

PART I: INTRODUCTION

1. This Counter-Memorial responds to the Memorial filed by Newfoundland on December 1, 2000. It also restates the relevant facts and law on the basis of which the Tribunal shall determine the question before it, namely, **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.**

A. Nova Scotia Has Proved Its Case In Its Memorial

2. In its Memorial, Nova Scotia demonstrates that the Nova Scotia-Newfoundland offshore boundary was resolved long ago, by the *1964 Agreement* concluded among the Atlantic Provinces, in good faith, on September 30, 1964 and acceded to by Québec one week later. (Figure 2)¹
3. The Nova Scotia Memorial describes the events leading up to and surrounding the conclusion of the *1964 Agreement* by the Premiers of the five East Coast Provinces, the precise delineation and description of the coordinates of the agreed boundaries in 1968-1969, the reaffirmation of the *1964 Agreement* by the five Premiers in 1972, and the practical application of the boundaries, from 1964 to the present day, by all of the East Coast Provinces in legislation, federal-provincial agreements and the issuance of oil and gas exploration permits.
4. Nova Scotia relies for its proof on the historical record, including a wide array of documents evidencing such matters as the intent of the East Coast Provinces to establish interprovincial boundaries binding as between these Provinces, the *verbatim record* of the Newfoundland House of Assembly in which the Premiers' approval of the technical delineation and description of the boundaries is proclaimed, and charts illustrating the parties' subsequent conduct in the issuance

¹ Figures and annexes referred to in this Counter-Memorial that were also referred to in the Nova Scotia Memorial bear the numbers originally assigned to them in the Memorial. Figures appearing for the first time in this Counter-Memorial begin at number 23, while annexes referred to herein for the first time begin at number 133.

of oil and gas permits along the agreed line and extending up to 300 miles from shore.

5. Nova Scotia has also described the principles of international law applicable to this dispute, as stipulated in the *Terms of Reference* and their underlying legislation, and has explained how those principles apply to the facts of this case.
6. On the basis of the facts and the law, Nova Scotia has submitted that the question whether the line dividing the respective offshore areas of Newfoundland and Nova Scotia has been resolved by agreement must be answered in the affirmative. That submission is reiterated here.

B. Newfoundland's Case Relies On Factual Inaccuracies And Incorrect Law

i) Newfoundland Distorts The Record

7. In its Memorial, Newfoundland claims that it does not know the case it has to meet,² and states that its argument is based on the assumption "that the agreement alleged by Nova Scotia is based on a set of lines originally proposed in 1964 by the Atlantic Provinces in support of their claim for offshore ownership."³
8. Newfoundland's assumption is wrong. As demonstrated in Nova Scotia's Memorial and as confirmed in this Counter-Memorial, Nova Scotia's case is indeed based on boundary lines dated to 1964 – but they are lines that were **agreed**, not proposed, by the Provinces at that time.
9. Newfoundland's case, reduced to its essentials, is based on the following propositions:

² Newfoundland Memorial, para. 16.

³ Newfoundland Memorial, para. 17.

- in 1964, the Provinces did nothing more than agree on a **proposal to the federal government** regarding interprovincial boundaries in the offshore;⁴
 - there was never any **agreement** among the Provinces on interprovincial boundaries;⁵
 - the proposal was **conditional** upon federal government acceptance and sanction, which was not forthcoming; thus, the proposal “came to nothing;”⁶
 - in any event, “[f]rom the beginning to the end ... the whole object” of the Provinces’ effort was provincial **ownership** of offshore mineral resources, to which interprovincial boundary lines were “inextricably linked”; absent ownership, the boundaries have no application;⁷
 - further, the Provinces’ “**preoccupation**” was the Gulf of Saint Lawrence and the Cabot Strait area; outside of those areas, the boundary is imprecise and thus ineffective;⁸
 - the arbitration is governed by **Canadian law**, under which the *1964 Agreement* is ineffective.⁹
10. While Newfoundland states that it is almost totally ignorant of the case it has to meet in the arbitration, its Memorial discloses, on the contrary, a clear recognition of many of the key elements of Nova Scotia’s case and, indeed, of the *1964 Agreement*.
11. How is it, then, that the two parties to this arbitration hold such diametrically opposed views, particularly when they rely to a large extent on the same historical record?

⁴ Newfoundland Memorial, para. 186 and *passim*.

⁵ Newfoundland Memorial, para. 184 and *passim*.

⁶ Newfoundland Memorial, para. 192 and *passim*.

⁷ Newfoundland Memorial, para. 189 and *passim*.

⁸ Newfoundland Memorial, paras. 210-212, 218-219 and *passim*.

⁹ Newfoundland Memorial, para. 156 and *passim*.

