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International Law—Delimitation of Maritime Boundarie

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NOTE

INTERNATIONAL LAW—DELIMITATION OF MARITIME BOUNDARIES—The International Court of Justice holds that a maritime delimitation between states with opposite or adjacent coasts should be effected through application of equitable criteria and the use of practical methods, which will ensure an equitable result. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.)*, 1984 I.C.J. No. 67.

INTRODUCTION

> A law of the sea is as old as nations, and the modern law of the sea is virtually as old as modern international law. For three hundred years it was probably the most stable and least controversial branch of international law. It was essentially reaffirmed and codified as recently as . . . 1958. By 1970 it was in disarray.[1]

In 1984 the International Court of Justice[2] decided the case concerning the delimitation of the maritime boundary in the Gulf of Maine area. The court's decision has done nothing to make more comprehensible the disarray in the status of the law of the sea which existed as of 1970.

The case was distinct from any of the international tribunal's previous decisions in at least three respects. The decision was the first ever announced by the court operating as a five-judge chamber. The court is usually composed of 15 judges, each from a different country, with representation for each of the permanent members of the United Nations Council.[3] In this case, the disputants requested a five-judge panel drawn entirely from western democracies.[4] Secondly, while in previous decisions the parties requested the court to determine what rules and principles should be applied to resolve a particular dispute involving a maritime boundary, this is the first instance in which the parties requested that the court actually draw the boundary line once it had determined the applicable rules and principles.[5] Finally, and most importantly for the purposes

1. L. HENKIN, HOW NATIONS BEHAVE 212 (2d ed. 1979).

2. Hereinafter referred to as "the court" or "the I.C.J." *See* INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1946-1947, published by the Registrar of the Court. The Yearbook indicates that on October 24, 1945, four months after the signing of the Charter of the United Nations, the court was created. *Historical Outline of the Constitution of the Court*, 1946-1947, I.C.J.Y.B. 15 (1947). The source of its creation was the Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, 3 Bevans 1179 (hereinafter cited as *Statute of the I.C.J.*), which was ratified by the members of the United Nations, all of whom are parties to the court. *See also* S. ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 471-72 (2d ed. 1979), which relates that the court has issued more than 40 judgments, and nearly 200 orders; several of the court's most important cases related to the international law of the sea will be discussed in this note.

3. Bernstein, *World Court Settles Dispute on U.S.-Canadian Boundary*, N.Y. Times, Oct. 13, 1984, § 1, at 3, col. 5. The author also describes the generally favorable reaction from officials of both States, and the criticism of industry representatives.

4. Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.), 1984 I.C.J. No. 67 [hereinafter cited as *Maritime Boundary*], at 252.

5. *Id.* at 267.

of this note, and for its implications in international law, this is the first time in international judicial or arbitral practice that the court established a delimitation of two distinct elements by means of a single line.[6] In this particular case the United States and Canada requested the court to use a single line to delimit both the continental shelf and the 200-mile exclusive fishery zone.[7] This note will analyze the way the court selected criteria to delimit both zones, and examine what the process portends for the future of international law.

SUMMARY OF THE CASE

The area directly concerned in the delimitation (Figure 1) was described by the court as "a broad oceanic indentation in the eastern coast of the North American Continent, having roughly the shape of an elongated rectangle."[8] The "inner zone," or Gulf of Maine in the true sense, is separated from the Atlantic Zone of the area in question by an imaginary line drawn from the southeastern point on Nantucket Island, to Cape Sable at the southwestern end of Nova Scotia. The parties requested the court to draw its delimitation line from point A to the area within the triangle indicated on the map. The United States and Canada were to determine the boundaries of the areas between the land and point A, and outside the triangle, through negotiations following the court's decision.[9] The "fighting issue" involved in the dispute was the Georges Bank fishing ground,[10] an area lying out in the Atlantic Ocean, which is "bigger than Massachusetts, Connecticut, and Rhode Island combined."[11] Georges Bank has been described as "one of the richest fisheries in the world and quickly becoming a focal point for offshore oil and gas exploration."[12]

