

PART IV: NEWFOUNDLAND IS WRONG REGARDING THE SCOPE OF THE *1964 AGREEMENT*

A. Introduction: The *1964 Boundaries Apply To All Forms Of Jurisdiction And To The Full Extent Of The Continental Shelf*

1. Newfoundland makes numerous assertions – none of which can be proved – regarding the scope of the *1964 Agreement*. Two such assertions, in particular, are addressed here.
2. Newfoundland alleges that the *1964 Agreement* was concerned solely with the attainment of **ownership and full jurisdiction** over the offshore. Therefore, Newfoundland claims, the boundaries agreed by the Provinces could not be applied to a régime of cooperative management and revenue sharing between the Provinces and the federal government as ultimately emerged, and as currently exists, in Nova Scotia and Newfoundland:¹

The 1964 Stanfield proposal dealt with ownership and jurisdiction, not cooperative management and revenue sharing...

The purpose and context of the proposed Stanfield line was therefore different from that of the lines contemplated by the present Accords and the implementing legislation.

3. Newfoundland also contests the **geographic** scope of the *1964 Agreement*. It asserts that the *1964 Agreement* did not cover the entire length of the line dividing the parties' respective offshore areas – it claims that “the most important and extensive portions of the line were left as a ‘blank on the map’” – and that, as a result, the entire Agreement is ineffective.²
4. These issues have been fully addressed in Nova Scotia's Memorial,³ where it is demonstrated that the parties not only intended, but did in fact agree on a line extending to the outer limit of the continental shelf over which Canada could claim rights under international law, a line to be applied for the purpose of offshore exploration and

¹ Newfoundland Memorial, paras. 207, 208.

² Newfoundland Memorial, para. 223.

³ Nova Scotia Memorial, Part IV, paras. 17-62.

development irrespective of the particular jurisdictional or administrative régime that might apply between the Provinces and the federal government.

5. In this Part, the facts and law relating to these questions, as adduced by Newfoundland in its Memorial, are considered. As with many aspects of Newfoundland's case, its theories regarding the limited jurisdictional and geographic scope of the *1964 Agreement* are fundamentally untenable. Newfoundland's claims are in fact at odds with the plain words of the documents evidencing the *1964 Agreement* and with the very object and purpose of that Agreement, as well as with the conduct of all five East Coast Provinces, including its own conduct, in the years since the Agreement was concluded.
6. In the previous Part of this Counter-Memorial, the lie is put to Newfoundland's theory that that *1964 Agreement* was, in its entirety, merely a proposal to the federal government whose interdependent parts depended, in turn, on federal acceptance for their validity. For many of the same reasons – including a partial, highly selective and manifestly inaccurate account of the factual record – Newfoundland's argument to the effect that the Provinces intended that their agreed boundaries would be restricted in scope, covering only submarine minerals that were owned by or subject to the exclusive jurisdiction of the Provinces, and only within the Gulf of St. Lawrence, must fail.

B. The Boundaries Apply To All Forms Of Jurisdiction – Not Just “Ownership”

i) The Plain Words Of The Documents Demonstrate That The Boundaries Apply To All Forms Of Jurisdiction

a) Newfoundland Misinterprets And Misapplies The *Joint Submission*

7. In 1964, the Provinces did indeed assert, vis-à-vis the Government of Canada, ownership and full jurisdiction over the offshore, as confirmed by both Newfoundland and Nova Scotia in their Memorials. What the Provinces did not do is subordinate their agreement on boundaries to that jurisdictional claim, or agree that those boundaries would apply

only in the event that provincial ownership and jurisdiction were confirmed. Nor is there any reason why they should have done so.

8. The evidence offered by Newfoundland in support of its theory is the following passage extracted from the *Joint Submission*:⁴ (Annex 31)

In conclusion, the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland assert that the Provinces are entitled to the ownership and control of submarine minerals underlying territorial waters, including, subject to International Law, areas in the Banks off Newfoundland and Nova Scotia, on legal and equitable grounds.

9. From this statement of a provincial claim to ownership of submarine minerals, Newfoundland asks the Tribunal to leap to the following conclusion regarding the nature and effect of the Provinces' Agreement on boundaries *inter se*:⁵

The purpose and context of the proposed Stanfield line was therefore different from that of the lines contemplated by the present Accords and the implementing legislation.

10. But Newfoundland's purported conclusion ("the purpose and context ... was ... different") does not follow from its premise ("the Provinces asserted ownership..."), either logically or practically. It is a *non sequitur*. And it is disproved by actual events.
11. The extract of the *Joint Submission* quoted by Newfoundland does not limit the nature and scope of the Provinces' Agreement establishing those boundaries. It addresses the Provinces' claims against the federal government.
12. Moreover, as noted above, the *Joint Submission* is not the 1964 Agreement, and it is far from the only instrument evidencing the existence and binding intent of the boundaries agreed by the Provinces.
13. If one considers the actual interprovincial Agreement concluded on September 30, 1964, as opposed to the proposal made to the federal government on October 14-15, 1964, a very different picture emerges than that asserted by Newfoundland.

⁴ Newfoundland Memorial, para. 207. Annex 31: *Joint Submission*; Newfoundland Document # 15.

⁵ Newfoundland Memorial, para. 208.

14. First, there is not a single word in the various documents evidencing the *1964 Agreement* that would suggest that the boundaries agreed by the Provinces *inter se* would be effective only in the event that the Provinces attained ownership of the offshore. Nor is there the slightest indication that the Premiers regarded the boundaries agreed by them to apply solely to mineral resources in an offshore over which the Provinces enjoyed full jurisdiction, as opposed, for example, to shared administration.
15. On the contrary, all of the documents evidencing the *1964 Agreement* deal with an **agreement between the Provinces on boundaries and a proposal to the Government of Canada on ownership and jurisdiction as separate matters.**⁶
16. In sum, the *1964 Agreement* between the Provinces was indeed concluded while a dispute was ongoing between the Provinces and the federal government regarding jurisdiction over offshore resources. An agreement between the Provinces on interprovincial boundaries was regarded as a means of facilitating the negotiation and settlement of jurisdictional issues with the federal government and of fostering the orderly development of the offshore.⁷ In the context of those negotiations (at the time and, indeed, for many years thereafter), the Provinces asserted their entitlement to ownership and full jurisdiction over the offshore.
17. These facts are incontestable. They do not imply, however, nor do any of the historical documents reveal, that the boundaries agreed between the Provinces in 1964 would apply only in the event that their claim to ownership and jurisdiction over the offshore vis-à-vis the federal government were accepted by the Government of Canada. A stipulation to that effect could very easily have been included in the *1964 Agreement* – but it was not.

b) Newfoundland's Argument Is Irrational

18. There is, finally, a very simple reason why Newfoundland's exceedingly restrictive interpretation of the Provinces' 1964 boundary Agreement is untenable. While it may be

⁶ See Nova Scotia Memorial, Part II, paras. 3-31.

⁷ See Nova Scotia Memorial, Part II, para. 3 *et seq.*

correct that “a proposal agreed upon for a specific objective cannot be considered legally applicable for other, distinct objectives”,⁸ this proposition is entirely beside the point.

19. Newfoundland’s argument regarding the inapplicability of the *1964 Agreement* to the *Accord Acts* that are at issue in this arbitration amounts to the following: a boundary agreed for purposes of **full** provincial jurisdiction over the offshore is inapplicable to a situation of **partial** or **shared** jurisdiction. This is tantamount to arguing that an agreement that explicitly applies to the most **complete** purpose (ownership and full jurisdiction), encompassing the right to legislate on all aspects of the offshore, does not apply to a lesser purpose (joint administration), encompassing the right to legislate on only certain aspects of the offshore. Newfoundland’s Memorial does not say why this must be so. Indeed it would be more logical to conclude that a boundary that is agreed to cover the complete bundle of rights implied in full offshore jurisdiction must, *a fortiori*, apply to “lesser but included” forms of control, such as those set out in the *Canada-Nova Scotia* and *Canada-Newfoundland Acts*.

ii) The Parties’ Subsequent Conduct Confirms That The Boundaries Apply To All Forms of Jurisdiction

20. Even if the Tribunal were to find that the documents evidencing the *1964 Agreement* are ambiguous regarding whether the agreed boundaries were intended to apply to régimes **other** than one under which the Provinces possess full jurisdiction (which Nova Scotia denies), that ambiguity would be readily resolved by considering the subsequent conduct of the parties.
21. The issue of subsequent conduct is addressed fully in the Nova Scotia Memorial.⁹ In addition, new evidence has come to light, both in the Newfoundland Memorial and in files previously requested by Newfoundland of the federal government and only recently made available to Nova Scotia,¹⁰ which confirms that the Provinces always intended the

⁸ Newfoundland Memorial, para. 209.

⁹ See Nova Scotia Memorial, Part II, paras. 72-99 and Part IV, paras. 11-16, 35-51.

¹⁰ See Part I, para. 28, above.

- boundaries established in the *1964 Agreement* to apply to any and all jurisdictional regimes that might emerge from their negotiations with the federal government.
22. This section reviews the most significant instances of the parties' conduct, as it pertains specifically to the application by them of the agreed boundaries to such "other" jurisdictional contexts.
 23. Newfoundland flatly asserts that "[t]he parties could hardly have agreed in 1964 or 1972 to divide a form of offshore management that was not in existence or even in contemplation at that time,"¹¹ and goes on to claim that "[t]he 1964 line simply ceased to have any relevance even as a proposal when it became apparent that the goal of ownership was not to be attained."¹²
 24. Among the several problems with these assertions is that, while neither ownership nor full jurisdiction had been attained when the boundaries were agreed, in 1964, and in fact have never been achieved, history records that the East Coast Provinces, including Newfoundland, actually began applying their agreed boundaries almost immediately upon concluding the *1964 Agreement*.¹³
 25. Examples of the Provinces' conduct in this regard include the issuance of exploration permits along the agreed boundaries, the promulgation of legislation and maps depicting those boundaries and the incorporation of the boundaries into other agreements and legislation.¹⁴ All the while, of course, the federal government and, in 1967 and 1984, the Supreme Court of Canada,¹⁵ rejected numerous formulations of provincial claims to ownership and jurisdiction.
 26. Moreover, the record discloses that, by 1972 (and even before), the Provinces were already contemplating "forms of offshore management" other than full provincial control,

¹¹ Newfoundland Memorial, para. 208.

¹² Newfoundland Memorial, para. 208.

¹³ See Nova Scotia Memorial, Part II, paras. 83, 88-92, Part IV, paras. 36, 37.

¹⁴ Nova Scotia Memorial, Part II, paras. 80-96 and Figures 11-21.

¹⁵ Nova Scotia Memorial, Part II, para. 1.

and accepted without question that the *1964 Agreement* boundaries applied to such arrangements, as demonstrated below.

a) The Allard Letter Of May 12, 1969

27. On May 12, 1969, P.-E. Allard, Vice-Chairman of the *JMRC*, wrote to the provincial Ministers of Mines who were members of the *JMRC*, enclosing a series of recommendations regarding both the offshore negotiations with the federal government and the boundaries agreed between the Provinces. As is fully recounted in Nova Scotia's Memorial,¹⁶ these recommendations, along with additional recommendations made by the *JMRC* in May 1972, were before the Premiers and provided the basis for their discussions and, ultimately, their decision, of June 1972.
28. The facts reveal unequivocally that, at least as early as 1972, the East Coast Premiers were considering scenarios in which the Provinces might enjoy less than full jurisdiction over the offshore, in all of which their agreed boundaries were regarded as applicable.
29. Minister Allard clearly states in his letter that, while the Provinces should agree among themselves to a negotiating position demanding full ownership, they would eventually be free to adopt different individual positions on jurisdiction with the federal government. The one constant, however, was that the agreed boundaries would continue to apply as between the Provinces regardless of the particular jurisdictional settlement that might be reached by a given Province and the federal government:¹⁷ (Annex 43)

The approach in this connection must be that the submarine areas between the Provinces belong to the adjoining Provinces and the boundaries must be determined with that concept in mind. **If, after the Provinces have so agreed, then it is quite in order if one Province wishes to take the approach that the land covered with water between the low water mark of the Province and the interprovincial boundary does not belong to it but the Government of Canada.** I do not recommend this and personally do not agree with it, however, the

¹⁶ Nova Scotia Memorial, Part II, paras. 44-45 and Part IV, para. 55. See also Annex 43: Allard letter; Newfoundland Document # 33.

¹⁷ Annex 43: Allard letter at 3; Newfoundland Document # 33. See also Nova Scotia Memorial, Part IV, para. 55.

