

**ARBITRATION BETWEEN
NEWFOUNDLAND AND LABRADOR
AND
NOVA SCOTIA
CONCERNING PORTIONS OF THE LIMITS OF THEIR
OFFSHORE AREAS
AS DEFINED IN THE *CANADA-NOVA SCOTIA OFFSHORE
PETROLEUM RESOURCES ACCORD IMPLEMENTATION
ACT* AND THE *CANADA-NEWFOUNDLAND ATLANTIC
ACCORD IMPLEMENTATION ACT***

**AWARD OF THE TRIBUNAL
IN THE FIRST PHASE**

Ottawa, May17, 2001

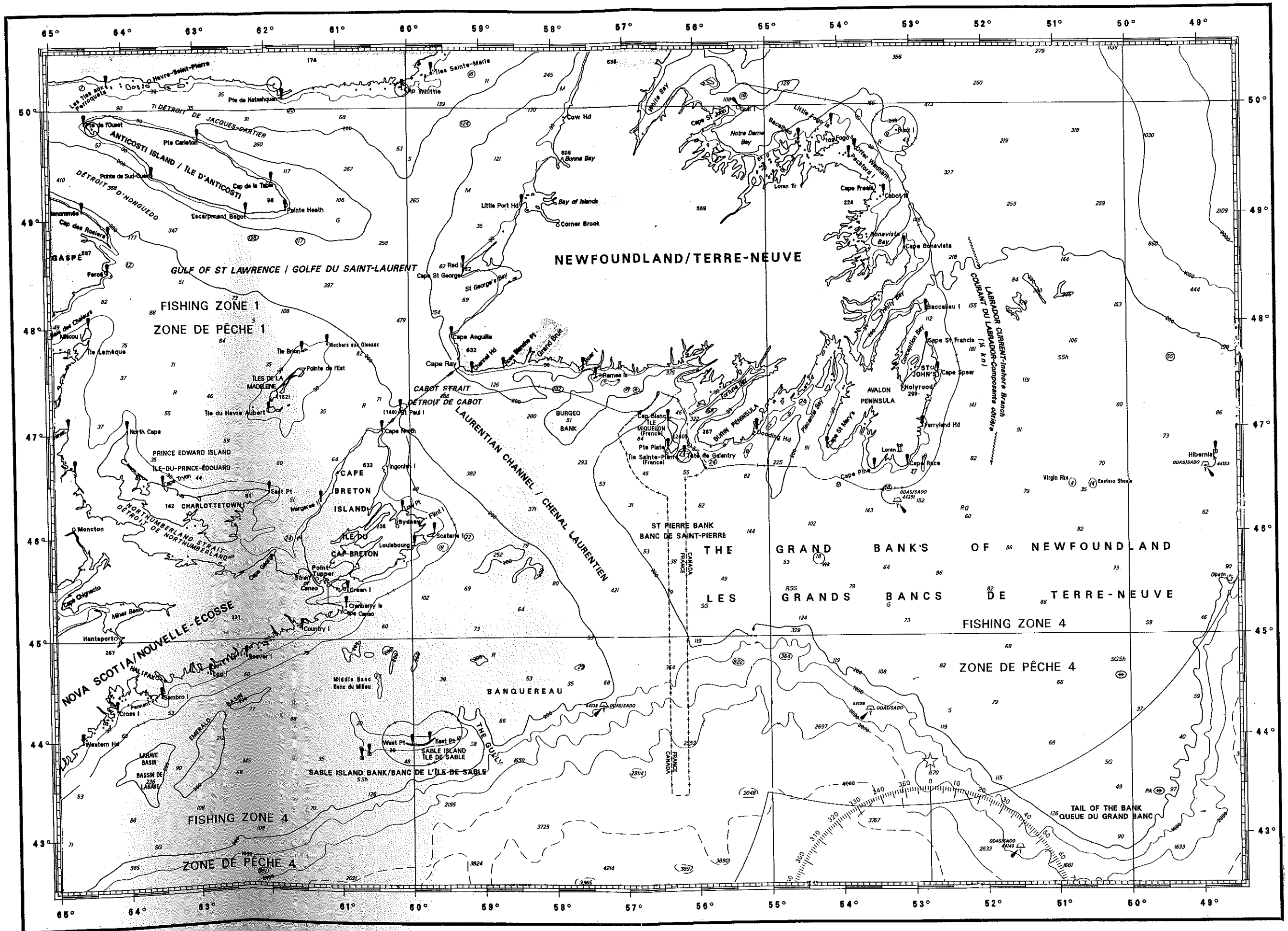


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In the case concerning the delimitation of portions of the offshore areas
between
the Province of Nova Scotia *and* the Province of Newfoundland and Labrador

THE TRIBUNAL

Mr. Gérard V. LA FOREST, Chairperson
Mr. Leonard H. LEGAULT, Member, and
Dr. James R. CRAWFORD, Member

Registrar:

Ms. Heather M. HOBART

Technical Expert:

Mr. David H. GRAY

For Nova Scotia

Government Representatives:

The Honourable John Hamm, Province of Nova Scotia,
The Honourable Gordon Balsler, Minister of Economic Development of the Nova
Scotia Petroleum Directorate,
Dr. Patricia Waring-Ripley, Deputy Minister, Intergovernmental Affairs,
Ms. Margaret L. MacInnis, Chief Executive Officer, Office of Aboriginal Affairs.

Counsel:

Mtre. L. Yves Fortier, Ogilvy Renault,
as Agent and Counsel,
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as Deputy Agent and Counsel,
Mtre. Valerie Hughes, Ogilvy Renault,
Mtre. Jean G. Bertrand, Ogilvy Renault,
Professor Phillip M. Saunders, Dalhousie University, Faculty of Law.

Advisors:

Mtre. François Mathys, Professor, Faculté de droit de l'Université de Montréal,
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Technical Experts and Researchers:

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For Newfoundland and Labrador

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Mr. Brian Maynard, Deputy Minister, Department of Mines and Energy,
Mr. Adam Sparkes, Department of Mines and Energy,
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Professor Donald M. McRae, University of Ottawa, Faculty of Law,
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Ms. Deborah Paquette, Department of Justice,
as Deputy Agent and Counsel,
Mr. L. Alan Willis,
Mr. Brian A. Crane, Gowling Lafleur Henderson,
Professor John H. Currie, University of Ottawa, Faculty of Law,
Ms. Ritu Gambhir, Gowling Lafleur Henderson.

Technical Experts and Researchers:

Mr. Ron Gélinas, Lindquist Avey Macdonald Baskerville,
Mr. Mike Comeau, Lindquist Avey Macdonald Baskerville,
Mr. Fred Allen, Department of Mines and Energy,
Mr. Robert Pitt, Canning & Pitt Associates,
Mr. Stratford Canning, Canning & Pitt Associates.

THE ARBITRATION TRIBUNAL

Composed as above,

Makes the following Award:

On May 31, 2000 the Federal Minister of Natural Resources, Ralph Goodale,
following consultation with the Parties, advised of his decision to “establish an arbitration

process with two distinct phases” to resolve the dispute relating to the line dividing the respective offshore areas of the Province of Nova Scotia and the Province of Newfoundland and Labrador. The Arbitration Tribunal was established under the dispute settlement provisions of the *Canada-Newfoundland Atlantic Accord Implementation Act*, and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*. The Federal Minister set out the constitution, membership of the Tribunal and the procedure for the arbitration in the Terms of Reference. The Terms of Reference are found in the attached Appendix A.

1. The Establishment of the Tribunal and its Terms of Reference

1.1 The Tribunal was established pursuant to the *Canada - Newfoundland Atlantic Accord Implementation Act*¹ (hereinafter the “*Canada-Newfoundland Act*”) and the *Canada - Nova Scotia Offshore Petroleum Resources Accord Implementation Act*² (hereinafter the “*Canada-Nova Scotia Act*”). Each of these Acts provides for joint administration and provincial revenue sharing with the Federal Government in respect of the offshore area of each province. This area is defined in each Act, in a way described in more detail in what follows.

1.2 A dispute has existed for many years between the two provinces concerning portions of the limits of these offshore areas. A principal focus of the dispute is the Laurentian Channel, *ie.*, the area seaward of Cabot Strait. (The general area of the dispute, with relevant features is shown on Map 1 which is the frontispiece to this Award.) Both Acts provide in identical terms for the settlement of such disputes.³ They provide that if the Government of Canada is unable by means of negotiation to bring about a

¹ S.C. 1987, c. 3.

² S.C. 1988, c. 28.

³ *Canada-Newfoundland Act*, s. 6; *Canada-Nova Scotia Act*, s. 48.

resolution of a dispute within a reasonable time, the dispute shall be referred to an impartial person, tribunal or body at such time as deemed appropriate by the Federal Minister of Natural Resources, in consultation with the provinces concerned. The Federal Minister is also charged with the responsibility of determining the constitution and membership of the tribunal or body and the procedure for the settlement of the dispute. Where such procedure involves arbitration (as is the case here), the arbitrator is required to "apply the principles of international law governing maritime boundary determination, with such modifications as the circumstances require". The relevant provisions read:

(2) Where a dispute between the Province and any other province that is a party to an agreement arises in relation to a line or portion thereof prescribed or to be prescribed for the purpose of the definition "offshore area" in section 2 and the Government of Canada is unable, by means of negotiation, to bring about a resolution of the dispute within a reasonable time, the dispute shall, at such time as the Federal Minister deems appropriate, be referred to an impartial person, tribunal or body and settled by means of the procedure determined in accordance with subsection (3).

(3) For the purposes of this section, the person, tribunal or body to which a dispute is to be referred, the constitution and membership of any tribunal or body and the procedures for the settlement of a dispute shall be determined by the Federal Minister after consultation with the provinces concerned in the dispute.

(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.⁴

The Federal Minister is given power unilaterally to delineate the offshore area for the purposes of each Act in order to give effect to the award of an arbitral tribunal.⁵

⁴ *Canada-Newfoundland Act*, s. 6; *Canada-Nova Scotia Act*, s. 48 with minor variations in subsection (1).

⁵ *Canada-Newfoundland Act*, s. 6(5); *Canada-Nova Scotia Act*, s. 48(5).

- 1.3 Having been unable to bring about a resolution of the dispute by means of negotiation, the Federal Minister, pursuant to these provisions and with the consent of the Parties, on March 31, 2000, referred the dispute to this Arbitration Tribunal and set out its constitution, membership of the Tribunal and the procedure in the Terms of Reference. The Terms of Reference, as already noted, are found in the attached Appendix A. In particular, the Terms of Reference thus describe the mandate of the Tribunal:

ARTICLE THREE
THE MANDATE OF THE TRIBUNAL

- 3.1 Applying the principles of international law governing maritime boundary 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.
- 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.
- (i) In the first phase, the Tribunal shall determine 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.
- (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.
- 1.4 Two matters should be noted about the mandate. The first has to do with the applicable law. Article 3.1 provides that in applying the principles of law governing maritime boundary delimitation with such modifications as the circumstances

require, the Tribunal is instructed to do so “as if the parties [the two provinces] were states subject to the same rights and obligations as the Government of Canada at all relevant times.” The quoted addition to the words in the Acts, as well as the extent to which the applicable law may be subject to modification in the present phase of the arbitration, will be examined below in part 3.

- 1.5 The second matter to be noted about the mandate concerns the order in which the Tribunal must deal with the basic issues before it. Article 3.2 requires the Tribunal to determine the line dividing the respective offshore areas of the two provinces in two phases. In the first phase, the Tribunal is called upon to determine whether that line has been resolved by agreement. In the absence of such agreement the Tribunal is, in the second phase, to determine the line dividing the respective offshore areas of the two provinces. In the first phase, it is incumbent on the Tribunal to examine the conduct of the Parties, described with more particularity later, so far as it is relevant to the issue to be determined at this stage. That issue is solely whether the boundary between the two provinces has been “resolved by agreement”. Questions of the conduct of the Parties are examined only from this point of view. This is without prejudice to the Tribunal’s consideration of the possible relevance of such conduct to the delimitation of the boundary to the extent that the Tribunal finds that the boundary, or any part of it, has not been “resolved by agreement”.

2. The Arbitration Proceedings

- 2.1 The procedure for Phase One of the arbitration is described in Article 4 of the Terms of Reference as follows:

4.1 The following procedure will apply in Phase One:

- (i) Within three (3) months of the establishment of the Tribunal, the Parties shall file Memorials on the question of whether, in accordance with Article 3.2(i) above, 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.

- (ii) Within one (1) month after filing of the Memorials, the Parties shall file Counter Memorials.
- (iii) Within one (1) month after filing of the Counter Memorials, the Tribunal shall convene an oral hearing.
- (iv) Within two (2) months after the oral hearing the Tribunal shall render its decision.

2.2 After consulting the Parties, the Tribunal appointed Heather M. Hobart, B.N., LL.B., LL.M., an associate with Stewart McKelvey Stirling Scales, as Registrar for the Tribunal, under Article 2.4 of the Terms of Reference.

2.3 The Tribunal, in accordance with Article 8 of the Terms of Reference, met with the Parties on September 5, 2000, in Fredericton, New Brunswick. Prior to the meeting, the Parties agreed to extend the time periods found in Article 4 of the Terms of Reference, as permitted under Article 8.7 of the Terms of Reference. The following persons attended the meeting: Mr. L. Yves Fortier, Mr. Stephen L. Drymer, Mr. Jean G. Bertrand, Dr. Patricia Waring-Ripley, Ms. Margaret L. MacInnes, on behalf of the Province of Nova Scotia; and Professor Donald M. McRae, Ms. Deborah J. Paquette, Mr. Brian A. Crane, Mr. Brian Maynard, Mr. Adam Sparkes, on behalf of the Province of Newfoundland and Labrador.

2.4 On September 15, 2000, the Tribunal issued an Order which recorded a number of the agreements reached by the Parties during the September 5, 2000, meeting including: (1) the date for the oral hearing from March 12 to March 21, 2001; (2) the appointment of a technical expert for the Tribunal; and (3) Nova Scotia's offer to present its case first during Phase One of the hearing. The Order fixed the filing dates for the Memorials and Counter-Memorials as December 1, 2000, and February 15, 2001, respectively. The Order stated as follows:

As to a possible Phase II of the arbitration, should this prove necessary, the Tribunal intends if at all possible, to conduct the hearing of this phase in November 2001, and it notes the agreement of the parties that the following dates, namely November 19th to 23rd and November 26th to 30th, would be convenient. In the event that Phase II proves necessary and that the November timetable cannot be met for any reason, the parties are asked to reserve January 21st to 25th and January 28th to February 1st, 2002 for that purpose;

- 2.5 The Tribunal, after consulting with the Parties, appointed Mr. David Gray, B.A. Sc., M.A. Sc., P. Eng., C.L.S., Maritime Boundary Specialist, Canadian Hydrographic Service, as Technical Expert.

- 2.6 The Memorials were filed within the time limits prescribed. Nova Scotia filed a total of four Volumes of material including the Memorial and Annexes Volumes 1, 2 and 3 (1 to 132). Newfoundland and Labrador filed a total of six Volumes of material including the Memorial, Annex of Documents Volumes 1, 2 and 3, Annex of Authorities and Annex of Statutes.

- 2.7 Counter Memorials were filed by both Parties within the prescribed time limits. Nova Scotia, in addition to filing a Counter Memorial, also filed Annexes Volume 4 (133 to 165). Newfoundland and Labrador filed a Counter Memorial, a Supplementary Annex of Documents, Supplementary Annex of Authorities and Supplementary Annex of Statutes.

- 2.8 The hearing for Phase One took place at the Wu Conference Centre, University of New Brunswick, Fredericton, New Brunswick from March 12 to March 20, 2001. During the hearing the Tribunal heard the counsel of the Parties in the order agreed between them, the Province of Nova Scotia being the first Party to plead. The following counsel and advisors submitted oral arguments on behalf of the Parties: The Honourable John Hamm, Mr. L. Yves Fortier, Mr. Stephen L. Drymer, Ms. Valerie Hughes, Mr. Jean G. Bertrand, Professor Phillip Saunders, on behalf of the

Province of Nova Scotia; and Professor Donald M. McRae, Mr. L. Alan Willis, Mr. Brian A. Crane, on behalf of the Province of Newfoundland and Labrador.

- 2.9 Nova Scotia filed additional documentation with the Tribunal during its presentation on March 12, 13 and 19, 2001, including a number of slides referred to during the course of the hearing, a binder containing all of the figures filed by Nova Scotia with its Memorial and Counter-Memorial, Annexes Volume 5 (166 to 173) and Nova Scotia's Complement to Newfoundland and Labrador's Oral Argument Book.
- 2.10 Newfoundland and Labrador filed additional materials with the Tribunal during the course of its oral presentation on March 15, 16 and 20, 2001. The materials included three additional volumes of material: Oral Argument Book Volume 1 (Tabs 1-37), Oral Argument Book Volume 2 (Tabs 38-67) and a binder which contained copies of the slides of the visual materials presented during the oral presentation.
- 2.11 On March 16, 2001, two questions were put to the Parties by the Tribunal. The questions were:
1. In the event that the Tribunal were to hold that there is a binding agreement between the Parties as to the line extending out to the Atlantic, what would be the effect on that agreement of the award of the Tribunal in the St. Pierre Miquelon case?
 2. Precisely which modifications in the view of the Parties are required by the circumstances to the principles of international law governing maritime boundary delimitation, having regard to the requirement that the Parties are to be treated as if they were states subject to the same rights and obligations as the Government of Canada at all relevant times?
- 2.12 The Parties filed responses to the questions posed by the Tribunal on March 23, 2001. Nova Scotia filed a complete copy of the "Report on the Rights of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island to the Ownership of Adjacent Submarine Resources".⁶

⁶ Prof. Gérard V. La Forest, Fredericton, New Brunswick (September 16, 1959).

- 2.13 Nova Scotia argued that an agreement existed between Nova Scotia and Newfoundland and Labrador which effected the delimitation of their respective offshore areas. This agreement, it was submitted, was entered into in 1964 by the premiers of the Atlantic Provinces, an agreement to which Québec subsequently adhered. The terms of the 1964 Agreement were, it was argued, confirmed by the subsequent conduct of the Parties.
- 2.14 Nova Scotia requested that the Tribunal declare that the line dividing the respective offshore areas of the Province of Nova Scotia and the Province of Newfoundland and Labrador has been resolved by agreement.
- 2.15 Newfoundland and Labrador argued that a line dividing the offshore areas between Nova Scotia and Newfoundland and Labrador has not been resolved by agreement, that there was no evidence of an intent on the part of Newfoundland and Labrador to be legally bound by any agreement or to follow a particular line. Nova Scotia, it was argued, failed to establish the line dividing the respective offshore areas of Newfoundland and Labrador and Nova Scotia has been resolved by agreement.
- 2.16 Newfoundland and Labrador requested that the Tribunal determine that the line dividing the respective offshore areas of the Province of Nova Scotia and the Province of Newfoundland and Labrador has not been resolved by agreement.
- 2.17 The case was ably and fully argued by both the Province of Nova Scotia and the Province of Newfoundland and Labrador. Both Parties submitted extensive documentation.