12. The answer, regrettably, is quite simple: Newfoundland's case rests on a plethora of fundamental inaccuracies and mischaracterisations regarding the historical record, the applicable law and the Tribunal's mandate as established in the *Terms of Reference*.
13. Rather than good faith and *pacta sunt servanda*, Newfoundland relies on the power of revisionism.

ii) **Newfoundland Erects A Straw Man**

14. In its selective account of the history of the development of interprovincial offshore boundaries, Newfoundland concentrates almost exclusively on the **federal-provincial** dimension of the issue. By doing so, Newfoundland diverts attention from the **interprovincial** relationships and agreements – including the relationship and agreement between Nova Scotia and Newfoundland – that must be the true focus of the arbitration. The question whether the Nova Scotia-Newfoundland boundary “has been resolved by agreement” obviously refers to an agreement **between the parties**.
15. Newfoundland's tunnel vision pervades its Memorial. For example, its account of the critical events of 1964 is largely restricted to a discussion of the October 1964 *Joint Submission* presented by the Provinces to the federal government (**Annex 31**); the actual interprovincial Agreement concluded on September 30, 1964 (**Annex 22**), on which the *Joint Submission* was itself based, is treated to only passing (and distorted) reference. Newfoundland goes to great lengths to confuse the two events, holding out the *Joint Submission* as the Agreement by which, it says, Nova Scotia argues that the Provinces determined their offshore boundaries. It then purports to analyse whether the *Joint Submission*, standing alone, constitutes a binding interprovincial agreement – which of course it does not. Having asked the wrong question, Newfoundland naturally reaches the wrong conclusion.

16. Newfoundland's blinkered approach is also reflected in what little evidence it proffers regarding the parties' conduct subsequent to 1964. The Newfoundland Memorial reveals an obsessive and unhelpful reliance on the views of federal officials and politicians as to the supposedly non-binding nature of the *1964 Agreement*.¹⁰ Yet these statements are reflective only of the federal view that, until the federal government agreed, the Provinces' claim to ownership of the offshore and the interprovincial boundaries that they asked the federal government to recognise were not **opposable to the federal government**. What Newfoundland fails to address, however, is the overwhelming evidence that **the Provinces** – the parties to the *1964 Agreement* – regarded their boundaries as binding **between themselves** and that they acted accordingly for over 30 years.
17. Finally, Newfoundland grossly exaggerates both the nature of the Agreement that is at issue in this case and the impact of the Tribunal's decision, suggesting that matters such as legislative supremacy are in question.¹¹ In fact, the Tribunal has been tasked by the Government of Canada to determine whether the boundary between the offshore areas of the Provinces of Nova Scotia and Newfoundland and Labrador "has been resolved by agreement", for the purposes of the *Accord* legislation – **and for no other purpose**.¹² A finding, as requested by Nova Scotia, that that boundary **has been resolved by agreement**, will not constitute, once the Tribunal's award is translated into law, an alteration of the Provinces' boundaries as set out in Canada's Constitution. Nor will it encroach in any manner on the principle of the supremacy of Parliament. It will merely determine – as it has been asked to do by the Government of Canada – one aspect of the Provinces' respective rights and obligations arising under existing, valid administrative arrangements.
18. Newfoundland erects a straw man – it construes the "agreement" that it says Nova Scotia must prove exists as **an agreement between the Provinces and Canada**,

¹⁰ See, for example, Newfoundland Memorial, paras. 38, 39, 50, 59, 67, 86.

¹¹ Newfoundland Memorial, paras. 225, 229.

¹² *Terms of Reference*, Articles 1.1 and 3.2(i).

**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 THREE
THE MANDATE OF THE TRIBUNAL**

(...)

- 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.

(our emphasis)

(Terms of Reference, May 31, 2000 at 1 and 2)

binding under domestic Canadian law – and then proceeds to knock it down, by showing that such an agreement was not concluded. This exercise is completely beside the point.

19. Canada is not a party to this dispute or to the present arbitration, and the law applicable to the arbitration is not Canadian, but international, law. The question at issue in the arbitration is not whether Canada agreed with the Provinces, but **whether the parties agreed, between themselves**, on the line dividing their respective offshore areas. The “agreement” that the Tribunal has been asked to find is not an agreement between units of a federal State, but an agreement between parties who, for the purpose of the arbitration, are themselves regarded as **if they were States**, subject to international law, at all relevant times.

C. Outline Of Nova Scotia’s Counter-Memorial

20. In this Counter-Memorial, Nova Scotia sets the record straight. Given the sheer number and gravity of the legal and factual errors contained in Newfoundland’s Memorial, their exposure necessarily involves a detailed critique. The exercise, however, is required in this instance: those errors lie at the core of Newfoundland’s creative theory regarding the nature, object and effect of the *1964 Agreement*; indeed, they go to the very heart of the issue to be resolved by the Tribunal.¹³

i) Newfoundland’s Error Regarding The Applicable Law Is Corrected

21. Part II therefore provides a critique of Newfoundland’s statement regarding the law applicable to this dispute. Notwithstanding the clear words of the *Terms of*

¹³ While Nova Scotia addresses many aspects of Newfoundland’s various theories and allegations, space does not permit it to address all of the inaccuracies and inconsistencies embedded in Newfoundland’s claims. This should in no way be construed as an admission or acknowledgement regarding the truth of such claims.

