

SEPARATE OPINION OF JUDGE SCHWEBEL

I have voted for the Chamber's Judgment because I agree with the essentials of its analysis and reasoning, and because I find that the resultant line of delimitation is not inequitable.

In my opinion, the Chamber is right to exclude both the claims of the United States and of Canada, not with a view towards "splitting the difference" between them but because those claims, for the reasons which the Chamber's Judgment illuminates, are insufficiently grounded in law and equity. The Chamber is right to hold that the equidistance method of delimitation of the continental shelf which is found in the Convention on the Continental Shelf of 1958 to which the United States and Canada are party is not a rule of international law which binds the Parties in this case who seek not a simple delimitation of their continental shelf but the determination of a single maritime boundary comprehending the continental shelf and fishing and other rights in the waters above that shelf. The Chamber is right to reject an interpretation of the "distance principle" which in substance maintains that the intention of the Third United Nations Conference on the Law of the Sea was indirectly to prescribe the application of the equidistance method while directly declining, in the governing provisions of the Convention which it drafted, even to make mention of that method. The Chamber is right to deny the claims of "primary" and "secondary" coasts, and to discount lines which find their rationale either in continental shelf or in fishing considerations but which do not embrace the requirements and equities of a single maritime boundary. It is right to uphold the contention that the lengths of national coasts bearing upon the waters in question and the locus of the existing boundary between the United States and Canada must, in the circumstances of this case, be weighed in arriving at a delimitation. It is right to emphasize how limited the principles of international law in this sphere of maritime delimitation are. And the Chamber is certainly right to stress that, in every case of delimitation of a maritime boundary, the particular pattern of the area's geographical configuration must govern.

For some of these and for other reasons which the Chamber's Judgment sets forth, I am unable to accept the contention of the United States that the area essentially at stake in the case – Georges Bank – is "as American as apple pie". That homely and appealing phrase of the United States Agent has considerable historical support ; indeed, United States counsel marshalled a great many arguments in its support. But, in view of the

Chamber's analysis of the applicable considerations of law and equity, I agree with its decision to divide Georges Bank between the United States and Canada. I agree as well with its basic approach in this case of dividing overlapping areas equally, subject, however, to a critical adjustment which takes appropriate account of the fact that much the greater part of the Gulf of Maine is bordered by the territory of the United States.

Where I disagree with the Chamber is in its placement of the dividing line. Its line substantially departs from the line which would result from the application of the Chamber's methodology if the Chamber did not, as I see it, err in one key respect.

There was much dispute between the Parties over the extent of the coasts of the Bay of Fundy to be regarded as coasts of the Gulf of Maine area for purposes of calculations of proportionality. That is understandable, because the impact of the treatment of those coasts could be anticipated to affect, and, in the event, does most materially affect, the placement of the line of delimitation.

The Judgment disposes of this dispute by holding that the coasts of the Bay of Fundy should be included up to the point where the Bay so narrows that it contains "only maritime areas lying no further than 12 miles from the low water mark" (para. 31). But the Judgment does not show why this is a determinative or even relevant consideration.

It is instructive to recall (as the Chamber does not) that, as recently as 1982, the International Court of Justice rejected a calculation of proportionality which would have taken into account the legal status of waters of the Gulf of Gabes (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 75-77). As the late distinguished counsel of Canada, Professor Antonio Malintoppi, reminded the Chamber, at the hearing of 5 May 1984 (afternoon) :

"... the legal status of the waters off the coast in question is not a relevant factor when deciding whether or not these coasts should be included in the calculation of coast-ratios for the purpose of the proportionality test. The *Tunisia/Libya* case is quite clear on this point."

Furthermore – to quote again from the argument of Canadian counsel – "Canada maintains for historical reasons its right to treat the waters of the Bay of Fundy as internal waters". That is to say, Canada reserves the right to treat all the waters of the Bay of Fundy as internal waters ; in the application of Canadian law, it is unclear whether territorial waters come into play at all in the Bay of Fundy. It is difficult to understand why the Chamber feels justified in basing its Judgment on this matter, to the benefit of Canada, on a criterion which Canadian law itself appears to obviate.

It should be added that the Chamber's approach to this question may not be wholly consistent with that which the Judgment applies to Massa-

chusetts Bay. That Bay contains both internal or territorial waters and high seas (some high seas even if, in order to compare like with like, one were to apply the Canadian 12-mile territorial sea limit rather than the United States 3-mile limit), but the straight line which the Chamber quite reasonably draws across its mouth from Nantucket to Cape Ann makes no distinction between them. Practically speaking, such a distinction would come to very little in Massachusetts Bay. But this inconsistency suggests the artificiality of the line which the Chamber has drawn in the Bay of Fundy.

Paragraph 31 of the Judgment also observes that the part of the Bay of Fundy closest to the Gulf is wide and the depth of the waters the same. The probative character of these observations is not clear. It has not been proposed to ignore the width of the mouth of the Bay of Fundy ; for its part, the United States proposed to draw a closing line across it and to give that closing line full effect in a calculation of proportionality (which, in my view, for reasons explained below, would accord Canada insufficient credit for the extent of the coasts of the Bay). And of what significance is the depth of the waters or their character ? To be sure, the waters of the Bay of Fundy mix with and influence the waters of the Gulf of Maine, but so do the ocean currents which flow into the Gulf as, for that matter, do the waters of the rivers that flow into the Gulf.