3. The Applicable Law

- 3.1 As noted above, Article 3.2 of the Terms of Reference unambiguously requires the Tribunal, in this first phase, to determine whether the offshore boundary between the Parties has been “resolved by agreement” and to do so “in accordance with Article 3.1”. Article 3.1 requires the Tribunal to apply the principles of international law governing maritime boundary delimitation “with such modification as the circumstances require”, and to do so “as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times”.
- 3.2 According to Nova Scotia, these provisions are unambiguous. The principles of international law governing maritime boundary delimitation are to be applied in determining whether the boundary has been resolved by agreement, and for that purpose the Parties are to be treated as if they were, at all relevant times, independent states subject to the same rights and obligations as the Government of Canada.
- 3.3 According to Newfoundland and Labrador, on the other hand, neither the Terms of Reference nor the Accord legislation⁷ should be interpreted as requiring the Tribunal to apply international law standards of treaty making to the acts of provincial premiers and officials. The legislation refers only to “the principles of international law governing maritime boundary delimitation”. Even if those principles in the international context defer to boundaries established by agreement, they should not be read as hypothetically applying the law of treaties to the provinces, a process which would be contrary both to the facts and to the law actually governing the transactions on which Nova Scotia relies. But Newfoundland and Labrador also argued that, even if international law were to be applied to this question, and even if the Parties were treated as if they had been states at all relevant times, the boundary would not have been resolved by agreement. This was because the Parties never had

⁷ The Accord legislation includes the *Canada-Nova Scotia Act*, and the *Canada-Newfoundland Act*.

the intention of entering into an immediately binding agreement resolving that issue, as distinct from agreeing on the terms of successive proposals to be put to the Federal Government. These proposals were always understood to require federal concurrence and implementation, and in particular to require legislation at both the federal and provincial level. Accordingly, they were never binding on the provinces, nor could they be treated as such by applying (fictionally and retrospectively) the standards of international law for a binding agreement.

3.4 In dealing with these arguments, the Tribunal will first review the legal position, under Canadian law and international law, with respect to agreements as to maritime boundaries.

(a) **Requirements under Canadian Law for a Binding Agreement on Maritime Boundaries**

3.5 In its two decisions on offshore jurisdiction the Supreme Court of Canada held expressly that the territory of the provinces does not extend to the territorial sea as distinct from historic internal waters, and *a fortiori* that the provinces do not include areas of continental shelf.⁸ Jurisdiction over the continental shelf under Canadian law is exclusively a matter for the Federal Government. The same results were reached in the *Tidelands* cases in the United States⁹ and Australia.¹⁰

⁸ *Reference re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re: the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86.

⁹ *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 709 (1950); *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960); *United States v. Louisiana*, 420 U.S. 529 (1960); *United States v. Florida*, 420 U.S. 531 (1975); *United States v. Maine*, 420 U.S. 515 (1975).

¹⁰ *New South Wales v. Commonwealth* (1975), 135 C.L.R. 337 (Aust. H.C.).

3.6 Section 3 of the *Constitution Act, 1871* (formerly the *British North America Act, 1871*, 34-35 Vict., c. 28 (U.K.)) provides that:

The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

Thus to the extent that any agreement between the provinces would have required a change in “the limits of such Province”, for example by the addition to the province of areas of internal waters, section 3 requires that the change be implemented by a combination of federal and provincial legislation. No doubt questions might have been asked whether the recognition of jurisdiction or rights over the continental shelf would amount to a change in the limits of a province within the meaning of section 3. Under international law as well as in national practice, the continental shelf has been treated as adjacent to the territory of the state rather than as part of it. This is consistent with the conception of the continental shelf as a zone of “sovereign rights” beyond the territorial sea and internal waters. In the words of the International Court of Justice, the continental shelf is a zone of “only sovereign rights and functional jurisdiction”.¹¹ However, it is clear that the initial provincial proposals for offshore jurisdiction were conceived of as proprietary and as involving claims to territory and “ownership”. Moreover they envisaged legislation pursuant to section 3: this was expressly provided for in paragraph 6 of the Joint Statement of 1964¹² (hereinafter “the *Joint Statement*”) as well as in subsequent discussions.¹³

¹¹ *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)* Merits, judgment of March 16, 2001, para. 170.

¹² Joint Statement re: Atlantic Premiers Conference Halifax, Nova Scotia, (September 30, 1964) (NL Annex 11, NS Annex 24). Paragraph 6 of the *Joint Statement* is reproduced in paragraph 4.16 below.

¹³ See in particular the exchange between Prime Minister Pearson and Premier Smallwood at the Federal Provincial Conference on July 21, 1965, (NL Annex 21), cited below, paragraph 4.30.

- 3.7 In cases where some legal result can only be produced by parliamentary action, the executive cannot validly contract so as to fetter that action.¹⁴ This is an aspect of the principle of parliamentary sovereignty. And if the provincial premiers could not by agreement validly bind their own provinces to any boundary change, *a fortiori* they could not bind the Parliament of Canada. It follows that no executive agreement as to the location of a provincial boundary could be legally effective as such. Again, *a fortiori* the premiers could not validly agree on inter-provincial boundaries in respect of areas which appertain not to the provinces but to the Federal Government.
- 3.8 Even in respect of matters not requiring legislation under section 3 of the *Constitution Act, 1871*, the powers of the provinces to conclude valid executive agreements are limited. As a general matter, governments cannot under Canadian law validly contract so as to fetter their future executive action;¹⁵ nor can they by executive agreement (whether or not a contract) bind the subject.¹⁶ The courts have recognized that there is a sphere of public law agreements which, if they are intended to be binding and are acted upon as such, can produce legal effects. Some agreements, may require the backing of provincial legislation, and such agreements cannot validly commit the province in the absence of legislation. Where, on the other hand, the commitments under an agreement are limited to actions within the scope of provincial executive power, an inter-provincial agreement may be recognized as valid

¹⁴ *Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Co.*, [1950] A.C. 87 (P.C.); *Reference re: Canada Assistance Plan*, [1991] 2 S.C.R. 525. See G.H.L. Fridman, *The Law of Contract in Canada* 4th ed. (Toronto: Carswell, 1999) at 29: "there can be no intent to contract on the part of a government where the arrangement that is said to constitute a contract purports to bind the Crown or a legislature to promote legislation or would limit the legislature's power to repeal or amend legislation".

¹⁵ *Rederiaktiebolaget Amphitrite v. R.*, [1921] 3 K.B. 500; *Commissioner of Crown Lands v. Page*, [1960] 2 Q.B. 274 (C.A.) See also *Perry v. Ontario* (1997), 33 O.R. (3d) 705 (C.A.).

¹⁶ *Reference re: Anti-Inflation Act*, [1976] 2 S.C.R. 373.

and may give rise to “legal obligations capable of enforcement by any judicial remedy available in the case of a government liability”.¹⁷

3.9 In the present case, no question of remedies arises. The Tribunal is asked to determine the existence of a valid agreement, leaving to the Federal Minister the question of the exercise of powers under the Accord legislation.

(b) Requirements under International Law for a Binding Agreement on Maritime Boundaries

3.10 Turning to the issue of maritime delimitation agreements under international law, the present dispute concerns only the delimitation of the offshore boundary between the Parties beyond 12 nautical miles from their respective coastlines or areas of internal waters. Moreover no issue arises as to jurisdiction over fisheries. The dispute concerns only the mineral resources of the seabed. In accordance with the Terms of Reference, the Tribunal is required to apply “the principles of international law governing maritime boundary delimitation” as if the provinces were states subject at all relevant times to the rights and obligations of Canada. This directs the Tribunal to those principles binding upon Canada which govern the delimitation of adjacent areas of continental shelf.

3.11 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.¹⁸ It has

¹⁷ *South Australia v. Commonwealth* (1962), 108 C.L.R. 130 (Aust. H.C.), at 141 (Dixon, C.J.). This was no doubt the basis for Newfoundland and Labrador’s concession in argument that the Memorandum of Agreement establishing the Joint Mineral Resources Committee of July 16, 1968 (NL Annex 25, NS Annex 36) was valid. That Agreement envisaged continuing cooperation in respect of maritime resource claims, performance of which fell within the sphere of executive action. See below, paragraph 5.9.

¹⁸ *Convention on the Continental Shelf*, April 29, 1958, 499 U.N.T.S. 311 (entered into force June 10, 1964). Canada did however make a declaration, recording its view that “the presence of an accidental feature such as a depression or a channel in a submerged area should not be regarded as constituting an

not yet ratified the 1982 *United Nations Convention on the Law of the Sea (UNCLOS)*.¹⁹ Thus as a matter of international law, the governing provision, *prima facie* at least, is *GCCS* Article 6. This provides, both as to adjacent and opposite states, that the boundary of the continental shelf shall be determined in the first place “by agreement between them”. Only in the absence of agreement is the boundary to be determined by the principle of equidistance, “unless another boundary line is justified by special circumstances”.

3.12 The 1958 Convention is not alone in its emphasis upon agreement as the primary means of resolving continental shelf boundary disputes. Under Article 83 (1) of the *United Nations Convention on the Law of the Sea*,

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Moreover, in accordance with Article 83 (4),

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

The repeated reference to agreement in the texts is paralleled in the case law on maritime delimitation, from the *North Seas Continental Shelf Cases* onwards.²⁰ Thus

interruption in the natural prolongation of the land territory of the coastal state into and under the sea”.

¹⁹ (1982) 450 U.N.T.S. 11 (entered into force November 16, 1994).

²⁰ See e.g., *North Seas Continental Shelf Cases*, [1969] I.C.J. Rep.4 at 45 (para. 85); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, [1984] I.C.J. Rep. 246 at 299 (para. 112), 311 (para. 154); *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, [1985] I.C.J. Rep. 13 at 39 (para. 46).

for the purposes of the present phase of the arbitration, no question arises as to the possible modification or even supersession of *GCCS* Article 6 by subsequent developments in international law.

3.13 When multilateral conventions refer to the determination of boundaries by “agreement” or by “an agreement”, they clearly mean an agreement which is binding on the parties as a matter of international law, *i.e.*, a treaty. Thus if a treaty on maritime delimitation is expressed to be subject to ratification but has not been ratified, it does not determine anything, any more than does an unratified treaty on land boundaries.²¹ The fact that two states are *ad idem* on a boundary, *i.e.*, that they have the same view as to its existence or location, while it may be legally relevant, is not enough to constitute an agreement on the boundary for the purposes of *GCCS* Article 6 or Article 83 (4) of *UNCLOS*. It is necessary that their common attitude should have been expressed in an agreement which is binding on them under international law. The Parties to the present arbitration accepted this. On the assumption (which Newfoundland and Labrador denied) that the applicable law for this purpose is international law, the Parties agreed that the question for the Tribunal to determine is the following. If the two provinces had at all relevant times been independent states, would their offshore boundary have been “resolved” by an agreement binding upon them under international law, *i.e.*, by a treaty?

3.14 The Tribunal notes that it is also possible for a state to be bound in international law by a unilateral statement as to a boundary, especially where such a statement is made by a head of state or government or a minister of foreign affairs with the intention to commit the state. A well known example is the Ihlen Declaration in the *Eastern*

²¹

Cf. the unratified Treaty of 1935 in the *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6 at 27 (para. 57).

Greenland case.²² By contrast in the *Gulf of Maine case*, the Court declined to apply this rule to a statement made by a middle-ranking government official.²³ For the purposes of the present phase of the arbitration, Nova Scotia relies on the two joint statements or communiqués of September 30, 1964 (the *Joint Statement*)²⁴ and June 18, 1972 (hereinafter “the *1972 Communiqué*”).²⁵ In Nova Scotia’s view, these amount respectively to a delimitation and a more precise delineation agreement between the Parties resolving the location of the boundary; the Tribunal should treat these agreements as binding in accordance with international law. The *1964 Joint Statement* and the *1972 Communiqué* were not unilateral acts. Nova Scotia does not rely in the present phase of the arbitration on any discrete unilateral act, in the nature of the Ihlen Declaration, as resolving the boundary. No question accordingly arises as to whether parallel unilateral acts, binding under international law, might together amount to an agreement resolving a boundary.

- 3.15 The Parties also agreed that no specific requirements of form exist under international law for a treaty. There is no requirement under international law that a treaty be subject to ratification.²⁶ Nor is there any requirement as to the designation

²² *Legal Status of Eastern Greenland*, [1933] I.C.J. Rep. 95 at 103-104. See also: *Nuclear Tests Case (Australia v. France)*, [1974] I.C.J. Rep. 253 at 267-268, *Nuclear Tests Case (New Zealand v. France)*, [1974] I.C.J. Rep. 457 at 472.

²³ *Case concerning Delimitation of the Maritime Boundary, in the Gulf of Maine Area (Canada v. United States of America)*, [1984] I.C.J. Rep. 246 at 305-309.

²⁴ Joint Statement re: Atlantic Premiers Conference Halifax, Nova Scotia, (September 30, 1964) (NL Annex 11, NS Annex 24). See paragraph 4.16 for the full text.

²⁵ “Communiqué issued following meeting of the Premiers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and the Vice-Premier of Québec” (June 18, 1972) (NL Annex 48, NS Annex 54).

²⁶ *Vienna Convention on the Law of Treaties*, May 23, 1969, C.T.S. 1980 No. 37 Art. 11-14. The Convention does not expressly contemplate a treaty which is subject to no formality of conclusion whatever, e.g., an unsigned communiqué. This would have to fall within the general concluding words of Art. 11 (“The consent of a State to be bound by a treaty may be expressed by ... by any other means if so agreed”). Canada acceded to the Convention in 1970 and has thus been a party to it since its entry into force in 1980.

of the instrument in question or as to the form in which it is signed or approved.²⁷ What matters, ultimately, is the intention of the Parties to be bound by the agreement under international law. The International Court of Justice has confirmed this approach in a succession of cases.

- 3.16 In the *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Greece sought to establish the Court's jurisdiction based on an unsigned communiqué issued after a meeting of the two heads of government. The Court said:

On the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Arts. 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form — a communiqué — in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.²⁸

The Court, however, held that the communiqué did not amount to an agreement involving any immediate commitment to submit the dispute to the Court. Previous communications between the parties established that the purpose of the Brussels meeting was to discuss the joint submission of the dispute to the Court by agreement, and it was envisaged that experts would meet subsequently to negotiate a special agreement for that purpose. In the circumstances there was no indication that the two

²⁷ See *ibid.* at Art. 2(1)(a): “‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

²⁸ [1978] I.C.J. Rep. 3 at 39 (para. 96).

Prime Ministers were ready to “undertake an unconditional commitment to submit their continental shelf dispute to the Court”.²⁹ This was, however, without prejudice to the possible effect of the communiqué in terms of the further efforts of the parties “to arrive at an amicable settlement of their dispute”.³⁰

3.17 In the *Qatar v. Bahrain* case, by contrast, the Court held that the Doha Minutes, which had been signed by the foreign ministers of the two parties as well as by a third party acting as mediator, constituted a binding agreement containing specific commitments of the parties, including commitments relating to the modalities of invoking the Court’s jurisdiction. It held that:

... the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.³¹

The Court noted that the Minutes were concluded against the background of an earlier exchange of letters which both Parties accepted did amount to an international agreement. Thus the Doha Minutes did not so much create an obligation to submit the dispute to the Court as deal with the modalities by which this was to be done.³²

²⁹ *Ibid.* at 43 (para. 106).

³⁰ *Ibid.* at 44 (para. 108).

³¹ *Case concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Jurisdiction), [1994] I.C.J. Rep. 112 at 121 (para. 25) [hereinafter *Qatar v. Bahrain*].

³² *Ibid.* at 120 (para. 22). In other words, the Court did not hold that the Doha Minutes were an international agreement in isolation, but rather that they were intended to qualify and particularize an earlier treaty commitment as to the settlement of the dispute. *Cf.* however Oda, J. (dissenting), at 136-139, who held that neither the exchange of letters nor the Doha Minutes constituted an international agreement.

3.18 Evidently each case has to be considered in the light of its own circumstances and of the contemporary evidence of the intentions of the parties. Even an unsigned joint communiqué may be held to embody an agreement if this was the actual intention of the parties, and if they agreed that their intention was to be expressed by the issue of the communiqué. But if questions of form are not decisive they are nonetheless relevant. The absence of a signed document, especially on a matter of importance such as the determination of an international boundary; the use of language which is vague or which does not appear to embody any immediate commitment; a shared understanding between the parties to negotiations that their in principle agreement is to be embodied in some later formal document or is to be subject to some subsequent process of implementation in order to become binding — such factors may together or separately lead to the conclusion that a statement does not constitute a binding agreement under international law.

3.19 A factor sometimes referred to as indicative of an intention to enter into treaty relations is the status and powers of the negotiators. According to Article 7 of the *Vienna Convention on the Law of Treaties*, the following are considered as representing their State without having to produce full powers:

- 2(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;³³

Thus the representative capacity of a heads of state or governments or ministers of foreign affairs is established by virtue of their offices, and they do not need to produce full powers. On the other hand it does not follow that these officials (like the others mentioned in Article 7) automatically have the competence to bind the state in respect of any particular category of treaty in any given case. It may be

³³

Vienna Convention on the Law of Treaties, May 23, 1969, C.T.S. 1980 No. 37.

apparent from the practice of the parties or from the circumstances that a particular agreement expressed by an Article 7 official is not the final word and that some further action or approval is required. Again whether this is so depends on the facts of each case, and on the understanding that the other state party would have, “conducting itself in the matter in accordance with normal practice and in good faith”.³⁴ With respect at least to those senior officials mentioned in Article 7(2)(a), the other state party acting in good faith may well be entitled to treat them as having the necessary authority to commit the state by mere signature. But whether this is the case will depend on the practice of the parties and on what has been said in respect of the particular transaction.

3.20 This issue arose in the *Qatar v. Bahrain* case. The Bahraini Foreign Minister who signed the Doha Minutes was clearly able to do so, by virtue of Article 7, without producing full powers. Bahrain nonetheless argued that according to its Constitution the Foreign Minister could not commit the state to a treaty concerning territory without its “positive enactment as a law”. Accordingly, it was said, the Foreign Minister did not have and could not have had any intention to sign a legally binding agreement. The Court rejected the argument, on the ground that the text itself implied immediate commitments for the two parties:

The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to “a statement recording a political understanding”, and not to an international agreement.³⁵

³⁴ *Ibid.* at Art. 46(2).

³⁵ *Case concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, [1994] I.C.J. Rep. 112 at 122 (para. 27).

In any event, if the 1987 exchange of letters had already committed the parties to judicial settlement of their dispute, it could hardly have appeared to Qatar, acting in good faith, that the Foreign Minister was not authorized to deal with the modalities of the submission. Such an agreement was not, on the face of it, one relating to the territory of the state, and if the Foreign Minister was under constitutional constraints he should have communicated them to the other party.

