CHAPTER II GENERAL ASSESSMENT OF THE NOVA SCOTIA MEMORIAL

I. Introduction

5. The differences between the parties are far-reaching, but on one critical issue they are substantially in agreement. What would be required for an affirmative answer to the Phase One question is a *legally binding agreement*, the test of such an agreement being the intention of the parties to create binding legal relations. Such intention is a question of fact, as both parties agree.[3] However, having set out such a test, Nova Scotia then fails to meet it. The facts simply cannot support the conclusion that Newfoundland and Labrador and Nova Scotia - at any point - intended to enter into a legally binding agreement.

6. The burden of proof is on Nova Scotia to demonstrate that the line has been resolved by agreement, and the question at this stage is whether Nova Scotia has discharged that onus in its Memorial of December 1, 2000. As this Counter Memorial will show, Nova Scotia has failed to do so.

I. The Principal Nova Scotia Arguments

7. The main propositions of Nova Scotia can be summarized as follows:

   a) that the applicable law with respect to the issue of agreement is international law,

   b) that what is required is a legally binding agreement, the test of which is the intention of the parties,

[3] Nova Scotia (NS) Memorial, page III-6, para. 8; page III-11, para. 16; page IV-3, para. 5.

c) that the line has been resolved by an agreement concluded on September 30, 1964, the binding effect of which is shown by,

   (i) the "plain words" of the agreement;

   (ii) its "object and purpose"; and

   (iii) the "subsequent conduct" of the parties,

d) that the "1964 Agreement,"

   (i) provides for a line of 135° through the outer continental shelf; and

   (ii) applies for "any and all purposes" including the current federal-provincial Accords,

e) that the Nova Scotia line is also binding on Newfoundland and Labrador by virtue of acquiescence and estoppel, as defined by international law.

8. The parties are substantially agreed on point (b) above, the test of whether the line has been "resolved by agreement", but differ on each of the other contentions. The position of Newfoundland and Labrador will be set out in detail in this Counter Memorial and is briefly summarized in the paragraphs that follow.

II. The Applicable Law

9. The difference between the parties on the applicable law is obviously important; and yet its significance is narrowed by their agreement that intention, a question of fact, is the test of a legally binding agreement. As the Memorial of Newfoundland and Labrador has pointed out,

the same test applies with respect to intergovernmental agreements in Canadian law.[4] If, therefore, Nova Scotia has failed to establish what it refers to as "binding intent," as a question of fact, its submission must fail, regardless of whether Canadian or international law applies. It is only if that initial factual threshold can be crossed that the differing requirements of Canadian and international law respectively would require consideration.

10. The Nova Scotia position that the question of whether the line has been resolved by agreement is to be governed by international law is incorrect for each of the following reasons:

    a) it is contrary to the ordinary meaning of the expression "principles of international law governing maritime boundary delimitation," used in both the legislation and the Terms of Reference;

    b) it is inconsistent with the clear but limited purpose expressed in the legislation for the exceptional application of international law in what is a domestic proceeding; and

    c) retroactively applying the wrong system of law to the actions of two provinces of the Canadian federation would produce absurdity and potential injustice.

11. The first of these three points is decisive. The Terms of Reference do not refer to international law in general. They refer to "the principles of international law governing maritime boundary delimitation."[5] That phrase denotes a specialized and discrete branch of the international law of the sea, easily identified, and consisting of the rules and principles codified *inter alia* in

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[4] N&L Memorial, paras. 156-171.

[5] Terms of Reference, Article 3.1.

Articles 74 and 83 of the 1982 *Law of the Sea Convention,*[6] and reflected in the international jurisprudence from the *North Sea Continental Shelf Cases*[7] onward and in a considerable body of state practice.

12. Nova Scotia disregards this limiting language. It treats the Terms of Reference as if they provided for a general and unlimited adoption of all branches of international law. The Nova Scotia approach has the effect of deleting the critical phrase "governing maritime boundary delimitation,"[8] and depriving it of any substantive effect, as if the legislation and the Terms of Reference simply referred to "the principles of international law" without descriptive or limiting words of any kind.

