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The World Court Decision in the Canada-United States Gulf of Maine Seaward Boundary Dispute: A Perspective From Historical Geography

by Louis De Vorsey* 
and 
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I. INTRODUCTION

On October 12, 1984, a five-member Chamber of the International Court of Justice delivered its judgment in the case concerning the delimitation of the United States-Canadian maritime boundary in the Gulf of Maine and seaward over the rich fishing grounds known as Georges Bank. The parties brought their dispute for arbitration under the terms of a Special Agreement, which requested the Chamber to decide, "in accordance with the principles and rules of international law applicable . . . the following question:"

What is the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States of America from a point in latitude 44° 11' 12" N, longitude 67° 16' 46" W to a point to be determined by the Chamber within an area bounded by straight lines connecting the following sets of geographic co-ordinates:

- latitude 40° N, longitude 67° W;
- latitude 40° N, longitude 65° W;
- latitude 42° N, longitude 65° W?

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1 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12) [hereinafter cited as Delimitation]. The Chamber was not unanimous in its decision. Judge Schwebel voted for the Chamber's judgment and found the resulting line of delimitation to be equitable but not correctly adjusted to account for the Bay of Fundy's legal status. Judge Gros, on the other hand, dissented from the Chamber's judgment.

2 Delimitation, 1984 I.C.J. at 263-64, citing Special Agreement, art. II, para. 1 (Order of Jan. 20, 1982). Point A was simply the first point of intersection of the two lines representing the limits of the U.S. and Canada fishing zones claimed at the time they extended their jurisdictions to 200 nautical miles. There is a lingering dispute concerning which country has sovereignty over Machias Seal Island and North Rock that made it expedient to select point A rather than the terminus of the international boundary as a beginning for the seaward delimitation line. The triangular area that was to contain the delimitation line termination was similarly established as a result of the claims of
The general area of this lateral seaward boundary with the beginning point designated "A," and the large triangular area, thus described, is shown in Figure 1. Briefly stated, the Chamber was charged with determining a line from point A, shown on the map, to some point within the large triangular area described by the three geographic coordinates stipulated in the Special Agreement.

As long ago as 1975, discussions concerning the delimitation of a continental shelf boundary were held between the United States and Canada, but no agreement could be reached. In 1977, the implementation of 200-mile fishery zones by both countries created pressure for a speedy resolution of the problem as both the Gulf of Maine and Georges Bank fishing grounds were affected.

In September, 1978, an announcement in the Canadian Gazette further expanded Canada's claim in the region. The United States responded by asserting that the new Canadian claim had no merit under international law and would not be recognized. Finally, in 1979, the Special Agreement, which contained the question quoted, above was signed and ratified.

II. INTERNATIONAL COURT OF JUSTICE CHAMBER ESTABLISHED

Early in 1982, the International Court of Justice ordered a chamber of five judges constituted to hear the dispute. Four member judges in the International Court were selected to sit on the Gulf of Maine Chamber: Andre Gros of France; Hermann Mosler of West Germany; Roberto Ago of Italy; and Stephen Schwebel of the United States. Maxwell Cohen, former Dean of McGill University, Faculty of Law, was appointed by Canada to sit on the Chamber as judge ad hoc.

August 26, 1982 was fixed as the date for the submission of Memorials by both Canada and the United States. The Memorials are massive printed documents running to six volumes in the case of the United States and five volumes for the Canadian argument. No expense was spared in collecting and presenting the evidence to support each side's contentions. Many of the colored maps and illustrations used would have looked at home in the Canadian Geographical or National Geographic Magazine, such is their quality.

After six months, during which experts on both sides analyzed each the parties at the time of their Special Agreement. In this instance the maximum 200 mile claims of both terminate within the triangular area near the northeast apex and southwest apex respectively. *Id.* at 265.

3 Memorial of the United States (Can. v. U.S.) 86 (Memorial dated Sept. 27, 1982).
5 Memorial of the United States (Can. v. U.S.), at 96.
6 Delimitation, 1984 I.C.J. at 252.
other’s arguments and supporting evidence, a second or Counter-Memo-
rial was filed with the World Court. The Counter-Memorials were deliv-
ered for exchange on June 28, 1983. As with the Memorials, they are
lavishly illustrated multi-volume printed documents. Needless to say,
the Counter-Memorials were carefully analyzed by the opposing parties.
After several months of hard work, responses to the Counter-Memorials
were prepared. These responses, usually referred to as Reply Briefs or
simply Replies, were submitted on December 12, 1983. In the spring of
1984, the World Court Chamber (composed of the five jurists listed
above) heard oral arguments from the representatives of the United
States and Canada. Because of an interruption occasioned by Nicara-
gua’s case against the United States, the oral arguments could not be
completed as originally planned. The arguments commenced on April 2,
1984 and were finally concluded on May 11, 1984.

III. THE DISPUTE AS ARTICULATED BY THE
UNITED STATES AND CANADA

Before turning to the Chamber’s decision, it is instructive to gain
some perspective on the general nature and significance of the case as
seen by the parties. In Canada’s view:

[T]he range of factors in issue gives this case a unique human immedi-
acy and economic importance. For the first time, the Court is asked to
direct its attention to the full panoply of sovereign rights and jurisdic-
tion that coastal States may now exercise in the area beyond and adja-
cent to the territorial sea with respect to the living and non-living
natural resources of the seabed and subsoil and the superjacent waters.
The case thus brings together the promise of the continental shelf and
the known abundance of the fishery: the economic prospects that the
shelf may offer in years to come and the present livelihood of coastal
fishermen and the welfare of the communities they sustain.7

In his opening oral presentation outlining the United States point of
view for the Chamber, Davis R. Robinson, Legal Advisor, United States
Department of State, stressed that:

In the United States, the intense concern with this case stems largely
from historical American links with Georges Bank. United States fish-
ermen have fished significantly on Georges Bank since the 1820s. A

7 Memorial of Canada (Can. v. U.S.), at 18. An important section of Canada’s Memorial was
devoted to The Economic Importance of Georges Bank to Canada. In this section the Canadians
stressed the enormous importance of the fishing industry in the overall economy of Nova Scotia.
With reference to that industry, the Court was told that Georges Bank catches, in 1978, contributed
over one-third of the total in value for the Province as a whole. In the five counties forming south-
west Nova Scotia, where the bulk of Canada’s catches were landed, the proportion jumped to almost
46 percent of the total. The total dollar value of Georges Bank catch landings in the seventeenth
southwest Nova Scotia fishing ports in 1978 amounted to an impressive $64,218,000. Id. at 75-76.
rich folklore developed surrounding the exploit and the daring of these brave New Englanders. For almost a century and a half, it was, with few isolated exceptions, United States vessels alone that fished the waters over Georges Bank. During this period, especially in New England, the fisheries of Georges Bank were, to use a rather common American metaphor, considered by many citizens to be as "American as apple pie." In brief, Georges Bank has been closely connected with the United States for a long time. As could be expected, Canada's aspirations regarding the northeast portion of Georges Bank provoked a strong response, not only in New England, but also in the corridors of Washington.8

IV. THE DELIMITATION LINES PROPOSED BY THE PARTIES

In their pleadings both Canada and the United States presented specific lines which connected point A with the area of the large triangle described in their Special Agreement. These proposed delimitation lines are shown in Figure 1. Not surprisingly, the one proposed by the United States quickly earned the sobriquet, "the wedding cake line." Although not precisely a line composed of points which were equidistant in the terms of the Convention on the Continental Shelf, the Canadian line approaches that quality and came to be referred to as "the equidistant line" or "Canadian line."9 Both of these proposed delimitation lines are shown on Figure 1, along with the Chamber's. As can be seen, Canada gained a large area in the Gulf of Maine to which it had not laid any claim, but received only about one-half of the area on Georges Bank it had argued for.

