

PART III: NEWFOUNDLAND IS WRONG REGARDING THE NATURE OF THE *1964 AGREEMENT*

A. Introduction: The *1964 Agreement* Was An Agreement – Not A Proposal

1. At the heart of Newfoundland's case, and central to the tale it spins, are two wholly-unsubstantiated assertions.
2. First, claims Newfoundland, the Agreement concluded by the Premiers of the Atlantic Provinces on September 30, 1964,¹ in its entirety, constituted nothing more than a common negotiating position regarding jurisdiction over the offshore that the five East Coast Provinces agreed to propose, and did propose, to the Government of Canada. Second, that "proposal", including the agreement on boundaries that it expressed, died with its rejection by the federal government.² These assertions are utterly baseless in law and directly contrary to the historical record.
3. The Provinces did indeed set out a common position on offshore jurisdiction on September 30, 1964 (**Annex 24**), which was subsequently incorporated into the *Joint Submission* (**Annex 31**) presented to the Government of Canada on behalf of the Atlantic Provinces at the Federal-Provincial Conference of October 14-15, 1964 and which referred to the boundaries agreed by the Provinces, among themselves, on September 30.
4. The *Joint Submission*, however, was not the *1964 Agreement* (and the *1964 Agreement* was not the *Joint Submission*). Newfoundland's fatal flaw in its treatment of the historical record is to confuse this fact.

¹ Québec acceded the following week. The origins and conclusion of the *1964 Agreement* are discussed in Part II, para. 1 *et seq.* of Nova Scotia's Memorial.

² Newfoundland's unfounded yet frequently repeated theory is stated in various ways in its Memorial. One of the most straightforward expressions of the theory is found at para. 187: "The lines were put forward as an integral part of a package proposal which was submitted to and rejected by the federal government ... [they were] part of a joint negotiating proposal, not an agreement in its own right that could survive rejection of that proposal."

5. In fact, there were a number of proposals made to the federal government from 1964 onwards, and they all referred to the boundaries established in the *1964 Agreement*.³ While the interprovincial boundaries agreed by the East Coast Provinces and set out in the *1964 Agreement* were contained within these proposals, they were not, as Newfoundland asks the Tribunal to believe, subsumed within or subordinate to any of them. Nor were the agreed boundaries in any way conditional upon acceptance by the federal government of the Provinces' various proposals regarding federal *versus* provincial jurisdiction over the offshore. This is clear from the documentary record and from the conduct of the Provinces, including Newfoundland, over more than 30 years.
6. On the contrary, the repeated and consistent use of those boundaries by the Provinces, from 1964 to the present day, demonstrates that they regarded the boundaries not only as binding, but also as applicable to all forms of jurisdictional arrangements with the federal government.

B. The Events Of 1964 Demonstrate That The Parties Concluded A Binding Agreement

7. In its description of the seminal events of September and October 1964, and throughout its assessment of the *1964 Agreement*, Newfoundland focuses almost exclusively on the *Joint Submission (Annex 31)* presented to the Government of Canada at the Federal-Provincial Conference of October 14-15, 1964. By doing so, and by largely ignoring what occurred two weeks before, on September 30, 1964, Newfoundland attempts to convey the impression, as indicated above, that the *1964 Agreement* and the *Joint Submission* were essentially one and the same instrument, and that the agreement on boundaries was but one element of a package proposal concerning jurisdiction over the offshore. Such an analysis offers no assistance to the Tribunal, since it excludes from consideration facts that are central to the determination that the Tribunal must make.
8. The evidence, as set out in Part II of Nova Scotia's Memorial, demonstrates that an agreement on boundaries was concluded by the Provinces on September 30, 1964 in

³ These are discussed in Part II of Nova Scotia's Memorial and are reviewed, briefly, later in this Part.

Halifax, at a Conference of Atlantic Premiers, **not** on October 14-15 in Ottawa. The *Joint Submission* is highly relevant because, *inter alia*, it provides reliable proof of what occurred at the Conference of September 30, 1964. But the *Joint Submission* is not the Agreement by which the Provinces' offshore boundaries were established and on which Nova Scotia and the other East Coast Provinces have relied for over 30 years.

i) **Newfoundland Relies On An Inaccurate And Incomplete Version Of The Facts**

9. Newfoundland addresses the September 30, 1964 Conference of Atlantic Premiers only in passing, in a single paragraph in Chapter III of its Memorial⁴ and in a footnote to its legal argument in Chapter IV.⁵
10. In support of its theory that the agreed boundaries were merely one element of some sort of overarching "package proposal" to be presented to the federal government, Newfoundland describes the September 30 Conference as follows:⁶

On September 30, 1964, at the annual conference of Atlantic Premiers in Halifax, the Premiers agreed to present a common position to the federal government consisting of:

- (1) a joint statement setting out the position of the Atlantic Provinces on offshore resources;
 - (2) a metes and bounds description of proposed marine boundaries (Schedule A to the statement); and
 - (3) a map showing graphically the proposed marine boundaries between the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland (Schedule B to the statement).
11. Later, Newfoundland writes that the agreed boundaries "**originated** in a joint proposal made to the federal government in 1964 by the Atlantic Provinces [i.e., in the *Joint Submission*]"⁷.

⁴ Newfoundland Memorial, para. 33.

⁵ Newfoundland Memorial, para. 187, note 172.

⁶ Newfoundland Memorial, para. 33.

⁷ Newfoundland Memorial, para. 187 (emphasis added). The *Joint Submission* is filed by Newfoundland as Document #15.

12. There are a number of critical misstatements and omissions in this description of events – not the least of which is an inaccurate and misleading reference to a key document – which ignores the actual events of the September 30, 1964 Conference and the preparatory work on boundaries going back at least to 1961. This becomes clear when all of the various documents evidencing the *1964 Agreement* are considered in context, beginning with the *Communiqué* from the September 30 meeting (**Annex 24**).

ii) **The 1964 Communiqué From The September 30 Conference Contradicts Newfoundland's Theory**

13. The source cited by Newfoundland in support of its description, quoted above, of the Agreement reached on September 30, 1964 is the joint *Communiqué* issued at the end of the Premiers' Conference (**Annex 24**).

14. The *Communiqué* does not, however, disclose an overarching “[agreement] to present a common position to the federal government,” as described by Newfoundland. Nor does it speak, as Newfoundland says it does, of “proposed” marine boundaries. In fact, the *Communiqué* records that the Atlantic Premiers “unanimously agreed” on seven separate though related points, as follows:⁸ (**Annex 24**)

The Atlantic Premiers Conference held in Halifax on September 30, 1964, with Premier Stanfield of Nova Scotia, Premier Robichaud of New Brunswick, Premier Shaw of Prince Edward Island, and Premier Smallwood of Newfoundland in attendance **unanimously agreed**:

1. That the provincial governments are entitled to the ownership and control of submarine minerals underlying territorial waters including, subject to International Law, the areas in the Banks of Newfoundland and Nova Scotia, on legal, equitable and political grounds. The argument in support of these several grounds set out in the Report prepared in 1959 by Professor Gerard V. LaForest still retains full force and affect (sic).
2. That formal recognition of the rights of the provinces to the submarine minerals should be obtained from the Government of

⁸ **Annex 24:** *Communiqué* issued by Atlantic Premiers Conference, Halifax, Nova Scotia (30 September 1964). Newfoundland has also filed a copy as Document #11. These conclusions essentially reiterate the recommendations of the Attorneys-General at their meeting of September 23, 1964. (**Annex 21**)

Canada as essential to the expeditious economical and orderly development of mineral exploration, essential to the economy of the Atlantic Provinces.

3. That the Parliament of Canada be requested to continue to assert the status of the Gulf of St. Lawrence, including the Strait of Belle Isle and Chaleur Bay, Cabot Strait, Northumberland Strait and the Bay of Fundy, as in-land waters or territorial waters.
4. That it is desirable that the marine boundaries as between the several Atlantic Coast Provinces should be agreed upon by the provincial authorities and the necessary steps taken to give (sic) effect to that agreement.
5. **That the boundaries described by Metes and Bounds in Schedule A and shown graphically on Schedule B be the marine boundaries of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland.**
6. That the Parliament of Canada be asked to define the **boundaries as approved by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland** under the provisions of Section 3 of the British North America Act, 1871.
7. **That an immediate approach should be made to the Province of Quebec** so that a united presentation may be made to the Government of Canada.

(emphasis added)

15. From its misleading account of this seven-point agreement, Newfoundland attempts to construct an argument to the effect that the *1964 Agreement* constituted a single agreement on a "proposal", of which each of the "unanimously agreed" items were nothing more than component, interdependent parts.
16. Nowhere in the *Communiqué*, however, is there the least evidence that the Provinces viewed the *1964 Agreement* in this manner or that they regarded their boundary agreement as subordinate or ancillary to a proposal to the federal government. The effect desired by Newfoundland can be achieved only by cobbling together patently separate items of agreement that are listed individually with no indication of hierarchy or, much less, of interdependence.
17. Yet, building on its unsubstantiated theory of an overarching agreement on a common proposal, and again citing only the *Communiqué* in support, Newfoundland asserts that

- “the proposed lines were inseparable from [the] objective ... [of] ownership and jurisdiction over offshore mineral resources”.⁹
18. There is not a single word in the *Communiqué* that suggests, let alone states, that these issues were “inseparable”. The text of the *Communiqué*, as opposed to Newfoundland’s truncated and fanciful description of it, is actually very clear on the distinction between matters **agreed as between the Provinces**, on the one hand, and matters **agreed to be proposed to the federal government**, on the other.
19. Items 1 and 2 of the *Communiqué* deal with the issue of provincial *versus* federal control of the offshore. They record the Premiers’ agreement that the Provinces are “entitled to the ownership and control of submarine minerals ...” and that “formal recognition of [these] rights ... should be obtained from the Government of Canada ...”
20. Items 4 and 5 concern the Provinces’ agreement on boundaries. Item 4 states that offshore boundaries “should be agreed upon by provincial authorities and the necessary steps taken to [give] effect to that agreement”, while item 5 records that “the boundaries described by Metes and Bounds in Schedule A and shown graphically on Schedule B” are unanimously agreed to “be **the marine boundaries** of the Provinces” (not the “**proposed marine boundaries**”, as Newfoundland suggests¹⁰).
21. Item 6 records the Premiers’ agreement that Parliament is to be asked “to define **the boundaries as approved by the Provinces** ... under the provisions of Section 3 of the British North America Act, 1871.”¹¹ The Provinces thus agreed that they would ask the Government of Canada to “alter” – that is, to increase – their existing territorial limits to encompass the offshore (at the expense of Canada’s claim to exclusive federal jurisdiction). A bold request, indeed. The agreement to request federal legislation, however, as recorded in item 6 of the *Communiqué* is collateral to the rights and obligations of the Provinces **as between themselves**, grounded in their agreement on

⁹ Newfoundland Memorial, para. 187.

¹⁰ Newfoundland Memorial, para. 33 (emphasis added).

¹¹ **Annex 25: British North America Act, 1871**, 34-35 Vict., c.28 (U.K.), s. 3 provides for a Province’s territorial limits to be constitutionally “altered” by means of federal legislation enacted with the consent of the Province concerned.

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1. That the provincial governments are entitled to the ownership and control of submarine minerals underlying territorial waters including, subject to International Law, the areas in the Banks of Newfoundland and Nova Scotia, on legal, equitable and political grounds. The argument in support of these several grounds set out in the Report prepared in 1959 by Professor Gerard V. LaForest still remains full force and affect [sic].
2. That formal recognition of the rights of the provinces to the submarine minerals should be obtained from the Government of Canada as essential to the expeditious economical and orderly development of mineral exploration, essential to the economy of the Atlantic Provinces.
3. That the Parliament of Canada be requested to continue to assert the status of the Gulf of St. Lawrence, including the Strait of Belle Isle and Chaleur Bay, Cabot Strait, Northumberland Strait and the Bay of Fundy, as in-land waters or territorial waters.
4. That it is desirable that the marine boundaries as between the several Atlantic Coast Provinces should be agreed upon by the provincial authorities and the necessary steps taken to gove [sic] effect to that agreement.
5. **That the boundaries described by Metes and Bounds in Schedule A and shown graphically on Schedule B be the marine boundaries of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland.**
6. That the Parliament of Canada be asked to define **the boundaries as approved by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland** under the provisions of Section 3 of the British North America Act, 1871.
7. **That an immediate approach should be made to the Province of Quebec** so that a united presentation may be made to the Government of Canada.

(our emphasis)

(Annex 24: *Communiqué* issued by Atlantic Premiers Conference, Halifax, Nova Scotia (30 September 1964))

boundaries as set out in the preceding items 4 and 5, just as the agreement to request federal “recognition” of provincial rights to ownership and control of the offshore, recorded in item 2, is collateral to the Provinces’ statement of their entitlement to those rights, which are described in item 1 as deriving from legal, equitable and political grounds. In both cases, **federal acceptance is regarded neither as the source nor as a condition of the Provinces’ rights and obligations.** Those rights are seen as grounded, in the case of boundaries, on the Provinces’ agreement *inter se*; and in the case of ownership and jurisdiction over the offshore, on law, equity and political principles.

22. In sum, it is clear that the Provinces regarded their offshore boundaries as a matter both that **could** be agreed among themselves and that **was** in fact agreed at the Conference. There is nothing here that suggests that provincial agreement on the boundaries required federal action.¹²

iii) The Record Of “Matters Discussed” From The September 30 Conference Contradicts Newfoundland’s Theory

23. On October 2, 1964, Premier Stanfield wrote to the Atlantic Premiers enclosing a document entitled “Matters Discussed at the Atlantic Premiers Conference in Halifax September 30, 1964 Requiring Further Action” (“*Matters Discussed*”).¹³ Apart from a passing reference to the document in a footnote,¹⁴ Newfoundland studiously ignores this contemporaneous account of the September 30 Conference – perhaps understandably, for the document provides a very different account of the Conference than is contained in the Newfoundland Memorial.

¹² The allegation that the agreed boundaries were somehow “conditional” is addressed more fully in Part III.D of this Counter-Memorial.

¹³ A copy is found at Annex 26: “Matters Discussed at the Atlantic Premiers Conference in Halifax September 30, 1964 Requiring Further Action” and, by way of example, letter of transmission from R.L. Stanfield, Premier, Province of Nova Scotia to L.J. Robichaud, Premier, Province of New Brunswick (2 October 1964).

¹⁴ Newfoundland Memorial, para. 33, note 23.

24. Item 3, “Submarine Mineral Rights and Provincial Boundaries”, evidences the following:
(Annex 26)

The Conference agreed on the marine boundary lines between each of the provinces.

(...)

Premier Stanfield of Nova Scotia will prepare a presentation for the pending Federal/Provincial Conference setting out the position of the four Atlantic Provinces with respect to submarine mineral rights and the agreed marine boundaries.

(emphasis added)

25. Here we have an explicit statement of the actual agreement on boundaries concluded on September 30, not as a subsidiary component of a broader proposal as alleged by Newfoundland, but standing alone and separate from the Provinces’ “position ... with respect to submarine mineral rights”. The “position” was to be the subject of negotiation with the federal government; the “agreed boundaries” were a *fait accompli*.¹⁵

26. While Newfoundland asserts that the Premiers decided to present a “common position” to the federal government that included the description of “proposed” boundaries, the *Matters Discussed* records no such decision and in fact contradicts Newfoundland’s claim.

iv) **The Documents Respecting The Accession Of Québec Contradict Newfoundland’s Theory**

27. Newfoundland refers only briefly in its Memorial to the events that resulted in Québec’s accession to the *1964 Agreement*, and it does so in a manner that conveys only part of the truth.

