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OPENING STATEMENT IN ORAL PROCEEDINGS IN GULF OF MAINE MARITIME BOUNDARY CASE

The Honourable Allan J. MacEachen, Deputy Prime Minister and Secretary of State for External Affairs, and the Honourable Mark MacGuigan, Minister of Justice and Attorney-General of Canada, today released the text of the opening statement in the oral proceedings in the Gulf of Maine maritime boundary case between Canada and the United States.

The Honourable Mark MacGuigan opened the case for Canada on April 2, 1984.

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Mr. President, Members of the Chamber:

I am honoured to open these historic proceedings on behalf of Canada. The late Judge John E. Read was one of the early advocates of a flexible chamber system within the International Court of Justice. So it is especially appropriate that Canada's first case before the Court should be the first case heard by a chamber formed under Article 26, paragraph 2 of the Statute. This is also the first time that any international tribunal has been called upon to fix a single Maritime boundary dividing both the continental shelf and the 200-mile fishing zones of neighbouring coastal states. The practical effect is that we are dealing with the first judicial delimitation of the exclusive economic zone since the emergence of this new concept in state practice and in the United Nations Convention on the Law of the Sea. What we do here is likely to prove of great moment to the future development of international law.

Mr. President, Canada and the United States have never before submitted a boundary question--or any other question between them--to the International Court of Justice. The two countries, however, are not strangers to third-party settlement procedures in their bilaterial relations. Indeed, they have resorted to arbitration of their differences on twenty occasions in the past, beginning with the St. Croix River Boundary dispute in 1798. The present case fits within a long tradition of peaceful and progressive settlement of the boundaries of Canada and the United States. Mr. President, I wish to make clear at the outset what it is that brings the parties before the court on this occasion. In two words, it is Georges Bank. The written pleadings of both parties leave no room for doubt that the object of their dispute is Georges Bank. More specifically, the dispute centers on the abundant fishery resources and the potential hydrocarbon resources of this large detached bank seaward of the Gulf of Maine, off the coasts of Nova Scotia and Massachusetts.

Canada has claimed less than half of Georges Bank since it first began to issue oil and gas permits in the Gulf of Maine area in 1964. The United States has claimed the whole of the Bank since 1976. This difference in the extent of the claims of Canada and the United States is more than a simple quantitative difference. Whatever may be the outcome of the present proceedings, the Unites States will not cease to be present on Georges Bank, since the Canadian Claim itself leaves more than half of the Bank to the United States. If the Court were to accept the United States' Claim, however, the result would be Canada's eviction from the Bank as a whole. Canadian fishermen would be banished entirely from this traditional fishing ground on which they depend today and have depended for many years.

Long-standing Canadian Offshore permits would become worthless overnight. The effect on Canada--and especially on Nova Scotia--would be a heavy one. No decision by the court could produce a similar result for the United States. There is accordingly an essential difference--a qualitative difference--in what is at stake for the parties in these proceedings. This was already the case in relation to the claims defended by the parties when they concluded the special agreement in 1979. The United States widened the gap still further in claiming its "adjusted perpendicular line" in 1982. In 1979 and in 1982, however, the United States' claim encompassed the whole of Georges Bank. The United States line has advanced further towards Canada but the United States objective remains the same. And it was precisely th extravagance of the United States' claim that made prudence and reasonableness seem unnecessary to those United States' interests that lobbied against ratification of the 1979 agreement on east coast fishery resources, which was negotiated and concluded by the parties at the same time as the special agreement.

The 1979 fisheries agreement reflected a long history of cooperation in the fisheries relations of Canada and the United States. Its antecedents can be traced back to the treaty of Paris of 1783. It was explicitly recognized as a fair deal by both parties. If it had come into force, the impact of the boundary issue on competing fishing interests would obviously have been greatly lessened. This approach, however, was rejected by the opponents of the 1979 fisheries agreement in the United States. It was rejected because these opponents considered that the United States could afford a "winner take all" approach, in which the fishing rights of the parties would be settled exclusively by the boundary line to be fixed by the court. For the United States, of course, no boundary to be fixed by the court could possibly result in a total loss of access to Georges Bank. As a result, the United States failed to ratify the 1979 Fisheries Agreement, although it did not fail to hedge its bets in the later expansion of its claim to the "adjusted perpendicular line".

For Canada, however, the 1977 Fisheries Agreement represented the single most important bilateral issue in its relations with any country at that time. It was in these terms that I described the agreement to the Canadian public and Parliament as Canada's then Secretary of State for External Affairs. And it was only Canada's profound confidence in the international judicial process that finally led my Government to accept the disassociation of the Fisheries Agreement from the special agreement, and to entrust the Court with the determination of the single Maritime boundary and thereby with the disposition of the parties' fishing interests.

