PART II: NEWFOUNDLAND IS WRONG REGARDING THE APPLICABLE LAW

A. Introduction

1. Arguably the most fundamental and pervasive error in the Newfoundland Memorial is its contention regarding the law applicable to the arbitration.

2. The Newfoundland Memorial, in Chapter IV (III), concludes that "Canadian law ... is the applicable law for the determination of the question before the Tribunal in Phase One."[1]

3. As will be shown in this Part, the reasoning underlying this assertion would result in the complete subversion of the *Terms of Reference* and of the *Accord Acts*, all of which require that the dispute be resolved according to principles of international law.

B. The Applicable Law Is International Law

4. Newfoundland's argument on the matter of applicable law boils down to one, fundamentally misguided, proposition: that the *Terms of Reference* "**provide no specific guidance on the applicable law for the question in Phase One.**"[2]

5. This claim is worthy of outright rejection.

6. Newfoundland's reasoning relies, first, on the assumption of a non-existent distinction between delimitation **by application of principles of international law** and delimitation **by agreement**, and, second, on a reading of the *Terms of Reference* so extraordinarily selective as to constitute, in effect, a wholesale rewrite of the Tribunal's mandate.

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1 Newfoundland Memorial, para. 147.
2 Newfoundland Memorial, para. 138 (emphasis added).

i) The False Distinction Between "Delimitation Under International Law" And "Delimitation By Agreement"

7. Newfoundland claims that the issue in the first phase of the arbitration – whether the Nova Scotia-Newfoundland boundary has been resolved by agreement – is somehow distinct from the Tribunal's overall mandate to determine, in accordance with international law, the line dividing the parties' respective offshore areas. The following statement contains the gist of Newfoundland's claim in this regard:[3]

> [I]n Phase One, the issue is not the delimitation of the respective offshore areas of the parties by the application of the principles of international law governing maritime boundary delimitation. It is whether the line dividing the offshore areas of Newfoundland and Labrador and Nova Scotia has been "resolved by agreement." That question is not contemplated either in the Accords or in the legislation.
>
> (...)
>
> As a result, the Terms of Reference provide no specific guidance on the applicable law for the question in Phase One. They do not require the application of the principles of international law governing agreements.

8. It is obviously true that, in the first phase of the arbitration, the Tribunal shall determine "whether the line dividing the respective offshore areas of Newfoundland and Labrador and the Province of Nova Scotia has been "**resolved by agreement**".[4] What is patently incorrect, however, is Newfoundland's assertion that this task does not require the Tribunal to apply "the principles of international law governing agreements."[5]

9. As the International Court of Justice declared in the *North Sea Continental Shelf Cases*,[6] delimitation by mutual agreement and delimitation in accordance with equitable

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3 Newfoundland Memorial, paras. 137, 138.
4 *Terms of Reference*, Article 3.2(i).
5 Newfoundland Memorial, para. 138.
6 **Annex 33**: *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands*), [1969] I.C.J. Rep. 3 (hereinafter "*North Sea Cases*").

With regard to the delimitation of lateral boundaries between the continental shelves of adjacent States, a matter which had given rise to some consideration on the technical, but very little on the juristic level, the Truman Proclamation stated that such boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". **These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject.**

(our emphasis)

(**Annex 33:** *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands)*, [1969] I.C.J. Rep. 3 at 33)

principles, as enunciated in the Truman Proclamation, "have underlain all the subsequent history of the subject"[7] of maritime boundary delimitation.

10. The 1958 Geneva *Convention on the Continental Shelf* and the 1982 *United Nations Convention on the Law of the Sea* enshrine the rule that delimitation of the continental shelf between States with opposite or adjacent coasts "shall be determined by agreement between them"[8] and "shall be effected by agreement on the basis of international law ..."[9] It is only if there is no agreement between the States concerned that the delimitation is effected by other means.