(...)

The meeting adopted the report of the technical committee and directed that a listing of the longitudes and latitudes and a map be prepared and forwarded to the Secretary with directions that when the same had been done the Secretary was to forward the same to the Chairman of the Joint Mineral Resources Committee who, in turn, would write to each member Minister of the Committee sending to him a copy of the turning points and the map. The meeting agreed that upon receipt of these two items by each member Minister he was in turn to take them to his government for approval. 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.

As you are well aware, the Joint Mineral Resources Committee has also been entrusted with the task of providing recommendations to the five above Governments concerning the proposal made by The Honourable Pierre E. Trudeau, Prime Minister of Canada, with respect to minerals in the offshore areas of the Atlantic Coast. Before the Committee can come up with any such recommendations, the five above Provinces must first agree among themselves to the location of their interprovincial boundaries. The approach in this connection must be that the submarine areas between the Provinces belong to the adjoining Provinces and the boundaries must be determined with that concept in mind. **If, after the Provinces have so agreed, then it is quite in order if one Province wishes to take the approach that the land covered with water between the low water mark of the Province and the interprovincial boundary does not belong to it but the Government of Canada.** I do not recommend this and personally do not agree with it, however, the point I wish to get across is that **before any discussion of Mr. Trudeau's proposals can be had the Provinces must agree where their boundaries would be if they were the only parties involved.**

(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 3)

point I wish to get across is that **before any discussion of Mr. Trudeau's proposals can be had the Provinces must agree where their boundaries would be if they were the only parties involved.**

(emphasis added)

30. The Newfoundland Memorial, while addressing other aspects of the Allard letter, simply ignores this critical passage. Newfoundland also omits mention of the previous paragraph of Minister Allard's letter, in which he describes the boundaries as "**the boundaries between the Provinces for all purposes ...**".¹⁸

b) Premier Smallwood's Letter Of January 29, 1970

31. The fact that jurisdictional scenarios other than full provincial control were on the table in a serious manner, well in advance of the Premiers' 1972 approval of the technical coordinates of the *1964 Agreement* boundaries, is demonstrated in compelling fashion by a letter sent January 29, 1970 by Premier Smallwood of Newfoundland to Prime Minister Trudeau,¹⁹ in response to the latter's proposal on jurisdiction sent to each Province on December 2, 1969.²⁰
32. Newfoundland describes this exchange of correspondence in a manner both truncated and inaccurate:²¹

In December 1969, the Prime Minister wrote to each of the Atlantic Premiers offering to conclude agreements with them on an individual basis. This approach was rejected. (footnotes omitted)

33. Here again, the contents of the documents on which Newfoundland relies contradict the use to which they are put. To begin with, the letters addressed to the Prime Minister by Premier Smith of Nova Scotia²² and Premier Smallwood of Newfoundland²³ do **not** reject the substance of the Prime Minister's proposals, but state merely that further discussion

¹⁸ Annex 43: Allard letter at 3 (emphasis added).

¹⁹ Newfoundland Document # 40.

²⁰ Newfoundland Document # 38.

²¹ Newfoundland Memorial, para. 51.

²² Newfoundland Document # 39.

²³ Newfoundland Document # 40.

should occur between the federal government and the Provinces jointly, that is, through the *JMRC*.

34. More significant, however, are the substance of the Prime Minister's proposal and the reaction of Premier Smallwood. Prime Minister Trudeau's letter set out a number of suggestions regarding "governmental administrative arrangements" between Canada and Newfoundland. These included the use of mineral resource "administration lines" that would provide the Provinces with **administrative responsibility over part of the offshore**, and a readiness to consider provincial proposals on **revenue sharing**.²⁴ What is manifestly not on the table is any offer of "ownership" or "full jurisdiction." These matters are set aside.
35. Premier Smallwood's telling reaction to these proposals is not captured in Newfoundland's Memorial. The Newfoundland Premier actually "**agree[d] fully ... as to the urgency of establishing administrative arrangements** for the orderly exploration and subsequent development of petroleum and natural gas off Canada's sea coasts."²⁵ As with the Prime Minister, Premier Smallwood was evidently prepared to set aside the matters of "ownership" or "full jurisdiction" in order to consider "administrative arrangements".
36. Even more remarkable, Premier Smallwood suggested that this very objective – the establishment of administrative arrangements – was at the heart of the joint approach adopted by the Provinces in 1964.²⁶

Indeed, this precisely was the motivation of the Premiers of the Eastern Provinces in 1964 when they made provision for the establishment of the existing Joint Mineral Resources Agreement.

Pursuant to that Agreement, the Ministers of Mines of the five Provinces have been meeting frequently over the past year in the light of your proposal of December, 1968. The objective of their meetings, of course, has been the evolution of a plan of administration in respect of the waters off Canada's East Coast.

²⁴ Newfoundland Document # 38.

²⁵ Newfoundland Document # 40 at 1 (emphasis added).

²⁶ Newfoundland Document # 40 at 1.

My Dear Premier:

(...)

In particular, it seems essential that exploration and eventual development of offshore oil resources should not be discouraged by uncertainties as **to governmental administrative arrangements.**

(...)

The **administration line** concept represents a ready and definite solution to this complex problem.

(...)

In my view, the most urgent aspect of the whole matter is to reach agreement on the positioning of the administration lines, with the consequent acceptance by coastal Provinces of the **responsibilities and resulting benefits of administering the areas** between the lines and the shore.

(...)

You will recall that I have already indicated that the Federal Government would be agreeable to any proposal acceptable to the Provincial Governments for **dividing among the Provinces 50 per cent of the federal revenues from offshore mineral resources.** It is my understanding that no agreement has been reached by the Provinces on a revenue-sharing formula. Should the Provinces wish, **we would be prepared to make constructive suggestions in this regard.**

As you know, the Federal Government's proposals for an arrangement of the offshore minerals question were put forward in December of 1968, and have now been standing for close to a year. In view of the urgency which we attach to providing the greatest possible encouragement to the growing interest now being shown in exploration investment in the offshore, the time is fast approaching when the Federal Government must make its own position on the administration of offshore resources definitive.

(...)

If, as I believe, you are favourably disposed to reaching early agreement on the administration lines and related matters regarding our respective administrative responsibilities, then I shall ask the Minister of Energy, Mines and Resources to communicate with the appropriate Minister in your Government to arrange the necessary meeting..

(our emphasis)

(Newfoundland Document #38: Letter from Pierre Elliott Trudeau, Prime Minister of Canada to Joseph Smallwood, Premier of Newfoundland (2 December 1969) at 1, 2, 4 and 5)

I agree fully with you as to the urgency of establishing administrative arrangements for the orderly exploration and subsequent development of petroleum and natural gas off Canada's sea coasts.

Indeed, this precisely was the motivation of the Premiers of the Eastern Provinces in 1964 when they made provision for the establishment of the existing Joint Mineral Resources Agreement.

Pursuant to that Agreement, the Ministers of Mines of the five Provinces have been meeting frequently over the past year in the light of your proposal of December, 1968. The objective of their meetings, of course, has been the evolution of a plan of administration in respect of the waters off Canada's East Coast.

(our emphasis)

(Newfoundland Document # 40: Letter from Joseph Smallwood, Premier of Newfoundland to Pierre Elliott Trudeau, Prime Minister of Canada (29 January 1970) at 1)

37. When read together with the Trudeau proposal to which it responds, Premier Smallwood's letter makes two points abundantly clear, both of which undermine Newfoundland's argument regarding the meaning and scope of the *1964 Agreement*.
38. First, in 1970 Newfoundland recognised that the ongoing federal-provincial negotiations were part of the process initiated in 1964, and were not something new and distinct, incarnated only after the rejection and death of a previous provincial proposal.
39. Second, Newfoundland apparently regarded the Provinces' common objective, from 1964 onward, not in terms of **ownership or bust**, as it now claims, but rather as "**the evolution of a plan of administration**" possibly leading to the establishment of "**administrative arrangements**".
40. Premier Smallwood was merely stating the obvious: notwithstanding their "negotiating position" regarding "ownership and full jurisdiction", the Provinces were prepared to consider federal proposals regarding options for alternative jurisdiction. Had this not been so, there would have been nothing to negotiate.
41. The federal-provincial negotiations were just that – negotiations – which the Provinces approached in good faith. And the Provinces' position was just that – a position – not an ultimatum. Having stated their position, **provincial entitlement to ownership and full jurisdiction**, the Provinces did not rule out consideration of other possible outcomes. At no time did Newfoundland or any other Province declare that the agreed boundaries would apply to only one such outcome.

c) The JMRC Recommendations Of May 24, 1972

42. As noted in both the Newfoundland²⁷ and Nova Scotia²⁸ Memorials, on May 24, 1972 the *JMRC* met at the request of Newfoundland and agreed on a series of recommended principles to be presented to the Premiers at their forthcoming meeting, on June 17-18.

²⁷ Newfoundland Memorial, para. 55.

²⁸ Nova Scotia Memorial, Part II, para. 46 and Annex 44: "Minutes of Joint Meeting of Committee and Sub-Committee of the Joint Mineral Resources Committee Held in the Red Room, Province House, Halifax, Nova Scotia, May 24, 1972". See also Newfoundland Document # 46.

43. Newfoundland refers to two of the eight principles recommended by the *JMRC*: that ownership rests with the Provinces; and that the Provinces should confirm the *JMRC*'s technical delineation and description of the agreed boundaries, as requested in the Allard letter of May 12, 1969.²⁹
44. There is, however, no indication whatsoever in the document in question of any hierarchy or linkage between these two recommendations, one concerning the Provinces' negotiating stance on ownership and the other dealing with confirmation of the latitude/longitude of the turning points of their agreed boundaries. Indeed, any such linkage would have been nonsensical given the clarity with which the Allard letter itself distinguished the **continuing question of jurisdiction** and the **settled matter of boundaries**.

d) The Premiers' Confirmation Of The Boundaries On June 17-18, 1972

45. As demonstrated above, it is evident that the concept of administrative arrangements (based on grounds other than federal recognition of provincial ownership of the offshore) was on the table long before the East Coast Provinces re-confirmed their boundaries on June 17-18, 1972; and the Provinces regarded their boundaries as applicable to all such arrangements.
46. The outcome of the June 17-18 meeting also justifies this view.³⁰ The joint *Communiqué* issued following the Premiers' meeting records the Provinces' agreement on the technical delineation and description of their agreed boundaries. The *Communiqué* also records the Provinces' assertion of ownership of the mineral resources of the offshore, and then immediately declares their willingness to discuss other, unspecified "arrangements", including forms of delegated administration, with the federal government:³¹ (**Annex 54**)

²⁹ Newfoundland Memorial, para 55.

³⁰ See Nova Scotia Memorial, Part II, paras. 50-54.

³¹ **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). Newfoundland also filed this as Document # 48.

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.

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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))

(...)

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.
47. Nowhere in the *Communiqué*, or indeed in any other document referred to by Newfoundland, is there any indication that the agreed boundaries would apply to ownership-based régimes but not to such other jurisdictional and administrative “arrangements”.
48. Additional evidence on this issue is contained in the documents evidencing the May 9, 1972 meeting between Premier Moores and his Minister of Mines, Mr. Doody (as well as other Newfoundland Ministers and officials), and Donald Macdonald, the federal Minister of Energy, Mines and Resources.³² In the course of a discussion on offshore issues, the following exchange took place:³³ (**Annex 47**)
- 7) Premier Moores raised the question of the **distribution of the Provincial portion of offshore revenues** amongst the Provinces, and was reminded by Mr. Doody that **the five Atlantic Provinces had, some years ago, agreed on boundary lines and spheres of interest.**

(emphasis added)

³² See Nova Scotia Memorial, Part II, paras. 48-49 for a full discussion of this meeting.

³³ **Annex 47:** Memorandum from J. Austin, Deputy Minister of Energy, Mines and Resources, Government of Canada to Donald Macdonald, Minister of Energy, Mines and Resources, Government of Canada (15 May 1972) at 2. See also Nova Scotia Memorial, Part II, para. 48 and note 71 referring to the further briefing of Premier Moores on June 6, 1972 regarding jurisdiction over the continental shelf and offshore resource exploration.

FROM DEPUTY MINISTER
DE

TO HON. D.S. MACDONALD
À

May 15, 1972

Subject MINUTES OF A MEETING BETWEEN HON. D.S. MACDONALD, PREMIER
Sujet FRANK MOORES OF NEWFOUNDLAND, HON. JOHN CROSBIE, NFLD.
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT, HON. WM.
DOODY, NFLD. MINISTER OF MINES, AGRICULTURE AND RESOURCES,
HON. R.L. CHEESEMAN, NFLD. MINISTER OF FISHERIES AND DR.
S. PETERS, EXECUTIVE ASSISTANT TO PREMIER MOORES, HELD MAY 9,
1972 IN OTTAWA.