Georges Bank, Mr. President, is more than the object of the dispute now before the Court. It is also, for both parties, the benchmark, the crucial test of an equitable delimitation in these proceedings. The United States maintains that Canada's claim is inequitable by the very fact that it includes part of Georges Bank and does not leave it all to the United States. Canada, on the other hand, maintains that the United States claim is inequitable not simply because it comprises the whole of Georges Bank but because it denies to Canada that part of the Bank where Canada has undeniable rights and established interests. Allow me, Mr. President, to enquire briefly into these two conflicting notions of equity by which the parties seek to resolve the fate of Georges Bank. Surely the most important feature of an equitable result is that it must be not only equitable in the sense of being "fair" but also equitable within the law. The special agreement highlights this requirement in the present case by requesting the court to determine the single Maritime boundary "in accordance with the principles and rules of international law applicable in the matter as between the parties". (Special Agreement, Article 11, paragraph 1.) The court itself stated the same requirement very clearly in the 1969 North Sea Continental Shelf Case when it noted that a judicial decision must find "its objective justification in considerations lying not outside but within the rules". (I.C.J. Reports 1969, paragraph 88). While a Maritime boundary delinitation must end in equity, it must begin in law. The emphasis on an equitable result cannot be allowed to obscure the requirement that the result be founded in law. In the words of Frederic Wm. Maitland, equity comes "not to destroy the law, but to fulfill it". (Lectures on Equity, 1909).

The marriage of equity and law underlies Canada's claim to the eastern part of Georges Bank. This may be seen from Canada's four main arguments in these proceedings:

-First, Canada maintains that an equidistance boundary for Georges Bank is required by Article 6 of the 1958 Convention on the Continental Shelf, which represents a binding rule of treaty law for both parties. Under Article 6, the equidistance method is the first choice and, as the court of arbitration stated in the Anglo-French Continental Shelf Award, it becomes obligatory if no special circumstances render it inequitable. (Award, paragraph 70). The Court of Arbitration also made clear that Article 6 represents a particular expression of the general norm that Maritime Boundaries are to be determined on equitable principles. (IBID). The Canadian Line established on the basis of equidistance gives appropriate expression to the geographical configuration of the Gulf of Maine areas and to the costal relationships of the parties.

-Secondly, Canada maintains that an equidistance boundary for Georges Bank is consistent with the distance principle as the legal basis of title to the 200-mile zone. This point is of fundamental importance. From the Court's reasoning with regard to the Continental Shelf in the 1982 Tunisia-Libya Case, it is clear that the principles and rules of international law that may be applied for the delinitation of exclusive economic zones must be derived from the concept of the exclusive economic zone iteself, as understood in international law. (I.C.J. Reports, paragraph 36). The distance principle figures among the most important elements of this concept, and it provides an essential frame of reference for a truly juridical delimitation of a single Maritime boundary.

-Thirdly, Canada maintains that its much greater economic dependence on the fisheries of the disputed area of Georges Bank represents a relevant factor and an equitable consideration to be taken into account by the Court. The legal relevance of this consideration again flows from the very concept of the exclusive economic zone. Unlike the continental shelf, the exlusive economic zone is not terra incognita or terra deserta. It is, in a sense, inhabited by the fishermen of the costal state--and especially by the fishermen of southwest Nova Scotia within the disputed area in the present case. Its resources are known and exploited. They support established patterns of fishing that may be of vital importance to adjacent costal communities. This is certainly true of the fishery resources of Georges Bank in relation to southwest Nova Scotia, far beyond any comparison with the situation in Massachusetts.

-Fourthly, Canada maintains that the history of the dispute provides further support for the Canadian Claim. International law seeks to uphold stability and good faith in relations between states. It recognizes too that the best indication of an equitable result in a Maritime boundary delimitation may come from the conduct of the parties themselves. And the conduct of the parties, over many years, in fact demonstrates their acceptance of equidistance as the proper basis for an equitable result. An equidistance boundary for Georges Bank is thus the only boundary that can satisfy these tests of law and equity.

Mr. President, whatever may be the advantages or disadvantages of equidistance, it has never before been described as an ex aequo et bono method of delimitation. Yet the United States attempts to present Canada's claim in this light. The reason is clear. The United States seeks to make a virtue of the fact that its own claim incorporates

the whole of Georges Bank, extended, of course, to the "adjusted perpendicular line" in an effort to provide it with additional tactical protection on the perimeter. For the United States, the non-division of Georges Bank becomes an equitable principle in its own right, clothed in the theories of the "natural boundary" and "single-state management". The measure of equity becomes the length of Georges Bank, as the length of the Lord Chancellor's foot became the measure of eguity when the then separate systems of equity and law drew too far apart in England.