¹⁵ It is of note that in this record of the September 30, 1964 Conference, the question of a proposal to the federal government appears, not as the principal accomplishment of the September 30 Conference or as the dominant feature of the Premiers’ agreement, as represented by Newfoundland, but as an action item – in truth, as the second of two such items. See Annex 26.

MATTERS DISCUSSED AT THE ATLANTIC PREMIERS CONFERENCE

IN HALIFAX SEPTEMBER 30, 1964

REQUIRING FURTHER ACTION

(...)

3 Submarine Mineral Rights and Provincial Boundaries

The Conference agreed on the marine boundary lines between each of the provinces. The Conference further agreed that the Parliament of Canada should continue to assert the status of the Gulf of St. Lawrence, including the Strait of Belle Isle and Chaleur Bay, Cabot Strait, Northumberland Strait and the Bay of Fundy, as inland or territorial waters. The Conference further agreed that the Province of Quebec should be kept advised of the action of the four Atlantic Provinces and its concurrence in that action solicited.

Action

Premier Stanfield of Nova Scotia will forward to the Minister of Resources in the Province of Quebec a copy of the proposed marine boundaries and a copy of the map showing those boundaries. Premier Stanfield will ask the Province of Quebec to support the stand of the four Atlantic Provinces and seek the approval of the Provinces of Quebec and British Columbia as to the proposed marine boundary lines.

Premier Stanfield of Nova Scotia will prepare a presentation for the pending Federal/Provincial Conference setting out the position of the four Atlantic Provinces with respect to submarine mineral rights **and** the agreed marine boundaries.

(our emphasis)

(Annex 26: "Matters Discussed at the Atlantic Premiers Conference in Halifax September 30, 1964 Requiring Further Action" at 1 and 2)

28. The Atlantic Premiers' request to Premier Stanfield, the latter's *démarche* vis-à-vis Premier Lesage of Québec and the result of that initiative are dealt with in a single sentence in Newfoundland's Memorial:¹⁶

Premier Stanfield was asked to solicit Quebec's support and to prepare a presentation regarding the position of the provinces on offshore mineral resources at the federal-provincial conference. [footnote omitted]

29. As discussed above, however, the *Matters Discussed* reveals the true scope and significance of the approach to Québec, as agreed by the Provinces on September 30, 1964: (Annex 26)

Premier Stanfield of Nova Scotia will forward to the Minister of Resources in the Province of Quebec a copy of the proposed marine boundaries and a copy of the map showing those boundaries. Premier Stanfield will ask the Province of Quebec to support the stand of the four Atlantic Provinces and seek the approval of the Provinces of Quebec and British Columbia as to the proposed marine boundary lines.

30. The instruction to Premier Stanfield was explicit: he was to seek both "support" for the Provinces' general position and "approval" of the boundary lines.
31. It should also be noted that the text relates that Premier Stanfield was to forward to Québec a copy of "proposed" boundaries. The use of this expression was entirely proper, given that, as of 30 September, the boundaries had yet to be approved by Québec. The next paragraph of the document, referring to "the position of the four Atlantic Provinces", correctly speaks of "the agreed marine boundaries," just as, at the outset, the document correctly records that "[t]he Conference [which did not include Québec] agreed on the marine boundary lines between each of the provinces." (Annex 26)
32. Premier Stanfield's October 2, 1964 letter to Premier Lesage, copied to the other Premiers, also makes this distinction.¹⁷ In his letter, Premier Stanfield first states that he is enclosing "a description of the proposed boundaries" and a "map showing the proposed

¹⁶ Newfoundland Memorial, para. 33.

¹⁷ Annex 27: Letter from R.L. Stanfield, Premier, Province of Nova Scotia to J. Lesage, Premier, Province of Québec (12 October 1964). See also Nova Scotia Memorial, Part II, para. 21.

MATTERS DISCUSSED AT THE ATLANTIC PREMIERS CONFERENCE

IN HALIFAX SEPTEMBER 30, 1964

REQUIRING FURTHER ACTION

(...)

3 Submarine Mineral Rights and Provincial Boundaries

The Conference agreed on the marine boundary lines between each of the provinces. The Conference further agreed that the Parliament of Canada should continue to assert the status of the Gulf of St. Lawrence, including the Strait of Belle Isle and Chaleur Bay, Cabot Strait, Northumberland Strait and the Bay of Fundy, as inland or territorial waters. The Conference further agreed that the Province of Quebec should be kept advised of the action of the four Atlantic Provinces and its concurrence in that action solicited.

Action

Premier Stanfield of Nova Scotia will forward to the Minister of Resources in the Province of Quebec a copy of the proposed marine boundaries and a copy of the map showing those boundaries. Premier Stanfield will ask the Province of Quebec to support the stand of the four Atlantic Provinces and seek the approval of the Provinces of Quebec and British Columbia as to the proposed marine boundary lines.

Premier Stanfield of Nova Scotia will prepare a presentation for the pending Federal/Provincial Conference setting out the position of the four Atlantic Provinces with respect to submarine mineral rights **and** the agreed marine boundaries.

(our emphasis)

(Annex 26: "Matters Discussed at the Atlantic Premiers Conference in Halifax September 30, 1964 Requiring Further Action" at 1 and 2)

boundaries,” consistent with the status of Québec as a non-party to the Agreement at that point. This is followed immediately by a passage that makes it clear that, as regards the Atlantic Provinces themselves, the boundaries had already been agreed: (**Annex 27**)

I understand that these proposed boundaries had been referred previously to the Province of Quebec but perhaps only at the administrative level.

The Conference agreed that I should advise the Government of the Province of Quebec of our stand on the matter of submarine mineral rights **and** of the marine boundaries agreed upon by the Atlantic Provinces.

I was directed further to seek the concurrence of the Government of the Province of Quebec in our course of action.

(emphasis added)

33. In addition to demonstrating that the Premiers regarded the boundaries as “proposed” with respect to Québec, but already “agreed upon” as between the Atlantic Provinces, Premier Stanfield’s letter, as the *Matters Discussed*, distinguishes “our stand on the matter of submarine mineral rights” from “the marine boundaries agreed upon ...”.
34. Premier Lesage certainly recognised that the outcome of the September 30, 1964 meeting was both a common position on mineral rights **and** an agreement on agreed boundaries. In his October 7, 1964 telegram in reply to Premier Stanfield, he states his agreement on both issues:¹⁸ (**Annex 28**)

Further to your letter of October second I am happy to let you know that the Province of Quebec is in agreement with the Atlantic Provinces on **the matter of submarine mineral right[s] and of the marine boundaries agreed upon by the Atlantic Provinces.**

(emphasis added)

¹⁸ **Annex 28:** Canadian Pacific Telegram, World Wide Communications, RAA268-BA XA20846, Québec (7 October 1964).

v) **Newfoundland Misinterprets The *Joint Submission***

35. Newfoundland's characterisation and use of the *Joint Submission* (**Annex 31**) are, as stated above, fundamentally flawed. The *Joint Submission* is **not** the *1964 Agreement*. The *Joint Submission* is, though, compelling evidence of the *1964 Agreement*.
36. Apart from this critical error, Newfoundland also mischaracterize the actual terms of the *Joint Submission*, in aid of its theory that the boundaries agreed on September 30, 1964 were nothing more than a proposal to the Government of Canada and conditional upon federal acceptance. Newfoundland's description of the *Joint Submission* is perhaps best summed up as follows:¹⁹

From the beginning to the end of the presentation the whole object was federal recognition of provincial ownership and jurisdiction, and the boundary proposal was inextricably linked to that purpose.

37. A reading of the *Joint Submission*, in its entirety, puts paid to this false depiction of the facts.
38. The *Joint Submission*, agreed to by all the Premiers, was explicit on the matter of prior agreement on boundaries:²⁰ (**Annex 31**)
- "... the Atlantic Provinces have discussed this question among themselves and have agreed ...";
 - "... I request the Federal authorities to give effect to the boundaries thus agreed ...";
 - "... for all practical purposes, the attached description of the boundaries and map represent the agreement of the Atlantic Provinces."

¹⁹ Newfoundland Memorial, para. 189.

²⁰ **Annex 31**: "Submission on Submarine Mineral Rights by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland" (*Joint Submission*) with Annex entitled "*Notes Re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries*," (*Notes Re: Boundaries*) presented to Federal-Provincial Conference of Prime Ministers (14 – 15 October 1964); Newfoundland Document # 15. See also Nova Scotia Memorial, Part II, para. 29 and note 45.

39. These statements are incompatible with the contention that the boundaries were merely a “proposal”.
40. Further, as regards the supposed “inextricable” linkage between the Provinces’ agreement on boundaries and their jurisdictional proposal to the federal government, the Newfoundland Memorial simply ignores the plain words of the *Joint Submission*. As in Premier Lesage’s October 7, 1964 telegram (**Annex 28**), just as in Premier Stanfield’s October 2 letter to him (**Annex 27**), the *Matters Discussed* (**Annex 26**) and *Communiqué* recording the September 30, 1964 Conference (**Annex 24**), and the agenda for the Federal-Provincial Conference (**Annex 23**),²¹ the *Joint Submission* distinguished the **pending question of jurisdictional rights and the settled matter of the Provinces’ offshore boundaries: (Annex 31)**

... The questions with which we are concerned are (a) that of the **proprietary rights in submarine minerals** as between Canada and the Provinces, whatever the extent and nature of those rights may be, and (b) **boundary lines between Provinces**.

(emphasis added)

41. Finally, Newfoundland observes that the *Joint Submission* refers to the boundaries as “tentative” and notes that they “should be reviewed and revised” prior to use in legislation.²² (The *Joint Submission* actually states: “[i]t **may be** that before actual legislation is prepared the description by metes and bounds should be reviewed and revised²³) Given that, in 1964, the turning points had not yet been assigned coordinates, this language is hardly surprising. As described in the Nova Scotia Memorial, the necessary review was conducted by the *JMRC* in 1968-1969, geographic coordinates were assigned to the agreed turning points and the results were confirmed by the Premiers in June 1972.²⁴

²¹ **Annex 23**: “Atlantic Premiers Conference, Halifax, Nova Scotia, September 30, 1964.” See also Nova Scotia Memorial, Part II, para. 18.

²² Newfoundland Memorial, para. 194.

²³ See **Annex 31** (emphasis added) and Newfoundland Document # 15.

²⁴ Nova Scotia Memorial, Part II, paras. 38 – 59.

Submission

On Submarine Mineral Rights

by the

Provinces of Nova Scotia, New Brunswick,

Prince Edward Island and Newfoundland

(...)

The questions with which we are concerned are (a) **that of the proprietary rights in submarine minerals** as between Canada and the Provinces, whatever the extent and nature of those rights may be, and, (b) **boundary lines between Provinces**. These are the only questions which at this time it would be appropriate to discuss.

(...)

Reference has been made in this submission to Provincial boundaries but I do not think that that general question need be discussed at length or decided at this Conference. Section 3 of the British North America Act, 1871, provides the procedure for changing boundaries and in effect it is primarily a matter for agreement between the Provinces concerned. I can say, however, that **the Atlantic Provinces have discussed this question among themselves and have agreed** upon tentative boundaries of the marine areas adjoining those Provinces. These boundaries have been set out by metes and bounds and have been graphically delineated on a map. Hereto attached is a copy of the map and the description of the boundaries by metes and bounds. Speaking on behalf of the Province of Nova Scotia and as authorized by the Premiers of the Provinces of New Brunswick, Prince Edward Island and Newfoundland, **I request the Federal authorities to give effect to the boundaries thus agreed** upon by legislation, pursuant to Section 3 of the British North America Act, 1871. It may be that before actual legislation is prepared the description by metes and bounds should be reviewed and revised and the attached map, if necessary, varied accordingly, but, **for all practical purposes, the attached description of the boundaries and map represent the agreement of the Atlantic Provinces.**

(our emphasis)

(Annex 31: "Submission on Submarine Mineral Rights by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland" with Annex entitled "Notes Re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries" at 16 and 18)

vi) **Newfoundland Mischaracterize The Map Depicting The Agreed Boundaries Annexed To The *Joint Submission***

42. Newfoundland states in its Memorial that the map annexed to the *Joint Submission* depicts merely “proposed” boundaries, supposedly demonstrating that “[n]othing had crystallized” and that “final conclusion and legal implementation were still a distant prospect, and one that would never be realized.”²⁵
43. The word “proposed” does appear on the map, but Newfoundland neglects to mention that the map in question was originally prepared in 1961, along with the *Notes Re: Boundaries*,²⁶ long before the Atlantic Premiers concluded the *1964 Agreement*.²⁷ At the time the map was prepared, the boundaries were merely “proposed”; and they were subsequently “unanimously agreed”, as declared in item 5 of the *Communiqué* issued at the close of the September 30, 1964 Atlantic Premiers’ Conference.²⁸
44. It should also be noted that, on a copy of the map in use by the government of Newfoundland in 1972, and filed by Newfoundland in the present arbitration,²⁹ the words “(NFLD-NS-NB-PEI) 1964 INTERPROVINCIAL PREMIERS’ BOUNDARIES” have been written near the bottom of the document, correctly indicating its change in status.
45. Finally, the Tribunal must be alerted to the fact that Newfoundland has submitted with its Memorial what it claims – falsely – is a “true copy” of the map in question used in 1972.³⁰ The purported “true copy” submitted by Newfoundland bears the title “Schedule B – Stanfield Proposal.” This title does not appear on the original.
46. The issue is not merely Newfoundland’s curious addition of the words “Stanfield Proposal” to describe, in the context of this arbitration, a document that was presented to the Government of Canada on behalf of all of the Atlantic Provinces. More seriously, the addition of the words “**Schedule B**” to the map creates the misleading impression that the

²⁵ Newfoundland Memorial, para. 194.

²⁶ Nova Scotia Memorial, Part II, para. 13 *et seq.* and Annex 18.