13. A limitation on the scope of international law made applicable is therefore required by the language used in the Terms of Reference. It is also required by a consideration of the legislative purpose behind that language. In this context, the purpose of adopting international law is obvious: there is no domestic law on the delimitation of the continental shelf, while there is a very full body of international law on this subject. The adoption of international law was designed to fill a legal vacuum. This limited purpose, plainly, does not extend to the determination of whether a binding interprovincial agreement already disposes of the issue. That is an inherently domestic issue to which domestic law should be applied, and which is not even conceivably within the purview of "the principles of international law governing maritime boundary delimitation."[9]

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[6] *United Nations Convention on the Law of the Sea,* (1982) 450 UNTS 11, Supplementary Statutes # 12.

[7] *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 3, Supplementary Authorities # 10.

[8] Terms of Reference, Article 3.1.

[9] *Ibid.*

14. Finally, the Nova Scotia position leads to absurdity. It would be absurd to apply the rules of international law to the actions of two provinces in the 1960s, when those provinces were at all material times subject to Canadian law and had no legal right to act except within that legal framework. International law was irrelevant to interprovincial relations in 1964, and it remains so.

15. An analysis that applies the wrong system of law to matters that are clearly subject to a different system of law is almost certain to be flawed. It could lead to a result that would be contrary to the legal rules that really applied: in other words, to a result that would be, in effect, illegal. It could also lead to a result that would contradict the legitimate expectations of the people who were involved and the constituencies they represented: in other words, to a result that would be unjust.

16. Even if international law applied, the basic tenets of the Nova Scotia position would still fail. First, as Nova Scotia has emphasized, the creation of a binding international treaty depends on the intention of the parties, which is a question of fact. This consideration leads straight back to the Canadian constitutional context, and therefore to Canadian law.[10] Simply put, the parties could not possibly have intended legal consequences that could not have resulted from their conduct within the legal framework to which they were subject. Second, international law governing maritime boundary delimitation is to be applied "with such modifications as the circumstances require...."[11] The "circumstances" include, above all, the fact that the parties were, and remain, not sovereign states but provinces of the Canadian federation subject to a legal regime that has nothing whatever to do with international law so far as the formation of legally binding agreements is concerned.

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[10] N&L Memorial, paras. 144 & 145.

[11] Terms of Reference, Article 3.1.

III. The Test of a Legally Binding Agreement

17. The Nova Scotia Memorial is replete with references to the requirement of a "binding agreement,"[12] which implicitly recognizes the existence of other types of agreements that are not binding, including political undertakings or policy agreements, provisional or *ad referendum* agreements, agreements subject to ratification or legislation, or agreed proposals made in the course of a multilateral negotiation. Nova Scotia is no less explicit with respect to intention as the test of a binding agreement, and the factual nature of that test: "[t]he Parties' Intent to be Bound is the Key" – one of its headings proclaims.[13] It states 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."[14]

18. These principles – alone among the issues – are a matter of agreement between the parties. And they are fatal to the Nova Scotia argument, because on the facts of this case it is clear that the requisite intention to be legally bound cannot be established. This would involve disregarding both the "plain words" of the 1964 documents and their "object and purpose." It would overlook the fact that the 1964 proposal was never styled as a self-executing agreement, but as a request – which was never carried out – for federal legislation under section 3 of the *Constitution Act, 1871*.[15] It would also overlook the fact that the 1964 proposal was linked to a more fundamental objective of constitutionally recognized ownership and jurisdiction over the offshore, which was never achieved.

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[12] NS Memorial, page II-44, para. 85; page II-48, para. 94; page II-50, para. 99; page III-1, para. 2; pages III-3 to 8 inclusive (multiple references); page IV-1, para. 1; page IV-4; para. 6; page IV-5, para. 10; and page IV-33, para. 33.

[13] NS Memorial page III-6, heading (ii). See also page III-3, heading B and page III-6, para. 8.

[14] NS Memorial, page IV-3, para. 5. See also page III-11, para. 16: " the question of intent to be bound is factual one, to be answered in light of the available evidence..."

[15] Supplementary Statutes, # 2.