3.21 The premier of a Canadian province is not an Article 7 official. But a premier is a head of government. The Tribunal is directed by the Terms of Reference to apply international law to the facts of the present case "as if the parties were states". On this basis, Nova Scotia forcefully argued that the premiers must be taken to have had the authority to commit their provinces to a boundary agreement binding in international law. All that would be necessary is that their intention to do so should sufficiently appear from the relevant documents. No doubt it was true, as a matter of Canadian law as now authoritatively declared by the Supreme Court of Canada, that neither Nova Scotia nor Newfoundland and Labrador had the competence to agree upon their maritime boundaries, since at all relevant times they had no jurisdiction over the offshore and therefore no abutting maritime boundaries. The offshore areas pertained to Canada and not to the provinces. But the Terms of Reference require the Tribunal to treat the provinces as if they were states, and coastal states in their situation would have had valid entitlements to adjoining offshore areas and could have entered into an agreement delimiting them. Having done so, they could not have relied on their internal law as a justification for failure to comply with the agreement.³⁶

³⁶ *Vienna Convention on the Law of Treaties*, May 23, 1969, C.T.S. 1980, No. 37, Art. 27. This rule is subject to Art. 46, which deals with manifest violations of rules of internal law of fundamental importance. Since a continental shelf delimitation agreement would seem not to involve changes in the limits of a province, it would not have been open in such a case for either party to invoke section 3 of the *Constitution Act, 1871* as an excuse for non-performance. The hypothetical treaty would have been valid under Art. 46.

3.22 Even if the Tribunal were to proceed on the assumption that the provinces had something to divide, Newfoundland and Labrador argued, it would not follow that the premiers had the authority, acting through the medium of an unsigned communiqué, to bind their provinces as to an actual delimitation. As a matter of Canadian law, evidently, they lacked such authority since changes in provincial boundaries required legislative action pursuant to section 3 of the *Constitution Act, 1871* or otherwise. In the circumstances, the most the premiers could have done in terms of executive action was to enter into some *modus vivendi* or understanding as to the licensing practice of their respective provinces, pending the formal implementation of any eventual offshore accord. Thus, according to Newfoundland and Labrador, even if international law was to be applied, after the event and on the hypothesis that the provincial premiers were to be deemed heads of sovereign governments, this could not alter the fact that their actual intentions in 1964 or 1972 were inevitably coloured by the circumstances in which they were acting. In those circumstances, according to Newfoundland and Labrador, even if the provinces are to be deemed to have had the authority to agree, the premiers could not have had, and did not have, the relevant intent to enter into immediate binding commitments.

3.23 The Tribunal accepts that there are difficulties in applying the international law of maritime boundary delimitation to the question whether provincial premiers have entered into a binding agreement. International law, identified as applicable in the Accords³⁷ and in the implementing legislation, did not govern and was not thought of as governing the transactions on which Nova Scotia relies, and its retrospective application to those transactions is not straightforward. On the other hand, the federal Accord legislation does not purport to attribute offshore areas to the provinces, still

³⁷ "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 100, NS Annex 1); "Canada-Nova Scotia Offshore Petroleum Resources Accord" (August 26, 1986) (NL Annex 108, NS Annex 2).

less to change provincial boundaries.³⁸ That legislation, and the mirroring provincial legislation,³⁹ allows the Federal Government by regulation to change the definition of the offshore area in the relevant Schedule to give effect to an arbitral decision, and to do so without provincial agreement. The applicable law is specified in the legislation. The effect of these provisions is that the Tribunal is authorized to decide the boundary dispute in accordance with the principles of international law governing maritime boundary delimitation, and the Federal Minister is authorized to give effect to that decision. The sole consequence of doing so will be to change, or further specify, the limits of the offshore area in the Schedules to the Acts. There does not appear to be any constitutional or other obstacle to the Canadian Parliament authorizing changes to the schedule of a federal Act in accordance with legal criteria specified in legislation, even if those criteria were not applicable *as such* at the time of the provincial transactions which are at the source of the present dispute.

3.24 Thus the Tribunal does not accept Newfoundland and Labrador's argument that there is something inherently fallacious in applying international law as a criterion of decision to the questions before it.⁴⁰ The Terms of Reference clearly require this for both phases of the arbitration. That international law is the applicable law is stipulated in the Accord legislation, federal and provincial.⁴¹ The rules of

³⁸ See *Canada-Nova Scotia Act*, s. 2, definition of "offshore area"; *Canada-Newfoundland Act*, s. 2, definition of "offshore area".

³⁹ *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3; *Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act*, S.N. 1986, c. 37.

⁴⁰ It may be noted that the Accord legislation was not the first appearance of international law as a criterion for the delimitation of continental shelf areas between the provinces. In the context of the constitutional negotiations in 1979-1980, the provinces proposed a constitutional amendment giving them "all economic or proprietary rights in the non-renewable natural resources" of the "continental shelf adjacent or appurtenant to any province". The proposal provided for delimitation "within lines drawn by agreement in accordance with principles of international law": Report to Ministers from the Sub-Committee of Officials on Offshore Resources, (July 24, 1980) (NL Annex 89). It was not proceeded with.

⁴¹ Difficulties might conceivably arise were two provinces to agree to arbitrate public disputes between them under some legal system other than as provided or allowed by Canadian law. But the present

international law on maritime boundary delimitation refer, and always have referred, to agreement as the primary mode of delimitation.⁴² To the extent that the Terms of Reference go further than the provisions of the Accord legislation in referring to the applicable law, they seem to the Tribunal to do no more than spell out the implications of that legislation and to deal validly with matters of procedure.⁴³

(c) **“With such Modifications as the Circumstances Require”**

- 3.25 This does not however conclude the matter. Both the federal and provincial Acts and the Terms of Reference qualify international law as the applicable law by the use of the phrase “with such modifications as the circumstances require”.
- 3.26 The phrase is no doubt intended to give the Tribunal some flexibility in applying rules of international law, as it were retrospectively, to transactions which took place within Canada by reference to Canadian law and politics. If a binding inter-provincial agreement had been reached in 1964 or 1972, its proper law would not have been international law and the inquiry the Tribunal has to carry out is to that extent hypothetical. On the other hand, the phrase “with such modification as the

arbitration is a statutory, not a contractual arbitration.

⁴² The need for agreement was implicit in the Truman Proclamation itself, at the origins of the development of the continental shelf doctrine. This said that: “In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles” (Proclamation by the President with Respect to the Natural Resources of the Seabed and Subsoil of the Continental Shelf, September 28, 1945) (1946), 40 *A.J.I.L. Supp* 45).

⁴³ Quite apart from legislation, courts have accepted the analogy with international law presented by certain issues arising within a federation, including boundary issues. See, e.g., *Reference re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 433 (Laskin, C.J.) (“even if the agreement is binding upon the Government of Ontario as such, on the analogy of treaties which may bind the contracting Parties but yet be without domestic force, that would not make the agreement part of the law of Ontario binding upon persons purportedly affected by it.”); *Port MacDonnell Fishermen’s Association Inc. v South Australia* (1989), 168 C.L.R. 340 at 367, where the High Court of Australia noted that “Were it not for other legislation carrying the Offshore Constitutional settlement into effect, the legislature might be taken to have intended those boundary lines [between South Australia and Victoria] to be lines of equidistance determined in accordance with principles of international law”. See also *Canton du Valais v. Canton du Tessin* (1980), 75 I.L.R. 114; *Dubai-Sharjah Border Arbitration* (1981), 91 I.L.R. 543 at 585-587.

circumstances require” clearly applies to “the principles of international law governing maritime boundary delimitation”, and not to the facts of the dispute. The Terms of Reference do not require the Tribunal to attribute to the premiers in 1964 or 1972 an intention they could not have had at the time, namely, to enter into a treaty binding under international law. Rather they call for the application of international law by analogy to the conduct of provincial governments within Canada claiming the benefit of a resource.

3.27 In response to a specific question by the Tribunal, the Parties made further written submissions on the effect of the phrase “with such modification as the circumstances require”. According to Newfoundland and Labrador, regard for both Canadian law and international treaty law requires demonstrating “an actual intent by the parties to conclude a legally binding agreement, having regard to the actual circumstances in which they were acting”. The principal such circumstance is “the actual legal and constitutional framework within which the parties were acting”. According to Nova Scotia, the Tribunal's Terms of Reference, and in particular the requirement that the provinces be treated as if they were states at all relevant times, themselves specify the only modifications that are required: 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”, and this is already achieved in the Terms of Reference.

3.28 In the Tribunal's view, the first and essential question to be asked in this phase of the arbitration is this: did the premiers intend to enter into an immediate commitment as to the delimitation of their respective maritime areas, whether these areas already existed in accordance with the provincial claims or would subsequently be conceded under some eventual offshore settlement? This first question is essentially one of fact, and it would arise whether the applicable law was Canadian or international law. Moreover there is nothing implausible about such a commitment. It is not unlikely that two states claiming, or envisaging a claim to, certain maritime territory or a certain resource should agree between themselves as to its partition, and should do so

with immediate effect. Evidently if the claim were to fail their partition agreement would be frustrated. But under the Accord legislation the claims of the two Parties have at least partly succeeded. The legislation gives them a substantial share in the administration and the benefits of the offshore areas.⁴⁴

3.29 For present purposes the Tribunal considers that the circumstances require two modifications in order that the principles of international law governing maritime boundary delimitation can be applied to the provinces as envisaged in the Accord legislation and the Terms of Reference. First, the Tribunal does not have to seek (counterfactually) for a provincial intent to be bound under international law. Evidently no such intent existed at the time. It is sufficient that those authorized to act on behalf of the provinces, doing so within their apparent authority, intended to make an immediate good faith commitment as to their respective boundaries in the sense explained in the preceding paragraph.⁴⁵ Secondly, to the extent that any such commitment was understood to be conditional upon subsequent confirmation by some other authority, whether provincial or federal, the situation should be treated by analogy with a treaty subject to ratification, *i.e.*, as not binding in the absence of that confirmation or approval.

⁴⁴ *Cf.* the Nauru Island Agreement, 1919 by which Australia, New Zealand and the United Kingdom agreed on the distribution of benefits to be derived from their control of the phosphate industry on Nauru as a mandated territory. The mandate for Nauru was not formally granted until 1920.

⁴⁵ This may not be a modification. International law applies to the relations of states irrespective of their intent, and it is sufficient for a treaty that the Parties entered into immediate commitments which were to be fulfilled in good faith.

(d) **Conclusion**

3.30 For these reasons, applying “the principles of international law governing maritime boundary delimitation with such modification as the circumstances require”, the Tribunal regards it as sufficient to establish an agreement which resolves the boundary if it can be shown that the premiers definitively agreed on a boundary separating their respective offshore areas. To establish a “definitive” agreement, it is necessary to show that the premiers agreed on the boundary:

- (a) for all purposes, and not only for the purpose of presenting to the Federal Government a proposal which was ultimately rejected;
- (b) by an agreement which was not subject to any subsequent process of confirmation or ratification or any analogous process in order to be considered binding; and
- (c) which was sufficiently clear, so as to allow the boundary to be determined by a process of legal interpretation of the agreement.

Only if these conditions were met could it be said that the boundary was “resolved by agreement” for the purposes of the Terms of Reference.

4. The Joint Statement of September 30, 1964

4.1 Nova Scotia’s primary argument is that the four Atlantic Provinces reached an agreement as to their respective boundaries at the Premier’s Conference on September 30, 1964, an agreement to which Québec subsequently adhered. According to Nova Scotia, the provinces on September 30, 1964 entered into an agreement which was

- (a) intended by them to be binding, *i.e.*, it was neither provisional, nor tentative, nor subject to any subsequent process of ratification or approval;

(b) unconditional and immediately effective, *i.e.*, it did not depend on whether the provincial claims to the offshore areas were accepted by the Federal Government but was adopted "for all purposes" that might arise as between the provinces;

(c) sufficiently precise as to its content as to constitute a binding agreement;

(d) comprehensive, so as to cover the full extent of the maritime rights of Canada existing or future.

4.2 By contrast, according to Newfoundland and Labrador, all that happened on September 30, 1964 was that the Parties agreed in broad terms on a proposal

(a) which, in the absence of federal and provincial legislation could not have been, and was not, intended to be legally binding;

(b) which was made for the purposes of supporting an unsuccessful provincial claim to ownership and control of offshore areas, and which lapsed when it was rejected by the Federal Government;

(c) which was too vague and imprecise in its terms, especially as concerns the area east of turning Point 2017,⁴⁶ to constitute an enforceable agreement;

(d) which in any event did not extend to the outer continental shelf beyond the line shown on the 1964 Map.⁴⁷

⁴⁶

See paragraph 5.4 below.

⁴⁷

See paragraph 4.8 below.

4.3 The Tribunal finds it useful to examine this question in the first place as a matter of fact. It accordingly turns to the history of the discussions between the provinces, leading to the *Joint Statement* of September 30, 1964.

4.4 In the 1950s the provincial governments began to raise the issue of jurisdiction over and ownership of offshore mineral resources. In a memorandum of April 22, 1959, the Deputy Attorney General of Nova Scotia noted that an application had been received for an offshore exploration permit in the area of Sable Island, including the island itself. After discussing the question of ownership of Sable Island and submarine mineral rights, the Deputy Attorney General suggested that a number of steps be taken without delay. The first two were as follows:

1. The Province should determine what stand it proposes to take on this whole question, and also on the question of boundary divisions between the Provinces;
2. The matter should be made the subject of immediate discussion, either at the Dominion-Provincial level or, in the first instance, among the Atlantic Provinces.⁴⁸

4.5 The matter was considered at conferences of Atlantic Premiers in September 1959 and September 1960. By this time, the provinces had a legal opinion from the Special Advisor to the Province of New Brunswick (Professor G.V. La Forest). He strongly endorsed the provincial claim to internal and territorial waters, but also argued that both legal and moral arguments could be made that "the Maritime Provinces, Newfoundland and Quebec own the submarine subsoil under the continental shelf which stretches from the shore to about two hundred miles from Newfoundland."⁴⁹

4.6 In October 1960, Canadian provincial Ministers of Mines meeting in Québec City

⁴⁸ "Department of Attorney General, Interdepartment Memo, from Deputy to: Attorney General" (April 22, 1959), (NL Oral Argument Book Annex 1, NS Annex 8).

⁴⁹ NS Annex 10.

issued a unanimous resolution that “offshore mineral rights within such distances offshore from provincial lands as seems reasonable and just and consistent with the Terms of Union pursuant to the B.N.A. Act are the resources of the province and subject to provincial jurisdiction.”⁵⁰

4.7 At a meeting in Halifax on June 28, 1961, the Attorneys General of the Atlantic Provinces, according to a report prepared by B. Graham Rogers of Prince Edward Island, noted that “The question of the Continental Shelf which extends out in the Gulf of St. Lawrence as well out in the Atlantic Ocean and who owns oil, gas or mineral rights has to be decided upon.”⁵¹ Prince Edward Island presented a map showing “tentatively accepted” boundaries between Nova Scotia, New Brunswick and Prince Edward Island in the Northumberland Strait. The meeting considered that, “Ottawa should, without hesitation or argument and as a matter of right and equity, grant to the four Provinces, the request for ownership of Oil, Gas and Mineral Rights along the boundaries to be decided upon between these Provinces.”⁵²

4.8 On August 7, 1961, the Deputy Attorney General of Nova Scotia wrote to the Attorneys General of the other three Atlantic Provinces providing them with a document entitled *Notes re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries*⁵³ (hereinafter *Notes re: Boundaries*). This described the boundaries of the various provinces by metes and bounds and depicted these boundaries on a map accompanying the notes. This material was prepared in accordance with an undertaking by Nova Scotia at the meeting of June 28, 1961. The

⁵⁰ Letter from R. A. Donahoe, Attorney General, Province of Nova Scotia to L. R. Curtis, Attorney General, Province of Newfoundland (June 9, 1961), (NL Annex 1).

⁵¹ Minutes of meeting of Attorneys General of Atlantic Provinces “Re: License Areas Offshore, Particularly” (June 28, 1962) (NL Annex 2, NS Complement Annex 5A.)

⁵² *Ibid.*

⁵³ *Notes re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries* (1961) (NL Annex 15, NS Annex 18).

Nova Scotia Deputy Attorney General indicated that, "It was our understanding that the boundaries so delineated might be agreed upon among the Provinces concerned, or at least would provide a basis for further discussions and, when agreement had been reached, the several Provinces would approach the Federal Government for a settling of the boundaries between the Provinces, as provided for in the B.N.A. Act, 1871."⁵⁴ Map 2 on the following page is a reduced copy of this map (hereinafter "the 1964 Map").

- 4.9 On May 11, 1962, the Deputy Attorney General of Nova Scotia, in a memorandum to his Attorney General, wrote as follows:

You will recall also, that arising out of a meeting of the Atlantic Province Premiers, you called a meeting of the Attorneys General in June 1961, at which time it was agreed that we should first of all agree among ourselves upon inter-provincial boundaries, assuming that all of the lands under the Bay of Fundy and Northumberland Strait and substantial parts of the Gulf of St. Lawrence were to be owned by the Provinces.

Later in the same memorandum, he went on:

What our approach should be to the Federal authorities, is of course a question of policy. One course, and in many ways perhaps what would be considered the most desirable course, would be to obtain agreement from the Federal authorities that the Provinces should have the mineral rights in the submarine areas. Perhaps one way of giving effect to this would be a redelineation of the provincial boundaries as would be possible, I think under the B.N.A. Act amendment of 1871. This of course, would involve eventual Federal Legislation but, for the time being a commitment would be quite sufficient for our purposes.⁵⁵

⁵⁴ Letter from J. A. Y. MacDonald, Deputy Attorney General, Province of Nova Scotia to B. G. Rogers, Geological Officer, Department of Industry and Natural Resources, Province of Prince Edward Island (August 7, 1961) (NL Oral Argument Book Annex 6, NS Annex 17).

⁵⁵ "Department of Attorney General, Interdepartment Memo, from Deputy to: Attorney General" (May 11, 1962) (NS Annex 16).