In its Memorial, Canada proposed the application of the principle of equidistance to be appropriate in arriving at an equitable division of the disputed area. When it came to applying the equidistance method, however, Canada found Cape Cod and its offlying islands to be an "exceptional protrusion" which, "when superadded to the general protrusion of the coast of Massachusetts," produced an inequitable effect on the delimitation.10 To remedy the "disproportionate influence" of Cape Cod on the equidistance computation, the Canadians chose "an appropriate base-point on Cape Cod" and thus eliminated the effect of the Cape or Nan-


9 For a discussion of the equidistant maritime boundary concept, see Hodgson & Cooper, The Technical Delimitation of a Modern Equidistant Boundary, 3 OCEAN DEV. & INT'L L. 361 (1976). In its application of the equidistant concept, Canada chose to consider Cape Cod as an "irregularity of the eastern North American coastline." In effect, Canada ignored Cape Cod's existence in the choice of coastal basepoints from which a line of equidistance was constructed. The U.S. line, while appearing complex, is basically a perpendicular to the general direction of the coast adjusted to avoid splitting fishing banks.

10 Memorial of Canada (Can. v. U.S.), at 183.
tucket Island. In Canada's view, the adjusted equidistance method produced "an equitable solution that takes account of all relevant factors and meets the test of a reasonable degree of proportionality."\(^{12}\)

When the World Court Chamber scrutinized the Canadian line it found something less than equity. The Chamber pointed out that:

The Canadian line . . . consists of a line constructed almost entirely from the nearest points of the baselines from which the breadth of the territorial sea is measured. In this instance, this means solely islands, rocks or low-tide elevations. An exception is however made for the basepoints selected on the coast of Massachusetts, which have been transferred from the outer end of the peninsula of Cape Cod and Nantucket Island, much further to the west, to the eastern end of Cape Cod Canal.\(^{13}\)

Canada's inconsistency in failing to feel any obligation to similarly displace its eastern basepoint from Seal Island to the mainland coast of Nova Scotia was critically noted by the Chamber. Seal Island lies some distance off the coast of Nova Scotia and would have displaced the Canadian delimitation line to the favor of the United States had it been used as a basepoint.

The United States had proposed various delimitation lines in negotiations during the years preceding the World Court adjudication. The final position of the line was derived from what the United States maintained was the general direction of the coastline facing Georges Bank and the disputed waters. On this central idea was based a set of assertions, which the Chamber summarized as follows:

(a) recognition of the priority to be given, in all respects, to consideration of the general southwest and northeast direction of the eastern seaboard of the American Continent;

(b) a distinction . . . between "primary coasts" and "secondary coasts," according as they follow the general direction of the coast or, on the contrary, deviate from it;

(c) the classification, \textit{inter alia}, of the Atlantic coast of Nova Scotia as one of the "primary" coasts and of the coast of Nova Scotia abutting on the Gulf of Maine - like the coast of Massachusetts abutting on that Gulf - as "secondary" coasts;

(d) a finding that the coast of Maine abutting on the Gulf follows a direction corresponding to the "general direction" and is, therefore, a "primary" coast; and that Georges Bank, situated off and opposite the coast of Maine, is oriented in the same direction.\(^{14}\)

\(^{11}\) Id.
\(^{12}\) Id.
\(^{13}\) Delimitation, 1984 I.C.J. at 287.
\(^{14}\) Id. at 318.
Thus, in the Chamber's view, the United States was arguing the concept of natural prolongation through the extension of its primary coastal front in the geographical sense, rather than in the geological or geomorphological sense.\(^5\) Avoidance of encroachment and cut-off as well as proportionality were also served by this methodology. Further adjustment was required to ensure total respect for the ecosystems of Georges Bank and Browns Bank, thus contributing to the stair step or wedding cake appearance of the United States delimitation line. As the Chamber viewed it, the resulting line was a "compromise solution between two fundamentally different methods: the geometrical method of the perpendicular to the general direction of the coast and the ecological method . . . of respect for the unity of the distinct ecosystems . . . and distribution on that basis between the two neighboring States."\(^6\)

In the opinion of the Chamber neither of the parties' boundary lines had merit. "In both cases," the majority of judges agreed "the outcome of the parties' efforts can be said to have been preconceived assertions rather than any convincing demonstration of the existence of the rules that each had hoped to find established by international law."\(^1\) Clearly, the Chamber viewed the voluminous collections of legal and factual findings submitted by the parties flawed by the "\(a\ priori\) nature" of their underlying premises and deductions.

The Chamber was further critical of the parties' "false premise," which led them to search and employ international law "for, as it were, a set of rules which [were] not there."\(^8\) "[C]ustomary international law . . . ," the Chamber averred, "comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community . . . ."\(^9\) There does, in the Chamber's opinion, exist a "set of customary rules whose presence . . . can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas."\(^10\) A body of detailed rules for such a delimitation is not what the Chamber would accept as a bona fide product resulting from a search of the extant relevant body of international law.

V. THE CHAMBER'S SEARCH FOR THE FUNDAMENTAL NORM OF INTERNATIONAL LAW

The Chamber's search for the "fundamental norm of customary in-
international law governing maritime delimitation” and a just delimitation line was based on article 38 of the Statute of the International Court of Justice. In the terms of that article, the Court should consider the following authorities in reaching decisions to those disputes it hears:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of 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.

As had been pointed out, the United States and Canada had entered into a Special Agreement in 1979, which, for the first time, called on the Court to delimit not only the continental shelf, but also the exclusive fishing zone in the superjacent waters above it. As will be seen, that agreement shaped the Chamber’s deliberations in important ways.

As the Chamber began the discussion of its mandate and the ensuing search for the “fundamental norm” of international law that should apply in delineating a boundary, it reminded the parties, “that ‘legal title’ to certain maritime or submarine areas is always and exclusively the effect of a legal operation.” It was not correct, in the Chamber’s opinion, to conclude that boundaries arose from any sort of intrinsic merit or physical characteristic. Rather, a boundary was nothing more or less than the limit of the extent of the title as derived from law. It would not be correct to conclude “that international law recognized[d] the title conferred on the State by the adjacency of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences.”

