

## PART I: INTRODUCTION

1. This case is not, in essence, about a boundary. It is about an Agreement. An Agreement concluded over 35 years ago among the Governments of Canada's five East Coast Provinces, in good faith. An Agreement that has stood unchallenged and on which the five governments have relied since that time, to their benefit. An agreement to which, today, one of the five governments apparently claims it never agreed.
2. The Agreement was concluded in 1964, and provided for the delimitation of the offshore areas of the five Provinces, including the line dividing the offshore areas of Nova Scotia and Newfoundland. The government is the Government of Newfoundland and Labrador,<sup>1</sup> which now says that it never accepted the line; the evidence, including Newfoundland's conduct over the years, says otherwise.
3. The line in question is not a "proposed" line, or a "purported" line, or a "Nova Scotia" line. It is the line, agreed to by the governments of five Provinces in the context of a binding agreement among all regional jurisdictions. It is the existing line, applied in practice by Nova Scotia and Newfoundland and incorporated into federal and provincial law. It is the line that the parties to this arbitration have resolved by agreement.

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<sup>1</sup> In the Throne Speech of March 20, 1996, the newly-elected provincial government committed itself to changing Newfoundland's official name to *Newfoundland and Labrador*. A Resolution to amend the *Terms of Union of Newfoundland with Canada* accordingly was unanimously passed by the Newfoundland House of Assembly on April 29, 1999. To Nova Scotia's knowledge, however, the resolution has not yet been passed by the Senate or House of Commons of Canada, or been proclaimed by the Governor General, as required by section 43 of the *Constitution Act, 1982* to give effect to such a change. (see <http://www.geocities.com/Yosemite/Rapids/3330/constitution/1999tu.htm>) For ease of reference, and because many of the documents referred to in this Memorial pre-date this fairly recent occurrence and refer merely to "Newfoundland", the Province of Newfoundland and Labrador will at times be referred to in this Memorial as "the Province of Newfoundland", or as "Newfoundland". The Province of Nova Scotia will also at times be referred to as "Nova Scotia".

## A. The Dispute

4. The *Terms of Reference* establishing the Tribunal state that the dispute in this case concerns portions of the line dividing the respective offshore areas of the Province of Nova Scotia and the Province of Newfoundland and Labrador. More particularly, the Tribunal is asked to determine, at this time, whether that line has been resolved by agreement.<sup>2</sup>
5. The dispute arises in relation to the description of the term “offshore area” as set out in legislation enacted by the Parliament of Canada and the legislatures of the two Provinces. This legislation applies to the petroleum and natural gas resources of the seabed and subsoil of the “offshore area” defined for each Province.<sup>3</sup> It has no application to fisheries or to any other matters related to the water column. **Figure 1** (The Continental Shelf Off the East Coast of Canada) depicts the offshore area of Canada’s East Coast.
6. At the outset, it is useful to examine briefly the key provisions of these instruments as they apply to the dispute that the Tribunal has been mandated to resolve, and to describe the fundamental nature of the dispute itself.

### i) The Underlying Legislation

#### a) The Canada-Newfoundland Accord And The Canada-Nova Scotia Accord And Their Implementing Legislation

7. In 1985 and 1986, respectively, the Government of the Province of Newfoundland and the Government of the Province of Nova Scotia each concluded a bilateral *Accord* with the Government of Canada, establishing an administrative regime to govern the management of oil and gas exploration in its offshore area. Each of those *Accords* was subsequently implemented by means of “mirror” federal and

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<sup>2</sup> The Tribunal’s mandate, as established in the *Terms of Reference*, is discussed in greater detail below, in Part I B. The *Terms of Reference* may be found under a separate tab in this binder.

<sup>3</sup> The *Canada – Newfoundland Accord Act* does not currently, but can, apply to other minerals.

provincial legislation. The Accords and their implementing legislation are examined below.