1) This is to report a meeting held on May 9, 1972 in Ottawa between Hon. D.S. Macdonald, Minister of Energy, Mines & Resources and Premier Frank Moores of Newfoundland and his three Ministers as mentioned above. Dr. S. Peters, Premier Moores Executive Assistant, accompanied them. Mr. J. Austin, Deputy Minister of Energy, Mines & Resources attended also.

(...)

7) **Premier Moores raised the question of the distribution of the Provincial portion of offshore revenues amongst the Provinces, and was reminded by Mr. Doody that the five Atlantic Provinces had, some years ago, agreed on boundary lines and spheres of interest.** The Minister noted the problem of Sable Island in discussions with Nova Scotia and the boundary issue with France. The question of how the Provinces might share revenue offshore was not discussed in detail, but the Minister mentioned the difference between the concept of all revenue within a certain area going to a single Province and the concept of an "insurance pool" which had been raised previously by the Prime Minister. The Minister also explained the suggestion regarding administrative lines.

(our emphasis)

(Annex 47: Memorandum from J. Austin, Deputy Minister of Energy, Mines and Resources, Government of Canada to Donald Macdonald, Minister of Energy, Mines and Resources, Government of Canada (15 May 1972) at 1 and 2)

49. It thus appears that, immediately prior to the June 1972 meeting, Premier Moores (in the presence of the federal Minister) was informed by his Minister of Mines that the boundary lines already agreed “some years ago” would apply to “the distribution of the Provincial portion of offshore revenues amongst the Provinces”, in the context of some form of federal-provincial revenue sharing arrangement.
50. Again, the factual record directly contradicts Newfoundland’s claim. In this instance, it undermines the assertion that “a negotiated regime of cooperative management and revenue sharing” was “a form of offshore management that was not in existence or even in contemplation” in “1964 or 1972”.³⁴ Not only was revenue sharing very much in contemplation by Newfoundland and the other Provinces; in 1972, so too was the application of the *1964 Agreement* boundaries.

e) Premier Moores’ June 19, 1972 Statement To The Newfoundland House Of Assembly

51. The June 19, 1972 Statement by Premier Moores to the Newfoundland House of Assembly, and Newfoundland’s misleading reference to that Statement, have been dealt with above.³⁵ On the matter of offshore ownership and jurisdiction, the Statement provides yet further evidence of the underlying fallacy in Newfoundland’s claim.
52. In his speech, Premier Moores restated in its entirety the Premiers’ agreement of the day before, including their confirmation of the boundaries, their assertion of provincial ownership of the offshore and their willingness to discuss various arrangements, delegated administration, regional administration and financial issues.
53. As noted above, Premier Moores also sought to reassure the House that, despite the Provinces’ seven-point agreement, including their boundary agreement, no concrete decisions had been made regarding such matters as the “arrangements” (point 4) or “delegation of ... administration” (point 5) that the Provinces were explicitly “prepared

³⁴ Newfoundland Memorial, para. 208.

³⁵ See Part III. C.

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)

to discuss with the Federal Government” (point 5).³⁶ In other words, the boundaries were confirmed with no need for, and despite the absence of, a resolution of the jurisdiction issue.

f) The Premiers' Meeting Of August 2, 1972

54. At their meeting of August 2, 1972, the Premiers reconfirmed their June 18 decision on boundaries. As discussed in Nova Scotia's Memorial, the Premiers also determined that it was “desirable that there be some form of joint Provincial-Federal body to administer the offshore area”,³⁷ and publicly declared, *inter alia*:³⁸ (**Annex 56**)

The First Ministers agreed that the matter of offshore minerals can be settled amicably by the Provincial and the Federal Governments, and [that] the **methods of administrative co-operation between the Governments can be developed.**

(..)

A suitable **regional agency with representation from the five Eastern Provinces and the Federal Government** would be desirable to **administer certain aspects** of the offshore oil and gas industry.

(emphasis added)

55. Again, the record contradicts Newfoundland's claim that “a negotiated regime of cooperative management and revenue sharing” was “a form of offshore management that was not in existence or even in contemplation” in “1964 or 1972”.³⁹ In fact, the Provinces confirmed their boundaries even as they opened the door to federal-provincial “methods of administrative co-operation” and a joint administrative “agency”.

³⁶ **Annex 58:** Premier Moores' Statement at 2491 (emphasis added). Newfoundland filed a version of Premier Moores' Statement as Document # 50.

³⁷ Nova Scotia Memorial, Part IV, para. 57; **Annex 56:** “Minutes of Meeting of First Ministers of the Five Eastern Provinces on Nova Scotia Memorial, Offshore Minerals Held in the Cabinet Room, Province House, Halifax, Nova Scotia, August 2, 1972” at 2.

³⁸ Nova Scotia Memorial, Part IV, para. 57. See also Nova Scotia Memorial, Part II, para. 54 and **Annex 56** at attachment “Communiqué Issued Following the Second Meeting of the First Ministers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Quebec” at 2.

³⁹ Newfoundland Memorial, para. 208.

COMMUNIQUE ISSUED FOLLOWING THE SECOND MEETING OF THE FIRST MINISTERS OF NOVA SCOTIA, NEW BRUNSWICK, PRINCE EDWARD ISLAND, NEWFOUNDLAND AND QUEBEC.

THE FIRST MINISTERS OF THE FIVE EASTERN PROVINCES MET IN HALIFAX TODAY TO CONTINUE DISCUSSIONS ON OFFSHORE MINERAL RESOURCES.

THIS OCCASION MARKED THE SECOND TIME THAT THE FIVE EASTERN PROVINCES HAVE SAT DOWN TOGETHER AT THE FIRST MINISTER LEVEL TO DISCUSS THE OFFSHORE QUESTION ... THE ORIGINAL MEETING HAVING BEEN HELD IN HALIFAX ON JUNE 17 AND 18 OF THIS YEAR.

AS A RESULT OF TODAY'S MEETING THE FIVE EASTERN FIRST MINISTERS AGREED THAT:

(...)

THE FIRST MINISTERS AGREED THAT THE MATTER OF OFFSHORE MINERALS CAN BE SETTLED AMICABLY BY THE PROVINCIAL AND THE FEDERAL GOVERNMENTS, AND THE **METHODS OF ADMINISTRATIVE CO-OPERATION BETWEEN THE GOVERNMENTS CAN BE DEVELOPED.**

(...)

A **SUITABLE REGIONAL AGENCY WITH REPRESENTATION FROM THE FIVE EASTERN PROVINCES AND THE FEDERAL GOVERNMENT** WOULD BE DESIRABLE TO ADMINISTER CERTAIN ASPECTS OF THE OFFSHORE OIL AND GAS INDUSTRY.

(our emphasis)

(Annex 56: "Communiqué Issued Following The Second Meeting of The First Ministers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Quebec" (2 August 1972) at 1 and 2)

56. The evidence also undermines Newfoundland's statement, set out in the very next paragraph of its Memorial, that "[a]s a matter of law," what it calls "the delimitation component" of the *1964 Agreement* "could not have been made applicable for the distinctly different purposes of the Accords ...".⁴⁰ The *Accords*, of course, incorporate and implement those very concepts.
57. The Newfoundland Memorial contains no reference to the Premiers' August 2, 1972 meeting. It offers no explanation of how the evidence regarding that meeting might be reconciled with Newfoundland's categorical and, on their face, incorrect statements of fact on this point.

g) The Federal-Provincial First Ministers' Meeting Of August 23, 1972

58. As was noted in Part I, the records associated with the August 23, 1972 meeting of the Prime Minister of Canada and the East Coast Premiers became available only after submission of the parties' Memorials on December 1, 2000. These records solidify the view that the Provinces intended their *1964 Agreement* boundaries to apply to jurisdictional arrangements not based on provincial ownership of the offshore.
59. The purpose of the August 23, 1972 meeting was to discuss new proposals submitted by the federal government, proposals intended to catalyse the federal-provincial discussions on the offshore. As recorded in notes of the meeting made by federal officials, the meeting was concerned with joint administration – not ownership:⁴¹ (Annex 136)

Premier Regan opened the meeting by setting out a couple of basic points; the first being that the **resolution of the ownership of off-shore resources question should be set aside for the moment** as not being essential to arriving at a general solution. The Prime Minister agreed with this suggestion and The Honourable Mr. Levesque, on behalf of the Province of Quebec, said that that was Quebec's position as well. Premier Regan also suggested that there should be created a joint **Federal-Provincial body for the administration of the resources of**

⁴⁰ Newfoundland Memorial, para. 209.

⁴¹ Annex 136: D. S. Macdonald, "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 "D.S. Macdonald; Notes from a Meeting") at 1.

Department of Energy,
Mines and Resources
MINISTER'S OFFICE
MEMORANDUM

CANADA

Ministère de l'Énergie,
des Mines et des Ressources
CABINET DU MINISTRE
MÉ MORANDUM

Ottawa, August 25, 1972.

CONFIDENTIAL

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.

(...)

Premier Regan opened the meeting by setting out a couple of basic points: the first being that the **resolution of the ownership of off-shore resources question should be set aside for the moment** as not being essential to arriving at a general solution. The Prime Minister agreed with this suggestion and The Honourable Mr. Levesque, on behalf of the Province of Quebec, said that that was Quebec's position as well. Premier Regan also suggested that there should be created a **joint Federal-Provincial body for the administration of the resources of the region**, but that before that could be done a great deal of work would be necessary to determine the most appropriate form and manner of operation of such a body, and for this a great deal of information was in federal hands. If the point was worth pursuing, he suggested that federal officials be appointed to meet with the **committee of officials from the five provinces which had already been considering the question.**

(our emphasis)

(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) at 1)

the region, but that before that could be done a great deal of work would be necessary to determine the most appropriate form and manner of operation of such a body, and for this a great deal of information was in federal hands. If the point was worth pursuing, he suggested that federal officials be appointed to meet with the **committee of officials from the five provinces which had already been considering the question.**

(emphasis added)

60. This discussion is notable on at least four counts, all of which undermine the foundation of Newfoundland's position.
61. First, the question of ownership was to be set aside, but (as will be shown, below) the agreed boundaries were to remain effective. Second, the Premiers actually discussed the creation of a "joint Federal-Provincial body for the administration of the resources of the region", a concept that Newfoundland claims was "a form of offshore management that was not in existence or even in contemplation" at the time.⁴² Third, the Provinces "had already been considering the question", contrary to Newfoundland's insistence otherwise in this arbitration. Finally, the record of the August 23, 1972 meeting discloses no protest by Newfoundland, no objection or challenge or reservation of any sort to these statements made by Premier Regan regarding the position of the Provinces and their willingness to discuss matters that Newfoundland today claims were anathema to the Provinces at the time.
62. The rest of the meeting ranged broadly over issues of administrative format and revenue sharing (again, matters that Newfoundland alleges were not under discussion at the time), before turning to the agreed boundaries.⁴³
63. The meeting's approach to the boundary question is discussed in detail above.⁴⁴ In brief, the federal government noted that interprovincial lines would be required for revenue

⁴² Newfoundland Memorial, para. 208.

⁴³ See Annex 136: D.S. Macdonald, Notes from a Meeting, *supra* note 41.

⁴⁴ See Part III. C.

Department of Energy,
Mines and Resources
MINISTER'S OFFICE
MEMORANDUM

CANADA

Ministère de l'Énergie,
des Mines et des Ressources
CABINET DU MINISTRE
MÉ MORANDUM

Ottawa, August 25, 1972.

CONFIDENTIAL

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.

(...)

Premier Regan raised the question as to **whether the Federal Government expected to participate** in ascertaining the pool shares if a pooling arrangement was entered into. Mr. Macdonald indicated that it was anticipated that, if there were to be a pooling arrangement, **basically the arrangements would be made between the provinces. From the federal standpoint, three things would be desirable - 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 realization); 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. **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 or whether it would hedge its bets by participating in whole or in part in a pooling arrangement.