IV. The Application of the Test to the Facts

19. The agreed test as to whether the line has been resolved by agreement puts the focus in this case decisively on the facts. Every element of the historical record contradicts the notion that there was an intention to conclude a legally binding agreement in 1964. Three early examples illustrate this:

- Premier Stanfield, in his Submission, characterized the lines as "tentative."[16]

- Replying to the Prime Minister in the open plenary of the 1965 federal-provincial conference, Premier Smallwood said that the lines were only a proposal and the provinces had not attempted to make them law.[17] Premier Smallwood's response did not engender any reaction or comment from Nova Scotia.

- The Vice-Chair of the Joint Maritime Resources Committee wrote to the Atlantic provinces in 1969 calling for (i) formal confirmation of the boundaries by each government; (ii) the conclusion of an intergovernmental agreement; and (iii) legislation.[18] These requests make no sense if a boundary had already been agreed to.

As will be pointed out in Chapter V, there were numerous similar statements in subsequent years.

20. In the face of this evidence, the obstacles facing the central proposition of the Nova Scotia case are overwhelming if not insuperable. Undaunted, Nova Scotia has attempted to rewrite

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[16] Stanfield Submission (October 14, 1964) at 14, N&L Doc. # 15.

[17] Federal-provincial Conference (July 21, 1965) at para. 118, N&L Doc. # 21.

[18] Letter from P. Allard to P. Gaum (May 12, 1969), N&L Doc. # 33.

the historical record with an argument under three general headings: the "plain words" of the purported agreement, its "object and purpose," and the "subsequent practice" of the parties.[19]

A. The "Plain Words"

21. Every word that Nova Scotia quotes as the "plain words" showing an intention to be legally bound relates to a request for constitutional legislation by the Parliament of Canada to "give effect" to the boundaries – legislation that was never even drafted let alone enacted.[20]

22. A request for legislation is not consistent with an expectation that the parties will be legally bound by an agreement if the legislation is not enacted. It is an expression of a desire to become bound when and if the legislation is passed, and to be bound not by an agreement but by the legislation itself. And it carries the implication that if the requested legislation is not passed – if the stated condition is not met – then the interested parties will not be bound. When the request is framed in terms of legislation "to define the boundaries"[21] and "to give effect to the boundaries,"[22] the further implication is that absent such legislation the boundaries would not have been defined let alone have any legal effect. In short, the record shows that the Premiers intended their provinces to be bound only if the lines were legislated – exactly the opposite to what Nova Scotia submits.

23. A recurring theme in the Nova Scotia Memorial is that because the words "agreed" or "agreement" were used from time to time, they must refer to a legally binding agreement. The argument overlooks a point made in the Nova Scotia Memorial itself: international law (always the touchstone for Nova Scotia) recognizes that there may be instruments

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[19] NS Memorial, pages IV-i and IV-ii.

[20] NS Memorial, pages IV-2 and 3, para. 3.

[21] Stanfield Submission (October 14, 1964), N&L Doc. # 15.

[22] *Ibid.*

characterized by the parties as "agreements" that are not intended to be binding.[23] The same is true in domestic law, as shown by *Reference re Canada Assistance Plan*[24] and *South Australia* v. *The Commonwealth*[25] cited in the Newfoundland and Labrador Memorial.[26]

24. The word "agreement" itself, therefore, is neutral: it can refer to a merely political agreement or understanding or to a legally binding agreement. A statement that politicians have met and "agreed" or "reached agreement" does not *prima facie* mean that they have concluded a legally binding and executory agreement. The so-called "1964 Agreement," the linchpin of Nova Scotia's case, turns out, like so much else, simply to beg the question – which is whether or not something characterized as an "agreement" was intended by the parties to be legally binding in and of itself.

B. The "Object and Purpose"

25. So much, then, for the "plain words" of a document that does not even exist. Nova Scotia argues next that the "object and purpose" of the purported agreement demonstrates an intention to be bound.[27] In fact the opposite is true. The "object and purpose" of the 1964 proposal was inextricably linked to the objective of constitutionally recognized ownership of offshore resources.[28] If the Parliament of Canada had enacted legislation pursuant to the *Constitution Act, 1871* providing for provincial boundaries extending throughout the offshore, the legislation would have constituted federal recognition of the provincial claim, and by the

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[23] NS Memorial, page IV-5, para. 10, citing McNair on *The Law of Treaties*.