6. *Id.* at 326.
7. *Id.* at 253.
8. *Id.* at 268.
9. *Id.* at 264.
10. Christian Sci. Monitor, Mar. 6, 1981, at 24, col. 4.
11. Kidder, *U.S.-Canadian Fishing: Troubled Waters*, Christian Sci. Monitor, Oct. 19, 1981, at 1, col. 1.
12. *Id.* Any oil and gas exploration which may take place in the area will occur on the continental shelf. The continental shelf refers:

> (a) to the seabed and subsoil of the submarine area adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of natural resources of the said areas;
>
> (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Convention on the Continental Shelf, April 1958, 15 U.S.T. 471, at 473, T.I.A.S. No. 5578, 450 U.N.T.S. 311.

Fishery zones are generally considered to be those maritime areas contiguous to a State over which the State claims jurisdiction for the limited purpose of regulating fish resources. For an historical analysis of States' increasing claims to greater areas of the seas and their resources, *see* Fleischer, *The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone*, 14 SAN DIEGO L. REV. 548 (1977). Rather than looking to the geology of the area to define its limits, to determine the outer limits of a fishery zone, one merely must calculate a given distance from the geographical

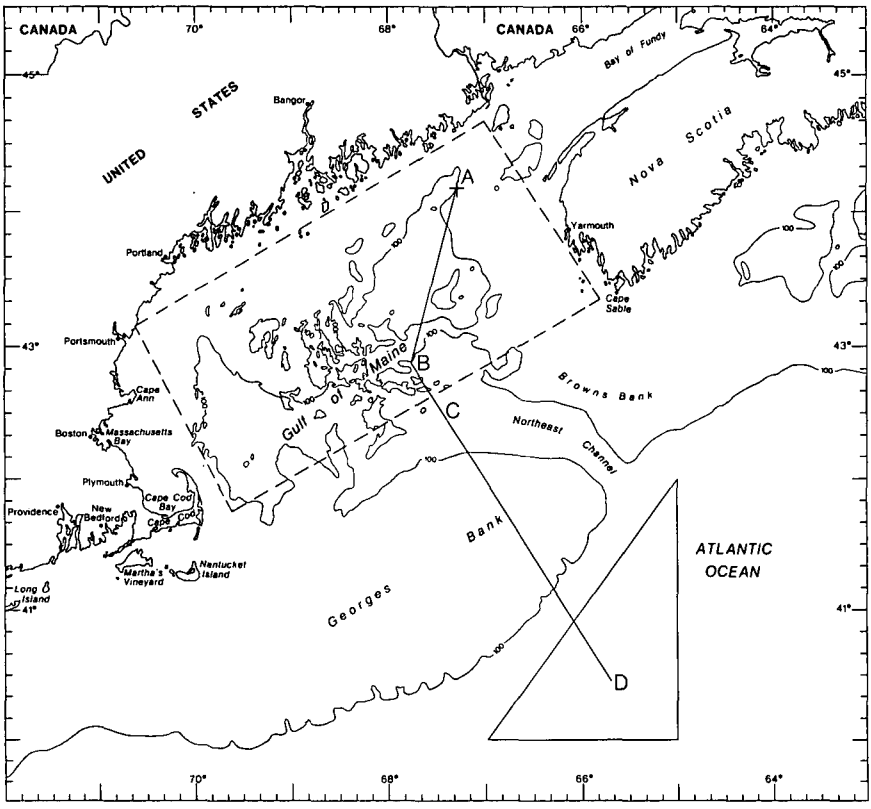

FIGURE 1.

