



## AD HOC ARBITRATION

### ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR AND NOVA SCOTIA CONCERNING PORTIONS OF THE LIMITS OF THEIR OFFSHORE AREAS

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#### AWARD OF THE TRIBUNAL IN THE SECOND PHASE

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26 March 2002

**Tribunal:**

[G rard Vincent La Forest](#) (President)

[Leonard Legault](#) (Co-Arbitrator)

[James R. Crawford](#) (Co-Arbitrator)

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# Award of the Tribunal in the Second Phase

## 1. Introduction

### (a) The Present Proceedings

1.1. This Tribunal was constituted on May 31, 2000 by the federal Minister of Natural Resources, pursuant to the dispute settlement provisions of the *Canada-Newfoundland Atlantic Accord Implementation Act*,<sup>1</sup> and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*<sup>2</sup> (hereafter the *Accord Acts*). These Acts, and their provincial counterparts,<sup>3</sup> gave effect to the Accords reached in 1985 between Canada and Newfoundland and Labrador and in 1986 between Canada and Nova Scotia (hereafter the Accords).<sup>4</sup> The Terms of Reference (set out in Appendix A in the Tribunal's First Phase Award of May 17, 2001) mandated the Tribunal to deal with the dispute in two phases. In the first phase it was required to consider "whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement".<sup>5</sup> If (as the Tribunal held) the answer to that question was no, the Tribunal was required in a second phase to "determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined"<sup>6</sup> Article 6 of the Terms of Reference laid down a pleading schedule for the second phase, requiring the deposit of Memorials within three months of the First Phase Award and of Counter-Memorials within a further two months; the Tribunal was then, within two months of the filing of the Counter-Memorials, to convene an oral hearing, with the eventual decision to be rendered within four months thereafter.

1.2. Following the First Phase Award, the Parties proceeded to an exchange of pleadings in respect of the question to be considered in the second phase, with simultaneous Memorials deposited on August 17, 2001 and Counter-Memorials deposited on October 17, 2001. The Tribunal heard oral argument in the second phase at the Wu Conference Centre, University of New Brunswick, Fredericton, New Brunswick on November 19, 20, 22, 23, 26 and 28, 2001. The following persons appeared on behalf of the Parties:

For Newfoundland :

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<sup>1</sup> S.C. 1987, c. 3.

<sup>2</sup> S.C. 1988, c. 28.

<sup>3</sup> *Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act*, S.N. 1986, c. 37 (hereafter *Newfoundland Act*), *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3 (hereafter *Nova Scotia Act*)

<sup>4</sup> "The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing". (February 11, 1985) (NL Annex of Documents 100, NS Annex 1); "Canada-Nova Scotia Offshore Petroleum Resources Accord" (August 26, 1986) (NL Annex of Documents 108, NS Annex 2).

<sup>5</sup> Terms of Reference, Article 3.2(i).

<sup>6</sup> *Ibid.*, Article 3.2(ii).

Professor Donald M. McRae  
Mr. L. Alan Willis, Q.C.  
Mr. David A. Colson  
Professor John H. Currie

For Nova Scotia :

Mr. L. Yves Fortier, C.C., Q.C.  
Mr. Jean G. Bertrand  
Professor Phillip M. Saunders  
Professor Dawn Russell

Once again, the cases of the Parties were presented with great clarity and ability by their respective counsel.

- 1.3. The submissions of the Parties regarding the manner in which the offshore areas of Newfoundland and Labrador and Nova Scotia should be delimited were as follows:

For Newfoundland and Labrador :

a) The line in the area outside the Gulf of St. Lawrence shall be constructed as follows:

- From North 47° 19' 25" West 59° 50' 46" (Point A) the line shall proceed on an azimuth of 123.9 degrees until it reaches North 46° 50' 30" West 58° 47' 45" (Point B).
- From North 46° 50' 30" West 58° 47' 45" (Point B) the line shall proceed on an azimuth of 163.15 degrees until it reaches North 46° 16' 13" West 58° 32' 42" (Point C).
- From North 46° 16' 13" West 58° 32' 42" (Point C) the line shall proceed on an azimuth of 163.2 degrees until it intersects the outer limit of Canada's continental shelf jurisdiction.

a. The line in the area inside the Gulf of St. Lawrence shall proceed from North 47° 19' 25" West 59° 50' 46" (Point A) on an azimuth of 321.5 degrees to the limit of the offshore area of Newfoundland and Labrador and Nova Scotia within the Gulf.<sup>7</sup>

For Nova Scotia :

(1) THAT the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia is delimited as follows:

- From a point at latitude 47° 45' 40" and longitude 60° 24' 17", being approximately the midpoint between Cape Anguille (Newfoundland) and Pointe de l'Est (Quebec);
- Thence southeasterly in a straight line to a point at latitude 47° 25' 28" and longitude 59° 43' 33", being approximately the midpoint between St. Paul Island (Nova Scotia) and Cape Ray (Newfoundland);
- Thence southeasterly in a straight line to a point at latitude 46° 54' 50" and longitude 59° 00'

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<sup>7</sup> Newfoundland and Labrador Counter-Memorial, Phase Two, at p. 111 (para. 305).

30", being approximately the midpoint between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland);

- Thence southeasterly in a straight line and on an azimuth of 135° 00' 00" to the outer edge of the continental margin;

(2) THAT the line defined in sub-paragraph (1) above is correctly set out in the *Canada-Nova Scotia Offshore Petroleum Resources Implementation Act* (S.C. 1988, c. 28), Schedule I, as it relates to the limits of the offshore area of Nova Scotia along the boundary with Newfoundland and Labrador.<sup>8</sup>

## (b) History of the Dispute

1.4. As noted in the First Phase Award, a dispute exists between the two provinces concerning the limits of their respective offshore areas. Initially the Parties cooperated, along with the other East Coast Provinces, in making a joint claim to the ownership of offshore areas against the Government of Canada. Details of these early discussions were set out in the Tribunal's First Phase Award.<sup>9</sup> Initial preparations included the circulation by Nova Scotia on August 7, 1961 of a document entitled *Notes re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries* (hereafter *Notes re: Boundaries*).<sup>10</sup> This described the boundaries of the various provinces by metes and bounds and depicted these boundaries on an attached map which, as indicated below, was approved by the Atlantic Premiers in 1964 (hereafter the 1964 map).<sup>11</sup> The map, entitled "Atlantic Coast, Gulf and River St. Lawrence", showed what purported to be "proposed boundaries of Maritime Provinces, Newfoundland and Quebec with primary regard to Mineral Rights". The boundary between Nova Scotia and Newfoundland was a line connecting three points (subsequently numbered turning points 2015, 2016 and 2017): the method for establishing these turning points was already laid down in the *Notes re: Boundaries*. The 1964 map also showed a rather short (approximately 85 nautical miles) line extending out in a general "southeasterly" direction into the Atlantic as also envisaged in the *Notes re: Boundaries*. While the *Notes re: Boundaries* referred only to a southeasterly direction, this line ran on an azimuth of approximately 125°.

1.5. Following further discussions, the Atlantic Premiers on September 30, 1964 issued a Joint Statement asserting the entitlement of the provincial governments "to the ownership and control of submarine minerals underlying territorial waters including, subject to International Law, the areas in the Banks of Newfoundland and Nova Scotia, on legal, equitable and political grounds". The Premiers regarded it as "desirable that the marine boundaries as between the several Atlantic Coast Provinces should be agreed upon by the provincial authorities and the necessary steps taken to give effect to that agreement". The Joint Statement said that the boundaries described in the attached *Notes re: Boundaries* and on the appended map "be the marine boundaries of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland", and proposed action by the Parliament of Canada "To define the boundaries"<sup>12</sup> pursuant to section 3 of the *British North*

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<sup>8</sup> Nova Scotia Counter-Memorial, Phase Two, at p. V-7,

<sup>9</sup> First Phase Award, at p. 32-44, 44-64, 64-75 (paras. 4.4-4.30, 5.1-5.27, 6.1-6.16).

<sup>10</sup> *Notes re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries* (1961) (NL Annex of Documents 15, NS Annex 18).

<sup>11</sup> The 1964 map is reproduced after p. 34 of the First Phase Award.

<sup>12</sup> Joint Statement re: Atlantic Premiers Conference Halifax, Nova Scotia (September 30, 1964) (NL Annex of Documents 11, NS Annex 24).

*America Act, 1871* 34-35 Viet., c. 28 (U.K.) (now the *Constitution Act, 1871*). It also envisaged an approach to Quebec to obtain its agreement to a joint approach to the Federal Government; the Premier of Quebec subsequently stated by telegram that his province was "in agreement with the Atlantic Provinces on the matter of submarine mineral right[s] and of the marine boundaries agreed upon by the Atlantic Provinces".<sup>13</sup>

- 1.6. Pursuant to this decision, the four Atlantic Provinces presented a "Submission on Submarine Mineral Rights" to the Federal-Provincial Conference of Prime Ministers held in Quebec City on October 14-15, 1964.<sup>14</sup> In presenting the proposal, Premier Stanfield of Nova Scotia requested "the Federal authorities to give effect to the boundaries thus agreed upon by legislation, pursuant to Section 3 of the *British North America Act, 1871*".<sup>15</sup> However, the Federal Government did not agree to the provincial claims; its view was that ownership of submarine mineral rights beyond the land territory and internal waters of the provinces was vested in Canada and that accordingly no question of existing provincial boundaries arose. In 1967, the Supreme Court of Canada in *Reference re: Offshore Mineral Rights (British Columbia)* upheld the federal view.<sup>16</sup>
- 1.7. Following the decision of the Supreme Court in 1967, discussions continued between the Federal Government and the provinces over some cooperative scheme for offshore areas. The five Atlantic Provinces sought to take a common line on these matters. To this end they established a Joint Mineral Resources Committee (JMRC) by a formal memorandum of agreement of July 16, 1968.<sup>17</sup> For its part the Federal Government proposed a scheme involving federal administration of most of the offshore with provincial revenue sharing, as well as provincial administration within "mineral resource administration lines" close to the provincial coasts.<sup>18</sup> Neither that proposal nor a subsequent proposal for the pooling of offshore revenues was acceptable to the East Coast Provinces. Meanwhile the JMRC through a Technical Committee on Delineation and Description of the Boundaries of the Participating Provinces in Submarine Areas prepared a more detailed description of the turning points described in the *Notes re: Boundaries*. These were referenced to the North American Datum 1927 (NAD 27) and were shown on a map (hereafter the 1972 map) which did not, however, show any extension southeasterly from point 2017.<sup>19</sup> In 1971, federal officials prepared a small-scale map for the purposes of discussion with the provinces which showed a dividing line between Nova Scotia and Newfoundland and Labrador extending seaward to the base of the continental slope in a straight line very close to an azimuth of 135°.<sup>20</sup>
- 1.8. The 1972 map and the accompanying delineation were agreed to at a meeting of the Atlantic Premiers and the Vice-Premier of Quebec on June 18, 1972. The Communique of that meeting stated *inter alia*:

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<sup>13</sup> Telegram from J. Lesage, Premier, Province of Quebec to R L. Stanfield, Premier, Province of Nova Scotia (October 7, 1964) (NL Annex of Documents 14, NS Annex 28).

<sup>14</sup> "Submission on Submarine Mineral Rights by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland" The Federal/Provincial Conference (October, 1964) (NL Annex of Documents 15, NS Annex 31).

<sup>15</sup> NL Annex of Documents 15 at p. 4, NS Annex 31 at p. 18.

<sup>16</sup> [1967] S.C.R. 792.

<sup>17</sup> Memorandum of Agreement establishing Joint Mineral Resources Committee (July 16, 1968) (NL Annex of Documents 25, NS Annex 36 Schedule A).

<sup>18</sup> See First Phase Award, at p. 50 (para. 5.10).

<sup>19</sup> The 1972 map, entitled "Atlantic Provinces Showing Boundaries of Mineral Rights", is reproduced after p. 53 of the First Phase Award.

<sup>20</sup> See First Phase Award, at p. 73 (para. 6.11).

4. THE FIVE EASTERN PROVINCES ASSERT OWNERSHIP OF THE MINERAL RESOURCES IN THE SEABED OFF THE ATLANTIC COAST AND IN THE GULF OF ST. LAWRENCE IN ACCORDANCE WITH THE AGREED BOUNDARIES.<sup>21</sup>

- 1.9. Prime Minister Trudeau was peremptory in his response. Responding to Premier Regan's request for a meeting to discuss the issues, he said, *inter alia*:

... I do not think that such a meeting could usefully be directed to the points concerning jurisdiction, ownership and administration as outlined in your telegram...

Clearly ownership and the extent of provincial territory, as well as the location of provincial boundaries are matters of law. The only way they can properly be settled, if the provinces definitely wish to contest them, is in the Supreme Court... I see no purpose to be served by discussion of these legal matters...<sup>22</sup>

The Premiers, while maintaining the positions taken in the Communique, decided not to press the question. In particular they were not prepared to take the issue to the point of litigation.<sup>23</sup>

- 1.10. At about this time Newfoundland and Labrador undertook a review of its offshore policy. As part of that process it sought clarification of the "present demarcation" vis-a-vis Nova Scotia. In a letter of October 6, 1972 to the Premier of Nova Scotia's Principal Secretary, Minister C.W. Doody, the Newfoundland and Labrador Minister of Mines, Agriculture and Resources said, *inter alia*:

...the Government of Newfoundland is not questioning the general principles which form the basis of the present demarcation. However, we feel that the line should be established according to those scientific principles generally accepted in establishing marine boundaries. The boundary should be established as accurately as possible.

Attached hereto is what we consider a more accurate reflection of the general principles of division to which we have agreed. I hasten to add that this version is meant for explanatory purposes only and is itself inaccurate because of the limitations of the maps used in its preparation. In essence, it merely follows the configuration of the coasts more precisely.<sup>24</sup>

Attached to the letter was a copy of the 1964 map, with an alternative dashed line drawn from turning point 2017 in a south-southeasterly direction on an approximate azimuth of 145° (as compared with 125° on the 1964 map) and extending approximately the same distance out to sea. Thus Nova Scotia was put on notice that there was no agreement between the two provinces on the location of the southeasterly line. As the Tribunal pointed out in its First Phase Award, in the context

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<sup>21</sup> "Communique issued following Meeting of the Premiers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and the Vice-Premier of Quebec" (June 18, 1972) (NL Annex of Documents 48, NS Annex 54).

<sup>22</sup> Letter from P. E. Trudeau, Prime Minister of Canada to G. Regan, Premier, Province of Nova Scotia (June 22, 1972) (NL Annex of Documents 51, NS Annex 117), cited in First Phase Award, at p. 58 (para. 5.19).

<sup>23</sup> First Phase Award, at p. 58 (para. 5.19).

<sup>24</sup> Letter from C. W. Doody, Minister of Mines, Agriculture & Resources, Province of Newfoundland and Labrador to M. J. Kirby, Principal Secretary to the Premier, Province of Nova Scotia (October 6, 1972) (NL Annex of Documents 57), cited in First Phase Award, at p. 60 (para. 5.22).

of interstate relations governed by international law and of an alleged agreement on a boundary, a letter such as that of October 6, 1972 would probably have been treated as the beginning of a dispute and would have called for some response. In response, Mr. Kirby agreed "that boundaries should be established as accurately as possible", expressed uncertainty as to "what principles were used in drawing the boundaries as shown on existing maps", and promised to inquire further. He was "confident that any difficulty with regard to the boundary line can be resolved amicably".<sup>25</sup> However, despite a further reminder from Newfoundland and Labrador,<sup>26</sup> nothing was done to clarify the matter.

1.11. Thereafter, further disagreements developed between Newfoundland and Labrador and the other four provinces, which continued to advocate joint action.<sup>27</sup> In September 1973 Newfoundland and Labrador made a direct approach to the Federal Government with a detailed proposal for provincial administration and a 90:10 split of revenues in its favour,<sup>28</sup> which Prime Minister Trudeau rejected outright.<sup>29</sup> Quebec subsequently also dissociated itself from the joint East Coast Provinces' position, while apparently continuing to maintain the provincial boundaries shown on the 1964 and 1972 maps.<sup>30</sup>

1.12. At this time, Canada was engaged in difficult negotiations over maritime boundaries and fisheries issues with the United States in respect of the area in and outside the Gulf of Maine, and with France in respect of St. Pierre and Miquelon and French fishing generally in the region. Eventually each of the two boundary disputes was submitted to third-party settlement, before a Chamber of the International Court of Justice in respect of the Gulf of Maine,<sup>31</sup> and a Court of Arbitration in respect of St. Pierre and Miquelon.<sup>32</sup> The pendency of those disputes affected internal discussions on federal-provincial issues. A federal moratorium on drilling activity in the vicinity of St. Pierre and Miquelon was introduced in 1967 and remained in effect until July 1992, when the decision of the Court of Arbitration was given effect by Canada and France.<sup>33</sup> This did not, however, affect areas south of 46°N or west of the Burin Peninsula, and both Parties issued permits in the disputed area

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<sup>25</sup> Letter from M. J. Kirby, Principal Assistant to the Premier, Province of Nova Scotia, to C. W. Doody, Minister of Mines, Agriculture and Resources, Province of Newfoundland and Labrador (October 17, 1972) (NL Annex of Documents 58).

<sup>26</sup> Letter from C. Martin, Legal Advisor to the Minister of Mines, Agriculture and Resources, Province of Newfoundland and Labrador to M. J. Kirby, Principal Secretary to the Premier, Province of Nova Scotia (November 17, 1972) (NL Annex of Documents 59, NS Annex 61).

<sup>27</sup> See the "Memorandum to First Ministers" by J. Austin and M. Kirby Co-Chairmen (May 8, 1973) (NL Annex of Documents 60, NS Annex 60).

<sup>28</sup> "Proposal of the Government of Newfoundland to resolve the current offshore minerals dispute between the Province of Newfoundland and the Federal Government" (September 27, 1973) (NL Annex of Documents 62).

<sup>29</sup> Letter from P. E. Trudeau, Prime Minister of Canada to F. D. Moores, Premier, Province of Newfoundland and Labrador (January 25, 1974) (NL Annex of Documents 65). See also Letter from R. Hatfield, Chairman, Council of Maritime Premiers to F. D. Moores, Premier, Province of Newfoundland and Labrador (September 27, 1973) (NL Annex of Documents 63); Letter from G. A. Regan, Premier, Province of Nova Scotia to P. E. Trudeau, Prime Minister of Canada, (September 28, 1973) (NL Annex of Documents 64).