[24] [1991] 2 S.C.R. 525 at 553-554 (per Sopinka J.), N&L Authorities, # 5.

[25] (1962), 108 C.L.R. 130 (H.C. of A.) at 154, N&L Authorities, # 9.

[26] N&L Memorial, paras. 159, 161, 162.

[27] NS Memorial, page II-5, paras. 9-11.

[28] N&L Memorial, paras. 207-209. See also NS Memorial, Annex 9.

same token, it would have put the provincial claim beyond challenge. The requested legislation would have been the vehicle for the entrenchment of the provincial claim to ownership and jurisdiction. That was the "object and purpose" of the initiative, and it demonstrates that there could never have been an intention to bring the boundaries into legal effect without federal approval and legislative implementation.

26. The "object and purpose" of the purported agreement, according to the Nova Scotia Memorial, was legal certainty.[29] This objective was to have been achieved through federal acceptance and constitutional legislation, not by a political communiqué. The objective of legal certainty is totally inconsistent with the Nova Scotia position that the boundaries were brought into legal force in a casual manner, or that the requested constitutional legislation was not required.

27. Nova Scotia then draws attention to the "special quality of boundary agreements in international law."[30] While it is true that international law (setting aside the question of its applicability) puts boundary treaties on an especially secure footing, this presupposes that the treaty has entered into force. International law, obviously, does not treat *draft* boundary agreements, or *proposals* for boundary agreements, or *unratified* boundary agreements as treaties in force. If anything, the immutability of boundary agreements that have entered into force calls for great caution in attributing to the parties an intention to be bound. Once again, the Nova Scotia argument about the "special quality" of boundary agreements simply begs the question.

28. In any event, the very concept of "object and purpose" is out of place, and not only because international law is not the governing law with respect to interprovincial agreements. "Object and purpose" is a principle of *interpretation*. It relates to the interpretation of treaties *in force*,

[29] NS Memorial, page IV-5, para. 9.

[30] NS Memorial, page IV-6, para. 10.

as codified in Article 31 of the *Vienna Convention on the Law of Treaties.*[31] It has nothing to do with the determination of whether or not an agreement is in force, which is the only issue in this phase. Here as elsewhere, Nova Scotia has assumed its conclusion in order to prove it – circularity of a particularly transparent kind.

C. Subsequent practice

29. Far from confirming an intention to become bound, the historical record subsequent to 1964 contradicts it. Time and time again, as the Newfoundland and Labrador Counter Memorial will show, the historical record discloses statements and initiatives by key players that demonstrate that while there may have been lines proposed in 1964, they had never entered into force, and that no legally binding agreement had been concluded.

30. The argument from subsequent practice is also legally misconceived. There is extensive reliance on Article 31, paragraph 1(c) of the *Vienna Convention* [32] to give the subsequent practice argument some legal substance and inflate its importance.[33] The legal fallacy here is the same as in Nova Scotia's reliance on "object and purpose." Article 31 applies to the interpretation of treaties *in force*. It has nothing to do with the determination of whether a treaty exists in the first place.

31. Practice alone cannot constitute a legally binding agreement. It must, as Nova Scotia emphasizes, be accompanied by an intention to create binding legal relations. That intention must be expressed. Without that intention, practice is practice, and nothing more. It is fallacious to infer the existence of a legal obligation solely from a pattern of state conduct,

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[31] (1969), 1155 U.N.T.S. 331 (*Vienna Convention*), N&L Statutes, # 10.

[32] *Ibid.*

[33] See for example, NS Memorial, page III-9, para. 14.

however settled, and doubly fallacious to assume that the imputed obligation stems from a binding agreement.

32. Nova Scotia states that "if Newfoundland issued permits along its boundaries so as to conform to the line, it can only be because it viewed those boundaries as settled and binding."[34] The statement, which in any event is not supported by the facts, is a complete *non sequitur*. It assumes, without explanation, that to allege a *de facto* practice is sufficient to prove that it was intended to be binding *de jure*. This is inconsistent with a major premise of the Nova Scotia case, which stresses that an intention to become bound is the essential prerequisite of a binding agreement.[35] Such an intention cannot be presumed. It must be demonstrated. Nova Scotia has presented no evidence showing that the alleged actions of Newfoundland and Labrador were based upon a perception of legal obligation.