11. In addition, the 1982 *United Nations Convention on the Law of the Sea* provides that "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."[10]

12. The concept of "mutual agreement" was recognised as integral to the international law of maritime boundary delimitation as well by the Chamber of the International Court of Justice in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*. In its statement of the "fundamental norm" of maritime boundary delimitation, the Chamber found as follows: [11] **(Annex 106)**

> No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following

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7 **Annex 33**: *Ibid.* at 33.

8 **Annex 83**: *Convention on the Continental Shelf*, 29 April 1958, 499 U.N.T.S. 312, Article 6(1) and (2) (entered into force 10 June 1964).

9 **Annex 82**: *United Nations Convention on the Law of the Sea*, 10 December 1982, U.N. Doc. A/CONF.62/122, Article 83(1) (entered into force 16 November 1994).

10 *Ibid.*, Article 83(4).

11 **Annex 106**: *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 (hereinafter "*Gulf of Maine*" case). In its Memorial, Nova Scotia referred to the *Case Concerning the Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark* v. *Norway)* and the *Guinea – Guinea Bissau Maritime Delimitation* case, where the question of prior agreement was examined as a preliminary matter. See Nova Scotia Memorial, Part III, para. 2 and **Annexes 84** and **85**.

Convention on the Continental Shelf

Article 6

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States **shall be determined by agreement between them**. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf **shall be determined by agreement between them**. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

(our emphasis)

(**Annex 83:** *Convention on the Continental Shelf*, 29 April 1958, 499 U.N.T.S. 312, Article 6(1) and (2))

Convention on the Law of the Sea

Article 83. Delimitation of the continental shelf between States with opposite or adjacent coasts.

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.

(...)

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.

(our emphasis)

(**Annex 82:** *United Nations Convention on the Law of the Sea*, 10 December 1982, U.N. Doc. A/CONF. 62/122, Article 83(1) and (4))

> negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party ...

13. The notion that a delimitation by agreement of the parties is not a subject-matter encompassed by the international law governing maritime boundary delimitation is without any foundation; and of course the Newfoundland Memorial offers not a single authority to support its claim in this regard. In fact, the authorities are categorical: the delimitation of maritime boundaries **by agreement** is part and parcel of the **international law governing maritime boundary delimitation.**[12] Newfoundland's claim to the contrary is wrong.

14. Newfoundland itself appears to concede this very point later in its Memorial, where it states: [13]

> The question of whether a maritime boundary between states has been delimited by agreement has arisen in a number of cases before international courts and tribunals. **In addressing this question, these courts and tribunals have applied the principles of international law governing the question of whether a treaty or international agreement exists.**
>
> (emphasis added)

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[12] The parties' obligation to determine their boundaries by agreement could even be described as the first and most important "principle of international law governing maritime boundary delimitation." See Nova Scotia Memorial Part III, para. 2.

[13] Newfoundland Memorial, para. 143.

15. Equally wrong is Newfoundland's assertion that the Tribunal's mandate as established in the *Terms of Reference* – to determine, in the first phase of the arbitration, whether the Nova Scotia-Newfoundland boundary has been resolved by agreement – "is not contemplated either in the Accords or in the [*Accord Acts*]."[14] The fallacy in this assertion is perhaps (best) understood by Newfoundland itself, for it does not even attempt to support the claim.

ii) Newfoundland Ignores The Plain Words Of The *Terms Of Reference*

16. The extraordinary exercise in exegesis on which Newfoundland's argument is based is absolutely unnecessary. The *Terms of Reference* are unequivocal; they do not distinguish, as Newfoundland wishes to do, between the law applicable to the first phase of the arbitration and the law applicable to the second phase of the arbitration. Having engaged in such an exercise, however, Newfoundland obliges both Nova Scotia and the Tribunal to follow suit, and to dissect what are patently transparent terms.

17. Article 3.1 of the *Terms of Reference*, which describes **the totality of the Tribunal's mandate**, requires the Tribunal, by "[a]pplying the principles of international law ...", to "determine the line dividing the respective offshore areas of the Province[s]."