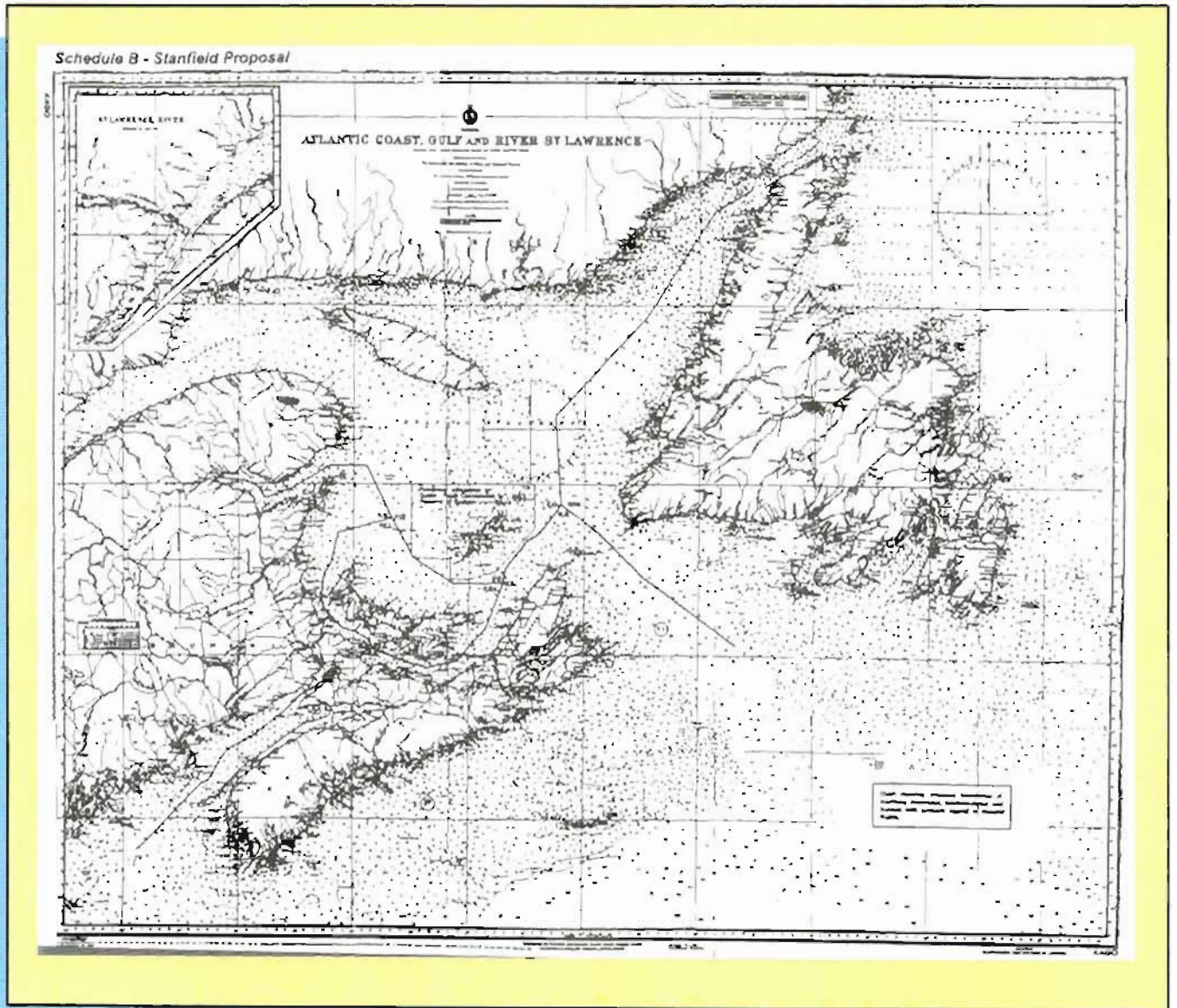
²⁷ This is described in Nova Scotia’s Memorial at Part II, paras. 9-13.

²⁸ See above, para. 14; see also Annex 24.

²⁹ See Newfoundland Document # 57.

³⁰ Newfoundland Memorial, para. 36, note 26.

[The title "Schedule B – Stanfield Proposal" was added by Newfoundland. This title does not appear on the original of this map, a true copy of which is found at Annex 32]



(Schedule B to the Newfoundland Memorial,
para. 36, note 26)

title itself is authentic – that is, that the map in its entirety is a true copy of Schedule B to the *Joint Submission*.

47. A “true” true copy of the map created in 1961, agreed by the Atlantic Premiers on September 30, 1964, proposed to Québec on October 2, accepted by Premier Lesage on October 7 and annexed as Schedule B to the *Joint Submission* is found at Annex 32 to Nova Scotia’s Memorial.

C. The Parties’ Conduct Subsequent To 1964 Confirms That They Concluded A Binding Agreement

48. The historical record shows clearly that the *1964 Agreement* was never just a mere proposal to the federal government: the Agreement comprised a mutually binding commitment among the five East Coast Provinces regarding their boundaries in the offshore.
49. This is confirmed not only by the events leading up to and surrounding the conclusion of the *1964 Agreement*, but as well by the subsequent conduct of the Provinces, including the conduct of the parties to this arbitration, stretching over many years. That conduct is described in Nova Scotia’s Memorial.³¹ Newfoundland, however, has chosen to present a skewed and entirely self-serving overview of the relevant facts.

i) Newfoundland’s Account Of The Parties’ Subsequent Conduct Is Riddled With Errors And Omissions

50. According to the Newfoundland Memorial, the so-called “proposal” to the federal government, including the boundaries agreed by the Provinces, was rejected in 1964, or possibly in 1965.³²

³¹ See Nova Scotia Memorial, Part II, paras. 72-99 and Part IV, paras. 11-16, 35-51. That conduct is also reviewed later in this Counter-Memorial, where recently-discovered evidence is also introduced which, as will be seen, confirms the position that the line dividing the offshore areas of Nova Scotia and Newfoundland has been resolved by agreement.

³² Newfoundland Memorial, para. 37 refers to correspondence from December 1964 and February, March and April 1965.

51. Elsewhere in its Memorial, Newfoundland's argues that "a failure of negotiations means, by definition, that there is no agreement at all. The proposals are 'off the table'; they lapse as if they had never been made".³³ By this reasoning, the Provinces' September 30, 1964 "proposal" on boundaries should have died at the same time as the rest of the package of which it was supposedly a component part.
52. The defect in Newfoundland's argument, of course, is that **this did not happen**. The boundaries established in the *1964 Agreement* did not die, either in 1964, 1965 or later. The Provinces' Agreement did not lapse. It had a life of its own. And once agreed, the boundaries were applied by all of the East Coast Provinces, including Newfoundland, and they continued to be applied in the years following the federal government's rejection of the Provinces' proposal on jurisdiction.³⁴
53. Critical aspects of the Provinces' conduct subsequent to 1964 are not addressed by Newfoundland in its Memorial. These include the fundamental matter of permit issuance in the offshore by Newfoundland and Nova Scotia, in full respect of their agreed boundary, (**Figure 23**), as well as the consistent application of the boundaries by New Brunswick, Prince Edward Island and Québec from 1964 to the present. (**Figure 15 and Figure 24**)
54. Newfoundland does discuss a number of instances of the parties' subsequent conduct, and refers as well to certain events not described in Nova Scotia's Memorial. The cumulative effect of Newfoundland's assertions may be superficially persuasive, but a closer examination reveals that its broad-brush approach rests on a series of omissions, misstatements and misinterpretations.

³³ Newfoundland Memorial, para. 180.

³⁴ For a description of the conduct of the East Coast Provinces as it relates to the agreed boundaries, see Nova Scotia Memorial, Part II, paras. 72-99 and Part IV, paras. 11-16, 35-51. See also **Figures 11-19 and Figure 21**.

a) Premier Smallwood's July 1965 "Interjection"

55. The Newfoundland Memorial quotes an account of Premier Smallwood's "interjection" at a federal-provincial conference in July 1965, to the effect that "interprovincial boundaries in the Gulf were merely a proposal and that the provinces had not attempted to make them law...".³⁵ Several observations are in order.

56. A reading of the document submitted by Newfoundland (an extract of minutes of a federal-provincial conference) shows that the discussion had nothing to do with the effect of the Provinces' boundary agreement as between themselves; it concerned, rather, the question of federal *versus* provincial claims to the offshore.³⁶

[The Prime Minister] isolated the fundamental issue to be resolved as whether the ownership and jurisdiction of mineral rights in the off-shore regions vest in Canada as a state or in the provinces that bound the particular water areas involved.

57. This is further confirmed by the discussion that both precedes and follows the exchange cited by Newfoundland. Prime Minister Pearson speaks of the need to settle "the question of legal ownership and legal right."³⁷ A discussion ensues regarding, *inter alia*, a reference to the Supreme Court of Canada on this "question," regarding which Premier Shaw is recorded as stating the following.³⁸

... that the Atlantic Provinces and Quebec had reached agreement on interprovincial boundaries in the Gulf of St. Lawrence region, had subdivided the Gulf between themselves, and had advised the Federal Government accordingly. Thus there was no legal question involved.

(emphasis added)

58. In response, the Prime Minister "[points] out that ... provinces do not have the constitutional authority to adjust provincial boundaries unilaterally,"³⁹ at which point Premier Smallwood interjects. Again, the issue is **not** whether or not the Provinces

³⁵ Newfoundland Memorial, para. 38. See also Newfoundland Document # 21 at 28.

³⁶ Newfoundland Document # 21 at 27 (first page of the copy provided by Newfoundland).

³⁷ Newfoundland Document # 21 at 27.

³⁸ Newfoundland Document # 21 at 28.

³⁹ Newfoundland Document # 21 at 28.

110. The Prime Minister opened the meeting at 10:30 a.m. by setting out the federal position on this question. He pointed out that the Federal Government was not challenging the constitutional rights of the provinces with respect to resources that are within their boundaries. He discussed the significance of internal, territorial and extra-territorial waters with regard to the underlying off-shore mineral rights, and isolated the fundamental issue to be resolved as whether the ownership and jurisdiction of mineral rights in the off-shore regions vest in Canada as a state or in the provinces that bound the particular water areas involved. He stressed that the Federal Government considered that the question of legal ownership and legal right should be settled before any reasonable and equitable arrangements could be negotiated between the Federal Government and the coastal provinces. He suggested a modus operandi for the interim period whereby both the Federal Government and the provincial government involved in an off-shore region would issue duplicate permits to companies without prejudice to each other's claims.

(...)

116. Mr. Shaw stated that the Atlantic Provinces and Quebec had reached agreement on interprovincial boundaries in the Gulf of St. Lawrence region, had subdivided the Gulf between themselves, and had advised the Federal Government accordingly. Thus there was no legal question involved.

117. The Prime Minister pointed out that adjustment of provincial boundaries without Federal participation would be an arbitrary action and he stressed that provinces do not have the constitutional authority to adjust provincial boundaries unilaterally.

118. Mr. Smallwood interjected that these interprovincial boundaries in the Gulf were merely a proposal and that the provinces had not attempted to make them law.

(Newfoundland Document #21: Minutes of the Federal-Provincial Conference (21 July 1965) at 27 and 28)

concluded an agreement on their interprovincial boundaries, nor even whether they had the authority to do so. The “question” is the same – whether they could apply those boundaries to assert ownership over the offshore claimed by the Government of Canada. The fact is that the Prime Minister was correct; under the Constitution, the Provinces could not, as discussed above, unilaterally “adjust” their territorial limits.⁴⁰ So too was Premier Smallwood correct; as far as federal-provincial relations were concerned, the boundaries were “merely a proposal”. This says nothing, however, about their having been the subject of a mutually binding agreement **as between the provinces**.

59. Prime Minister Pearson’s comments themselves suggest a recognition that some form of régime providing for interprovincial boundaries relating to mineral rights in the offshore was extant. The *modus operandi* suggested by the Prime Minister involved the issuance of “duplicate permits” by “the Federal Government and **the provincial government involved in an off-shore region**”⁴¹. This could only work if there existed some means of determining the “offshore region” within which a particular province would be “involved.” Identifiable boundaries, opposable not to federal authorities (who would issue permits throughout the offshore) but to the provinces (who would issue “duplicate permits” in an “offshore region”) were necessary to the Prime Minister’s proposed scheme.⁴²

⁴⁰ Annex 25: *British North America Act*, 1871, 34-35 Vict., c. 28 (U.K.), s.3.

⁴¹ Newfoundland Document # 21 at 27 (emphasis added).

⁴² This is not a fanciful notion. As demonstrated in Nova Scotia’s Memorial, boundaries were considered essential to the orderly economic development of the offshore. Indeed, in many of the federal documents submitted by Newfoundland regarding the numerous forms of jurisdictional or administrative arrangements being contemplated over the years, one finds reference to the concept of “adjacency” – that is, the idea that the benefits derived from mineral deposits in a particular area of the offshore should accrue in some special manner (i.e., in some greater share) to the Province “adjacent” to that area (see, for example: Newfoundland Document # 43 at 2, para. 5; Newfoundland Document # 52 at 5, para. 12; Newfoundland Document # 60 at 5, 6, paras. 11, 12; Newfoundland Document # 21 at 27, first para. and at 28, last para.). Adjacency, of course, is only feasible if there exists a means of determining which offshore area is adjacent to which Province – that is, if some form of offshore boundaries exist for the purpose of determining provincial offshore mineral rights.

110. The Prime Minister opened the meeting at 10:30 a.m. by setting out the federal position on this question. He pointed out that the Federal Government was not challenging the constitutional rights of the provinces with respect to resources that are within their boundaries. He discussed the significance of internal, territorial and extra-territorial waters with regard to the underlying off-shore mineral rights, and isolated the fundamental issue to be resolved as whether the ownership and jurisdiction of mineral rights in the off-shore regions vest in Canada as a state or in the provinces that bound the particular water areas involved. He stressed that the Federal Government considered that the question of legal ownership and legal right should be settled before any reasonable and equitable arrangements could be negotiated between the Federal Government and the coastal provinces. He suggested a *modus operandi* for the interim period whereby both the Federal Government and the provincial government involved in an off-shore region would issue duplicate permits to companies without prejudice to each other's claims.

(...)

116. Mr. Shaw stated that the Atlantic Provinces and Quebec had reached agreement on interprovincial boundaries in the Gulf of St. Lawrence region, had subdivided the Gulf between themselves, and had advised the Federal Government accordingly. Thus there was no legal question involved.

117. The Prime Minister pointed out that adjustment of provincial boundaries without Federal participation would be an arbitrary action and he stressed that provinces do not have the constitutional authority to adjust provincial boundaries unilaterally.

118. Mr. Smallwood interjected that these interprovincial boundaries in the Gulf were merely a proposal and that the provinces had not attempted to make them law.

(Newfoundland Document #21: Minutes of the Federal-Provincial Conference (21 July 1965) at 27 and 28)

b) The Mandate And Work Of The JMRC

60. Newfoundland's characterisation of the work of the *JMRC* in plotting precise coordinates for the turning points of the boundaries established in the *1964 Agreement* is both incomplete and inaccurate. The pattern is familiar. Newfoundland makes unsupported assertions regarding the mandate of the *JMRC's Technical Committee on Boundaries*, misstates the purpose of the *JMRC's* work and misquotes a critical document.
61. For example, Newfoundland asserts that the task of the *Technical Committee* was "to give the lines a proper description so that they could be incorporated into an agreement and eventually enacted into law."⁴³ This characterisation, which suggests that the mandate of the *Technical Committee* was bound up with, and subordinate to, the drafting of an agreement and legislation, is pure invention, designed to fit Newfoundland's theory of an overarching package proposal on offshore ownership.
62. The *Technical Committee's* actual mandate, and the task that it actually accomplished, are clearly stated in the final Report of its Chairman, Mr. Smith:⁴⁴ (**Annex 41**)

Upon the instructions of the Joint Mineral Resources Committee, the technical committee has **determined and agreed upon the location and methodology for defining the turning points as described in 'Notes re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries', as set forth by the Atlantic Provinces Premiers in 1964.**

The Technical Committee has not discussed the merits of such definition of boundaries but have **precisely located those mid-points described therein.**

(emphasis added)

63. The second error in Newfoundland's account of the *JMRC's* work is its statement that "there would have been no need for the *JMRC* technical committee if the boundaries had

⁴³ Newfoundland Memorial, para. 195.

⁴⁴ **Annex 41:** "Minutes of Meeting of Joint Mineral Resources Committee Held at the Board Room, Provincial Building, Halifax, Nova Scotia, January 17, 1969" at attachment "A". See Nova Scotia Memorial, Part II, para. 42.

already been resolved by agreement.”⁴⁵ This statement is in direct contradiction to the Report, quoted above.