33. The Nova Scotia argument equating "subsequent practice" with a recognition that a binding agreement is in force is not only wrong but dangerous. Its approach would be inimical to political cooperation and good faith in negotiations. It would be a serious error to equate compliance with provisional agreements, or agreements pending ratification, or proposals in an ongoing negotiation, with a recognition that an agreement is in force. In many of these situations, *de facto* compliance is simply a matter of political responsibility and of good faith in the conduct of negotiations.

34. The conduct of the other East Coast provinces is called in aid.[36] It is no more persuasive. The argument is also based on the fallacy that a *de facto* practice can automatically be equated with a *de jure* obligation. The provisional use of a median line in the absence of an agreement is a perfectly normal practice, especially in a configuration of opposite coasts like the Gulf.

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[34] NS Memorial, page II-44, para. 85.

[35] NS Memorial, page III-6, para. 8.

[36] NS Memorial, pages II- 42 and II-43, paras. 80-83.

35. On this topic, the rhetoric of the Nova Scotia Memorial – seldom restrained – rises to a fever pitch. Newfoundland and Labrador, it is alleged, is asking the Tribunal "to erase, indeed, all of the interprovincial boundaries agreed to by the five East Coast Provinces in 1964 – and thereby throw into disarray over 36 years of regional stability."[37] This *in terrorem* suggestion has no basis. The Newfoundland and Labrador position would leave the delimitation of the Gulf exactly where it has always been - a matter of *de facto* practice at most. It has never been a matter of compliance with a fictitious agreement where not one of the legal steps needed to bring such an agreement into force, as identified by the JMRC in 1969, was ever taken. What would indeed be destabilizing to the Canadian federation - and not merely with respect to offshore resources - is the Nova Scotia position that binding, executory and irrevocable agreements on matters of the highest constitutional importance can be brought into effect by vague and conditional undertakings by politicians, with neither legislative authority nor sanction, nor even a signed agreement that could be subjected to public and legislative scrutiny.

36. Nova Scotia makes a great deal of its contention that the reasons for Newfoundland and Labrador's decision in 1973 to withdraw from the multilateral negotiations did not relate to the boundary.[38] This assertion, as Chapter V will demonstrate, is wrong. But, in any event, when a negotiation comes to an end without a concluded agreement, it is not just the "deal-breaker" that fails to enter into force. Nothing enters into force. All the proposals fall to the ground, whether they were contentious or not. All Nova Scotia's Memorial does is corroborate Newfoundland and Labrador's position that the negotiations were still under way in 1973, which means that there can have been no agreement concluded in 1964.

[37] NS Memorial, page I-6, para. 17.

[38] NS Memorial, page II-33 to II-37, paras. 64-71.

VI. Consequential Issues

37. Much of the Nova Scotia Memorial is taken up with arguments that attempt to anticipate two powerful objections to its claim. The first objection is the direction of the line in the outer area is nowhere to be found in the relevant historical documents.[39] The second objection is the contention that the "1964 Agreement" applies for "any and all purposes," including the special regime of the federal-provincial Accords, and was not linked to its stated subject matter of provincial ownership and jurisdiction.[40]

38. These are consequential issues in the sense that they would become material only if the Tribunal were to decide that a legally binding agreement of some sort is in existence. They are nevertheless critical, because each issue would have to be resolved in Nova Scotia's favour if it is to prevail. Both issues have already been dealt with in the Memorial of Newfoundland and Labrador.[41]

A. The 135° line[42]

39. The critical area in this dispute, as Nova Scotia itself has said, is the outer continental shelf.[43] But here, Nova Scotia's 135° line is conspicuously absent from the historical record on which Nova Scotia relies in order to establish the existence of an agreement. In 1964, when the purported agreement was made, the focus of attention, so far as boundaries were concerned,

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[39] NS Memorial, pages IV-14 to IV-25, paras. 23-51.

[40] NS Memorial, pages IV-26 to IV-30, paras. 52-62.