18. Article 3.2, which provides for the Tribunal to "determine the line ... in two phases", **also** provides that the Tribunal shall do so "in accordance with Article 3.1."

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[14] Newfoundland Memorial, para. 137. In its Memorial, Newfoundland acknowledges that the *Terms of Reference* provide that the Tribunal is to apply "the principles of international law governing maritime boundary delimitation with such modifications as the circumstances require." (See Newfoundland Memorial, para. 135.) Newfoundland also recalls that this requirement is derived from the legislation relevant to this dispute, namely, section 6 of the *Canada-Newfoundland Accord Act* and section 48 of the *Canada-Nova Scotia Accord Act*. (See Newfoundland Memorial, para. 135.) Those legislative provisions stipulate, *inter alia*, that "the arbitrator shall apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require." Identical provisions are also found in the respective provincial implementing legislation. See section 6 of the *Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act* (**Annex 1**) and section 49 of the *Canada-Nova Scotia Offshore Petroleum Resources Accord (Nova Scotia) Act* (**Annex 2**).

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.

(*Terms of Reference*, May 31, 2000 at 2)

19. Finally, Article 3.2 (i) states that, in the first phase, the Tribunal shall "determine whether the line ... has been resolved by agreement", while Article 3.2(ii) provides that, if the answer to that question is no, the Tribunal shall "determine how in the absence of any agreement the line ... shall be determined." As indicated, the Tribunal's determination in both phases must be in accordance with international law, as stipulated in Article 3.1.

20. There is not the slightest ambiguity in the *Terms of Reference* regarding the applicable law, nothing whatsoever to suggest, as does Newfoundland, that international law would be applicable in the second phase of the arbitration but is somehow **not** applicable in the first phase.

21. Nonetheless, from the false distinction between a maritime delimitation resolved by international legal principles and a maritime delimitation resolved by agreement of the parties, Newfoundland arrives at the conclusion that the *Terms of Reference* are in fact **silent** regarding the law applicable in the first phase of the arbitration. And it goes further, arguing that since international law does not regulate agreements between sub-units of States, there is in effect no "international law" that could apply in this phase of the arbitration: [15]

> As a result, the Terms of Reference provide no specific guidance on the applicable law for the question in Phase One. They do not require the application of the principles of international law governing agreements. **And, in any event, since international law does not regulate agreements between sub-units of states, there are no rules of international law for determining whether provinces have resolved an issue by agreement.**
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> (emphasis added)

22. The trick of course is that, even as it refers to "the *Terms of Reference*", Newfoundland makes the words of Article 3.1 effectively disappear. Read in its entirety, however,

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[15] Newfoundland Memorial, para. 138.

Article 3.1 of the *Terms of Reference* leaves not the slightest room for doubt regarding the law applicable to the parties in this dispute.

> 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.**
>
> (emphasis added)

23. The illusion that Newfoundland tries to create is thus dispelled, in an instant, upon reading the final words of this passage, the meaning of which is clear yet the existence of which is nowhere indicated in the Newfoundland Memorial: international law is the governing law of the arbitration, and it applies to the Provinces of Nova Scotia and Newfoundland and Labrador in this case "**as if [they] were states**".[16]

iii) The Status Of The Provinces Is Not A Circumstance Requiring Modification Of The Applicable Law

24. Both the Nova Scotia and the Newfoundland *Accord Acts*, as well as the *Terms of Reference*, provide for the application of international law "with such modification as the circumstances require." [17]

25. In its Memorial, Nova Scotia discusses the meaning of these words, and provides an explanation that is reasonable, practicable and true both to the instruments in which the words are found and to the circumstances of this unusual dispute.[18]

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16 A fuller explanation of the meaning of this phrase, including the words "subject to the same rights and obligations as Canada ..." is found at Part I, para. 30 and Part III, para. 1 of the Nova Scotia Memorial.

17 **Annex 1**: *Canada-Newfoundland Atlantic Accord Implementation Act*, s. 6; **Annex 2**: *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, s. 48.

18 Nova Scotia Memorial, Part I, para. 30.

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.