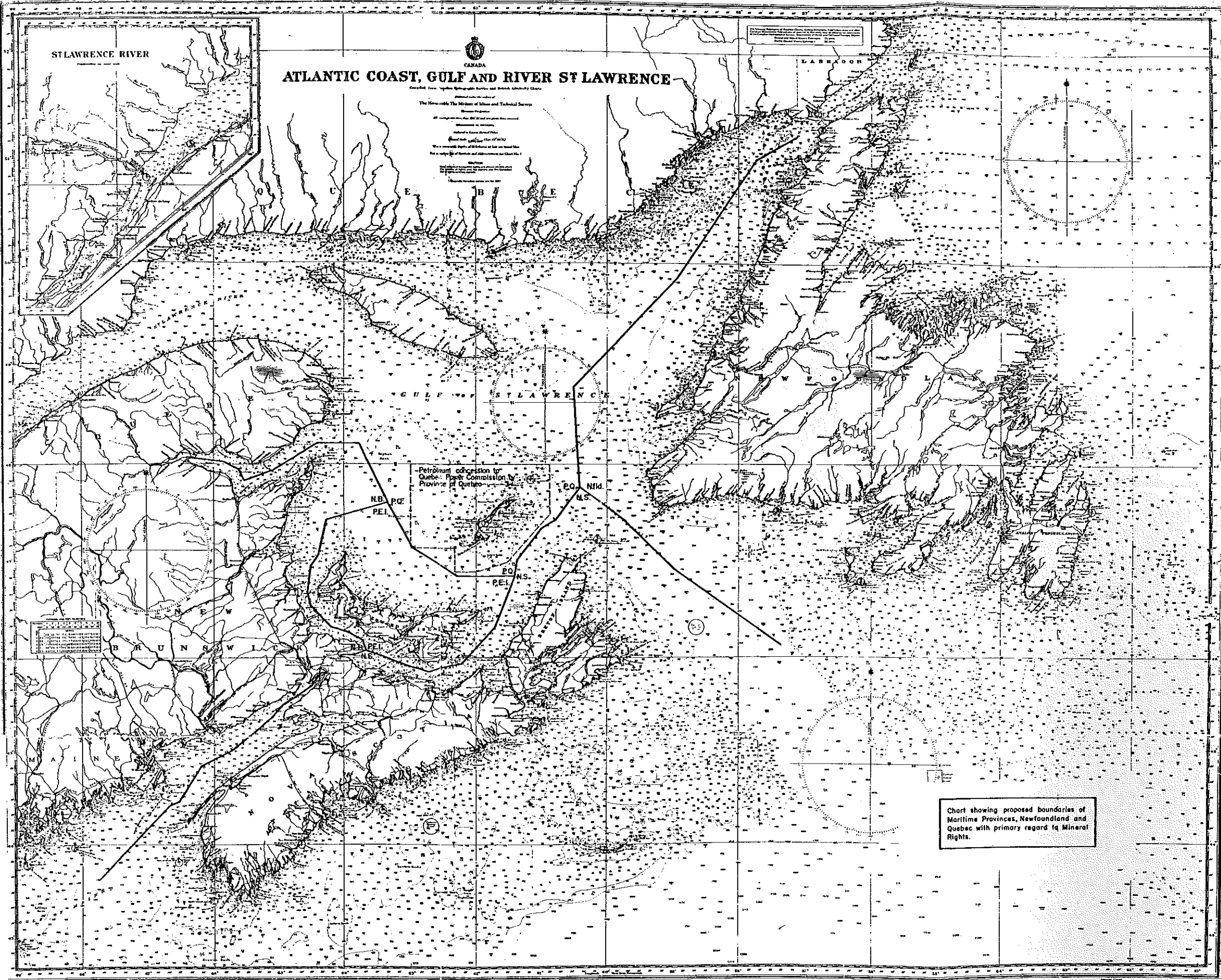


Chart showing proposed boundaries of Maritime Provinces, Newfoundland and Quebec with primary regard to Mineral Rights.

- 4.10 On July 3, 1964, a Senior Solicitor in the office of the Attorney General of Nova Scotia wrote to the Geological Officer of the Government of Prince Edward Island on the question of the circumstances under which the provinces might be in a position to conclude a final agreement on inter-provincial submarine boundaries in the Gulf of St. Lawrence. The salient parts of his letter are set out below:

Until such time as there has been an agreement with the Federal Government and the Provinces concerned with reference to the boundary question or a determination of the issue by the Courts, I do not think that it is possible to finalize any agreement between the various provinces concerned with the Northumberland Strait area.

Pending a determination of the problem each application for a license or lease will have to be dealt with as it arises. This has been the practice which we have been following to date in respect of licenses and leases in the off shore area. Where a problem arises which obviously effects more than one province then the application will have to be discussed between the provinces concerned. While this is not a very satisfactory situation, I do not see any other alternative at the present time.⁵⁶

- 4.11 On July 6, 1964, the Prince Edward Island Geological Officer responded to the Nova Scotia Senior Solicitor in the following terms with reference to the boundary in Northumberland Strait:

[T]his line was accepted as a boundary line and I think this is about as far as we can go at the present time but I feel that it must be clearly understood that each of the Provinces should have the right to issue offshore licenses on their respective sides of this accepted boundary line and then [*sic*] later if we have to argue with Ottawa about it we will only have to do so.⁵⁷

⁵⁶ Letter from M. C. Jones, Senior Solicitor, Province of Nova Scotia to B. G. Rogers, Geological Officer, Department of Industry and Natural Resources, Province of Prince Edward Island (July 3, 1964) (NL Annex 7).

⁵⁷ Letter from B. G. Rogers, Geological Officer, Department of Industry and Natural Resources, Province of Prince Edward Island to M. C. Jones, Senior Solicitor, Province of Nova Scotia (July 6, 1964) (NL Annex 8, NS Complement 7A).

- 4.12 Nova Scotia argued that the documents referred to above, among others, provided evidence of a provincial strategy under which the provinces would first agree on their submarine boundaries among themselves and then pursue the issue of ownership of submarine resources with the Federal Government on that basis. Newfoundland and Labrador, on the other hand, argued that the two issues of boundaries and ownership were inherently inter-related and were pursued together. This debate is best considered in the light of what actually happened when the Atlantic premiers made the critical strategic move on September 30, 1964.
- 4.13 On September 23, 1964 officials of New Brunswick, Nova Scotia and Prince Edward Island met in Halifax to discuss the offshore rights situation preparatory to the annual Conference of Atlantic Premiers to be held a week later. (Newfoundland and Labrador was not present at this meeting of officials but received a copy of the minutes.) The officials agreed that formal recognition of the rights of the provinces to submarine minerals was "essential to the expeditious and economic and orderly development of mineral exploration".⁵⁸ They further agreed on a number of recommendations to the premiers, notably the following:

The meeting felt that it was desirable that the boundaries as between the several Atlantic Coast Provinces should be agreed upon by the Provincial authorities and the necessary steps should be taken to give effect to that agreement. In this respect, a plan was prepared by the Nova Scotia Department of Mines, setting forth graphically and by metes and bounds suggested boundary lines covering the Bay of Fundy, Northumberland Strait, the Gulf of St. Lawrence, including the Bay of Chaleur and the Strait of Belle Isle and Cabot Strait. These suggested boundaries have had the tentative approval of New Brunswick, Prince Edward Island, Newfoundland and Nova Scotia and, it is understood, are also acceptable to Quebec. It is recommended that these boundaries should have the more formal approval of the several Governments concerned. It is further recommended that Parliament be asked to define the boundaries as so approved by the Provinces, under the provisions of Section 3 of the

⁵⁸ "Memorandum of Meeting the 23rd September, 1964" (NL Annex 9, NS Annex 21).

4.14 The above-noted recommendations were before all four Atlantic premiers when they met in Halifax a week later, on September 30, 1964. On the agenda item of "Submarine Mineral Rights and Provincial Boundaries", the premiers considered the two issues of "(a) Constitutional questions" and "(b) Agreed boundaries".⁶⁰ In the course of their meeting the premiers approved three documents:

1. a *Joint Statement* setting out seven points on which the premiers had reached unanimous agreement;
2. a metes and bounds description of marine boundaries (Schedule A to the *Joint Statement*);
3. a map showing graphically these marine boundaries (Schedule B to the *Joint Statement*).

4.15 A fourth document, which may or may not have been approved by the premiers, appears to be cast in the form of a press release and reports that, "The Premiers were agreed that submarine mineral rights should be vested in the Provinces and considered the matter of provincial boundaries in relation to submarine mineral rights."⁶¹ Counsel for Nova Scotia suggested that this press release was prepared in advance of the Conference. In any event, it is at least possible and perhaps likely that the press release could have been revised by the premiers or their officials at the conclusion of the meeting if it omitted or miscast some important point of agreement resulting from the meeting. At the very least, if the press release was prepared in advance it would reflect what was expected from the meeting and qualifies as a contemporaneous account of the meeting intended to be made public.

4.16 It is the seven-point *Joint Statement* referred to above which incorporates what Nova

⁵⁹ *Ibid.*

⁶⁰ "Atlantic Premiers Conference Halifax, Nova Scotia September 30, Agenda" (NS Annex 23).

⁶¹ Joint Statement re: Atlantic Premiers Conference Halifax, Nova Scotia (September 30, 1964) (NL Annex II, NS Annex 22).

Scotia describes as the "1964 Agreement" on maritime boundaries and offers as the primary evidence for its position. Thus, the *Joint Statement* must be given a close reading, initially from a factual perspective. Both Parties agree that "the question of intent, including the intent of the parties to create binding relations, is a factual question to be considered in the light of the available evidence."⁶² The full text of the *Joint Statement* reads as follows:

The Atlantic Premiers Conference held in Halifax on September 30, 1964, with Premier Stanfield of Nova Scotia, Premier Robichaud of New Brunswick, Premier Shaw of Prince Edward Island, and Premier Smallwood of Newfoundland in attendance unanimously agreed:

1. That the provincial governments are entitled 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 argument in support of these several grounds set out in the Report prepared in 1959 by Professor Gerard V. La Forest still retains full force and affect. [*sic*]
2. That formal recognition of the rights of the provinces to the submarine minerals should be obtained from the Government of Canada as essential to the expeditious economical and orderly development of mineral exploration, essential to the economy of the Atlantic Provinces.
3. That the Parliament of Canada be requested to continue to assert the status of the Gulf of St. Lawrence, including the Strait of Belle Isle and Chaleur Bay, Cabot Strait, Northumberland Strait and the Bay of Fundy, as in-land waters or territorial waters.
4. That it is desirable that the marine boundaries as between the several Atlantic Coast Provinces should be agreed upon by

⁶² NS Memorial at IV -3, (para, 5) and at III-11, (para 16); NF Counter-Memorial at 8, (para. 17).

the provincial authorities and the necessary steps taken to give effect to that agreement.

5. That the boundaries described by Metes and Bounds in Schedule A and shown graphically on Schedule B be the marine boundaries of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland.
6. That the Parliament of Canada be asked to define the boundaries as approved by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland under the provisions of Section 3 of the British North America Act, 1871.
7. That an immediate approach should be made to the Province of Quebec so that a united presentation may be made to the Government of Canada.⁶³

4.17 Point 1 of the items of agreement in the *Joint Statement* is that “the provincial governments are entitled 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.” This provision states the claim the provincial governments had made from the outset: full ownership and control over submarine mineral resources. The claim is also specified to include undefined areas off the Banks of Newfoundland and Labrador and Nova Scotia, subject to international law.

4.18 Point 2 of the items of agreement envisages that “formal recognition of the rights of the provinces to the submarine minerals should be obtained from the Government of Canada.” This is clearly a primary objective of the premiers.

4.19 Point 3 of the items of agreement is not germane to the question of intent and need not be discussed here.

⁶³

NL Annex 11, NS Annex 24.

4.20 Point 4 of the items of agreement provides that "it is 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." Nothing suggests that this objective is given priority over point 2. The meaning of the words is clear. The boundaries of the Atlantic Provinces remain to be agreed upon; such agreement is desirable; and certain unspecified steps should be taken to give effect to that agreement. It may be, or at least could be, that such steps were what the Atlantic provincial officials had in mind at their meeting of September 23 when they recommended that "boundaries should have the more formal approval of the several Governments concerned". It is also conceivable that this "more formal approval" meant simply the approval granted by the premiers themselves (in point 5) to the boundaries which the officials a week earlier had described as having the "tentative approval" of the four Atlantic Provinces. The latter possibility hinges upon the degree of formality that can be attributed to the *Joint Statement*. That document was unsigned.

4.21 Point 5 of the items of agreement is that "the boundaries described by Metes and Bounds in Schedule A and shown graphically on Schedule B be the marine boundaries of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland." Here an ambiguity arises, especially in the light of the particular wording of point 4 above. Point 4 notes that provincial agreement on maritime boundaries is "desirable". Nothing in the language of point 5 suggests clearly and unequivocally that point 5 itself represents an expression or embodiment of the desired agreement, with immediate effect. The word "be" as used here can be taken to mean "should be", "will be", "shall be" "are to be", or simply "are". Although the matter is not free from doubt one way or the other, the tension between points 4 and 5 is undeniable, and the sense of futurity manifest in point 4 appears to lend a similar sense to point 5. This may explain why the press release, whether it was prepared before or after the conference, reported that the provinces "considered"

rather than “agreed upon” maritime boundaries. Moreover, point 4 expressly recognizes that the provincial authorities should take the “necessary steps” to “give effect” to any agreement on maritime boundaries. What those steps might be is not specified, but they are clearly not steps effected by the *Joint Statement* itself. Something more was intended: at least some form of confirmation or “ratification” by the provinces themselves, but also some kind of formal “recognition” from the Federal Government.

- 4.22 An even greater uncertainty and imprecision arises in connection with point 5 as it relates to the description of the boundaries set out in Schedule A and shown graphically on the map at Schedule B. Schedule A, of course is the *Notes re: Boundaries* provided by Nova Scotia to the Attorneys General of the other three Atlantic Provinces in 1961. This document described the boundary of Nova Scotia extending out of Cabot Strait from a point midway between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland and Labrador) “southeasterly to International waters”. The boundary of Newfoundland and Labrador is described as running from the same midpoint “S.E. to International waters”. The terms “southeasterly” and “S.E.”, which are used interchangeably, are not defined and cannot be assumed to mean due southeast. The line depicted on the map referred to as Schedule B runs along an azimuth of 125° and not 135°. Moreover, no precision attaches to the use of terms like “easterly”, “northeasterly” and “southeasterly” used in respect of other lines in the *Notes re: Boundaries*. The reference to “International waters” is scarcely more helpful in identifying the terminal point of this southeasterly line. The term “international waters” on the face of it has nothing to do with the outer limits of state jurisdiction over the continental shelf, and moreover the line depicted on the Schedule B map comes nowhere near the outer limit of Canada’s jurisdiction over the continental shelf, even as that limit was known in 1964.

- 4.23 Point 6 of the items of agreement provides that “the Parliament of Canada be asked

to define the boundaries as approved by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland under the provisions of section 3 of the British North America Act, 1871.” This plainly constituted recognition that “necessary steps” must be taken not only by the provincial authorities but also by the federal authorities to give effect to any boundary agreement between the provinces.

4.24 Point 7 of the items of agreement provides that “an immediate approach should be made to the Province of Quebec so that a united presentation may be made to the Government of Canada.” This approach was duly made and on October 7 the Premier of Québec responded by telegram that “the Province of Quebec is in agreement with the Atlantic Provinces on the matter of submarine mineral rights [*sic*] and of the maritime boundaries agreed upon by the Atlantic Provinces.”⁶⁴ The significance of this exchange is discussed below, along with other developments occurring after September 30.

4.25 As to such developments the document, entitled “MATTERS DISCUSSED AT THE ATLANTIC PREMIERS CONFERENCE IN HALIFAX, SEPTEMBER 30, 1964 REQUIRING FURTHER ACTION”⁶⁵ appears to treat the *Joint Statement* as a matter requiring no further action except with regard to informing Québec of what had taken place and seeking its concurrence. This, however, is completely at odds with the action requirements explicitly listed in the *Joint Statement* itself: obtaining formal federal recognition of provincial ownership and control of submarine resources; taking the necessary steps to give effect to any agreement on provincial maritime boundaries; and asking the Parliament of Canada to define such boundaries under section 3 of the *Constitution Act, 1871*. Accordingly, the “Matters Discussed” document cannot be taken to suggest that whatever agreement might have been

⁶⁴ Telegram from J. Lesage, Premier, Province of Québec to R. L. Stanfield, Premier, Province of Nova Scotia (October 7, 1964) (NL Annex 14, NS Annex 28).

⁶⁵ NL Annex 13, NS Annex 26.

reached on September 30, was self-executing in nature.

- 4.26 When the Premier of Nova Scotia wrote to the Premier of Québec on October 2, 1964, he sought not the accession of that province to a provincial boundary agreement but rather the “concurrence of the Government of the Province of Québec in our course of action”.⁶⁶ The Premier of Québec replied that his province “is in agreement with the Atlantic Provinces on the matter of submarine mineral rights [*sic*] and of the marine boundaries agreed upon by the Atlantic Provinces”.⁶⁷
- 4.27 A document very closely related to the *Joint Statement* of September 30 is the “Submission on Submarine Mineral Rights” presented by the four Atlantic Provinces to the Federal-Provincial Conference of Prime Ministers held in Ottawa on October 14-15, 1964. In this submission, the Atlantic Provinces reiterate and explain their claim to the ownership and control of submarine mineral resources. They make it abundantly clear that their claim is to “proprietary rights in minerals”.⁶⁸ Evidently the boundaries they have in mind are those relating to that claim.
- 4.28 On the question of boundaries, Premier Stanfield of Nova Scotia, speaking on behalf of all four Atlantic Provinces, made the following observations:

Reference has been made in this submission to Provincial boundaries but I do not think that that general question need be discussed at length or decided at this Conference. Section 3 of the British North America Act, 1871, provides the procedure for changing boundaries and in effect it is primarily a matter for agreement between the

⁶⁶ Letter from R. L. Stanfield, Premier, Province of Nova Scotia to J. Lesage, Premier, Province of Québec (October 2, 1964) (NL Annex 12, NS Annex 27).

⁶⁷ Telegram from J. Lesage, Premier, Province of Québec to R. L. Stanfield, Premier, Province of Nova Scotia (October 7, 1964) (NL Annex 14, NS Annex 28).

⁶⁸ “Submission on Submarine Mineral Rights by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland” (NL Annex 15, NS Annex 31).

Provinces concerned. I can say, however, that the Atlantic Provinces have discussed this question among themselves and have agreed upon tentative boundaries of the marine areas adjoining those Provinces. These boundaries have been set out by metes and bounds and have been graphically delineated on a map. Hereto attached is a copy of the map and the description of the boundaries by metes and bounds. Speaking on behalf of the Province of Nova Scotia and as authorized by the Premiers of the Provinces of New Brunswick, Prince Edward Island and Newfoundland, I request 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. It may be that before actual legislation is prepared the description by metes and bounds should be reviewed and revised and the attached map, if necessary, varied accordingly, but, for all practical purposes, the attached description of the boundaries and map represent the agreement of the Atlantic Provinces.⁶⁹

4.29 Premier Stanfield clearly stated that the Atlantic Provinces have agreed upon “tentative boundaries”. While he went on to ask the federal authorities to “give effect to the boundaries thus agreed upon by legislation”, the boundaries referred to were those he had just described as “tentative”. Moreover, Premier Stanfield recognized that for legislative purposes the description by metes and bounds may need to be “reviewed and revised” and the attached map “if necessary, revised accordingly”. He concluded by adding that “for all practical purposes, the attached description of the boundaries and map represent the agreement of the Atlantic Provinces”. A question arises here as to what precisely is meant by the expression “for all practical purposes”.

4.30 Almost a year later, during a federal-provincial conference on July 21, 1965, Premier Smallwood of Newfoundland and Labrador had the following exchange with Prime Minister Pearson:

116. Mr. Shaw stated that the Atlantic Provinces and Quebec had reached agreement on interprovincial boundaries in the Gulf of St.

⁶⁹

Ibid. NL at 4, NS at 18.

Lawrence region, had subdivided the Gulf between themselves, and had advised the Federal Government accordingly. Thus there was no legal question involved.

117. The Prime Minister pointed out that adjustment of provincial boundaries without Federal participation would be an arbitrary action and he stressed that provinces do not have the constitutional authority to adjust provincial boundaries unilaterally.

118. Mr. Smallwood interjected that these interprovincial boundaries in the Gulf were merely a proposal and that the provinces had not attempted to make them law...⁷⁰

Nova Scotia, which participated in this meeting, did not object to Mr. Smallwood's characterization of the situation.⁷¹ Counsel for Nova Scotia argued that taken in context Mr. Smallwood meant only to say that the boundaries were merely a proposal in the sense that they were not opposable to the Federal Government. This, however, is not what he said.