(our emphasis)

(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." from D.S. Macdonald, Minister, Department of Energy, Mines and Resources Canada (25 August 1972) at 1 and 3)

sharing purposes and that such boundaries were a matter “between the provinces”, while the Premiers made it clear that they regarded the question as “settled”.⁴⁵

64. The First Ministers did not agree on the final shape of a federal-provincial offshore arrangement at their August 23, 1972 meeting, but they regarded their boundaries to be settled and to be applicable for revenue sharing and other cooperative management purposes – as indeed they are, in the *Offshore Accords*. These facts run utterly contrary to Newfoundland’s theory.

h) The Work Of The Joint Committee Of Federal–Provincial Officials:
October 1972 – May 1973

65. The deliberations of the Joint Committee of Federal and Provincial Officials are also discussed in detail in Part III above.⁴⁶ This Committee, it will be recalled, was established by the First Ministers to “examine the possible forms of an administrative set-up for cooperative administration of the resource”.⁴⁷ The Committee engaged in extensive discussions, from October 1972 through to May 1973, and its consideration of possible cooperative arrangements proceeded on the assumption that the *1964 Agreement* boundaries applied in this context as well as in all others. No alternative boundaries were ever proposed or discussed at the meetings, nor was any disagreement on boundaries mentioned in the May 1973 final report of the Committee, it being understood that the 1964 boundaries applied to whatever “administrative set-up for cooperative administration” might emerge.

⁴⁵ See Annex 136: D.S. Macdonald, Notes from a Meeting, *supra* note 41 at 3.

⁴⁶ See Part III. C.

⁴⁷ Annex 136: D.S. Macdonald, Notes from a Meeting, *supra* note 41 at 6.

i) Newfoundland's Failure To Protest The 1977 MOU Or The 1982 Canada-Nova Scotia Agreement

66. The boundaries established in the *1964 Agreement* were applied in the *1977 MOU* between the Maritime Provinces and Canada, and later, in the *1982 Canada-Nova Scotia Agreement* and implementing legislation.⁴⁸
67. Both of these agreements dealt with forms of offshore management, administration and revenue sharing that were not grounded in provincial ownership of the offshore. As pointed out in its Memorial, Newfoundland was not a party to these instruments, yet it does not deny that it was fully aware of both.⁴⁹
68. Despite being aware of the fact that both the *1977 MOU* and the *1982 Canada-Nova Scotia Agreement* – as well as the federal and provincial legislation implementing the latter – incorporated the *1964 Agreement* boundaries, Newfoundland never protested the boundary between it and Nova Scotia. Newfoundland's internal analysis of the *1982 Agreement* criticised various aspects of the deal, but as regards the existence and placement of the Nova Scotia-Newfoundland boundary, or its application to a régime of cooperative management and revenue sharing, it was silent.⁵⁰
69. Whatever Newfoundland claims to believe, **today**, about the line dividing its offshore area from that of Nova Scotia, it is clear that, **at the time**, it considered that line to exist, to be binding and to be applicable for the very type of administrative and revenue sharing purposes that are the basis of the present *Accords*.

⁴⁸ See Part III. C, above and Nova Scotia Memorial, Part II, paras. 73-75.

⁴⁹ Newfoundland Memorial, paras. 74, 92, 202.

⁵⁰ See Part III. C, above.

C. The Parties Intended To Divide The Entire Continental Shelf Accruing To Canada Under International Law

i) The Record Clearly Demonstrates That The 1964 Boundaries Extended to The Outer Limit Of The Continental Shelf

70. Newfoundland declares the following:⁵¹

... the focus of attention in 1964 and in subsequent years, so far as the delimitation issue was concerned, was not the outer area. The parties were concerned primarily with the Gulf of St. Lawrence, where the interests of all five provinces were at stake, and not with the outer continental shelf.

(footnote omitted)

71. Having stated its hypothesis, Newfoundland then sets about attempting to prove it. Its “proof”, however, is illusory. It suffices to refer, again, to certain key events documented in the historical record.

a) The Meeting Of September 23, 1964

72. Newfoundland refers to the record of the September 23, 1964 meeting of Maritime Provinces Attorneys-General as supposed evidence of “[t]he virtually exclusive preoccupation of the parties with the Gulf and adjacent waters.”⁵² The record itself, however, reveals no such “preoccupation”.

73. Newfoundland states that the record “refers to the delimitation of the Gulf of St. Lawrence, ‘including the Strait of Belle Isle and Cabot Strait.’ It makes no reference to the outer area”.⁵³ In fact, the document cited makes this claim only in passing - not, as represented by Newfoundland, in a description of the area covered by the delimitation,

⁵¹ Newfoundland Memorial, para. 210.

⁵² Newfoundland Memorial, para. 221.

⁵³ Newfoundland Memorial, para. 221 (footnote omitted). See Newfoundland Document #9. The same document is found in Annex 21.

but in reference to “a plan [that] was prepared by the Nova Scotia Department of Mines, setting forth graphically and by metes and bounds ...”.⁵⁴

74. Indeed, immediately preceding the words quoted by Newfoundland, one reads the following, which expresses the true intent of the Attorneys-General to delimit “the boundaries as between the ... Provinces” without any geographic limitation:⁵⁵
(Annex 21)

The meeting felt that it was desirable that the boundaries as between the several Atlantic Coast Provinces should be agreed upon by the Provincial authorities and the necessary steps should be taken to give effect to that agreement.

75. Subsequent events confirm that Newfoundland's theory is baseless. For example, in another document – the *Communiqué* issued at the conclusion of the Premiers’ June 17-18, 1972 meeting – that is cited by Newfoundland as proof that, as late as 1972, the Provinces had in mind only the delimitation of their boundaries “in the Gulf of St. Lawrence”,⁵⁶ one reads the following:⁵⁷ (Annex 54)

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.

76. The Provinces’ “preoccupation”, it seems, throughout the relevant period, was to agree as between themselves upon their boundaries “in the seabed off the Atlantic Coast and in the Gulf of St. Lawrence”. This is precisely what they did. The agreement reached on September 23, 1964 between the Maritime Attorneys-General was subsequently approved and agreed by the Premiers of the Atlantic Provinces on September 30, 1964, presented to

⁵⁴ Annex 21: “MEMORANDUM OF MEETING the 23rd September, 1964, at which were present Mr. H.W. Hickman, New Brunswick, Mr. Graham Rogers, Prince Edward Island, Messrs. I.G. MacLeod, M.C. Jones and John A.Y. MacDonald, Nova Scotia (hereinafter “MEMORANDUM OF MEETING the 23rd September, 1964”).

⁵⁵ Annex 21: “MEMORANDUM OF MEETING the 23rd September, 1964”. See also Newfoundland Document # 9 and Nova Scotia Memorial, Part II, para. 15.

⁵⁶ Newfoundland Memorial, para. 210, footnote 196, referring to Newfoundland Memorial, para. 57.

⁵⁷ 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) at 2. See also Newfoundland Document # 48 for a copy of the same document.

the Government of Canada on behalf of all five East Coast Provinces on October 14-15, 1964 and later reaffirmed and technically delineated by the Premiers in 1972.

b) The “Missing” Laurentian Channel And Sub-Basin

77. The Premier of Nova Scotia, claims Newfoundland, has himself “identified the Laurentian Sub-Basin as the area most critical to the present arbitration.”⁵⁸ Later on, Newfoundland itself purports to identify the outer segment as “the most important” element of the Newfoundland-Nova Scotia boundary.⁵⁹
78. While it is true that the Sub-basin is important, for many reasons, Newfoundland has concocted an extraordinary interpretation of the events of 1964.⁶⁰

The contemporary documentation is replete with references to the Gulf of St. Lawrence. It also mentions Cabot Strait, the Bay of Fundy, the Strait of Belle Isle, Chaleur Bay and Northumberland Strait. **Significantly, it contains not a single reference to the Laurentian Channel or the Laurentian Sub-Basin.**

(emphasis added)

79. “Significantly” is perhaps not the best word in the circumstances. Three points suffice to rebut the spurious claim that, because the Laurentian Channel and Laurentian Sub-basin were not mentioned, they were not within the scope of the 1964 delimitation of the Nova Scotia-Newfoundland boundary.

⁵⁸ Newfoundland Memorial, para. 210.

⁵⁹ Newfoundland Memorial, para. 223.

⁶⁰ Newfoundland Memorial, para. 211.

80. First, it would have been impossible for the “contemporary documentation” to refer to the Laurentian Sub-basin, because scientists had not, in 1964, discovered the structure.⁶¹ Second, all of the names (Cabot Strait, Bay of Fundy, etc.) mentioned in the passage from Newfoundland’s Memorial just quoted are familiar geographical names associated with well-known surface features and areas. The Laurentian Channel, on the other hand, is a seabed feature. The use of surface features and common place names in the historical documents, and the omission of terms more likely to be used by oceanographers, geologists or geomorphologists than by lawyers and politicians, is evidence of precisely ... nothing.
81. Third, while referring to parts of the historical record from 1964, Newfoundland chooses to ignore the references to certain submarine features that were part of common vocabulary at the time. These are “the Banks off Nova Scotia and Newfoundland”, which in certain areas extend up to 300 miles from shore.

c) The Joint Submission

82. Here, as elsewhere, the *Joint Submission* of October 14-15, 1964 is the key piece of evidence relied upon by Newfoundland; and its account of that document is woefully inaccurate.
83. Newfoundland observes that the 1961 *Notes Re: Boundaries* (presented to the Premiers on September 30, 1964, when they concluded the *1964 Agreement*, and then annexed to the *Joint Submission* two weeks later) uses the words “thence southeasterly to

⁶¹ Annex 141: To Nova Scotia’s knowledge (in particular, that of geologists in the Nova Scotia Petroleum Directorate), the earliest indication of the existence of the Laurentian Sub-basin in the scientific literature is found in a 1984 paper, published in 1986. M.T. Halbouty, ed., *Future Petroleum Provinces of the World* (Tulsa: American Association of Petroleum Geologists, 1986) at 181. By contrast, a 1975 paper describing the geology of the area, published by the Geological Survey of Canada, states that “... seismic data are lacking in the vicinity of the Laurentian Channel and St. Pierre Bank ... and it is possible that another Mesozoic Sub-Basin may occur in this area.” L.F. Jansa and J.A. Wade, “Geology of the Continental Margin off Nova Scotia and Newfoundland” in W.J.M. Van Der Linden and J.A. Wade, eds., *Offshore Geology of Eastern Canada*, vol. 2 – Regional Geology (Ottawa: Energy, Mines and Resources Canada, 1975) at 54, 55. Indeed, the maps presented with this paper demonstrate the lack of seismic research done in the area (“figure 3”) and disclose that the Laurentian Sub-basin was unknown at the time (“figure 4”) - in fact, the area is boundary by lines with question marks.

International waters”⁶² to describe the outer segment of the Nova Scotia-Newfoundland boundary. It also asserts that the phrase contains “two critical ambiguities” that render it meaningless and ineffective: the word “southeasterly” and the term “International waters”.⁶³

84. The meaning of “southeasterly” is discussed in the following section of this Counter-Memorial, dealing with the direction of the line. Here, the question of the extent, or the outer limit, of the agreed boundary is considered.

85. As regards the so-called “critical ambiguity” inherent in the phrase **international waters**, Newfoundland pleads the following:⁶⁴

As a matter of law, “international waters” are reached not at the outer limit of the continental shelf but at the outer limit of the territorial sea. The terms of the 1964 proposal itself show that the parties were well aware of this distinction and the legal meaning of “international waters”. One of the main points was a request that the Parliament of Canada should assert, as “inland waters or territorial waters”...

On its face, therefore, the Stanfield proposal called for a line extending not to the outer limit of the continental shelf but to the limit of the “territorial waters” claim in respect of the Gulf of St. Lawrence and Cabot Strait.

86. These sweeping assertions, when compared to the evidence, including the actual words used in the *Joint Submission*, prove to be groundless. The term “territorial waters” as used by the East Coast Premiers in the records evidencing the *1964 Agreement* did not mean “territorial sea” or any other international legal term-of-art; nor was “International waters” intended to refer specifically to waters beyond the territorial sea.⁶⁵

87. The *Joint Submission* itself discloses, in the paragraph immediately following that quoted by Newfoundland, that the Provinces understood “territorial waters” in a manner totally at odds with Newfoundland’s theory:⁶⁶ (**Annex 31**)

⁶² Newfoundland Memorial, para. 212.

⁶³ Newfoundland Memorial, para. 213.

⁶⁴ Newfoundland Memorial, paras. 213, 214.

⁶⁵ This issue is addressed in Nova Scotia’s Memorial, Part II, para. 30.

⁶⁶ **Annex 31:** *Joint Submission* at 19.

ANNEX

NOTES RE: BOUNDARIES OF MINERAL RIGHTS AS BETWEEN MARITIME PROVINCIAL BOUNDARIES

(...)