Reference,¹⁴ Newfoundland maintains in its Memorial that the Tribunal must apply domestic Canadian law to determine the question at issue here.

22. As it does with respect to the *1964 Agreement* that entered into with the other East Coast Provinces, Newfoundland simply turns a blind eye to the plain words of the *Terms of Reference* requiring the Tribunal to determine the question before it in accordance with the principles of international law governing maritime boundary delimitation.
23. Perhaps in recognition of the weakness of its case regarding the applicability of Canadian law, Newfoundland also provides argument regarding an interpretation, albeit misguided, of the principles of international law that it claims are relevant in this case. This too is addressed in Part II.

ii) Newfoundland's Errors Of Fact Are Revealed

24. Parts III and IV of this Counter-Memorial examine the various facets of Newfoundland's factual case -- from the patently **contrived**, for example, its use of the term "Stanfield Proposal" to describe, at various times, both the October 1964 *Joint Submission* made on behalf of all the Atlantic Provinces and the actual boundaries agreed by the Provinces, to the **misleading**, for example, its addition of the word "proposed" to a document that speaks of "boundaries", to the merely **mistaken**.

iii) Nova Scotia Sets The Record Straight

25. In Part V, Nova Scotia restates its case. This comprises a review of the salient facts and legal principles that, together, demonstrate unequivocally that the line dividing the offshore areas of Nova Scotia and Newfoundland and Labrador has been resolved by binding agreement.

¹⁴ The *Terms of Reference* may be found under a separate tab in this binder.

iv) **Conclusion**

26. Part VI provides a summary of this Counter-Memorial, reviews the conclusions that Nova Scotia urges the Tribunal to reach and reiterates Nova Scotia's submission.
27. For its part, Nova Scotia has nothing to fear from a careful and full reading of the documents that make up the historical record. In both its Memorial and Counter-Memorial, Nova Scotia urges neither more nor less than that the facts be considered in good faith, in their entirety.

D. New Evidence Confirms Nova Scotia's Argument

28. In addition to referring to the factual material discussed in the parties' Memorials, this Counter-Memorial also includes references to evidence that has come to light since the filing of those Memorials, on December 1, 2000. It is Nova Scotia's understanding that Newfoundland had requested this material from the federal government prior to that date, as part of its general request for information relating to this case in the possession of the Government of Canada,¹⁵ and that the material was apparently misfiled. It was not released to Nova Scotia until late December 2000.
29. This new evidence furnishes additional confirmation that Nova Scotia and Newfoundland intended to conclude, and did conclude, a binding Agreement on their offshore boundaries in 1964, and that the boundaries established in that *1964 Agreement* have been respected and applied since that time, with no protest.¹⁶

¹⁵ **Annex 131:** Letter from Brian A. Crane, Counsel for the Government of Newfoundland and Labrador to Vello Mijal, General Counsel, Legal Services, Natural Resources Canada (31 July 2000); **Annex 132:** Letter from Donald M. McRae, Agent for the Government of Newfoundland and Labrador to Vello Mijal, General Counsel, Legal Services, Natural Resources Canada (18 August 2000). (See also Nova Scotia Annexes, "Introduction to the List of Annexes.")

¹⁶ Part I, paras. 17, 18 of the Nova Scotia Memorial describe Newfoundland's initiation of the dispute in the mid-1990s, leading to the establishment of the Tribunal on May 31, 2000.

E. The Proof is Incontrovertible: The Line Has Been Resolved By Agreement

30. Newfoundland asserts in its Memorial that Nova Scotia bears the burden of proving “that there is a legally binding agreement between Newfoundland and Labrador and Nova Scotia establishing the line dividing their respective offshore areas.”¹⁷
31. Nova Scotia agrees that it bears the burden of proving facts alleged in its Memorial. Nova Scotia has met that burden and has demonstrated that the line dividing the respective offshore areas of Nova Scotia and Newfoundland has been resolved by agreement.
32. It is now for Newfoundland to meet **its** burden of proof. The burden of proof before international tribunals is stated clearly in the following excerpt from the decision of the WTO Appellate Body in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*:¹⁸

... we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.
(footnotes omitted)

¹⁷ Newfoundland Memorial, para. 134.

¹⁸ Annex 133: *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997 at 14.

33. As demonstrated in this Counter Memorial, Newfoundland has **asserted** various theories according to which, it claims, the Nova Scotia – Newfoundland boundary has not been resolved by agreement. Yet it fails utterly to **prove** its various claims. In particular, Newfoundland has adduced no evidence to counter the overwhelming proof that the boundary at issue in this arbitration was in fact resolved long ago by agreement of the parties.