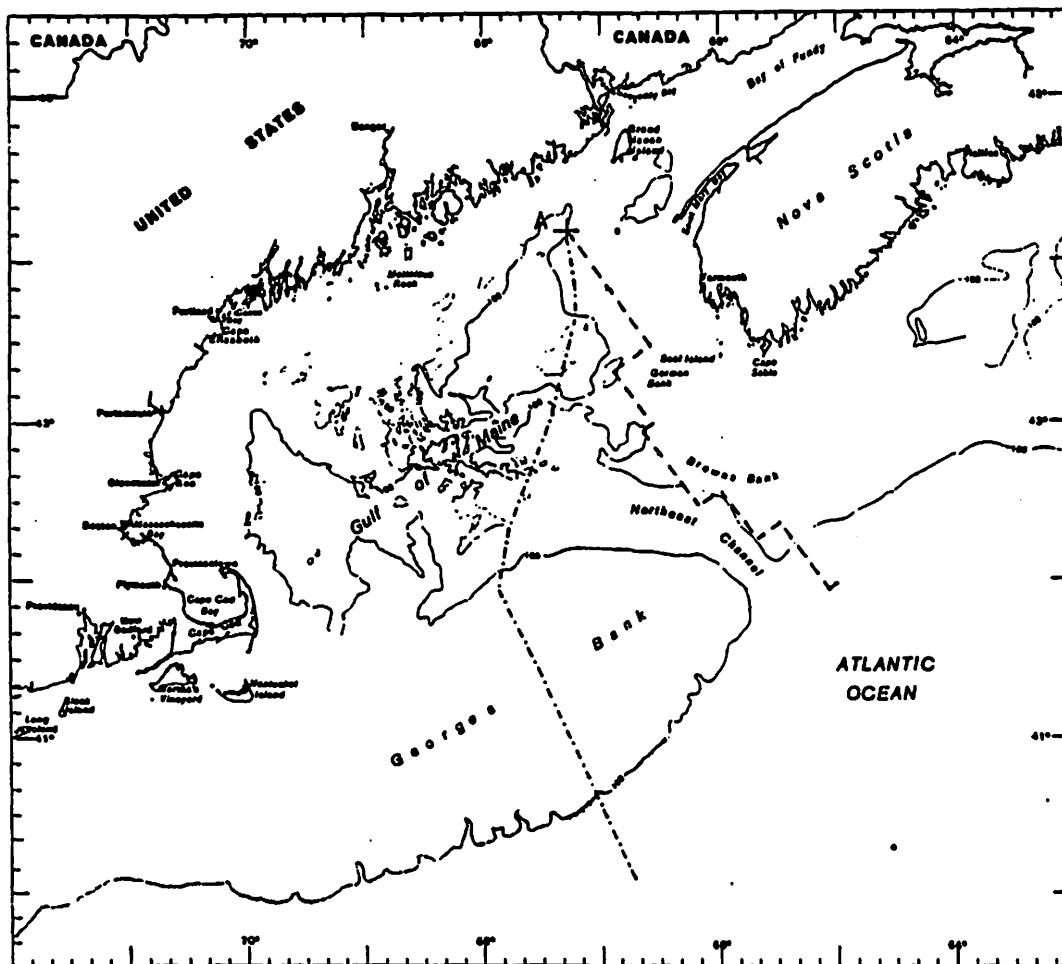
The competing contentions of the two nations are depicted below in what the chamber designated as Maps No. 2 and 3:



MAP NO. 2

LIMITS OF FISHERY ZONES AND CONTINENTAL SHELF CLAIMED BY THE
PARTIES, AT 1 MARCH 1977
(see paragraphs 68-70)