I - Boundary of Nova Scotia

(...)

(P.Q.) From the above point the boundary with Quebec runs northeasterly to the midpoint between the south-east corner of Amherst Island and White Capes; thence northeasterly to the midpoint between Cape St. Lawrence and East Point: (Magdalen Islands); thence northeasterly to the midpoint between St. Paul Island and East Point; thence northeasterly to the Newfoundland-Quebec boundary at the midpoint between Cape Anguille and East Point.

(Nfld.) From this mutual corner the boundary with Newfoundland runs southeasterly to the midpoint between St. Paul Island (Nova Scotia) and Cape Ray (Newfoundland); thence to a point midway between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland); thence southeasterly to International waters.

(...)

VI - Boundary of Newfoundland

Boundary
with
(P.Q.)

Starting at a point midway between Ile au Bois and Feralle Point on the southern extension of the north-south line on land between Quebec and Labrador, southwesterly to the midpoint between Port.-St.-Servan and Point Riche; thence south-westerly to the midpoint between Mecatina Island and Table Point; thence southwesterly to the midpoint between St. Mary Island and Cape St. Gregory; thence southwesterly to the midpoint between Heath Point and Cape St. George; thence southerly to the midpoint between East Point (Magdalen Islands) and Cape Anguille, which is the mutual corner of Quebec, Nfld. and N.S.

Boundary
with
(N.S.)

From the above common point, southeasterly to the midpoint between St. Paul Island and Cape Ray; thence southeasterly to the midpoint between Flint Island and Grand Bruit; thence S.E. to International waters.

(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" (14-15 October 1964) at 20, 21, 24 and 25)

[t]he Provinces are entitled to the ownership and control of submarine minerals underlying territorial waters, including, subject to International Law, areas in the Banks off Newfoundland and Nova Scotia...

(emphasis added)

88. The “Banks off Newfoundland and Nova Scotia” are, of course, far outside the “territorial sea” as understood in any juridical sense – especially as the term was understood in 1964, when Canada’s territorial sea extended only three miles from its baselines.⁶⁷ (Figure 26) Moreover, a glance at the map attached as Schedule B to the *Joint Submission* removes any doubt that the five East Coast provinces were not contemplating a boundary covering only a potential internal waters claim for the Gulf of St. Lawrence, or even extending to the limits of the territorial sea at the time. (Figure 4) Schedule B was not intended to depict with precision the outer segment of the agreed line.⁶⁸ On its face, however, the map demonstrates the Provinces’ clear intention that the line continue well beyond any conceivable inland waters or territorial sea limits. When considered alongside the words of the description that it accompanies, discussed above⁶⁹, this fact is even more readily apparent.
89. Finally, no matter what gloss Newfoundland attempts to put on the clear words of the *1964 Agreement*, it is undeniable that the most seaward “turning point” along the Nova Scotia-Newfoundland boundary (assigned number 2017 by the *JMRC* in 1969) is itself well outside the legal “territorial sea”, far beyond any internal waters or territorial sea claim made by Canada to this day.⁷⁰ (Figure 8) Clearly, the term “territorial waters” as employed by the Provinces in relation to the *1964 Agreement* means something quite different, something non-technical, less specific and more expansive than the meaning espoused by Newfoundland.

⁶⁷ Annex 142: *Territorial Sea and Fishing Zones Act*, S.C. 1964-65, c. 22, s. 3. Canada extended the limits of the territorial sea to 12 miles in 1970: Annex 143: *An Act to Amend the Territorial Sea and Fishing Zones Act*, R.S.C. 1970, 1st Supp., c. 45, s. 3.

⁶⁸ Nova Scotia Memorial, Part II, para. 28; Part IV, paras. 28, 29.

⁶⁹ See Part III. A, above.

⁷⁰ Annex 144: *Dispute Concerning Filleting within the Gulf of St. Lawrence by the French Trawlers Referred to in Article 4(b) of the Fisheries Agreement Between Canada and France of March 27, 1972*, Counter-Memorial Submitted by Canada, 22 April 1986 at 37-38.

90. In any event, it is important to recall the purpose for which the Provinces agreed their boundaries: to facilitate the establishment of an administrative regime for the exploration and development of the mineral resources of the seabed and subsoil of the offshore, that is, of the **continental shelf**. Neither fisheries nor any other matter related to the water column was at issue.⁷¹ In this context, it is even more clear that the term “International waters”, as the term is used in the documents evidencing both the conclusion and the application of the boundaries set out in the *1964 Agreement*, refers to the limit at which **Canada’s jurisdictional claim over the continental shelf** ends and so-called “International” waters begin.
91. Newfoundland makes no attempt to reconcile the map with the words of the *1964 Agreement*; it declares merely that the map “explains nothing”. On the contrary, it is the Newfoundland Memorial that fails altogether to explain the map.
92. The words used by the Provinces in 1964 to express their agreement on boundaries are clear. “Critical ambiguity” best describes the argument made by Newfoundland in this instance.

d) The True Scope Of The 1964 Agreement

93. The plain words of the documents evidencing the negotiation and conclusion of the *1964 Agreement*, as well as the context in which those events occurred, have been addressed in the Nova Scotia Memorial and in previous sections of this Counter-Memorial.⁷² They prove that the East Coast Provinces were well aware, based on legal advice received at the outset of their negotiations,⁷³ that Canada’s potential shelf claim extended at least 200 miles offshore. They also prove that the Premiers had in mind **the full shelf available to Canada at international law** when they explicitly referred to “the Banks off Nova

⁷¹ Nova Scotia Memorial, Part I, para. 5.

⁷² See, for example, Nova Scotia Memorial, Part II, paras. 1-37; Nova Scotia Counter-Memorial, Parts III. A and III. B.

⁷³ Nova Scotia Memorial, Part II, para. 9 and Annex 10: G.V. LaForest, “Report on The Rights of the Provinces Of Nova Scotia, New Brunswick and Prince Edward Island To the Ownership of Adjacent Submarine Resources” (16 September 1959).

Scotia and Newfoundland” in regard to both their agreement on boundaries *inter se* and their claim to jurisdiction vis-à-vis the federal government.⁷⁴

94. There is not the slightest evidence that, as Newfoundland contends, the Provinces were “preoccupied” only with the Gulf of St. Lawrence and immediately adjacent areas, or that they somehow neglected to deal with the outer segment of the Nova Scotia – Newfoundland line.

ii) **The Parties' Subsequent Conduct Puts The Matter Beyond Doubt**

95. If there were, in 1964, any conceivable doubt regarding this issue, it has long since been resolved by Newfoundland itself, and by the other parties to the *1964 Agreement*, by their subsequent conduct. The following paragraphs provide a brief review of that conduct, which is fully described in Nova Scotia’s Memorial.⁷⁵

a) Newfoundland Issued Permits In The Outer Area Along the Boundary

96. In 1965, Newfoundland was issuing exploration permits on the outer continental shelf, up to 300 miles from shore, far outside the Gulf of St. Lawrence and Cabot Strait. Approximately 30 million acres of permits were issued. Newfoundland's permits respected the agreed boundary as established in the *1964 Agreement*.⁷⁶

b) Nova Scotia Issued Permits In The Outer Area Along The Boundary

97. Nova Scotia also issued permits along the 1964 boundary, to the outer limits of continental shelf jurisdiction.⁷⁷ **Figure 27** is a compilation of the Nova Scotia and Newfoundland permit maps that appeared in the Nova Scotia Memorial as **Figures 17, 18 and 21**.

⁷⁴ **Annex 31: Joint Submission** at 19.

⁷⁵ Nova Scotia Memorial, Part II, paras. 88-96; Part IV, paras. 35-42; Appendix A: **Figures 16, 17, 18, 19, 21**.

⁷⁶ Nova Scotia Memorial, Part II, paras. 90-94; Part IV, paras. 37-42; Appendix A, paras. 12-36; **Figures 18, 21**.

⁷⁷ Nova Scotia Memorial, Part II, paras. 88-89; Part IV, paras. 36-42; Appendix A, paras. 6-11; **Figures 16, 17**.

c) The Work Of The JMRC Technical Committee

98. Newfoundland makes much of fact that the JMRC's *Technical Committee*, when plotting the geographic coordinates of the previously-agreed turning points in 1968/69, stopped at point 2017 in the Laurentian Channel. Claims Newfoundland:⁷⁸

[T]he Turning Points did not relate to a line through the Laurentian Channel and the outer continental shelf. What the map shows is a line that stops abruptly at Turning Point 2017, not far from the entrance to Cabot Strait.

99. One searches in vain, however, for an explanation in Newfoundland's Memorial of why this was so, though the explanation is simple: as described clearly by Nova Scotia in its Memorial, the *Technical Committee's* mandate was limited strictly to "precisely locat[ing]" – that is, to verifying and defining the latitude and longitude coordinates of – the turning points agreed by the five East Coast Premiers in 1964.⁷⁹ The *Technical Committee* was **not** asked to discuss and it **did not** discuss "the merits" of the boundaries; it "precisely located those midpoints described" in the *1964 Agreement*.⁸⁰

100. The *Technical Committee* carried out its mandate. Point 2017 was, in fact, the last of the "midpoints" (turning points). Seaward of point 2017 there is no other "midpoint" to be defined – the boundary runs southeast in a straight line. The *Technical Committee* was asked to locate the "midpoints" of the boundaries; it was not asked to locate, and it did not locate, the "endpoint" of the line.

d) The Premiers Confirmed The Area Delineated In June, 1972

101. Newfoundland builds on its erroneous account of the *Technical Committee's* work by asserting that, when the East Coast Premiers confirmed the delineation and description recommended by the JMRC in June 1972, they merely confirmed the map and turning

⁷⁸ Newfoundland Memorial, para. 219.

⁷⁹ Nova Scotia Memorial, Part II, para. 42 and 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".

⁸⁰ *Ibid.* (emphasis added).

points prepared by the *JMRC* – that is, with no reference to anything that had gone on before.⁸¹ This assertion is sustained only by misstating the Premiers' *Communiqué* and by ignoring other relevant facts.

102. Newfoundland's interpretation of the *Communiqué* issued at the end of the June 17-18, 1972 Conference is as follows:⁸²

The communiqué issued at the same time [June 18, 1972] described a provincial consensus on delineation and description of the offshore boundaries between the five provinces **in the Gulf of St. Lawrence.**

(emphasis added)

103. As indicated above, however, this interpretation contradicts the plain words of the text itself – and of evidence cited elsewhere in Newfoundland's Memorial:⁸³ (**Annex 54**)

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.**

(emphasis added)

104. The statement could not be more clear. The agreed boundaries, in accordance with which the Provinces asserted ownership, lay along the seabed both off the Atlantic coast and in the Gulf.

105. In addition, the East Coast Premiers had before them, at least as of August 1972, and the Premier of Newfoundland even earlier, a map entitled "Canada East Coast Offshore," which covered the entire outer area, to what was believed to be the base of the continental scope.⁸⁴ (**Figure 9**)

⁸¹ Newfoundland Memorial, para. 220.

⁸² Newfoundland Memorial, para. 57.

⁸³ Newfoundland Memorial, para. 57 citing Document # 48. Nova Scotia also provided a copy of this document at **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 Nova Scotia Memorial, Part II, para. 50.

106. No protest or objection to this depiction or to the use of the map was raised by the Newfoundland Premier.

e) The "Geographical Area Involved" Was Reiterated In August 1972

107. Had Newfoundland, in 1972, harboured the peculiar belief that the Provinces intended only to delimit their boundaries in the Gulf of St. Lawrence, it would surely have protested as forcefully then as it does today. Instead, it appears from the record that, at the August 14, 1972 meeting of the Continuing Committee of Officials, the following was agreed by all of the Provinces concerned:⁸⁵ (Annex 145)

To clarify the geographical area involved, the members agreed that they were concerned about the off-shore area claimed by Canada in international law, an area which included portions of the continental shelf.

(emphasis added)

108. Newfoundland fails to refer to this meeting, and offers no explanation for the agreement clearly stating "the geographical area involved".

f) Newfoundland Asked "Where" Not "Whether" The Line Was Drawn

109. The October 6, 1972 letter from Mr. Doody of Newfoundland to Mr. Kirby of Nova Scotia, referred to in Newfoundland's Memorial,⁸⁶ was clearly written in the belief that the outer area had already been delimited. The letter itself states that it is in reference to "the **precise determination** of the interprovincial boundary", and then offers the assurance that "Newfoundland is not questioning the general principles which form **the basis of the present demarcation.**"⁸⁷

⁸⁵ Annex 145: "DRAFT MINUTES, Continuing Committee on Offshore Minerals, August 14, 1972" at 6.
⁸⁶ Newfoundland Memorial, para. 62.
⁸⁷ Newfoundland Document # 57 at 1 (emphasis added).

