CHAPTER IV THE APPLICABLE LAW

94. In setting out its views on the applicable law, Nova Scotia has misinterpreted the Terms of Reference. As a result, it has incorrectly identified the law applicable to this dispute.

95. Article 3.1 of the Terms of Reference provides that the mandate of the Tribunal is as follows:

> Applying the principles of international law governing maritime boundary delimitation with such modifications 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.[102]

96. In accordance with that mandate, the Tribunal is to determine in Phase One 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." [103] This raises a preliminary issue: what principles of law are to be applied to the question of whether the line dividing the respective offshore areas has been resolved by agreement? As Newfoundland and Labrador pointed out in its Memorial, since any such agreement must be an agreement that is binding between the two provinces, the applicable law must be the law that governs whether provinces have entered into a legally binding agreement - Canadian law.[104]

97. However, in its Memorial, Nova Scotia advances the argument that the relevant principles of law governing the question of whether the line dividing the offshore areas of Newfoundland and Labrador and Nova Scotia has been resolved by agreement are principles of international

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[102] Terms of Reference, Article 3.1.

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

[104] N&L Memorial, paras. 135-147.

law. There must be, Nova Scotia says, "a binding agreement as defined by international law."[105] Nova Scotia later elaborates as follows: "In the present case the Tribunal must apply the principles of international law governing the conclusion and interpretation of international agreements" in order to decide whether the boundary line has been resolved by agreement.[106]

98. A footnote to this statement in the text of the Nova Scotia Memorial justifies this position in the following way:

> The *Terms of Reference* confirm that the Tribunal is to apply principles of international law to questions relating to the conclusion and interpretation of an agreement. The preambular paragraph of Article 3.2 states that the determination of whether the line has been 'resolved by agreement' is to be carried out 'in accordance with Article 3.1', and Article 3.1 requires the application of international law.[107]

99. The fallacy in the Nova Scotia argument is obvious. Article 3.1 of the Terms of Reference does not provide for the wholesale incorporation into this arbitration of the principles of international law. If that had been the intention, then the Terms of Reference would have done that. Instead, the Terms of Reference require the Tribunal to apply "the principles of international law governing maritime boundary delimitation with such modifications as the circumstances require...".[108]

100. The phrase "principles of international law governing maritime boundary delimitation" denotes a particular branch of international law consisting of the rules and principles codified,

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[105] NS Memorial, page I-13, para. 31.

[106] NS Memorial, page III-2, para. 3.

[107] NS Memorial, page III-2 , FN 7.

[108] Terms of Reference, Article 3.1.

inter alia, in Articles 74 and 83 of the 1982 *Law of the Sea Convention*,[109] and reflected in the jurisprudence from the *North Sea Cases*[110] onward, and developed considerably in state practice. This body of law includes relevant circumstances, equitable principles, natural prolongation, non-encroachment and proportionality, and a range of methods leading to an equitable result. The content of the principles of international law governing maritime boundary delimitation is considerable, but it does not encompass all of international law.

101. A general and unlimited incorporation of international law would have required the use of quite different language. Specifically, it would have required the deletion of the words "governing maritime boundary delimitation," so that the introductory words of Article 3 would have read "[a]pplying the principles of international law...." That would have incorporated the entire corpus of international law, however anomalous the result. But, for obvious reasons, that was not the language used. There is no reference in Article 3.1 to the principles of international law governing the conclusion and interpretation of treaties, nor any reference to the whole corpus of international law.[111]

102. And the absence of such a general incorporation makes sense. This is a delimitation between provinces, sub-units of a state, to which the general body of international law would not apply. Article 3.1 itself recognizes this, because it provides that for the purposes of applying the law governing the delimitation of maritime boundaries, the two provinces are to be deemed to be "states subject to the same rights and obligations as the Government of Canada at all relevant times."[112] Moreover, the limitation on the application of the principles of international law governing maritime boundary delimitation - that they are to be applied

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[109] *United Nations Convention on the Law of the Sea*, (1982) 450 UNTS 11.

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

[111] Terms of Reference, Article 3.1.

[112] *Ibid.*

"with such modifications as the circumstances require"[113] - is a further indication of only a qualified incorporation of a defined body of international law.

103. Such an approach is supported by the normal rules of interpretation, under either the law of Canada or under international law, which require that meaning be given to the words used and that words in a provision not be rendered without any meaning at all. Nova Scotia's argument that the words - the principles of international law governing the delimitation of maritime boundaries - automatically meant simply "all principles of international law" renders the words "governing the delimitation of maritime boundaries" without any substantive content at all. They become superfluous and without effect, contrary to the most elementary principles of interpretation.