64. The Report speaks for itself. The *Technical Committee* was concerned with “the **location and methodology** for defining the turning points ... as set forth by the **Atlantic Provinces Premiers in 1964**”; its ultimate objective was to “precisely [locate] those mid-points described therein.” The *Technical Committee* was **not** concerned with, and it did not address, “the merits of such definition of boundaries”.
65. The connection to the *1964 Agreement* is stated explicitly, as is the understanding that the “definition of [the] boundaries” had already been accomplished.
66. In this regard, it should also be recalled that the need for technical delineation and description of the agreed boundaries, initially described exclusively by metes and bounds, was foreseen in 1964. As noted in Nova Scotia’s Memorial,⁴⁶ the October 14-15, 1964 *Joint Submission* acknowledged that it remained for the turning points (the various “mid-points” described therein) to be assigned precise coordinates. To borrow from the words of the Report of the *Technical Committee* that eventually carried out the task, it remained to “precisely [locate] those mid-points described therein.”⁴⁷

⁴⁵ Newfoundland Memorial, para. 195.

⁴⁶ Nova Scotia Memorial, Part II, para. 29, note 45 (discussing the use of the words “tentative”, “reviewed and revised” and “reviewed in detail” in the October 14-15, 1964 *Joint Submission*); and Part II, para. 38, note 53 (“It remained to fix the precise technical coordinates ...”).

⁴⁷ As noted in the Nova Scotia Memorial (Part II, para. 38), a boundary delimitation is normally a two-step exercise: first, the boundary is determined based on certain principles, which is followed by the more technically precise exercise of plotting the line. This is recognized, for example, in the request made to the International Court of Justice in the *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, when the parties asked the Court not only to determine the “principles” to be applied for the delimitation, but also “further requested” that the Court specify the practical way in which the principles were to apply so as to enable the parties to delimit the areas. (See Nova Scotia Memorial, Part II, para. 38, note 53.). Newfoundland’s contention on this point is that, contrary to normal practice (and common sense), the Provinces considered it expedient to engage in the technical exercise of plotting coordinates for a boundary that had yet to be determined, or that it was somehow not possible for them to agree on a boundary without first having gone through such an exercise.

67. As shown in the Nova Scotia Memorial, the necessary technical review was conducted by the *JMRC* in 1968/69, and the results were confirmed by the five East Coast Premiers, including Premier Moores of Newfoundland, in June 1972.⁴⁸
68. Finally, Nova Scotia must again draw the Tribunal's attention to a false and seriously misleading "quotation" by Newfoundland of an important piece of evidence in this case. At paragraph 41 of its Memorial, discussing the mandate of the *Technical Committee*, Newfoundland states:

One of the technical committees was charged with 'the delineation and description of the proposed boundaries of the participating provinces' in the submarine areas.

(emphasis added)

69. The words "delineation and description of the proposed boundaries ...", ascribed to the May 12, 1969 letter from P.-E. Allard to the members of the *JMRC* (**Annex 43**),⁴⁹ are, in fact, false. Unbelievably, Newfoundland has added the word "**proposed**" to the word "boundaries" that appears in the original text. That is, it has substituted the phrase "**proposed boundaries of the participating provinces**", no doubt extremely useful in the context of its argument in this arbitration, for the less convenient "**boundaries of the [...]** Provinces".

⁴⁸ Nova Scotia Memorial, Part II, paras. 38-59.

⁴⁹ Newfoundland Memorial, para. 41, note 36. Newfoundland has provided a copy of the Allard letter as Document # 33. Nova Scotia provided a copy of the letter as Annex 43. Nova Scotia discusses the Allard letter in its Memorial at Part II, paras. 44, 45.

70. The sentence in question actually reads as follows:⁵⁰ (Annex 43)

One of the technical committees the Sub-committee was directed to establish was one dealing with the delineation and description of the boundaries of the above Provinces in submarine areas.

(emphasis added)

71. The “factual background” purportedly described by Newfoundland in Chapter III of its Memorial is again shown to comprise as much fiction as fact, and its use by Newfoundland, in support of its otherwise insupportable theories, pure artifice.

c) The Allard Letter Of 1969

72. The letter of May 12, 1969 from P.-E. Allard (Vice-Chair of the *JMRC*) to the five provincial Ministers is further misinterpreted in the Newfoundland Memorial, beyond the serious misquote described above. Newfoundland claims that the letter “would be inexplicable if the boundaries had already become the subject of a binding agreement”.⁵¹ This conclusion is based on the fact that the letter asked each Minister to “request from his government a commitment to enter into an agreement with the other four Provinces and ratify the said agreement by legislation”.⁵²

73. The difficulty with Newfoundland’s conclusion is twofold. First, it ignores words in the letter, immediately prior to the reference to legislation, stating that the simple “approval”

⁵⁰ Annex 43: Letter from P.-E. Allard, Vice-Chairman, Joint Mineral Resources Committee to P. Gaum, Minister of Mines, Government of Nova Scotia (12 May 1969) (hereinafter “Allard letter”) at 1. There are other problems with Newfoundland’s treatment of the record. As with the word “proposed”, the words “participating provinces” used by Newfoundland also do not appear in Mr. Allard’s letter, which refers, as indicated, to “the boundaries of the above Provinces in submarine areas” (emphasis added). This may simply reflect insufficient attention to detail. Or, perhaps Newfoundland intended to refer to another source. Nova Scotia notes that in the July 16, 1968 “Minutes of Meeting of Joint Mineral Resources Committee held at the Board Room, Provincial Building, Halifax, Nova Scotia, July 16, 1968” (Annex 36 at 2), the words “participating Provinces” do appear, and that document also describes the mandate of the *JMRC*’s various technical committees in terms similar to those of the Allard letter. However, there, too, the phrase “proposed boundaries” does not appear. It states that the *Technical Committee* will address “[d]elineation and description of the boundaries of the participating Provinces in submarine areas.” (emphasis added) This document is discussed at Nova Scotia Memorial, Part II, para. 40.

⁵¹ Newfoundland Memorial, para. 193.

⁵² Newfoundland Memorial, para. 193; Annex 43: Allard letter at 3.

(...)

One of the technical committees the Sub-committee was directed to establish was one dealing with the delineation and description of **the boundaries of the above Provinces in submarine areas.**

(...)

The effect of such approval is to be that **the boundaries shown on the map and delineated by the turning points are the boundaries between the Provinces** for all purposes and especially for the purpose of showing the entitlement to any minerals within the boundaries be they on land or in submarine areas. Each member Minister is **also** to request from his government a commitment to enter into an agreement with the other four Provinces and ratify the said agreement by legislation.

(our emphasis)

(Annex 43: Letter from P.-E. Allard, Vice-Chairman, *Joint Mineral Resources Committee* to P. Gaum, Minister of Mines, Government of Nova Scotia (12 May 1969) at 1 and 3)

of the turning points and map prepared by the *Technical Committee* would have effect *ipso facto*:⁵³ (Annex 43)

The effect of such approval is to be that the boundaries shown on the map and delineated by the turning points are the boundaries between the Provinces for all purposes and especially for the purpose of showing the entitlement to any minerals within the boundaries be they on land or in submarine areas. Each member Minister is also to request from his government ...

(emphasis added)

74. More significant, though, is that, as the full record (as opposed to the elements picked and offered by Newfoundland) establishes, the Allard letter was far from the final step in the process.
75. Contrary to the claim that “[t]here was no follow-up and the agreement contemplated in the Allard letter was never concluded”,⁵⁴ the Premiers in fact **did** reach an agreement on this very matter, on June 17-18, 1972.

d) The June And August 1972 Premiers’ Meetings

76. The critical meetings of June and August 1972, at which (in June) the East Coast Premiers agreed on the technical coordinates of the *1964 Agreement* boundaries previously determined by the *Technical Committee* of the *JMRC*, and then (in August) reaffirmed that decision, are dealt with but partially in Newfoundland’s Memorial.

⁵³ Annex 43: Allard letter at 3. It is also worth noting that on the map submitted by Newfoundland to the Tribunal as Document # 28, the caption that appears on the original – “Atlantic Provinces showing boundaries of mineral rights” has been cut off. A true copy of this map is found at Annex 42 to the Nova Scotia Memorial and is reproduced in the Memorial itself as Figure 7.

⁵⁴ Newfoundland Memorial, para. 47. See also Newfoundland Memorial, paras. 44, 195.

77. Following their meeting of June 17-18, 1972, the Premiers issued a *Communiqué* declaring the seven items agreed by them at the meeting.⁵⁵ Newfoundland describes the 1972 *Communiqué* as follows:⁵⁶

The 1972 communiqué, like Premier Stanfield's submission of 1964, set out a negotiating position. It was a step in a process leading to ownership of the offshore. It represented the formulation of a common position for the process, but no more.

78. The Premiers' declaration that they had "agreed to the delineation and description of the offshore boundaries between each of [the] Provinces"⁵⁷ is similarly dismissed by Newfoundland:⁵⁸

As in 1964, the boundary description was part and parcel of a package proposal, the central features of which were provincial ownership and cooperative arrangements. It was ancillary to, and inseparable from, the negotiating proposal in which it appears.

79. The fundamental problem, as with its treatment of the 1964 record, is that Newfoundland asserts an "integral", "inextricable" or "inseparable" relationship between the Provinces' express agreement on boundaries, on the one hand, and their agreement on a proposal to the federal government, on the other – but does not **support** the assertion.
80. Nor is Newfoundland able to explain the remarkable longevity of a "proposal" on boundaries that, according to its theory, had already died at least twice prior to 1972 but was, even then, in full use by the Provinces. The explanation, of course, is that the boundaries were not a "proposal" at all, as far as the Provinces were concerned. The boundaries were the object of an agreement that, far from repeatedly lapsing, only to rise again and again, was regarded by the Provinces as final and binding and that was, in fact, applied by them throughout the years.

⁵⁵ Annex 54: "Communiqué Issued Following Meeting of the Premiers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, and the Vice-Premier of Quebec" (18 June 1972) (hereinafter "*1972 Communiqué*"). Newfoundland also filed a copy as Document # 48.

⁵⁶ Newfoundland Memorial, para. 199.

⁵⁷ Annex 54: *1972 Communiqué* at 2.

⁵⁸ Newfoundland Memorial, para. 198.

81. In the case of the seven-point agreement reached by the Premiers on June 17-18, 1972 – as in the case of the *1964 Agreement* – there is nothing to suggest that the agreement relating to technical delineation of the boundaries (item 2) is “ancillary” to what is clearly a separate item relating to assertion of ownership (item 3), any more than are the items regarding “arrangements” (item 4), “delegation of certain aspects of [offshore] administration” (item 5) or “a regional administrative authority” (item 6).
82. The only evidence adduced by Newfoundland in support of its characterisation of the June 18, 1972 *Communiqué* is Premier Moores’ statement to the Newfoundland House of Assembly on June 19, 1972. As discussed briefly below, Newfoundland’s treatment of this important event represents yet another distortion of the historical record to suit what it apparently considers to be its needs in this case.

e) Premier Moores’ Statement To The Newfoundland House Of Assembly

83. Of all the records evidencing the outcome of the Premiers’ June 17-18, 1972 meeting, the Statement made by Premier Moores to the Newfoundland House of Assembly on June 19, 1972 is perhaps the most compelling.⁵⁹ In the first part of his Statement, it will be recalled, Premier Moores declared that “[t]he result of those meetings was a seven-point agreement outlining the areas of co-operation between the provinces.” He went on, *inter alia*, to enumerate those seven points, including the following explicit statement: (Annex 58)

The Governments of the five Eastern Provinces have agreed to the delineation and description of the offshore boundaries [sic] between each of these five Provinces.

⁵⁹ Annex 58: Newfoundland, 36th General Assembly, “Statement by Premier Moores” in *Verbatim Report*, 1st Session, Vol. 1, No. 33 (19 June 1972) (hereinafter “Premier Moores’ Statement”) at 2491. Newfoundland has also submitted a copy of the Statement at Document # 50. However, unlike the document produced by Nova Scotia, Newfoundland’s Document # 50 is not a verbatim transcript of Premier Moores’ Statement, but apparently a copy of the prepared Statement. As it turns out, there are only a few discrepancies between the prepared text and the Statement actually made to the House by Premier Moores, and none of substance relating to the issues in this arbitration. Yet one wonders why, in the present arbitration, Newfoundland would choose to submit anything other than an authentic transcript of Premier Moores’ Statement.

COMMUNIQUE ISSUED FOLLOWING MEETING OF THE PREMIERS OF NOVA SCOTIA, NEW BRUNSWICK, PRINCE EDWARD ISLAND, NEWFOUNDLAND, AND THE VICE PREMIER OF QUEBEC

THE PREMIERS OF NOVA SCOTIA, NEW BRUNSWICK, PRINCE EDWARD ISLAND, NEWFOUNDLAND AND THE VICE PREMIER OF QUEBEC MET IN HALIFAX THIS WEEKEND TO DISCUSS OFFSHORE MINERAL RESOURCES.

THE OCCASION HOLDS A RATHER HISTORICAL SIGNIFICANCE IN THAT IT REPRESENTS THE FIRST TIME THAT THE FIVE EASTERN PROVINCES HAVE SAT DOWN TOGETHER AT THE FIRST MINISTER LEVEL, TO DISCUSS THE QUESTION OF OFFSHORE MINERAL RESOURCES.

THE PREMIERS DISCUSSED A NUMBER OF TOPICS RELATING TO THE OFFSHORE QUESTION WITH PARTICULAR ATTENTION BEING PAID TO OWNERSHIP, FINANCIAL ARRANGEMENTS AND DEVELOPMENT OF OFFSHORE MINERAL RESOURCES.

THE FIRST MINISTERS AGREED THAT:

1. THE PROPOSAL CONCERNING OFFSHORE MINERAL RESOURCES MADE BY THE GOVERNMENT OF CANADA ON NOVEMBER 29, 1968, AND AS ANNOUNCED IN THE HOUSE OF COMMONS ON DECEMBER 2, 1968, IS NOT ACCEPTABLE TO THE FIVE EASTERN PROVINCES.
2. THE GOVERNMENTS OF THE FIVE EASTERN PROVINCES HAVE AGREED TO THE DELINEATION AND DESCRIPTION OF THE OFFSHORE BOUNDARIES BETWEEN EACH OF THESE FIVE PROVINCES.
3. THE FIVE EASTERN PROVINCES ASSERT OWNERSHIP OF THE MINERAL RESOURCES IN THE SEABED OFF THE ATLANTIC COAST AND IN THE GULF OF ST. LAWRENCE IN ACCORDANCE WITH THE AGREED BOUNDARIES.
4. THE FIVE EASTERN PROVINCES AS A UNITED GROUP WILL SEEK DISCUSSIONS WITH THE GOVERNMENT OF CANADA CONCERNING ARRANGEMENTS RELATED TO THE DEVELOPMENT OF THE OFFSHORE RESOURCES IN THOSE AREAS.
5. THE FIVE EASTERN PROVINCES ARE PREPARED TO DISCUSS WITH THE FEDERAL GOVERNMENT THE DELEGATION OF CERTAIN ASPECTS OF THE ADMINISTRATION OF THE MINERAL RESOURCES IN THE SEABED OFF THE ATLANTIC COAST AND THE GULF OF ST. LAWRENCE.
6. THE PREMIERS AGREED THAT THE CONCEPT OF A REGIONAL ADMINISTRATIVE AUTHORITY WAS WORTHY OF FURTHER STUDY BY THE PROVINCES CONCERNED.
7. THE MATTER OF FINANCIAL ARRANGEMENTS IN THE OFFSHORE AREA WILL BE A SUBJECT OF FURTHER STUDY AND WE HAVE ARRANGED FOR ONGOING CONSULTATIONS.

THE FIRST MINISTERS HAVE TAKEN STEPS TO INFORM THE PRIME MINISTER OF THE CONTENTS OF THIS STATEMENT.