VI. EQUITABLE CRITERIA AND PRACTICAL METHODS FOR A DELIMITATION

It was the Chamber’s conclusion that the fundamental norm of international law governing maritime delimitation demanded that such delimitations “be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result.” “In reality,” the Chamber stated,

21 Id. at 300.
23 Id. art. 38, para. 1(a)-(d), at 1060, T.S. No. 993.
25 Id.
26 Id. at 300.
a delimitation by a single line . . . i.e., a delimitation which has to apply at one and the same time to the continental shelf and to the superjacent water column can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one . . . to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them.27

The criteria that the Chamber ultimately chose were derived from geography. By geography the Chamber meant "mainly the geography of coasts, which has primarily a physical aspect, to which may be added, in the second place, a political aspect."28 Within such a framework, the Chamber favored "a criterion long held to be as equitable as it is simple, namely that in principle . . . one should aim at the equal division of areas where the maritime projections of the coasts of the States . . . converge and overlap."29 The geographical complexities of the New England-Nova Scotia facade fronting the Gulf of Maine would of course make necessary

the likewise auxiliary criterion whereby it is held equitable partially to correct any effect of applying the basic criterion that would result in cutting off one coastline, or part of it, from its appropriate projection across the maritime expanses to be divided, or then again the criterion — it too being of an auxiliary nature — involving the necessity of granting some effect, however limited, to the presence of a geographical feature such as an island or group of small islands lying off a coast, when strict application of the basic criterion might entail giving them full effect or, alternatively, no effect.30

Once committed to this line of reasoning the Chamber found, not surprisingly, that geometrical methods would be suitable instruments for giving effect to their criteria for delimitation. In the words of its decision, "[t]he delimitation line to be drawn in a given area will depend upon the coastal configuration."31 Considered as a whole, the Chamber's approach to the problem of deciding a single delimitation line for the continental shelf and waters above it could be said to subscribe to the adage "the land dominates the sea."32 Whether this approach was wise

27 Id. at 327.
28 Id.
29 Id.
30 Id. at 328.
31 Id. at 330.
32 Id. at 338. It is significant to note that the Chamber called attention to this adage in its discussion of the crucial third and longest segment of the delimitation line. This was the segment that extended seaward from the Gulf of Maine to divide Georges Bank between Canada and the United States. The "land dominates sea" concept was articulated in several earlier international disputes concerning coastal jurisdiction. For example, in its Memorial, the United States cited the Grisbadarna dispute between Norway and Sweden where the Court was quoted as stating: "Whereas, this opinion is in conformity with the fundamental principles of the law of nations . . . in
or appropriate will be evaluated below. Before turning to that discussion, however, attention should be given to the manner in which the Chamber constructed the delimitation line now in effect between Canada and the United States. Moving from the “fundamental norm” of international law to a practical and equitable boundary line separating the jurisdictions of sovereign states is no easy task.

VII. Chamber’s Construction of the Delimitation Line

To begin the construction of a delimitation line the Chamber established what it considered to be the coastal areas of the United States and Canada fronting on the Gulf of Maine. In discussing this, the Chamber noted that the parties had frequently involved coasts well outside of the gulf proper and invoked a broader geographical concept under the rubric “Gulf of Maine area” in structuring their respective arguments. In the Chamber’s view “the involvement of coasts other than those directly surrounding the Gulf does not and may not have the effect of extending the delimitation area to maritime areas which have in fact nothing to do with it.”

The Chamber’s independent analysis and conclusion that the Gulf of Maine formed “a broad oceanic indentation in the eastern coast of the North American Continent, having roughly the shape of an elongated rectangle,” was crucial to the delimitation lines decreed. In the Chamber’s construct neither the waters of the Bay of Fundy nor those of Massachusetts Bay and Cape Cod Bay were included in the Gulf of Maine. The rectangular geometry of the Gulf of Maine as defined by the Chamber can be observed on the map in Figure 2.

Beginning at the terminus of the U.S.-Canada international bound-
ary, the Chamber found that a straight imaginary line drawn through
Grand Manan Island to Brier Island and Cape Sable would form the
northeastern side of a rectangle. A bit over two hundred miles to the
southwest a similar imaginary line drawn between "the elbow of Cape
Cod" and Cape Ann was found to be the opposite and "quasi-parallel"
side of the rectangle. The long sides were formed by the seaward closing
line between Nantucket Island and Cape Sable and another imaginary
line connecting Cape Elizabeth, Maine, and the Grand Manan Channel.
This rough rectangle then became the framework within which the
Chamber employed its criteria and methods to determine an equitable
line of delimitation through the area of overlapping Canadian and United
States offshore claims.

Point A was not technically an equidistant point but had been desig-
nated by the parties as the point of origin for the delimitation line. For
this reason the Chamber found it "necessary to renounce the idea of em-
ploying the technical method of equidistance." The Chamber chose
instead a method which was "geometrical" and "based on respect for the
geographical situation of the coasts between which the delimitation is to
be effected."

In brief, the Chamber drew two lines from point A to form
perpendiculars with the two basic coastal rectangle lines which formed a
corner at the terminus of the international boundary. The reflex angle
that the two perpendiculars formed at point A was found to be approxi-
ately 278 degrees. The bisector of this angle was taken as the course or
azimuth for the first segment of the delimitation line. The Chamber had
thus fixed the direction of the first of two segments of the delimitation
line drawn in the Gulf of Maine, which started at point A and ended at
point B where the second segment began. At no point in its discussion of
this, and following crucial delimitation line determinations, did the
Chamber reference or cite earlier actions of the International Court or
other international tribunals. That this was the case is not entirely sur-
prising as tribunals had not usually been requested actually to draw de-
limitation lines, but rather to indicate the principles and rules of
international law applicable to such delimitations. It should also be kept
in mind that the Chamber was breaking new legal ground in this case in
that, for the first time, a tribunal was requested to draw a single bound-
ary line applicable to all aspects of coastal state jurisdiction including
both the continental shelf and exclusive fishing zone.

To determine the course of the second segment, the Chamber looked

36 Delimitation, 1984 I.C.J. at 330. Point A was selected because it was the first point of
intersection of the two lines representing the limits of the fishing zones claimed by Canada and the
United States when they decided to extend their respective fishing jurisdiction zones out to 200
miles. The geographic position of point A is latitude 44° 11' N, longitude 67° 16' 46" W.
37 Id. at 333.
again at its geometrical rendering of the Gulf of Maine and noted that a distinctly different relationship existed between the coasts of Nova Scotia and Massachusetts than that existing between the Canadian province and Maine. Massachusetts and Nova Scotia formed opposite coasts and did not have the quality of lateral adjacency that had guided the determination of the first segment of the line from point A. Here, within the Gulf of Maine, the Chamber stated that only a median line drawn “approximately parallel to the approximately parallel lines of the two opposite coasts” would satisfy its self-imposed requirement of a method of geometrical origin. In essence, the Chamber followed the more general requirement of article 6, paragraph 1 of the 1958 Convention of the Continental Shelf, which calls for a median line boundary “every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.”