Neither equity nor law provides a basis for such an extraordinary view of equitable principles. The theory of a natural boundary defining and dividing both the continental shelf and the exlusive economic zone does not fit within the legal framework of either concept. The duty to conserve resourses and the duty to avoid disputes are duties that apply to all neighbouring states. They limit the exercise of a State's rights. But they have nothing to do with the delimitation of the area in which these rights may be exercised. Otherwise, Mr, President, things would really be too easy for the party claiming the whole pie. That party, in effect, would be given a ready-made recipe for a monopolistic claim.

Mr. President, the United States' claim to the whole of Georges Bank also relies upon a theory of "complete dominance" over the Gulf of Maine area, constructed on the basis of state activities in no way related to the history of the dispute. The notion of dominance, however, has nothing to do with the legal regime of the Continental Shelf. It was categorically rejected in the development of the concept of the exclusive economic zone. More important still, it is repugnant to the very idea of equity. "Equality is equity", says the English Maxim (Richard Francis, Maxims of Eguity, 1728), and international law adds only that equality must be reckoned within the same place and must not imply any refashioning of geography (I.C.J. Reports, 1969, paragraph 91).

But, Mr. President, the notion of dominance is implicit even in the United States' view of geography, and the refashioning of geography is precisely what follows from the United States' doctrine of primary and secondary coasts. For the Unites States gives the coast of Maine a dominant character because it is allegedly a "primary" coast. And the coast of Nova Scotia must yield to this dominance because it is allegedly a "secondary" coast. Despite the most careful reading of the United States' pleadings, we must say that we cannot understand the reasons for this unusual proposition, nor find any legal authority advanced in its support.

The implications of the United States' approach go beyond the future development of international law, Mr. President. They touch upon the very possibility of international order. If it is an equitable principle of maritime boundary delimitation that cooperation in defence of search and rescue activities may prejudice a state's claims of jurisdiction or sovereign rights, then no state will wish to cooperate in these fields unless it is the "dominant" party in the relationship. If it is an equitable principle of Maritime boundary delimitation that the result must exclude any need for cooperation in the management of overlapping fish stocks, then there can be little hope for cooperation in the management of shared natural resources anywhere. And if it is an equitable principle of Maritime boundary delimitation that nature or providence draws the lines, then we will have returned to one of the most troublesome doctrines that has ever provoked conflict among states.

All of this, Mr. President, is a step backward, not a step forward--a new form of isolationism, and no form of law. And any kind of isolationism is out of place in the relations of the parties. Canada and the United States share one of the longest, most artificial, and, so to speak, most porous land boundaries in the world. In the words of President Reagan, it is "a border not which divides us, but a border which joins us". (Address to Joint Session of the Houses of Parliament, Ottawa, 11 March 1981). President Kennedy elaborated on the same theme in the following statement: "Geography has made us neighbours. History has made us friends. Economics has made us partners. And necessity has made us allies." (Address to Joint Session of Houses of Parliament, Ottawa, 17 May 1961.)

The present dispute, of course, has also made us litigants for a time. But it is preposterous to suggest that a "buffer zone" is required between Canada and the United States in the Gulf of Maine. (United States Memorial, paragraphs 255 and 256.) We have done very well without such buffer zones along the 8891 kilometers of our common land boundary. The extension of a Maritime boundary 200 nautical miles into the sea hardly requires their introduction now. A better view of the situation in the Gulf of Maine area has recently been expressed by a fisherman from Gloucester, Massachusetts: "if it were up to the fishermen themselves, we would keep the waters open between the two countries. We get along with the Canadians. Historically we've fished in each others waters and helped each other out. The only war we've had is who could catch the most fish." (Compass Point, National Geographic Society, 28 December 1983).

Mr. President, the boundary proposed by Canada for the Gulf of Maine area is a reasonable and balanced one whose origins date back to 1964. It results from the application of law to geography. Its equitable character is confirmed by non-geographical relevant circumstances that are rooted in legal principles proper to the zones to be delimited. The conduct of the parties themselves attests to these facts. And the tradition of cooperation between the parties is the most solid foundation for the rational management of the variety of resources that will inevitably be divided by any single Maritime boundary the Court in its wisdom may establish.

Mr. President, Members of the Chamber, I thank you for the courtesy you have shown me in hearing me so patiently today. The agent for Canada will now proceed with his presentation of the Canadian case.