8. In 1985, the Government of Newfoundland and the Government of Canada entered into the “Memorandum of Agreement Between the Government of Canada and the Government of the Province of Newfoundland on Offshore Petroleum Resource Management and Revenue Sharing dated February 11, 1985” (the “*Canada-Newfoundland Accord*”). The *Canada-Newfoundland Accord* was subsequently incorporated into legislation by means of the federal *Canada-Newfoundland Accord Implementation Act*, S.C. 1987, c. 3 (the “*Canada-Newfoundland Accord Act*”), as well as the provincial *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*, S.N. 1986, c. 37. (**Annex 1**)
9. The following year, the Government of Nova Scotia and the Government of Canada entered into the “Canada-Nova Scotia Offshore Petroleum Resources Accord dated August 26, 1986” (the “*Canada-Nova Scotia Accord*”). The *Canada-Nova Scotia Accord* was incorporated into law in the federal *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* (the “*Canada-Nova Scotia Accord Act*”) and the provincial *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S. N. S., 1987, c. 3.<sup>4</sup> (**Annex 2**)
10. The essential purpose of the two Accords and their implementing legislation was to set aside longstanding constitutional differences between the Provinces and the Government of Canada, regarding jurisdiction over the mineral and other resources of the seabed and subsoil of the waters offshore of each Province. To

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<sup>4</sup> **Annex 1:** Selected excerpts of the *Canada-Newfoundland Accord Act* and the *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*, as well as the *Canada-Newfoundland Accord*. **Annex 2:** Selected excerpts of the *Canada-Nova Scotia Accord Act* and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, as well as the *Canada-Nova Scotia Accord*. For uniformity, all references in this Memorial to the legislation implementing either the *Canada-Newfoundland Accord* or the *Canada-Nova Scotia Accord* will be to the respective federal legislation, namely, the *Canada-Newfoundland Accord Act* and the *Canada-Nova Scotia Accord Act*.

that end, each Accord and its corresponding legislation established a management and revenue-sharing regime administered by a joint federal-provincial “Offshore Petroleum Board” (the “*Canada-Newfoundland Board*” or “*CNOPB*”; and the “*Canada-Nova Scotia Board*” or “*CNSOPB*”; collectively, the “Boards”).<sup>5</sup> The Boards enjoy specified authority over exploration and development in each of the Nova Scotia and Newfoundland offshore areas, including the authority to issue permits for exploration and exploitation purposes and to perform a range of other management functions. The scope of the legislation, and thus the operations of the Boards that they establish, is limited to the “offshore area” as defined in each *Accord Act*.

b) The Definition Of “Offshore Area” In The *Canada-Nova Scotia Accord Act*

11. Section 2 (“Interpretation”) of the *Canada-Nova Scotia Accord Act* defines Nova Scotia’s offshore area as follows: “‘*offshore area*’ means the lands and submarine areas within the limits described in Schedule I.” Schedule I to the *Act* provides a detailed description of the limits of the “offshore area”.<sup>6</sup> The offshore boundary between Nova Scotia and Newfoundland is defined in Schedule I in the following terms:

(...) [Beginning at] a point at latitude 47°45'40" and longitude 60°24'17", being approximately the midpoint between Cape Anguille (Nfld.) and Pointe de l'Est (Que.);

thence southeasterly in a straight line to a point at latitude 47°25'28" and longitude 59°43'33", being approximately the midpoint between St. Paul Island (N.S.) and Cape Ray (Nfld.);

thence southeasterly in a straight line to a point at latitude 46°54'50" and longitude 59°00'30", being approximately the midpoint between Flint Island (N.S.) and Grand Bruit (Nfld.);

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<sup>5</sup> See Annex 1, at s. 9 and Annex 2, at s. 9

<sup>6</sup> See Annex 2.

thence southeasterly in a straight line and on an azimuth of 135°00'00" to the outer edge of the continental margin.<sup>7</sup>

12. This boundary is shown in **Figure 2** (The Agreed Offshore Boundary Between Nova Scotia And Newfoundland And Labrador). As demonstrated below, in Part II of this Memorial, Schedule I of the 1988 *Canada-Nova Scotia Accord Act* incorporates the boundary between the respective offshore areas of Nova Scotia and Newfoundland that had been established twenty-four years earlier, in an agreement concluded by the five Provinces of Nova Scotia, Newfoundland, New Brunswick, Prince Edward Island and Quebec on September 30, 1964. That Agreement is known to all as the "*1964 Agreement*".
13. The *1964 Agreement* established interprovincial offshore boundaries not only for Newfoundland and Nova Scotia, but for all of Canada's East Coast Provinces<sup>8</sup>. The Agreement has been respected by these Provinces throughout the period from its conclusion to the present day. Indeed, the boundaries established in the *1964 Agreement* have been applied by the various East Coast Provinces to legislate the limits of their respective offshore areas, to depict those areas on published maps, and to issue permits for exploration and exploitation of the mineral and other resources of the seabed and subsoil of those areas. Only Newfoundland – and that, as of only very recently – contests the boundaries established in the *1964 Agreement*.
14. **Figure 3** depicts the boundaries and offshore areas of the East Coast Provinces established by the *1964 Agreement*.<sup>9</sup> The impact of the Agreement is clear. By virtue of the *1964 Agreement*, Newfoundland secured rights, as against the other

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<sup>7</sup> See Annex 2.