In this case, the Chamber’s approximately parallel lines forming the northeast and southwest sides of its Gulf of Maine rectangle were treated as baselines.

A correction was needed, however, to take account of the difference in the lengths of the U.S. and Canadian coastlines and achieve equity through proportionality. In the Chamber’s reckoning there were about 284 miles of U.S. coastline as compared to 206 miles of Canadian coastline involved. This produced the ratio of 1.38 to 1. A further correction was deemed necessary, however, before an equitable adjusted median line could be fixed upon.

The Chamber considered that Seal Island and Mud Island off the coast of Nova Scotia should have some influence in the calculation of the location of the second segment of the delimitation line. Rather than transfer the whole of the Nova Scotia coastline by the distance between Seal Island and the mainland, the Chamber decided to allow the island half effect. This resulted in a corrected ratio of 1.32 to 1 in place of the 1.38 to 1 that was determined before Seal Island was taken into account. In the Chamber’s words, “the result of the effect to be given to the island is a small transverse displacement of [the corrected median] line, not an angular displacement; and its practical impact therefore is limited.”

Thus, the second segment of the delimitation line was the corrected median line between the coasts of Nova Scotia and that of Massachusetts as the Chamber had defined them. It intersected the first segment at point B on the map in Figure 2 and extended seaward to the closing line of the Gulf of Maine. The Chamber noted

38 Id. at 334.
40 Delimitation, 1984 I.C.J. at 337.
that the meeting-point of the first and second segments of the delimitation line, i.e., the pivotal point where this line changes direction, is located about as far into the Gulf as Chebogue Point, a feature of the Nova Scotian coast which marks the transition from the part of this coast in an adjacency relationship with the coast of Maine to the part facing the Massachusetts coast in a relationship of oppositeness.\footnote{Id.} The third and longest segment of the delimitation line would lie entirely seaward of the Gulf of Maine closing line. As a consequence of this fact, the Chamber reasoned that the most appropriate geometrical method for its determination would be the simple drawing of a perpendicular from the closing line at the point of intersection with the corrected median line.\footnote{Id. at 337-38.} This point is shown as C on the accompanying map. From point C the Chamber's line of delimitation was extended across Georges Bank into the triangular termination area the parties had designated in their Special Agreement (Figure 1). There the line of delimitation was terminated where the perpendicular from the Gulf of Maine closing line reached the outermost extent of the disputed overlapping 200 mile claims of Canada and the United States.\footnote{Id. at 339.}

\section*{VIII. THE CHAMBER'S LINE AND SUBJECTIVE PERSPECTIVE}

While it is probably incorrect to view the Chamber's efforts in terms of winning or losing, it is a fact that its line of delimitation confirmed to Canada a large portion of Georges Bank. In the words of the Chamber's decision, "[t]his Bank is the real subject of the dispute . . . the principal stake in the proceedings, from the viewpoint of the potential resources of the subsoil and also, in particular, that of fisheries that are of major economic importance."\footnote{Id. at 353.} Clearly the coastal geography/geometry methodology followed by the Chamber in its effort to articulate and implement the fundamental norm of customary international law governing maritime delimitation, had resulted in a division of Georges Bank not radically different from the "equidistance" division that had been argued by Canada.

In his separate opinion, the American member of the Chamber, Judge Schwebel, agreed with "the essentials of . . . analysis and reasoning"\footnote{Id.} and found that the "resultant line of delimitation [was] not inequitable."\footnote{Id. at 357.} He did, however, disagree with the placement of the delimitation line.\footnote{Id. at 353.} In his comments, Judge Schwebel noted that "the law is more
plastic than formed” in such matters. He also used the term “subjective perspective,” a term that, it could be argued, sums up a basic flaw in the Chamber’s whole attempt to move from the fundamental norm of international law to the practical task of fixing a single line of delimitation through the Gulf of Maine and across Georges Bank.

It will be recalled that the Chamber was critical of the imprecise definition of the term “Gulf of Maine area” as it was employed by the parties in their Special Agreement and pleadings. The Chamber considered it “indispensable to achieve a greater degree of precision to the geographical concepts used in this context by way of basis for the operation which it has to perform.” To satisfy this need for greater precision, the Chamber alluded to the maps included with their decision and stated that “the Gulf of Maine . . . is a broad oceanic indentation in the eastern coast of the North American Continent, having roughly the shape of an elongated rectangle.” To echo a phrase used by the Chamber in another context, “it is a far cry from this hypothesis to geographical reality.”

Rectangles, triangles, squares, or circles almost never occur in nature; they are geometrical shapes — with mathematically predictable properties and relationships. Nature, to the contrary, presents an untidy assemblage of irregular configurations all in a continual state of flux. It is the challenging task of geographers, equipped with a number of sub-fields of expertise, to find and analyze the real-world relationships that do exist in particular regional settings across the globe. Experience has shown that such relationships are complex and, especially when humans are involved, seldom predictable.

In his dissenting opinion, Judge Gros was vigorous in criticizing the Chamber’s subjective description of the Gulf of Maine as forming a rectangle. He wrote:

The idea that the Gulf [of Maine] is a rectangle has no other utility than to prepare the discovery that an angle in the north of the Gulf will enable a bisector to be drawn; the choice of some imaginary lines to compose certain sides of the mythical rectangle ending in an area outside the Chamber’s competence is presented as a striking likeness of nature. The Gulf is not a rectangle in any exact description of the facts in this case, since, like any gulf, it has only three sides, but it is made out to be one simply because that enables it to be given a fourth side at its entrance which will prove an indispensable line for justifying the
tionality. However, his construct of the delimitation line, accompanying his separate opinion, allowed Canada less of the area of Georges Bank.