Although the parties disagree on exactly when the dispute regarding their boundaries began, the court and other analysts consider it to have first developed in the early 1960s with exploration for hydrocarbon resources.[13] By 1965, United States Bureau of Land Management officials and representatives of the Canadian Department of Northern Affairs and National Resources were exchanging correspondence attempting to re-

points of reference on the mainland. Before the dispute, both the United States and Canada selected 200 miles as the distance for exclusive fishery management. *See also* Note, *International Ramifications of the Fishery Conservation and Management Act of 1976*, 7 GA. J. INT'L & COMP. L. 133, 135-36 (1977), in which the author describes President Ford's hesitancy to establish a 200-mile fishery zone because of doubts as to whether the extension was legal under customary international law. *See generally* Rubin, *Georges Bank Ruling is too Fair*, 29 INT'L PRAC. NOTEBOOK 33 (1985). Mr. Rubin, Professor of International Law at Tufts University's Fletcher School of Law and Diplomacy, criticizes what he considers to be the court's application in the Gulf of Maine Case of a standard better adapted to a delimitation of the fishery zone alone.

13. *Maritime Boundary, supra* note 4, at 279. *See also* Purcell, *Court Writes End to U.S. Canada Offshore Dispute*, Christian Sci. Monitor, Oct. 16, 1984, at 5, col. 1.

solve questions regarding areas in which the shelf of the two countries overlapped.[14]

In 1968, the United States suggested negotiations and a moratorium on mineral explorations. Canada agreed to negotiate, but declined to observe a moratorium. At this point, according to the court, the dispute became clearly established.[15] Formal negotiations commenced between the parties in 1970, at first regarding the continental shelf only.[16] However, by 1977 both parties had adopted a 200-mile fishery zone, which added the waters and their living resources to the continental shelf dispute.[17]

In 1981, the United States and Canada agreed to submit to binding dispute settlement the delimitation of a single boundary governing continental shelf and fishery resources in the Gulf of Maine area.[18] They requested the court to decide the question in accordance with the applicable principles and rules of international law.[19]

INTERNATIONAL LAW GOVERNING THE DISPUTE

According to Article 38 of the Statute of the International Court of Justice, the court, in deciding disputes submitted to it, must apply: (i) international custom, as evidence of a general practice accepted as law; (ii) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; and (iii) judicial decisions.[20] The court found it necessary to consider each of these areas; this note will consider the same sources of international law. This note will discuss the international law of the sea, as it applies generally to maritime boundaries. Each of the sources of international law will then be further divided into the particular aspect of international law as it applies to the continental shelf, and to fisheries.

The Law of the Sea Generally

Traditionally, international law divided the seas into two legal categories: Those under the sovereignty of the coastal states; and the high

14. *Maritime Boundary, supra* note 4, at 280.
15. *Id.* at 280-81.
16. *Id.*
17. *Id.* at 283. *See also* Note, *supra* note 12.
18. *Maritime Boundary, supra* note 4, at 287.
19. *Id.* at 288.
20. *Statute of the I.C.J., supra* note 2. The applicable text of the statute provides as follows:
    1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

seas.[21] An early and basic principle of the law of the sea was that of freedom. The sea could not be acquired by nations and made subject to national sovereignty.[22] In recent years, however, coastal states have sought to increase and expand their jurisdiction over their adjacent sea areas.[23]

This expansion of coastal state jurisdiction has changed people's perception of the sea and the applicable law. The seas are now seen as being divided into zones subject to different legal regimes, with the principle of commonage applicable only in the areas beyond national jurisdiction where the high seas begin.[24] Some of those zones receiving international recognition include: Contiguous zones; special fisheries zones; zones of special jurisdiction, such as customs zones; and zones in which exclusive control is claimed for weapons testing.[25] Two of those zones, "subject to different legal regimes," are those involved in the United States-Canada dispute: The continental shelf and fishery zones.