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)

110. The letter also refers to: “a more accurate reflection of the general principles of division to which we have agreed”; “the present version of the boundary”; “the regional agreement”; and “a more accurate version of the boundary”.⁸⁸
111. The Doody letter enclosed as well a map (reproduced on the page opposite for ease of reference) clearly showing a line running down the Laurentian Channel and out into the open ocean. The accuracy of the map is not in issue – the Doody letter states that the map “is meant for explanatory purposes only and is itself inaccurate because of the limitations of the maps used in its preparation.”⁸⁹ The point is that it undermines totally the claim made by Newfoundland, today, that the outer segment of the boundary was not considered and agreed by the Provinces.⁹⁰

g) Newfoundland’s 1973 Proposal Itself Covered The Shelf

112. The September 1973 proposal made by Newfoundland to the federal government explicitly claimed all areas of the shelf “to which Canada as a sovereign state may claim exclusive rights.”⁹¹
113. If, as claimed by Newfoundland, in 1972 the parties were still concerned only with the inner area of their boundary,⁹² then the 1973 proposal by Newfoundland represents a fantastic, not to say remarkably quick, about-face.

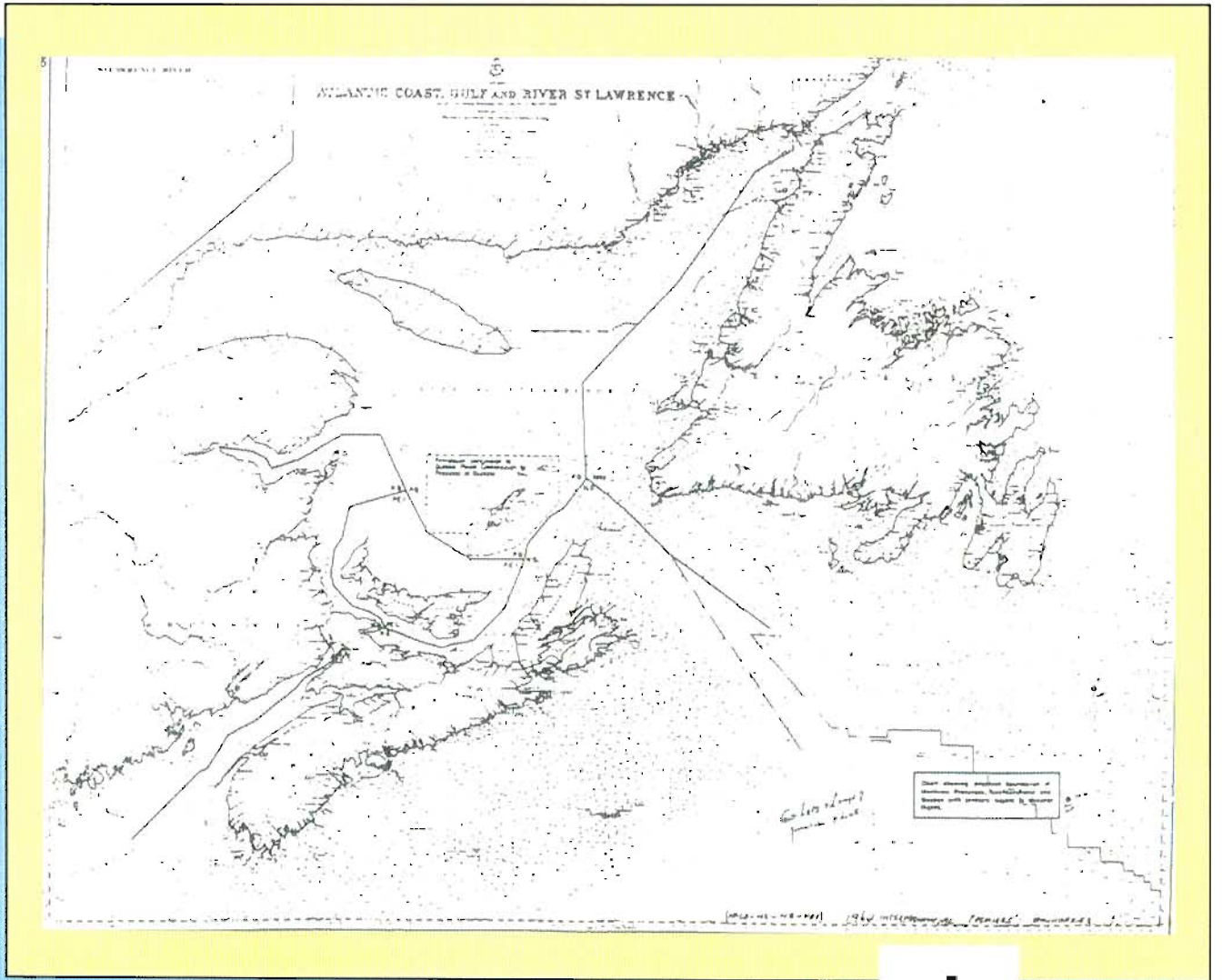
⁸⁸ Newfoundland Document # 57 at 1-2. (Although Nova Scotia was aware of the existence of this letter prior to filing its Memorial, it had not seen a copy of the letter until it received the documents submitted with the Newfoundland Memorial.)

⁸⁹ Newfoundland Document # 57 at 1.

⁹⁰ It is also of interest that the map in question – which appears to be the same map that was attached to the 1961 *Notes Re: Boundaries*, that was agreed by the Premiers on September 30, 1964 and that was annexed to the *Joint Submission* of October 14-15, 1964 (see Nova Scotia Memorial, Part II, para. 28, Figure 4 and Annex 32) – bears the caption: “(NFLD-NS-NB-PEI) 1964 INTERPROVINCIAL PREMIERS’ BOUNDARIES”. See attachment to Newfoundland Document # 57.

⁹¹ 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.

⁹² Newfoundland Memorial, para. 222.



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

(Newfoundland Document #57)

h) Newfoundland Never Protested The 1977 MOU Or The 1982 Canada-Nova Scotia Agreement

114. The application of the *1964 Agreement* boundaries “to the continental margin, or to the limits of Canada’s jurisdiction”⁹³ in the *1977 MOU* provoked no protest from Newfoundland.
115. Similarly, Newfoundland failed to object to the use of the *1964 Agreement* boundaries running to “the continental margin” in the *1982 Canada-Nova Scotia Agreement* and its 1984 implementing legislation.⁹⁴
116. Newfoundland does refer, in its Memorial, to one document – entitled “Possible Questions and Suggested Answers Concerning the Memorandum of Understanding to be Signed on February 1, 1977”⁹⁵ – in order to explain (away) the words “Interprovincial Lines of Demarcation agreed upon in 1964 by Nova Scotia, New Brunswick and Prince Edward Island” as used in the *1977 MOU*.⁹⁶
117. The document in question was, in Newfoundland’s submission, “prepared for Ministers by federal officials”⁹⁷, evidently for briefing purposes surrounding the signing of the *1977 MOU*.⁹⁸

⁹³ **Annex 67:** “*Federal - Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces*” (1 February 1977) (hereinafter “*1977 MOU*”) at Article 2.

⁹⁴ **Annex 68:** “*Canada - Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing*” (2 March 1982) at Schedule I, p. 32 and **Annex 70:** “*Canada - Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29 at Schedule I, p. 932.

⁹⁵ Newfoundland Memorial, para. 75; Newfoundland Document # 73.

⁹⁶ **Annex 67:** *1977 MOU* at Article 2.

⁹⁷ Newfoundland Memorial, para. 75.

⁹⁸ Newfoundland Memorial, paras. 75, 222.

118. It is impossible to determine whether the text was approved by the “Ministers” or ever used by them – that is, it is impossible to determine, from the document alone, whether it actually reflects the views of the Government of Canada.⁹⁹
119. In any event, and notwithstanding the limited value of material of such indeterminate nature, the words of the document bear closer scrutiny. In fact, the document in question seems to contradict the terms of the agreement – the 1997 MOU that it purports to explain.
120. Article 2 of the 1977 MOU states: (Annex 67)

THE AREA

2. The Area to be covered by the Agreement will be the seabed and subsoil seaward from the ordinary low water mark on the coasts of Nova Scotia, New Brunswick, and Prince Edward Island to the continental margin, or to the limits of Canada’s jurisdiction to explore and exploit the seabed and subsoil off Canada’s coast, whichever may be farther, and where applicable, to the Interprovincial Lines of Demarcation agreed upon in 1964 by Nova Scotia, New Brunswick and Prince Edward Island.
121. On its face, the 1977 MOU applied to the entire offshore areas of the Provinces concerned. More particularly, each Province’s area is defined as follows:

... **from** the ordinary low water mark ... **to** the continental margin, **or to** the limits of Canada’s jurisdiction to explore and exploit the seabed and subsoil off Canada’s coast whichever may be farther, **and where applicable, to** the Interprovincial Lines of Demarcation agreed upon in 1964 ...

(emphasis added)

⁹⁹ Absent proof to the contrary, Nova Scotia submits that the document reflects nothing more than the views of its apparent author, a mid-level functionary, and that this should be taken into account in assessing its weight as evidence in this arbitration. The point is not that a document prepared by officials is immaterial to the arbitration; it may or may not be, depending on its content. The issue is that, in the present proceedings, in which all evidence is documentary, the weight of each piece of evidence can be assessed only by reference to the document in question itself. It is thus of paramount importance that characterisations of the evidence be as accurate as possible.

122. The inner limit of the area is each Province's "low water mark". The outer limit is either "the continental margin" or "the limits of Canada's jurisdiction ..." or, "where applicable ... the Interprovincial Lines of Demarcation."
123. The "Interprovincial Lines of Demarcation" are regarded as defining, where applicable, **the outer limit of the offshore** area covered by an agreement between Canada, New Brunswick, Prince Edward Island and Nova Scotia. That includes, of course, in the case of Nova Scotia, the area extending from its shores to the continental margin (or the limit of Canada's shelf jurisdiction). It also includes, where applicable, the area between its shores and (generally toward the North and West) the boundary line with Québec and (approximately toward the East and Southeast) the agreed boundary dividing its offshore area from that of Newfoundland. (Figure 5)
124. As between the actual text of the *1977 MOU* and the text of a certain official's briefing material, there can be no question as to which reflects most accurately the intentions of the parties. The *MOU* trumps.
125. What the "Possible Questions" document does reveal unequivocally, however – and in this respect it is obviously reliable – is that "federal officials" regarded the Provinces' offshore boundaries as having been agreed, and as having been agreed as a matter distinct from their jurisdictional claim presented to the Federal-Provincial Conference of October 1964.
126. The passage from the paper quoted by Newfoundland states clearly, at the outset, that the boundaries incorporated into the *1977 MOU* "are the lines agreed upon by the four Atlantic Provinces and Quebec which were presented ..." ¹⁰⁰ These are, of course, the boundaries established in the *1964 Agreement*, on September 30, 1964, acceded to by Québec and then incorporated into the *Joint Submission* of October 14-15, 1964. The same boundaries, deriving from the same Agreement, that Newfoundland claims were dead in the water long before 1977.

¹⁰⁰ Newfoundland Memorial, para. 75.

i) Newfoundland Failed to Protest The *Canada-Nova Scotia Accord*

127. In the same vein, Newfoundland lodged no protest and raised no challenge to the application of the *1964 Agreement* boundaries to the “continental margin”¹⁰¹ in the *1986 Canada-Nova Scotia Accord* or to “the outer edge of the continental margin”, in the 1988 implementing legislation.¹⁰²
128. Again, whatever Newfoundland claims, **today**, it is clear that, **at the time**, it considered its agreed boundary with Nova Scotia to divide the entire continental shelf.

D. The Outer Segment Is Delimited By The 135° Azimuth Line

i) **The Historical Documents Speak For Themselves**

129. As discussed above, Newfoundland claims to have identified “two critical ambiguities” in the words “thence southeasterly to International waters”, which, it would have the Tribunal believe, renders the *1964 Agreement* inoperable.¹⁰³ The first of its arguments, which concerns the seaward extent of the agreed boundaries (“International waters”), has been refuted in the preceding section. The second concerns the direction of the line (“southeasterly”); this claim is addressed below.
130. The conclusion to which Newfoundland attempts to direct the Tribunal – that the course of the outer segment of the agreed boundary was never determined – is the product of a factually incorrect account of the origin of the 135° line coupled with a more general failure to interpret the parties’ *1964 Agreement* in good faith.