(*Terms of Reference*, May 31, 2000 at 2)

26. Newfoundland, on the other hand, would use these words as a wrecking ball, to demolish all distinction between fact and fiction in this case: [19]

> The lack of any body of international law regulating agreements between sub-units of states, either in the law governing maritime boundary delimitation or elsewhere in international law, is a circumstance that requires modification as Article 3.1 contemplates. That modification is the application of the domestic law of Canada to the question of whether the line has been resolved by agreement.

27. The plain words of the *Terms of Reference*, and the fiction they deliberately create – the parties are regarded "as if they were states" in order to facilitate the Tribunal's application of international law - are addressed above.[20] It remains only to answer Newfoundland's plea, in effect, that **all we're asking the Tribunal to do is to "modify" international law "as the circumstances require."**

28. The answer is simple, and quickly stated. The only "circumstance" alluded to by Newfoundland as "requiring" the application of domestic Canadian law to the arbitration is the supposed "lack of any body of international law regulating agreements between sub-units of states." In the particular circumstances of this case, however, this is not an issue.

29. The *Terms of Reference* anticipate and deal conclusively with the matter. As demonstrated, they provide that for purposes of the arbitration, and specifically as regards the law applicable to the determination of whether the Nova Scotia-Newfoundland

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19 Newfoundland Memorial, para. 141.
20 See paras. 22, 23 above.

boundary has been resolved by agreement, the parties are **not** regarded as sub-units of a state, but as **States**.[21]

30. In a final effort to justify the application of Canadian law to this case, Newfoundland attempts to invoke, as a drowning man grabs for the merest flotsam, the notion that international law itself provides a convenient "**renvoi**" to domestic law.

31. Newfoundland seeks to rely on the doctrine of intertemporal law, contending in this regard that the intent of the parties with respect to the *1964 Agreement* must be considered in the light of the "particular circumstances" of the case; and "the important circumstance" is – **again** – the fact that the parties are Provinces of Canada as opposed to sovereign States.[22]

32. Newfoundland's arguments are completely beside the point. As demonstrated above, the *Terms of Reference* state plainly the law to be applied by the Tribunal and settle conclusively the matter of the parties' status. The framework for the arbitration imposed by the *Terms of Reference* may be unique; as regards the matter of applicable law, it is also both coherent and complete.

33. The law applicable to the arbitration is international law. For the purpose of the arbitration, and specifically for the purpose of applying international law, the parties are regarded as States. This is as true for the first as for the second phase of the arbitration, if a second phase proves necessary. The mandate of the Tribunal is to determine, in the

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[21] The impact of Newfoundland's position, if accepted, would not be restricted to the first phase of the arbitration. Newfoundland's illogic would wreak havoc with the applicable law in the second phase as well. All of its arguments regarding the so-called lack of specific guidance in the *Terms of Reference*, the proper subjects of international law and the parties' status as sub-units of States, would remain as true in the second as in the first phase of the arbitration. The Tribunal would be left with no international law to apply and, in Newfoundland's own submission, no domestic law of relevance to the matter. (See Newfoundland Memorial, para. 136: "[D]omestic law, which is applicable to sub-units of a state, contains no rules on the delimitation of maritime boundaries.") The only recourse would be a determination *ex aequo et bono*, which is not provided for in the *Terms of Reference* and seems to have been explicitly rejected by Newfoundland. (See Newfoundland Memorial, para. 129.)

[22] Newfoundland Memorial, paras. 143-145.

first phase, whether the Nova Scotia-Newfoundland boundary has been resolved by agreement, applying the principles of international law and assuming, for that purpose, that Nova Scotia and Newfoundland were States at all relevant times.

iv) Newfoundland Proposes Rewriting The *Terms of Reference*

34. The application of Canadian domestic law to the arbitration, as proposed by Newfoundland, would obviously constitute something altogether different from a "modification" of the principles of international law. The word **modification** is defined in the *Oxford English Dictionary* as "the action of making changes in an object without altering its essential nature or character,"[23] and in *Webster's Third New International Dictionary* as "the act of limiting the meaning or application of a concept ... the act or action of changing something without fundamentally altering it".[24] Applying Canadian domestic law to determine any aspect of this dispute would be fundamentally at odds with the *Terms of Reference* and with the legislation from which they were derived.