<sup>30</sup> See the "frontiere interprovinciale" shown on the map, "Le Quebec et ses limites administratives" (Quebec: Ministère des Ressources naturelles, 1998) (NS Annex 74). The same line is shown, together with certain exploration permits in the Gulf, on a 1999 map issued by the same Ministry "Permis de recherche de réservoir souterrain et de pétrole et de gaz naturel en Vigueur Gaspésie - Anticosti - Estuaire et Golfe du Saint-Laurent" (Quebec: Ministère des Ressources naturelles, 1999) (NS Annex 75).

<sup>31</sup> *Case Concerning, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, [1984] LC.J. Rep. 246 (hereafter *Gulf of Maine*).

<sup>32</sup> *Case Concerning, Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon)*, (1992), 95 I.L.R. 645 (hereafter *St. Pierre and Miquelon*).

<sup>33</sup> The moratorium area is the area marked "Not available" on NS Annex 114, "Canada East Coast Offshore Federal Permit Map" (Calgary: Nickel Map Service Ltd., 1970).

during the 1960s and early 1970s. The potential relevance of this practice will be examined in Section 3 of this Award.

- 1.13. The subsequent history of federal-provincial negotiations for a settlement of the offshore question was outlined in the First Phase Award and need not be repeated.<sup>34</sup> It is clear from minutes of meetings and otherwise that Nova Scotia was aware that there were unresolved inter-provincial issues: for example in 1976, the Nova Scotia Legislative Counsel noted that as to inter-provincial boundaries "there would be only one area of controversy, that between Nova Scotia and Newfoundland"<sup>35</sup> A 1976 federal memorandum noted that Newfoundland did not accept "the so-called 'inter-provincial boundary lines'.... in their entirety"<sup>36</sup> In 1977 a Newfoundland White Paper respecting the Administration and Disposition of Petroleum included maps purporting to show the provincial offshore boundary<sup>37</sup> although only approximately drawn, they clearly did not show the 135° line.
- 1.14. Unlike Nova Scotia or the other East Coast Provinces, Newfoundland and Labrador asserted a claim to offshore ownership through the Canadian courts, relying on the special history of Newfoundland and in particular on the proposition that it already had a continental shelf when it joined Confederation in 1949. The Supreme Court of Canada dealt with the matter in the *Hibernia* reference in 1984, rejecting the claim by Newfoundland and Labrador.<sup>38</sup>
- 1.15. Meanwhile, negotiations were proceeding between Nova Scotia and Canada on offshore oil and gas resource management. An agreement was concluded on March 2, 1982 (hereafter the 1982 *Agreement*)<sup>39</sup> It was subsequently implemented by both Canadian and Nova Scotia legislation.<sup>40</sup> The 1982 *Agreement* allowed the Federal Government after consultation with all parties concerned to redraw the boundaries of the offshore region "if there is a dispute as to those boundaries with any neighbouring jurisdiction".<sup>41</sup> In the meantime the boundaries of the "offshore region" were defined in the 1982 *Agreement* in terms of the *Notes re: Boundaries*.<sup>42</sup> In 1984, however, the *Canada-Nova Scotia Oil and Gas Agreement Act* defined the boundary seaward of the mid-point between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland) as proceeding "southeasterly in a straight line and on an azimuth of 135° 00' 00" to the outer edge of the continental margin".<sup>43</sup> Newfoundland and Labrador argued<sup>44</sup> that this 135° line originated with the Surveyor General of Canada who, as part

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<sup>34</sup> See First Phase Award, at p. 66 (paras. 6.5-6.6).

<sup>35</sup> "Minutes of Meeting of Federal and Provincial Officials to Discuss East Coast Offshore Mineral Resources" (May 12, 1976) at p. 13 (NL Annex of Documents 71). For reservations by other provinces, see First Phase Award, at p. 53 (paras. 5.13 - 5.14).

<sup>36</sup> Memorandum to Cabinet, "Offshore Mineral Rights. Proposed Agreement with Maritime Provinces" (July 12, 1976) at p. 12-13 (NL Annex of Documents 72).

<sup>37</sup> "A White Paper Respecting the Administration and Disposition of Petroleum belonging to Her Majesty in Right of the Province of Newfoundland", Government of Newfoundland and Labrador (May 1977) after p. 51 (NL Annex of Documents 75, NS Annex 129).

<sup>38</sup> *Reference re: the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*. [1984] 1 S.C.R. 86.

<sup>39</sup> "Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing" (March 2, 1982) at Schedule I (NS Annex 68).

<sup>40</sup> *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29; *Canada-Nova Scotia Oil and Gas Agreement (Nova Scotia) Act*, S.N.S., 1984, c.2.

<sup>41</sup> "Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing" (March 2, 1982) at Schedule 1 (NS Annex 68).

<sup>42</sup> See "Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing" (March 2, 1982), at Schedule I (NS Annex 68); *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29, s. 6.

<sup>43</sup> S.C. 1984, c. 29, Schedule I.

<sup>44</sup> Newfoundland and Labrador Counter-Memorial, Phase One, at p. 17 (para. 41).

of his response to a request from the federal Department of Energy, Mines and Resources, "assumed" that the southeasterly line referred to in the *1964 Notes Re: Boundaries* was a line having an azimuth of 135°. <sup>45</sup>

- 1.16. In 1985, following the Supreme Court's decision in the *Hibernia* reference, Canada and Newfoundland and Labrador reached agreement on the offshore: the Atlantic Accord of February 11, 1985 <sup>46</sup> was thereafter implemented by joint legislation (hereafter the *Newfoundland Accord Acts*) <sup>47</sup> The definition of the "offshore area" did not contain any specific description of boundaries. Instead it provided:

"offshore area" means those submarine areas lying seaward of the low water mark of the province and extending, at any point, as far as

(i) a prescribed line, or

(ii) where no line is prescribed at that location, the outer edge of the continental margin or a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea of Canada is measured, whichever is the greater;... <sup>48</sup>

No line was then or has since been prescribed. There was thus a potential discrepancy between the "offshore area" as defined in the *Newfoundland Accord Acts* and that defined in the *Canada-Nova Scotia Oil and Gas Agreement Act*. <sup>49</sup> As already noted, however, the *Newfoundland Accord Acts* made provision for settlement of inter-provincial disputes concerning the extent of offshore areas.

- 1.17. On August 26, 1986 a further accord was reached between Canada and Nova Scotia, implemented by Nova Scotia in 1987 <sup>50</sup> and by Canada in 1988. <sup>51</sup> The legislation defined the "offshore area" in the same terms as the earlier Canada and Nova Scotia Acts had done (*i.e.*, using the 135° line), and it also contained a provision for dispute settlement in the same terms as the *Newfoundland Accord Acts*. The Tribunal has already considered, and rejected, Nova Scotia's argument that the inclusion of a precise definition of the "offshore area" in the federal legislation implementing the 1986 Accord <sup>52</sup> should be regarded as resolving the dispute in favour of Nova Scotia's claim. <sup>53</sup> The history does, however, show that Nova Scotia consistently maintained its position as to the appropriate boundary from 1964 onwards.

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<sup>45</sup> Letter from W. V. Blackie, Surveyor General and Director, Legal Services Division, Energy, Mines and Resources Canada to Mr. G. Booth Canada Oil and Gas Land Administration, Energy Mines and Resources Canada (November 24, 1983) (NL Annex of Documents 97).

<sup>46</sup> "The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and 47 Revenue Sharing" (February 11, 1985) (NL Annex of Documents 100, NS Annex I).

<sup>47</sup> *Newfoundland Act*, S.N. 1986, c. 37, *Canada-Newfoundland Act*, S.C. 1987, c. 3.

<sup>48</sup> *Newfoundland Act*, S.N. 1986, c. 37, s. 2(o); See also *Canada-Newfoundland Act*, S.C. 1987, c. 3, s. 2. The definition of the area covered in the Atlantic Accord of February 11, 1985 referred to "the appropriate lines of demarcation between Newfoundland, the adjacent provinces, and the Northwest Territories", without further specification: see First Phase Award, at p. 75 (para. 6.16).

<sup>49</sup> *S.C. 1984*, c. 29.

<sup>50</sup> *Nova Scotia Act*, S.N.S. 1987, c. 3.

<sup>51</sup> *Canada-Nova Scotia Act*, S.C. 1988, c. 28.

<sup>52</sup> "Canada-Nova Scotia Offshore Petroleum Resources Accord" (August 26, 1986) (NL Annex of Documents 108, NS Annex 2).

<sup>53</sup> First Phase Award, at p. 48 (paras. 5.6-5.7). Essentially the same considerations apply to the legislation implementing the 1982 *Agreement*, even though it did not contain provision for settlement of disputes by arbitration.

- 1.18. Earlier indications (e.g., the maps attached to the 1977 White Paper) suggested that Newfoundland and Labrador proposed a boundary which ran broadly in a southeasterly direction from turning point 2017 to the outer edge of the continental margin. Unlike the line on the 1964 map, it did not run on a constant bearing. Although it was shown only on small-scale maps, it gives the impression of being an equidistance line to the west and south of Newfoundland itself from points drawn on opposite coasts and islands, including Sable Island.
- 1.19. The record does not disclose that there were any bilateral discussions between the Parties as to their boundary in the period between 1973 and 1992. In August 1992, shortly after the award of the Court of Arbitration in the *St. Pierre and Miquelon* case,<sup>54</sup> the Canadian Minister of Energy, Mines and Resources raised with the provincial ministers the need "to address the issue of the determination of the offshore inter-provincial boundary".<sup>55</sup> In reply, the Nova Scotia Minister doubted "that the limited discussions to date between representatives of Nova Scotia and Newfoundland concerning the boundary have resulted in a 'dispute'", but accepted the need to resolve the boundary.<sup>56</sup> Evidently the Parties were not in agreement, although it does not seem that Newfoundland and Labrador had at this stage a clear position of its own. A version of the Newfoundland and Labrador claim line was communicated to the federal authorities in November 1997;<sup>57</sup> shortly thereafter the Canadian Minister registered the existence of a dispute which, if not resolved promptly by negotiations, would be referred to arbitration under the *Accord Acts*.<sup>58</sup> In July 1998 Newfoundland and Labrador provided to Nova Scotia, on a without prejudice basis, an indication of its claim line with "a short explanatory note indicating the basis on which the line was established".<sup>59</sup> Overall the positions of the parties remained relatively consistent during this period. Nova Scotia argued for the line set out in the Accord of 1986; Newfoundland and Labrador denied it had agreed to that line but was slow in developing an alternative.

### (c) Findings of the Tribunal in the First Phase

- 1.20. In its First Phase Award, the Tribunal ruled that the negotiations and agreements of the East Coast Premiers in the period 1964-1972 did not amount to a binding agreement on the location of the boundary, with the result that the boundary has not been "resolved by agreement". It is not necessary to repeat here the reasons which led the Tribunal to that conclusion.<sup>60</sup> However, two points bear emphasis for present purposes.

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<sup>54</sup> (1992) 95 I.L.R. 645.

<sup>55</sup> Letter from J. Epp, Minister of Energy, Mines and Resources, Government of Canada, to R. Gibbons, Minister of Mines and Energy, Government of Newfoundland and Labrador (August 6, 1992) (NL Annex of Documents 111). A letter in the same terms was sent to Nova Scotia.

<sup>56</sup> Letter from J.G. Leefe, Minister of Natural Resources, Government of Nova Scotia, to J. Epp, Minister of Energy, Mines and Resources, Government of Canada (September 9, 1992) (NS Annex 3).

<sup>57</sup> Letter from F.G. Way, Deputy Minister, Department of Mines and Energy, Government of Newfoundland and Labrador, to LC. McCloskey, Deputy Minister, Natural Resources, Government of Canada (November 4, 1997) (NS Annex 5).

<sup>58</sup> Letter from R. Goodale, Minister of Natural Resources, Government of Canada, to C.J. Furey, Minister of Mines and Energy, Government of Newfoundland and Labrador and K. MacAskill, Minister of Natural Resources, Government of Nova Scotia (January 7, 1998) (NS Annex 6).

<sup>59</sup> Letter from A. Noseworthy, Deputy Minister, Intergovernmental Affairs Secretariat, Government of Newfoundland and Labrador, to P. Ripley, Deputy Minister, Nova Scotia Petroleum Directorate (July 22, 1998) (NS Annex 7).

<sup>60</sup> They are summarized in the First Phase Award, at p. 76, 78-80 (paras. 7.2, 7.5-7.7).

- 1.21. First, as to the line southeast of turning point 2017, the Tribunal noted that:  
even if the 1964 *Joint Statement* or the 1972 *Communique* had amounted to a binding agreement, this would not have resolved the question of that line. As to the 1964 *Joint Statement*, the reason is that neither the *Joint Statement* nor the *Notes re: Boundaries* provided any rationale for the direction or length of the line. The direction of the line on the map did not coincide with a strict southeast line, and there was nothing in the documents or in the *travaux* which could resolve the uncertainty. If anything, the indications were that the line would not follow a strict southeast direction, and this leaves to one side the question what form the line would take — e.g., a constant azimuth (a rhumb line) or a geodesic. The JMRC for its part made no attempt to draw the southeasterly line, and for the reasons given above, the subsequent process by which it was described and drawn for the purposes of the *Canada-Nova Scotia Act* is not opposable to Newfoundland and Labrador. Thus, even if the interprovincial boundary up to Point 2017 had been established by agreement, the question of the boundary to the southeast would not have been resolved thereby and a process of delimitation would still have been required in that sector.<sup>61</sup>
- 1.22. The Tribunal also made it clear that it was concerned at the first stage only to determine whether the interprovincial boundary has been resolved by agreement, *i.e.*, by a binding agreement from the perspective of international law, as required by the Terms of Reference. But the conduct of the Parties may be relevant to delimitation in a variety of ways, while stopping short of a dispositive agreement. Such conduct thus remains relevant for the process of delimitation in the second phase of this arbitration.<sup>62</sup>

## (d) The Positions of the Parties in the Second Phase

- 1.23. The Tribunal turns now to the question presented by the Terms of Reference for the second phase. This is formulated as follows:  
3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.  
...  
(ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.
- 1.24. As to the applicable law in the second phase, Newfoundland and Labrador argued that the starting point was the "fundamental norm" of customary international law, which the Chamber in the *Gulf of Maine* case stated in the following terms:  
...delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other

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<sup>61</sup> First Phase Award, at p. 81 (para. 7.10).

<sup>62</sup> First Phase Award, at p. 80 (para. 7.8). See also p. 71, 80 (paras. 6.8, 7.9).

relevant circumstances, an equitable result.<sup>63</sup>

Newfoundland and Labrador noted that the International Court of Justice in the *Tunisia/Libya* case added the qualification—reflected in [Articles 74 and 83 of the United Nations Convention on the Law of the Sea](#) (hereafter the 1982 *Law of the Sea Convention*)<sup>64</sup> — that it is the equity of the result that is of paramount importance.<sup>65</sup> In the view of Newfoundland and Labrador, the 1958 *Geneva Convention on the Continental Shelf* (hereafter the 1958 *Geneva Convention*)<sup>66</sup> was inapplicable and, in any event, it maintained, both the result and process of delimitation would be the same as under customary law and Article 6 of that convention as international tribunals have consistently affirmed the substantial similarity of the two sources of law.

- 1.25. Nova Scotia agreed that the applicable law in this case was the "fundamental norm" of customary international law. The fundamental norm, as formulated by Nova Scotia, required that delimitation was to be effected by the application of equitable principles, taking into account all the relevant circumstances, in order to achieve an equitable result. Like Newfoundland and Labrador, Nova Scotia considered Article 6 of the 1958 *Geneva Convention* inapplicable, but it also considered that this provision was reconcilable with customary international law.
- 1.26. Despite their agreement on the fundamental norm, the Parties took radically opposed positions both as to the legal framework for the resolution of this question, and as to the resulting answer. **Figure 1** shows the respective claim lines of the Parties, as well as a strict equidistance line between the two provinces.
- 1.27. Newfoundland and Labrador argued that in the present case the conduct of the Parties was irrelevant to the location of the boundary, both in principle and as a matter of fact. In its view, in a continental shelf delimitation carried out in accordance with international law, conduct could only be taken into account if it embodied an agreement of the parties or if it provided unequivocal indications of a shared view as to the equitableness of a specific boundary. The Tribunal having held there was no agreement on the boundary, and the facts disclosing no such shared view, the question was to be resolved exclusively by reference to geographical considerations. Geographical factors were of fundamental importance because sovereignty over the coast was the basis of title. The first step was to identify, on the basis of the notion of frontal projection, the seaward extensions of the coasts, which were the areas directly in front of those coasts. The "principle of non-encroachment" required that the delimitation should accord to each Party its own "natural prolongation" or seaward extension of its coast and avoid any "cut-off" effect on the seaward extension of the other Party. An equitable delimitation would give proportionate effect to the coastal geography and avoid the potentially distorting effects of incidental features. Proportionality — the relationship between coastal lengths and maritime entitlements — was a critical factor both in the selection and application of the method of delimitation to be used and as an *ex post facto* means of testing, by reference to proportionality between coastal lengths and offshore areas, the equitable character of the delimitation.

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<sup>63</sup> [1984] I.C.J. Rep. 246 at p. 57 (para. 112).

<sup>64</sup> [United Nations Convention on the Law of the Sea, December 10, 1982](#), 450 U.N.T.S. 11 (entered into force November 16, 1994).

<sup>65</sup> *Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, [1982] I.C.J. Rep. 18 at p. 59 (para. 70) (hereafter *Tunisia/Libya*).

<sup>66</sup> *Convention on the Continental Shelf April 29, 1958*, 499 U.N.T.S. 312 (entered into force June 10, 1964).