Customary International Law

Customary international law is comprised of two distinct elements: General practice and its acceptance as law.[26] In 1945 President Truman proclaimed that the government of the United States regarded the natural resources of the subsoil and the seabed of the continental shelf beneath the high seas, and contiguous to the coast of the United States, as appertaining to the United States, subject to its jurisdiction and control.[27] As late as 1951 authorities were able to suggest that the doctrine had not yet become part of the corpus of international law.[28] It had not given rise to a correlative obligation, even if many States had adopted it. Article 6 of the Geneva Convention of 1958 on the Continental Shelf identified the principle of equidistance as the method States should use in delimiting continental shelf boundaries.[29] In its judgment of 1969 in the *North Sea Continental Shelf Cases* the court held that the principle of equidistance had not developed into a rule of customary international law obliging

21. Goldie, *International Law of the Sea—A Review of States' Offshore Claims and Competences*, NAV. WAR C. REV. 43 (1972). Professor Goldie notes that the law of the sea is in a state of flux because many of the new zones only recently have started to become recognized in international law. *See also* Oda, *Fisheries Under the United Nations Convention on the Law of the Sea*, 77 AM. J. INT'L L. 739 (1983).

22. Henkin, *Changing Law for the Changing Seas*, in USES OF THE SEAS 70-71 (Gullion ed. 1968).

23. *See* Goldie, *supra* note 21.

24. *See* Henkin, *supra* note 22.

25. For a discussion of each of the zones of the sea now receiving international recognition, *see* Goldie, *supra* note 21.

26. *Statute of the I.C.J.*, *supra* note 2.

27. Feldman & Colson, *The Maritime Boundaries of the United States*, 75 AM. J. INT'L L. 729, 730-31 (1981).

28. *Abu Dhabi Case*, 1 INT'L & COMP. L. Q. 247 (1952).

29. Convention on the Continental Shelf, April 1958, *supra* note 12.

States to apply the method in resolving continental shelf disputes.[30] However, because both the United States and Canada are parties to that convention, they would be obliged to apply the method as set out in the convention, if this were a dispute concerning the continental shelf alone.

In 1974, the court held that no firm rule could be deduced from State practice as being sufficiently general and uniform to be accepted as a rule of customary law fixing the maximum extent of the coastal State's jurisdiction with regard to fisheries.[31] From then until 1981, when the United States and Canada submitted their boundary delimitation problem to the court, no firm rule had yet developed.[32] The court found in the Gulf of Maine case that customary law did not provide specific practical methods for a delimitation of a single boundary dividing continental shelf and fishery resources.[33] Instead, the court sought to find those methods in treaty and case law.[34]

International Treaty Law

Some debate exists as to whether treaties should be viewed as merely a source of obligation, much as a contract between parties, or as a source of international law.[35] However, the issue presented no problem to the court, because the only treaties relevant in this case were general treaties, signed by both parties, and therefore binding upon them, whether viewed as a contract or otherwise.[36]

The first multilateral treaty relevant to the case was the Geneva Convention of 1958 on the Continental Shelf. Both the United States and Canada acknowledged the Convention to be in force between them. As mentioned above, this Convention concerned only the seabed and its subsoil. Article 3 of the Convention specified that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters,[37] making clear that the law as to those waters must be determined by other means.

Nonetheless, the Convention did provide that, where the same continental shelf was adjacent to the territories of two or more States with

30. North Sea Continental Shelf Cases (W. Ger. v. Den.)(W. Ger. v. Neth.), 1969 I.C.J. No. 4 [hereinafter cited as *Continental Shelf Cases*].

31. Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. No. 3.

32. *Maritime Boundary, supra* note 4, at 299.

33. *Id.*

34. *Id.* at 300.

35. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, SYMBOLAE VERZIJL 153 (1958). Fitzmaurice concludes that, in general, treaties should be viewed as a source of international law.

36. *Maritime Boundary, supra* note 4, at 299-300.

37. Convention on the Continental Shelf, April 1958, *supra* note 12.

opposite coasts, the boundary of the continental shelf appertaining to such States should be determined by agreement. In the absence of agreement, and unless another boundary line was justified by special circumstances, the boundary should be the median line, every point of which was equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State was measured.