5. The Communiqué of June 18, 1972

- 5.1 For the most part Nova Scotia in its written and oral pleadings seemed to place all its eggs in the basket of the *Joint Statement* of September 30, 1964. The difficulties in relying on that Statement as a definitive agreement have already been analysed. One particular difficulty however bears emphasis. In 1964 the provinces were advancing a claim to actual ownership of the offshore areas vis-à-vis the Federal Government, and they envisaged that the claim, if accepted, would be embodied in legislative form under section 3 of the *Constitution Act, 1871*. Their common intention has to be viewed in that light. In 1967 the Supreme Court of Canada ruled that British Columbia's claim to offshore areas lacked foundation in Canadian law.⁷² Although the Atlantic Provinces were not formally parties to that case, the reasoning applied

⁷⁰ Minutes of Federal-Provincial Conference, (July 21, 1965) at 28 (NL Annex 21).

⁷¹ *Ibid.*

⁷² *Reference re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.

equally to them unless they could establish valid grounds of distinction. Newfoundland and Labrador would appear to have had the most plausible case, since it entered Confederation in 1949 under Terms of Union which arguably preserved any existing offshore rights it then had. In the event, the Supreme Court of Canada rejected even that argument.⁷³

- 5.2 Thus after 1967, any agreement between the East Coast Provinces as to offshore boundaries could only with difficulty have been made on the basis that the provinces actually disposed of rights in offshore areas, and certainly not in those areas beyond any conceivable closing lines of internal waters. Paradoxically perhaps, that might have made it easier to construe an agreement between the provinces as to offshore areas as an agreement "for all purposes". Newfoundland and Labrador's argument that the *Joint Statement* of 1964 was made for the purposes of a rejected proposal might have less force in relation to agreements or arrangements made after 1967. The Federal Government had already made it clear that, even if the Supreme Court of Canada rejected provincial claims to the offshore, questions of administration and benefit were negotiable at the political level, and this continued to be the case. An inter-provincial agreement after 1967 could thus plausibly be taken to be a definitive agreement as to the eventual benefits to be enjoyed by the provinces *inter se*. Moreover such an agreement would not necessarily have had to be formalized, for example under section 3 of the *Constitution Act, 1871*, since it would not, or need not, have produced a change in the boundaries of the provinces. It could thus have been definitive in the sense explained above. Not requiring specific implementation as a change in provincial boundaries under the Constitution, it could have been effective as an agreement relating to the benefits the provinces would gain from the eventual settlement with the Federal Government. In terms of the subsequent Accord Legislation, it can be argued that there was no reason for the Federal Government not

⁷³ Reference re: the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland, [1984] 1 S.C.R. 86.

to give effect to such an agreement, or for the Tribunal to decline to say that it “resolved” the issue of boundaries.

- 5.3 Thus it could be argued that, even if the 1964 *Joint Statement* was not a definitive agreement, such an agreement was reached in the inter-provincial discussions which recommenced following the Supreme Court of Canada’s decision in 1967, and which led to the Communiqué of Atlantic Premiers and the Vice-Premier of Québec on June 18, 1972. Nova Scotia also argued that the subsequent practice of the parties, including Newfoundland and Labrador, confirmed and gave effect to the agreement embodied in the 1964 *Joint Statement* and the 1972 *Communiqué*.
- 5.4 Newfoundland and Labrador, on the other hand, argued that even in the 1970s, provincial boundary proposals were made with a view to an eventual settlement of offshore claims and that any understandings about boundaries could not be dissociated from those claims. But even if the understandings had been definitive in the sense explained in paragraph 3.30 above so far at least as some of the Atlantic Provinces or Québec were concerned, they were never accepted or implemented by Newfoundland and Labrador. Finally, Newfoundland and Labrador argued that, even if the 1972 *Communiqué* were to be treated, alone or in conjunction with the subsequent practice, as resolving by agreement the turning points in the Gulf of St. Lawrence, it had no application to any potential boundaries in the Atlantic to the southeast of the Cabot Strait and specifically, to any potential boundaries southeast of the last turning point identified in the *Notes re: Boundaries*. (This turning point was subsequently numbered Point 2017 and it will hereinafter be referred to as such.)
- 5.5 As with the events leading up to the *Joint Statement* of 1964, the Tribunal will consider these arguments first as a matter of fact. What was said and done in the period after 1967 that might amount to a definitive agreement on inter-provincial

boundaries for the purposes of what became the Accord legislation? In responding to this question, the Tribunal will consider, first, the work of the Joint Mineral Resources Committee (hereinafter the JMRC) in the period from 1969-1972, and secondly, the events surrounding the *1972 Communiqué*, before going on to deal with the subsequent practice of the Parties.

- 5.6 Before doing so, it is necessary to say something about the implications, if any, to be drawn from the descriptions of the offshore area in the Accord legislation itself. According to Newfoundland and Labrador, the concurrence in the two federal Accord Acts of 1987 and 1988 of Schedules setting out on the one hand Nova Scotia's line and on the other hand Newfoundland and Labrador's absence of a line demonstrates, in and of itself, that no agreed line exists. Had there been such a line, according to Newfoundland and Labrador, it would have been included in the two Schedules in the same terms and without an arbitration clause.
- 5.7 In keeping with what it has already said about the role of the arbitration provisions in the Accord legislation and of the applicable law, the Tribunal does not accept this argument. By the time the Accord legislation was passed, it was clear that Newfoundland and Labrador, and Nova Scotia were in dispute as to the existence and location of a boundary separating their offshore claims, in particular in the Atlantic sector. As will be seen, the beginnings of that dispute go back to 1973, when Newfoundland and Labrador began to question the principle on which a line was purportedly drawn beyond Point 2017. Later the dispute became more general, as Newfoundland and Labrador withdrew from the East Coast Provinces' alliance and sought to establish its particular claims to offshore jurisdiction. The dispute continued even after Newfoundland and Labrador's legal claim was rejected in 1984. The existence of a dispute was known to federal officials as well as to Nova Scotia. No doubt the Parliament of Canada could have decided for itself (or authorized the Minister to decide) the offshore "boundaries" of the two provinces for the purposes

of the Accord legislation. Evidently it declined to do so, inserting in the Accord legislation each respective province's own view of the position. In acting in this way, it cannot be taken to have prejudiced those positions. If the provinces could not agree, the dispute would be subject to settlement under the Accord legislation on the initiative of the Federal Minister. Thus it remains open to either Party to argue for its version of the line, using any available legal argument, including the argument that the line was already settled by agreement.

(a) The Work of the Joint Mineral Resources Committee (JMRC), 1968-1972

- 5.8 The first offshore Reference was argued before the Supreme Court of Canada in March 1967.⁷⁴ While the decision was pending, and anticipating that it would result in a decision favouring the Federal Government at least as to the offshore, two Canadian officials, Messrs. Crosby and Thorgrimsson, produced a position paper looking towards a possible negotiated resolution of the conflict.⁷⁵ It argued for federal-provincial revenue sharing but under federal administration, and called for accurate determination of "the various areas of interest of the federal government and the coastal provinces". The paper stated:

All such offshore lines should be accurately determined and agreed upon during the course of reaching a federal-provincial settlement so as to avoid future disputes and prolonged and costly litigation.⁷⁶

No reference was made in the paper to any earlier inter-provincial agreement on boundaries.

⁷⁴ See *Reference re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.

⁷⁵ D. G. Crosby and T. Thorgrimsson "Offshore Mineral Rights: Resolution of Federal-Provincial Conflict", (April 7, 1967) (NL Annex 22).

⁷⁶ *Ibid.* at 1 (para. 2).

5.9 Following the Supreme Court of Canada's decision in November 1967, the five East Coast Provinces met to consider matters of common concern as to the offshore. It was agreed that a joint committee should be established "on a firm basis so that the status of the Committee will be known to all the participating Provinces".⁷⁷ At the suggestion of Nova Scotia it was agreed that this would be done by an "agreement... executed by a representative of the Government of each participating Province".⁷⁸ The Memorandum of Agreement establishing the JMRC was signed by the five provinces and came into force on July 16, 1968.⁷⁹ Its purpose was "to initiate and foster co-operation among the Provinces that are parties to the Agreement in the study of problems concerning the management of mineral resources in the submarine areas or lands within the Provinces and in their common terrestrial border zones and to make recommendations to the Governments of the Provinces for resolving the problems". Despite the formality of its conclusion, this was an essentially procedural agreement.

5.10 In November 1968 the Federal Government made a first substantive proposal for a settlement, proposing "Mineral resource administration lines" close to the coasts within which the East Coast Provinces would manage the resources. Seaward of the line, administration would be federal with the provinces pooling a share of the revenue. According to Prime Minister Trudeau, the basis for the division of provincial revenues "should, in the first instance, be left to the provinces to decide amongst themselves"; there was no suggestion they had already done so.⁸⁰ The proposal did not involve any change in provincial limits under section 3 of the

⁷⁷ *Ibid.*

⁷⁸ Letter from D.M. Smith, Minister of Mines, Province of Nova Scotia, to C.M. Lane, Minister of Mines, Agriculture and Resources, Province of Newfoundland and Labrador (June 7, 1968) (NL Annex 23).

⁷⁹ Memorandum of Agreement establishing Joint Mineral Resources Committee (July 16, 1968) (NL Annex 25, NS Annex 36 Schedule A).

⁸⁰ Letter from P. E. Trudeau, Prime Minister of Canada to L. J. Robichaud, Premier, Province of New Brunswick, (November 29, 1968) (NL Annex 26). Similar letters were apparently sent to the other

Constitution Act, 1871. Mr. Trudeau made a statement to the same effect to the House of Commons on December 2, 1968.⁸¹

- 5.11 If the earlier discussions about inter-provincial boundaries were overlooked in the federal proposals of 1968, the provinces continued to take them into account. An internal Newfoundland and Labrador note of January 7, 1969 gave details of the *Notes re: Boundaries* with coordinates; the attached map stopped at Point 2017.⁸² The JMRC established a Technical Committee on Delineation and Description of the Boundaries of the Participating Provinces in Submarine Areas, which likewise determined the coordinates of the turning points described in the *Notes re: Boundaries*, without however discussing the merits of the method of delimitation used.⁸³ The Technical Committee agreed that once remaining issues had been resolved, it would “recommend to the Joint Mineral Resources Committee that an agreement be entered into by the provinces pertaining thereto and be confirmed by legislation by the participating provinces”.⁸⁴ The JMRC for its part seemed to think that legislation might not be necessary for this purpose: it directed the Secretary “to draft an agreement between the participating Provinces and forward the same to the Ministers of the participating Provinces who in turn were to obtain approval of their governments to its contents”.⁸⁵

east and west coast provinces.

⁸¹ NL Annex 27.

⁸² Memorandum from F. J. Lukins, Chief Engineer, Department of Mines, Agriculture and Resources, Government of Newfoundland and Labrador to Deputy Minister of Mines, Government of Newfoundland and Labrador (January 7, 1969) (NL Annex 28, NS Annex 40).

⁸³ “Report of the Technical Committee on Delineation and Description of the Boundaries of the Participating Provinces in Submarine Areas” from J. C. Smith, Chairman. (NL Annex 29, NS Annex 41).

⁸⁴ “Minutes of the Sub-committee of the Joint Mineral Resources Committee” (January 7, 1969) (NL Annex 30).

⁸⁵ “Minutes of Meeting of Joint Mineral Resources Committee” (January 17, 1969) (NL Annex 31, NS Annex 41). Uniform legislation was however envisaged for the administration of provincial areas: *ibid.*

5.12 Following that meeting the JMRC Vice-Chairman and Québec Minister of Natural Resources, Paul E. Allard, wrote on May 12, 1969 to the other provinces, referring to the *Note re: Boundaries*, the 1964 Map and the Stanfield proposal of 1964. He sought provincial approval of the turning points and the map as fixed by the JMRC:

The meeting agreed that upon receipt of these two items by each member Minister he was in turn to take them to his government for approval. The effect of such approval is to be that the boundaries shown on the map and delineated by the turning points are the boundaries between the Provinces for all purposes and especially for the purpose of showing the entitlement to any minerals within the boundaries be they on land or in submarine areas. Each member Minister is also to request from his government a commitment to enter into an agreement with the other four Provinces and ratify the said agreement by legislation.⁸⁶

Specifically he sought assurances on six points:

1. That your Government agrees that the map enclosed herewith setting forth the turning points with the appropriate longitudes and latitudes delineates the boundaries between your Province and the other Provinces shown thereon.
2. That your Government agrees that the map enclosed herewith setting forth the turning points with the appropriate longitudes and latitudes delineates the boundaries between the other Provinces shown thereon.
3. That the boundaries are effective for all purposes, and in particular, mineral rights in the submarine areas are the property of the Province within whose boundaries the area is.
4. That your Government will confirm the map and the turning points for the purposes set out herein by agreement.
5. That your Government will confirm the agreement by legislation.

⁸⁶ Letter from P. E. Allard, Vice-Chairman, Joint Mineral Resources Committee to P. Gaum, Minister of Mines, Government of Nova Scotia (May 12, 1969) (NL Annex 33, NS Annex 43).

6. That your Government will join with the four Provinces herein in seeking legislation by the Government of Canada confirming the agreement if the Joint Mineral Resources Committee so recommends.⁸⁷

The JMRC map attached to the Allard letter showed boundaries between the turning points, but (unlike the 1964 Map) it showed no boundary to the southeast of Point 2017. (A reduced copy of the JMRC map is shown on the following page; it will be referred to hereinafter as "the 1972 Map").

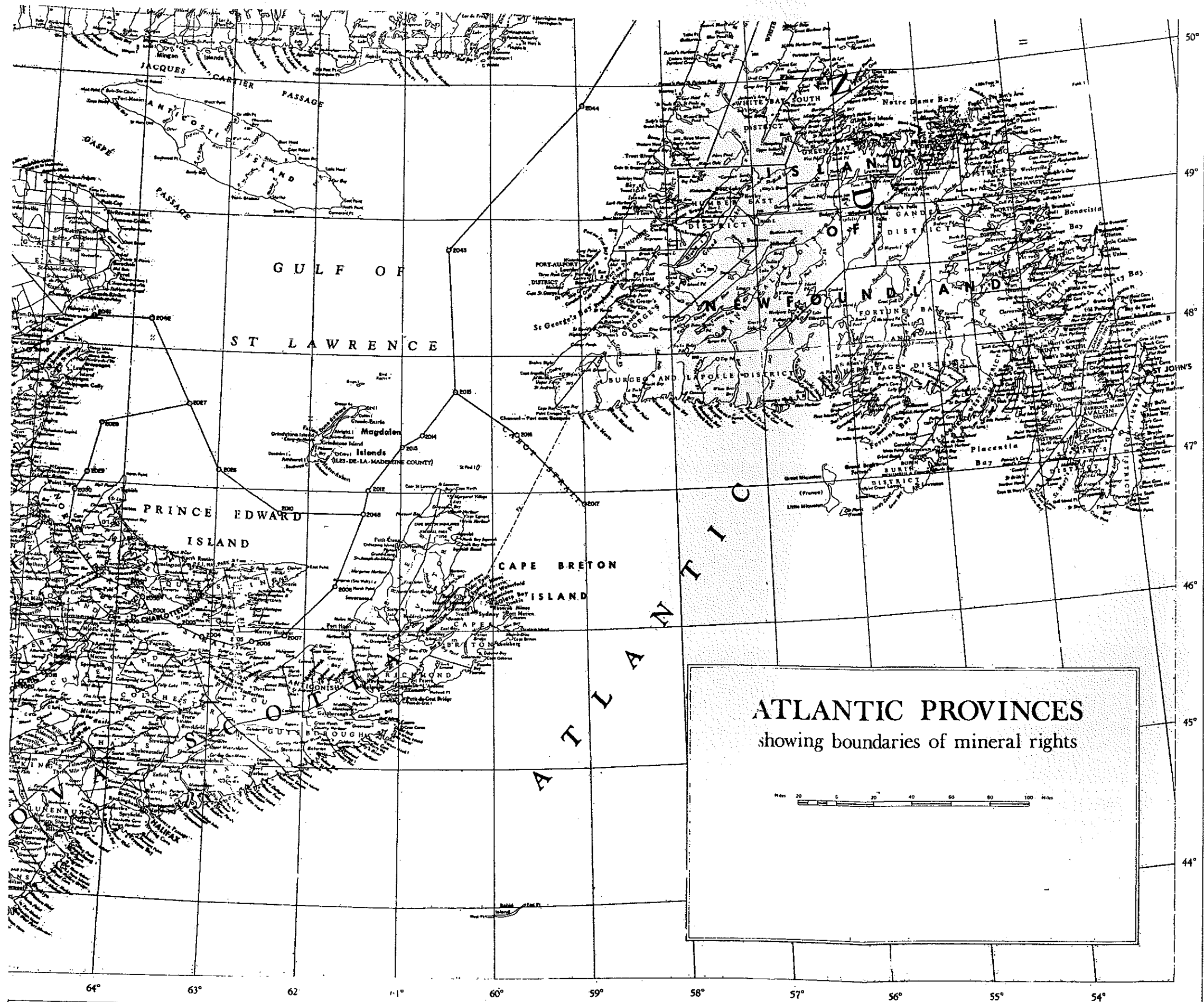
- 5.13 Responses from the other provinces varied. Minister Miller of Prince Edward Island agreed with the map and turning points so far as his province was concerned, but thought that the phrase "for all purposes" was "meaningless without further definition of 'all purposes' and is surely moving outside the jurisdiction of the Committee".⁸⁸ At the JMRC meeting on June 13, 1969, Nova Scotia and Québec agreed to the six points "without reservation". New Brunswick wished to review the boundary lines "in the light of any discussions with the federal officials". Newfoundland and Labrador reserved its position.⁸⁹
- 5.14 The position at this stage was accurately summarized by Federal Minister Lang in a letter to the Prime Minister of September 22, 1969:

The eastern five provinces have been taken up with discussions among themselves about a concerted approach; however, it is not likely that they will reach such an approach because of the unwillingness of New Brunswick and possibly Prince Edward Island to go along with what is either Nova Scotia and Quebec leadership on

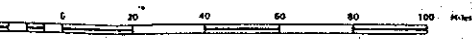
⁸⁷ *Ibid.* at 3-4.

⁸⁸ Letter from C.A. Miller, Minister, Province of Prince Edward Island to P.E. Allard, Vice-Chairman, Joint Mineral Resource Committee, (May 22, 1969) (NL Annex 34). There is also an undated note, apparently written by a P.E.I., official recommending that the province "not agree to accept inter-provincial boundary lines either as provincial boundaries, *i.e.*, enclosing provincial waters, or as a basis for revenue sharing" (NL Annex 36) and preferring some form of national pooling arrangement; this may have been written earlier in 1969, before Minister Miller's letter.

⁸⁹ "Minutes of Meeting of Joint Mineral Resources Committee" (June 13, 1969) (NL Annex 35).



ATLANTIC PROVINCES
 showing boundaries of mineral rights



the question of Nova Scotia leadership with Quebec encouragement. Newfoundland goes along with the attempt to work something out especially for the eastern five because of its very large coastline and its large share of the offshore under the tentative lines which the five provinces drew in an informal unapproved agreement several years ago.⁹⁰

In light of these divisions the Prime Minister wrote again to the premiers, urging their acceptance in principle of the federal proposal and promising flexibility on details. Indeed he drew on the analogy of international trade negotiations:

I can appreciate that a Province might hesitate to reach a settlement with the Federal Government before other Provinces have done so, in case one or more of the later settlements might involve significant changes in the administration lines. I believe it would facilitate reaching bilateral agreements with individual Provinces if we were in this particular case to adapt to federal-provincial use the principle that has been utilized for many years to enable governments on the international scene to reach agreements in matters of trade. This principle assures participants to an agreement that if one of them gives more advantageous terms to any party later on, then all parties to the original agreement will receive similar benefits.⁹¹

But for the time being no progress was made.