1.28. In conformity with the conclusions as to coastal geography reached by the Court of Arbitration in *St. Pierre and Miquelon*, Newfoundland and Labrador considered that the area in dispute could be divided into two sectors: (a) an "inner concavity" bounded on the one hand by the closing line across Cabot Strait and on the other hand by an outer closing line joining Cormorandiere Rocks, off Scatarie Island, Nova Scotia and Lamaline Shag Rock off Newfoundland, and (b) an outer area to the southeast of the closing line, bounded by the coast of Nova Scotia down to Cape Canso, and by the south-facing coast of Newfoundland over to Cape Race. The configuration of the two areas, and the disparity of coastal lengths in favour of Newfoundland and Labrador dictated a solution modelled on that adopted by the Chamber in *Gulf of Maine*: namely, the adoption of bisectors to the general direction of the coasts within the "inner concavity", an adjustment to the midpoint on the closing line to take into account the ratio of coastal lengths within the inner indentation, and from that adjusted point a perpendicular to the closing line out to 200 nautical miles. This procedure divided the relevant area between the Parties in a ratio uncannily close to the ratio of coastal lengths, and was accordingly equitable. For Newfoundland and Labrador, it had the further advantage of ignoring or giving no effect both to St. Paul Island (in Cabot Strait) and Sable Island. These small, uninhabited islands, if taken into account in any way, would further affect the equity of a delimitation to the disadvantage of Newfoundland and Labrador, despite the significant disparity of coastal lengths in its favour.

1.29. The construction of the Newfoundland and Labrador line is shown on **Figure 2**, with insets showing the equivalent line constructed by the Chamber in *Gulf of Maine*.

1.30. Newfoundland and Labrador stressed not only the view of the coastal geography taken by the Court of Arbitration in *St. Pierre and Miquelon*, but also its general approach. It accepted that this Tribunal was not bound by the reasoning in that decision, as distinct from the result. But the area awarded to the French islands by the Court of Arbitration (the mushroom-like shape shown on **Figure 1**) was underpinned by a number of clear findings: the dominance in the relevant area of the southern coast of Newfoundland, the need to avoid cutting off any of the south-facing coasts (including those of the French islands), and the non-projection of the coast of Cape Breton Island to the east. In particular, the following passage from the *St. Pierre and Miquelon* award was stressed:

The objections of Canada against the southern projection of the coast of St Pierre and Miquelon, based on an eastern projection from Nova Scotia and Cape Breton Island are not compelling. Geographically, the coasts of Nova Scotia have open oceanic spaces for an unobstructed seaward projection towards the south in accordance with the tendency, remarked by Canada, for coasts to project frontally, in the direction in which they face. In the hypothesis of a delimitation exclusively between St Pierre and Miquelon and Nova Scotia, as if the southern coast of Newfoundland did not exist, it is likely that corrected equidistance would be resorted to, the coasts being opposite. In that event it is questionable whether the area hypothetically corresponding to Nova Scotia, would reach the maritime areas towards the south appertaining to St Pierre and Miquelon.<sup>67</sup>

Newfoundland and Labrador argued that the Tribunal could not award offshore areas to Nova Scotia to the east of the St. Pierre and Miquelon corridor without disregarding the clear reasoning of the Court of Arbitration. The method it proposed certainly avoided doing so, as can be seen from **Figure 2**. It also, according to Newfoundland and Labrador, avoided any cut-off effect on the southwest coast of Newfoundland as well as of any southeast-facing coasts of Nova Scotia.

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<sup>67</sup> *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 672 (para. 73).

- 1.31. By contrast, Nova Scotia placed great emphasis on its view of the basis of the Parties' title to the offshore. This was to be found exclusively in the *Accord Acts*, which implement a Canadian negotiated settlement to provincial offshore claims. Nova Scotia stressed (as the Tribunal had already noted) that the *Accord Acts* do "not purport to attribute offshore areas to the provinces, still less to change provincial boundaries".<sup>68</sup> The legislation simply gives the provinces a share in the administration of and revenue from certain areas of an undivided Canadian continental shelf. Thus, the Parties' entitlements, deriving from a negotiated domestic arrangement, did not involve inherent title or any natural prolongation of coasts. That fundamental fact, in Nova Scotia's view, affected all aspects of the present phase of the arbitration. It determined the identification of relevant circumstances and it reduced the importance of geography. It displaced or made irrelevant the 1958 *Geneva Convention*, since the Tribunal is not to delimit two areas of continental shelf but rather offshore areas under and for the purposes of Canadian law. Even if the conduct of the Parties and the content of their (unperfected) negotiations might not be decisive, or even relevant, in continental shelf delimitation under international law, they were highly relevant in a case where the Tribunal has to delimit offshore areas arising from a negotiated Canadian settlement. In any event, Nova Scotia argued that the conduct of the Parties over the period from the early 1960s onwards, even if it did not give rise to an estoppel, was such as to demonstrate the equitable character of that boundary. In this context it pointed out that a boundary based on the conditional agreement of 1964 took account of resource location and access and corresponded reasonably well to a strict or full-effect equidistance line. Such a line also divided the area of overlapping offshore entitlements of the Parties proportionately to the ratio of relevant coasts — a result achieved by Nova Scotia's taking into account coastlines from Cape Forchu up to Cape Spear, and the vast offshore areas which those coastlines generated, radially and out to the outer edge of the continental margin.
- 1.32. Despite the major divergences in the construction of their claim lines and in their supporting argumentation, there were a number of apparent points of agreement between the Parties, beyond their agreement on the fundamental norm. In particular, as has already been noted, they agreed that the 1958 *Geneva Convention* is not applicable in the present case. They also agreed that the Tribunal was not required to begin its consideration of the delimitation by adopting, even provisionally, an equidistance line. The reasons for these agreements were, however, essentially accidental, and did not involve any real convergence of views. Before turning to a more detailed analysis of the geography of the area in question and to the process of delimitation, it is accordingly necessary to say something further on the applicable law.

## 2. The Applicable Law

### (a) The Terms of Reference

- 2.1. The present dispute has been referred to the Tribunal pursuant to the dispute settlement provisions of the *Accord Acts*, implementing the Accords with Nova Scotia on one hand and Newfoundland and Labrador on the other. The relevant subsection, identical in both Acts, provides:

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<sup>68</sup> First Phase Award, at p. 25 (para. 3.23).

(4) Where the procedure for the settlement of a dispute pursuant to this section involves arbitration, the arbitrator shall apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require.<sup>69</sup>

Pursuant to these provisions, Article 3.1 of the Terms of Reference requires the Tribunal to apply "the principles of international law governing maritime boundary delimitation with such modification as the circumstances require... as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times".

- 2.2. The Tribunal analysed these provisions in some detail in its First Phase Award.<sup>70</sup> Of particular significance is the phrase "as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times" in Article 3.1. That phrase is not contained in the *Accord Acts* themselves. But as the Tribunal has already noted, it does no more than spell out the necessary implications of the legislation, which in terms requires an arbitral tribunal to apply principles of international law in delimiting the offshore areas of two provinces.<sup>71</sup> Ordinarily the Tribunal would not have needed to take matters further.
- 2.3. However, by a curious transposition, Nova Scotia (which in the first phase argued for the application of international law to negotiations and agreements of the governments of Canadian provinces) argued in the present phase that the Tribunal's task was rather a domestic one, that of attributing offshore areas to the provinces for specific purposes under the *Accord Acts*. In contrast, Newfoundland and Labrador (which had earlier argued that international law could not be applied to inter-provincial agreements even by analogy) now argued for the direct application of international law to the delimitation of offshore areas, applying a panoply of international principles and techniques elaborated by international tribunals.<sup>72</sup>
- 2.4. It is accordingly necessary to return to the matter, in particular to consider two closely related questions. The first is whether (as Nova Scotia argued) the domestic law basis of title under the *Accord Acts* effectively replaced the international law basis of title for the purpose of applying the principles of international law under the Terms of Reference. The second is whether the reference to "the same rights and obligations as the Government of Canada" may not require the Tribunal to apply the 1958 *Geneva Convention* in the present case, given that Canada is a party to that Convention. Further questions then arise, as to the possible modification of the delimitation article of the Convention (Article 6) in practice, and as to its application to a broad continental shelf given the definition of "offshore areas" under the *Accord Acts*.

## (b) The Basis of Title

- 2.5. As already noted, Nova Scotia argued strenuously that the "offshore areas" to be delimited by the Tribunal differ significantly from the continental shelf in legal terms, and particularly in terms of

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<sup>69</sup> *Canada-Newfoundland Act*, S.C. 1987, c. 3, s. 6(4); *Canada-Nova Scotia Act*, S.C. 1988, c. 28, s. 48(4).

<sup>70</sup> See First Phase Award, at p. 24-30 (paras. 3.21-3.30).

<sup>71</sup> See First Phase Award, at p. 26 (para. 3.24).

<sup>72</sup> See First Phase Award, at p. 12 (paras. 3.2, 3.3) for a summary of the Parties' positions in the first phase.

their basis of title, which for the offshore areas derives from a "negotiated entitlement" expressed in the legislation implementing the Canada-Newfoundland Accord and the Canada-Nova Scotia Accord. According to this argument, the legal regime of the continental shelf is inherently different from the regime of joint management and revenue sharing that is the object of this arbitration. Under the negotiated regime of the *Accord Acts*, the provinces acquire no jurisdiction or exclusive sovereign rights to explore and exploit seabed resources that are at the heart of the continental shelf regime. The limited, shared provincial entitlements that do exist in the offshore areas arise exclusively by virtue of the Accords and their implementing legislation. These provincial rights are fundamentally at odds, as regards both their nature and scope, with the exclusive sovereign rights of the continental shelf regime.

- 2.6. In distinguishing between the continental shelf and the areas to be delimited in this case, Nova Scotia also argued that the substantive scope of the interests in the two types of zones is different. The regime of the offshore areas, unlike the continental shelf regime, does not apply to sedentary species, or to mineral resources other than hydrocarbons, or to the regulation of certain other seabed activities such as pipelines. Moreover, Nova Scotia pointed out, the offshore areas do not correspond to the same areas of the seabed as the continental shelf, whether under the 1958 *Geneva Convention* or the 1982 *Law of the Sea Convention*, a point to which the Tribunal will return.
- 2.7. Under international law "[t]he geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title".<sup>73</sup> In contrast, Nova Scotia argued, provincial rights in the offshore areas do not derive from the seaward projection of sovereignty over the coasts, but rather from what the provinces were able to negotiate with the Federal Government. Thus, for Nova Scotia, the Tribunal is not concerned with a continental shelf delimitation; it is concerned with the delimitation of a maritime zone that is *sui generis* to the *Accord Acts*.
- 2.8. Nova Scotia attached critical importance to the question of legal basis of title. It viewed legal title as a circumstance of special relevance; as affecting the choice of equitable criteria, and as critical to determining the relevant area for the delimitation and to proportionality. For Nova Scotia, the significance of the juridical nature of the zone was such as to affect *all* aspects of the delimitation.
- 2.9. Newfoundland and Labrador, for its part, did not disagree with the central importance of title. It did, however, disagree vigorously with Nova Scotia's view of where that basis is to be found. While accepting that provincial offshore entitlements could not literally be continental shelf rights from the perspective of international law, Newfoundland and Labrador maintained that this did not imply that negotiated or legislated provincial entitlements could not be treated as genuine continental shelf rights for the specific purpose of applying the international law of maritime boundary delimitation as incorporated into the relevant domestic instruments.
- 2.10. Newfoundland and Labrador asserted that the reference to the international law of maritime boundaries in this dispute between provinces could only be meaningful with the adoption of a legal fiction and a legal assumption. The legal fiction was that the parties to the dispute are sovereign states. The legal assumption was that the maritime zones at issue are either identical or substantially similar to those to which the international law of maritime delimitation applies — the territorial sea, the continental shelf or the exclusive economic zone as the case may be. Otherwise, according to Newfoundland and Labrador, the exercise would become a logical impossibility. For

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<sup>73</sup> *Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 61 (para. 73).

Newfoundland and Labrador, these assumptions or legal fictions must be implicit in the statutory adoption of international law as the governing law, since international law is not directly applicable to the provinces. In the view of Newfoundland and Labrador, the Terms of Reference make explicit the assumption regarding the sovereign status of the provinces by providing that international law is to be applied "as if the parties were states" whose seabed entitlements beyond the territorial sea would be continental shelf entitlements. Thus, Newfoundland and Labrador considered that, read together, the *Accord Acts* and the Terms of Reference provided a complete answer to the Nova Scotia approach to the basis of title.

- 2.11. According to Newfoundland and Labrador, the Nova Scotia approach would lead to an impasse, even a *non liquet*, in these delimitation proceedings. Nova Scotia's proposition that the object of the delimitation was merely an *ad hoc* negotiated entitlement under Canadian law, "fundamentally at odds with the continental shelf", implied that the entitlement would not be within the scope of the international law of maritime delimitation, which does not apply in its own right to negotiated arrangements implemented in Canadian law. In the view of Newfoundland and Labrador, the result would be a total frustration of the statutory adoption of international law and of this arbitration.
- 2.12. This impasse, Newfoundland and Labrador claimed, was implicit in the Nova Scotia view (shared by Newfoundland and Labrador but for quite different reasons) that the 1958 *Geneva Convention* does not apply here because the continental shelf regime is inherently different from the regime of joint management and revenue sharing that is the object of the delimitation. This, Newfoundland and Labrador argued, would preclude the application of the customary law of continental shelf delimitation for exactly the same reasons. In that event there would be no law that could be applied, contrary both to the *Accord Acts* and the Terms of Reference.
- 2.13. According to Newfoundland and Labrador, the basis of title in the present delimitation was closely related to the continental shelf as understood in international law. The statutory definition of "offshore area" in the *Accord Acts* was an unmistakable indication of the juridical nature of the zones that form the object of the *Accord Acts*. The delimitation provisions of the *Accord Acts* treat the two Parties as if they were sovereign states; for Newfoundland and Labrador this meant that the rights at issue are deemed to flow from the same source of title as the continental shelf entitlements of such states, namely, territorial sovereignty over adjacent coasts. It was only on this basis that it was possible to apply the international law of maritime delimitation without disregarding its very essence. The fact that the negotiated regime did not cover every element of the continental shelf regime did not raise any practical or conceptual impediment to the application of the law relating to the delimitation of the continental shelf.
- 2.14. For its part, the Tribunal is not persuaded by Nova Scotia's contention that the basis of title, for the purposes of this delimitation, is to be treated as entirely distinct from that of the continental shelf, or that the origin of the Parties' rights in the *Accord Acts* makes any relevant difference to the process of delimitation. Indeed, it hardly seems possible to speak of a domestic basis of title in this case when domestic law grants the Parties no title or ownership whatever over offshore areas or resources. It is true that the offshore areas of the Parties and the limited rights they have negotiated in those areas are different from the legal institution of the continental shelf. As Canadian provinces, the Parties enjoy no sovereignty over their coasts and no sovereign rights to explore and exploit the resources of the continental shelf adjacent to those coasts; this sovereignty and these rights are vested in Canada as a state in international law. The Tribunal, however, is bound by the

Terms of Reference and the *Accord Acts*. These dictate the law the Tribunal is to apply to the facts of the case. Indeed, in the Tribunal's view, they do so unambiguously.

2.15. Article 3.1 of the Terms of Reference, already referred to, directs the Tribunal in the following terms:

Applying the principles of international law governing maritime delimitation with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.

This provision is made up of four elements:

- First, the Tribunal is to determine the line dividing the respective offshore areas of the two provinces. These areas are and will remain areas encompassing not exclusive sovereign rights over seabed resources, but limited, shared, negotiated rights in respect of certain of those resources only.
- Second, for the purpose of making this determination, the Tribunal is to apply the principles of international law governing maritime boundary delimitation, with such modification as the circumstances require. The provinces, however, are not subjects of international law. The principles governing maritime delimitation apply to the territorial sea, the continental shelf and the economic zone, and not to a purely domestic arrangement between provinces and the Federal Government on joint management and revenue sharing relative to offshore hydrocarbon resources, a regime unknown to international law. Evidently something more is required for the Tribunal to carry out its mandate.
- Third, for this reason, the Tribunal is required to effect its determination as if the Parties were states, with all the attributes of states, including territorial sovereignty and exclusive sovereign rights in respect of the resources of the continental shelf adjacent to their coasts.
- Fourth, to add emphasis and even greater precision to the foregoing point, the Tribunal is also required to make its determination as if the provinces were subject to the same rights and obligations as the Government of Canada. Canada's rights in respect of the continental shelf arise not from domestic law but from its legal basis of title under international law. The offshore rights of Nova Scotia and Newfoundland and Labrador under the *Accord Acts* must therefore be treated for the purposes of delimitation of those areas as arising, like Canada's, from the same basis of title in international law.

This is the legal framework the Terms of Reference impose upon the Tribunal and the Parties. It puts no difficulty or obstacle of any kind in the way of the delimitation exercise. Rather, it is what makes the exercise possible.

2.16. The Tribunal would also note that while there are differences between the regime of "negotiated entitlements" and the regime of the continental shelf, there are a number of important similarities. In particular, both extend to the outer edge of the continental margin as defined in international law, and both concern — albeit in a different measure — the management and benefits from the exploitation of a vital natural resource, hydrocarbons. Moreover, none of the differences between the two regimes conflict with or impede the application of the Terms of Reference.

- 2.17. The negotiations regarding the Parties' entitlements make it clear that the Parties themselves always looked upon them as being governed by the same principles of delimitation as the continental shelf. Originally, indeed, they claimed ownership of the resources of the continental shelf adjacent to Canada and proceeded to delimit their respective areas according to a form of equidistance method based on their coastal frontages. This general approach never varied throughout the negotiations. The Federal Government offered to create a system of revenue pooling among the Atlantic Provinces, but they refused to depart from an individual delimitation anchored in geographic considerations.
- 2.18. In an eloquent plea by the Agent for Nova Scotia during the oral proceedings, it was said that the principles of international law are fully capable of application to the delimitation of offshore areas for which the basis of title was founded on domestic (*i.e.*, Canadian) law. Even if this is unprecedented, it was urged, the principles of international law governing maritime delimitation were sufficiently robust to assist in such a delimitation. The difficulty, however, does not lie in the lack of precedent nor the lack of flexibility in international law. As was pointed out by Nova Scotia, the International Court was able to apply the law to novel situations: to the delimitation of the continental shelf in the *North Sea Continental Shelf Cases*;<sup>74</sup> to the delimitation of a single maritime boundary in the *Gulf of Maine case*;<sup>75</sup> and to the delimitation of two separate but coincident boundaries of exclusive fishing zone and continental shelf in the *Jan Mayen case*.<sup>76</sup> But these cases involved the delimitation of zones whose basis of title flowed directly from international law, and the flexibility required to deal with them was found within, not outside, the realm of international law — flexibility *infra legem*, one might call it. What Nova Scotia contended for seemed to be something else entirely: the application of international law to zones whose basis of title was apparently divorced from any international extension or connotation, being founded exclusively on domestic (Canadian) law and a domestic (Canadian) negotiated settlement. Now the fact that Canada has sovereign rights over the continental shelf and its resources, and that vis-a-vis third states the extent of its continental shelf rights is determined by international law principles of delimitation, did not require Canada to use those principles in allocating interests in offshore areas to the provinces. The *Accord Acts* could have laid down some different basis of delimitation, as for example with the fisheries jurisdiction lines between England and Scotland before 1999.<sup>77</sup> But when the *Accord Acts* expressly stipulated that, in the absence of agreement, disputed offshore areas of the two provinces were to be delimited according to the principles of international law, the Canadian Parliament was seeking to resolve a difficulty, not to create one. It was entirely appropriate to apply the international law principles of delimitation to this task (as they have been applied for analogous purposes in the United States).<sup>78</sup> The Parliament of Canada having done so, there is no reason to treat the legislative mandate and the Terms of Reference as saying anything else than their words provide. This is all the more so as the purposes for which the offshore areas are created are key purposes of the continental shelf — the administration of and benefit from exploitation of oil and gas resources.