United States line - - - - - 337
Canadian line -



MAP No. 3

DELIMITATION LINES PROPOSED BY THE PARTIES BEFORE
THE CHAMBER

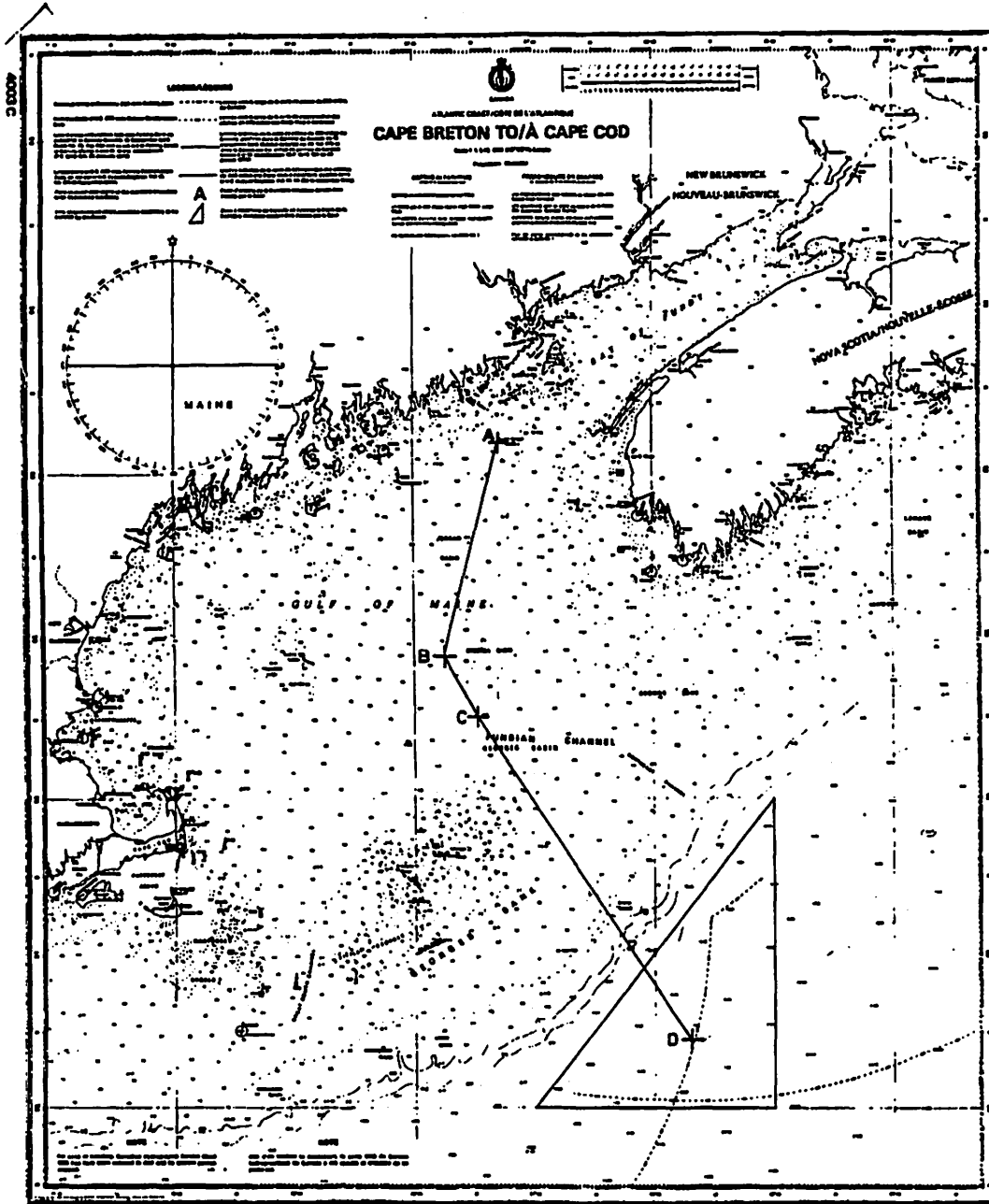
(see paragraphs 71, 77-78)

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

The Canadian line in Map 3 is based on an equidistant line dividing the waters equally in half; the basepoints used by the Canadians in this division ignore all of Cape Cod, Massachusetts, which it characterizes as a "geographical anomaly" that should not affect the division of ocean space. The U.S. line is based in part on its view of the "natural prolongation" of the continental shelf, and hence follows the Northeast Channel which separates Georges Bank from Browns Bank. The United States also argued that it should receive the larger share of the disputed ocean space because (A) the coastline on the U.S. side of the Gulf is longer than on the Canadian side, (B) the population of the U.S. coastal areas facing the Gulf is considerably higher than that of the Canadian coastal areas and hence that citizens of the United States have relied on and continue to need the resources of this region more than the Canadian citizens, (C) that Americans have historically fished the Georges Bank area in much greater numbers than have Canadians, and (D) that it is preferable to keep unified ecosystems within one nation's control (and hence that all of Georges Bank should be awarded to the United States).

Both nations asked the chamber to draw a single maritime line that would apply both to the continental shelf and to the water above and its living resources. The major known resource in dispute was the fish and shellfish in the Georges Bank region.

The chamber adopted its own line depicted below:



DELIMITATION LINE DRAWN BY THE CHAMBER

The segment from points A to B is essentially an equidistance line between the upper part of the Gulf. The segment between B and D allocates greater ocean space to the United States according to a ratio of 1.32 to 1. This figure was determined by the court to correspond to the relative lengths of coastline of the two countries in the Gulf. Canada's coastline included the coast of the Bay of Fundy, excluding only those areas in the mouth where the Bay narrows to 12 miles.

In the course of its opinion, the chamber concluded that the governing international law standard was one of "equity," and that the language of Article 6 of the 1958 Convention on the Continental Shelf and Articles 74 and 83 of the 1982 Law of the Sea Convention, along with judicial decisions and state practices all pointed in that general direction. The chamber said that the parts of the 1982 Convention on the exclusive economic zone "may ... be regarded as consonant at present with general international law on the question" (para. 94).