35. Ultimately, what Newfoundland proposes is that the Tribunal in effect *rewrite* the *Terms of Reference*. This, of course, the Tribunal may not do, any more than a party may substitute its own choice of law for that laid down in the *Terms of Reference*.

C. Newfoundland Misinterprets International Law

36. As an alternative to its claim regarding the applicability of domestic law, Newfoundland argues that, even under principles of international law, the five East Coast Provinces did nothing more in 1964 than subscribe to a common negotiating position that eventually came to naught. Newfoundland seeks support for its contention in the jurisprudence – it

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23 Annex 134: *Oxford English Dictionary*, Compact Edition, Volume I at 1829, *s.v.* "modification".
24 Annex 19: *Webster's Third New International Dictionary*, 1986 at 1452, *s.v.* "modification".

refers to *Qatar* v. *Bahrain*[25] and the *North Sea Cases*[26] – but an examination of the authorities on which it relies discloses that its effort is in vain.

i) *Qatar* v. *Bahrain*

37. In *Qatar* v. *Bahrain*, Qatar had argued that the Minutes of a meeting between the parties constituted a binding international agreement. Bahrain maintained that the document was merely a "statement recording a political understanding"[27] – in effect, a record of negotiations – and that the parties never intended to conclude an agreement. In addition, Bahrain stated that, according to its Constitution, treaties could not come into force until enacted in law, and therefore the Foreign Minister had no capacity to conclude an agreement that included provisions having immediate effect.[28]

38. The International Court of Justice determined that the Minutes **did** constitute an international agreement. The Court declared that "international agreements may take a number of forms and be given a diversity of names."[29] The Court quoted its earlier decision in the *Aegean Sea Continental Shelf*[30] case to the following effect:[31]

> Furthermore, as the Court said, in a case concerning a joint communiqué, 'it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement ...'

39. The Court in *Qatar* v. *Bahrain* found that the Minutes enumerated commitments to which the parties had consented, and that they therefore created rights and obligations at

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25 **Annex 135:** *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain) (Jurisdiction and Admissibility)*, [1994] I.C.J. Rep. 112 (hereinafter "*Qatar* v. *Bahrain*").
26 **Annex 33:** *North Sea Cases, supra* note 6.
27 **Annex 135:** *Qatar* v. *Bahrain, supra* note 25 at 121.
28 **Annex 135:** *Ibid.*
29 **Annex 135:** *Ibid.* at 120.
30 *Judgment*, [1978] I.C.J. Rep. 1978 (**Annex 91**).
31 **Annex 135:** *Qatar* v. *Bahrain, supra* note 25 at 120, 121.

international law. As regards Bahrain's arguments based on its constitutional law, the Court states as follows:[32] (**Annex 135**)

> [having] signed a text recording commitments accepted by [his Government], some of which were to be given immediate application ... **[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.**
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> Nor is there anything in the material before the Court which would justify deducing from any disregard by Qatar of its constitutional rules relating to the conclusion of treaties that it did not intend to conclude, and did not consider that it had concluded, an instrument of that kind; **nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question.**
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> (emphasis added)

40. Newfoundland relies on *Qatar* v. *Bahrain* to support its argument that "a record of agreed terms is insufficient if there is no corresponding evidence of an intent to treat such agreed terms as legally binding."[33] What is evident from the Court's decision, is that the case also stands for the following propositions:

(1) international agreements need not be drawn up in any particular form;

(2) statements made years after the conclusion of an agreement regarding the intent of the parties cannot override the evidence of intent contemporaneous with the conclusion of the agreement; and

(3) even an intention **not to conclude** an agreement "[could not] prevail over the actual terms of the instrument in question."