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<sup>74</sup> *North Sea Continental Shelf Cases*, (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*, [1969] I.C.J. Rep. 3 (hereafter *North Sea Continental Shelf Cases*)). [1984] I.C.J. Rep. 246.

<sup>75</sup> *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen*

(*Denmark v. Norway*), [1993] I.C.J. Rep. 38 (hereafter *Jan Mayen*).

<sup>77</sup> See now Scottish Adjacent Waters Boundary Order 1999 (SI 1999/1126).

<sup>78</sup> See J. I. Charney, "The Delimitation of Lateral Seaward Boundaries between States in a Domestic Context" (1981) 75 *A.J. I. L.* 28.

## (c) Applicability of the 1958 *Geneva Convention on the Continental Shelf*

2.19. The Tribunal turns to a second, closely related question concerning the applicable law: that is, whether the 1958 *Geneva Convention*, and particularly its Article 6 on delimitation between opposite or adjacent coasts, is applicable to the present delimitation. In its First Phase Award, the Tribunal noted that;

Canada ratified the fourth *Geneva Convention of 1958 on the Continental Shelf (GCCS)* with effect from February 6, 1970. It did so without any reservation. It has not yet ratified the [1982 United Nations Convention on the Law of the Sea \(UNCLOS\)](#). Thus as a matter of international law, the governing provision, *prima facie* at least, is *GCCS* Article 6.<sup>79</sup>

As the qualifying phrase in the last sentence implies, the Tribunal in the first phase did not need to decide that the 1958 *Geneva Convention* is applicable to this delimitation. It was thus open to the Parties in the second phase to argue that it does not and both did so, albeit for quite different reasons. In the circumstances, the Tribunal considers that it must look beyond the surface agreement of the Parties and examine their underlying disagreement.

2.20. Nova Scotia argued that the 1958 *Geneva Convention* is of limited utility in this arbitration and that the delimitation provisions found in Article 6 are not directly applicable. It founded this argument on essentially the same grounds as its argument on the basis of title, and more specifically on the ground that the *Accord Acts* do not address the same rights, the same resources, the same uses, or the same areas of the seabed that are the subject matter of the 1958 *Geneva Convention*. The Tribunal has already addressed most of these points in dealing with the basis of title. What remains to be considered is Nova Scotia's argument that at least some of the areas concerned in this delimitation differ from the legal definition of the area of the continental shelf under the 1958 *Geneva Convention*.

2.21. The offshore areas dealt with in the Terms of Reference begin at the low-water mark of the coasts, whereas the 1958 *Geneva Convention* defines the continental shelf as encompassing "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea".<sup>80</sup> On the other hand, the line to be determined in this delimitation will not proceed through any area of the territorial sea adjacent to either province. Although the areas delimited extend to the coasts of the Parties, the line will at no point represent a territorial sea boundary.

2.22. Nova Scotia also argued that the seaward extent of the offshore areas involved here is defined by reference to the "continental margin". This is itself defined in the *Oceans Act*,<sup>81</sup> which prescribes the limits of Canadian jurisdiction in terms borrowed from Article 76 of the 1982 *Law of the Sea Convention* rather than the 1958 *Geneva Convention*. In the Tribunal's view, the contrast that Nova Scotia seeks to draw between the definitions of the continental shelf in the 1958 and the 1982 conventions is too stark. The 1958 *Geneva Convention* definition of the continental shelf as

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<sup>79</sup> First Phase Award, at p. 16 (para. 3.11) (footnotes omitted).

<sup>80</sup> *Geneva Convention on the Continental Shelf* April 29, 1958, 499 U.N.T.S. 312, (entered into force June 10, 1964) Article 1.

<sup>81</sup> *S.C. 1996, c. 31*.

extending over submarine areas "to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas"<sup>82</sup> is essentially compatible with the definition given in the 1982 *Law of the Sea Convention*. Under the 1958 definition, some states, including Canada, claimed continental shelf rights to the outer edge of the continental margin well before 1982. To the Tribunal's knowledge, it has not been suggested in state practice that a delimitation out to 200 nautical miles requires adjustment in terms of its direction beyond that limit; certainly neither of the Parties suggested as much. The Tribunal accordingly is not persuaded that the 1958 *Geneva Convention* does not apply to this delimitation for the reasons advanced by Nova Scotia.

- 2.23. As to the reasons advanced by Newfoundland and Labrador, the Tribunal finds these equally unpersuasive. Newfoundland and Labrador argued that the expression "principles of international law" used in the Terms of Reference refers to generally applicable principles of law and not what it called the *lex specialis* created by particular treaties such as the 1958 *Geneva Convention*. According to Newfoundland and Labrador, that was "undoubtedly" the meaning the expression must be given in the *Accord Acts*, which do not authorize the federal Minister to alter the substantive law as prescribed by the legislation itself.
- 2.24. The Tribunal accepts that the Terms of Reference cannot change, and should not be interpreted as changing, the law applicable to this arbitration as laid down in the *Accord Acts*. But it does not accept that the term "principles of international law" should be narrowly construed so as to refer exclusively to customary international law principles. It was, in the Tribunal's view, appropriate for the Terms of Reference to apply to the present task the provisions of treaty law relating to delimitation of continental shelf which are binding on Canada. As a party to the 1958 *Geneva Convention* without any reservation, Canada is subject to the rights and obligations it incorporates, including those under Article 6. So too, under the Terms of Reference, are Nova Scotia and Newfoundland and Labrador. This in no way alters the substantive law prescribed by the legislation. It rather confirms and clarifies it.
- 2.25. The Tribunal notes that, although international courts have not applied the 1958 *Geneva Convention* to cases involving the determination of a single maritime boundary (*i.e.*, involving both the exclusive economic zone and the continental shelf out to 200 nautical miles),<sup>83</sup> the present case is confined to resources falling within the scope of the continental shelf and that it involves areas extending out to the outer margin of the continental shelf. The International Court has not suggested that states parties to the 1958 *Geneva Convention* have somehow ceased to be bound by its provisions as a result of subsequent developments in the law of the continental shelf or in the practice of maritime delimitation.<sup>84</sup>

## (d) Subsequent Developments in the International Law of Maritime Delimitation

- 2.26. The Tribunal accordingly starts from the 1958 *Geneva Convention*, in particular Article 6, which

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<sup>82</sup> *Geneva Convention on the Continental Shelf*, April 29, 1958, 499 U.N.T.S. 312, (entered into force June 10, 1964) Article 1.

<sup>83</sup> *Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 303 (para. 125); *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 663 (para. 40).

<sup>84</sup> *Cf. Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 301 (para. 118); *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 57 (para. 44).

provides as follows:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, 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.
2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.

This compares with Article 83 of the 1982 *Law of the Sea Convention*, which refers to delimitation of the continental shelf "by agreement on the basis of international law, as referred to in [Article 38 of the Statute of the International Court of Justice](#), in order to achieve an equitable solution".

- 2.27. The apparent contrast between these two articles has been attenuated by subsequent practice and caselaw. On the one hand, the "special circumstances" of Article 6 of the 1958 *Geneva Convention* have rather readily been found to exist, and to be not very different from the "relevant circumstances" of Article 83; moreover, the underlying aim of achieving an equitable result, the focus of Article 83 and customary international law, has also tended to suffuse the consideration of Article 6. On the other hand, in the application of Article 83 or of the customary international law principle of equitable delimitation since *Libya/Malta*, courts and tribunals, notably the International Court, have normally begun by considering an equidistance line and adjusting that line in accordance with relevant considerations in each case. As the Court said in the *Jan Mayen* case;

If the equidistance-special circumstances rule of the 1958 Convention is... to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference — at any rate in regard to delimitation between opposite coasts — between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles.<sup>85</sup>

The equidistance line was also the starting point for the International Court in the *Qatar-Bahrain* case which, as the Court noted, involved areas where the coasts were opposite to each other and those which are "rather comparable to adjacent coasts",<sup>86</sup> albeit within a confined area. Again the

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<sup>85</sup> [1993] I.C.J. Rep. 38, at p. 58 (para. 46) citing the Anglo-French Court of Arbitration in the *Channel Islands/Western Approaches* case, (1977), 18 R.I.A.A. 3 at p. 45 (para. 70), and its own judgment in the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, [1985] I.C.J. Rep. 13 at p. 33 (para. 33). See also *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 62 (para. 56).

Court in that case noted that

the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.<sup>87</sup>

- 2.28. In the context of opposite coasts and latterly adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstances justify it.<sup>88</sup> The Tribunal will further consider the question of choice of methods in due course. For present purposes it is sufficient to note that the applicability of the 1958 *Geneva Convention* in the present proceedings reinforces the case for commencing with an equidistance line, but in any event that is now the starting point in most cases, whether the governing law is the 1958 *Geneva Convention*, the 1982 *Law of the Sea Convention* or customary international law.

## (e) The Offshore Areas beyond 200 Nautical Miles

- 2.29. Finally, some reference should be made to the mandate of the Tribunal in terms of the outer limits of the "offshore areas" to be attributed to the Parties. As already noted, the *Accord Acts* define these areas as extending to the outer edge of the continental margin, a definition that incorporates the provisions of Article 76 of the 1982 *Law of the Sea Convention*. In the present case both Parties accepted that the line determined by the Tribunal should in principle extend out so far, and the Tribunal's jurisdiction clearly permits it to do so. It should, however, be noted that no international tribunal has yet had to delimit to the outer edge of the continental shelf as between adjacent states, and certain points arise as to the task of the Tribunal in this respect.

- 2.30. Canada's claim to an extended continental shelf rests within its domestic law on the *Oceans Act*, which at subsection 17(1) states:

The continental shelf of Canada is the seabed and subsoil of the submarine areas, including those of the exclusive economic zone of Canada, that extend beyond the territorial sea of Canada throughout the natural prolongation of the land territory of Canada

(a) subject to paragraphs (b) and (c), to the outer edge of the continental margin, determined in

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<sup>86</sup> *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, (2001), 40 I.L.M. 847, at p. 883 (para. 170) (hereafter *Qatar/Bahraini*). See also p. 892 (para. 230).

<sup>87</sup> *Ibid.*, at p. 892 (para. 231).

<sup>88</sup> *Eritrea-Yemen Arbitration (Second Stage: Maritime Delimitation)*, (2001), 40 I.L.M. 983 at p. 998 (para. 83) (hereafter *Eritrea-Yemen*) ("the Tribunal has taken as its starting point, as its fundamental point of departure, that, as between opposite coasts, a median line obtains."). In the *St. Pierre and Miquelon case*, there was at no stage explicit consideration of an equidistance line in either sector (*cf* p. 671 (paras. 67-68)). Evidently the Court of Arbitration in that case treated St. Pierre and Miquelon as being, for its purposes, part of the general coastline of Newfoundland and as not being in an "opposite" situation to any coasts, there being no question of a delimitation on the east or north-facing coasts of the islands. The majority's reasoning, summary as it is, was dominated by arguments concerning non-encroachment and frontal projection.

the manner under international law that results in the maximum extent of the continental shelf of Canada, the outer edge of the continental margin being the submerged prolongation of the land mass of Canada consisting of the seabed and subsoil of the shelf, the slope and the rise, but not including the deep ocean floor with its oceanic ridges or its subsoil;

(b) to a distance of 200 nautical miles from the baselines of the territorial sea of Canada where the outer edge of the continental margin does not extend up to that distance; or

(c) in respect of a portion of the continental shelf of Canada for which the geographical coordinates of points have been prescribed pursuant to subparagraph 25(a)(iii), to lines determined from the geographical coordinates of points so prescribed,

Canada has not yet prescribed the required geographical co-ordinates of points. This Tribunal does not have the competence or the mandate to delimit the outer limit of the continental shelf, but simply notes that a continental shelf wider than 200 nautical miles from the territorial sea baselines probably exists through most, if not all, of the area seaward of these two provinces.

2.31. In the *St. Pierre and Miquelon* case, the Court of Arbitration held it had no jurisdiction to delimit the continental shelf beyond 200 nautical miles, on the ground that to do so would involve the legal position of a third party, the "international community" as represented by the Commission on the Limits of the Continental Shelf established under Annex II of the 1982 *Law of the Sea Convention*.<sup>89</sup> The present Tribunal is in a quite different position: first, in that it is a national and not an international tribunal, so that there is no question of any decision which might be opposable to any international processes for the determination of the outer edge of the Canadian continental shelf; and second, in that all it is called to do is to specify the offshore areas of the two Parties *inter se* for the purposes of the *Accord Acts*, which it can do by providing that the line shall not extend beyond the point of intersection with the outer limit of the continental margin as determined in accordance with international law.<sup>90</sup>

2.32. Nova Scotia provided expert evidence of the outer limit of the continental shelf as defined by Article 76.<sup>91</sup> Newfoundland and Labrador did not dispute that Canada enjoyed an extended continental shelf throughout the region from east of the island of Newfoundland to the area off the Gulf of Maine, but it did not provide any evidence as to the location of the outer limit. The Tribunal's Technical Expert provided a version of Canada's possible claim to an extended continental shelf that was not significantly different from that shown by Nova Scotia.<sup>92</sup> That limit is shown on **Figure 3** for illustrative purposes only.

2.33. Newfoundland and Labrador did, however, argue that, in determining the relevant area for the purposes of delimitation and in making any proportionality calculation, the Tribunal should ignore areas beyond 200 nautical miles. The essential reason was that under Article 76 the extent of such

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<sup>89</sup> *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 674 (paras. 78-79).

<sup>90</sup> In this respect there does not seem to be any difference in principle between the non-effect of a bilateral delimitation vis-a-vis a third state (cf *Eritrea/Yemen*, (2001), 40 I.L.M. 983, at p. 1010 (para. 164)) and its non-effect vis-a-vis the "international community" or third states generally.

<sup>91</sup> Nova Scotia Memorial, Phase Two, Appendix B.

<sup>92</sup> See also R. MacNab, ed., "Canada and Article 76 of the Law of the Sea: Defining Limits of Canadian Jurisdiction Beyond 200 nautical miles in the Atlantic and Arctic Oceans" (Ottawa: Geological Survey of Canada, 1994) open File Report 3209.

areas depends on geomorphological considerations, so that areas off the same stretch of coast may vary in ways that have nothing to do with coastal geography. Indeed, as can be seen from **Figure 3**, the outer continental shelf is considerably broader off the coast of Newfoundland than it is further south, off Nova Scotia. If exact measures of proportionality are to determine continental shelf delimitation, it was argued that differential breadths of outer continental shelf would be decisive. This, it was said, would be inequitable to "broad shelf" coasts such as Newfoundland's,

- 2.34. The Tribunal does not accept this argument for a number of reasons. One is that Article 6 in its inception applied to a continental shelf seen as a function of geomorphology, not distance; yet the drafters clearly considered that Article 6 could be applied to delimitations throughout the whole extent of a broad margin. In 1958 it would have been anachronistic to use a 200 nautical mile limit in the application of Article 6. Another reason is that the existence of a "disproportionately" narrow or broad outer continental shelf could presumably be a special or relevant circumstance in a delimitation. But the main point is simply that Newfoundland and Labrador's argument implies equating equitableness with a mathematical proportionality test — and indeed its construction of its claim line appeared to depend on high levels of mathematical concordance between ratios of coastal lengths and maritime areas. For reasons that will be explained below, the Tribunal does not accept that the criterion of general proportionality is to be applied in this rigid way, if it is applied at all.

## (f) The Tribunal's Conclusions as to the Applicable Law

- 2.35. For these reasons, the Tribunal reaffirms its view that the principles of international law are applicable in the present phase;<sup>93</sup> for Canada, and therefore for the Parties, those principles include the provisions of Article 6 of the 1958 *Geneva Convention* and the developments under customary international law that have been associated with the interpretation and application of Article 6. Of course, the *Accord Acts* do not simply stipulate the application of principles of international law for the Tribunal's task; they add the qualifier "with such modifications as the circumstances require". In response to a question from the Tribunal in the first phase concerning the effect of this proviso, Nova Scotia replied that it is "not necessary to modify the principles of international law other than so as to ensure their applicability to the parties in this case"; this was, in its view, already achieved by the Terms of Reference.<sup>94</sup> For the reasons given above, the Tribunal agrees. Just as in the first phase the Terms of Reference called for the application of international law by analogy to the conduct of provincial governments within Canada claiming the benefit of a resource,<sup>95</sup> so in the second phase they clearly call for the application of the principles of international law governing maritime boundary delimitation by analogy, in order to determine the extent of the offshore areas of the two provinces. In both cases the application of international law is analogical. In both cases it is appropriate and required by the *Accord Acts* and the Terms of Reference. Furthermore, in the Tribunal's view, the international law governing maritime boundary delimitation (including the provisions of Article 6 of the 1958 *Geneva Convention*) is flexible enough to allow the delimitation process to be carried through without further modification.

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<sup>93</sup> First Phase Award, at p. 25 (paras. 3.23-3.24).

<sup>94</sup> *Ibid.*, at p. 28 (para. 3.27).

<sup>95</sup> *Ibid.*, at p. 27 (para. 3.26).

### 3. The Process of Delimitation: Preliminary Issues

3.1. On this basis, the Tribunal turns to the actual process of delimitation of the Parties' offshore areas, and to the applicable criteria in terms of Article 6 of the 1958 *Geneva Convention*. For the most part, it is established, such criteria concern the configuration of the relevant coasts and their relationship with each other, *i.e.*, the geography of the region. Nova Scotia, however, relied on certain additional criteria and these need to be dealt with. They were, first, the conduct of the Parties, and second, the question of access to the resources in dispute.