Since the reasons given by the Chamber in paragraph 31 of the Judgment afford inadequate support for its conclusions, what is a more sustainable approach ? In my view, Canada should be credited in a calculation of proportionality with that portion of the coast of New Brunswick which, running from the international border, actually fronts upon the Gulf of Maine, as far, at least, as Point Lepreau, and, at most, as Saint John, together with the length of a closing line running from one of those points to Brier Island, Nova Scotia. An illustration which in this respect does not much differ from this formula was presented by Canada itself in Canadian Figure 171, entitled "Canadian Proportionality Model A including Only the Bay of Fundy Coast that 'Faces' the 'Area in Which the Delimitation Is to Take Place' ", which was laid before the Chamber in the course of its oral proceedings (which is not to say that Canada gave any support to the Fundy calculation which this opinion supports). The approach which I believe the Chamber should have adopted in this regard is illustrated on the Map annexed to this opinion (see p. 359, below), which takes Saint John (apparently the point reached in Canadian Figure 171) as the farthest reach of the Fundy coast facing the Gulf of Maine.

The reasons why I support this approach are essentially these :

- (a) Apart from, at the extreme, the stretch of New Brunswick coast up to Saint John, the coasts of the Bay of Fundy do not face the Gulf of Maine or the area of the delimitation : they face each other.

- (b) For that reason, the extension of the remaining, interior segments of the coasts of the Bay of Fundy cannot overlap the extension of the coasts of the United States in the Gulf of Maine area or the area of delimitation in any consequential measure ; as the Agent of Canada acknowledged at the hearing of 3 April 1984 (morning) : "The concave configuration of the Bay of Fundy means that its coasts cannot, even under the application of equitable principles, be granted a significant seaward extension of their own." Accordingly, and in view of the great length of the coasts of the Bay of Fundy relative to its water area, the Fundy coasts should, in a calculation of proportionality, be abated.
- (c) Third, to do otherwise and to give full weight to a feature which in this case is so distorting in a calculation of proportionality would be inequitable. The reason why inclusion of the coasts, or even the greater part of the coasts, of the Bay of Fundy, is distorting is that its very long coasts and relatively small water area so substantially affect the ratio of coast to water in the entire Gulf of Maine area. The impact varies somewhat with the test area taken. But to cite one example advanced in the United States pleadings, inclusion of the whole of the Bay of Fundy increases by just 7 per cent the sea area appertaining to Canada in the proportionality test illustrated by Figure 51A of the Canadian Counter-Memorial while at the same time it increases the Canadian coastline length by 93 per cent. The situation is thus to be distinguished, principally on this ground, from that addressed by the Court in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, *I.C.J. Reports 1982*, pages 75-76, and referred to in paragraph 221 of the Judgment in the instant case, where the extent of coasts and sea areas were in relative equilibrium. In the *Tunisia/Libya* case, it did not much matter whether certain segments of coast and their waters, including the coasts and waters of the Gulf of Gabes, were included in or excluded from the test of proportionality, because of that equilibrium. But in this case, the locus of the line may be fundamentally affected by the extent of the coasts of the Bay of Fundy which are included, since those coasts are so disproportionate to the waters they comprehend. "So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being itself creative of inequity." (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 49.)

The Chamber's Judgment does not count the whole of the Bay and its coasts, but, in my view, it counts so much as, arguably, to create an inequity.

If the Chamber had included in its calculation of proportionality the more limited measure of the coasts of the Bay of Fundy which I believe to