47 Id.
48 Id. at 268.
49 Id. (emphasis added).
50 Id. at 334.
direction of the final segment of the boundary . . . .

In Judge Gros's view, a judge should not "modify the geographical situation by a representation, be it a line, rectangle or angle, which is his own vision of the facts and alters those facts."52

IX. THE EQUITABLENESS OF THE CHAMBER'S LINE

It was not until page 99 of its 105-page decision document that the Chamber formally took up its last remaining task, which was "to ascertain whether the result thus arrived at may be considered as intrinsically equitable, in the light of all the circumstances which may be taken into account for the purpose of that decision."53 Such verification was not deemed necessary in the instance of the two segments (A-B, B-C) of the delimitation line drawn inside the Gulf of Maine. Within the gulf, the Chamber averred, "it would scarcely be possible to assess the equitable character of the delimitation . . . on the basis of any other than the dominant parameters provided by the physical and political geography of the area."54

Outside the Gulf of Maine and over Georges Bank, the Chamber felt that the question of intrinsic equitableness might take on something of a different complexion. As the Chamber saw the matter:

This Bank is the real subject of the dispute between the United States and Canada in the present case, the principal stake in the proceedings, from the viewpoint of the potential resources of the subsoil and also, in particular, that of fisheries that are of major economic importance. Some enquiry whether, in addition to the factors provided by the geography of the Gulf itself, there are no others that should be taken into account, is therefore an understandable step. It might well appear that other circumstances ought properly to be taken into consideration in assessing the equitable character of the result produced by this portion of the delimitation line, which is destined to divide the riches of the waters and shelf of this Bank between the two neighbouring countries.55

The Chamber's "other circumstances" worthy of consideration were found to be summed up in the data from human and economic geography provided by the parties. In the Chamber's opinion, these data were "ineligible for consideration as criteria to be applied in the delimitation

51 Id. at 379-80.
52 Id. at 380.
53 Id. at 339-40.
54 Id. at 340. In support of the correctness of this position the Chamber noted that neither party had made any special reference to the fishing or potential petroleum resources existing landward of the Gulf of Maine closing line.
55 Id.
process itself..." Economic and human geography might, however, "be relevant to assessment of the equitable character of a delimitation first established on the basis of criteria borrowed from physical and political geography." Once again the Chamber exhibited its admitted "land dominates sea" bias. The declaration is that a line of delimitation the Chamber set in motion by means of its arguably subjective interpretation of the complexities of coastal configurations in the far corners of the Gulf of Maine would govern the division of the world's premier fishing ground with only the slightest heed being paid to the rich history of mankind's activities there over the centuries since discovery. While no disrespect is intended, it could be said that the Chamber was creating a situation in which a remote Gulf of Maine "tail" was wagging a Georges Bank "dog."

X. THE CONCEPT OF THE BEHAVIORAL ENVIRONMENT

The Chamber might have avoided the pitfall of allowing a Gulf of Maine "tail" to wag the Georges Bank "dog" by broadening its narrow definition of geography to embrace the discipline's well-established sub-field, historical geography. Historical geographers, committed to an investigation of the disputed area through its long history of human use, would agree that Georges Bank itself, rather than the fringing coasts of the gulf, was the disputed region's fulcrum.

In his seminal paper, Historical Geography and the Concept of the Behavioral Environment, British geographer William Kirk emphasized that:

In as much as in Historical Geography we are concerned with the behavior of human groups in relation to environment it behooves us to reconstruct the environment not only as it was at various dates but as it was observed and thought to be, for it is in this behavioral environment that physical features acquire values and potentialities which attract or repel human action.

Kirk's behavioral environment concept is similar to that of the "psychomilieu" as it was discussed in the context of international political decision-making by the well-recognized work of Harold and Margaret Sprout. In the Sprouts' thesis, "what matters in decision-making

56 Id.
57 Id.
58 As the term suggests, the chief concerns of historical geography deal with the geography of areas in times past and the changing geographical relationships of areas through time. See also, De Vorsey, Florida's Seaward Boundary: A Problem in Applied Historical Geography, 25 PROF. GEOGRAPHER 214-20 (Aug. 1973).
59 Kirk, Historical Geography and the Concept of the Behavioral Environment, INDIAN GEOGRAPHICAL SOC'Y SILVER JUBILEE SOUVENIR & N. SUBRAHMANYAM MEMORIAL VOLUME 159 (Madras, 1952).
is how the milieu appears to the decision maker(s) under considera-
tion — not how the milieu actually is or how it appears, or might appear,
to some other person(s).”

XI. THE GEORGES BANK ENVIRONMENT AS CONSIDERED
BY THE CHAMBER

It is significant to note that neither of the parties invoked a consider-
ation of the historical behavioral environment of Georges Bank in its
arguments before the Chamber. In the case of Canada, this is under-
standable, in view of what will be discussed below. It is far less under-
standable on the part of the United States’ litigators, who might have
strengthened their position through such a reconstruction. This is not to
imply that the United States failed to mount historical arguments. The
traditional arguments failed, however, to sway the Chamber, which sum-
marized them in the following paragraph:

233. In the eyes of the United States, the main consideration here is the
historical presence of man in the disputed areas. It believes the deci-
sive factor here to be the activities pursued by the United States and its
nationals since the country’s independence and even before, activities
which they claim to have been alone in pursuing over the greater part
of that long period. This reasoning is simple and somewhat akin to the
invocation of historic rights, though that expression has not been used.
This continuous human presence took the form especially of fishing,
and of the conservation and management of fisheries, but it also in-
cluded other maritime activities concerning navigational assistance,
rescue, research, defense, etc. All these activities, said greatly to ex-
ceed in duration and scale the more recent and limited activities of
Canada and its nationals, must, according to the United States, be re-

garded as a major relevant circumstance for the purpose of reaching an
equitable solution to the delimitation problem.

As mentioned above, Canada placed far less stress on historical argu-
ments concerning its nationals’ activities on Georges Bank through
time. As the Chamber summarized, “the only period which in Canada’s
eyes should be regarded as relevant was the recent one leading up to, or
even continuing beyond, the time when both States finally decided to go
ahead with the institution of exclusive fishery zones.” In Canada’s
view only the events of the current decade were worthy of weight in the
Chamber’s adjudication of the lateral boundary dispute.

The Chamber rejected these positions of the parties. In the case of
the United States, the Chamber confirmed “its decision not to ascribe

60 H. Sprout & M. Sprout, Toward A Politics of the Planet Earth 192 (1971).
62 Id. at 341.
any decisive weight . . . to the antiquity or continuity of fishing activities carried on in the past within that part of the delimitation area which lies outside the closing line of the Gulf.\textsuperscript{63} In the Chamber's view, the waters over Georges Bank "were part of the high seas and as such freely open to the fishermen not only of the United States and Canada but also of other countries . . . ."\textsuperscript{64} More discussion of the United States' thesis regarding Georges Bank is included in the Chamber's decision but these quotations suffice to make clear that the judges persisted in a view of these disputed waters as what Judge Gros critically characterized as "an empty sea" — just so much more undifferentiated blue high seas as shown on small-scale maps and charts.

Most of the 300 supporting maps, sketches or diagrams that Canada and the United States included with the 7,600 pages of pleadings and 2,000 pages of oral arguments submitted to the Chamber showed the bathymetry and features of Georges Bank. The presence of these shallows is the dominant submarine feature immediately seaward of the Gulf of Maine closing line (Figures 1 and 2). In anthropomorphic terms it might be described as a broad submerged "thumb" stretching from a "hand" or "palm" formed by the northeastern states. The space between the imagined thumb and an index finger, forming the New England coast from Massachusetts to New Brunswick, is occupied by the Gulf of Maine. Immediately to the north of the tip of the Georges Bank "thumb" lies a marked depression shown on the charts as the Northwestern Channel.