#### (a) The Conduct of the Parties

3.2. There was extensive argument in both phases of this arbitration as to the extent and implications of the Parties' conduct in terms of establishing or at least indicating the propriety of a particular line. The Tribunal has already ruled that the conduct relied on was insufficient to establish an agreement between the Parties resolving the boundary between them.<sup>96</sup> In its written pleadings Nova Scotia argued that Newfoundland and Labrador was nevertheless estopped from denying that a boundary existed, so that the effect of its conduct was tantamount to a formal agreement — in effect, an application of the doctrine of estoppel by convention in the common law. This argument was not pressed in the oral phase, and in the Tribunal's view rightly so. The conduct of the provincial Premiers in 1964 and 1972, not amounting to an agreement which disposed of the boundary, can hardly be converted into such an agreement by presenting it in terms of the doctrine of estoppel. The problem with that conduct is not that it was unilateral, requiring reliance by the other party to render it binding; the problem was (*inter alia*) that it was conditional. After 1972, Nova Scotia was on notice that Newfoundland and Labrador did not accept the 135° line.<sup>97</sup> It was also of course fully aware that the Federal Government refused to accept the provincial claim to title (with which the determination of "provincial boundaries" was intimately linked) and that this refusal had been upheld by the Supreme Court of Canada. There was no distinct statement or representation by Newfoundland and Labrador after 1972 that it accepted the boundary, and no statement, before or after 1972, that it accepted the boundary "for all purposes". When Quebec Minister Allard pressed the other provinces to do so in 1969, Newfoundland and Labrador reseeded its position.<sup>98</sup>

3.3. Thus, from the point of view of its formal acceptance of a boundary, the conduct of Newfoundland and Labrador at relevant times was, at best, analogous to that of the signatory of an unratified boundary agreement.<sup>99</sup> Such an agreement does not establish a boundary.<sup>100</sup>

3.4. This does not, however, dispose of the matter, as the Tribunal has already noted.<sup>101</sup> Courts and tribunals dealing with maritime delimitation have frequently been faced with arguments based

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<sup>96</sup> First Phase Award, at p. 64-71 (paras. 6.1-6.8).

<sup>97</sup> The Parties disagreed as to whether and when Newfoundland and Labrador saw the line on the map prepared by federal officials in 1971. It is however, clear from Munster Doody's letter of October 6, 1972 that the line was unacceptable.

<sup>98</sup> First Phase Award, at p. 53 (para. 5.13).

<sup>99</sup> *Ibid.*, at p. 29 (para. 3.29).

<sup>100</sup> See, e.g., *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6 at p. 24 (para. 50) p. 27 (para. 57) and *cf.* the treatment of the Releve des Conclusions in *Sr. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 656, 677 (paras. 10, 91).

<sup>101</sup> See paragraph 1.21 above.

upon conduct, ranging from acquiescence in the use of a particular feature as a basepoint to the establishment through a pattern of conduct of a *de facto* line which is entitled to respect. For example, in the *Tunisia/Libya* case the International Court treated as "a circumstance of great relevance for the delimitation" the existence of a "line of adjoining concessions, which was tacitly respected for a number of years, and which approximately corresponds... to the line perpendicular to the coast at the frontier point which had in the past been observed as a *de facto* maritime limit".<sup>102</sup> The Court referred to "the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference, or (until 1976) protests, by the other".<sup>103</sup> That line was "neither arbitrary nor without precedent in the relations between the two States".<sup>104</sup> It was incorporated in the line awarded by the Court on the ground that it was one of the "indicia... of the line or lines which the Parties themselves may have considered equitable or acted upon as such".<sup>105</sup> This may be contrasted with the finding of the Chamber in the *Gulf of Maine* case, where there had been a period of apparent United States acquiescence in Canadian activity up to the equidistance line. But, the Chamber held, the period in question (from about 1965 to 1972) was "too brief to have produced a legal effect of this kind, even supposing that the facts are as claimed".<sup>106</sup> In the Chamber's view, for conduct (falling short of an actual agreement) to be relevant, it would have to be "sufficiently clear, sustained and consistent".<sup>107</sup> Mere coincidence of pennits, even when combined with some measure of acquiescence or silence at an administrative level, was insufficient to meet this standard, in its view.

- 3.5. In maritime boundary cases it has often been argued that the parties have by conduct established a particular line or consolidated some aspect of a maritime boundary.<sup>108</sup> Such arguments have always been treated as admissible and have been carefully considered. But it must be said that more often than not they have been rejected, either because the conduct did not relate to the area in question,<sup>109</sup> or was merely unilateral,<sup>110</sup> or was performed vis-a-vis a third party,<sup>111</sup> or was an exercise in self-restraint to avoid aggravating the dispute,<sup>112</sup> or was equivocal.<sup>113</sup> There is little point in considering these cases in detail since each depended on its own facts. In the Tribunal's view, in order to establish that a boundary (not settled or determined by agreement) has been established through conduct, it is necessary to show an unequivocal pattern of conduct as between the two parties concerned, relating to the area and supporting the boundary, or the aspect of the boundary, which is in dispute. In the words of the International Court in the *Libya/Malta* case, the question is whether there is "any pattern of conduct on either side sufficiently unequivocal to constitute either

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<sup>102</sup> [1982] I.C.J. Rep. 18 at p. 71 (para. 96).

<sup>103</sup> *Ibid.*, at p. 84 (para. 117).

<sup>104</sup> *Ibid.* (para. 119).

<sup>105</sup> *Ibid.* (para. 118).

<sup>106</sup> [1984] I.C.J. Rep. 246 at p. 311 (para. 151).

<sup>107</sup> *Ibid.*, at p. 309 (para. 146).

<sup>108</sup> See *North Sea Continental Shelf Cases* [1969] I.C.J. Rep. 3 at p. 25-27 (paras. 27-33); *Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 66-71 (paras. 87-96); *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 28 (paras. 24-25); *Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 303-311 (paras. 126-54); *Guinea - Guinea-Bissau Maritime Delimitation*, (1985), 77 I.L.R. 636 at p. 666-668, 682 (paras. 61-66, 105); *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 677 (paras. 89-92); *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 53-56, 75-76 (paras. 33-39, 82-86); *Eritrea/Yemen*, (2001), 40 I.L.M. 983 at p. 997-998 (paras. 76-82).

<sup>109</sup> *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 52 (para. 32).

<sup>110</sup> *Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 68 (paras. 90,92).

<sup>111</sup> *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 55 (paras. 37, 86).

<sup>112</sup> *Ibid.*, at p. 54 (para. 36).

<sup>113</sup> *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 29 (para. 25); *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 52 (paras. 34, 35).

acquiescence or any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court".<sup>114</sup> It may be observed that (as was clearly demonstrated in argument before the Tribunal) the relevant line in *Tunisia/Libya* closely followed the line of actual exploration and exploitation based on oil concessions granted by one party and not protested by the other over a significant period of time.<sup>115</sup> In effect, each of the parties had established a consolidated and relatively concordant set of vested rights without protest from the other. This was not just a question of the appearance on the map of a line established by paper acts such as permits, but the consolidation of the line in practice by conduct referable to it, including the discovery of exploitable fields.

- 3.6. In line with its argument on the basis of title, already considered above, Nova Scotia argued that more weight should be given to conduct in the domestic context. The offshore areas were the result of a Canadian negotiated settlement of claims: in the context of such a negotiation, lasting from the early 1960s, considerations of good faith and equity demanded that substantial weight be accorded to the conduct of the Parties. In that regard, Nova Scotia stressed the consistency of its own conduct since 1964 and the purported acquiescence of Newfoundland even after 1972.
- 3.7. The Tribunal has already explained why it cannot accept Nova Scotia's general argument in relation to the basis of title, having regard to the *Accord Acts* and the Terms of Reference. But even if the Tribunal were delimiting "offshore areas" with a basis of title distinct from the institution of the continental shelf under international law, it fails to see how conduct which was equivocal or uncertain could be considered decisive in relation to what is, on any view, a significant legal entitlement of both provinces. It accordingly sees no reason to depart from the standard laid down by the International Court in *Libya/Malta*, namely, whether there is "any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable..."<sup>116</sup>
- 3.8. In seeking to establish its position, Nova Scotia relied essentially on two kinds of conduct: first, general assent, maintained over time, to a procedure of delimitation, to the use of particular basepoints and to the general direction of a delimitation line, and second, the oil permit practice of the Parties, especially in the outer area.
- 3.9. As to the inner area, the position may be summarised as follows:
  - (a) Both Nova Scotia and Newfoundland accepted a particular procedure for the determination of a maritime boundary in the inner area, including specific agreement on particular basepoints. This agreement was, however, as the Tribunal has already held, made in support of a claim to an existing provincial maritime zone, which claim was rejected by the Federal Government and by the Supreme Court of Canada. Unlike Nova Scotia, Newfoundland and Labrador never expressly accepted the 1964 boundary in the inner area as an "all purpose" line.
  - (b) When, in 1972, the relevant Newfoundland and Labrador Minister queried the 1964 boundary, he said that he was "not questioning the general principles which form the basis of the present demarcation". However, he made it clear that the line eastward of turning point 2017 was, in

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<sup>114</sup> *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 29 (para. 25).

<sup>115</sup> The Tribunal was referred to maps in the pleadings in *Tunisia/Libya*, [1982] I.C.J. Rep. 18, to demonstrate the extent of convergence between wells drilled and the line eventually awarded.

<sup>116</sup> *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 29 (para. 25).

Newfoundland and Labrador's view, not "established according to those scientific principles generally accepted in establishing marine boundaries", and he suggested a different line as a basis for negotiations.<sup>117</sup>

(c) Newfoundland and Labrador made no objection at this stage to the turning points themselves, or to the configuration of the line in the vicinity of Cabot Strait. Indeed it did not expressly query the use of those turning points, as a basis for a delimitation based on an adjusted equidistance line, until the pleadings in the present case.

(d) Newfoundland and Labrador only formulated a detailed proposal in the period 1997-1998. This was based on the use of bisectors to the general direction of the coast in the inner area. It was not identical to the present claim line but clearly enough came from the same quiver. It did not envisage the use of an equidistance line.

(e) Although there was some issuing of oil permits and some seismic exploration and other activity in the inner area, this was limited. No wells were drilled beyond territorial waters, and Newfoundland and Labrador's seismic permits, though they did not respect the 1964 line, contained a caveat for provincial boundaries. In any event, there was no reason for Nova Scotia to be aware of these permits or to protest them. In the Tribunal's view, it is difficult to accept that seismic activity, of itself, could give rise to a situation analogous to that in *Tunisia/Libya*, and anyway there is no evidence that there was seismic activity in the critical areas close to the equidistance line, or that Nova Scotia should have been aware of such activity, if indeed it occurred.

3.10. The Tribunal notes the Chamber's criticism of United States conduct, including failure to protest Canadian claims and actions, in *Gulf of Maine*.<sup>118</sup> Similar criticisms can be directed at Newfoundland and Labrador in the present case. It is true that in the period between 1972 and 1992 there were a number of factors — the moratorium on drilling around St. Pierre and Miquelon, the *Hibernia* reference, the continuing negotiations of both Parties with the Federal Government before and after 1984 — which may explain and to a certain extent justify that silence. But after 1992, with the Accords in place, the boundaries with France delimited and the moratorium lifted, the position was different. Oil activity pursuant to the Atlantic Accord in the 1990s, had it conformed to the 1964 line, could very well have led to the conclusion that the boundary was now settled. No such activity has, however, been drawn to the Tribunal's attention, and it may be inferred that there was none. In the circumstances, the Tribunal concludes that there was no "sufficiently clear, sustained and consistent" conduct on the part of Newfoundland and Labrador to justify holding that it accepted the line in the inner sector. On the other hand, its failure to protest the methodology in the inner sector, and in particular the use of St. Paul Island as a basepoint, is in the Tribunal's view relevant. There was no indication that Newfoundland and Labrador disputed that use (which it had expressly accepted in 1972), or that it found it inequitable. These are factors to be taken into account, along with others, in the determination of an eventual line in the inner area.

3.11. As to the outer area, it is necessary to stress on the one hand that, from 1972, Nova Scotia was on notice that there was no agreement on the precise location of the line, and on the other hand that

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<sup>117</sup> Letter from C. W. Doody, Minister of Mines, Agriculture & Resources, Government of Newfoundland and Labrador to M. J. Kirby, Principal Secretary to the Premier, Government of Nova Scotia (October 6, 1972) (NL Annex of Documents 57), cited above, at paragraph 1.9.

<sup>118</sup> *Guif of Maine*, [1984] I.C.J. Rep. 246 at p. 307-308 (paras. 138, 140, 141).

the "oil practice" was more substantial than it was in the inner area. In particular, based on the evidence adduced by the Parties and the explanations given, the position may be summarised as follows:

(a) The Petroleum Grid Map of Nova Scotia of approximately 1972<sup>119</sup> explicitly refers to the boundary line shown thereon as the "Mineral Rights Boundary Line", in conformity with the *Notes Re: Boundaries*. Permits utilizing the boundary were first issued in 1965.

(b) Mobil had taken out a provincial permit on the Nova Scotia side of the 135° line and, apparently, wished to take out a Newfoundland permit for that area of its federally issued permit that was on the Newfoundland side of the same line. This permit was issued by Newfoundland in September 1967 and renewed in 1972 as a Class A permit.

(c) In the written and oral pleadings of the first phase and the second phase, both Parties devoted significant time and effort to the location of the Katy Permit with respect to the 135° line from point 2017. The information provided indicated that the permit had been issued in May 1971. Since the permit was given only by reference to a medium-scale map on what was alleged to be a conic projection, the information was rather equivocal. The Tribunal asked the Parties and its Technical Expert to compute the distance from the southwest and northwest comers of the permit areas to the 135° line. The distances provided were computed along the appropriate parallels of latitude and were:

By Nova Scotia	By Newfoundland & Labrador	By the Technical Expert
NW comer 1.7 n.m.	10.1 n.m.	6.1 n.m.
SW corner 12 n.m.	39 n.m.	40.7 n.m.

Distances relate to the permit comers west of the 135° line. Two things are worthy of note. First, there were major differences between the two Parties in interpreting the same information. Second, the distances west of the 135° line were significant according to the computations by Newfoundland and Labrador and the Technical Expert.

3.12. In the Tribunal's view, the conduct of the Parties in the outer sector has to be analysed in relation to the period before and after 1972, when Newfoundland and Labrador indicated its disagreement with the 135° line, just prior to its departure from the East Coast alliance on the offshore.

3.13. As to the period before October 1972, there was, it is true, a degree of concordant practice associated with the line, including on the part of Newfoundland and Labrador. For the reasons given above, however, this conformity was neither complete nor, in its context, did it reflect a clear consensus of the Parties as to where any boundary should be drawn.

3.14. The basic considerations in the Tribunal's view are as follows. First, as both Parties accepted, no drilling activity took place throughout the entire area now in dispute except under cover of federal permits. It is true that there was no complete concordance of federal and provincial permit areas, but it is apparent that no oil company was prepared to engage in costly exploration, still less

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<sup>119</sup> Map of Nova Scotia showing Reservation Grid System for Petroleum Licenses, Map 1 of 2 (Nova Scotia Department of Mines, 1972 approximately) (NL Supplementary Documents 16, NS Annex 77).

exploitation, of the area without a federal permit; and this for the good reason that the provincial claims to the area were unfounded in law. Indeed, the provincial permits, at least beyond a certain limited distance from the shore, were evidently *ultra vires* and the companies for the most part paid for them under protest. There is no evidence whatever of reliance on provincial permits as the legal basis for actual expenditure in the disputed area, which was an important factor, *mut atis mutandis*, in *Tunisia/Libya*. The provincial permit trail was accordingly little more than a paper trail. Second, the period in question (approximately 1965-1972) was not, without more, sufficient to establish a boundary by practice, any more than it was in *Gulf of Maine*. It is relevant in particular here that no wells were drilled under federal or provincial permits close to the 135° line. If there was activity along the line, it seems to have been rather ephemeral at this stage, partly perhaps because of the moratorium. Third, the period was characterised by a continuing common effort (in which Newfoundland and Labrador participated) to persuade the Federal Government to accept provincial claims. The definitive federal rejection of a proprietary claim to the eastern offshore, in the Tribunal's view, came in June 1972. Up to that point, Newfoundland and Labrador was acting in the context of the common front. That front having failed in its purpose, the Tribunal does not think that the limited conduct of Newfoundland and Labrador up to that point — even if it were to be considered unequivocal — can be converted into the all purposes acceptance of a boundary.

- 3.15. Turning to the period after 1972, the position is, in the Tribunal's view, even clearer. Once a state has given notice that it does not accept a particular situation or claim, strong evidence is needed that it has thereafter abandoned its position. After 1972 there was no equivalent from Newfoundland and Labrador of an *Ihlen Declaration*.<sup>120</sup> Indeed there was no indication from any Newfoundland and Labrador source that the 135° line was considered equitable.
- 3.16. Moreover, in the Tribunal's view, that line was not equitable. It was drawn on the Newfoundland side of the strict or full-effect equidistance line, in circumstances where Newfoundland had the longer coastline and where its own maritime areas were potentially seriously affected by French claims around St. Pierre and Miquelon. In such circumstances, it cannot seriously be argued that a full-effect equidistance line required further adjustment at the expense of Newfoundland and Labrador. The lack of any articulated justification for the 135° line has already been noted. That factor must, in the Tribunal's view, affect its appreciation of the situation.
- 3.17. However that may be, there is no sufficient indication of adherence to the 135° line on the part of Newfoundland and Labrador after 1972. Few or no new permits seem to have been issued (quite apart from the difficulties with relying on the provincial permit practice already discussed). The indications are that all parties were aware of the existence of a disagreement about the line in the period after 1972. In these circumstances, Newfoundland and Labrador could not be regarded as having somehow acquiesced in Nova Scotia's position without the clearest evidence. There is no such evidence.
- 3.18. For all these reasons, the Tribunal holds that Newfoundland and Labrador's practice in relation to the supposed 135° boundary southeast of turning point 2017 does not sustain a claim of acquiescence, or support the view that the Parties regarded that line as equitable.

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<sup>120</sup> *Legal Status of Eastern Greenland Case*, (1933) P.C.I.J. (Ser.A/B) No. 53 at p. 71.