IT WAS AGREED THAT THE FIRST MINISTERS WILL MEET AGAIN IN THE NEAR FUTURE TO CONTINUE DISCUSSIONS.

-30-

Halifax, N.S.
June 18, 1972

(our emphasis)

(Annex 54: "Communiqué Issued Following Meeting of the Premiers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, and the Vice Premier of Quebec" (18 June 1972))

84. Newfoundland's gloss on Premier Moores' Statement, remarkably, is that it confirmed that the Premiers had **not** reached any agreement on June 17-18, but had managed only to formulate "a common position ... but no more".⁶⁰ One is told that Premier Moores "made that clear" in his June 19 Statement, which Newfoundland illustrates⁶¹ – **without mentioning the "seven-point agreement" that is the centrepiece of the Statement** – by means of the following passage contained within Moores' Statement: (Annex 58)

It must be stressed that the meetings did not attempt to make concrete decisions on particular problems. It must be clear that the meetings succeeded only in creating a common philosophy on the question ...

85. Once again, Newfoundland offers an interpretation of events that can be supported only by selective reference to the facts. The passage in question was, of course, part of Premier Moores' Statement. But as a reading of the full Statement shows, in the passage quoted by Newfoundland Premier Moores is addressing issues **apart from the agreement on boundaries**. The point is not that Newfoundland does not reproduce the full text of the Statement in its Memorial; the point is that it misrepresents the Statement.
86. In fact, the quoted passage is drawn from the second part of the Statement, after the announcement of the seven-point agreement as described above. Premier Moores himself distinguishes that agreement from what follows in his address to the House:⁶² (Annex 58)

Mr. Speaker, **apart from the agreements themselves**, the meetings also provided two real benefits. The greatest benefit is perhaps the creation of a solid front to voice a single strong opinion on the offshore question rather than fragmented voices as in the past.

(emphasis added)

87. The Statement goes on to identify the involvement of Québec as the second "real benefit" provided by the Premiers' meeting – "apart from the agreements themselves" – then

⁶⁰ Newfoundland Memorial, para. 199.

⁶¹ Newfoundland Memorial, para. 199.

⁶² Annex 58: Premier Moores' Statement, *supra* note 60 at 2492.

HONOURABLE FRANK D. MOORES (PREMIER): Mr. Speaker, I would like to make a statement to the members of the House regarding the meetings in Halifax over the weekend of the five Eastern Provinces with the four Atlantic Premiers and the Vice-Premier of Quebec.

The result of those meetings was a seven-point agreement outlining the areas of co-operation between the provinces. In arriving at the seven points, a number of topics related to offshore resources were discussed including ownership, financial arrangements and development.

The seven points are:

1. The proposal concerning offshore mineral resources made by the Government of Canada on November 29, 1968, and as announced in the House of Commons on December 2, 1968, is not acceptable to the five Eastern Provinces.
2. **The Governments of the five Eastern Provinces have agreed to the delineation and description of the offshore boundaries (sic) between each of these five Provinces.**
3. The five Eastern Provinces assert ownership of the mineral resources in the seabed off the Atlantic Coast and in the Gulf of St. Lawrence in accordance with the agreed boundaries.
4. The five Eastern Provinces as a united group will seek discussions with the Government of Canada concerning arrangements related to the development of the offshore resources in those areas.
5. The five Eastern Provinces are prepared to discuss with the Federal Government the delegation of certain aspects of the administration of the mineral resources in the seabed off the Atlantic Coast and the Gulf of St. Lawrence.
6. The Premiers agreed that the concept of a Regional Administrative Authority was worthy of further study by the Provinces concerned.
7. The matter of financial arrangements in the offshore area will be a subject of further study and we have arranged for ongoing consultations.

Mr. Speaker, apart from the agreements themselves, the meetings also provided two very real benefits. The greatest benefit is perhaps the creation of a solid front to voice a single strong opinion on the offshore question rather than fragmented voices as in the past.

The second benefit is the joining of the Province of Quebec with the Atlantic Provinces in this matter and the common decision of each of the five Provinces that further meetings should be held soon.

The depth of co-operation and the readiness to discuss this problem by all those present at the meetings would indicate that **inter-provincial co-operation** on a number of other issues might be expected as well.

It must be stressed that the meetings did not attempt to make concrete decisions on particular problems. It must be clear that the meetings succeeded only in creating a common philosophy on the question and a procedural method will follow through.

(our emphasis)

(Annex 58: Newfoundland, 36th General Assembly, "Statement by Premier Moores" in *Verbatim Report*, 1st Session, Vol. 1, No. 33 (19 June 1972) at 2491 and 2492)

returns to the question of “inter-provincial co-operation”.⁶³ As demonstrated by the words just before and after the passage quoted in Newfoundland’s Memorial, it is in the context of “inter-provincial co-operation” and “a solid front to voice a single strong opinion on the offshore question”, that Premier Moores claims that “the meetings succeeded only in creating a common philosophy on the question”.⁶⁴

88. Why the need to stress to the House that, as regards cooperation with the other Provinces, no concrete decisions were made? The answer is provided in the Statement itself, where Premier Moores emphasises Newfoundland’s “unique case ... regarding offshore ownership”:⁶⁵ (Annex 58)

All the five Provinces in Eastern Canada have claims to offshore resources, but Newfoundland has a claim in writing, drafted and signed by Federal Authorities and that is Term 37 of the Terms of Union.

89. In his Statement, Premier Moores assured the Members of the House that he was ever-conscious of their Province’s “unique case” regarding the offshore; while prepared to voice “a single strong opinion on the offshore question”, he would be careful to ensure that Newfoundland’s case was not compromised by an alliance with Provinces whose claims may have been less solid and which might therefore have been prepared to settle for less than full ownership.
90. In fact, as the record reveals, one year later Newfoundland divorced itself from the provincial “solid front” over precisely this issue. This is discussed further, below.

f) The Premiers’ Meeting Of August 2, 1972

91. The meeting of East Coast Premiers held August 2, 1972, confirmed the outcome of the June 18-19 meeting with respect to boundaries. Furthermore, this meeting, which is not addressed by Newfoundland in its Memorial, made it clear that the Premiers confirmed the boundaries in the context of alternative arrangements apart from the original

⁶³ Annex 58: Premier Moores’ Statement, *supra* note 60 at 2492.

⁶⁴ Annex 58: Premier Moores’ Statement, *supra* note 60 at 2492.

⁶⁵ Annex 58: Premier Moores’ Statement, *supra* note 60 at 2493. See also Nova Scotia Memorial, Part II, para. 60 *et seq.*

June 19, 1972

Tape 798

JM - 1

The House met at 3:00 P.M.

Mr. Speaker in the Chair.

MR. SPEAKER: Order!

HONOURABLE FRANK D. MOORES (PREMIER): Mr. Speaker, I would like to make a statement to the members of the House regarding the meetings in Halifax over the weekend of the five Eastern Provinces with the four Atlantic Premiers and the Vice-Premier of Quebec.

The result of those meetings was a seven-point agreement outlining the areas of co-operation between the provinces. In arriving at the seven points, a number of topics related to offshore resources were discussed including ownership, financial arrangements and development.

The seven points are:

(...)

Mr. Speaker, apart from the agreements themselves, the meetings also provided two very real benefits. The greatest benefit is perhaps the creation of a solid front to voice a single strong opinion on the offshore question rather than fragmented voices as in the past.

(...)

It must be stressed that the meetings did not attempt to make concrete decisions on particular problems. It must be clear that the meetings succeeded only in creating a common philosophy on the question and a procedural method will follow through.

(...)

Newfoundland has a unique case, Mr. Speaker, regarding offshore ownership. All the five Provinces in Eastern Canada have claims to offshore resources, but Newfoundland has a claim in writing, drafted and signed by Federal Authorities and that is Term 37 of the Terms of Union.

(our emphasis)

(Annex 58: Newfoundland, 36th General Assembly, "Statement by Premier Moores" in *Verbatim Report*, 1st Session, Vol. 1, No. 33 (19 June 1972) at 2491-2493)

provincial proposal on full jurisdiction – an impossibility under Newfoundland’s version of the status of the *1964 Agreement* as merely part of a proposal.⁶⁶ This issue is addressed further in Part IV.B below.

g) The October 1972 Letter From Minister Doody

92. On October 6, 1972, William Doody, Newfoundland Minister of Mines, wrote to Dr. Michael Kirby, Principal Secretary to Premier Regan of Nova Scotia, raising the matter of the “precise determination of the interprovincial boundary between the Nova Scotia and Newfoundland sectors”.⁶⁷ There is no doubt that Mr. Doody considered “the interprovincial boundary” to exist. He even explicitly confirmed Newfoundland’s prior acceptance of that boundary:

...[T]he Government of Newfoundland is not questioning the general principles which form the basis of the present demarcation.

93. Furthermore, it is clear from the map accompanying Mr. Doody’s letter – a marked-up copy of what had been Schedule B to the *Joint Submission* in 1964 (reproduced on the page opposite) – that Mr. Doody knew perfectly well that the boundaries in question were those agreed by the Provinces in 1964. Mr. Doody’s copy of the map contained the following handwritten annotation: “(NFLD-NS-NB-PEI) 1964 Interprovincial Premiers’ Boundaries”. Clearly, Mr. Doody recognized that this was an agreed boundary – not a dead proposal – and he knew precisely its origin.

94. Mr. Doody’s concern with the accuracy of the depiction of the agreed line might have been prompted by the fact that he was still using the original map which represented the line as described in metes and bounds in the *1964 Agreement*. Accordingly, the map attached to Mr. Doody’s letter included a hand-drawn sketch of a proposed outer segment

⁶⁶ The results of the August 2, 1972 meeting are addressed in Nova Scotia Memorial, Part II, para. 54. The minutes of the meeting are found at Annex 56.

⁶⁷ Newfoundland Document # 57 at 1; Newfoundland Memorial, para. 62. See also Nova Scotia Memorial, Part II, para. 67.

Dear Dr. Kirby,

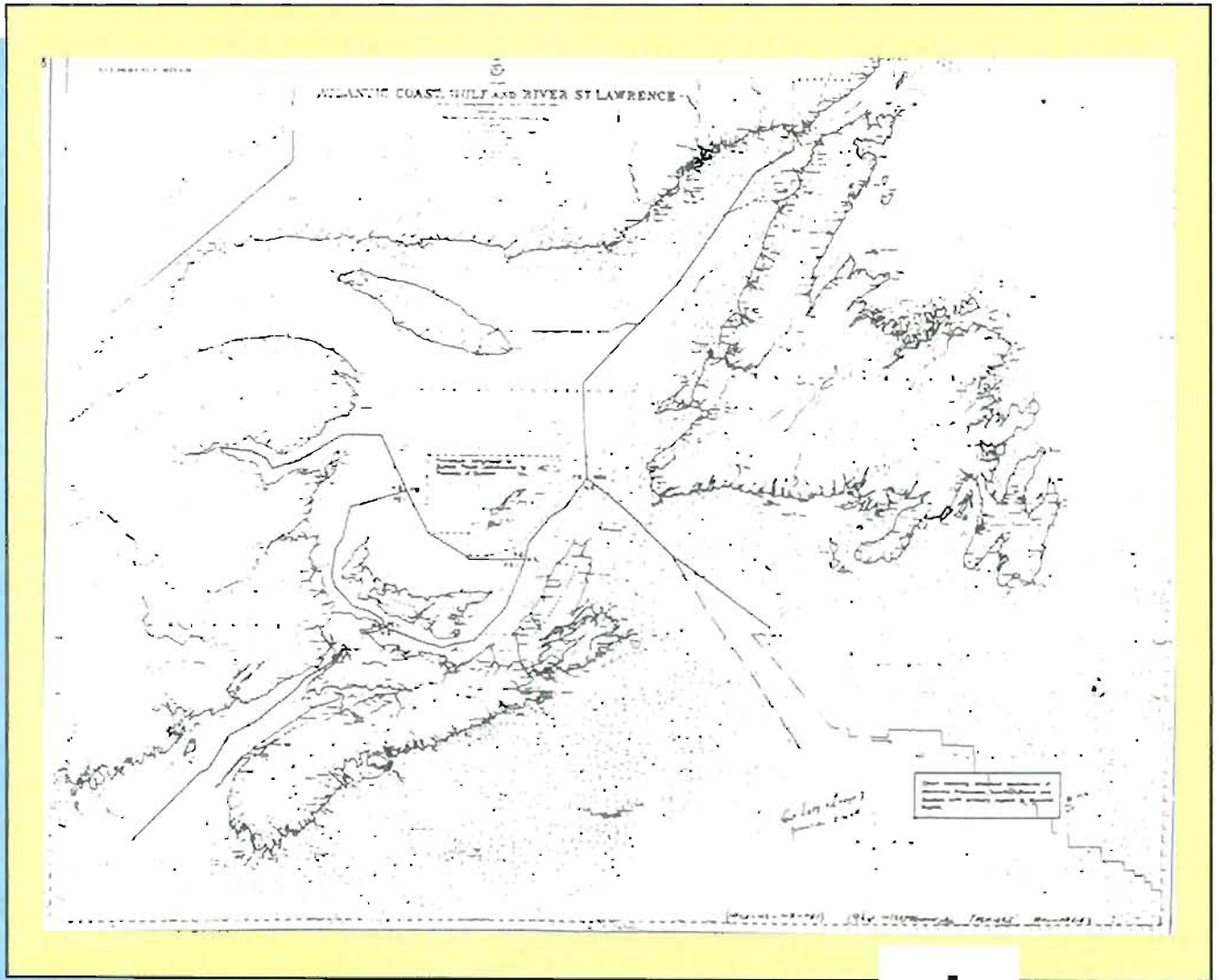
I would like to take up a matter which I have previously discussed with you informally. This is the matter of the **precise determination of the interprovincial boundary** between the Nova Scotia and Newfoundland sectors.

In doing so, **the Government of Newfoundland is not questioning the general principles which form the basis of the present demarcation.** However, we feel that the line should be established according to those scientific principles generally accepted in establishing marine boundaries. The boundary should be established as accurately as possible.

Attached hereto is what we consider a more accurate reflection of the general principles of division to which we have agreed. I hasten to add that this version is meant for explanatory purposes only and is itself inaccurate because of the limitations of the maps used in its preparation. In essence, it merely follows the configuration of the coasts more precisely.

(our emphasis)

(Newfoundland Document # 57: Letter from C. William Doody, Minister of Mines, Agriculture and Resources, Newfoundland to Dr. Michael J. Kirby, Principal Assistant to the Nova Scotia Premier (6 October 1972) at 1)



(NFLD-NS-NB-PEI) 1964 INTERPROVINCIAL PREMIERS' BOUNDARIES

(Newfoundland Document #57)

boundary that extended well out along the Laurentian Channel, which was described as “meant for explanatory purposes only and is itself inaccurate...”.⁶⁸

95. Newfoundland’s position regarding the significance of this letter is that “the issue remained unresolved”.⁶⁹ A more accurate assessment, however, is that the issue raised by Newfoundland regarding the “precise determination of the interprovincial boundary” was **never pursued by Newfoundland**. The boundary that had been agreed by the Premiers in 1964 and had recently been reconfirmed by the Premiers, in June 1972, remained in effect. Any amendment or alteration of the *1964 Agreement* or its technical implementation would have required reconsideration by the Premiers, which never occurred.

h) New Evidence Of Federal-Provincial Negotiations In 1972-1973

96. As noted in Part I, above, new evidence regarding the events of 1972 and 1973 was provided to Nova Scotia after the submission of the Memorials in this arbitration on December 1, 2000. This evidence is completely supportive of Nova Scotia’s case, and utterly contradictory to Newfoundland’s account of the historical record. The documents in question concern a meeting of the East Coast Premiers and Prime Minister Trudeau on August 23, 1972, and the ensuing federal-provincial negotiations on offshore jurisdiction.⁷⁰

• *The First Ministers’ Meeting of August 23, 1972*

97. The First Ministers’ meeting of August 23, 1972 was intended to revive the negotiations between the East Coast Provinces and the federal government on the status of arrangements for the offshore. As discussed more fully in Part IV.B below, these discussions entailed setting aside ownership issues and focusing on revenue sharing and other administrative arrangements.