- 5.15 In April 1972, more than three years after the federal proposal was first made, Minister Doody of Newfoundland and Labrador took the initiative.⁹² The JMRC was asked to determine whether the five participating provinces "are still approaching the

⁹⁰ Letter from O. E. Lang, Minister Without Portfolio, Government of Canada to P. E. Trudeau, Prime Minister of Canada (September 22, 1969) (NL Annex 37).

⁹¹ Letter from P. E. Trudeau, Prime Minister of Canada to J.R. Smallwood, Premier, Province of Newfoundland (December 2, 1969) (NL Annex 38, NS Complement Annex 25A). Similar letters were sent to the other premiers.

⁹² Letter from C.W. Doody, Minister of Mines, Government of Newfoundland and Labrador to G.D. Walker, Secretary, Joint Mineral Resources Committee, (April 11, 1972) (NL Annex 46, attachment,

matter of offshore mineral rights as a joint venture".⁹³ The answer was, apparently, yes, and it was recommended *inter alia* that:

- (4) The Governments of the four Atlantic Provinces and the Province of Quebec should confirm the delineation and description of the boundaries of the said five provinces in the submarine areas and the turning points in longitude and latitude relating thereto as was requested by the Honourable Paul E. Allard on May 12, 1969, then Vice-Chairman of the Joint Mineral Resources Committee. A copy of the map showing the delineation and description of the said boundaries and the turning points are attached hereto and marked 'E'.⁹⁴

(b) **The Communiqué of Atlantic Premiers and the Vice-Premier of Québec, June 18, 1972**

5.16 This was the background to the meeting of June 18, 1972, which was intended to restate the common position of the five participating provinces. The unsigned 1972 *Communiqué* of the meeting noted the rejection of the Prime Minister's proposal of December 2, 1968. It continued as follows:

THE FIRST MINISTERS AGREED THAT:

2. THE GOVERNMENTS OF THE FIVE EASTERN PROVINCES HAVE AGREED TO THE DELINEATION AND DESCRIPTION OF THE OFFSHORE BOUNDARIES BETWEEN EACH OF THESE FIVE PROVINCES.
3. THE FIVE EASTERN PROVINCES ASSERT OWNERSHIP OF THE MINERAL RESOURCES IN THE SEABED OFF THE ATLANTIC COAST AND IN THE

NS Annex 45).

⁹³ "Minutes of Joint Meeting of Committee and Sub-committee of the Joint Mineral Resources Committee" (May 24, 1972) (NL Annex 46, NS Annex 44).

⁹⁴ *Ibid.*

GULF OF ST. LAWRENCE IN ACCORDANCE WITH
THE AGREED BOUNDARIES.⁹⁵

Premier Regan of Nova Scotia in a telex of the same date so informed the Prime Minister on behalf of the five provinces, using the language of the 1972 *Communiqué*.⁹⁶

- 5.17 In a statement to the Newfoundland and Labrador House of Assembly the following day, Premier Moores read out the "seven-point agreement outlining the areas of co-operation between the provinces", again using the exact words of paragraphs 2 and 3 of the 1972 *Communiqué*.⁹⁷
- 5.18 Counsel for Newfoundland and Labrador sought to minimize the effect of Premier Moores' statement by referring to a later passage of his speech to the House, in which he said:

Mr. Speaker, apart from the agreements themselves, the meetings also provided two very real benefits. The greatest benefit is perhaps the creation of a solid front to voice a single strong opinion on the offshore question rather than fragmented voices as in the past.

The second benefit is the joining of the Province of Quebec with the Atlantic Provinces in this matter and the common decision of each of the five Provinces that further meetings should be held soon.

The depth of co-operation and the readiness to discuss this problem by all those present at the meetings would indicate that inter-provincial co-operation on a number of other issues might be expected as well.

⁹⁵ "Communiqué issued following Meeting of the Premiers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and the Vice-Premier of Québec" (June 18, 1972) (NL Annex 48, NS Annex 54).

⁹⁶ Telegram from G. A. Regan, Premier, Province of Nova Scotia to P. E. Trudeau, Prime Minister of Canada (June 18, 1972) (NL Annex 49, NS Annex 55).

⁹⁷ "Newfoundland 36th General Assembly, "Statement by Premier Moores" in *Verbatim Report*, 1st Session, Vol. 1 No. 33 (June 19, 1972) at 2492 (NL Annex 50, NS Annex 58).

It must be stressed that the meetings did not attempt to make concrete decisions on particular problems. It must be clear that the meetings succeeded only in creating a common philosophy on the question and a procedural method will follow through.

Premier Regan of Nova Scotia, who chaired the meetings, stated strongly that further co-operation between the Governments represented and the gathering of a great deal of scientific and other information must come before final decisions are made on matters such as sharing administration costs and duties.

Steps have been taken to inform the Prime Minister of Canada of the decisions that were made.⁹⁸

The Tribunal does not accept that by these general words Premier Moores sought to undo the effect of what he himself referred to as "agreements" made the day before, agreements which he had just announced to the House of Assembly and which he evidently supported. The passage quoted more naturally refers to the general concept of inter-provincial cooperation. The coordinates and map referred to in paragraph 2 of the 1972 *Communiqué* were specific enough, and were not merely a general expression of a "common philosophy". On the other hand, neither in the 1972 *Communiqué* nor in any of the accompanying statements was anything said about how the agreements were to be implemented. All that was envisaged was "further discussions" both among the first ministers and with the Prime Minister. The 1972 *Communiqué* still embodied a claim by the eastern provinces to "ownership... in accordance with the agreed boundaries",⁹⁹ a claim which would have to be given legal effect either by way of section 3 of the *Constitution Act, 1871*, or by some form of federal-provincial legislative scheme.

⁹⁸ *Ibid.* at 2491.

⁹⁹ "Communiqué issued following Meeting of the Premiers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and the Vice-Premier of Québec" (NL Annex 48, NS Annex 54).

- 5.19 The Prime Minister replied promptly to Premier Regan's telegram, regretting that the provincial position did not form a basis for negotiations so far as the Federal Government was concerned. In particular he said:

... I would be quite prepared to arrange a meeting with you and the Premiers of the other eastern provinces if that is desired. I must make it clear, however, that 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. In view of the assertion of ownership of the mineral resources of the seabed by the provinces and that the provincial boundaries extend offshore in a manner to be delineated by provincial agreement, it might become necessary to have a resolution of the points of law at issue...

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...¹⁰⁰

- 5.20 The federal perception of the 1972 *Communiqué* was also reflected in a Cabinet submission shortly thereafter, which noted that the *Communiqué* contained "nothing really new as concerns points 1 through 4". In particular, it said, "point 2 involves jurisdictional offshore boundaries that were agreed upon by the Provincial Governments years ago, and presented to the Federal Government in 1964".¹⁰¹
- 5.21 The five East Coast Premiers held a further meeting to discuss the issue on August 2, 1972. They agreed to seek a negotiated solution rather than press their claims by litigation. The agenda papers prepared for the meeting proposed, *inter alia*, that the five provinces "request the Government of Canada to accept the delineation and

¹⁰⁰ Letter from P. E. Trudeau, Prime Minister of Canada to G. Regan, Premier, Province of Nova Scotia, (June 22, 1972) (NL Annex 51, NS Annex 117).

¹⁰¹ "Memorandum to the Cabinet: Offshore Mineral Rights" (July 10, 1972) from D. S. Macdonald, Minister of Energy, Mines and Resources, Government of Canada." (NL Annex 52 at 12), (para. 26). For the Cabinet decision, maintaining the federal position, see "Meeting of July 14, 1972, Offshore Mineral Rights" (July 19, 1972) from D. L. Leach, Supervisor of Cabinet Documents, Government of Canada (NL Annex 53).

description of the offshore boundaries between each of the Five Eastern Provinces which delineation and description was agreed upon by the First Ministers at their meeting on June 17 and 18".¹⁰² The minutes of the meeting itself record the following exchange on this item:

In dealing with the Agenda item concerning the boundaries between the Provinces, it was suggested that the Governments of the Five Eastern Provinces request the Government of Canada to accept the delineation and description of the offshore boundaries between each of the Five Eastern Provinces, which delineation and description was agreed upon by the First Ministers at their meeting on June 17 and 18. No consensus was reached on this suggestion. The meeting agreed that the position concerning the boundaries should be that taken at the meeting of June 17 and 18.¹⁰³

Accordingly no request for federal recognition of the 1972 boundary description was made in the communiqué issued after the meeting. This said, *inter alia*, that "the First Ministers have not changed the positions expressed in their June 18th Communiqué".¹⁰⁴ Apparently it was Newfoundland and Labrador that was responsible for the lack of consensus on this point. It gave two reasons for disagreeing with the proposal. First, there was "no constitutional mechanism by which the division of areas of jurisdiction for limited purposes, as opposed to the extension of provincial boundaries could be accomplished". Secondly, given Prime Minister Trudeau's summary rejection of the premiers' proposals, it was very unlikely that the Federal Government would agree to the request.¹⁰⁵ In fact there was no reason for it not to accept the lines if they really were agreed as part of an agreed plan for the offshore. The Prime Minister subsequently indicated a willingness to do

¹⁰² Letter from G. D. Walker, Legislative Counsel, Government of Nova Scotia to L. L. Pace, Attorney General, Government of Nova Scotia (August 1, 1972) with attached agenda (NL Supplementary Annex 10, NS Annex 53, Agenda Item (3)).

¹⁰³ "Minutes of Meeting of First Ministers of the Five Eastern Provinces on Offshore Minerals" (August 2, 1972) at 1 (NS Annex 56).

¹⁰⁴ *Ibid.* Attachment "F" at 2.

¹⁰⁵ Memorandum from C. Martin, Special Legal Advisor, Province of Newfoundland and Labrador to Minister of Mines, Agriculture & Resources, (August 9, 1972), at 3-4 (NL Supplementary Annex 10).

so for the purposes of the 1977 Memorandum of Understanding.¹⁰⁶ But there was no point in asking the Federal Government to recognize a provincial agreement on boundaries when it flatly rejected the underlying proposal for provincial ownership.

5.22 Shortly afterwards, Newfoundland and Labrador began a process of reviewing its offshore policy, a process which was to lead to its departure from the "joint venture", and eventually to the 1984 Supreme Court of Canada decision rejecting Newfoundland and Labrador's particular claim to offshore areas.¹⁰⁷ Of special relevance for present purposes was a letter of October 6, 1972, by Minister Doody to the Premier of Nova Scotia's Principal Secretary, Mr. Kirby. This raised the question of "the precise determination of the interprovincial boundary between the Nova Scotia and Newfoundland sectors". Minister Doody said:

... 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.

The Government of Newfoundland feels that if a find were made in an area immediately adjacent the present version of the boundary at a point where it is inaccurately established, then a severe strain would be placed on the regional agreement. I think we both feel

¹⁰⁶ Letter from P. E. Trudeau, Prime Minister of Canada to G. Regan, Chairman, Council of Maritime Premiers, (August 4, 1976), Annex 1, at 5 (NS Annex 66): "As regards the limits of the areas to be covered by the arrangement, the interprovincial lines of demarcation agreed upon by the five eastern provinces in 1964 would be accepted as a basis for settlement."

¹⁰⁷ In a letter to oil companies on August 31, 1972, Newfoundland and Labrador Minister C.W. Doody announced "an extensive review of its offshore petroleum legislation and related matters": (NL Annex 55).

that the possibility of such problems arising must be minimized where possible.

The Government of Newfoundland feels sure that a more accurate version of the boundary can be established in the co-operative manner other offshore problems are being approached.¹⁰⁸

Attached to the letter was the 1964 Map, with an alternative dashed line drawn from the last turning point (Point 2017 of the 1972 Map) in a south-south-easterly direction. Although it was not presented by Minister Doody as a precise line, it was on an approximate azimuth of 145°.

5.23 Minister Doody's letter is significant in a number of respects, not all of them pointing in the same direction:

- (1) He seems to have assumed, as between Newfoundland and Labrador and Nova Scotia, an existing boundary and an existing agreement. In successive paragraphs he refers to "the interprovincial boundary", "the present demarcation", "the present version of the boundary", "the regional agreement", "the boundary".
- (2) He refers not to the 1972 *Communiqué* but to the 1964 Map. He does not mention that the line in question was not shown in 1972, relevant though that might have been to his concerns.
- (3) He raises for the first time in the record the lack of any principled basis for the south-easterly line in the 1964 *Joint Statement*. Although the turning points identified in 1964 were established by a rather approximate method, at least there *was* a method and it was explained in the documents. In 1972 the JMRC, without questioning the method, appears to have had no difficulty in following it. But no principle was stated in 1964 justifying the line southeast

¹⁰⁸

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 57).

of the last turning point, nor was any explanation given as to why the line stopped where it did.

- (4) He does not seem to treat the issue of the precise location of the line as foreclosed by any agreement.

5.24 In the context of interstate relations governed by international law and of an existing agreement on a boundary, a letter such as Minister Doody's of October 6, 1972 would probably have been treated as the beginning of a dispute, and it would certainly have called for some response. In fact Mr. Kirby's response was mildness itself, and would have confirmed Minister Doody in his view that the location of the line was negotiable. In his reply of October 17, 1972, Mr. Kirby said:

Thank you for your letter of October 6, 1972, in which you raise the question of the precise determination of the boundary between the Nova Scotia and Newfoundland offshore areas. I certainly agree that boundaries should be established as accurately as possible. However, I am not totally clear in my own mind what principles were used in drawing the boundaries as shown on existing maps.

I have asked Graham Walker, who was Secretary to the Committee of Mines Ministers of the five Eastern Provinces, to go back through his records and determine the principles which were used in drawing the boundary lines. Once these principles have been established, I will then ask our Mines Department to draw an accurate boundary and see if it agrees with the new boundary suggested in the map enclosed with your letter.

As soon as this boundary has been drawn by our Mines Department, we can get together to discuss it. I am confident that any difficulty with regard to the boundary line can be resolved amicably.¹⁰⁹

¹⁰⁹

Letter from M. J. Kirby, Principal Assistant to the Premier, Province of Nova Scotia, to C. W. Doody, Minister of Mines, Province of Newfoundland and Labrador (NL Annex 58).

5.25 A month later the legal adviser to Minister Doody wrote to Mr. Kirby reminding him of the earlier correspondence, stressing that this was a "matter of considerable importance", and seeking a reply "at your earliest convenience".¹¹⁰ No reply ever seems to have been sent.

5.26 Further discussions in early 1973 indicated continued and increasing tensions between Newfoundland and Labrador and the other four provinces who continued to advocate a joint approach.¹¹¹ In September 1973 Newfoundland and Labrador made a direct approach to the Federal Government with a new, detailed proposal for provincial administration and a 90:10 split of revenues in its favour.¹¹² This was described (inaccurately) as patterned on the Australian offshore settlement. It was further described as an "equitable solution" to the conflict of interests. The accompanying draft Agreement, in clause 2 (ii) (a), defined "adjacent submarine area" as being

... subject to any lines of demarcation agreed to by the Province of Newfoundland with respect to the submarine areas within the sphere of interest of other Provinces.¹¹³

This was equivocal as to the existence of agreed lines of demarcation in 1973, but would apparently have given direct effect to any agreement reached without further legislation, once the Newfoundland and Labrador proposal was in place.

¹¹⁰ 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 59, NS Annex 61).

¹¹¹ The divergence of views is detailed in a memorandum to First Ministers of May 8, 1973 by J. Austin and M. Kirby Co-Chairmen (NL Annex 60, NS Annex 60).

¹¹² "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 62).

¹¹³ *Ibid.* Appendix "I" at 2.

5.27 Both the Council of Maritime Premiers and the Prime Minister reacted sharply, seeing little point in further meetings. Prime Minister Trudeau characterized the Newfoundland and Labrador proposal as seeking “a unilateral authority over offshore mineral resources within some territory which is beyond the boundaries of the Province”.¹¹⁴ Thereafter, federal attempts at a negotiated settlement involved the other four East Coast Provinces, and subsequently three as Québec also dissociated itself from any common effort.

6. The Subsequent Practice of the Parties

6.1 In addition to the two documents themselves, Nova Scotia relies on the subsequent practice of the Parties, and in particular of Newfoundland and Labrador, as showing continued adherence to the 1964 *Joint Statement* and as showing, further, the existence of an agreed line southeast of Point 2017 on an azimuth of 135°. Newfoundland and Labrador objects that such “evidence” concerns not the interpretation of an earlier agreement but its existence and is accordingly question begging. Newfoundland and Labrador also denies that the practice demonstrates anything, either as to the existence of an agreement or of the 135° line.

6.2 There is no doubt that evidence of subsequent practice is admissible in international law in relation to the interpretation of a treaty, although subject to certain limitations. Article 31 of the *Vienna Convention on the Law of Treaties*, which states the “general rule of interpretation”, provides that:

¹¹⁴ Letter from P. E. Trudeau, Prime Minister of Canada to F. D. Moores, Premier, Province of Newfoundland, (January 25, 1974) (NL Annex 65). See also Letter from R. Hatfield, Chairman, Council of Maritime Premiers to F. D. Moores, Premier, Province of Newfoundland (September 27, 1973) (NL Annex 63); Letter from G. A. Regan, Premier, Province of Nova Scotia to P. E. Trudeau, Prime Minister of Canada, (September 28, 1973) (NL Annex 64).

3. There shall be taken into account, together with the context:
...
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; ...

The Privy Council applied an analogous rule in *Re Labrador Boundary*, when it noted that “where a document is ambiguous, evidence of a course of conduct which is sufficiently early and continuous may be taken into account as bearing upon the construction of the document”.¹¹⁵

- 6.3 The evidence Nova Scotia sought to rely on in the present case concerned two distinct legal issues: first, whether the “1964 Agreement” exists as such, and secondly, what line it established to the southeast of Point 2017. The latter could be considered a question of interpretation. As to the former, the question is not one of interpretation but of the conclusion of an agreement in the first place. It is true that evidence subsequent to the adoption of a document may help to establish its status as an agreement under international law. For example, the joint action of parties in registering a communiqué under Article 102 of the *United Nations Charter* would be evidence that they considered it as a treaty, or at any rate as giving rise to binding obligations. The International Court of Justice has taken into account subsequent practice of the parties in determining whether they considered a particular instrument as binding or not.¹¹⁶ On the other hand, although such evidence is not inadmissible, its probative value will often be limited. It is not enough to show that parties acted consistently with a document claimed by one of them to have the status of a binding

¹¹⁵ [1927] 2 D.L.R. 401 (P.C.) at 422.