Where the same continental shelf was adjacent to the territories of two adjacent States, the boundary of the continental shelf was to be determined by agreement between them. If the parties could not agree, and unless another boundary line was justified by special circumstances, the boundary line was to be determined by application of the principle of equidistance from the nearest point of the baselines from which the breadth of the territorial sea of each State was measured.[38]

The court interpreted the above principles from the Convention to mean that any agreement or solution must involve the "application of equitable criteria." The court stated that:

> [T]he Convention clearly affirms. . .the principle, in brief, that any delimitation must be effected by agreement between the States concerned, either by the conclusion of a direct agreement or, if need be, by some alternative method, which must, however, be based on consent. To this one might conceivably add—although the 1958 Convention does not mention the idea, *so that it entails going a little far in interpreting the text*—that a rule which may be regarded as logically underlying the principle just stated is that any agreement or other equivalent solution should involve the application of equitable criteria. . .[39] (Emphasis added)

The majority of the court also examined the next important convention, the Third United Nations Conference on the Law of the Sea. Although not in force between the parties at the time of the dispute, the court found the consensus reached on relevant portions of the Conference to be helpful in resolving the dispute between the United States and Canada.[40] The relevant provisions were the identical definitions in Articles 74 and 83 of the Conference relating to the rule for delimiting the exclusive economic zone (which includes the fishery zone) and the continental shelf. Those articles provide that the delimitation of both areas between States with opposite or adjacent coasts are to be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, "in order to achieve an equitable so-

38. *Id.*

39. *Maritime Boundary, supra* note 4, at 292. See Analysis portion of this note for a discussion of the court's "interpretation" of the Convention.

40. *Id.* at 294.

lution."[41] The court viewed the provisions as consistent with its own interpretation of the principle enunciated in the 1958 Convention: An expression of the need for settlement "by agreement and recalling the obligation to achieve an equitable solution."[42]

International Case Law

Article 38 of the Statute of the International Court of Justice requires the court to apply judicial decisions, subject to the provisions of Article 59, as a subsidiary means for the determination of rules of law.[43] Article 59 states that decisions of the court are not binding except between the parties and in respect of that particular case.[44] The court's decisions, therefore, are not governed by the principle of *stare decisis*. However, as provided for in Article 38, the court often cites its previous decisions, thereby incorporating by reference its earlier opinions.[45]

For guidance in the dispute between the United States and Canada the court looked first to its judgment in the *North Sea Continental Shelf Cases*. The court therein held that a delimitation of the continental shelf must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.[46]

In a later decision on the delimitation of the continental shelf between France and the United Kingdom, the Court of Arbitration enunciated a general rule that "failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles."[47] Finally, in the I.C.J.'s judgment of February 1982 in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, it again stressed the importance of "the satisfaction of equitable principles. . .in the delimitation process."[48]

41. Third United Nations Conference on the Law of the Sea, A/CONF. 62/WP 10/Rev. 1 (28 April 1979). *But cf.* Phillips, *The Economic Resources Zone—Progress for the Developing Coastal States*, 11 J. MAR. L. & COM. 349, 349 (1980). Phillips criticizes the conference for, in his view, "the failure of the international community to agree on any precise legal regime for the oceans."

42. *Maritime Boundary, supra* note 4, at 294.

43. *Statute of the I.C.J., supra* note 2.

44. *Id. See also* W. FRIEDMAN, LEGAL THEORY (5th ed. 1967).

45. *See* S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965).

46. *Continental Shelf Cases, supra* note 30.

47. *Maritime Boundary*, at 293. For a description of the international arbitral process, *see* W. REISMAN, NULLITY AND REVISION, THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS (1971). The Court of Arbitration was instituted at the Hague Peace Conference of 1899, through the Convention for the Pacific Settlement of Disputes, 32 Stat. 1799, 2 Malloy 2016. The specific method for selecting a panel of arbitrators was set forth in the Revised Convention of 1907, 36 Stat. 2199, 2 Malloy 2220.

48. Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. No. 63, at 47.

HOLDING OF THE CASE

After its review of the above principles of international law, the court formulated a "fundamental norm," which it stated should be used by States in every maritime delimitation. The court articulated the norm as follows:

> (1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.
>
> (2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.[49]

APPLICATION OF THE "FUNDAMENTAL NORM"

Having identified the "fundamental norm" applicable in all maritime delimitation cases, the court set out to identify the equitable criteria and practical methods which would ensure an equitable result in this case. It first discussed various arguments of the parties. Those of the United States the court rejected as being more appropriate to the fishery zones, and those of Canada it said would be more appropriate for a delimitation of the continental shelf. Neither party, in the view of the court, presented arguments which would equitably delimit both zones.[50]

The majority then identified "a criterion which need only be stated to be seen as intrinsically equitable: . . .equal division of the areas of convergence and overlapping of the maritime projections of the coastlines of the States concerned in the delimitation."[51] It based this "equal division" upon the geographical characteristics of the area.[52]

The practical methods selected by the majority to give the above criterion effect fall into three broad categories, thereby giving the line to be drawn as a boundary three segments. The first segment of the line the court determined, basically, by the practical method of bisecting the angle

49. *Maritime Boundary, supra* note 4, at 299.
50. *Id.* at 301-12.
51. *Id.* at 328.
52. *Id.* at 329.

formed by what it described as the upper left hand corner of the rectangle at point A on the map (Figure 1). The court arrived at this solution based upon what it considered to be the lateral adjacency of the two countries' coastlines at this portion of the rectangle.[53] This segment is identified on the map by the points A to B.

The practical method applied to determine the second segment of the line was that of a median line between the two opposite coastlines formed by what the court considered the short sides of the rectangle representing the Gulf of Maine, corrected because of the special circumstance of the longer U.S. coastline.[54] The points B to C on the above map represent this second segment of the maritime boundary. The court determined the final segment of the line by forming a right angle at the point where the second segment of the line and the closing line separating the Gulf of Maine proper from the Atlantic Ocean met. This segment continued to the termination in the triangle to which the parties requested the court to restrict its judgment.[55] This third segment of the boundary is represented by the points C to D.

ANALYSIS

Official representatives of both countries accepted the decision of the court as being basically fair. A senior American official viewed the decision as a compromise. "We wanted 100 percent of Georges Bank; they wanted half of it. One would say that the court went for a split-the-difference sort of decision."[56] The Canadian government also expressed satisfaction with the result, which it said "confirmed Canadian jurisdiction over a substantial part of the Georges Bank."[57] Fishermen from both countries, on the other hand, were unhappy with the boundary line drawn by the court.[58] These very different reactions by groups interested in the court's decision, however, fail to consider its more important consequences: those for international law and future delimitations of maritime boundaries.

First, although the court repeatedly asserted that the criterion it selected was appropriate for a delimitation of both a continental shelf and a fishery zone boundary, it ignored the very different historical development of the two zones. Whereas jurisdiction over fisheries historically has been asserted on the basis of geography, depending on which country was closest, jurisdiction over the continental shelf has been determined on the basis

53. *Id.* at 331-33.
54. *Id.* at 333-37.
55. *Id.* at 337-39.
56. Bernstein, *supra* note 3.
57. *Id.*
58. *Id.*

of the geology of the shelf and its connection with the land territory of the competing coastal States.[59]

Perhaps more important, however, was the court's continuation of an attempt to "formulate the general principles of equity applicable to a fair allocation of the resources. . .between neighbors."[60] In this case, as in previous decisions regarding the continental shelf alone, it was necessary for the court to "determine the delimitation of boundaries in the light of its own conceptions of equity."[61]

The concept of equity is, in fact, applicable in international law, and one scholar has suggested that it should be viewed as an "indispensible rectifying factor in the process of decision making, including negotiation which culminates in agreement."[62] The principle of equity may arise in disputes before the international court in at least two contexts.