⁶⁸ Newfoundland Document # 57 at 1.

⁶⁹ Newfoundland Memorial, para. 62.

⁷⁰ These events are described in the Nova Scotia Memorial at Part II, para. 73 *et seq.*

98. Two facts in particular are clear from the record, both of which are fatal to Newfoundland's contention that the agreed boundaries existed only as part of a proposal to the federal government. First, it is evident from the federal documents evidencing the August 23, 1972 meeting that the Provinces' proposals on ownership had still not been accepted by the Government of Canada. Second, the federal government regarded interprovincial boundaries as a matter for the Provinces to resolve, while the Premiers themselves regarded the boundaries as settled.
99. In the course of a discussion on pooling and sharing of revenue derived from offshore development, Premier Regan "raised the question as to whether the Federal Government expected to participate in ascertaining the pool shares [of] a pooling arrangement". Minister Macdonald, representing the federal government, replied that "basically the arrangements would be made between the provinces," and stated that, from the perspective of the Government of Canada, three factors were "desirable":⁷¹ (Annex 136)

Firstly, that the provinces agree on the zoning of the off-shore area (that is to say, as to where the zone lines will be drawn for resource realisation); secondly, each province would decide as to whether it would take a chance of going on its own, or participate in a pool; and, thirdly, that there be some kind of arbitration procedures worked out so that where a discovered field happened to cross a zoning line, an equitable distribution of benefits would be available without prejudicing the favourable development of the field.

100. The Government of Canada thus acknowledged that interprovincial boundaries were necessary for purposes of revenue sharing and, further, that such boundaries were a matter "between the provinces." The Premiers' response was straightforward.⁷² (Annex 136)

The Premiers generally felt that the zoning question had been settled and seemed to accept the concept that each province was to determine whether it would "go for broke" by not participating in a pool...

⁷¹ Annex 136: "Notes from a Meeting of the Premiers of the four Atlantic Provinces, and the Vice-Premier of Quebec, with the Prime Minister on August 23, 1972" (25 August 1972) (hereinafter "Notes from a Meeting on August 23, 1972") at 3. This document was included with the material received from the federal government after Nova Scotia filed its Memorial (See Part I, para. 28, above).

⁷² *Ibid.*

(emphasis added)

101. Clearly, the Premiers regarded the matter of their mutual boundaries as settled – as indeed it was – despite the fact that their jurisdictional “proposal” to the federal government had been rejected. Furthermore, the federal government accepted that this was a matter for the provinces to agree among themselves. None of this is reconcilable with Newfoundland’s position that the boundaries lived and died along with the “proposal” of which they were supposedly an integral component.

- *The Work Of The Joint Committee Of Federal–Provincial Officials: October 1972 – May 1973*

102. The other significant outcome of the August 23, 1972 meeting was the establishment of a joint committee of federal and provincial officials, chaired by Mr. Kirby of Nova Scotia and Mr. Austin of the federal government, charged to “examine the possible forms of an administrative set-up for cooperative administration of the resource”.⁷³ The committee established by the First Ministers engaged in extensive discussions from the Fall of 1972 through May 1973. The extensive records of this series of meetings disclose a number of important facts that undermine Newfoundland’s theory regarding the status of the boundaries.

103. It was clear throughout the discussions that the matter of interprovincial boundaries and their applicability to revenue-sharing and the division of administrative responsibilities was clearly before the officials. A federal “Checklist” of items to be addressed included “boundaries between offshore areas of interest”,⁷⁴ and indeed the Provinces’ agreement on boundaries was discussed at various times:

⁷³ Annex 136: Notes from a Meeting on August 23, 1972, *supra* note 71 at 6.

⁷⁴ Annex 137: Memorandum from D.G. Crosby, Director, Resource Management and Conservation Branch, Energy, Mines and Resources Canada to J. Austin, Deputy Minister of Energy, Mines and Resources (23 May 1973) attaching draft “Minutes of Meeting of Federal – Provincial Officials to Discuss East Coast Offshore Mineral Resource Administration – Arrangement of April 9, 1973, May 7-8, 1973” and attachments (hereinafter “Minutes of Meeting, May 7-8, 1973”) at p. 2 of attachment “Checklist for Agreement”. This document was included with the material received from the federal government after Nova Scotia filed its Memorial. See Part I, para. 28.

- At a meeting held on April 25-26, 1973 with Mr. Barry (Newfoundland Minister of Mines and Energy), Mr. Austin (federal Deputy Minister of Energy, Mines and Resources) had the following exchange with Dr. Crosby, his Divisional Director responsible for this area (who had earlier confirmed by memorandum the Premiers' June 1972 confirmation of the boundaries⁷⁵):⁷⁶ (Annex 138)

Austin: (...)Another problem to look at is that of the boundary between provincial adjacent areas. Queried Dr. Crosby whether we have the lines decided upon between provinces.

Crosby: Confirmed same.

(emphasis added)

- At a meeting of May 4, 1973 Mr. Kirby of Nova Scotia commented (in response to a query from Mr. Austin as to whether the Provinces had agreed their boundaries) that "he understood that Newfoundland did not agree as regards portions of the boundary line in the NE Gulf of St. Lawrence region."⁷⁷ (It was, of course, in the northeast Gulf of St. Lawrence that the final closing of the boundary line between Newfoundland and Québec from the midpoint to shore had not been determined in 1964.⁷⁸)

⁷⁵ Annex 57: "Memorandum to the Deputy Minister: Offshore Mineral Rights" from D.G. Crosby, Director, Resource Management and Conservation Branch, Department of Energy, Mines and Resources Canada to Deputy Minister, Department of Energy, Mines and Resources Canada (20 June 1972). See Nova Scotia Memorial, Part II, paras. 55-58.

⁷⁶ Annex 138: "Minutes of Meetings – Federal Provincial Officials to Discuss East Coast Offshore Mineral Resource Administration – Arrangement of April 9 - Wednesday and Thursday, April 25 and 26, 1973" (2 May 1973) at 44. This document was included with the material received from the federal government after Nova Scotia filed its Memorial. See Part I, para. 28.

⁷⁷ Annex 62: "Minutes of Meeting of Federal – Provincial Officials to Discuss East Coast Offshore Mineral Resource Administration – Arrangement of April 9 – Thursday, May 4, 1973" (4 May 1973) (hereinafter "Minutes of Meeting, May 4, 1973") at 8.

⁷⁸ See Nova Scotia Memorial, Part II, para. 83, note 117.

- Newfoundland's representatives were not present during this exchange. Later during the May 3 meeting, however, Mr. Kirby returned to the matter and asked Mr. Barry whether Newfoundland accepted "the provincial offshore boundaries". Mr. Barry replied that "Newfoundland had not decided on a final position", given that "a number of documents relating to this" were "missing from their files".⁷⁹
- Finally, near the closing of this same meeting, in the presence of Mr. Barry and without any objection from him, the following exchange took place between Mr. Walker of Nova Scotia and Mr. Austin of the federal government:⁸⁰ (Annex 62)

Walker: Referring to item 6 [in the Checklist], inquired whether the Federal Government was prepared to accept agreed provincial offshore boundaries.

Austin: Agreed that these boundaries should be acceptable provided that they raise no difficulties for Canada internationally.

104. On their own, these comments by various officials are not dispositive of the issue. They do, however, clearly reveal four points that are relevant to the determination to be made by the Tribunal. First, interprovincial boundaries were regarded as an important element of any potential settlement with the federal government. Second, the federal government was prepared, as stated at the August 23, 1972 meeting attended by the Prime Minister, to accept boundaries as agreed among the Provinces. Third, despite several opportunities to do so, Newfoundland never protested or rejected the existing boundaries or proposed any alternative lines. Fourth, all of these statements, and in particular Mr. Austin's comment "[a]greed that these boundaries should be acceptable...(emphasis added)" assumed the existence of the previously agreed boundaries.

⁷⁹ Annex 62: Minutes of Meeting, May 4, 1973, *supra* note 77 at 11.
⁸⁰ *Ibid.* at 18.

- *The Joint Officials' Report To First Ministers*

105. The fact that the boundaries were both “on the table” in these discussions and “agreed” by the Provinces is conclusively shown by the report that summarized the results of the Officials’ discussions of 1972/1973.
106. At the Officials’ meeting of May 3, 1973, it was agreed that a report would be prepared for the First Ministers, which would, *inter alia*, indicate “what fundamental issues require settlement by First Ministers.”⁸¹ This report was to be drawn up with reference to the issues listed on the “Checklist” prepared by the federal government, which included the item of boundaries.⁸² A draft report was accordingly prepared, which was presented and approved at the Officials’ meeting of May 7-8, 1973.⁸³
107. As recounted in the Nova Scotia Memorial, the report to the First Ministers, which covered a wide range of “issues” and concerns”, did not include interprovincial boundaries among the issues that remained to be settled.⁸⁴ Nor did the matter of boundaries even figure as an element of the positions of the various Provinces, including Newfoundland, that are set out in the report.
108. All of the evidence that has recently come to light confirms that offshore boundaries were agreed among the Provinces and were never disputed. They had a life of their own, independent of the various proposals tabled during federal-provincial negotiations regarding ownership and jurisdiction over the offshore. Furthermore, the only boundaries that were ever in the contemplation of the parties during this period were the *1964 Agreement* boundaries, as shown by Mr. Doody’s acknowledgement of them in the Autumn of 1972.⁸⁵

⁸¹ *Ibid.* at 19.

⁸² *Ibid.* at 14-15

⁸³ Annex 137: Minutes of Meeting, May 7-8, 1973, *supra* note 74 at 27.

⁸⁴ Annex 60: “Memorandum to First Ministers Re Discussions by Officials on Atlantic Offshore Mineral Resource Administration Arrangements” (8 May 1973) J. Austin and M. Kirby, Co-Chairmen. This report was made available to Nova Scotia prior to the receipt of the documents from the meetings themselves, and is discussed in the Nova Scotia Memorial at Part II, paras. 64, 65.

⁸⁵ See para. 92, above.

i) The Newfoundland Proposal Of September 1973

109. Both Memorials refer to the separate proposal made to the federal government by Newfoundland in September 1973, and particularly to the reference to offshore boundaries contained in that proposal. The relevant section reads as follows:⁸⁶
(Annex 63)

2. (...)

(ii) In this Agreement

(a) "adjacent submarine area" means all that area seaward of the mean low water mark lying off the coast of Newfoundland as defined in term 2 of the Terms of Union between Newfoundland and Canada to which Canada as a sovereign state may claim exclusive rights for the purpose of the exploring for and the exploitation of the mineral resources of the sea bed and sub-soil thereof **subject to any lines of demarcation agreed to by the Province of Newfoundland with respect to the submarine areas within the sphere of interest of other Provinces.**

(emphasis added)

110. Newfoundland declares that these words "unambiguously referred to the fact that interprovincial boundaries remained unsettled".⁸⁷ On the contrary, what is unambiguous is that the words "lines of demarcation agreed to by the Province of Newfoundland" can by no stretch of the imagination be read, as Newfoundland suggests, to mean "lines of demarcation to be agreed to by the Province of Newfoundland." The drafters of the document could easily have used words such as "lines of demarcation to be negotiated by the Province of Newfoundland ..." or "to be agreed ..." or "that may be agreed ...". They did not.

⁸⁶ Annex 63: Letter from F. Moores, Premier, Province of Newfoundland to G. Regan, Premier, Province of Nova Scotia (11 September 1973) and Appendix I at 2.

⁸⁷ Newfoundland Memorial, para. 64. See Nova Scotia Memorial, Part II, paras. 70, 71 for a discussion of this provision.

j) Federal-Provincial Negotiations: 1974-1977

111. Following the departure of Newfoundland from the multilateral negotiations in 1973, the other East Coast Provinces and the federal government continued discussions on an offshore agreement in 1974 and again in 1976, in the lead-up to the conclusion of the *1977 MOU*.
112. Newfoundland recounts some of this history in its Memorial, but once again relies on a selective and misleading presentation of the historical record.
113. For example, Newfoundland refers to a document “prepared ... for Nova Scotia officials”⁸⁸ by Dr. Kirby of Nova Scotia, as support for its allegation that Mr. Kirby “acknowledged the need for an agreement about boundaries ...”.⁸⁹ Newfoundland has apparently relied on its Document # 68, but it appears to have misread its own evidence.
114. First, the document was **not** “prepared .. for Nova Scotia officials”; it is addressed to the “Members of the Officials Committee on Offshore Oil and Gas of the Maritime Provinces and the Province of Quebec.”⁹⁰ Second, Mr. Kirby did not “acknowledge” a “need for an agreement **about** boundaries”; rather, he listed as an outstanding “technical” matter to be “resolved ... at the officials level” an agreement indicating “precisely where the boundaries lie” between the Provinces.⁹¹ Clearly, Mr. Kirby’s statement presupposes the existence of interprovincial boundaries previously agreed by the Provinces. The “technical” matter of their precise location, however, for the purposes of the federal-provincial agreement, was left to “officials”.

k) The 1977 MOU And The 1982 Canada-Nova Scotia Agreement

115. The remarkable life-span of the boundaries supposedly “proposed” and “rejected” in the 1960s (and again in the early 1970s) extended into the late 1970s, when they were

⁸⁸ Newfoundland Memorial, para. 69.
⁸⁹ Newfoundland Memorial, para. 69.
⁹⁰ See Newfoundland Document # 68.
⁹¹ Newfoundland Document # 68 at 5.

included in the *1977 MOU* entered into by the Government of Canada and the Provinces of New Brunswick, Prince Edward Island and Nova Scotia.⁹² Newfoundland claims that it was not a party to the *MOU* and that it criticised the document.⁹³ These statements are disingenuous in the extreme.

116. Newfoundland was clearly not a party to the *1977 MOU*; however, it did not, to Nova Scotia's knowledge, ever protest the inclusion of the agreed Nova Scotia–Newfoundland boundary in the *1977 MOU*. Moreover, and its “criticisms” of the *MOU* did not relate to the boundary.
117. Similarly, in its discussion of the *1982 Canada – Nova Scotia Agreement* and the implementing legislation, Newfoundland notes that it “condemned” the *1982 Agreement* at the time⁹⁴ and that it was “not involved” in the negotiations.⁹⁵ Newfoundland claims that “[t]he *Agreement* specifically did not assume any agreement between Newfoundland and Labrador and Nova Scotia but on the contrary provided for a dispute resolution mechanism”.⁹⁶ It also states that its contemporaneous analysis of *1982 Agreement* found that it “left the boundary between provinces to be resolved by the federal government”.⁹⁷
118. Once again, the facts speak for themselves. The “condemnation” and “analysis” in question were concerned principally with the matter of jurisdiction and revenues (“to entertain any such kind of Agreement for our offshore would be tantamount to another Upper Churchill giveaway”⁹⁸). Newfoundland’s concern with the treatment of offshore boundaries in the *1982 Canada-Nova Scotia Agreement* had nothing to do with the location of those boundaries, which were described in that Agreement and generally depicted on an attached sketch map. Insofar as boundaries were addressed, the analysis prepared by Newfoundland in 1982 (as opposed to the argument contained in its

⁹² See Nova Scotia Memorial, Part II, paras. 73, 74 for a discussion of the *1977 MOU*, a copy of which is found in Annex 67.