¹¹⁶ Thus in the *Libya-Chad* case, the failure of Libya and France to mention the unratified 1935 Convention in the Treaty of 1955 was evidence that it was not considered as binding: *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6 at 25 (para. 50). In the *Aegean Sea* case, the failure of Greece to rely on the Brussels Communiqué in subsequent correspondence was treated as confirming the Court’s conclusion as to the Communiqué: *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, [1978] I.C.J. Rep. 3 at 44 (para. 106).

agreement, since that may be explicable on other grounds. It would be necessary to show that the conduct was referable to the treaty and was adopted because of the obligations contained in it. In particular in the context of maritime delimitation, the parties may adopt a common approach to a boundary on the basis of some *modus vivendi*, a common informal understanding or a desire to avoid overlapping claims, without their practice evidencing any international agreement already concluded. Such practice may well be relevant in the delimitation of the boundary, but unless it could be unequivocally related to a prior agreement it would be a matter to be taken into account, among others, in the delimitation process.

- 6.4 The subsequent practice of the Parties was of essentially three kinds. The first concerned their continued negotiations with the Federal Government on an offshore settlement; the second concerned their permit practice. A separate though related issue was the precise direction and extent of any line drawn southeasterly of Point 2017. Something should be said about each of these.

(a) Further Negotiations for an Offshore Settlement after 1972

- 6.5 Federal-provincial negotiations concerning the offshore in the years after 1972 went through many vicissitudes, which it is not necessary to detail here. In 1977 Canada concluded with the three remaining Atlantic Provinces a Memorandum of Understanding which envisaged a later formal agreement.¹¹⁷ This lapsed when Nova Scotia unilaterally withdrew from it, and the formal agreement was never drawn up. Subsequently the federal position changed with changes of government, and the notion of a joint East Coast authority with an East Coast revenue pool was in turn abandoned. Various legislative schemes were adopted at the provincial level in the

¹¹⁷ "Federal-Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces" (February 1, 1977), (NL Annex 74, NS Annex 67).

1980s, leading eventually to the Accords of 1986 and 1987. No accords have been concluded with New Brunswick, Prince Edward Island or Québec.

6.6 It is necessary briefly to review those aspects of the negotiations during this period which bore on the existence or otherwise of agreed inter-provincial boundaries.

- (1) At a federal-provincial meeting in April 1974, not attended by Newfoundland and Labrador, Mr. Kirby the Premier of Nova Scotia's Principal Secretary, is reported as indicating "his understanding that there had been an agreement on boundaries among the Provinces some years ago"; he added that "Nova Scotia had no evidence of Newfoundland agreeing on the boundaries, but would search its files".¹¹⁸
- (2) At the same meeting Mr. T.B. Smith, Director of the Constitutional, Administrative and International Law Section in the Federal Department of Justice, gave an estimate of the legal position. In his view "we are trying to develop an arrangement that would be legally enforceable... [E]ven if Provinces had made an earlier political agreement on boundaries, this did not necessarily mean that they were locked into the arrangement".¹¹⁹ The only response was from Québec, asking whether "the Federal Government would be bound by a four- or five-Province arrangement as to boundaries".¹²⁰ Mr. Smith apparently took this as a reference to the existing situation, since he answered that "the Federal Government was not bound at all -- what was involved was simply an arrangement amongst Provinces".¹²¹

¹¹⁸ "Minutes of Meeting of Federal-Provincial Officials to Discuss East Coast Offshore Mineral Resource Administration - Arrangement of April 9, 1973", (April 30, 1974) at 6 (NL Annex 66).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, at 7.

- (3) Mr. Kirby of Nova Scotia summarized the state of negotiations in a memorandum of August 7, 1974. On the subject of boundaries, he said:

10- There are a number of technical problems which have not yet been resolved but which officials believe can be resolved by further negotiations at the officials level. These include:-

- (a) An agreement indicating precisely where the boundaries lie between each of the five Eastern Provinces. This statement is required because the veto power over the issuance of an initial exploration permit will be held jointly by the Federal Government and the adjacent Province. Therefore, the territory over which the adjacent province has a veto must be clearly defined.¹²²

- (4) At a further meeting (this time without Québec) in 1976, Mr. Walker, Nova Scotia Legislative Counsel, noted that as to interprovincial boundaries "there would be only one area of controversy, that between Nova Scotia and Newfoundland". Overall the tenor of the discussion was that no agreed boundaries were yet in place.¹²³

- (5) The Federal Government was aware of the 1964 lines but doubted whether they were currently agreed between the provinces:

20. As regards determination of the "territory" to be covered by the proposed Agreement, the Federal Government could accept the so-called "inter-provincial boundary lines" tabled on behalf of the four Atlantic Provinces by then Premier Stanfield of Nova Scotia at the Federal-Provincial Conference of October 1964 and later reportedly subscribed

¹²² Memorandum from M.J.L. Kirby, to Members of the Officials Committee on Offshore Oil and Gas of the Maritime Provinces and the Province of Québec "Summary of the existing state of negotiations with the Federal Government and a proposed procedure for resolving outstanding issues", (August 7, 1974) at 5 (NL Annex 68).

¹²³ "Minutes of Meeting of Federal and Provincial Officials to Discuss East Coast Offshore Mineral Resources", (May 12, 1976) at 13 (NL Annex 71).

to by Quebec. However, it appears that at least certain representatives of Prince Edward Island and New Brunswick are not entirely satisfied with these lines, and that the Newfoundland Government does not accept them in their entirety; however, federal representatives have not been made aware of any suggested alternatives in this context. It may, therefore, prove necessary to establish new provincial revenue-sharing lines for the Agreement area, if necessary without the consent of the Newfoundland and perhaps Quebec Governments, accepting the risk of a judicial challenge in this regard.¹²⁴

- (6) A document prepared for briefing purposes at the time of the conclusion of the 1977 Memorandum of Understanding noted that the interprovincial lines of demarcation were absent in two places:

The lines as originally drawn by the five East Coast Provinces do not extend far enough in two places to fulfill the revenue-sharing purpose for which they will be used under this new federal-provincial arrangement: off the mouth of the Bay of Fundy; and southeasterly from Cabot Strait.¹²⁵

- (7) The Memorandum of Understanding itself defines the area covered by the Agreement as follows:

2. The Area to be covered by the Agreement will be the seabed and subsoil seaward from the ordinary low water mark on the coasts of Nova Scotia, New Brunswick, and Prince Edward Island to the continental margin, or to the limits of Canada's jurisdiction to explore and exploit the seabed and subsoil off Canada's coast, whichever may be farther, and where applicable, to the Inter-provincial Lines of

¹²⁴ Memorandum to Cabinet, "Offshore Mineral Rights. Proposed Agreement with Maritime Provinces", (July 12, 1976) at 12-13 (NL Annex 72).

¹²⁵ "Possible Questions and Suggested Answers Concerning the Memorandum of Understanding to be Signed on February 1, 1977", at 4 (NL Annex 73). An earlier answer points out that the 1964 lines "were represented as inter-provincial jurisdictional boundaries", whereas under the Memorandum of Understanding they were merely revenue allocation lines: *Ibid.* at 3.

Demarcation agreed upon in 1964 by Nova Scotia, New Brunswick and Prince Edward Island.

...

4. The division of the Area among Nova Scotia, New Brunswick and Prince Edward Island will be, for the purposes of the Agreement, defined, where applicable, by reference to the Interprovincial Lines of Demarcation, or, in the absence of any such Line, as may be agreed upon by the Provinces concerned.¹²⁶
-
- (8) A Newfoundland and Labrador White Paper of May 1977 persisted in the claim to exclusive Newfoundland and Labrador ownership of offshore resources. The map attached to the White Paper, clearly does not show anything like a 135° line in the Atlantic.¹²⁷

 - (9) A Federal Justice Department options paper of July 9, 1979 described the position as follows:
 - (g) Inter-provincial lines of demarcation would be necessary in order to set out the respective areas of jurisdiction on the east coast. It remains to be seen whether the lines informally agreed in 1964 among the eastern provinces can be utilized for this purpose. Negotiation of these lines could prove difficult, particularly in the Gulf of St. Lawrence where Quebec may have particular interests...¹²⁸

¹²⁶ "Federal-Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces", (February 1, 1977) (NL Annex 74, NS Annex 67).

¹²⁷ "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) at 51 (NL Annex 75, NS Annex 129).

¹²⁸ "Offshore Resources – Options", Department of Justice, Canada (July 9, 1979) at 9 (NL Annex 80).

- (10) Prime Minister Clark in a letter to Premier Peckford of Newfoundland and Labrador in September 1979 noted that "It will be necessary at some stage for representatives of adjoining provinces to get together with federal representatives to determine mineral resource delimitation lines between provinces in offshore areas".¹²⁹

(b) The Oil Permit Practice

- 6.7 Nova Scotia also sought to rely on Newfoundland and Labrador's oil permit practice which, it said, evidenced acceptance of the 1964 boundaries, including the southeasterly line on an azimuth of 135°. It is true that an early Newfoundland and Labrador permit, granted to Mobil in 1967, did adhere to the 135° line.¹³⁰ According to Newfoundland and Labrador this was because it responded to the permit area requested by Mobil (which already had a Nova Scotia permit to an area southwest of the line). The Parties disagreed at length on whether a permit granted by Newfoundland and Labrador to Katy Industries in 1971 intended to respect the 135° line,¹³¹ as they did regarding the correctness or significance of Newfoundland and Labrador's later permits and maps that did not appear to adhere to the 135° line; for example the map attached to its White Paper¹³² did not do so.
- 6.8 Whatever the position may have been with the permits, the Tribunal does not find it necessary to analyse the oil permit practice of the Parties in any detail for present purposes. This may be a matter for a second phase of the arbitration, and the Parties are at liberty to adduce further evidence of their oil permit practice in due course. As

¹²⁹ Letter from J. Clarke, Prime Minister of Canada to B. Peckford, Premier, Province of Newfoundland (September 14, 1979) at 3 (NL Annex 81).

¹³⁰ "Interim Permit" Government of Newfoundland and Labrador Minister of Mines, Agriculture and Resources (September 15, 1967) (NL Supp. Annex 42, NS Annex 80).

¹³¹ Map of Nova Scotia showing Reservation Grid System for Petroleum Licenses, (NS Annex 77).

¹³² See above, paragraph 6.6(8).

the International Court of Justice noted in the *Tunisia-Libya* case, the practice of adjacent states in granting oil permits and licensing wells, if it produces a relatively concordant situation on the ground, may be relevant in terms of an eventual delimitation.¹³³ But it did not suggest that such a situation was sufficient to produce a boundary by agreement. The position is the same here, in the Tribunal's view. Whatever explanations may be given for the oil permit practice of the Parties since 1972, there is no unequivocal indication that that practice was referable to an earlier agreement on boundaries which was treated by the Parties as binding. In the circumstances, the analysis of the permitting practice does not assist Nova Scotia in its claim relating to an existing boundary established by agreement.

(c) The Establishment of a "Southeasterly" Line from Point 2017

6.9 Finally, something should be said about the question of the location of a delimitation line southeasterly of Point 2017. Such a line was shown in the original on the 1964 Map, but on a bearing of approximately 125°. However, as noted already, the 1964 description gave no rationale either for the direction or the length of that line. No attempt was made by the JMRC to establish the line more precisely, and it did not appear on the map which was before the East Coast Premiers at their meeting of June 18, 1972.

6.10 That there needed to be a line beyond what became Point 2017 was always clear, but the description in the *Notes re: Boundaries* was neither unequivocal nor consistent, as has been demonstrated. Any line drawn from the Cabot Strait seaward would proceed in a general south-easterly direction. The *Notes re: Boundaries* made many references to "prime directional line[s]". Phrases such as "easterly", "northeasterly", "N of E", "northerly", "southerly", "north-east" etc., abounded, but on the attached map they did not translate in any consistent way to compass bearings. Where the

¹³³

Case concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya), [1982] I.C.J. Rep. 18.

lines joined two described points, this was of little concern because the direction of the line could be otherwise ascertained; where, as with the line southeast of Cabot Strait, the terminal point was not specified, the description "southeasterly" or "S.E." gave no precise guidance.¹³⁴

- 6.11 Nova Scotia argued that the description of the line in the *Notes re: Boundaries* as endorsed in 1964 took precedence over its depiction in the 1964 map. It noted that the 135° line had been used by federal officials in discussions with the provinces concerning the shares each would receive from different versions of the revenue-sharing formula. For example a map entitled "Canada East Coast Offshore" was used by Mr. Crosby in his discussions with Nova Scotia in 1971 on revenue-sharing. That map showed the 1964 lines in the Gulf of St. Lawrence but a 135° line to the outer edge of the continental margin, and it showed calculated areas attributed to Nova Scotia and Newfoundland and Labrador for revenue-sharing purposes based on that line.¹³⁵ The 1971 map was referred to by Nova Scotia's Deputy Attorney General in advice to Premier Regan of May 13, 1971.¹³⁶ The Deputy Attorney General thought Nova Scotia's chances in any legal claim were "remote", and that the matter "must be dealt with at a political level". From a Nova Scotia point of view it was a "gamble either way" whether to adopt revenue sharing on a geographical basis or to opt for a regional pool. Evidently all these issues were still to be resolved.

¹³⁴ See above, paragraph 4.22.

¹³⁵ Map: East Coast offshore Areas prepared by Federal Department of Energy Mines and Resources (NS Annex 51). This was one of a number of "revenue-sharing maps" which federal officials had "constructed" for the purpose of discussions with the provinces: D.G. Crosby, "Note for File. Offshore Mineral Rights, Federal-Provincial Meeting in St. John's, Newfoundland, June 6, 1972", (June 14, 1972) (NS Annex 48).

¹³⁶ Letter from I. C. MacLeod, Deputy Attorney-General, Government of Nova Scotia to G. A. Regan, Premier, Province of Nova Scotia (May 13, 1971) (NS Annex 50). See also NS Annex 52, "Notes Related to Revenue-Sharing Map for Briefing Session with Premier Moores", from D. G. Crosby (May 19, 1972) showing that the same figures were used by Mr. Crosby in briefing Premier Moores of Newfoundland.

- 6.12 In the practice of the Parties after 1972, it became clear relatively soon that Newfoundland and Labrador did not accept the 1964 southeasterly line. Minister Doody's letter of October 6, 1972 has already been referred to.¹³⁷ Nova Scotia's response was accommodating, but it failed to follow up, despite being informed by Newfoundland and Labrador that this was a "matter of considerable importance".¹³⁸ Subsequent Newfoundland and Labrador maps tended to show a line which proceeded in a general SSE direction from Cabot Strait.
- 6.13 It seems that the question of the precise location of a line in the Atlantic was not raised again until the conclusion in 1982 of the first Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing. Schedule I of the Agreement used a modified version of the description attached to the October 1964 submission: "thence southeasterly to the outer edge of the continental margin",¹³⁹ which was technically an improvement on the phrase "international waters" but was no more precise.
- 6.14 Subsequently the Canadian Surveyor General was asked to calculate more precise locations of the lines and points used in the 1964 submission. It is noteworthy that in doing so he did not refer expressly to the 1972 agreed turning points. In fact the Surveyor General's versions of the turning points were materially different from those of the JMRC. His letter of November 24, 1983, to the Federal Department of Energy, Mines and Resources noted that the 1964 description was "subject to a certain amount of interpretation". As to the southeasterly line itself he said:

¹³⁷ See above, paragraph 5.22 (NL Annex 57).

¹³⁸ See above, paragraphs 5.23, 5.24.

¹³⁹ "Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing" (March 2, 1982) (NL Annex 92, NS Annex 68).

The southerly part of the boundary between Nova Scotia and Newfoundland described as: thence south easterly to International waters (from a point midway between Flint Island (N.S.) and Grand Bruit (Newfoundland), was assumed to be a line having an azimuth of 135°00'00" from the point having the geographic coordinates 46°55'28", 59°01'02".¹⁴⁰

He had earlier described those deflection points as "more or less arbitrarily accepted". The Surveyor General's points were in fact not used for the purposes of the Canada-Nova Scotia agreements and legislation. Instead Nova Scotia used the points established by the JMRC and endorsed in 1972, together with a line on a constant azimuth of 135°.

6.15 Although some Newfoundland and Labrador documents (*e.g.*, Minister Doody's letter of October 6, 1972) seem to have used the 1972 turning points, at no stage did Newfoundland and Labrador accept or endorse the 135° line. Quite apart from the Doody letter and its sequel, subsequent indications are that Nova Scotia knew Newfoundland and Labrador disputed that line.¹⁴¹

6.16 The Atlantic Accord of February 11, 1985 between Canada and Newfoundland and Labrador defined the area covered in the following terms:

68. The area covered by this Accord is that area below the low water mark lying off the coast of Newfoundland and Labrador out to the outer edge of the continental margin, coming within Canada's jurisdiction being north and east and south of the appropriate lines of

¹⁴⁰ Letter from W.V. Blackie, Surveyor General and Director, Energy, Mines and Resources Canada, to G. Booth, Department of Energy, Mines and Resources Canada. (November 24, 1983) (NL Annex 97).

¹⁴¹ See "Minutes of Meeting of Federal-Provincial Officials to Discuss East Coast Offshore Mineral Resource Administration", (May 3, 1973) at 9, 12 (NL Supp. Annex 13, NS Annex 62); Briefing Booklet produced for a meeting between federal and Nova Scotia officials on October 15, 1985 (NL Annex 101).

demarcation between Newfoundland, the adjacent provinces, and the Northwest Territories.¹⁴²

The discrepancy between the descriptions of the areas covered in federal-Nova Scotia and federal-Newfoundland and Labrador texts was continued into the Accord legislation, the implications of which the Tribunal has already discussed.¹⁴³

7. The Tribunal's Conclusions

7.1 In the Tribunal's view, the documentary record looked at as a whole does not disclose the existence of an agreement resolving the offshore boundaries of Newfoundland and Labrador and Nova Scotia, within the meaning of the Terms of Reference. This is true whether the criterion be taken to be the international law of agreements or Canadian public law. In particular, the Tribunal concludes that the Parties at no stage reached a definitive agreement resolving their offshore boundary, in the sense explained in paragraph 3.30 above.

7.2 As to the 1964 *Joint Statement*, the reasons for this conclusion are essentially as follows:

- (1) The Statement contains a clear appreciation that the provincial claims required some form of recognition or acceptance from the federal government. In other words it was predicated on the (eventually unfulfilled) hope of federal recognition of the provincial claim for ownership.

¹⁴² "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 100, NS Annex 1).

¹⁴³ See above, paragraphs 5.6, 5.7.

- (2) In this context there was no clear indication that the boundaries described in Schedule A and shown on Schedule B were agreed to conclusively or for any purpose other than that of the provincial claim to ownership.
- (3) That claim, in terms, required further action by both the provinces and Federal Government to give the boundaries legal effect; such action can be regarded as a form of confirmation or ratification.
- (4) In key respects, the boundaries were described and illustrated with a lack of precision and attention to detail that were hardly consistent with an intent to enter into a final and binding agreement. This was especially so in relation to the line southeast from Cabot Strait. The inference was that the content of the *Joint Statement* required further refinement, and would be the subject of further consultation and agreement.

7.3 The tenor of the *Joint Statement* is thus inconsistent with any intent to enter into a final and binding agreement with immediate effect. In the Tribunal's view, this would be the case even if points 4, 5 and 6 of the items of agreement were the only matters dealt with in the *Joint Statement*. The terms of the *Joint Statement* are more consistent with a political, provisional or tentative agreement, which may lead to a formal agreement but which is not itself that agreement. This is the case whether the document is viewed from the perspective of Canadian law or the principles of international law governing maritime boundary delimitation.