## (b) The Issue of Access to Resources

3.19. The *Accord Acts* allow for provincial participation in administration of the area and for revenue sharing in respect of exploration and exploitation of hydrocarbons. They have no reference to living marine resources, including sedentary species. In practice all the decisions on continental shelf delimitation have likewise been concerned, actually or potentially, with control over hydrocarbon resources.<sup>121</sup> This raises the question whether the Tribunal can properly take account of the likely existence and location of hydrocarbon resources in its decision.

3.20. On this issue, again the Parties disagreed. For Newfoundland and Labrador, reference to the incidence of resources here was inappropriate. Maritime delimitation is not "an operation of distributive justice",<sup>122</sup> nor does it involve the sharing out of an undivided whole on grounds of need or otherwise. To the extent that access to resources is a relevant factor in marginal cases, this is only where the resource in question was, in the words of the Court in the *North Sea Cases*, "known or readily ascertainable".<sup>123</sup> According to Newfoundland and Labrador, that may have been the case with the fisheries resources in *Jan Mayen*<sup>124</sup> but it was not the case here. On the contrary, the existence of hydrocarbon resources in the disputed area was still essentially speculative and the precise location of any resources was unknown. In contrast, Nova Scotia saw the question of access to hydrocarbon resources as central to the offshore entitlements of the Parties under the *Accord Acts*. It noted that in public statements, officials of both provinces had referred to the present arbitration as one concerning the potential hydrocarbon resources of the Laurentian sub-basin, an area described as highly prospective. According to information provided,<sup>125</sup> this is a triangular area between latitudes 44°N and 45°N and between longitudes 54°W and 58°W. Even if the precise location of resources within that sub-basin is as yet uncertain, this Tribunal — according to Nova Scotia — would be closing its eyes to reality in failing to take potential resources into account. Whether or not other courts and tribunals had done so expressly, they had certainly done so in fact.

3.21. It is now well settled that a court engaged in maritime delimitation may not take account of the relative wealth or natural resources of the states concerned or their peoples; these are wholly extraneous matters.<sup>126</sup> Nor, in the end, did either Party suggest otherwise. As to access to the specific resources of the zone in question, the Tribunal does not think that this factor is irrelevant. Indeed, in accordance with earlier jurisprudence it seems that access to resources in the zone to be delimited may be relevant in two different ways. One concerns the hypothesis that a particular delimitation may entail "catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned";<sup>127</sup> but this can clearly be excluded in the present case. More relevant is the possibility, already recognized in the *North Sea Continental Shelf Cases*, of having regard in any delimitation to the natural resources of the area in question "so far as known or readily ascertainable". This was decisive in *Jan Mayen* in producing an eventual adjusted

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<sup>121</sup> In *Qatar-Bahrain*, (2001), 40 I.L.M. 847, at p. 893 (paras. 235-236) the Court considered but dismissed the relevance of pearl fishing activities, which had ceased many years earlier.

<sup>122</sup> As the Court stressed in *Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 60 (para. 71).

<sup>123</sup> I.C.J. Rep. [1969] 3 at p. 54 (para. 101 (D) (2)), cited with approval by the Court in *Libya/Malta*, I.C.J. Rep. [1985] 13 at p. 41 (para. 50).

<sup>124</sup> I.C.J. Rep. [1993] 38 at p. 70 (paras. 72-73), p. 71-72 (paras. 75-76). See however the separate opinion of Judge Schwebel at p. 172.

<sup>125</sup> Nova Scotia Counter-Memorial, Phase Two, at p. III—77, Figure 76.

<sup>126</sup> See *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 41 (para. 50), cited with approval by the Court in *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 74 (para. 80).

<sup>127</sup> *Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 342 (para. 237).

equidistance line.<sup>128</sup> True, to have regard to the location of potential resources stands in some tension with the often-repeated statement that a court engaged in maritime delimitation is not sharing out an undivided whole.<sup>129</sup> For the reasons explained already, this Tribunal is in no different position in delimiting the undivided continental shelf of Canada as between the two Parties for the purposes of the *Accord Acts*. Thus it is not the Tribunal's function to share out equitably any offshore resource, actual or hypothetical, irrespective of its location. On the other hand, the effect of any proposed line on the allocation of resources is, in the Tribunal's view, a matter it can properly take into account among other factors.

3.22. As will be seen from **Figure 4**, each Party's claim line allocated to it the greater part of the Laurentian sub-basin. (The St. Pierre and Miquelon corridor also cuts through this sub-basin, although no mention is made of this fact in the Award of the Court of Arbitration, which rather emphasised fisheries resources.)<sup>130</sup> In a situation where officials of both sides have referred to an area of potential resources as being at stake, the Tribunal does not believe that the *North Sea* formula ("known or readily ascertainable") should be restrictively applied. Accordingly, the impact of any delimitation on access to that resource is a potentially relevant factor in the present case.

3.23. In a case where the claim lines of each Party allocate to it all or most of a resource and where neither claim line can (for different reasons) be upheld, it is virtually inevitable that the line eventually awarded will end up dividing the resource in some way, and that is the case here. The Tribunal has no information as to which areas within the sub-basin may be more prospective than others, and any more precise calculation of the impact of a line on access to resources (as undertaken by the Court in *Jan Mayen*) is not possible here, even if it were desirable in principle. Thus, the incidence of the line on potential resources is only one factor to be taken into account, among others, in assessing the overall equitableness of the delimitation. The Tribunal notes that no information is available to it which would suggest that the line it will award is inequitable to either Party on this ground — and certainly not to the extent of justifying any further adjustment.

## 4. The Geographical Context for the Delimitation: Coasts, Areas and Islands

### (a) General Description

4.1. The area within which the delimitation is to take place is shown on **Figure 5**. It lies principally south of the island of Newfoundland, east and south of Cape Breton Island and, eventually, southeast of the mainland of Nova Scotia. It includes the maritime space between Cape Breton Island and Newfoundland, with at its narrowest, Cabot Strait. The delimitation also involves a small portion of the Gulf of St. Lawrence in the direction of a tripoint with areas of the Gulf associated with the Magdalen Islands (Quebec). The coasts of the island of Newfoundland, Cape Breton Island and mainland Nova Scotia are indented by numerous bays and have many small islands and islets lying off them. To the east and south of Cape Breton Island, southeast of mainland Nova Scotia and to the

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<sup>128</sup> *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 72 (para. 76).

<sup>129</sup> *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 3 at p. 21 (para. 18).

<sup>130</sup> *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 692, 677 (paras. 73, 89).

south of the island of Newfoundland, the area is open to the Atlantic Ocean.

## (b) Identifying the Relevant Coasts and Area

- 4.2. To the west of both Cape Breton Island and the island of Newfoundland is the Gulf of St. Lawrence. In this delimitation, since the two Parties are to be treated as independent states, the Gulf may be considered to be an enclosed sea. The Provinces of Quebec, New Brunswick, Nova Scotia and Newfoundland border the Gulf. The Province of Prince Edward Island is a large island in the southern part of the Gulf. Anticosti Island and the Magdalen Islands, situated in the northwestern and central parts of the Gulf, respectively, are part of the Province of Quebec. The west coast of Cape Breton Island and the island of Newfoundland are almost in a straight line forming the eastern side of the Gulf.
- 4.3. The south coast of the island of Newfoundland is almost straight easterly from Cape Ray to Fortune Bay. It is deeply indented by fjord-like bays and has a few offlying islands. Fortune Bay is a 60-nautical mile deep bay, with a mouth about 30 nautical miles across.<sup>131</sup> The south side of the bay is the Burin Peninsula. The entrance point on the north side of the bay may be identified with Connaigre Head, 137 nautical miles east of Cape Ray. Lamaline Shag Rock, on the southwest end of the Burin Peninsula, is 36 nautical miles south of Connaigre Head.
- 4.4. The northeastern point of Cape Breton Island lies approximately 60 nautical miles southwest of Cape Ray, from which it is separated by Cabot Strait which gives access to the Gulf of St. Lawrence. The east coast of Cape Breton Island stretches in a direction slightly east of south for 67 nautical miles to Scatarie Island, lying about one nautical mile offshore.<sup>132</sup>
- 4.5. Scatarie Island marks the western end of the closing line of what Newfoundland and Labrador referred to as the "inner concavity" and the Tribunal will refer to as the "inner area". It is to be contrasted with the area lying south and southeast of the closing line drawn between appropriate points off the coasts of the two parties, namely, Cormorandiere Rocks, 0.6 nautical miles off the northeast extremity of Scatarie Island and Lamaline Shag Rock and out to the outer edge of the continental margin, which may be referred to as the "outer area". In relation to the distinction between the two areas, three initial points may be made:
- (a) First, although the Court of Arbitration in the *St. Pierre and Miquelon* case treated the inner area as forming "a marked concavity",<sup>133</sup> that is not the situation facing the Tribunal as between the Parties to the present case. The Court of Arbitration, in this respect following the Canadian argument, took into account the length of the Cabot Strait closing line as representing "coastlines inside the Gulf which are in direct opposition to St. Pierre and Miquelon and are less than 400 nautical miles away".<sup>134</sup> While entirely reasonable in the context of that case, this is essentially irrelevant here. In maritime delimitation, geographical features have to be considered in relation to the actual coasts of the parties in dispute and not in an abstract sense.<sup>135</sup> Considered in relation

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<sup>131</sup> *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 659 (para. 19).

<sup>132</sup> *Ibid.* (para. 20).

<sup>133</sup> *Ibid.* (para. 22).

<sup>134</sup> *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 661 (para. 29).

<sup>135</sup> *Cf. Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 76 (para. 86).

to each other, the coasts of Newfoundland and Cape Breton Island are essentially opposite, albeit receding, coasts, and neither province is represented in terms of the closing line across Cabot Strait, which lies slightly to the west of St. Paul Island.

(b) Second, the islands of St. Pierre and Miquelon lie within the closing line of the inner area, although the south-facing maritime zone attributed to those islands by the Court of Arbitration lies entirely in the outer area. The Tribunal will return to this matter at the appropriate stage.

(c) Third, the closing line to the inner area here does not entirely coincide with the line of the general direction of the coasts of Nova Scotia and Newfoundland, if indeed such a line can be said to exist. On one view, the southeast coast of Nova Scotia can be seen as essentially a straight line conforming with the southeast facing coast of the Burin Peninsula, with the Avalon Peninsula jutting out by way of an initially narrow projection from the coast. Relative to that notional line, the closing line of the inner area faces approximately 7° more southerly. Even a comparatively minor difference of this kind can take on major significance in the case where a delimitation line is drawn as a perpendicular from the closing line, as Newfoundland and Labrador has proposed. In particular, the effect of any divergence of a closing line from the general direction of the coast is magnified the longer the line is extended, as it is here since it proceeds to the outer edge of the continental shelf.

In the Tribunal's view, all three factors tend to distinguish the situation in the present case from that dealt with by the Chamber in *Gulf of Maine*. Taken together they speak against any automatic adoption of the methodology of that decision in the present case.

- 4.6. To summarize, in the Tribunal's view the distinction between the inner and outer areas is not only a matter of descriptive geography: it corresponds to the transition between the area where the Parties' coasts are essentially opposite, and those (in the outer area) where they are, "rather comparable to adjacent coasts", to use the language of the Court in *Qatar-Bahrain*.<sup>136</sup>
- 4.7. Turning to the outer area, the Newfoundland coast of this area is formed by the south coasts of the Burin and Avalon Peninsulas. Placentia Bay, about 48 nautical miles across at its mouth and about 60 nautical miles deep is a prominent feature on this coast.<sup>137</sup> The eastern extremity of the south coast of Newfoundland is Cape Race, 114 nautical miles east of Lamaline Shag Rock.
- 4.8. The general direction of the coast of Cape Breton Island turns at Scatarie Island to a southwesterly direction for 73 nautical miles to Cape Canso,<sup>138</sup> after which the east coast of mainland Nova Scotia continues in essentially the same direction to Cape Sable, a distance of 300 nautical miles from Scatarie Island. Cape Canso, on the mainland, forms the southerly entrance to Chedabucto Bay, separating Cape Breton Island from the mainland.
- 4.9. The continental shelf in the area is agreed to be a continuum. The 200-metre isobath is generally about 120 nautical miles off the coasts described, except where it borders the Laurentian Channel, a wide glacial valley about 50 nautical miles in width with an average depth of 400 metres, which runs in a southeast direction from Cabot Strait. This channel is a secondary feature which does not

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<sup>136</sup> *Qatar-Bahrain*, (2001), 40 *LL.M.* 847 at p. 883 (para. 170).

<sup>137</sup> See *St. Pierre and Miquelon*, (1992), 95 *I.L.R.* 645 at p. 659 (para. 20).

<sup>138</sup> *Ibid.*

interrupt the continuity of the shelf. Further east and southeast of the island of Newfoundland, the 200-metre isobath extends to a distance of nearly 250 nautical miles from the coast.<sup>139</sup>

- 4.10. The Tribunal has already dealt with the question of locating the outer edge of the continental margin, which is defined in the legislation as the seaward limit of the offshore area. The approximate location of this limit is shown in **Figure 3**, above, for illustrative purposes only.
- 4.11. For the purpose of confining the equitableness of their respective claim lines, both Parties provided proportionality models in which relevant areas and relevant coasts were defined. **Figure 6** shows the relevant areas proposed by the Parties.
- 4.12. As to its proposed relevant area, Newfoundland and Labrador noted that this only needed to be identified for the purposes of applying a proportionality test, *i.e.*, comparing the length of the relevant coasts with the respective offshore areas awarded to each of the Parties. Against that eventuality Newfoundland and Labrador defined the relevant area in the same terms as those adopted by the Court of Arbitration in the *St. Pierre and Miquelon* case. Newfoundland and Labrador did not, however, follow the Court in excluding the Newfoundland coasts north and east of St. Pierre and Miquelon, coasts which had already been used as the basis of a 1972 territorial sea delimitation between Canada and France.<sup>140</sup> The relevant coasts of Newfoundland, measured along their general direction, extended from Cape Ray in the west to Cape Race in the east, a distance according to Newfoundland and Labrador of 319 nautical miles. Nova Scotia's relevant coasts, again measured along their general direction, extended from Money Point in the north to Cape Canso in the south over a distance of 141 nautical miles. Thus, Newfoundland and Labrador put the ratio of coastal lengths as more than 2:1 in its favour. These various coasts were considered relevant by Newfoundland and Labrador because they faced toward the delimitation area, creating a zone of "overlap and convergence".
- 4.13. Newfoundland and Labrador further adjusted the Court of Arbitration's relevant area by extending lines perpendicular to the general direction of the coast from Cape Race and Cape Canso to the 200 nautical mile limit of Canada's exclusive economic zone (see **Figure 6**). This approach did not encompass the shelf areas extending beyond 200 nautical miles to the outer edge of the continental margin, for reasons already discussed. In any event, Newfoundland and Labrador maintained, there was no reason to believe that the addition of those areas would significantly alter the proportions of offshore areas accruing to either Party.
- 4.14. Nova Scotia rejected Newfoundland and Labrador's approach in all respects. Its objections can be briefly summarized. Whereas Newfoundland and Labrador argued that only coasts facing directly onto the area of delimitation were relevant, Nova Scotia suggested that all coasts contributing to the generation of the Parties' respective potential entitlements were relevant. The findings of the Court of Arbitration in the *St. Pierre and Miquelon* case on this matter were not applicable in the present case, in Nova Scotia's view, because the area involved was not substantially the same. For example, in that case the relevant area extended seaward to 200 nautical mile arcs about points on Newfoundland and St. Pierre, whereas in the present case it extends to the outer edge of the continental margin. Moreover, Nova Scotia said, the Court of Arbitration did not use perpendiculars to define the lateral limits of the relevant area; rather it drew the eastern lateral limit as a line due

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<sup>139</sup> *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 660 (para. 23).

<sup>140</sup> *St. Pierre and Miquelon* (1992), 95 I.L.R. 645, at p. 661 (para 30).

south of Cape Race, and the western limit as a line drawn from Cape Canso to the intersection of the 200 nautical mile arcs from Cape Canso and St. Pierre. According to Nova Scotia, what Newfoundland and Labrador had done was to alter the equation between the respective coasts and areas of the Parties by maximizing the length of the relevant coast of Newfoundland while minimizing its maritime area, and at the same time minimizing Nova Scotia's coastal length while maximizing that province's maritime area, all to the advantage of Newfoundland and Labrador.

- 4.15. Nova Scotia defined its own relevant coast as starting at Chebogue Point in the Gulf of Maine (near Yarmouth) and going anti-clockwise around the province to Enragee Point in the Gulf of St. Lawrence (near Cheticamp). It defined the relevant coast of Newfoundland and Labrador as starting at Cape Broyle, on the east side of the Avalon Peninsula (south of St. John's, Nfld.) and going clockwise around the island to Cape Anguille in the Gulf of St. Lawrence. This produced relevant coastal lengths of 403.2 nautical miles for Nova Scotia and 378.5 nautical miles for Newfoundland and Labrador, a ratio of 1:0.94 in favour of Nova Scotia.
- 4.16. As to the relevant area, Nova Scotia argued again that the legal basis of title was critical to the issue of definition. Citing the *North Sea* and *Tunisia/Libya* cases, Nova Scotia defined the relevant area as the area "where one claim encroaches on the other". This concept, according to Nova Scotia, was further refined in the *Jan Mayen* case, in which the notion of a "claim" was explained as including "...areas which each State would have been able to claim had it not been for the presence of the other State". Thus, in addition to an area of overlapping claims, "there is an area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other".<sup>141</sup> This "area of overlapping entitlements", Nova Scotia concluded, provided the basis for the critical definition of the area relevant to the delimitation.
- 4.17. In the present case, the Nova Scotia argument continued, it was not necessary to examine factors such as relevant coasts and coastal projections to determine the area of overlapping entitlements. Rather, this was to be decided by reference to the *Accord Acts*, which provide that the respective entitlements of the two provinces extend to the outer edge of the continental margin. The *Canada-Newfoundland Accord Act* prescribed no dividing line between the Newfoundland and Nova Scotia entitlements; the *Canada-Nova Scotia Accord Act*, on the other hand, did prescribe such a dividing line but that line was irrelevant given that Newfoundland denied its applicability in the delimitation.
- 4.18. In short, Nova Scotia defined the Parties' entitlements in accordance with Article 76 of the 1982 *Convention on the Law of the Sea* (incorporated in Canada's *Oceans Act*) and applied those entitlements according to a system of radial projection and on the basis of "line of sight", extending to every point within the Article 76 limits, from the Canada-U.S. maritime boundary in the Gulf of Maine area to 465 nautical miles to the northeast of Cape Race. This procedure had the coasts of Nova Scotia reaching parts which calculations of relevant areas in earlier cases had not reached. Nova Scotia defended its unusual procedure on the basis that any more restrictive view of the area privileged certain coasts over others and was question begging.
- 4.19. In reply, Newfoundland and Labrador vigorously rejected Nova Scotia's concept of the areas of overlapping entitlements. It argued that the *Accord Acts* must be interpreted in accordance with the

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<sup>141</sup> See *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 64 (para. 59).

rule of reason and subject to implied constraints based on the notions of geographical adjacency and frontal projections of the coasts. Under international law, according to Newfoundland and Labrador, no state could consider itself entitled to areas 700 nautical miles away, lying directly in front of the territory of neighbouring states. The idea of an area which each state would have been able to claim had it not been for the other made sense in the *Jan Mayen* case, given the precisely defined overlapping 200 nautical mile arcs of the parties. But it made no sense, according to Newfoundland and Labrador, in the present case.