104. What the Nova Scotia Memorial also ignores is that the Terms of Reference provide for something that is not mentioned at all in the authorizing legislation, that is whether the boundary has been "resolved by agreement." The authorizing legislation refers to disputes over "a line or portion thereof prescribed or to be prescribed" and provides in the case of arbitration for the application of "the principles of international law governing maritime boundary delimitation." [114] The intent of the legislation is thus clear. It is to have the body of law governing maritime boundary delimitation applied to resolve disputes over the location of the line dividing the relevant offshore areas. There can be no facile assumption that the incorporation of one body of international law, the principles of international law governing maritime boundary delimitation, automatically means the incorporation of a separate body of law, the law governing the conclusion of treaties.

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[113] *Supra*, note 110.

[114] See section 6 of the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c.3, N&L Statutes # 5. Similar language is found in section 48 of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c.28, N&L Statutes #6.

105. Nova Scotia also argues that the application of principles of international law governing the conclusion and interpretation of international treaties is justified because international courts and tribunals have referred to principles of international law governing the conclusion of treaties when the issue of agreement has arisen in the course of an international maritime boundary dispute.[115] But, it does not follow from this that the law of maritime boundary delimitation encompasses all of international law. Similar situations are familiar in domestic law: a court dealing with a taxation issue may have to consider issues of contract or property law, the law of successions or trusts. That does not destroy the identity of "tax law" as a distinct legal category. The concrete application of any defined body of law may involve the application of rules outside that body of law, without destroying the notion that the law can be organized into meaningful and distinct categories.

106. In the application of the law of maritime boundary delimitation between states, when questions arise relating to agreement, they are resolved by reference to the body of international law relating to treaties. But when, exceptionally, the principles of international law respecting maritime delimitation are applied to entities that are not states, the existence or otherwise of an agreement resolving the issue is something that has to be determined by the law which applies to the relations between those entities - not merely the "proper" law, but the *only* law that is applicable to that question.[116]

107. The Tribunal is faced with a specific, separate question, distinct from the question of the delimitation of the boundary in accordance with the principles of international law governing maritime boundary delimitation. In these circumstances, as Newfoundland and Labrador has argued in its Memorial, the Tribunal cannot ignore the domestic law of Canada, the legal

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[115] NS Memorial, page III-1, para. 2.

[116] N&L Memorial, paras. 143-145. *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, [1978] I.C.J. Rep. 3, at para. 96, N&L Authorities, # 10.

framework in which governments were operating when they were alleged to have concluded an agreement in the autumn of 1964.

108. Nova Scotia's reading of the text as an unlimited incorporation of international law, when in fact it is anything but, is therefore not consistent with the plain meaning of the language. The Terms of Reference derive their authority from the legislation and must be interpreted in accordance with the legislation according to its true spirit, intent and meaning.[117] In fact, the expression "the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require" is taken verbatim from the implementing legislation: see subsection 6 (4) of the Newfoundland and Labrador legislation and subsection 48 (4) of the Nova Scotia legislation.[118] The purpose of adopting international law for this specific purpose 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 legal vacuum had to be filled if the arbitration was to be based upon legal principles. That is the purpose - the entire purpose - behind the reference to a specialized body of international law in the legislation, and the verbatim adoption of this reference in the Terms of Reference.

109. There is no similar legal vacuum in Canadian law with respect to the existence or otherwise of binding agreements between provinces. This is an inherently domestic issue to which domestic law should be applied. The application of international law to this issue is not called for by the legislation, and would have no logic or rationale. There would be no textual or other basis for construing the legislation - or the Terms of Reference - as requiring the application of international law to determine whether a binding inter-provincial agreement

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[117] R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto and Vancouver: Butterworths, 1994) at 38-39, Supplementary Authorities # 21.

[118] N&L Statutes # 3 and 5.

was concluded at some point in history, because that issue is not even conceivably within the purview of the principles of international law "governing maritime boundary delimitation."[119]

110. Moreover, Nova Scotia's argument makes no practical sense. For one thing, when the applicable system of law is so clear that there can be no question about the choice of law, the deliberate application on a retroactive basis of a completely different system of law would be impossible to justify. It could lead to a result that would be contrary to the mandatory rules of the system that really applied: in other words, to a result that would be illegal.