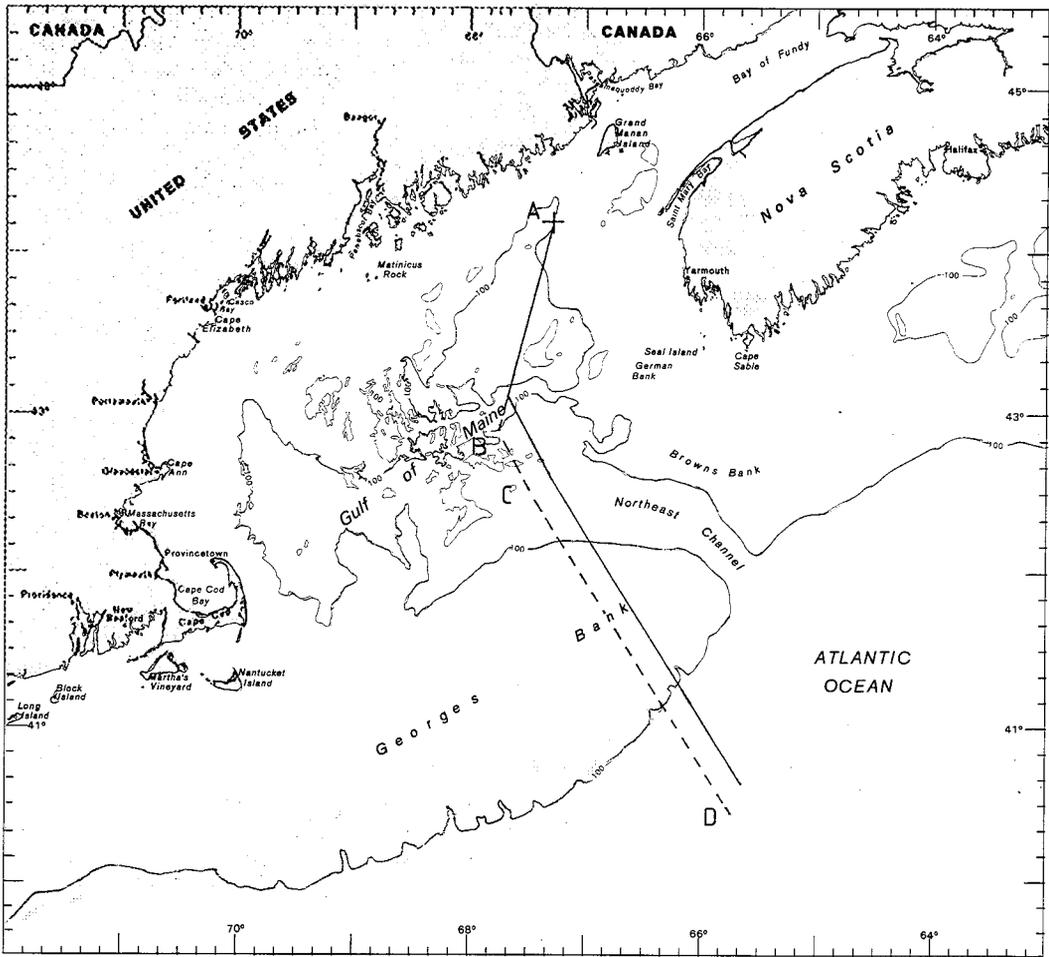
be appropriate, the effect on the placement of the line of delimitation would have been significant. How significant is illustrated on the attached map, which treats the coasts of the Bay of Fundy in this fashion. On this map are marked both the line delimited by the Chamber's Judgment and the line which, in my view, better accords with the governing considerations of law and equity (see p. 359, below).

Despite the extent of the difference between the line of delimitation which the Chamber has drawn and the line which my analysis produces, I have voted for the Chamber's Judgment. I have done so not only because I am generally in agreement with its reasoning but because I recognize that the factors which have given rise to the difference between the lines are open to more than one legally – and certainly equitably – plausible interpretation. The main operative issue of the Judgment which sets me apart from the Chamber's majority is the extent of the coasts of the Bay of Fundy to be included in a calculation of proportionality. While I have the doubts set forth above about the Chamber's approach, I must acknowledge that the alternative approach which I propose is open to criticism on several counts, not least on the ground that the portion of the coasts of New Brunswick that "faces" the Gulf of Maine is in some measure a matter of subjective perspective.

On a question such as this, the law is more plastic than formed, and elements of judgment, of appreciation of competing legal and equitable considerations, are dominant. It is easier to criticize than to construct. The United States espoused one position on the coasts of the Bay of Fundy and Canada a very different position; the Chamber has arrived at a third, intermediate position and I at a fourth, intermediate position. While I am convinced of the equity of my conclusion, nevertheless I am not prepared to maintain that the Chamber is necessarily wrong and that the line which its position on the test of proportionality has produced is inequitable. On the contrary, it is to be expected that differences of judgment on the application of equitable principles will arise, which at times may not admit of confident conclusions of law. Analysts of the jurisprudence of this Court and of international arbitration as acute as the late Wolfgang Friedmann and Elihu Lauterpacht have pointed out that the Court, in its seminal Judgment in the *North Sea Continental Shelf* cases, gave weight to certain considerations which it saw as equitable while excluding others that might as well (or better) have been included (Wolfgang Friedmann, "The North Sea Continental Shelf Cases – A Critique", *American Journal of International Law*, Vol. 64 (1970), pp. 229 ff., and E. Lauterpacht, Q.C., "Equity, Evasion, Equivocation and Evolution in International Law", *American Branch of the International Law Association, Proceedings and Committee Reports, 1977-1978*, pp. 40-41). Mr. Lauterpacht has observed that the Decision of the Court of Arbitration on the delimitation of the continental shelf between France and the United Kingdom went even further in its selective application of principles of equity while not explaining why its conclusions were equitable (*ibid.*, pp. 41-43). In view of the flexibility of approach illustrated by these important judgments, it is not to be expected

that subsequent cases will not afford considerable room for differences of opinion in the application of equitable principles to problems of maritime delimitation.

(Signed) Stephen M. SCHWEBEL.



MAP

REFERRED TO IN THE SEPARATE OPINION OF JUDGE SCHWEBEL

Chamber's line -----
Judge Schwebel's line _____