<sup>8</sup> In Canada, the term "*Maritime Provinces*" refers to the three Provinces of Nova Scotia, New Brunswick and Prince Edward Island; "*Atlantic Provinces*" connotes the Maritime Provinces and the Province of Newfoundland and Labrador; the four Atlantic Provinces and the Province of Québec comprise the "*East Coast Provinces*".

<sup>9</sup> **Figure 3: East Coast Provincial Offshore Areas As Determined By The *1964 Agreement*.** The depiction has been "updated" to account for the boundaries with the United States, in the Gulf of Maine, and with France, in the area off Saint-Pierre-and-Miquelon, established subsequent to 1964, and covers the estimated area of Canada's continental shelf.

East Coast Provinces, to over 65% of Canada's offshore area on the East Coast, almost double the area assigned to all of the other Provinces combined.

c) The Definition Of "Offshore Area" In The *Canada-Newfoundland Accord Act*

15. The *Canada-Newfoundland Accord Act*, in contrast to the *Canada-Nova Scotia Accord Act*, does not specify the limits of Newfoundland's offshore area. It provides instead a generic definition of "offshore area", leaving the precise definition to be "prescribed". Section 2 ("Interpretation") of the *Canada-Newfoundland Accord Act* states as follows:<sup>10</sup>

'offshore area' means those submarine areas lying seaward of the low water mark of the Province and extending, at any location, as far as

(a) any prescribed line, or

(b) where no line is prescribed at that location, the outer edge of the continental margin or a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea of Canada is measured, whichever is the greater.

16. To date, no "line" has been "prescribed".

ii) **The History Of The Dispute**

17. The dispute in the present case was initiated by the Province of Newfoundland in an effort to evade the obligations it willingly assumed in 1964 and to claim for itself a greater offshore area than that established in the *1964 Agreement*. The implications of this effort are profound. Newfoundland would ask the Tribunal effectively to undo the *1964 Agreement*, erase its agreed boundary with Nova Scotia – erase, indeed, **all** of the interprovincial boundaries agreed to by the five East Coast Provinces in 1964 – and thereby throw into disarray over 36 years of regional stability.

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<sup>10</sup> Section 2 of the *Canada-Newfoundland Accord Act* states that "'prescribed' means prescribed by regulations made by the Governor in Council" (i.e., the federal Cabinet). See by contrast Annex 2.

18. The precise date on which a “dispute” arose under the terms of the underlying legislation is not entirely clear.<sup>11</sup> It appears that, as a result of various letters and discussions between Newfoundland and the federal Minister of Natural Resources, Ralph Goodale, in late 1997, the federal Minister considered that a dispute had arisen requiring him “to exercise his authority under the Accord legislation with respect to negotiations to resolve the boundary issue.”<sup>12</sup> In any event, in January 1998, Minister Goodale himself formally notified Nova Scotia and Newfoundland that he was exercising the authority granted him under the dispute settlement provisions of the *Canada-Newfoundland Accord Act* and *Canada-Nova Scotia Accord Act*, by convening negotiations “with a view to resolving this issue.”<sup>13</sup> (The dispute settlement provisions of the legislation are discussed, immediately below, in Part I A iii of this Memorial.) Up to the present

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<sup>11</sup> There appear to have been some very preliminary discussions of a possible need to “resolve” certain issues in 1992, but this does not seem to have crystallised into a “dispute” at that time. See e.g. Annex 3: Letter from J.G. Leefe, Minister of Natural Resources, Government of Nova Scotia to J. Epp, Minister of Energy, Mines and Resources, Government of Canada (9 September 1992) indicating that Nova Scotia did not believe there was a “dispute” in 1992. Similarly, in 1995, Newfoundland advised Nova Scotia that it would support “a process of negotiation” and that once its preparations were complete it would “be in contact” with Nova Scotia. See Annex 4: Letter from R. Gibbons, Minister of Natural Resources, Government of Newfoundland to D. Downe, Minister of Natural Resources, Government of Nova Scotia (15 August 1995).