- 4.20. What the Tribunal for its part seeks in the definition of the relevant coasts is guidance as to those coasts which may affect the actual delimitation, *i.e.*, that contribute to the delimitation in some general sense. In this respect it treats as relevant any coast of either party which affects or might potentially affect the delimitation.<sup>142</sup> This involves a practical judgement, not a merely geometrical concept; it needs to have regard to the zone to be delimited and the respective claim lines of the parties. On that basis, the Tribunal can no more accept Newfoundland and Labrador's restricted vision of the relevant coasts and relevant area than it can accept Nova Scotia's greatly extended one. There is about both these versions an unmistakable odour of the pre-cooked.
- 4.21. In particular, Newfoundland and Labrador's approach ignores a portion of the Nova Scotia coast southwest of Cape Canso which the Tribunal considers relevant, and it excludes from the relevant area those areas of the continental shelf beyond 200 nautical miles. Newfoundland and Labrador asserted that an equidistance line between the coasts of the Parties, ignoring Sable Island, would only be governed on the Nova Scotia side by coasts down to Cape Canso and no further. But the fact remains, in the first place, that Sable Island cannot be assumed *a priori* to be irrelevant to the delimitation (especially given the possibility that it may contribute to the area of Canadian continental shelf to be delimited), and in the second place, that Nova Scotia's coast further to the southwest does contribute to the area of potential convergence and overlap. In the Tribunal's estimation, a more appropriate view of Nova Scotia's relevant coast from this perspective would include the area west of Cape Canso to Egg Island, just east of Halifax. This would add 88 nautical miles to Nova Scotia's relevant coast. Since Newfoundland and Labrador's definition of its relevant coast would remain unchanged, this would give a total of 231 nautical miles to Nova Scotia as compared with 319 nautical miles to Newfoundland, a ratio of 1:1.38 in favour of Newfoundland and Labrador.<sup>143</sup>
- 4.22. As to Nova Scotia's relevant area, the Tribunal's greatest difficulty is that it provides the Tribunal no assistance whatever in carrying out its task. It tells the Tribunal no more than that the delimitation is not to be carried out between, say, the coast of Maine and the coast of Labrador. The definition of relevant coasts and the relevant area is, generally, intended to help judicial bodies determine which coasts may actually affect the course of a dividing line, to narrow the geographical focus to the area where the delimitation is to take place, and to fix the bounds within which a proportionality test, if

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<sup>142</sup> Cf. *Tunisia/Libya*, [1982] I.C.J. Rep. 18 at p. 61 (para. 75); *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 49 (para. 67); *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 68 (para. 67).

<sup>143</sup> The Parties disagreed as to whether the west-facing coast of Newfoundland "behind" the islands of St. Pierre and Miquelon could be counted for this purpose, and on the interpretation to be given to the position of the Anglo-French Court of Arbitration in relation to the analogous case of the *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and French Republic*: see (1977), 18 U.N.R.I.A.A. 3 at p. 92 (para. 193), p. 94-96 (paras. 201-203). Given that any second stage proportionality exercise in cases such as the present must be approximate, and that it is not the function of the Tribunal "to share out an area of overlap on the basis of comparative figures for the length of the coastal fronts and the areas generated by them" (*Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 67 (para. 64)), the Tribunal does not deem it necessary to resolve the point. For this purpose it has included all Newfoundland coasts facing on to the area of the delimitation, including the west-facing coast in question.

appropriate in the circumstances of a particular case, is to be applied. In some cases a coast or area which is relevant — that is to say, useful — for one of these purposes may not be so for another, and this is often reflected in the use courts actually make of relevant coasts and relevant areas.

- 4.23. The Nova Scotia concept of the area of potential overlapping entitlements has been applied only once, in the *Jan Mayen* case. However, the circumstances of the *Jan Mayen* case were very different from the present case, involving as it did opposite coasts, precisely overlapping 200-nautical mile arcs,<sup>144</sup> and a situation where one party asserted the maximum claim of 200 nautical miles and the other party did not. The Court did not apply a proportionality test to assess the equity of the result; the disparity of coastal lengths was a factor, along with access to resources, in generating an adjustment in the provisional equidistance line but it was not, so to speak, used twice to generate a further adjustment on the basis of mathematical proportionality.
- 4.24. In the Tribunal's view, the particular circumstances of this case are such that it is sufficient, for the purposes of the delimitation, to identify the relevant coasts without proceeding to define a relevant area. This is so for the following reasons. First, as will be explained later, the Tribunal does not consider it appropriate to apply a proportionality test of coastal lengths and maritime areas in the present delimitation, and it is therefore unnecessary to define a relevant area or proportionality area for this purpose. Second, there are no circumstances present here, such as other existing or potential delimitations, that would require the Tribunal to define western or eastern lateral limits within which the Tribunal must confine the delimitation. Third, as the Tribunal proposes to begin the delimitation with a provisional equidistance line, the area where the delimitation takes place will be self-evident and requires no further definition. That delimitation area clearly lies within an area of convergence and overlap generated by the relevant coasts as defined by the Tribunal.

## (c) Situation of Offshore Islands

- 4.25. Within the area where the delimitation will take place, there are a number of islands which raise questions pertaining to a possible delimitation. Newfoundland and Labrador denied that several of these — notably Sable Island in the Atlantic off Nova Scotia and St. Paul Island in Cabot Strait — should be given any effect in the event that the Tribunal chose to draw a provisional equidistance line. Some discussion of the relevant features is called for.

### (i) *St. Pierre and Miquelon*

- 4.26. The French islands of St. Pierre and Miquelon lie within the inner area, off the mouth of Fortune Bay and west and southwest of the Burin Peninsula. The islands have an area of 237 square kilometres. Besides the two main islands, there are several smaller islands and islets and many drying rocks. Miquelon, which has an hour-glass shape with a north-south axis and an area of 210 square kilometres, is about 27 nautical miles south of the island of Newfoundland. The island is 21.6 nautical miles long from north to south and is about 7 nautical miles wide. The island of St. Pierre is situated 3 nautical miles southeast of Miquelon and almost 10 nautical miles southwest of the Burin Peninsula. It is oriented northeast-southwest and has an area of 27 square kilometres and a

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<sup>144</sup> *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 68 (para. 67).

length of 4.4 nautical miles.<sup>145</sup> The area of maritime jurisdiction appertaining to France was definitively determined in 1972 in an agreement with Canada for the territorial sea delimitation between the French islands and the Burin Peninsula<sup>146</sup> and in 1992 by the decision of the Court of Arbitration. It consists of belts of water surrounding the islands (up to 24 nautical miles in breadth on the west side and 12 nautical miles on the southeast), as well as the long corridor about 10.5 nautical miles wide extending due south to the French 200 nautical mile limit.

- 4.27. The Court of Arbitration declined to rule on whether France had any continental shelf area beyond the 200 nautical mile limit from St. Pierre, on the ground that the area was beyond its mandate.<sup>147</sup> This Tribunal will proceed on the basis that the maritime areas pertaining to France are those within the limits defined by the Court of Arbitration.<sup>148</sup>
- 4.28. Neither Party argued that the islands of St. Pierre and Miquelon were relevant considerations in the present arbitration, although Newfoundland and Labrador argued that if some other initial delimitation method were to be adopted than its system of bisectors and perpendiculars, they might possibly have to be taken into account. As to the maritime area pertaining to the islands, however, both Parties contended that it did represent a relevant consideration. Nova Scotia argued that any area gained by France in any seaward extension of its zone beyond 200 nautical miles would be at the expense of Nova Scotia on the basis of Nova Scotia's claim line. In the same vein but from a different perspective, Newfoundland and Labrador argued that all of the area already allocated to France was "carved out" of the area that would otherwise belong to Newfoundland and Labrador, and this unequal impact had to be taken into account in the balancing of all relevant circumstances. The Tribunal, however, is aware of no principle whereby Newfoundland and Labrador, or Nova Scotia, should be "compensated" in this delimitation for what it "lost", or might hypothetically lose, in another. As to Newfoundland and Labrador's assertion that the maritime areas of St. Pierre and Miquelon and Nova Scotia together create a cut-off effect in respect of the Newfoundland coast in the inner area, the Tribunal will deal with this matter in the course of effecting the delimitation of that area.
- 4.29. The Tribunal notes that in a few cases in state practice, islands belonging to third states have been used as basepoints. Indeed, since St. Pierre and Miquelon lie within the closing line of the inner area, it considered whether a methodology which divided that closing line in ratios reflecting the coasts behind it might not be appropriate.<sup>149</sup> However, the inner area (unlike the Gulf of Fonseca) is not an area subject to joint sovereignty, nor is it subject to a regime analogous to that of internal waters vis-a-vis third states. It is an area of territorial sea, continental shelf and exclusive economic zone of Canada and France. In any event, the Tribunal does not believe that any further account needs to be taken of the French islands in order to produce an equitable solution as between the Parties to the present case.

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<sup>145</sup> *St. Pierre and Miquelon*, (1992), I.L.R. 645 at p. 659 (para. 22).

<sup>146</sup> *Fisheries Agreement between Canada and France (with supplementary Exchanges of Letters)*, March 27, 1972, Can. T.S. 1979 No. 37 (entered into force 27 March 1972).

<sup>147</sup> *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 673-674 (paras. 75-82).

<sup>148</sup> *Cf. Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 33 (para. 34).

<sup>149</sup> *Cf. the remarks of the Chamber on the Gulf of Fonseca closing line in the Land, Island and Maritime Boundary case*, [1992] I.C.J. Rep. 351 at p. 607-609 (paras. 418-420).

## *(ii) St. Paul Island*

- 4.30. St. Paul Island is situated about 13 nautical miles north of Money Point, Cape Breton Island and 41.5 nautical miles distant from Cape Ray, Newfoundland, and almost on the direct line between the two points. The island was the site of many shipwrecks and for many years two life-saving stations were operated from the island. Since 1839 there have been lighthouses at both the north and south ends of the island.<sup>150</sup> Only recently have they been automated. The island has never supported human habitation without sustenance from outside. The island is rocky, bold and rises to 148 metres.<sup>151</sup> It measures about 2.8 nautical miles long (north-south) and about one nautical mile wide, and has an area of less than 5 square kilometres.<sup>152</sup>
- 4.31. Newfoundland and Labrador argued that St. Paul Island should have no effect on the construction of the line, on the ground that an uninhabited island situated in enclosed waters more than 12 nautical miles from the coast was almost bound to have a disproportionate effect in the delimitation. On the other hand, in the context of a provisional equidistance line drawn from opposite coasts, it is unusual for no effect to be given to an island (not merely a rock or other minor feature), even where other delimitation methods are used.<sup>153</sup> For its own part, the Tribunal would have been inclined to give half effect to St. Paul Island. In earlier inter-provincial discussions, however, Newfoundland expressly accepted St. Paul Island as a basepoint for the purposes of delimitation, and it did not object to this at the time (1972) when it made it clear it did not accept any line eastwards of turning point 2017, or for that matter at any subsequent time before 1997. It is true that the East Coast Provinces did not — as the present Tribunal has already held — reach any definitive or binding agreement on an actual line, even northwestward of point 2017. But the question is a different one: it is whether, starting with an equidistance line in this area, St. Paul Island ought to be given half effect, and Newfoundland's conduct is relevant in answering that question, just as French conduct in accepting that Eddystone Rock was a basepoint was treated as relevant, if not decisive, in the *Anglo-French Channel Islands* arbitration.<sup>154</sup> In these circumstances there is no sufficient case for giving less than full effect to St. Paul Island.

## *(iii) Sable Island*

- 4.32. Sable Island is an isolated, sandy, crescent-shaped island oriented in an east-west direction, 22 nautical miles long and less than one nautical mile wide, situated 120 nautical miles south of

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<sup>150</sup> The provinces have not always been enthusiastic as to the ownership or appurtenances of St. Paul Island. Of the 1820s it has been noted that:

Since St. Paul Island at this time lay outside the jurisdiction of all the Atlantic colonies, the initiative at the outset lay with the home government. Lord Dalhousie, governor of Lower Canada, put the matter before the imperial authority in a despatch of 24 March 1826... The imperial treasury concurred in June 1829 in sharing the cost of the project [building lighthouses] with the colonies concerned, but ruled that Newfoundland be excluded a contribution.

*Canadian Historic Sites*, Occasional Papers in Archaeology and History No. 9, (Ottawa: Indian and Northern Affairs, 1974) at p. 40.

<sup>151</sup> Sailing Directions, Nova Scotia (Atlantic Coast) and Bay of Fundy, 1990, at p. 68

<sup>152</sup> St. Paul Island, Map (Ottawa: Canadian Hydrographic Service, 1997) Chart 4450. See also [http://www.geocities.com/Hearthland/Estates/6001/St Paul Island.htm](http://www.geocities.com/Hearthland/Estates/6001/StPaulIsland.htm) (NS Annex 214).

<sup>153</sup> Cf. the treatment of Seal Island in the *Gulf of Maine* case, [1984] I.C.J. Rep. 246 at p. 336-7 (para. 222). This may be contrasted with (the Court's treatment of Filfla, a small uninhabited inshore island, in *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 48 (para. 64).

<sup>154</sup> *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and French Republic*, (1977), 18 R.I.A.A. 3 at p. 72-73 (paras. 140-141).

Scatarie Island and about 88 nautical miles from the mainland of Nova Scotia. It has an area of 33 square kilometres.<sup>155</sup> For a time there was an attempt to inhabit the island; there were life-saving station personnel and lighthouse keepers as well, but now the only occupants are federally-authorized personnel. Its reputation as a graveyard of ships no doubt played a role in the exclusive federal ownership and jurisdiction over the island established by the *Constitution Act, 1867*, a departure from the general rule of provincial ownership and jurisdiction of Crown lands in Canada.

- 4.33. Despite its special constitutional status, there is no doubt that Sable Island remains part of Nova Scotia and its coasts are to be considered as Nova Scotia coasts for the purposes of this arbitration. Specific mention is made of it in both the 1982 and 1986 Nova Scotia Accord. Moreover, it has been used as a basepoint by Canada for the purposes of claiming the exclusive economic zone and could be used for the purpose of delimiting the outer continental shelf area.<sup>156</sup>
- 4.34. Newfoundland and Labrador argued that to utilize Sable Island in the construction of a provisional equidistance line would be tantamount to refashioning geography and would have the same effect as an exponential expansion of the Nova Scotia landmass and a shift of its mainland coast a full 88 nautical miles out to sea. In the view of Newfoundland and Labrador, this situation could not be remedied by the use of modified or adjusted equidistance but required the choice of other methods altogether.
- 4.35. Unlike St. Paul Island, Sable Island was not referred to in the *Notes re: Boundaries*, the 1964 *Joint Statement* or the 1972 *Declaration*. It does not fall within the description of an island "lying between Provinces" for the purposes of the *Notes re: Boundaries*, and there is no unequivocal indication that Newfoundland and Labrador ever accepted its use as a basepoint for the purposes of maritime delimitation with Nova Scotia. Moreover, in the context of a delimitation between adjacent coasts and a line proceeding out to the open sea, a relatively minor feature such as Sable Island is capable of having major effects. This can be seen from **Figure 7**, which shows the strict or full-effect equidistance line, a line giving half effect to Sable Island, and a line giving no effect to Sable Island. In the *Qatar/Bahrain* case, the International Court made a similar observation with regard to Fasht al Jarim, which it described as "a maritime feature located well out to sea and of which at most a minute part is above water at high tide", and to which it gave no effect in the delimitation.<sup>157</sup>
- 4.36. Sable Island is considerably more substantial than Fasht al Jarim. But in the context of the present delimitation, it is clearly a "special" or "relevant" circumstance which needs to be taken into account. The Tribunal will return to the question in the context of its overall approach.

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<sup>155</sup> *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 659 (para. 21).

<sup>156</sup> The exclusive fishing zone of Canada established by Order in Council in 1977 defined the centres of arcs of circles of 200 nautical miles radius. Four of these points were on Sable Island. Canada declared its exclusive economic zone with the proclamation of the *Oceans Act*, 1996 as being 200 nautical miles from the territorial sea baselines. Since the territorial sea baseline is defined, *inter alia*, as the low water mark on Sable Island, any point along its shore and charted drying areas within 12 nautical miles of the island can be used as a centre of an arc of 200 nautical miles radius. The definition of the outer bound of the continental shelf under Article 76 provides for the greater of (1) arcs of 350 nautical miles from the territorial sea baseline, or (2) 100 nautical miles from the 2500-metre isobath. The best estimate of the actual continental shelf (60 nautical miles from the foot of the slope, or where the sedimentary rock thickness is 1% of the distance to the foot of the slope) is beyond 350 nautical miles from mainland Nova Scotia and beyond 100 nautical miles from the 2500-metre isobath, but not as far seaward as 350 nautical miles from the low water mark of Sable Island. Nova Scotia in its definition of the potential entitlements noted the effect caused by Sable Island being part of Nova Scotia, but not being part of Newfoundland.

<sup>157</sup> *Qatar/Bahrain*, (2001), 40 I.L.M. 847 at p. 894 (para. 248).

#### *(iv) Other islands forming potential basepoints*

- 4.37. A number of other islands form potential basepoints in the inner area off the coasts of both parties. Leaving aside St. Paul Island, no difficulty was raised by either of the Parties as to the use of any of these basepoints in the drawing of an equidistance line. The Tribunal sees no reason why any of them should not be used in constructing a provisional equidistance line.