After its consideration of the best and most current expert scientific evidence dealing with the offshore environment, that the parties could supply, the Chamber concluded that:

The continental shelf of the whole of this area is no more than an undifferentiated part of the continental shelf of the eastern seaboard of North America, from Newfoundland to Florida. According to generally accepted scientific findings, this shelf is a single continuous, uniform and uninterrupted physiographical structure, even if here and there it features some secondary characteristics resulting mainly from glacial and fluvial action. In this wider context the continental shelf of the area relevant to the present proceedings may be defined as the natural prolongation of the land mass around the Gulf of Maine; neither Party disputes the fact that there is nothing in this single sea-bed, lacking any marked elevations or depressions, to distinguish one part that might be considered as constituting the natural prolongation of the coasts of the United States from another part which could be regarded as the natural prolongation of the coasts of Canada.\textsuperscript{65}

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 273-74.
Even the disputed area's most accentuated feature, the Northeast Channel, was found to lack the "characteristics of a real trough marking the dividing-line between two geomorphologically distinct units."66

When it came to the water over and around Georges Bank, the Chamber concluded "that it too essentially possesses the same character of unity and uniformity already apparent from an examination of the seabed, so that, in respect of the waters too, one must take note of the impossibility of discerning any natural boundary capable of serving as a basis for carrying out a delimitation of the kind requested of the Chamber."67 Neither party, needless to say, had argued the existence of a simple "natural boundary" in the waters of the disputed area seaward of the Gulf of Maine. They had, however, emphasized the distinctive and palpable qualities of those waters at great length. Canada, for example, acknowledged the fact that "there is a distinct ecosystem of Georges Bank, which is geographically defined by the Great South Channel and the Northeast Channel." 68

It is clear from these quotations, and other statements by the Chamber, that it was not swayed from its "empty sea" stance by the parties' impressive efforts to employ the findings of modern ocean science concerning the physical environment of the area in dispute.69 Modern science can inventory and evaluate the natural phenomena, living and inanimate, as well as the physical and human processes operating in any particular area of earth space with some degree of reliability. Oceanographic scientists do not, however, normally concern themselves with the reconstruction of past "behavioral environments" - those cognition fields or milieus within which individuals and groups framed their choices, decisions and activities over time in a region. It is suggested that this is precisely the sort of reconstruction with which the Chamber should be primarily concerned if the application of international law is to result in truly equitable solutions rather than apparently arbitrary pronouncements concerning the human disputes and problems which result from those past choices, decisions, and actions in their regional contexts.

XII. THE BEHAVIORAL ENVIRONMENT OF GEORGES BANK

The full reconstruction of the behavioral environment of Georges Bank and its superjacent waters would run to an extended length and produce a monograph of ample proportions. Space limitations will not

66 Id. at 274.
67 Id. at 277. The only known instance of a natural oceanic water boundary serving as a political boundary was in Florida following the state's re-entry into the United States in 1868. For a discussion of this unique boundary, see generally De Vorsey, supra note 58, at 214-20.
68 Delimitation, 1984 I.C.J. at 276.
69 Id. at 277.
permit the examination of more than a few selected elements that could form integral parts of the reconstructed behavioral environment of the disputed area.

In the eyes of the many generations of fishermen who inhabited the shores of the Gulf of Maine and began the commercial exploitation of its fishery at least as early as 1710, Georges Bank was an extension of New England. This view was eloquently stated by the New England philosopher-author, Henry David Thoreau in the middle of the last century. In his book, *Cape Cod*, Thoreau reported that “[o]n Cape Cod the next most eastern land you hear of is St. George’s Bank.” Thoreau went on to state:

the fishermen tell of “Georges,” “Cashus,” and other *sunken lands* they frequent. Every Cape man has a theory about George’s Bank having been an island once, and in their accounts they gradually reduce the shallowness from six, five, four, two fathoms, to somebody’s confident assertion that he has seen a mackerel-gull sitting on a piece of dry land there.71

The persistence of this folk view of Georges Bank as a former island outlier of New England was demonstrated by Shebnah Rich in an account published in 1883:

The distance from Chatham to southwest Georges is about sixty miles. One sixth nearly of this distance is here accounted for [by islands that had been eroded by the sea since Gosnold and Smith’s exploration in the early 1600s] which well sustains the opinion, that at no very distant day Georges Bank was connected with groups of islands, if not mainland, extending to Nantucket and the Cape. Old Skipper Joseph Wharf, the father of the late Joseph, used to say that he had played ball on Georges, and men were living fifty years ago, who said they had seen long strings of gulls sitting on the dry sandbars.

It used to be quoted as history, that an Amsterdam Company once proposed purchasing the right to build there a port.72

Henry Mitchell, a scientist with the U.S. Coast and Geodetic Survey, added qualified support to folk cognitions of Georges Bank as a wasted remnant of former land. In an official report dated October 10, 1878, Mitchell noted that “St. George’s Bank, the summit of which is called George’s Shoal, is probably a wasted island.”73 In support of this

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70 2 H.D. THOREAU, CAPE COD 123 (1896). In his own book, *Cape Cod and the Old Colony*, Albert Perry Brigham reflected on the folk-view reported by Thoreau. After recounting an oft-told tale of a ship’s crew once playing a game of baseball on an exposed shoal on Georges Bank, Brigham concluded, “True or false, the yarn serves to fix in the memory this feature of our Atlantic waters.” A.B. BRIGHAM, CAPE COD AND THE OLD COLONY 55 (1920) (emphasis added).

71 2 H.D. THOREAU, supra note 70, at 123.

72 S. RICH, TRURO-CAPE COD 195 (1883).

73 H. MITCHELL, PHYSICAL HYDROGRAPHY OF THE GULF OF MAINE, REPORT OF THE SU-
conclusion Mitchell wrote:

Capt. Isaac Hull, U.S.N., made note, in 1815(?), of the assertion of Cape Cod fishermen that ‘part of the shoal has been quite dry, with gulls sitting upon it,’ and states that his own shoalest water was three feet after subtracting over seven feet for height of tide. There would seem to be no reason why the sands should not heap up occasionally so as to emerge at low tide; but the testimony is not direct, and I find much the same report mentioned with discredit in Hollingsworth’s *Nova Scotia*, printed in 1786.\(^{74}\)

It is informative to contrast these reported folk views of Georges Bank as a wasted island with the analysis of Thomas Pownall, who served as governor of colonial Massachusetts during the period of 1757-1759. In his frequently cited treatise, *Topographical Description of the Dominions of the United States of America*, Pownall described “a long Hook of a Promontory called Cape Cod.”\(^{75}\) Pownall continued:

The Long Low neck of land by which this [the Promontory itself is high Land] is joined to the Main seems to have been formed by the Coil and Recoil of the Tides, rolling up Silt and Sand at the Thread of their least Force . . . . Many and various Alternations have been made, and are continually making on the East Coast at the Back of this Promontory: And a long Point of Sand has been formed into solid Marsh Land within these Forty Years, at the South Point of it. Let those who are curious in the Process of the Operation of Nature, watch the Progress of George’s Sand. From the Inquiries I made, and the Answers I got, I think that it will in some Years, and perhaps not many hence, form into another Sable Island. Its southern Point is now at Low Water with a strong off-shore Wind visibly a Shoal.\(^{76}\)

For maximum appreciation, Pownall’s description of Georges Bank in process of evolving into another Sable Island should be read with a copy of *A General Map of the Northern British Colonies in America 1776* at hand.\(^{77}\) On this important Revolutionary-era map, a large shaded area

\(^{74}\) Mitchell’s statement that the report of dry banks on Georges Bank was mentioned with “discredit” by Hollingsworth is hard to understand and may have resulted from an incorrect reading of his notes. With reference to Georges Bank, Hollingsworth wrote, “it is asserted to have been seen dry in some places, which is not impossible, as there are credible persons who have sounded upon it in three fathoms water.” S. Hollingsworth, An Account of the Present State of Nova Scotia 29 (Edinburgh 1786).

\(^{75}\) T. Pownall, Topographical Description of the Dominion of the United States of America 89 (1949).

\(^{76}\) Id. at 89-90.

\(^{77}\) R. Sayer & J. Bennett, A General Map of the Northern British Colonies in America . . . (published by the Admiralty & Bd. of Trade, London 1776).
off the New England coast is identified as "St. George's Bank or Malabar." Several small detached shaded areas fringe the main bank on its southern and southeastern edge. A gloss on the map explains these areas as "South Points of Malabar to be dry at low water with an offshore wind vid. Governor Pownall's Topographical Description." Thus, Pownall's hypothesis concerning Georges Bank, based on "Inquiries I made, and the Answers I got," was brought to the attention of a wider map-using public as well as the readers of his book.

Pownall was not alone in his interest in the formation and dynamics of the fishing banks found on the continental shelves of New England and eastern Canada. Thomas Jefferson, while considering a proposal to construct a canal through the Isthmus of Panama in a letter written in 1786, commented on possible impacts on the fishing banks far to the north. He speculated that the Gulf Stream would be deflected by such a canal and "Those banks, ceasing to receive supplies of sand, weeds and warm water by the gulf stream, it might become problematical what effect changes of pasture and temperature would have on the fisheries." 78

Even more interesting than his speculation regarding the influence of the Gulf Stream in forming and nourishing the fishing banks were Jefferson's thoughts concerning the ocean current as a potential "natural boundary" for the United States. John Quincy Adams revealed Jefferson's ideas on this score in the following extract dated November 30, 1805:

The President mentioned a late act of hostility committed by a French privateer near Charleston, South Carolina, and said that we ought to assume as a principle that the neutrality of our territory should extend to the Gulf Stream, which was a natural boundary, and within which we ought not to suffer any hostility to be committed . . . . I observed that it might be well, before we ventured to assume a claim so broad, to wait for a time when we should have a force competent to maintain it. But in the mean time, he said, it was advisable to squint at it, and to accustom the nations of Europe to the idea that we should claim it in future. 79

While the United States never made an official attempt to establish its outer limits at the Gulf Stream, there is evidence that much "squinting" to seaward did take place in the period following Jefferson's statement. For example, in 1807, An Act to Provide for Surveying the Coasts of the United States declared it to be lawful for the President "[t]o cause such examinations and observations to be made, with respect to St. Georges Bank, and any other bank or shoal . . . to the Gulf Stream

78 10 THE PAPERS OF THOMAS JEFFERSON 530 (J.P. Boyd ed. 1954).
79 1 MEMOIRS OF JOHN QUINCY ADAMS 375 (C.F. Adams ed. 1874).
The specific inclusion of St. Georges Bank in this general statute is an indication of just how highly regarded this portion of continental shelf was at this early date. From the fishing villages around the Gulf of Maine to the corridors of power in the new capital city of Washington, Georges Bank conjured up images of both potential riches and great hazard for the hardy shipowners and fishermen who dared venture there.

The unpredictable weather, wave conditions, and swift tidal currents that swept the shallow seas over Georges Bank were responsible for an enormous loss of human life and property. The port of Gloucester, Massachusetts, alone counted the loss of 87 ships and 722 men on Georges Bank in the period from 1837 to 1873. Not surprisingly, this factor loomed large in the emergence of Georges Bank as a major element of the behavioral environments of the groups inhabiting the shores of the Gulf of Maine. In the words of an early chairman of the Portland Harbor Commission: "The bones of all who have perished there would make a monument higher than that on Bunker Hill; and the property lost would pay for one of silver, if not too high."

The surviving brother of one victim of Georges Bank was moved sufficiently to develop a truly amazing scheme to convert the shoalest portion of the bank to a man-made island to serve as the base for a lighthouse. In 1838, Seward Porter, a well known Portland shipowner, petitioned Congress "for the erection of a beacon on St. George's shoal, or the cession of said shoal to him and his associates." Porter proposed that "old vessels loaded, with stone, to be sunk and imbedded there" would form the nucleus of an island much like Sable Island to the north. In his view "the Isle of Sables was once a hidden shoal, and converted into an island by the accidental wreck of vessels thereon."

Nothing came of Porter's proposal to gain a cession of Georges Shoal from Congress, but the idea of creating an island there persisted. Almost a half-century later, Henry Mitchell, Assistant of the U.S. Coast and Geodetic Survey, presented "an urgent plea for the establishment of a light on Saint George's Bank" in Appendix No. 11 to the Superintendent's annual report for 1885. Mitchell, like Porter, drew attention to

84 Id. at 1-2.
85 Id. at 2.
the similarity that existed between Georges Shoal and Sable Island in the following statement from his plea:

Saint George's Bank lies at the threshold of the Gulf of Maine, and its summit is called distinctively "George's Shoal" or "The Georges." Twenty miles westward of the Georges is the "Cultivator Shoal." Upon the Georges there are two spots of 12 feet given by chart, while upon Cultivator Shoal there is not less than 18 feet.

It is 100 miles from the nearest land, Chatham, Cape Cod. Its situation relative to the continent is like that of Sable Island, and, like this island, it would long ago have been lighted if dry land. As a shoal it is far more dangerous than it would be as an island, and therefore it is shunned and feared except by fishermen who are obliged to brave its dangers.86

In both implicit and explicit terms, Porter's scheme and Mitchell's later plea for a lighthouse on Georges make clear the fact that the bank was widely recognized as being a part of the United States. Clearly the early observations of the common fishermen, who saw Georges Bank as "the next most eastern land" from their New England shores, were being confirmed in these ambitious proposals to convert the shoal to an island for a lighthouse. Such cognitions, when taken in the aggregate, outline the historical behavioral environment of Georges Bank and form the basis for special circumstances that were eminently worthy of consideration by the International Court of Justice in its attempt to structure an equitable line of delimitation.

