

## 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***

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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. Gerald LaForest,  
Mr. Leonard Legault,  
Dr. James Richard Crawford.

The Chairperson of the Tribunal is Mr. Gerald LaForest.

- 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 to 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**

- 5.1 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 I 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.