⁹³ Newfoundland Memorial, para. 202.

⁹⁴ Newfoundland Memorial, para. 92.

⁹⁵ Newfoundland Memorial, para. 204.

⁹⁶ Newfoundland Memorial, para. 204.

⁹⁷ Newfoundland Memorial, para. 92.

⁹⁸ Newfoundland Document # 94 at 1.

Memorial) stated that an agreement similar to the *1982 Canada-Nova Scotia Agreement*, if applied to Newfoundland, would have allowed the federal government to “finalize”⁹⁹ or “redraw”¹⁰⁰ the boundaries in virtue of the dispute resolution mechanism. Both words recognise that boundaries were extant.

119. In sum, Newfoundland’s 1982 analysis did not find that the Agreement “left the boundary between the provinces to be resolved”; such a finding would have been, and is, absurd, given that the Agreement itself put boundaries in place. The 1982 analysis in fact discloses a concern that the agreed boundaries be preserved.
120. Finally, the assertion that “the *Agreement* specifically did not assume any agreement between Newfoundland and Labrador and Nova Scotia but on the contrary provided for a dispute resolution mechanism,” if intended to mean that the existence of a dispute resolution clause implies that the instrument does not establish boundaries, is ridiculous. This issue is addressed in Part III.E of this Counter-Memorial.
121. Newfoundland also alleges that the map attached to the 1982 *Canada-Nova Scotia Agreement* (Figure 10) “was not precise”.¹⁰¹ Nova Scotia agrees, and states as much in its Memorial.¹⁰² Newfoundland goes much further, however, claiming that the map does not correspond with the map that formed part of the *1964 Agreement* that was annexed to the October 14-15, 1964 *Joint Submission*, or with the map depicting the technically-determined turning points approved by the Premiers in 1972, or with the metes and bounds description in the *1982 Canada-Nova Scotia Agreement*¹⁰³ (all of which depict the identical boundaries).
122. Newfoundland provides no basis, no reason, for this assertion, and has presented no evidence in its support. In fact, within the limitations of a diagram intended only

⁹⁹ Newfoundland Document # 94 at 6.

¹⁰⁰ Newfoundland Document # 93 at 43. The analysis was incorrect in this regard, as discussed below. In any event, the point at issue here is that the words of the analysis differ from the account provided in the Newfoundland Memorial.

¹⁰¹ Newfoundland Memorial, para. 90.

¹⁰² Nova Scotia Memorial, Part II para. 76 and Figure 10, both of which note that the map only “generally” depicts the agreed boundaries.

¹⁰³ Newfoundland Memorial, para. 90.

“generally” to depict the boundary, the sketch map attached to the *1982 Canada-Nova Scotia Agreement* accords strikingly with the metes and bounds description and with other maps depicting the *1964 Agreement*. (Figure 25)

123. Indeed, the map in question was more than sufficient to show even the casual reader that the *1982 Canada-Nova Scotia Agreement* placed boundaries along all sides of Nova Scotia’s offshore area – including the line dividing its offshore area from that of Newfoundland. The map in fact depicts generally the offshore boundaries between all of the East Coast Provinces. Newfoundland saw this map in 1982, and did not object.

ii) **The “Time Of Death” Problem In The Newfoundland Argument**

124. The speciousness of Newfoundland’s position is also demonstrated by its own difficulty in determining just when it was that the so-called “proposal” to the federal government on interprovincial boundaries finally died.
125. Newfoundland is quite explicit, in one instance, that the provincial proposal was rejected in 1964:¹⁰⁴

The federal response was unequivocal. The provincial request was rejected. Instead of recognition of provincial rights, the federal government wanted a court ruling on the constitutional issue. In a letter dated December 11, 1964, Prime Minister Pearson stated the intention of the federal government to refer the matter to the Supreme Court of Canada and invited the Provinces to participate.

126. Newfoundland has also noted that, despite efforts to have the federal government reconsider the rejection, by April 1965 “the die had been cast”.¹⁰⁵ Or perhaps not: elsewhere, it asserts that the actual demise of the “proposal” occurred with the decision by Newfoundland to divorce itself from the provincial common front in negotiations with the federal government, in 1973:¹⁰⁶

¹⁰⁴ Newfoundland Memorial, para. 192.

¹⁰⁵ Newfoundland Memorial, para. 37.

¹⁰⁶ Newfoundland Memorial, para. 201.

Thus ended the years of unsuccessful multilateral negotiations. The process begun in 1964 came to an end with no concrete result. . . With the failure and termination of the multilateral process, the proposals made in the course of those negotiations ceased to have even a political relevance.

127. This confusion can be traced directly to the inconsistency between Newfoundland's "proposal" theory and the facts. Newfoundland is clear as regards the effect of a rejection of a proposal in the course of negotiations:¹⁰⁷

But a failure of negotiations means, by definition, that there is no agreement at all. The proposals are "off the table"; they lapse as if they had never been made.

128. If this were true, and if the Provinces' agreement on boundaries died with the federal government's rejection of the Provinces' jurisdictional proposals in 1964-1965 or in 1972-1973, then there would be no explanation for why the boundaries continued in use among the Provinces throughout the 1960s and 1970s, were incorporated (without protest by Newfoundland) into the *1977 MOU* and *1982 Canada-Nova Scotia Agreement*, and remain in use today.
129. Nothing in Newfoundland's argument displaces the overwhelming weight of the parties' conduct, which suggests that the *1964 Agreement* on boundaries in fact survived the numerous rejections of the numerous proposals to which it was supposedly inextricably linked.

D. The 1964 Agreement Was Not "Conditional"

130. In addition to its general theory that the East Coast Provinces' September 30, 1964 Agreement on boundaries was merely one component of a broad proposal to the federal government, Newfoundland also asserts that the alleged "proposal" on boundaries was

¹⁰⁷ Newfoundland Memorial, para. 180.

subject to a specific “condition” or “proviso” that the boundaries must be implemented by means of the procedure provided for in section 3 of the *Constitution Act, 1871*.¹⁰⁸

131. The more general allegation regarding the supposed status of the *1964 Agreement* as a proposal has already been discussed above. The theory of conditionality, according to which the so-called specific condition would have to be fulfilled before the *Agreement* could be binding, is dealt with briefly here.

i) **The “Condition” Does Not Appear In The 1964 Documents**

132. Newfoundland has invented the supposed “condition” out of whole cloth. It states that the boundaries were subject to an “express condition” of constitutional implementation,¹⁰⁹ but the word “condition” does not appear in the record in this context. Newfoundland’s theory rests entirely on the fact that a **request** was made to the federal government. Yet there is no evidence offered – because none exists – that this request to the federal government was a condition precedent to the implementation of the interprovincial agreement as among the Provinces, or was in any way linked to it. Indeed, nowhere in the documents that evidence the *1964 Agreement* is there the slightest indication of the existence of any such “condition”, let alone that the agreement on boundaries would be effective only upon its fulfilment.
133. Far from being **express**, this supposed condition cannot even reasonably be **implied**.

¹⁰⁸ Newfoundland Memorial, paras. 231-238. As indicated above, and in Part II, para. 19, note 31 of Nova Scotia’s Memorial, section 3 of the *British North America Act, 1871* provides for a Province’s territorial limits to be constitutionally “altered” – in this case, increased to encompass the offshore – by means of federal legislation enacted with the consent of the Province concerned. The relevant section is found in Annex 25.

¹⁰⁹ Newfoundland Memorial, para. 238.

ii) **The Existence Of The “Condition” Is Belied By The Parties’ Subsequent Conduct**

134. It would of course have been clear, in 1964, that there was absolutely no chance that the sort of condition alleged by Newfoundland, today, would be fulfilled, a point conceded by Newfoundland:¹¹⁰

It was clear from the outset that the condition could never be fulfilled because the federal authorities were opposed to the proposal. The failure of the condition provides a complete answer to the contention that the lines are the subject of a legally binding agreement between the provinces.

135. One wonders why the Provinces would, as Newfoundland alleges, have expressed a condition regarding which “[i]t was clear from the outset could never be fulfilled”. More significantly, Newfoundland’s theory founders on the evidence that, notwithstanding the “failure of the [alleged] condition”, the Provinces continued for many years to apply and act in accordance with the *1964 Agreement*, as if the boundaries it established were the subject of a legally binding agreement – which of course they were. Newfoundland does not address this evidence.¹¹¹ What is clear is that there was never any such condition.

iii) **Newfoundland Relies On A False And Misleading Account Of The Work Of The *JMRC***

136. Newfoundland claims that the *JMRC Technical Committee* “recognized that the boundaries **would have to be** ‘confirmed by legislation by the participating provinces’”.¹¹² The Committee in fact recognized no such thing. In the passage from the *JMRC* minutes that Newfoundland appears to be quoting (no citation is provided), the *Technical Committee* merely agreed to “recommend” that the boundaries be confirmed

¹¹⁰ Newfoundland Memorial, para. 238.

¹¹¹ See also Part III.C above. See also Nova Scotia Memorial, Part II, paras. 72-99 and Part IV, paras. 35-62.

¹¹² Newfoundland Memorial, para. 237 (emphasis added).

by legislation.¹¹³ The Committee made no statement as to the necessity or otherwise of such legislation.

137. Newfoundland then goes on to describe the May 12, 1969 Allard letter¹¹⁴ as follows:¹¹⁵

The letter of May 12, 1969 from the Vice-Chairman of the JMRC reported the **decision** of the JMRC that each province **would have to** “ratify the agreement by legislation”. [footnote omitted]

(emphasis added)

138. Once again, the facts are incorrectly recounted. In the first place, the *JMRC*, as a committee of officials, did not and could not make a “decision” on this matter – the Allard letter states clearly that the *JMRC* was merely recommending a course of action to the Provinces.

139. Second, the Allard letter does not state that the Provinces “would have to ratify the agreement by legislation”. Apart from the fact that the letter primarily concerned approval of the geographic coordinates to be assigned to the previously-agreed turning points, the complete passage from which Newfoundland has carefully excised these words discloses that even the *JMRC* considered that the approval of governments was sufficient. While legislation was something that each member Minister was “also to request” from his government, it was not a precondition to binding effect:¹¹⁶ (Annex 43)

The effect of such approval is to be that the boundaries shown on the map and delineated by the turning points are the boundaries between the Provinces for all purposes and especially for the purpose of showing the entitlement to any minerals within the boundaries be they on land or in submarine areas. Each member Minister is also to request from his government a commitment to enter into an agreement with the other four Provinces and ratify the said agreement by legislation.

(emphasis added)

¹¹³ Newfoundland Document # 30: “Minutes of Meeting of the Sub-committee of the Joint Mineral Resources Committee Held at the Provincial Building, Halifax, Nova Scotia, January 16, 1969” at 2.

¹¹⁴ Annex 43: Allard letter, *supra* note 50. See also Newfoundland Document # 33.

¹¹⁵ Newfoundland Memorial, para. 237.

¹¹⁶ Annex 43: Allard letter, *supra* note 50 at 3. See also Newfoundland Document # 33.

140. This passage, read in its entirety, directly contradicts the interpretation proposed by Newfoundland in its quoted extract.

iv) Newfoundland's Argument Is Internally Inconsistent

141. In another manner, as well, the passage just quoted provides a clear and convincing rebuttal of Newfoundland's theory on conditionality. Newfoundland asserts categorically that the *1964 Agreement* was conditional on constitutional amendment of the Provinces' limits – that is, fulfilment of the condition required not just “ordinary legislation” but constitutional amendment:¹¹⁷

The lines proposed in 1964 were never intended to be self-executing. They were put forward subject to the proviso that they would be implemented, **not merely by ordinary legislation, but through the constitutional procedure for the alteration of provincial boundaries set out in section 3 of the *Constitution Act, 1871*...**

(emphasis added)

142. Later, Newfoundland emphasises that the “condition went hand-in-hand with the underlying assumption that the federal government was an essential party to the transaction, and that nothing could happen without its concurrence and active participation.”¹¹⁸

143. The *JMRC* recommendations, however, were **entirely** concerned with so-called “ordinary legislation” by the Provinces. It has already been demonstrated that, while legislation was proposed by the *JMRC* in 1969 as a means to express the Provinces' approval of the work of the *Technical Committee*, such legislation was not required and in fact the requisite approval was expressed publicly by the Premiers themselves, in June 1972. The point here, however, is different: nowhere in the evidence adduced by Newfoundland in support of its theory of conditionality is there mention of “constitutional ... alteration of provincial boundaries” or indeed of the need for any federal participation in the proposed legislative exercise.

¹¹⁷ Newfoundland Memorial, para. 232.

¹¹⁸ Newfoundland Memorial, para. 233.

144. If, as Newfoundland contends, the agreement on boundaries was conditional on federal legislation, why were the Provinces in 1969 discussing implementation by “ordinary” provincial legislation? The conduct of the parties in 1969 is in fact completely at odds with Newfoundland’s account of events and discredits totally its theory.
145. The flaw in Newfoundland’s argument goes much deeper, however, for it flies in the face of the *Terms of Reference*.
146. Article 3.1 of the *Terms of Reference* provides that 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) The Government of Canada has no obligation to have its international agreements sanctioned by Parliament (although it may choose to seek such approval). The “States” of Newfoundland and Nova Scotia are equally “sovereign” for the purposes of this arbitration, as dictated by the *Terms of Reference*. Constitutional entrenchment does not arise in the circumstances of this arbitration, where the Tribunal is required, in answering the question before it, to apply “the principles of international law governing maritime boundary delimitation ... as if the parties were states ... at all relevant times.”

E. The Dispute Settlement Provisions In The *Accord* Legislation Confirm The Existence Of A Binding Agreement

147. Newfoundland asserts in its Memorial that the inclusion of a dispute resolution clause in the legislation implementing the *Canada – Nova Scotia Accord* represents an admission of sorts by Nova Scotia that no binding agreement on the line was ever concluded, and

that the Newfoundland-Nova Scotia boundary set out in the legislation is therefore only an “interim” or “provisional” line.¹¹⁹

148. There is, of course, nothing in the facts or law identified by Newfoundland that would even remotely support this most original proposition that a party’s willingness to settle boundary disputes peaceably constitutes a concession regarding the subject-matter of the dispute. Newfoundland’s argument is patently wrong; and it is constructed, yet again, on the back of numerous distortions of the facts.

i) **Newfoundland’s Position Is Wrong**

a) The Dispute Settlement Provisions Support The Binding Nature Of The Agreement On Boundaries

149. At international law, the presence of a term providing for mandatory settlement of disputes arising out of an agreement is an indicator that the agreement in question was intended to be binding. Although there are several means of resolution to choose from, selecting adjudicative or arbitral means indicates that the parties treat the dispute as “justiciable”, or capable of solution by law.¹²⁰ Nova Scotia’s willingness to accede to a provision that requires it to attempt to resolve certain disputes relating to its *1964 Agreement* boundaries, first, by negotiation, and second, by means of an agreed dispute settlement process, concedes nothing – other than a recognition of the rule of law that parties to a dispute shall seek to resolve their differences by peaceful means.¹²¹

¹¹⁹ Newfoundland Memorial, paras. 204, 243-246. Of course, Newfoundland says nothing about the limits of the remainder of Nova Scotia’s offshore area as defined in the *Canada-Nova Scotia Accord* and implementing legislation. (See Annex 2.) Here, as throughout its Memorial, Newfoundland is silent regarding the impact of its argument on Nova Scotia’s boundaries with New Brunswick, Prince Edward Island and Québec. Presumably, according to Newfoundland, those lines are also non-binding, provisional, or interim – with the result that the *Accord* and implementing legislation must be read, despite their clear words, as not defining the “Offshore Area” of Nova Scotia.