### 5. Delimiting the Parties' Offshore Areas

- 5.1. The Tribunal accordingly turns to the actual delimitation. The positions of the Parties, and the reasons justifying their respective claim lines, have already been set out and discussed in detail. Not for the first time in maritime delimitation, the Tribunal finds that neither approach can be accepted as such.<sup>158</sup> The use by Newfoundland and Labrador of the *Gulf of Maine* analogy has already been criticized and the geographical situation here distinguished. As to Nova Scotia's position, the Tribunal has already held that the line southeastward of turning point 2017 was never established by agreement, nor for the reasons given above can it be treated as a *de facto* line consolidated through oil practice, in the manner of the inner line in the *Tunisia/Libya* case.

#### (a) The Initial Choice of Method

- 5.2. The Tribunal will first address the question of the choice of a practical method that will assure an equitable result in the particular circumstances of this case. That choice is not difficult to determine. Since the Parties are to be treated as being bound by Article 6 of the 1958 *Geneva Convention*, it is appropriate for the Tribunal to begin with the construction of a provisional equidistance line and to determine whether it requires adjustment in the light of special circumstances. The Tribunal would note, however, that its approach would have been precisely the same in applying customary international law or Article 83 of the 1982 *Law of the Sea Convention*. As the Court said in *Jan Mayen*:

there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result.<sup>159</sup>

The law governing maritime delimitation has thus attained a basic unity, while retaining the necessary flexibility to respond to the specific facts and features of each case. For its part, the Tribunal is convinced that this method, subject to the modifications to be indicated, will lead in the circumstances of the present case to the equitable result that is the overarching objective of all maritime delimitations, whether under customary or conventional international law.

- 5.3. The Tribunal proposes to construct its provisional equidistance line and effect the delimitation in three stages: first, within the inner area bounded by the Scatarie Island-Larnaline Shag Rock closing

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<sup>158</sup> Cf. *Gulf of Maine*, [1984] I.C.J. Rep. 246 at p. 325 (para. 190); *St. Pierre and Miquelon*, (1992), 95 I.L.R. 645 at p. 670 (para. 65).

<sup>159</sup> *Jan Mayen*, [1993] I.C.J. Rep. 38 at p. 62 (para. 56).

line; second, in the outer area extending from that closing line out to the outer edge of the continental margin; and third, in the area from Cabot Strait northwestward in the Gulf of St. Lawrence. The adoption of this three-stage approach will allow the Tribunal to take account of the relevant circumstances in each area, including the shift from a semi-enclosed geographical situation, where the coastal relationship is one of oppositeness, to an open-ended situation in which the essential relationship is that of adjacency.

## (b) The Inner Area

- 5.4. The Tribunal begins its provisional equidistance line at the closing line at the entrance to the Gulf of St. Lawrence, using basepoints on St. Paul Island and Newfoundland's Cape Ray. This starting point substantially coincides with turning point 2016 as defined by the JMRC in 1969 and approved by the Premiers in 1972.<sup>160</sup> From there, proceeding east from turning point 2016, the line swings gradually to the south until it reaches the central portion of the inner area, from where it turns gradually eastward before more or less straightening out until it intersects with the Scatarie Island-Lamaline Shag Rock closing line, 11.8 nautical miles west of the mid-point of that line. From its starting point, this line is directed by basepoints on Flint Island and Scatarie Island (actually Cormorandiere Rocks off the island) off the Nova Scotia coast, and Halibut Rocks, Duck Island, Yankee Rock, Ship Rock Shoal, Tinker Island, Southeast Rocks, SW Shag Rock, Ireland Island, Miffel Island and SW Turr Island (part of the Ramea Islands) off the Newfoundland coast. See **Figure 7**. The Tribunal has already explained why each of these points may be used in constructing the equidistance line, and in particular why St. Paul Island should be given full effect.
- 5.5. The Tribunal is not persuaded by Newfoundland's argument that the so-called protrusion of the Cape Breton coast, together with the so-called recessiveness of the Newfoundland coast, combine to create an inequitable effect, at Newfoundland's cost, in the central portion of the inner area. The Tribunal also rejects as unfounded Newfoundland's assertion that the coast of Newfoundland between Cape Ray and the Burin Peninsula is "squeezed" between the jurisdictions of France (St. Pierre and Miquelon) and Nova Scotia, so that the use of the equidistance method produces a cut-off effect in respect of the Newfoundland coast in the inner area. It is evident from a glance at the map — without the illusory perceptions created by colour tinting — that there is no squeeze and no cut-off effect.
- 5.6. Finally, the Tribunal rejects Newfoundland and Labrador's argument that an equidistance line in the inner area is inherently inequitable because of the difference in the respective lengths of the Parties' coasts in this area. Newfoundland and Labrador maintained that the equidistance method will invariably drive the line toward the middle of the closing line of the concavity. In fact, as was pointed out above, the equidistance line intersects the closing line 11.8 nautical miles west of the mid-point of the closing line. This compares with the point 34.6 nautical miles west of the mid-point at which Newfoundland and Labrador's claim meets the closing line. In the Tribunal's view, such a shift would be excessive and unreasonable: it would amount to the dividing up of offshore areas on

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<sup>160</sup> The Tribunal notes that the values for turning points 2015, 2016 and 2017 as computed by the JMRC in 1969 and confirmed by the Premiers in 1972 were based on North American Datum 1927. Article 7.1 of the Terms of Reference requires that all geodetic data be computed in terms of North American Datum 1983. The three turning points have been recomputed by the Technical Expert to meet this requirement. In addition, this recomputation has also taken into account improvements in coastal mapping since 1969, in order to fix more accurately the positions of the shore points used in the determination of the three turning points concerned.

a strict mathematical basis, a procedure which the International Court has consistently denied is required by equitable principles.<sup>161</sup>

- 5.7. The Tribunal now proposes to examine its provisional equidistance line in the light of the conduct of the Parties. As has already been seen, the dividing line conditionally drawn in the inner area in 1964, and conditionally affirmed in 1972, was essentially a simplified median line. As has also been seen, Newfoundland never raised any objection to or difficulty with that line up to turning point 2017. For this reason, and to a lesser extent for reasons of administrative convenience, the Tribunal considers that it would be both equitable and appropriate to simplify its strict equidistance line by drawing a straight line between turning points 2016 and 2017. The Tribunal has already explained why it does not consider the conduct of the Parties to be relevant beyond turning point 2017. Nevertheless, the Tribunal is of the view that it would be appropriate, for reasons of convenience and consistency, to simplify the last segment of the inner equidistance line by drawing a straight line between turning point 2017 and the point where the equidistance line meets the closing line of the inner area.
- 5.8. From what has already been said, it is clear that the simplified equidistance line reflects and responds to the relevant circumstances of geography and conduct of the Parties that the Tribunal has identified for this area. The result is not significantly different from that which would be achieved by a strict equidistance line or the lines respectively proposed by Nova Scotia and Newfoundland and Labrador. The Tribunal must, of course, reserve its judgment on the equity of the entire length of the delimitation line it is now constructing until it has taken the line to its terminal point in the outer area. It is to this task that the Tribunal now turns.

### (c) The Outer Area

- 5.9. As already noted, the coasts in the outer area stand in a relationship of increasing adjacency rather than oppositeness as the eye moves seaward from the closing line of the inner area. Nevertheless, as was done in the *Qatar/Bahrain* case<sup>162</sup> and the *Anglo/French* case,<sup>163</sup> it is appropriate to draw a provisional strict equidistance line in the outer area as well, beginning from the point of intersection of both the simplified and strict equidistance lines with the closing line of the inner area and continuing to the outer edge of the continental margin. Having done so, the Tribunal will consider whether there are circumstances that require modification of that line, which is shown in **Figure 7**.
- 5.10. The Tribunal stresses at the outset that the strict equidistance line in the outer area begins 11.8 nautical miles west of the mid-point of the Scatarie Island-Lamaline Shag Rock closing line. It is controlled by basepoints on, or lying off, the coasts of Cape Breton Island (Nova Scotia) and the island of Newfoundland, and trends generally southeastward 85 nautical miles until it comes under the control of basepoints on Sable Island, 88 nautical miles south of mainland Nova Scotia. There it deflects to the east for a distance of 106 nautical miles until it comes under the control of Cape Pine on the coast of Newfoundland, where it partially resumes its southeasterly course.

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<sup>161</sup> See e.g. *Libya/Malta*, [1985] I.C.J. Rep. 13 at p. 37-43 (para. 54). See also *ibid.*, at p. 44-45, (para. 57) citing the Anglo-French Court of Arbitration, (1977), 54 I.L.R.. 6 at p. 67-68 (paras. 100-101).

<sup>162</sup> (2001) 40 I.L.M. 847.

<sup>163</sup> (1997) 18 R.I.A.A. 3.

- 5.11. In the area eastward of Scatarie Island-Lamaline Shag Rock closing line, the conduct of the Parties does not justify any departure from the provisional equidistance line. The Tribunal has already reviewed the conduct of the Parties in the outer area but it will be helpful to recapitulate its conclusions here.<sup>164</sup> The oil permit practice in the offshore can be discounted because: (a) it was equivocal and uncertain; (b) it was limited in extent; (c) the Tribunal is not satisfied it was concordant; and (d) the area was federal and any real activity took place only on the basis of federal licences, so that there is no sufficient evidence of reliance on provincial licences as a basis for oil activity in this region. None of this amounts to the clear, substantial and unequivocal practice required to establish a distinct *de facto* line. In particular, Newfoundland clearly expressed to Nova Scotia its objection to the line for the outer area in Minister Doody's letter of October 6, 1972, after which the existence of a disagreement in this sector was generally known to those concerned.
- 5.12. Accordingly, the Tribunal agrees with Newfoundland and Labrador that beyond the Scatarie-Lamaline Shag Rock closing line, this case is to be decided exclusively on grounds of the relevant coastal geography.
- 5.13. The Tribunal has already discussed the position of Sable Island.<sup>165</sup> Having regard to its remote location and to the very substantial disproportionate effect this small, unpopulated island would have on the delimitation if it were given full effect, the Tribunal will initially consider an adjustment of the provisional equidistance line so as to give Sable Island half effect: this adjusted line is shown in Figure 7.
- 5.14. The question is whether the adjusted provisional equidistance line so drawn produces an inequitable result between Nova Scotia and Newfoundland and Labrador. In outer shelf areas where large spaces are at stake, the question is not so much one of strict proportionality as a manifest lack of disproportion. As the Court said in *Libya/Malta*, if proportionality were the criterion for delimitation, it would exclude all other factors.<sup>166</sup> In particular, Newfoundland and Labrador's line has the appearance of being constructed using proportionality of coasts as the sole criterion of division, as well as ignoring the areas beyond 200 nautical miles, despite the fact that the Tribunal's task is, as both Parties recognize, to delimit to the outer edge of the continental shelf.
- 5.15. Another significant concern relates to the cut-off effect that the provisional line has on the southwest coast of Newfoundland. Although giving half effect to Sable Island reduces the cut-off effect, the Tribunal considers that it should be further reduced in some limited measure. While agreeing that it is especially important to ensure that a delimitation line does not come "too close" to the coast of one of the states concerned, the Tribunal is not persuaded by Nova Scotia's argument that the cut-off effect necessarily becomes irrelevant as the distance from the coast increases. As the International Court stated in *Libya/Malta*, the principle of non-encroachment "is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances".<sup>167</sup> There is no suggestion that this principle applies only so far from the coast and no further. Moreover, the Tribunal is of the view that a further adjustment of the equidistance line (beyond giving only half effect to Sable Island) would accommodate in a reasonable way the

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<sup>164</sup> See above, paragraph 3. 11.

<sup>165</sup> See above, paragraph 4.32.

<sup>166</sup> [1985] I.C.J. Rep, 13 at p. 45 (para. 58).

<sup>167</sup> *Ibid.*, at p. 39 (para. 46).

disparity in the lengths of the Parties' coasts (as determined by the Tribunal) in both the inner and outer areas. Accordingly, the Tribunal further adjusts the equidistance line by giving no effect whatever to Sable Island. This zero-effect equidistance line is defined by geodesic lines connecting a series of turning points which themselves are defined by the controlling basepoints on the coasts of both Parties as set out in the Technical Report. While the Parties had requested the Tribunal to define the dividing line by means of a rhumb line, the Tribunal considers that geodesic lines better approximate the equidistance line.

## (d) From Cabot Strait Northwestward in the Gulf of St. Lawrence

5.16. Canada claims the area from Cabot Strait northwestward in the Gulf of St. Lawrence as Canadian internal waters which, however, have not been enclosed within straight baselines. This claim, of course, is consistent with the fact that Canada represents a single state surrounding the Gulf. Since Nova Scotia and Newfoundland and Labrador, under the Terms of Reference, must be treated as states in their own right, the Gulf cannot be regarded as internal waters for the purposes of this arbitration. This was the position taken by Newfoundland and Labrador, and the Tribunal agrees with it. Accordingly, the delimitation of this area is also to be governed by the international law of the continental shelf. Northwestward of turning point 2016, a strict equidistance line between the adjacent coasts here concerned would terminate at a tripoint with Quebec slightly to the north of turning point 2015. The difference between the two lines and the areas they divide is not significant, and the Tribunal, having regard to the conduct of the Parties in this sector, considers it appropriate to delimit this small, innermost area by a straight line joining turning points 2016 and 2015. The Tribunal emphasizes that its decision on this matter, as indeed the whole of its decision, is binding only on the Parties to this case and cannot prejudice the rights of any other parties that may be concerned.

## (e) Confirming the Equity of the Delimitation

5.17. The Tribunal notes that it is not the inevitable or even the most frequent practice of the International Court of Justice or arbitral tribunals to apply the so-called proportionality test by comparing the lengths of the relevant coasts of the parties with the respective areas awarded to them as a means of assessing the equity of the delimitation. In particular, the Tribunal notes that in the cases where relative lengths of coasts have been treated as relevant circumstances in the actual determination of the dividing line (*Gulf of Maine, Libya/Malta, Jan Mayen*) the Court has not applied this test, for reasons which appear to relate, *inter alia*, in some measure at least, to the fact that the proportionality factor has already been taken into account in drawing the line. In addition, the Tribunal wishes to stress once again that proportionality is not and cannot be a principle of delimitation or a basis of title.

5.18. A significant difficulty that often arises in relation to the proportionality test is the imprecision and "impressionism" involved in identifying the relevant area to be used for this purpose. The arguments of the Parties in the present case are rich in such imprecision and impressionism, owing in good part to the fact that it is the first case involving the delimitation of the continental shelf beyond the 200 nautical mile limit to the outer edge of the continental margin. The extreme

difference between the present Parties' respective approaches to the definition of the relevant area and the application of the proportionality test is a striking example of the pitfalls inherent in this exercise. The fact that each Party, despite the great difference in their approaches, was able more or less convincingly to satisfy the proportionality test down to almost the last decimal point only confirms that the test may be more contrived than constructive in some instances. The Tribunal further notes that during oral argument the Parties agreed that such a proportionality test was not mandatory.

5.19. While the Tribunal has rejected the relevant areas and proportionality tests proposed by both Parties, it may nevertheless be of interest to note the results that would be obtained by applying a hypothetical proportionality test using the line determined by the Tribunal and the relevant areas defined respectively by Nova Scotia and by Newfoundland and Labrador, modified in the latter instance so as to extend its western and eastern perpendicular limits to the outer edge of the continental margin. Using the Nova Scotia relevant area, the result would be a coastal ratio of 52% for Nova Scotia and 48% for Newfoundland and Labrador, as compared with an area ratio of 39% for the former Party and 61% for the latter. Using the relevant area defined by Newfoundland and Labrador, as modified to include the areas beyond 200 nautical miles to the outer edge of the continental margin, the result would be a coastal ratio of 33% for Nova Scotia and 67% for Newfoundland and Labrador, as compared to an area ratio of 38% for the former Party and 62% for the latter. While noting that such results would reveal no shocking disproportionality over such great areas even if the Parties' relevant areas were appropriately defined — which they have been held not to be — the Tribunal draws no conclusions from them beyond the fact that they demonstrate the vagaries associated with the definition of relevant areas and the use of a proportionality test.

## AWARD

- 6.1. For the foregoing reasons, the Tribunal unanimously determines that the line of delimitation dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia is as described in the following paragraphs.
- 6.2. In accordance with Article 7.1 of the Terms of Reference, the Tribunal is charged with describing the line in a technically precise manner. In particular, the positions of all the points mentioned are to be given in reference to the North American Datum 1983 (NAD 83) geodetic reference system. To this end, the coordinates of turning points previously prepared by the Joint Mineral Resources Committee have been revised by being computed on NAD 83.
- 6.3. In accordance with Article 3.2 (ii) of the Terms of Reference, the course of the delimitation line is defined in terms of geodesic lines connecting the turning points listed below and shown in **Figure 8**. The geographical coordinates are:

Point	Latitude North	Longitude West
2015 (revised)	47° 45'41.8"	60° 24' 12.5"
2016 (revised)	47° 25'31.7"	59° 43'37.1"

2017 (revised)	46° 54' 48.9"	59° 00'34.9"
A	46° 22'51.7"	58° 01'20.0"

6.4. From point "A", the course of the delimitation line is defined in terms of geodesic lines connecting the turning points listed below and shown in **Figure 8**, to the point where the delimitation line intersects the outer limit of the continental margin of Canada as it may be determined in accordance with international law.

Point	LatitudeNorth	LongitudeWest
B	46° 17' 25.1"	57° 53' 52.7"
C	46° 07'57.7"	57° 44' 05.1"
D	45° 41'31.4"	57° 31'33.5"
E	44° 55'51.9"	57° 10'34.0"
F	43° 14' 13.9"	56° 23'55.7"
G	42° 56' 48.5"	56° 16'52.1"
H	42° 03' 46.3"	55° 54'58.1"
I	41° 45'00.8"	55° 47'31.6"
J	41° 42' 24.7"	55° 46' 23.8"
K	41° 06' 19.2"	55° 36' 10.9"
L	40° 58'21.7"	55° 34' 23.3"

6.5. Should the outer limit of the continental margin, as it may be determined in accordance with international law, extend beyond point "L" above, the course of the delimitation line beyond that point shall be defined as a geodesic line along an azimuth of 166° 19' 50" to its point of intersection with the outer limit of the continental margin so determined.

6.6. The course of the delimitation has been depicted, for illustrative purposes only, on copies of Canadian Hydrographic Service chart 4001. An explanatory report of the Technical Expert is annexed to this decision.