First, in addition to the sources of international law discussed above, the I.C.J. may also look to general principles of law recognized by civilized nations to guide it in its decisions.[63] In some circumstances, it might be appropriate to view equity as part of those "general principles of law." In this context, the function of equity should be to bring to light the latent rules of law, not to create new rules of law.[64] The basic philosophy is that, as a general rule, equity should mitigate the rigors of the law,[65] or in the sense spoken of by Aristotle, it should temper the "injustice caused by a strict and literal application of law. . ."[66]

It is difficult to find fault with this application of equity in the resolution of international disputes. But in this case, although it argues that it does not, the court comes closer to making a decision *ex aequo et bono,* the second context in which equity will arise in international decisions. Translated, the phrase means "in justice and fairness [or] according to what is. . .good."[67] But the interpretation given to the clause in international law is that the court may use the function of equity to create new rules.[68] Rendering a decision *ex aequo et bono* requires the court to "decide according to non-legal principles of justice, of morality, of usefulness, of political prudence and of common sense, which a municipal legislator

59. Rubin, *supra* note 12.

60. Friedman, *The North Sea Continental Shelf Cases—A Critique,* 64 AM. J. INT'L L. 229, 229 (1970).

61. *Id.* at 235.

62. L. Goldie, Equity and the International Management of Transboundary Resources, 25 NAT. RES. J. 665 (1985).

63. *Statute of the I.C.J., supra* note 2.

64. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953).

65. L. Goldie, *supra* note 62.

66. Friedman, *supra* note 60.

67. BLACK'S LAW DICTIONARY 500 (rev. 5th ed. 1979).

68. *Statute of the I.C.J., supra* note 2.

or court would apply in a similar internal dispute, or which reasonable parties would adopt as their basis in concluding a treaty."[69]

Because decisions rendered under the *ex aequo et bono* clause may be viewed as being *contra legem,* an international tribunal will have the wider power to adjudicate a case *ex aequo et bono,* and thus to go outside the bounds of law, only if such power has been conferred on it by mutual agreement between the parties.[70] The United States and Canada did not request the court to give its decision *ex aequo et bono.* In the absence of such a request, the international court is to decide the case according to established law. As the dissent points out, the President of the Chamber asked both parties the following question:

> In the event that one particular method, or set of methods, should appear appropriate for the delimitation of the continental shelf, and another for that of the exclusive fishery zones, what do the Parties consider to be the legal grounds that might be invoked for preferring one or the other in seeking to determine a single line?[71]

The two States were unable to answer the question to the satisfaction of the court, even though they had:

> [S]ubmitted to the Chamber some 7,600 pages of pleadings and 2,000 pages of oral arguments together with 300 supporting maps, sketches or diagrams—more than 12 metres of shelving is taken up by the volumes deposited in the library by the Parties; yet no clear position regarding the essential legal problems arising in this case emerges from this mass of material.[72]

The court proceeded to ascertain its view of the answer through its earlier decisions and conventional law. It placed great reliance on the tribunal's decision in the *North Sea Continental Shelf Cases,* which Wolfgang Friedmann of the Board of Editors of the American Journal of International Law considered to be one of "the most interesting as well as debatable decisions in the history of the Court," in which the court formulated certain principles of general equity as applicable to the delimitation of continental shelves.[73] Friedman was most distressed by the fact that the court ruled that the equidistance principle had not become a general norm of international law applicable to all maritime States, whether or not they were signatories to a convention calling for its application.[74]

69. F. BERBER, RIVERS IN INTERNATIONAL LAW 266-67 (1959).

70. *Rann of Kutch Arbitration (India and Pakistan),* 7 INT'L LEGAL MATERIALS 633 (1969).