<sup>12</sup> Annex 5: Fax from F. Kwamena, Frontier Lands Management Division, Energy Sector, Natural Resources Canada to C. Ryan, Chief Executive Officer, Petroleum Development Agency, Department of Natural Resources, Government of Nova Scotia (27 November 1997). Mr. Kwamena’s fax, which enclosed a copy of a letter received from Newfoundland dated November 4, 1997, stated, *inter alia*: “[i]n view of Mr. Way’s letter and subsequent discussions between Ministers Goodale and Furey [respectively, the federal and Newfoundland Ministers of Natural Resources] the NRCan [Natural Resources Canada] Minister has decided to exercise his authority under the Accord legislation with respect to negotiations to resolve the boundary issue. Accordingly, he will be sending a letter to Nova Scotia and Newfoundland ...”.

<sup>13</sup> Annex 6: Letter from R. Goodale, Minister of Natural Resources, Government of Canada to C.J. Furey, Minister of Mines and Energy, Government of Newfoundland and K. MacAskill, Minister of Natural Resources, Government of Nova Scotia (7 January 1998). Minister Goodale’s letter also noted, with respect to the 1992 discussion referenced in footnote 11: “There has not been a meeting since.” *Ibid.* at 1.

date, however, Nova Scotia has never been formally advised of the exact nature of Newfoundland's objection to the existing, agreed and legislated boundary.<sup>14</sup>

iii) The Dispute Settlement Provisions

19. Regulations prescribing the limits of the Newfoundland offshore area under the *Canada-Newfoundland Accord Act* cannot be promulgated without the consent of the Government of Newfoundland.<sup>15</sup> Similarly, any amendment to Schedule I of the *Canada-Nova Scotia Accord Act*, which legislates the limits of Nova Scotia's offshore area, requires the consent of Nova Scotia.<sup>16</sup> The only exception to this rule, under both legislative schemes, is where the limits of the offshore area to be prescribed (in the case of Newfoundland) or amended (in the case of Nova Scotia's legislated limits), have been determined by means of the dispute settlement procedure provided in the legislation.<sup>17</sup> In that case, and only that case, the Government of Canada may act unilaterally, to prescribe or to amend the limits of the Provinces' respective offshore areas as determined by the dispute settlement procedure.
20. The *Canada-Newfoundland Accord Act* and the *Canada-Nova Scotia Accord Act* include nearly identical dispute settlement provisions, which in certain circumstances require that disputes be referred to "an impartial person, tribunal or

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<sup>14</sup> Nova Scotia is aware of occasional press articles referring to the Newfoundland view that it "doesn't accept" or "questions" the *1964 Agreement*, or that it "did not sign" the *Canada-Nova Scotia Accord*. As well, at a meeting of representatives of the two Provinces held at the Halifax Airport Inn on April 9, 1998, at which no minutes were taken and no paper exchanged, the Nova Scotia officials present heard from Newfoundland's legal counsel Newfoundland's view regarding how the existing line should have been drawn. Annex 7: On July 22, 1998, Nova Scotia received a letter from Newfoundland, to which was attached a map and a single page of explanatory notes regarding a "proposed line" (apparently similar to the description provided orally to Nova Scotia officials by Newfoundland on April 9): Letter from A. Noseworthy, Deputy Minister, Intergovernmental Affairs Secretariat, Government of Newfoundland and Labrador to P. Ripley, Deputy Minister, Nova Scotia Petroleum Directorate (22 July 1998). The material provided on July 22, 1998, however, in no way explained the basis for Newfoundland's objection to the existing line, and was, moreover, "provided without prejudice to any position that Newfoundland and Labrador might take in the future on the location of the line." (emphasis in the original) Other than the information referred to above, no explanation of Newfoundland's reasons for disputing the boundaries established in the *1964 Agreement* has been provided to Nova Scotia.

<sup>15</sup> See Annex 1, s. 7.

<sup>16</sup> See Annex 2, s. 6.