The chamber recognized that notions of equity are elusive and mentioned some of the criteria that have been used to reach equitable results:

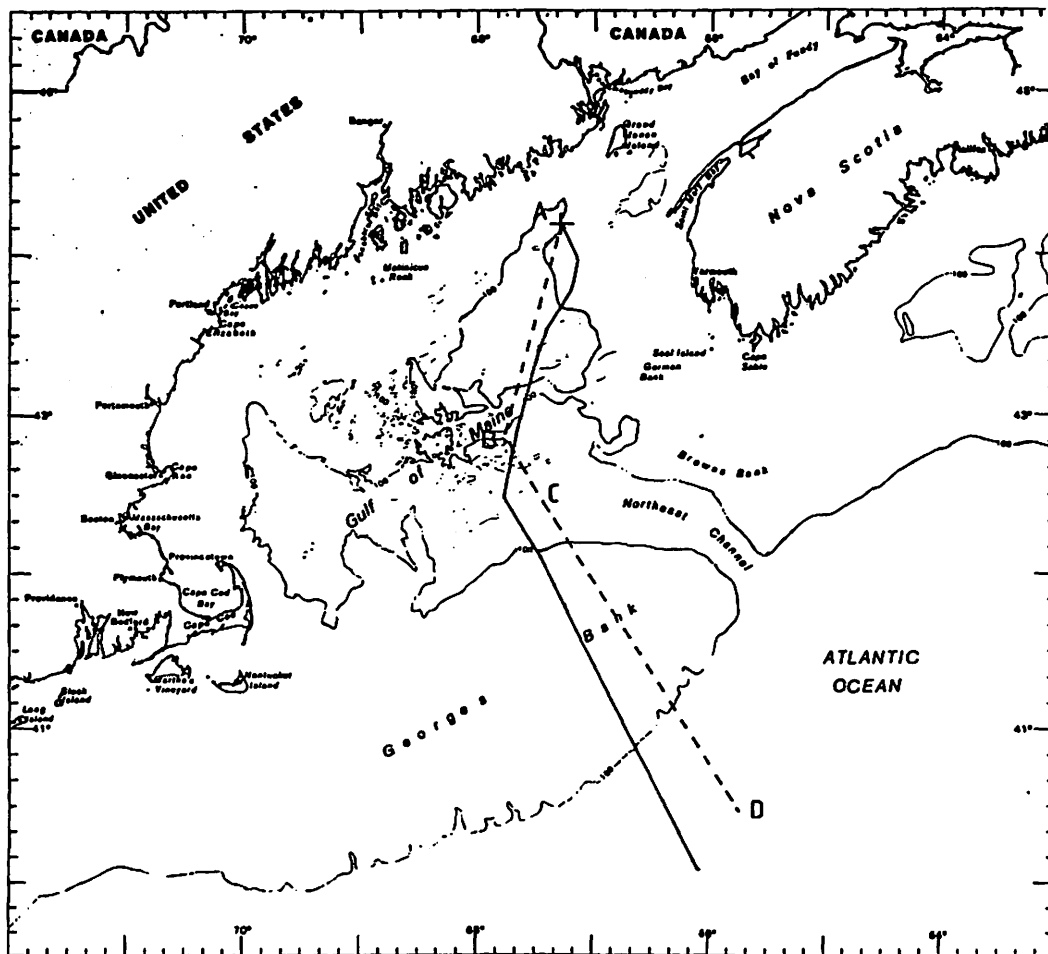
157. There has been no systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation, and this would in any event be difficult *a priori*, because of their highly variable adaptability to different concrete situations. Codification efforts have left this field untouched. Such criteria have however been mentioned in the arguments advanced by the parties in cases concerning the determination of continental shelf boundaries, and in the judicial or arbitral decisions in those cases. There is, for example, the criterion expressed by the classic formula that the land dominates the sea; the criterion advocating, in cases where no special circumstances require correction thereof, the equal division of the areas of overlap of the maritime and submarine zones appertaining to the respective coasts of neighbouring States; the criterion that, whenever possible, the seaward extension of a State's coast should not encroach upon areas that are too close to the coast of another State; the criterion of preventing, as far as possible, any cut-off of the seaward projection of the coast or of part of the coast of either of the States concerned; and the criterion whereby, in certain circumstances, the appropriate consequences may be drawn from any inequalities in the extent of the coasts of two States into the same area of delimitation.

None of these criteria are automatic or always applicable, and in this case the chamber concluded that equality of ocean space should be the starting point for decision and that it should be modified in this case only to correspond to the difference in the lengths of the coasts between the two nations. The chamber rejected any modification based on historical use or greater dependence because it found that the residents of both nations had historically used the area and continued to rely on it. It rejected the U.S. claim based on keeping the ecological units

Judge Gros dissented, arguing that "equity" does not have any known meaning, and that the court should simply have drawn the equidistant line between the two coastal areas. His approach was depicted in a map attached to his opinion:

GULF OF MAINE (DISS. OP. GROS)

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MAP

REFERRED TO IN THE DISSENTING OPINION OF JUDGE GROS

Chamber's line -----
 Judge Gros' line —————

Questions

Evaluate the chamber's reasoning? Does it provide guidance for other nations seeking to resolve their boundary disputes? Should the equidistance principle govern? What about the "proportionality" of the coasts? How should a court evaluate the "natural prolongation" of the land masses and which "special circumstances" in the geographical configuration should it consider?