71. *Maritime Boundary, supra* note 4, at 362. (Dissenting opinion of Judge Gross).

72. *Id.* at 360.

73. Friedman, *supra* note 60, at 229.

74. *Id.* at 233. Friedman stated that the court denied that the equidistance principle was justified on *"a priori" or "fundamentalist" grounds, but admitted that the principle was the most generally acceptable because "no other method of delimitation has the same combination of practical convenience and certainty of application."*

According to this scholar, because "[t]he crux of the problem is that in international law the borderlines between interpretation of existing law and the making of new law are inevitably fluid, [the court]. . .had to determine the delimitation of boundaries in light of its own conceptions of equity."[75]

The court then turned to the applicable treaty law, but in the end its holding amounts to exclusive reliance on the work of the Third Conference of the United Nations on the Law of the Sea, which produced agreement plus equity as its prescription for maritime delimitation.[76] Bernard Oxman, a United States representative at the Tenth Session of the Law of the Sea Conference, which adopted the provision relied upon by the court, regarded it as a vague notion which would not enable States with maritime disputes to "resolve differences that do arise by narrowing and reformulating them in generally acceptable legal terms."[77] In fact, the provision replaced an earlier rule agreed upon by the negotiating States which would have applied the equidistance principle to both the economic zone (which encompasses fishery zones) and the continental shelf.[78]

CONCLUSION

When the majority applied its holding to the facts of the Gulf of Maine dispute, it said that it had identified "a criterion which need only be stated to be seen as intrinsically equitable: . . .equal division of the areas of convergence and overlapping of the maritime projections of the coastlines of the States concerned in the delimitation."[79] For evidence that the majority was overly optimistic in its view, and that the concept of equity is one "to which each attaches his own meaning,"[80] one need only look to the dissenting opinion of Judge Gross. He aptly insisted that:

> [E]quity does not consist in a successive search for equality, proportionality, result; each of these considerations is a way of applying equity, it is a choice made in the manner of applying the law, and not an accumulation of equities which there is nothing to forbid supplementing with such others as one may glimpse in that frame of mind. One must not narrow down the law of delimitation to two

75. *Id.* at 235.

76. *Public International Law Report, Delimitation of Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.)*, 28 INT'L PRAC. NOTEBOOK 11 (1985), (a communique released by the Registry of the I.C.J.).

77. Oxman, *The Third United Nations Conference on the Law of the Sea: the Tenth Session (1981)*, 76 AM. J. INT'L L. 1, 15 (1982), quoting a statement made by U.S. Ambassador James L. Malone, Plenary, Aug. 28, 1981.

78. *Id.*

79. *Maritime Boundary, supra* note 4, at 328.

80. *Id.* at 377. (Dissenting opinoin of Judge Gross).

> words, agreement plus equity, only to equate that equity with judicial discretion.[81]

The dilemma faced by the court in applying a nebulous standard of agreement plus equity was predicted by the United States diplomat, Bernard Oxman, when he commented on the Conference which adopted the standard that "there is little ground for optimism about either the process or the result. One must hope it is an isolated aberration that will be corrected, and that it will not be repeated."[82] Unfortunately, in this case the I.C.J. did not heed Oxman's advice, and its decision provides little guidance for maritime States seeking to resolve differences similar to those which the United States and Canada had faced.

The result of the two countries' myriad of written materials and a lengthy court opinion is, unfortunately, continued disarray in this area of the international law of the sea. The parties had requested the court to delimit the fishery zone and the continental shelf through application of international legal rules.

Neither the parties, nor, in the end, the court, were able to clearly articulate the existence of any such rules governing delimitation of two such distinct areas. The best that the court could produce was the notion that the result should be equitable. The problem is that when judges are able to apply their own ideas of equity, the court loses credibility, with States facing a variety of legal disputes, not just disputes in the area of the law of the sea.

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81. *Id.* at 378.
82. Oxman, *supra* note 77, at 15.