<sup>17</sup> See Annex 1, s. 6(5) and Annex 2, s. 48(5).



body” for resolution. Section 48 of the *Canada-Nova Scotia Accord Act*<sup>18</sup> reads, in pertinent part, as follows:

*Settlement Procedure for Disputes*

Definition of “agreement”	48.(1) In this section, “agreement” means an agreement between the Government of Canada and the government of a province respecting resource management and revenue sharing in relation to activities respecting the exploration for or the production of petroleum carried out on any frontier lands.
Disputes between neighbouring provinces	(2) Where a dispute between the Province and any other province that is a party to an agreement arises in relation to the description of any portion of the limits set out in Schedule I and the Government of Canada is unable, by means of negotiation, to bring about a resolution of the dispute within a reasonable time, the dispute shall, at such time as the Federal Minister deems appropriate, be referred to an impartial person, tribunal or body and settled by means of the procedure determined in accordance with subsection (3).
Procedures determined by Federal Minister	(3) For the purposes of this section, the person, tribunal or body to which a dispute is to be referred, the constitution and membership of any tribunal or body and the procedures for the settlement of a dispute shall be determined by the Federal Minister after consultation with the provinces concerned in the dispute.
Principles of international law to apply	(4) Where the procedure for the settlement of a dispute pursuant to this section involves arbitration, the arbitrator shall apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require.

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<sup>18</sup> See Annex 2. The corresponding provisions of the *Canada-Newfoundland Act* are found at Annex 1, s. 6 (1)-(4).

iv) **The Recourse To Arbitration And The Establishment Of The Tribunal**

21. On May 31, 2000, after over one year of consultations between representatives of the Government of Canada and the Governments of Nova Scotia and Newfoundland regarding the terms of reference for a possible arbitration, the federal Minister of Natural Resources wrote to the parties, advising them of his decision to “establish an arbitration process with two distinct phases.” Attached to the Minister’s letter were the *Terms of Reference* governing the arbitration.<sup>19</sup>

**B. The Mandate Of The Tribunal**

22. Before considering the mandate of the Tribunal in the first phase of the arbitration and, in particular, the application of principles of international law to the dispute to be resolved, it is useful to highlight two fundamental characteristics of international maritime boundary delimitation. First, in the vast majority of cases, the maritime boundaries between and among States are determined by agreement of the States concerned. Second, the case law of the International Court of Justice and other international tribunals on maritime boundaries is overwhelmingly concerned with those atypical cases in which agreement between States has not been possible.

23. It is not surprising that States prefer to negotiate boundary agreements rather than rely on adjudication to delimit their maritime areas. In a negotiation, the parties are able to assess their own positions and make those compromises and trade-offs that they determine best reflect their interests. The give and take of negotiations, and the unique nature of agreements concluded as a result of such a process, cannot be duplicated by a tribunal in an adversarial proceeding. This is particularly the case where, as is the case with the *1964 Agreement*, multiple parties are involved. Given these advantages, it is also not surprising that

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<sup>19</sup> A copy of the May 31, 2000 letter of Minister R. Goodale may be found together with the *Terms of Reference* under a separate tab in this binder.

international law accords precedence to boundaries resolved by agreement, as discussed in Part III, below, and that international tribunals are reluctant to substitute their judgement for the freely expressed will of the parties.

24. Where there is no agreed boundary in place, international tribunals are called upon either to create a boundary or to instruct the parties as to the appropriate principles upon which such a boundary should be negotiated. The body of international law that has developed around maritime boundary delimitation is, as a result, largely concerned with the principles that govern the drawing of a boundary *tabula rasa*.
25. This arbitration is very different. It is not a typical case of a maritime boundary dispute submitted to a tribunal for adjudication. What is typical, and in fact quite representative of State practice, is that the parties have actually negotiated a delimitation. In this case, however, the dispute arises because one party, the Province of Newfoundland, seeks to disavow that Agreement. The Tribunal, therefore, is asked to determine a boundary where the slate is **not** clean. As a result, the *Terms of Reference* require this Tribunal first to adjudicate on the validity of the boundary established by the parties' Agreement.

**i) The Question To Be Determined By The Tribunal**

26. The jurisdiction and mandate of the Tribunal are clearly established by Article Three of the *Terms of Reference* for the arbitration, which provides as follows:

ARTICLE THREE

THE MANDATE OF THE TRIBUNAL

- 3.1 Applying the principles of international law governing maritime boundary delimitation with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.
- 3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the

Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.

- (i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.
- (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.