41. The decision of the International Court of Justice in *Qatar* v. *Bahrain* provides further support for a finding by the Tribunal in this case that the *1964 Agreement* is an

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32 **Annex 135:** *Ibid.* at 122.

33 Newfoundland Memorial, para. 176.

international agreement, that the intention of the parties was to create, and that the parties did create, binding interprovincial boundaries in the offshore.

ii) *North Sea Continental Shelf Cases*

42. Newfoundland also relies on the *North Sea Continental Shelf Cases* to argue, first, that "a state could [not] become bound by the provisions of a Convention calling for ratification, when that state had not in fact ratified the Convention",[34] and second, that a state cannot become legally bound by "manifesting acceptance"[35]of a treaty "or by having recognized it as being generally applicable".[36]

43. In the *North Sea Continental Shelf Cases*, the issue concerned a Convention that, by its terms, would become applicable to States only upon ratification; although a number of States had ratified the instrument, the Federal Republic of Germany had not done so. Denmark and Norway argued that Article 6 of the Convention was applicable to Germany because it represented customary international law, in the sense that the terms of the Article were "applicable as a conventional rule but also [represented] the accepted rule of general international law on the subject of continental shelf delimitation, as it exists independently of the Convention..."[37] The Court ruled that Article 6 did not form part of customary international law and therefore was not applicable to Germany in that manner. [38]

44. Denmark and Norway also argued that Article 6 applied to Germany because the latter had manifested its acceptance of the Convention by its conduct, including public statements. Newfoundland quotes the Court's finding that "only a very definite, very

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34 Newfoundland Memorial, para. 178.
35 Newfoundland Memorial, para. 178.
36 Newfoundland Memorial, para. 178.
37 **Annex 33:** *North Sea Cases*, *supra* note 6 at 24.
38 **Annex 33:** *Ibid.* at 26, 27.

consistent course of conduct" could justify such a claim.[39] The Court also found as follows with respect to the particular nature of the Convention at issue in those cases:[40] **(Annex 33)**

> In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up **a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested, namely the carrying out of certain formalities (ratification, accession)**, it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way... A further point, not in itself conclusive, but to be noted, is that if the Federal Republic had ratified the Geneva Convention, it could have entered ... a reservation to Article 6, by reason of the faculty to do so conferred by Article 12 of the Convention.

45. The Convention considered by the Court in the *North Sea Cases* is obviously distinguishable from the *1964 Agreement* concluded by the parties in the present arbitration. The *1964 Agreement* was not dependent on any "particular method" or conditional on any "formalities" prior to being implemented: the Premiers' intent to be bound was manifested in the *1964 Agreement* itself and the agreed boundaries were almost immediately applied, in practice, by the Provinces.

D. Conclusion

46. The *Terms of Reference* are unambiguous.

47. The law applicable to the arbitration is international law – not Canadian law.

48. And for the purpose of the arbitration, the parties are to be regarded as States subject to international law – not Canadian law – at all relevant times.

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39 Newfoundland Memorial, para. 178.

40 **Annex 33**: *North Sea Cases*, *supra* note 6 at 25, 26.

49. On this basis, **and only on this basis**, the Tribunal is asked to determine whether the line dividing the parties' respective offshore areas has been resolved by agreement. This includes the Tribunal's appreciation of events leading up to and surrounding the conclusion of the parties' Agreement in 1964, as well as all of their conduct subsequent. It also includes the Tribunal's assessment of the nature and scope of the *1964 Agreement* itself, including its form, effect and validity.

50. Indeed, **all issues** related to the question that the Tribunal is mandated to resolve are to be addressed on the basis, and only on the basis, that the parties are States which, in their mutual relations, are subject only to international law.

51. The question to be answered, then, is whether the boundaries agreed by Nova Scotia and Newfoundland on September 30, 1964, would, if concluded between States, constitute an Agreement binding on the parties under international law.

52. As demonstrated in Nova Scotia's Memorial and as discussed below, the answer to this question is a resounding *Yes*.