[41] N&L Memorial, paras. 207-209 ("any and all purposes") and 210-223 (the direction of the line in the outer area).

[42] The 135° line claimed by Nova Scotia is a line drawn from Turning Point 2017 on an azimuth of 135°. Hereafter, this will be referred to as the "135° line".

[43] Statement by Premier Hamm (May 31, 2000), N&L Doc. # 116.

was exactly the opposite – it was the Gulf.[44] It is not surprising, therefore, that beyond the entrance to Cabot Strait, the seaward extension of the boundary was described in terms that are not only vague, but profoundly ambiguous. There may have been an intention to delineate the boundary in the outer area in the fullness of time, but nothing had been developed with either the certainty or the precision that would be expected of a legally operative boundary.

40. Certain facts cannot be ignored. The 135° line is neither referred to in the "Notes re: Boundaries" nor is it depicted on the "Chart Showing proposed boundaries" of the five East Coast provinces, both of which accompanied the Stanfield Submission.[45] In fact, the 135° line is demonstrably inconsistent with both. The 1964 map depicts a line on a distinctly different bearing (a difference far too large to be explained away as a "drafting error"). The 135° line is equally inconsistent with the methodology contemplated by points 2, 3, and 4 of the introduction to the "Notes re: Boundaries."[46] When the lines were plotted with greater precision by the JMRC in 1969 – the most definitive expression of the 1964 proposal – the map produced showed no boundary at all in the outer area, but rather a line that stopped abruptly at Turning Point 2017 (the midpoint between Flint Island and Grand Bruit).[47]

41. The 135° line was an invention of federal Surveyor-General W.V. Blackie for the purpose of preparing legislation implementing the 1982 *Nova Scotia Agreement* – it came into existence long after both the original 1964 proposal and the work of the JMRC. The 135° line was characterized by Blackie, in his own terms, as an *assumption*, as opposed to something

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[44] N&L Memorial, paras. 210-223.

[45] N&L Doc. # 15. The map accompanying the Stanfield Submission is found in the pocket of the N&L Memorial.

[46] N&L Doc. # 15.

[47] N&L Memorial, Figure 4.

actually appearing in the source documentation.[48] Newfoundland and Labrador was not involved in this legislative process, which was of concern only to the federal government and to Nova Scotia, and Newfoundland and Labrador had nothing to do with the 135° line.

B. The subject matter of the 1964 proposal

42. Having claimed that it has established that the "1964 Agreement" exists, Nova Scotia then claims that the agreement applies for "any and all purposes," including the current Accords.[49] In so doing, Nova Scotia implicitly recognizes a fundamental difficulty with its own argument: the subject matter of the 1964 proposal was ownership and jurisdiction, not the far more limited regime of cooperative management and delegated benefits provided by the Accords that form the subject matter of this arbitration. But the contention that the agreement applies "for any and all purposes" would be incorrect even if the agreement existed. As the Memorial of Newfoundland and Labrador pointed out, an agreement made for a specified purpose cannot be applied for any other purpose – related or not – without the express agreement of the parties.[50]

43. The source of the phrase "any and all purposes" cited in quotation marks in the Nova Scotia argument is obscure. It may be that it is intended as a paraphrase, with editorial embellishment, of point 3 in the letter from Minister Allard of the JMRC of May 12, 1969, which requests each province "to report back" that "the boundaries are effective for all purposes...".[51] None of the provinces took the steps requested in the Allard letter.[52]

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[48] N&L Memorial, para. 93. Letter from W.V. Blackie to G. Booth (November 24, 1983), N&L Doc. # 97.

[49] NS Memorial, page IV-26, para. 52.

[50] N&L Memorial, para. 209.

[51] N&L Doc. # 33.

[52] N&L Memorial, para. 47.

44. Even less convincing is the attempt to distance the 1964 proposal from its stated aim of ownership and jurisdiction by invoking the terms of a communiqué issued by the Premiers in 1972, which Nova Scotia claims opened the door to the possibility of delegated arrangements and a regional administrative authority. The communiqué is in fact a resounding reaffirmation of the original claim to ownership, and nothing less. Moreover, it is in that context – ownership and jurisdiction – that the delineation of maritime boundaries was referred to. The suggestion that the Premiers' proposal of 1972 (which in any event came to nothing) was "exactly the type of arrangement that was ultimately agreed in the two Offshore Accords"[53] contradicts the express terms of the proposal, whose main point was ownership, with cooperative arrangements as a possible "superstructure" upon that foundation.