¹⁰¹ **Annex 2 : *Canada - Nova Scotia Offshore Petroleum Resources Accord***, Article 43, which refers to the *1982 Canada - Nova Scotia Agreement*.

¹⁰² **Annex 2: *Canada - Nova Scotia Offshore Petroleum Resources Accord Implementation Act*** at Schedule I, p. 770.

¹⁰³ Newfoundland Memorial, para. 213.

a) Newfoundland's Account Of The Origin Of The Line Is Wrong

131. Newfoundland declares that the 135° azimuth line was an “innovation” resulting from “an arbitrary decision by the Surveyor General of Canada, V.W. Blackie,” in 1983.¹⁰⁴ This statement is grounded on the following “description” of Mr. Blackie’s work:¹⁰⁵

Prior to the enactment of legislation implementing the [1982] *Nova Scotia Agreement*, G. Booth of Canada Oil and Gas Lands Administration ... asked W.V. Blackie, Surveyor General and Director of the Legal Surveys Division, Department of Energy Mines and Resources, to **plot interprovincial boundary lines (and calculate grid areas) based on the description in the Stanfield submission.**

(emphasis added)

132. These statements constitute revisionist history at its best – or worst. The loose language employed by Newfoundland suggests that Mr. Blackie was determining interprovincial boundaries on the basis of original calculations. The documents themselves reveal that nothing could be further from the truth.

133. It must be recalled, first, that Mr. Blackie’s use of the 135° azimuth line was most definitely not an “innovation” – the line had been depicted a decade earlier, on the 1972 “Canada East Coast Offshore” map shown to the Premiers, as discussed above.¹⁰⁶

134. Second, in his November 24, 1983 letter, Mr. Blackie speaks **only** of “calculat[ing] the areas of certain grids areas” on the basis of the description of the interprovincial boundaries in the 1964 *Joint Submission*.¹⁰⁷

¹⁰⁴ Newfoundland Memorial, para. 217.

¹⁰⁵ Newfoundland Memorial, para. 93 (footnote omitted).

¹⁰⁶ See Nova Scotia Memorial, Part II, para. 50 and **Figure 9**.

¹⁰⁷ Newfoundland Document # 97. It should also be noted that, in the execution of his mandate, Blackie was at a serious technical disadvantage. As mentioned in his 1983 letter, Blackie relied on the **metes and bounds** description contained in the *Joint Submission*, without having the benefit of the technical precision of the 1972 *JMRC* coordinates. Why Blackie did not use the 1972 coordinates is not clear. In any event, he seems not to have been referred to the *JMRC*’s work by G. Booth, from whom he received his instructions, and his letters do not mention the 1972 coordinates. (See also Newfoundland Document # 98.) This of course explains the imprecision – for example, regarding “deflection points” – noted by Blackie (and emphasised by Newfoundland); the very imprecision that was resolved by the Premiers’ 1972 agreement on the technical delineation and description of the boundaries.

135. Similarly, contrary to Newfoundland's allegation that "[i]n April 1984, Blackie responded to a second request ... to calculate the line between Newfoundland and Labrador and Nova Scotia,"¹⁰⁸ his April 16, 1984 letter to G. Booth clearly discloses that his task was merely to "plot" (that is, "to mark or note ... on a map or chart; ... to locate and mark ... by means of coordinates"¹⁰⁹) the existing boundary, from a description supplied to him by Booth.¹¹⁰
136. Finally, contrary to Newfoundland's suggestion, the boundary coordinates contained in the 1984 legislation implementing the 1982 *Canada-Nova Scotia Agreement* are **not** those employed by Blackie in his grid calculation exercise, but the *JMRC* coordinates approved by the five East Coast Provinces in 1972.¹¹¹
137. In sum, Mr. Blackie played no role whatsoever in determining the Nova Scotia-Newfoundland boundary. What his work demonstrates, however, is that Canada's senior surveyor independently concluded that the metes and bounds description of the boundaries established in the *1964 Agreement*, no matter its lack of technical precision, described the outer segment of the Nova Scotia-Newfoundland boundary to be a line running to the outer limits of Canadian jurisdiction along an azimuth of 135°.

b) Newfoundland Misinterprets The 1964 Agreement

138. Having dispensed with Newfoundland's creative, but totally erroneous, theory as to the origin of the 135° azimuth line, we are left with its interpretation of the *1964 Agreement*, the main propositions of which are set out in paragraphs 212-218 of the Newfoundland Memorial. Those propositions are as follows:

- 1) the outer segment of the boundary is the most important;

¹⁰⁸ Newfoundland Memorial, para. 94.

¹⁰⁹ Annex 19: *Websters' Third New International Dictionary*, 1986 at 1742, s.v. "plot."

¹¹⁰ That Blackie did, in fact, "mark or note [the line] on a map or chart" is confirmed by the references in his letter to his having "shown" – which must mean on a map – certain features of the agreed boundary. Newfoundland Document # 98.

¹¹¹ Nova Scotia Memorial, Part II, para. 77.

As requested by you, we have **calculated the areas of certain grid** areas situated in the offshore between the provinces of Nova Scotia, Newfoundland and Québec.

Separate areas were calculated as being within the various provinces based **on the description of these boundaries in:**

**Submission
On Submarine Mineral Rights
by the
Province of Nova Scotia
Province of New Brunswick
Province of Prince Edward Island
to
The Federal/Provincial Conference
October, 1964**

(our emphasis)

(Newfoundland Document # 97: Letter from W.V. Blackie, Surveyor General and Director, Legal Surveys Division to G. Booth, Canada Oil and Gas Land Administration (24 November 1983) with enclosures, at 1)

Dear Sir:

RE: **Request for plotting of Interprovincial Offshore Boundary Lines**

We have plotted the offshore boundaries from the description you supplied. However, we found the description in many places vague and have shown in red on a copy the changes that should improve it.

We have **shown** part of the outer edge of the continental margin in broken lines and marked it "approximate positions" as the true position cannot be determined by us.

The single maritime boundary between Canada and the United States is not shown. This boundary is at the moment in dispute in the International Court in the Hague.

(our emphasis)

(Newfoundland Document # 98: Letter from W.V. Blackie, Surveyor General and Director, Legal Surveys Division to G. Booth, Canada Oil and Gas Land Administration (16 April 1984) with enclosures, at 1)

- 2) there is ambiguity resulting from the term “southeasterly”, which Newfoundland states cannot be equated to “due southeast”;
 - 3) the accompanying map is inaccurate because it shows a change in direction, and because it does not reflect the 135° azimuth;
 - 4) the result is that the most important part of the line was not defined;
 - 5) therefore, there was no agreement.
139. The words “thence southeasterly to International waters” are indeed used in the section of the *Notes Re: Boundaries* (agreed by the Premiers on September 30, 1964 and presented to the Federal-Provincial Conference on October 14-15, 1964) entitled “Boundary of Nova Scotia ... [with] (Nfld.)” Newfoundland makes much of this fact, relying on it to claim:¹¹²
- [T]he exact course of the delimitation was left undefined. The omission is critical ... precision on this point would have been an essential prerequisite ... [t]he expression ‘southeasterly’ connotes a general direction, not an exact course ... the expression is not synonymous with ‘due southeast’ ...
140. Even more definitively, Newfoundland states that, while coordinates were assigned to the Nova Scotia-Newfoundland boundary up to turning point 2017, “in the outer area – where the 1964 proposal was most lacking in specifics – the work was never even begun.”¹¹³
141. Yet Newfoundland neglects to mention that, in the section of the *Joint Submission* entitled “**Boundary of Newfoundland ... with (N.S.)**”, the identical segment of the boundary is described as “**thence S.E. to International waters.**”¹¹⁴ On its face, then, the

¹¹² Newfoundland Memorial, para. 216.

¹¹³ Newfoundland Memorial, para. 218.

¹¹⁴ Annex 31: *Joint Submission* at 24-25 (emphasis added). See also Newfoundland Document # 15.

ANNEX

NOTES RE: BOUNDARIES OF MINERAL RIGHTS AS BETWEEN MARITIME PROVINCIAL
BOUNDARIES

(...)

I - Boundary of Nova Scotia

(...)

(P.Q.) From the above point the boundary with Quebec runs northeasterly to the midpoint between the south-east corner of Amherst Island and White Capes; thence northeasterly to the midpoint between Cape St. Lawrence and East Point: (Magdalen Islands); thence northeasterly to the midpoint between St. Paul Island and East Point; thence northeasterly to the Newfoundland-Quebec boundary at the midpoint between Cape Anguille and East Point.

(Nfld.) From this mutual corner the boundary with Newfoundland runs southeasterly to the midpoint between St. Paul Island (Nova Scotia) and Cape Ray (Newfoundland); thence to a point midway between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland); thence southeasterly to International waters.

(...)

VI - Boundary of Newfoundland

Boundary
with
(P.Q.)

Starting at a point midway between Ile au Bois and Feralle Point on the southern extension of the north-south line on land between Quebec and Labrador, southwesterly to the midpoint between Port.-St.-Servan and Point Riche; thence south-westerly to the midpoint between Mecatina Island and Table Point; thence southwesterly to the midpoint between St. Mary Island and Cape St. Gregory; thence southwesterly to the midpoint between Heath Point and Cape St. George; thence southerly to the midpoint between East Point (Magdalen Islands) and Cape Anguille, which is the mutual corner of Quebec, Nfld. and N.S.

Boundary
with
(N.S.)

From the above common point, southeasterly to the midpoint between St. Paul Island and Cape Ray; thence southeasterly to the midpoint between Flint Island and Grand Bruit; thence S.E. to International waters.

(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" (14-15 October 1964) at 20, 21, 24 and 25)

- term “southeasterly” as used in the *Joint Submission* is in fact synonymous with “due southeast” or, even more precisely, “S.E.”¹¹⁵
142. Second, Newfoundland states that the map annexed to the *1964 Agreement* and the *Joint Submission* shows a change of angle (direction) that is not “reflected in the 1964 description or in the later work of the JMRC...”.¹¹⁶ The change in direction to which Newfoundland refers occurs approximately at point 2017 – the final turning point – from which it runs toward the continental margin.
143. As regards the description of the boundaries in the *1964 Agreement*, Newfoundland is just plain wrong. According to the 1964 description, the line **does** change angle at the last turning point (identified as 2017 by the *JMRC*). The azimuth of the line between the last two turning points (2016 and 2017) is slightly more southerly than 135°, whereas seaward of the last turning point the line is an azimuth of precisely 135°. If properly plotted by a draughtsman, therefore, the change of angle would in fact appear as a deflection to the East from the last turning point.¹¹⁷
144. Nova Scotia has never claimed that the map accompanying the *1964 Agreement* is precise – indeed, if Nova Scotia believed otherwise it could have pushed the outer segment of its boundary farther to the East, toward Newfoundland, as depicted on the map (Newfoundland claims that the map depicts the line as an azimuth of 125° rather than

¹¹⁵ In Nova Scotia’s submission, the direction of the outer segment of the line was accurately defined by the parties in 1964. Resort to a dictionary is useful in addressing claims regarding the supposed usage and connotation of certain words. The word “*southeasterly*” does *not*, in fact, refer to a “general direction”. On the contrary, it means specifically “from the southeast”; “toward the southeast”; “in the direction of southeast”, etc. (This is confirmed, *inter alia*, by the French version of Schedule I to the 1988 *Canada-Nova Scotia Accord Act*, which translates “southeasterly” as “vers le sud-est”.) It is used both as an adjective (to modify a noun – such as *direction* or *line* – so as to denote a particular quality, for example: “a southeasterly direction”) and as an adverb (to modify a verb, an adjective or another adverb – such as *running* or *drawn* – for example: “a line running southeasterly”). The word “*southeast*”, which is used as a noun, adjective or adverb, can refer to “the general direction between south and east”, but more commonly means “the point of the compass midway between the cardinal points south and east”; “the point directly opposite to northwest”; “abbreviation: S.E.”; “the direction lying midway between south and east”, etc. Annex 19: *Websters Third New International Dictionary*, 1986 at 2178, s.v. “southeast” and “southeasterly”; Annex 134: *The Compact Edition of the Oxford English Dictionary*, 1971, s.v. “southeast” and “southeasterly”.

¹¹⁶ Newfoundland Memorial, para. 215.

¹¹⁷ Nova Scotia Memorial, Appendix A, para. 33.