111. In short, the Nova Scotia approach to the applicable law leads to absurdity - applying the rules of international law to the actions of two provinces in the 1960s, when those provinces were subject to Canadian law. The provinces had no legal right to act *except* within that constitutional framework, and they were represented by officials and politicians whose expectations and perspectives were necessarily based upon that framework.

112. Nova Scotia is seeking to have the Tribunal engage in an artificial exercise of pretending that the officials of Newfoundland and Labrador and of Nova Scotia were throughout the relevant period acting as representatives of sovereign states in accordance with applicable principles of international law. Nova Scotia's strategy is to achieve this objective by addressing the issue on the basis of a pure legal fiction, that the parties were sovereign states at international law when notoriously they were not; and by applying with retroactive effect a system of law that did not apply, and could never even have been thought of as applicable by the representatives of the parties at the material times. Only the most compelling legislative language could lead to such a result; and in fact the legislative language points in precisely the opposite direction.

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[119] Terms of Reference, Article 3.1.

113. The Terms of Reference neither require nor contemplate the fictional assumption that provincial governments were operating under a body of law that did not apply to them. The provision deeming Newfoundland and Labrador and Nova Scotia as states subject to the same rights and obligations as the Government of Canada at all times, is designed, obviously, to ensure that applicable treaties are properly taken into account.[120] It was not designed to clothe provincial officials with a status and power, and with attendant consequences, which as officials of a province they could never have had.

114. But, even if international law were applicable, the Terms of Reference would require a consideration of the law of Canada. As Newfoundland and Labrador pointed out in its Memorial, the Terms of Reference provide for the modification of the application of the principles of international law governing maritime boundary delimitation where the circumstances so require.[121] 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 binding agreements is concerned.

115. Moreover, even if the principles of international law governing the conclusion of treaties were applicable, the very requirement of intent for the finding of a binding agreement would direct the Tribunal to the actual intent of the relevant provincial officials. 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.[122] This question of fact can be determined only by looking at the legal, constitutional and political context in which the parties were operating, in other words the domestic law of Canada. Simply put, the parties could not possibly have intended

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[120] *Ibid.*

[121] N&L Memorial, para. 143.

[122] NS Memorial, page IV-3, para. 5.

legal consequences that could not have resulted from their conduct within the legal framework to which they were subject.

116. Indeed, analogies drawn with a number of principles of international law show that the domestic law of Canada must be taken into account. Newfoundland and Labrador's Memorial referred to the international law doctrine of intertemporal law which would direct a *renvoi* to the domestic law of Canada.[123] Reference can also be made to Article 46 of the *Vienna Convention on the Law of Treaties* which invalidates consent to a treaty where that consent is expressed in manifest violation of a rule of internal law of a state of fundamental importance.[124] Canadian constitutional law regarding provincial territories and boundaries, as well as limitations on the power of the executive to act without legislative authority, are rules of fundamental importance that would have been manifestly violated in the Nova Scotia scenario.

117. Nova Scotia's reliance on the legal doctrines of acquiescence and estoppel also involves a misinterpretation of the Terms of Reference. The issue in Phase One is whether the line dividing the respective offshore areas of Newfoundland and Labrador and Nova Scotia has been "resolved by agreement." However, the Nova Scotia Memorial makes no pretense that it is arguing that the line has been resolved by agreement. It says: "By its conduct over many years, Newfoundland must be taken to have acquiesced in the boundaries established in the *1964 Agreement*, including its agreed boundary with Nova Scotia...."[125] Apart from the *non sequitur* of alleging acquiescence in an agreed boundary, Nova Scotia is arguing that there has

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[123] N&L Memorial, para. 45. G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law" (1953) 30 B.Y.I.L. 1 at 5, Authorities, # 26.

[124] (1969), 1155 U.N.T.S. 331, N&L Statutes, # 10.

been acquiescence in a boundary - in a line. This is an argument that a line has been acquiesced in, not that a line has been resolved by agreement.

118. Thus Nova Scotia has misinterpreted the Terms of Reference, and misapplied the concepts of acquiescence and estoppel. The question before the Tribunal is whether the line dividing the respective offshore areas of Newfoundland and Labrador and Nova Scotia has been resolved by agreement. That question can only be answered by determining whether the two provinces entered into an agreement that was binding on them in accordance with Canadian law governing the conclusion of intergovernmental agreements.