Thus far in this discussion the significance of Georges Bank in the behavioral environment of New Englanders and national leaders of the United States has been stressed. It is necessary, in view of the dispute and decision under consideration, to direct some attention to Canadian historical cognitions with respect to Georges Bank. When Canada's stress on the recent period is recalled it should come as no surprise that even the most diligent search of the historical record failed to produce a significant body of Canadian cognitions that could be used to argue that Georges Bank was historically a true Canadian behavioral environment. What that search did reveal was substance for an argument against any such claim had Canada attempted to mount one.

One extremely convincing body of evidence that would negate an attempt to place Georges Bank in a position of prominence in any reconstructed Canadian behavioral environment is found in the records of the Halifax Fisheries Commission, an international tribunal that convened for several months during 1877.87 The commission was charged with

86 H. Mitchell, supra note 82, at 483.
87 Award of the Fishery Commission: Documents and Proceedings of the Halif-
determining what, if any, compensation the United States should pay Canada in return for the "exchange" of inshore fishing rights under the provisions of the 1870 Treaty of Washington. To support their claims, the Canadians collected depositions from several hundred fishermen. Each of the 319 deponents described the areas in which he had fished in his career at sea. Several of them mentioned seasons during which they worked aboard American vessels, with some mentioning time spent on Georges Bank or in the "George's Fleet." In all of this voluminous testimony, however, only one Canadian vessel is described as ever having fished on Georges Bank. Julien Boudreau, of Esquimaux Point, Quebec, testified:

I have lived here 16 years, before that I lived at the Magdalene Islands where I was born. I am 63 years of age and have been a fisherman for 50 years, and for the last 45 years I have been carrying on the fishery with a vessel of which I was master and owner, on the north coast of the Gulf of St. Lawrence, from Sheldrake to the Straits of Belleisle, and in the Straits of Belleisle and on the Atlantic Coast of Labrador, as far as Cape Harrison, at the Magdalene Islands, on La Have Bank, at the mouth of the Bay of Fundy, and on Georges Bank. I am well acquainted with every operation relating to the taking and curing of codfish, halibut, mackerel and herring.88

The best that can be concluded is that, at some time between 1843 and 1878, Julien Boudreau, a Quebec fisherman and master, fished on Georges Bank. This single instance out of 319 investigations does little to place Georges Bank high in a Canadian behavioral environment or domain of any sort.

The absence of Canadian fishing vessels on Georges Bank in this nineteenth-century period is also verified by a survey of the annual lists of shipwrecks published by the Canadian Department of Marine and Fisheries. These lists normally include the location at which vessels were wrecked or lost. A screening of the lists for 1869, 1870, 1871, and 1872 indicates no wrecks or losses in the area of Georges Bank.89

Similar negative evidence for the period 1884-1890 can be gleaned from a history of Yarmouth, Nova Scotia, one of the Canadian fishing centers closest to Georges Bank. This work includes a comprehensive list of Yarmouth County maritime casualties during this period.90 What emerges from a study of these data is the fact that most of the Yarmouth

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88 Id. at Vol. 2, 1361, app. G (emphasis added).
ships lost were engaged in merchant shipping rather than fishing. The fishing vessels that were lost met their fates on the Grand Banks, Western Bank, or Grand Manan. No Yarmouth vessels were lost on Georges Bank although several Yarmouth fishermen lost their lives there while serving on New England schooners out of Gloucester and Rockland. In view of facts like these, it is not surprising that Canada had argued to convince the Chamber that only activities taking place on Georges Bank in recent decades should be regarded as relevant in the quest for an equitable line of delimitation there.

XIII. CONCLUSION

In its effort to establish a single equitable line of delimitation through the disputed waters off New England and Nova Scotia, the International Court of Justice Chamber paid close attention to the physical and political geography of the coasts fronting on the Gulf of Maine. In so doing the Chamber disregarded the long history of human activities associated with Georges Bank. This was done in spite of the fact that the Chamber itself stated that "[t]his Bank is the real subject of the dispute . . . the principal stake in the proceedings. . . ."91

Of the two contesting parties, it was clearly the United States that possessed the strongest historical evidence of its nationals’ activities on Georges Bank since the time before and following independence. Those activities were continuous and took the form especially of fishing, the conservation and management of fisheries, and such other maritime activities as charting, research, navigational assistance, search and rescue, and defense. Obviously, however, the presentation of this historical evidence was less than persuasive, it being found by the Chamber “simple and somewhat akin to the invocation of historic rights.”92

Recent experience in an original jurisdiction action before the United States Supreme Court suggests that the United States might have had more success in persuading the Chamber had it followed the strategy of presenting its historical evidence in the conceptual framework of the Georges Bank behavioral environment. The original jurisdiction case referred to is United States of America v. Maine93 (Massachusetts Boundary Case). The issue to be decided in that original jurisdiction proceeding was whether Vineyard Sound and Nantucket Sound were bays under the terms of the Convention on the Territorial Sea and Contiguous Zone.

In presenting its claim, Massachusetts included the argument that the state possessed title to the sounds as a result of the historical usage of

92 Id. at 340-41.
them by its citizens from colonial times to the present. By invoking the strategy provided by Kirk's behavioral environment concept in this context, Massachusetts' expert historical geographer witness succeeded in convincing the Special Master to the extent that he concluded and reported to the Supreme Court "that Massachusetts has introduced sufficient evidence to support a finding that the nature and extent of the colonists' exploitation of the marine resources of the sounds was equivalent to a formal assumption of sovereignty over them."94

In the discussion included in that report, the Special Master, Judge Walter E. Hoffman, further noted that the Supreme Court had not previously had the opportunity to decide the extent to which historical evidence of the sort marshalled by Massachusetts could support a historic inland waters claim. He informed the Court that this issue had, however, arisen in international tribunals and that those tribunals had tended to consider favorably the kind of evidence presented by Massachusetts.

Exactly what weight the World Court Chamber might have ascribed to arguments based on a behavioral environment strategy is impossible to estimate. It is argued here, however, that such a strategy vigorously invoked by the United States would have succeeded in focusing the Chamber's attention more squarely on Georges Bank and the continental shelf riches it epitomizes. Such focus on the declared bone of contention in the parties' dispute would, in turn, make clear the fact that land had not "dominated" sea here in the traditional sense of the Chamber's quoted adage. Rather, the coastal fringe from Cape Cod to southern Nova Scotia had, more often than not, been evaluated and developed in response to the perceived riches of the waters and beds of the adjacent continental shelves — particularly Georges Bank. A line of determination in the vicinity of the bank should have been drawn in the light of perspectives and arguments that emphasized the facts of past human assessments and behavior there rather than a subjective interpretation of the coastline in a far corner of the Gulf of Maine.

94 Id. at 58.