135°¹¹⁸). The map was merely representational of the metes and bounds description, and it clearly represents an outer line with a slight turn in the area of point 2017, consistent with the Agreement.

145. Briefly, with respect to the *JMRC* (in whose work, says Newfoundland, the outer segment of the boundary is not reflected), as explained both in the Nova Scotia Memorial and this Counter-Memorial,¹¹⁹ the mandate of the *Technical Committee* of the *JMRC* was to calculate and plot the coordinates of the agreed **turning points**. Nothing more. The *Technical Committee* was not asked to consider the seaward extension of the agreed boundary **beyond** the last turning point, and it quite properly did not do so.

c) Newfoundland Makes No Effort To Interpret The Facts In Good Faith

146. Agreements must be interpreted in good faith, in the light of their object and purpose; a good faith assessment of the parties' subsequent conduct constitutes an important element of the exercise. Newfoundland fails on all counts.
147. What Newfoundland is quick to call "arbitrary" or "inexplicable", is in fact incomprehensible only to those whose eyes are too narrowly trained on the wrong causes.
148. The circumstances surrounding the negotiation and conclusion of the *1964 Agreement* demonstrate that the object and purpose of the Agreement was to settle the matter of the Provinces' offshore boundaries, extending to the outer limit of the continental shelf subject to Canadian jurisdiction.
149. Confronted with what it considers ambiguous language, however, resulting from minor differences in the description of the angle of the outer segment of the boundary, and a map that represents the line less precisely than it might (or might not) wish, Newfoundland's approach is to ignore the object and purpose of the Agreement, and to make no good faith effort to give **any** effect to the words of the documents evidencing that Agreement.

¹¹⁸ Newfoundland Memorial, para. 36.

¹¹⁹ Nova Scotia Memorial, Part II, paras. 40, 43. See also Part III. C, above.

150. A good faith interpretation requires a reasonable effort to determine what was meant by the terms in question.¹²⁰ Newfoundland's approach, by contract, has the effect of denying that the parties meant anything by the inclusion of the language regarding the seaward extension of the Nova Scotia-Newfoundland boundary. As such, it is at odds, *inter alia* with the international legal rule of interpretation known as the principle of effectiveness. The principle is illustrated in the *Cayuga Indians Claims* case where the Claims Commission was asked to find that a provision "was not intended to have any definite application."¹²¹ The Commission declined to so find, stating:¹²²

We cannot agree to such interpretation. Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it meaning rather than as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do ...

(emphasis added)

151. Newfoundland asks this Tribunal to hold that the provisions in the documents evidencing the *1964 Agreement* setting out the outer segment of the Nova Scotia – Newfoundland boundary have no meaning. As with the Claims Commission in the *Cayuga Indians* case, this the Tribunal cannot do.¹²³

¹²⁰ Nova Scotia Memorial, Part III, paras. 12, 13.

¹²¹ Annex 86: cited in Lord McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961) at 384.

¹²² Annex 86: *Ibid.* at 385.

¹²³ Annex 146: The principle of effectiveness has also been relied upon by the Appellate Body of the World Trade Organization in several recent cases. See, for example, *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/9, 29 April 1996 at 23: "One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that the interpretation must give meaning and effect to all the terms of a treaty." See also Annex 147: *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996 at 12: "A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness..." The International Court of Justice considers that the principle of effectiveness "has an important role in the law of treaties." See Annex 148: *Fisheries Jurisdiction Case (Spain v. Canada) (Jurisdiction)* 4 December 1998, General List, No. 96 at para. 52.

ii) **The Parties' Conduct Related To The 135° Azimuth Line Is Indisputable**

152. The subsequent conduct of the parties also demonstrates the proper interpretation of the *1964 Agreement*.¹²⁴ **Figure 28** is a compilation of **Figures 15, 17, 18, 19** and **21** of the Nova Scotia Memorial.

153. The conduct of the parties with respect to the application of the 135° azimuth line is described in detail in the Nova Scotia Memorial.¹²⁵ The following instances of such conduct are particularly relevant, and bear reiteration.

a) Newfoundland Issued Permits Along The 135° Boundary

154. Newfoundland utilized the 135° boundary line in practice, for the purposes of permit issuance along the outer segment of the boundary in the period 1965-1971. In particular, permits were issued to Mobil in 1967 and Katy Industries in 1971 along the 135° azimuth line in the outer segment.¹²⁶ (**Figure 27**)

155. The importance of this conduct in relation to Newfoundland's argument cannot be emphasised too strongly. Newfoundland's position is categorical: work regarding the outer segment of the line was "never begun"; the line simply never existed.¹²⁷

156. How, then, are we to explain Newfoundland's conduct? What phenomenal coincidence led Newfoundland to locate the western limit of the Mobil permit along a line that it now claims never existed? Newfoundland's version of events is impossible on the facts.

b) Nova Scotia Issued Permits Along The 135° Boundary

157. Nova Scotia's conduct in this regard is clearly illustrated on **Figure 27**.

158. This open and consistent application of the agreed line was never challenged by Newfoundland.

¹²⁴ Nova Scotia Memorial, Part III, paras. 14-18.

¹²⁵ Nova Scotia Memorial, Part IV, paras. 35-51; **Figures 15, 17, 18, 19** and **21**.

¹²⁶ Nova Scotia Memorial, Part II, para. 92, Appendix A, paras. 21-35; **Figure 18**.

¹²⁷ Newfoundland Memorial, paras. 218, 223.

c) The East Coast Offshore Map Presented To The Premiers In 1972 Applied the 135° Azimuth Line

159. If, as Newfoundland now claims, the outer segment of the boundary had not even been addressed by the parties in 1964 and 1972, the reaction — more accurately, the lack of any reaction — by Premier Moores to the “Canada East Coast Offshore” map, which was presented to the Premiers in 1972,¹²⁸ would be inexplicable. This map (shown with the *1964 Agreement* boundaries overlaid in red, in **Figure 22**), clearly applied the 135° azimuth line as the boundary between Nova Scotia and Newfoundland, out to what was believed to be the base of the continental slope. The map was also the source of the area calculations before the Premiers at their meeting of August 2, 1972.¹²⁹
160. Despite the visual impact of this map, and its obvious use of the 135° azimuth line to the outer limits, the records disclose no protest or even inquiry from Premier Moores as to the presence of this line. His silence on the issue clearly shows that the depiction of an outer line, in this location, was no surprise at all.

d) The 1982 Canada-Nova Scotia Agreement

161. The Nova Scotia Memorial has shown that the *1982 Canada - Nova Scotia Agreement* and its implementing legislation applied the 135° azimuth line to the outer limits of Canadian continental shelf jurisdiction, as understood at the time,¹³⁰ consistent with the *1964 Agreement* and the practice of the parties in the intervening years. Newfoundland’s explanation of this is two-fold: first, Newfoundland did not explicitly consent to this line; and second, the map accompanying the *1982 Agreement* is imprecise.
162. On the first point, Newfoundland asserts that “[n]either Canada nor Nova Scotia sought the concurrence of Newfoundland and Labrador to the line set out in the *Nova Scotia Agreement* and in the implementing legislation.”¹³¹ In fact, the concurrence of

¹²⁸ Nova Scotia Memorial, Part II, para. 50 and **Figure 9**.

¹²⁹ *Ibid.*

¹³⁰ Nova Scotia Memorial, Part II, paras. 75-77.

¹³¹ Newfoundland Memorial, para. 96.

Newfoundland had been obtained in 1964, and confirmed in 1972 and 1973 (in the presence of the federal government).

163. More fundamental, however, is the fact the Newfoundland **never objected** to the line, as it surely would have done if the line incorporated a long segment previously unknown to it.
164. The other argument made by Newfoundland, that the map accompanying the *1982 Agreement* “did not correspond with”¹³² the *1964 Agreement* line, has already been addressed in this Counter-Memorial, as depicted in **Figure 25**. Moreover, Newfoundland’s point is irrelevant. The *1982 Agreement* made it clear that the metes and bounds description was definitive, and that the map was intended to show only “generally” the locations of the lines.

E. Conclusion

165. Newfoundland construes – and asks the Tribunal to construe – the *1964 Agreement* in the most restrictive, counter-purposive manner possible: as an agreement applicable only to one specific (and admittedly impossible) jurisdictional régime, a régime in which the Provinces enjoyed full ownership and complete jurisdiction over the offshore.
166. Newfoundland also construes – and asks the Tribunal to construe – the Provinces’ agreement as restricted to an area that excludes what Newfoundland itself describes as “the most important” segment of the parties’ boundary.¹³³
167. On both counts, Newfoundland’s assertions entail a complete denial of the object and purpose of the *1964 Agreement*, and a refusal to accord any meaning to the plain words of the documents evidencing that Agreement. Newfoundland does not engage in an interpretative exercise. Its approach is less an effort at good faith interpretation than an attempt to rewrite history.

¹³² Newfoundland Memorial, para. 90.

¹³³ Newfoundland Memorial, para. 223.

168. The conduct of the parties itself confirms that they intended to, and did, agree on a boundary that extended to the outer limits of Canadian continental shelf jurisdiction along a line running (from point 2017) “southeasterly”, or “S.E.”, or on an azimuth of “135°00'00””. Newfoundland issued permits in the offshore up to 300 miles from its coast, and both Nova Scotia and Newfoundland utilised the line for purposes of permit issuance in the 1960s and 1970s. And while Nova Scotia consistently and openly applied the 135° line in its agreements with the federal government, in legislation and on maps, Newfoundland, for its part, never protested Nova Scotia’s conduct.
169. In 1964, the Provinces recognised the need to establish boundaries, as between themselves, in order to foster the development of a viable offshore oil and gas industry.¹³⁴ To that end, they agreed on interprovincial boundaries. While the Provinces established their mutual boundaries at a time when they formally asserted an entitlement to “ownership” and “full jurisdiction” over the offshore in negotiations with the Government of Canada, their clear intent, as demonstrated, *inter alia*, by their subsequent conduct, was that the boundaries would apply irrespective of the “ownership” issue. The Provinces in fact continued to apply those boundaries – seamlessly, without any question ever being raised by any one of them – in the absence of recognition of their claim to ownership and in jurisdictional contexts other than full provincial control. The purpose throughout was the same: to establish a régime that would foster the exploration and development of the offshore and provide benefits to the Provinces concerned, no matter the scope of the Provinces’ control over the offshore.
170. It is noteworthy that, even today, the legislation implementing the 1986 *Canada-Nova Scotia Offshore Accord*, in which the Newfoundland-Nova Scotia boundary established in the *1964 Agreement* is enshrined, clearly acknowledges that the legislation is without

¹³⁴ Nova Scotia Memorial, Part II, para. 3 *et seq.*

prejudice to either provincial or federal claims regarding jurisdiction over the offshore:¹³⁵

(Annex 2)

Jurisdiction preserved

3. The provisions of this Act shall not be construed as providing a basis for any claim by or on behalf of the Government of Canada in respect of any entitlement to or legislative jurisdiction over the offshore area or any living or non-living resources in the offshore area.

171. The *Canada-Nova Scotia Offshore Accord*, itself, on which this legislation is based also states:¹³⁶ (Annex 2)

This political settlement of the issues between the Parties has been reached without prejudice to and notwithstanding their respective legal positions.

172. The fact is that the Provinces always intended the interprovincial boundaries established by them in 1964 to apply no matter which level of government – federal or provincial – was entitled to “ownership” or “full jurisdiction” over the offshore. The boundaries established the Provinces’ respective rights to the mineral resources of the continental shelf, “whatever the extent and nature of those rights”.¹³⁷

¹³⁵ Annex 2: *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c.3, s.3. Annex 1: Section 3 of the *Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act* reads, similarly: “This act shall not be interpreted as providing a basis for a claim by or on behalf of Canada in respect of an interest in or legislative jurisdiction over an offshore area or a living or non-living resource of an offshore area within the jurisdiction of the province.” The federal legislation implementing both the Nova Scotia and Newfoundland *Accords* reads: “For greater certainty, the provisions of this Act shall not be interpreted as providing a basis for any claim by or on behalf of any province in respect of any interest in or legislative jurisdiction over any offshore area or any living or non-living resources of any offshore area”. See Annex 1, s. 3 and Annex 2, s. 3.

¹³⁶ Annex 2: *Canada-Nova Scotia Offshore Petroleum Resources Accord* (26 August 1986) at 2.

¹³⁷ It will be recalled that in the *Joint Submission* the Provinces referred to “the proprietary rights in submarine minerals as between Canada and the Provinces, whatever the extent and nature of those rights may be” (emphasis added). See Annex 31 at 16.