¹²⁰ Annex 139: H. Kindred et al., eds., *International Law Chiefly as Interpreted and Applied in Canada* (Toronto: Emond Montgomery Publications Limited, 1987) at 256.

¹²¹ Annex 140 : *Charter of the United Nations*, Articles 2 and 33; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations: “The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered”.

b) Newfoundland's Position Is Internally Contradictory

150. Newfoundland itself concedes that the presence of a term providing for dispute resolution would be an indicator of a binding agreement (in domestic law).¹²² Yet, it also states that the **absence** of such a term in the *1964 Agreement* is presented by Newfoundland as evidence that that Agreement was **not** binding.¹²³
151. The combined result of Newfoundland's two arguments on this issue illustrates the weakness of its claim. On the one hand, Newfoundland argues that the failure to include a binding dispute settlement provision in the *1964 Agreement* demonstrates that the Agreement was not binding. On the other, it states that the subsequent adoption of a binding dispute settlement provision applicable to the subject-matter of the *1964 Agreement* also shows that the Agreement was not binding. Heads, Newfoundland wins; tails, Nova Scotia loses.

c) Newfoundland's Argument Leads To An Absurdity

152. The policy implications of Newfoundland's position further demonstrate the absurdity of its argument. Newfoundland argues that, where (as here) the existence and interpretation of an agreement are at issue, the fact that a party has agreed to refer the dispute to a dispute settlement process constitutes an admission that the agreement does not exist. If correct, such a rule would forever discourage recourse to peaceful methods of resolving disputes.
153. In the present case, the existence of terms calling for such recourse indicates a responsible willingness by Nova Scotia to have disputes settled peaceably, by process of law. Far from acknowledging a weakness in its position, Nova Scotia's readiness to defend its agreed boundaries in an arbitration demonstrates a confidence in the binding legal nature of those boundaries.

¹²² Newfoundland Memorial, paras. 164, 171.

¹²³ Newfoundland Memorial, paras. 204, 243-246.

ii) **Newfoundland Misstates The Facts**

154. The weaknesses in the Newfoundland argument on this issue are further demonstrated by the degree of factual distortion and simple misstatement necessary to support it. These errors centre on the origin and content of the dispute settlement provisions as incorporated in the *Accord* legislation, and Nova Scotia's supposed intent in agreeing to those provisions.

a) Newfoundland Misstates The Origin Of The Dispute Settlement Provisions

155. Newfoundland asserts that the dispute resolution provision in the 1986 *Canada - Nova Scotia Accord* and its implementing legislation is "consistent with" a provision in the 1982 *Canada-Nova Scotia Agreement* that dealt with potential disputes, and that the 1982 provision was somehow inconsistent with the existence of a binding agreement between the parties.¹²⁴ Both of these assertions are wrong on the facts.

- *The Purpose Of The Relevant Provision In The 1982 Canada-Nova Scotia Agreement*

156. The relevant provision in the 1982 *Canada - Nova Scotia Agreement* is found in the preamble to the boundary description, which reproduces the 1964 *Agreement* boundary:¹²⁵

The outer limits of the offshore areas within which this agreement applies are as follows, provided that if there is a dispute as to these boundaries with any neighbouring jurisdiction, the federal government may redraw the boundaries after consultation with all parties concerned.

157. Given this provision, Newfoundland concludes that Nova Scotia "would never have agreed to this language if there had been a prior agreement on the line", or indeed if there

¹²⁴ Newfoundland Memorial, para. 243.

¹²⁵ Annex 68: *Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing* (2 March 1982) (hereinafter "*1982 Canada - Nova Scotia Agreement*"). See also Newfoundland Document # 92.

“had been even an arguable case, or a legitimate expectation, that the line would be considered definitive or binding.”¹²⁶ Apart from the presumptuousness of Newfoundland’s statement – it refers to no supporting facts – regarding what Nova Scotia would or would not have agreed to, Newfoundland’s interpretation of this provision fails for several reasons.

158. First, although Newfoundland takes the liberty of referring to the provision as including “the potential for disputes with adjacent provinces”¹²⁷, the word “provinces” is **not used in the provision**. Rather, the text specifically and deliberately speaks of a dispute with “any neighbouring jurisdiction”.¹²⁸ Newfoundland has filed with its Memorial only Schedule I to the *1982 Canada – Nova Scotia Agreement*, where the dispute settlement provision appears.¹²⁹ A reading of the instrument in its entirety reveals that where the parties intend to refer to a province, the word “province” is used, not only in reference to Nova Scotia, but as well any “province other than Nova Scotia”.¹³⁰
159. Second, the words “if there is a dispute as to these boundaries with any neighbouring jurisdiction ...”¹³¹ must be understood in the light of the fact that, in 1982, Canada was in the midst of a maritime boundary dispute with its “neighbouring jurisdiction” to the south – the United States. The Special Agreement for submission of that dispute to a Chamber of the International Court of Justice had recently been signed, in November 1981. It is thus not surprising that the federal government would have viewed it as essential, in the exercise of its constitutional jurisdiction over international affairs, to preserve its ability to implement the Court’s decision in that case.
160. Finally, the words in question **do not appear** in the 1984 legislation that implemented the *1982 Canada – Nova Scotia Agreement*. The federal government’s broad power to “redraw” Nova Scotia’s boundaries was eliminated, replaced by more precise yet flexible

¹²⁶ Newfoundland Memorial, para. 244.

¹²⁷ Newfoundland Memorial, para. 244.

¹²⁸ Annex 68: *1982 Canada-Nova Scotia Agreement* at Schedule I, p. 1.

¹²⁹ Newfoundland Document # 92.

¹³⁰ Annex 68: *1982 Canada-Nova Scotia Agreement* at 34.

¹³¹ Annex 69: *1982 Canada-Nova Scotia Agreement* at Schedule I, p. 1.

language defining the intersection between the Nova Scotia offshore and the anticipated Single Maritime Boundary with the “neighbouring jurisdiction” in question.¹³²

...thence in a general westerly direction along the outer edge of the continental margin to the Single Maritime Boundary between Canada and the United States of America;

thence in a general northerly direction along the Single Maritime Boundary to the point where the Boundary intersects a straight line drawn on an azimuth of 225°00'00” from a point at latitude 44 25'03” and longitude 66 38'47”, being approximately the midpoint between Whipple Point on Brier Island (N.S.) and Southwest Head on Grand Manan Island (N.B.)...

161. Tellingly, Newfoundland fails to offer any explanation for the elimination of the federal “power to redraw the boundaries”. The entirety of Newfoundland’s argument on this issue is contained in the following sentence: “Inexplicably, the statutes omit any reference to a dispute resolution mechanism.”¹³³ But the omission is not inexplicable. It is simply inconvenient to Newfoundland, in that it entirely disposes of its claim.

- *The Connection Between The 1982 Agreement And The 1986 Accord*

162. In addition to misstating the purpose and meaning of the relevant portions of the *1982 Canada – Nova Scotia Agreement*, Newfoundland goes on to assert that the terms of the *1982 Agreement* were “implicitly reaffirm[ed]” in the *1986 Canada – Nova Scotia Accord*:¹³⁴

The *1986 Nova Scotia Accord* changed nothing. Article 43 of the *Nova Scotia Accord* simply defines the “Offshore Area” by reference to the legislation implementing the *1982 Nova Scotia Agreement*, and then provides for the arbitration of disputes with neighbouring provinces...This provision has two implications, both of them inconsistent with the apparent Nova Scotia position. First, it points to continuity with respect to the boundary issue, implicitly reaffirming the

¹³² Annex 70: *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29 at Schedule I, p. 932. Newfoundland has filed the federal legislation at Annex of Statutes, Tab 2 and the provincial implementing legislation Annex of Statutes, Tab 3.

¹³³ Newfoundland Memorial, para. 95.

¹³⁴ Newfoundland Memorial, para. 245.

caveat [i.e., the federal power to “redraw”] attached to the lines in the 1982 *Nova Scotia Agreement* ...

(emphasis added)

163. This statement is both incorrect and deceptive. The 1986 *Canada-Nova Scotia Accord* does adopt the definition of “offshore area” found in the 1984 legislation.¹³⁵ However, as demonstrated above, the so-called “caveat” relating to the federal power to “redraw” boundaries in certain circumstances does not appear in the 1984 legislation and is in no way referenced, either explicitly or implicitly, in the 1986 *Accord*.
164. The critical flaw in Newfoundland’s position is further demonstrated by the fact that the 1986 *Canada-Nova Scotia Accord* and the legislation that implements it explicitly adopt the dispute resolution mechanism under which the present arbitration is being conducted.¹³⁶ That mechanism, the subject-matter of which is the limits of Nova Scotia’s offshore area, is entirely inconsistent with the notion of a federal power to redraw those limits unilaterally.
165. In one significant respect, however, the 1986 *Canada-Nova Scotia Accord* actually did “change nothing”. The description of the boundary between Nova Scotia and Newfoundland was the same in 1986 as in 1984, 1982, 1977 and 1972. In fact, the boundary had not changed since it was established by the Provinces in the *1964 Agreement*.

b) The Wording Of The Dispute Resolution Provisions Proves Newfoundland Wrong

166. The facts on which Newfoundland relies for its distorted view of the dispute resolution provisions in the *Canada-Nova Scotia Accord* and its implementing legislation are dealt

¹³⁵ Annex 2: *Canada-Nova Scotia Offshore Petroleum Resources Accord* (26 August 1986) (hereinafter “1986 *Canada-Nova Scotia Accord*”) at Article 43, p. 19.

¹³⁶ Annex 2: *1986 Canada-Nova Scotia Accord* at Article 41, p. 19. See also Annex 2: *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28, s. 48 (hereinafter “*Canada-Nova Scotia Act*”) and *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Nova-Scotia) Act*, S.N.S., 1987, c. 3.

with above. What remains is its fundamental assertion that these provisions are somehow “authoritative recognition that the line has not been resolved by agreement,”¹³⁷ or “not consistent with the idea that there is a line that is definitive, binding or opposable to third parties.”¹³⁸

167. The error of these assertions is clearly demonstrated by a consideration of the wording of the relevant section in the *Canada – Nova Scotia Act*.¹³⁹

168. The Act provides for negotiation or arbitration only in certain circumstances and only in relation to certain matters: (Annex 2)¹⁴⁰

Where a dispute between the Province and any other province that is a party to an agreement arises in relation to the description of any portion of the limits set out in Schedule I...

(emphasis added)

169. Similarly, s. 48(5) refers to the power to “[amend] the description of the portion of the limits set out in Schedule I in relation to which the dispute arose.”¹⁴¹

170. These provisions necessarily presume the existence of the boundary itself.

171. Furthermore, Newfoundland's interpretation of the *Canada - Nova Scotia Accord Act* ignores the entire structure of the dispute resolution provision. The relevant section does not provide for the mandatory negotiation or arbitration of the boundary as a necessary step for the permanent definition of the offshore area, as would have been required if (as Newfoundland asserts) this was only a "provisional" line. Instead, the Act provides for invocation of the dispute settlement provisions **only** if "a dispute arises in relation to the description of any portion of the limits set out in Schedule I..."

172. The boundary as described in the definition of the "offshore area" is not temporary or provisional in any way - the offshore area is the area defined in Schedule I, which sets out

¹³⁷ Newfoundland Memorial, para. 246.

¹³⁸ Newfoundland Memorial, para. 248.

¹³⁹ Annex 2: *Canada-Nova Scotia Act*, s. 48. For a more general discussion of the legislation, see Nova Scotia Memorial, Part I, paras. 7-12.

¹⁴⁰ Annex 2: *Canada-Nova Scotia Act*, s. 48(2).

¹⁴¹ Annex 2: *Canada-Nova Scotia Act*, s. 48(5).

Settlement Procedure for Disputes

Règlement des litiges

Definition of "agreement"	48. (1) In this section, "agreement" means an agreement between the Government of Canada and the government of a province respecting resource management and revenue sharing in relation to activities respecting the exploration for or the production of petroleum carried out on any frontier lands.	48. (1) Pour l'application du présent article, «accord» vise celui conclu entre le gouvernement du Canada et celui d'une province sur le partage des revenus provenant d'activités liées à la recherche ou à la production d'hydrocarbures effectués dans les terres frontalières.	Définition d'accord
Dispute between neighbouring provinces	(2) Where a dispute between the Province and any other province that is a party to an agreement arises in relation to the description of any portion of the limits set out in Schedule 1 and the Government of Canada is unable, by means of negotiation, to bring about a resolution of the dispute within a reasonable time, the dispute shall, at such time as the Federal Minister deems appropriate, be referred to an impartial person, tribunal or body and settled by means of the procedure determined in accordance with subsection (3).	(2) Tout litige entre la province et une province partie à un accord sur tout ou partie des limites énoncées à l'annexe 1 est, si le gouvernement du Canada ne peut le résoudre par négociation dans un délai raisonnable, réglé quand le ministre fédéral l'estime approprié, à une juridiction neutre pour règlement conformément au paragraphe (3).	Litige entre provinces
Procedure determined by Federal Minister	(3) For the purposes of this section, the person, tribunal or body to which a dispute is to be referred, the constitution and membership of any tribunal or body and the procedure for the settlement of a dispute shall be determined by the Federal Minister after consultation with the provinces concerned in the dispute.	(3) Pour l'application du présent article, le ministre fédéral, après consultation des provinces en cause, établit la juridiction, y compris sa constitution, sa composition et la procédure.	Établissement par le ministre fédéral
Principles of international law to apply	(4) Where the procedure for the settlement of a dispute pursuant to this section involves arbitration, the arbitrator shall apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require.	(4) En cas d'arbitrage, l'arbitre applique compte tenu des adaptations de circonstance les principes du droit international relatifs au tracé des limites maritimes.	Principes de droit international qui s'appliquent
Approval of Provincial Ministers not required unless "otherwise made"	(5) Notwithstanding section 6, where a dispute is settled pursuant to this section and a regulation under subsection 3(1) amending the description of the portion of the limits set out in Schedule 1 in relation to which the dispute arose is made in accordance with the settlement, the regulation is not subject to the procedure set out in section 6 with respect to that description.	(5) Échappe à l'obligation énoncée à l'article 6 le règlement pris sous le régime du paragraphe 3(1) qui modifie le tracé des limites figurant à l'annexe 1 et la suite du règlement d'un litige à ce sujet.	Exemption

the *1964 Agreement* boundary.¹⁴² If no existing boundary had been contemplated in 1986 or 1988, then the legislation would have incorporated a mandatory provision for the **creation** of that boundary. It did not do so, because the boundary in the *Nova Scotia Accord* legislation was not provisional.

F. Conclusion

173. The record of events from the 1960s to the present day demonstrates that, in 1964, the Provinces agreed – not proposed – the delimitation of their offshore boundaries. That Agreement was to bind, and did bind, the Provinces to their agreed boundaries, from the moment it was concluded. These boundaries remain binding on the Provinces today.

¹⁴² **Annex 2: *Canada-Nova Scotia Act*, Schedule I at 770.**