7.4 As to the 1972 *Communiqué*, the position was potentially different. After 1967 and in light of the Supreme Court of Canada's ruling, the real issue was not the changing of provincial boundaries under the section 3 of the *Constitution Act, 1871*, but administration under a delegated scheme together with revenue sharing. An "all

purposes” agreement between the provinces — intended to be effective and to be observed in good faith by them in terms of whatever revenue sharing scheme might emerge — could have been definitive in the sense already explained. In the Tribunal’s view, however, no such agreement was made.

7.5 In this context it may be noted that:

- (1) Despite the differences between the 1964 and 1972 maps (in particular the absence from the latter of a line southeast of Point 2017), they were closely related, as were the 1964 *Joint Statement* and the 1972 *Communiqué*. The relation between them was more that of earlier delimitation and subsequent (partial) delineation. But the reason why the 1964 *Joint Statement* did not amount to a definitive agreement was not only its lack of precision. It was also its conditional character and its linkage to a provincial claim to existing legal rights to the offshore. In neither respect did the 1972 *Communiqué* change matters.
- (2) To the extent that the boundary agreement was associated with a legal claim to the offshore it was promptly rejected by the Federal Government and the provinces collectively were unwilling to press the legal issue. The Federal Government was prepared to accept the agreed lines for the purposes of revenue distribution, but the provinces never collectively accepted any such proposal.
- (3) The August 1972 premiers meeting already showed some signs of lack of consensus on the issue, and shortly after, Newfoundland and Labrador began to dissociate itself from the common front, followed some time later by Québec. The first formal agreement on the eastern offshore, the 1977

Memorandum of Understanding was made only with the three remaining provinces and collapsed with Nova Scotia's withdrawal from it.¹⁴⁴

- (4) The subsequent practice of the Parties, taken overall, does not support the thesis that there was already a binding agreement as to offshore boundaries.¹⁴⁵ If anything it shows the contrary.

7.6 More generally, it is a striking feature of the negotiating history that none of the participants invoked earlier agreements as binding or formally protested at departures from them. When Newfoundland and Labrador raised doubts about the location of the southeasterly line, it was met not with criticism but with the suggestion that the matter could be resolved (and yet Nova Scotia took no steps to resolve it).¹⁴⁶ When Newfoundland and Labrador broke away from the East Coast negotiations this was described as a "divorce" but was treated as a *fait accompli*.¹⁴⁷ Likewise when Nova Scotia withdrew from the 1977 Memorandum of Understanding.¹⁴⁸ Throughout, the negotiations are characterized by a measure of informality and imprecision. This can only be explained as based on a shared understanding that any eventual agreement would have to be formalized, if not through section 3 of the *Constitution Act, 1871* then through joint legislation or even a constitutional amendment. The alleged 1964 agreement was not even formalized in the manner of the agreement establishing the JMRC in 1968.¹⁴⁹

¹⁴⁴ See above, paragraph 6.5. The use of the term "memorandum of understanding" is itself significant: in international practice this is frequently used for arrangements not intended to be legally binding.

¹⁴⁵ See above, paragraph 6.6.

¹⁴⁶ See above, paragraphs 5.22, 5.25.

¹⁴⁷ See above, paragraphs 5.26, 5.27.

¹⁴⁸ See above, paragraph 6.5.

¹⁴⁹ See above, paragraph 5.9.

- 7.7 The closest the provinces came to a definitive agreement was in 1972, when Minister Allard sought explicit assurances on the JMRC boundaries “for all purposes”. Yet only Nova Scotia and Québec gave unequivocal replies; Newfoundland and Labrador reserved its position, as did New Brunswick. Prince Edward Island even suggested that the “all purposes” formula went beyond the mandate of the JMRC. The subsequent *Communiqué* of June 18, 1972 was not expressed as being for “all purposes”, but for the purposes of the old provincial claim to ownership of the offshore. No doubt it was a legitimate provincial tactic in the course of extended negotiations with the Federal Government to maintain that position. But if the provinces had actually owned the offshore, one might have expected a delimitation agreement to be more carefully considered — as a minimum, to have been signed.
- 7.8 This is not to say that the successive attempts by the provinces in 1964 and again in the period 1968-1972 to reach agreement on a common position were necessarily without legal effect or consequence. The Tribunal is concerned at this 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.
- 7.9 The case for the definitive character of the 1964 *Joint Statement* was made at the time not by either Nova Scotia or Newfoundland and Labrador but by Québec. At the JMRC Meeting held on June 13, 1969, Minister Allard speaking not as Chair but on behalf of Québec...

reported that Quebec answers yes to all six questions set forth in his letter to the other Ministers and further stated that the Province of Quebec had already accepted the boundaries as they were outlined by the four Atlantic provinces before Quebec was part of the original group. Quebec accepted these boundaries in good faith and further in good faith undertook certain actions and made certain commitments

concerning the area within these boundaries. Quebec has at all times considered these boundaries as part of Quebec and there is no good reason why it should decide otherwise now. Quebec accepted the boundaries at the request of the four Atlantic Provinces, which request was considered by Quebec to have been seriously made and no one has objected to its actions or activities within those boundaries.¹⁵⁰

The Tribunal is of course only concerned with provincial boundaries as between Nova Scotia and Newfoundland and Labrador. Its decision in the present phase is limited to the question whether the interprovincial boundary between the two Parties has been resolved by agreement between them. The Tribunal has not examined the subsequent practice of other East Coast provinces and makes no decision concerning those provinces. However the point of the remarks made by Québec extends beyond the issue of a formal agreement. Minister Allard's argument focused more on considerations such as reliance, good faith, legitimate expectation and subsequent practice than on the question of a legally binding agreement. Even if, as between Nova Scotia and Newfoundland and Labrador, the interprovincial boundary has not been resolved by agreement, this does not at all exclude the relevance of such considerations in the next phase of the arbitration.

- 7.10 In the circumstances, it is not strictly necessary to say anything about the line southeasterly of Point 2017. But, in the Tribunal's view, even if the 1964 *Joint Statement* or the 1972 *Communiqué* 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.¹⁵¹ If anything, the

¹⁵⁰

"Minutes of Meeting of Joint Resources Committee" (June 13, 1969) at 3-4 (NL Annex 35).

¹⁵¹

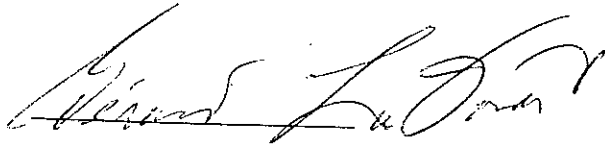
Cf. the *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6, where a dispute about the location of a southeast line arose and was resolved, by subsequent

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.

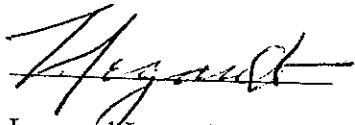
agreements, in favour of a line which did not follow an azimuth of 135°.

AWARD

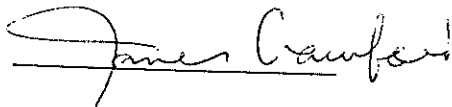
For the foregoing reasons, the Tribunal unanimously determines that the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has not been resolved by agreement.



Hon. Gérard La Forest (Chairperson)



Leonard Legault (Member)



James Richard Crawford (Member)

Appendix A

TERMS OF REFERENCE

Terms of Reference to Establish an Arbitration Tribunal for the Settlement of a Dispute Concerning Portions of the Limits of the Respective Offshore Areas as Defined in the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and the *Canada-Newfoundland Atlantic Accord Implementation Act*

CONSIDERING that a dispute has arisen between the Province of Newfoundland and Labrador and the Province of Nova Scotia concerning portions of the limits of their respective offshore areas ("offshore areas") as defined in the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c.18 ("Canada-Newfoundland Act") and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c.3 ("Canada-Nova Scotia Act");

CONSIDERING that the Government of the Province of Newfoundland and Labrador and the Government of Province of Nova Scotia ("Parties") have expressed a common desire to have the dispute referred to an arbitration Tribunal for resolution;

CONSIDERING the responsibility of the Federal Minister of Natural Resources ("Federal Minister") to determine the constitution and membership of an arbitration Tribunal and the procedure for the settlement of the dispute after consultation with the parties;

An arbitration Tribunal is hereby established with the following constitution, membership and procedure ("Terms of Reference"):

ARTICLE ONE THE DISPUTE

1.1 There is a "dispute" between the Province of Newfoundland and Labrador and the province of Nova Scotia within the meaning of Section 6.2 of the *Canada-Newfoundland Act* and Section 48.2 of the *Canada-Nova Scotia Act*; the Federal Minister has been unable, by means of negotiation, to bring about a resolution of this dispute; and the Federal Minister, pursuant to the mentioned legislation, hereby refers this dispute to arbitration in accordance with the Terms of Reference set out herein.

ARTICLE TWO THE TRIBUNAL

2.1 An arbitration Tribunal ("Tribunal") is established consisting of three members, namely Hon. Gérard La Forest, Mr. Leonard Legault, Dr. James Richard Crawford. The Chairperson of the Tribunal is Mr. Gérard La Forest.

2.2 If any member of the Tribunal is unable to act, the Federal Minister, after consultation with the Parties, shall name a replacement within a period of 30 days from the date on which the Tribunal notifies the Parties and the Government of Canada of the vacancy.

2.3 The place of the arbitration shall be Ottawa, where the Tribunal shall have its seat. Notwithstanding the foregoing, the Tribunal may hold hearings outside of Ottawa. Members of the Tribunal may also hold meetings, conference calls and deliberations outside of Ottawa, at their discretion.

2.4 After consultation with the Government of Canada and the Parties, the Tribunal shall appoint a Registrar and prescribe the Registrar's duties.

2.5 The Tribunal may employ staff and procure services and equipment, subject to the provisions of Article Twelve below.

ARTICLE THREE THE MANDATE OF THE TRIBUNAL

3.1 Applying the principles of international law governing maritime boundary 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.

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.

- (i) In the first phase, the Tribunal shall determine 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.

- (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.

ARTICLE FOUR PHASE ONE PROCEDURE

- 4.1 The following procedure will apply in Phase One:
- (i) Within three (3) months of the establishment of the Tribunal, the Parties shall file Memorials on the question of whether, in accordance with Article 3.2(i) above, 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.
 - (ii) Within one (1) month after filing of the Memorials, the Parties shall file Counter Memorials.
 - (iii) Within one (1) month after filing of the Counter Memorials, the Tribunal shall convene an oral hearing.
 - (iv) Within two (2) months after the oral hearing the Tribunal shall render its decision.

ARTICLE FIVE APPLICATION TO RESERVE DECISION

- 5.1 At the conclusion of the oral hearing of the first phase referred to in Article 4, above, either Party may request the Tribunal to reserve its decision on the first phase question until the conclusion of the oral hearing of the second phase referred to in Article 3.2(ii), above.

ARTICLE SIX PHASE TWO PROCEDURE

- 6.1 The following procedure will apply in phase two:
- (i) Within three (3) months after a decision of the Tribunal that the line has not been resolved by agreement, the Parties shall file Memorials on the question of how in accordance with Article 3.1 above, the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.

- (ii) Within two (2) months after filing of the Memorials, the Parties shall file Counter Memorials.
- (iii) Within two (2) months after filing of the Counter Memorials, the Tribunal shall convene an oral hearing.
- (iv) Within four (4) months after the oral hearing the Tribunal shall render its decision.

ARTICLE SEVEN TECHNICAL ISSUES

7.1 The Tribunal shall describe the line in a technically precise manner. To this end, the geometric nature of all the elements of the line shall be fully described, as shall all points and elements involved in the construction of the line, and the position of all the points mentioned shall be given by reference to their geographical coordinates in the North American Datum 1983 (NAD 83) geodetic system.

7.2 The Tribunal shall, for illustrative purposes only, indicate the course of the line on a Canadian Hydrographic Service chart, series 4000.

7.3 Notwithstanding the foregoing, the Parties shall be free to employ whatever illustrations, charts and geodetic systems they choose in support of their pleadings and arguments before the Tribunal.

7.4 After consultation with the parties, the Tribunal shall appoint an independent technical expert to assist it in carrying out the duties specified in Articles 7.1 to 7.2 above.

ARTICLE EIGHT ADDITIONAL PROCEDURES

8.1 Subject to the provisions of these Terms of Reference and after consultation with the parties, the Tribunal shall decide on its procedures and on all questions respecting the conduct of the arbitration.

8.2 The Tribunal may hold one or more preparatory conferences, to consider such matters as it deems appropriate.

8.3 A Party's written pleadings shall be communicated by the Tribunal to the other Party and to the Tribunal's technical expert, once the corresponding pleading of the other Party has been received by the Tribunal.

8.4 Oral arguments shall follow the written pleadings and shall be presented at a hearing to be held at a place and dates determined by the Tribunal after consultations with the Parties.

8.5 The Parties shall be represented at any hearing by their respective Agents or Deputy Agents and by such counsel, advisors and experts as they choose.

8.6 The technical expert appointed by the Tribunal shall be present at any hearing.

8.7 The time periods specified in this Agreement may be extended by agreement of the Parties or, in the absence of such agreement, by the Tribunal on application by a party or on its own motion, but, in either case, for only such longer period of time as may be reasonably necessary to ensure the fairness and effectiveness of the arbitration.

8.8 Each Party shall annex to its written pleadings a copy of all documents or other material referred to in its pleadings and on which it intends to rely during the hearing. In the event that a party intends to rely during the hearing on documents or other material not previously annexed to its written pleadings, it shall provide copies of these to the Tribunal and the other Party no later than 30 days before the hearing, or at such other time agreed to by the Parties or determined by the Tribunal after consultation with the Parties.

8.9 Unless the Parties agree, no Party shall invoke in support of its own position or to the detriment of the position of the other Party proposals or counter proposals made with a view to concluding an agreement or these Terms of Reference.

8.10 Written and oral submissions and all hearings shall be in French or English. Decisions and orders of the Tribunal shall be rendered in French or English, with translations subsequently made available in French or English as the case may be. Verbatim records of the hearings shall be produced in French or English, with translations subsequently made available in French or English as the case may be.

8.11 The Tribunal shall provide for translation and interpretation services where necessary for the efficient conduct of the arbitration.

ARTICLE NINE DISCLOSURE OF DOCUMENTS

9.1 Each party shall be entitled to request from the other Party documents and information relating to the dispute in the possession of the other Party, and that other Party shall furnish such documents and information to the requesting Party ("document discovery"). The terms of such document discovery, including applicable time periods, shall be determined by agreement between the Parties or, absent such agreement, by the Tribunal, in its discretion, after consultation with the Parties.

9.2 Each party shall be entitled to request documents and information relating to the dispute that were provided by the other Party and are in the possession of the Government of Canada, and the Government of Canada shall make provision for review of such documents and information by both Parties within 30 days from any such request. Where any such documentation or information would be protected under the Access to Information Act or the Privacy Act of Canada, the Government of Canada will consent to, or make its best efforts to obtain from the third party, within the meaning of the Access to Information Act or the Privacy Act, a release of any such duty of confidentiality to which the documentation or information is subject for the purposes of this arbitration; and the Parties will undertake as may be necessary to preserve the confidentiality.

ARTICLE TEN AGENTS

10.1 Each party shall designate an Agent for the purposes of the arbitration and shall communicate the name and address of its Agent to the other Party and to the Chairperson of the Tribunal within 30 days of the date of these Terms of Reference.

10.2 Each Agent so designated shall be entitled to appoint a Deputy to act for him/her when necessary. The name and address of any Deputy so appointed shall be communicated to the other Party and to the Chairperson of the Tribunal within 30 days of his/her appointment.

10.3 Agents shall be responsible for advocating the positions of their Governments and conducting the arbitration before the Tribunal. To this end, Agents shall:

- (1) Prepare and submit written submissions as required to the Tribunal;
- (2) Present oral arguments as required before the Tribunal; and
- (3) Consult with the Tribunal and/or its staff, Registrar or technical expert as requested by the Tribunal.

ARTICLE ELEVEN PUBLIC ACCESS

11.1 The written pleadings may not be made public until the oral hearing has commenced. Each Party shall communicate to the public only its written pleadings.

11.2 A party may make public the verbatim records of its submissions at the oral hearing.

11.3 As a general matter all hearings shall be open to the public. However, the Tribunal may hold hearings in camera on application of a Party where it is reasonably necessary to respect a duty or undertaking of confidentiality of a Party or of the Government of Canada.

ARTICLE TWELVE COSTS AND BUDGET

12.1 Each Party shall be solely responsible for all of its own costs and expenses incurred in the preparation and presentation of its case in the arbitration.

12.2 The costs and expenses of the arbitration, including the remuneration of members of the Tribunal and all costs and expenses of the Tribunal, including in respect of staff employed, services procured and provided and any independent expert engaged in the course of the arbitration, shall be borne by the Government of Canada.

12.3 The remuneration of the members of the Tribunal shall be:

- (1) Chairperson: \$1,400.00 CDN per day plus reasonable expenses;
- (2) Member: \$1,250.00 CDN per day plus reasonable expenses.

12.4 The Tribunal shall record the Tribunal's expenses in detail and render a final account of them to the Government of Canada.

12.5 All amounts referred to in Articles 12.2 – 12.4 above are limited by the approved budget of up to \$1,500,000 CDN, or up to such other amount as shall be set by the Government of Canada, after consultations with the Tribunal.

ARTICLE THIRTEEN DECISION OF TRIBUNAL

13.1 All decisions and orders of the Tribunal shall be made by a majority of its members, after deliberation among all members of the Tribunal.

13.2 All decisions and orders of the Tribunal shall be in writing and shall set forth the reasons on which they are based. A member of the Tribunal shall be entitled to attach to its decision or order his/her individual or dissenting opinion.

13.3 All decisions and orders of the Tribunal shall be rendered and transmitted to the Parties within the shortest reasonable time. The Tribunal's final decision(s) concerning the issues set out in Article Three above shall also be transmitted to the Government of Canada.

13.4 A Party may make public the text of the Tribunal's decisions and orders including any individual or dissenting opinion.

ARTICLE FOURTEEN FINALITY

14.1 All decisions and orders of the Tribunal shall be final and binding on the Parties and the Government of Canada, subject to the provisions of these Terms of Reference and applicable law.

14.2 A party may refer to the Tribunal any dispute with the other Party as the meaning and scope of the Tribunal's decisions and orders no later than 30 days after the date of the decision or order.

14.3 The Tribunal is empowered to correct any material error relating to its decisions and orders at the request of either Party no later than 60 days after the date of the decision order.

ARTICLE FIFTEEN REGULATIONS

15.1 The Federal Minister shall recommend that the Governor in Council by regulations made pursuant to sections 5(1), 6 and 48(5) of the Canada-Nova Scotia Act amend to the extent necessary the description of the portion of the limits set out in Schedule 1 of the Canada-Nova Scotia Act in relation to which the dispute arose, and by regulations made pursuant to sections 5(1), 6(5) and 7 of the Canada-Newfoundland Act prescribe the line in relation to which the dispute arose, for the purpose of paragraph (a) of the definition of "offshore area" in section 2 of the Canada-Newfoundland Act, the whole in accordance with the outcome of the arbitration determining as between the Parties the line delimiting their respective offshore areas as set forth in Article Three of this agreement.