VII. Acquiescence and Estoppel

45. Even if international law were applicable, acquiescence and estoppel would have no role to play in this proceeding. What is to be determined is whether the line has been resolved "by agreement"[54] – not in some other fashion. An "agreement" is something conceptually distinct from the doctrines of acquiescence and estoppel. An agreement is an affirmative and conscious act, a meeting of minds to which some form of expression has been given.[55] Acquiescence is an essentially passive concept that involves neither a meeting of minds, nor its expression, nor an intentional creation of legal obligations. Estoppel, moreover, is based

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[53] NS Memorial, page IV-29, para. 58.

[54] Terms of Reference, Article 3.2(i).

[55] The concept is succinctly put in the words of Judge Read, quoted in the Nova Scotia Memorial, that an "agreed arrangement...necessarily included two elements: a meeting of minds; and intention to constitute a legal obligation." Nova Scotia Memorial page III-7, para. 10, quoting the Separate Opinion of Judge Read in *International Status of South-West Africa* [1950] I.C.J. Rep. 128 at 170.

on considerations of good faith in conduct and detrimental reliance that have nothing to do with the existence or otherwise of an agreement.[56]

46. Throughout its argument Nova Scotia has wrapped itself in a mantle of high political virtue. It fits badly. What Nova Scotia is really calling for, as essential to avoid acquiescence, is politically irresponsible and provocative conduct – something that Newfoundland and Labrador has not engaged in. The Nova Scotia Memorial has a great deal to say about good faith in international law. Good faith is indeed the basis of estoppel and much else. But it is also a consequence of this principle, and of negotiation in good faith in particular, that confrontational conduct in a negotiating context should be avoided. A course of political restraint is not acquiescence; not, at any rate, in a legal system that values civility and amicable relations.

47. The provinces were acting on a well-understood legal premise – that under the Canadian Constitution, unlike international law, territorial rights are not acquired by conduct and claim, or by recognition or acquiescence. These are totally irrelevant in the Canadian constitutional order. Territorial rights of any kind, including the resource rights that go with them, are fixed by the Constitution, and can only be altered by the legislative procedures laid down in the Constitution.[57] It is legally irrelevant in what areas a province purports to exercise jurisdiction and it is legally irrelevant how neighbouring provinces react. The "creation of facts"– *les effectivités* – that characterizes the acquisition of territory in international law has no place whatever in Canadian domestic law.

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[56] Acquiescence and estoppel are discussed in Chapter VI.

[57] *Constitution Act, 1867,* s. 7, Supplementary Authorities, # 1; *Newfoundland Act*, Term 2 of the Schedule (the *Terms of Union*) which is part of the Constitution of Canada by virtue of s. 52(2) of the *Constitution Act, 1982*, Supplementary Authorities # 3 and # 4; *Constitution Act, 1871*, s. 3, Supplementary Authorities # 2.

48. Nova Scotia portrays a make-believe world of sovereign states, and seeks a decision based on that fictional premise. It is time to return to reality. The difference between the parties on the applicable law has already been noted. Beyond that question – but closely linked to it – is how anomalous it would be to evaluate the conduct of two provinces over three decades ago in terms of the practices of international diplomacy. The parties are not sovereign states. They could not be expected to act as such. The provinces are not equipped with the apparatus of diplomacy or accustomed to its norms. Nor should they be. They guide their conduct by the Constitution, and by Canadian political traditions. It would be artificial and potentially unjust to approach the issues on any other basis.

49. This chapter has pointed out the major directions of the Nova Scotia argument and indicated why they have no basis either in law or in fact, or in both. The parties agree that the fundamental issue is whether a legally binding agreement has been entered into between Newfoundland and Labrador and Nova Scotia, and Nova Scotia is unable to come anywhere near demonstrating on the facts that such a binding agreement exists. The following chapters will provide a detailed rebuttal of the Nova Scotia position.