27. The sole question to be determined by the Tribunal in the first phase of the arbitration is “whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.” This is the only issue in dispute and constitutes the full extent of the Tribunal’s jurisdiction at this time. It is clear from Article Three that, in this first phase, the Tribunal has no mandate to create a new boundary between the parties. In particular, it is not asked to “determine how ... the line ... shall be determined.” Once the question “whether the line ... has been resolved by agreement” is answered in the affirmative, that resolves the dispute. Only if it is determined that there is no agreement, would the Tribunal acquire a mandate to determine, in a second, separate phase, how the boundary should be drawn.
28. In the first phase, issues such as the nature of the agreed line, the manner in which it divides the parties’ respective offshore areas and the methods employed by the parties to delimit their boundary, are irrelevant. If the parties agreed upon a delimitation, the *Terms of Reference* explicitly require that the Tribunal defer to the parties regarding the merits of that delimitation. Indeed, insofar as the line has been resolved by agreement, there is no need – and no justification – for the Tribunal to search for the rationale of the agreed line or to examine whether it is equitable. Once the parties have determined a line, it is to be assumed that they regard it as equitable.

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  - (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.

ii) **The Law To Be Applied In Answering The Question**

29. In answering the question “whether the line ... has been resolved by agreement,” the *Terms of Reference* require the Tribunal to apply “the principles of international law governing maritime boundary delimitation with such modification as the circumstances require ... as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.” The nature and content of the applicable principles of international law are examined in Part III, below, but it is useful to consider several points, here.
30. The *Terms of Reference* mandate that the Tribunal shall answer the question raised in Article 3.2(i) (first phase), as well as, if necessary, the question raised in Article 3.2(ii) (second phase), “in accordance with Article 3.1.” That is, the Tribunal is required to resolve all aspects of the dispute by “[a]pplying the principles of international law governing maritime boundary delimitation ...” Because the Provinces of Nova Scotia and Newfoundland are not subjects of international law, however, the *Terms of Reference* also expressly provide that international law shall apply “as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.”<sup>20</sup> [emphasis added] In other words, the nature and effect of the parties’ conduct throughout the relevant period is to be viewed through the prism of international law. The question to be answered in the first phase, therefore, in accordance with Article Three of the *Terms of Reference*, is **whether the line has been resolved by a binding agreement as defined by international law.**
31. The *Terms of Reference* were, of course, determined in accordance with the underlying legislation, federal and provincial, implementing the *Canada-Newfoundland Accord* and the *Canada-Nova Scotia Accord*. All of these

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<sup>20</sup> The necessity of treating the parties “as if [they] were states”, so as to make feasible the application of international law, also explains why the *Terms of Reference* (and the underlying legislation) state that international law is to be applied “with such modification as the circumstances require”: see Article 3.1 of the *Terms of Reference*.

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instruments mandate that “the arbitrator shall apply the principles of international law ...” By the terms of their respective *Accords* and implementing *Acts*, the parties have, therefore, expressly consented to the choice of international law as the governing law of the arbitration.

32. In sum, the Tribunal is asked to determine whether, on the facts of this case, two sovereign States would be found to have concluded a binding agreement at international law regarding the boundary dividing their offshore areas. As is demonstrated unequivocally in the following Parts of this Memorial, the question must be answered in the affirmative. Moreover, by the time the Tribunal retires to consider its decision, there will be no issue of fact or law regarding which it will not have been fully briefed, and no evidence that remains to be adduced, relevant to the determination of the question. There will therefore be no reason to proceed to a second phase of the arbitration.

### **C. Overview Of Nova Scotia’s Argument**

33. The argument for Nova Scotia can be simply stated.
34. In the Autumn of 1964, Nova Scotia and Newfoundland, together with the Provinces of New Brunswick, Prince Edward Island and Québec, concluded a binding agreement providing for the division of those areas of the continental shelf adjacent to the four Provinces.<sup>21</sup>
35. The terms of the *1964 Agreement* are clear from the plain words of the Agreement, as evidenced in writing, and as interpreted with reference to its object and purpose. Those terms are also confirmed by the subsequent conduct of the parties. First, the Agreement divided the entire area of the continental shelf adjacent to the East Coast Provinces that might be claimed by Canada under

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<sup>21</sup> The *1964 Agreement* was concluded on September 30, 1964, by the Heads of Government (Premiers) of the four Atlantic Provinces; and one week later, it was acceded to by the Premier of Québec. The Agreement was subsequently presented by the Provinces to the Government of Canada, at a Federal-Provincial Conference of First Ministers held on October 14-15, 1964. See below, Part II B and C.



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international law. Second, the Agreement established the boundary lines as between the five East Coast Provinces for all purposes, including arrangements with the federal government for sharing of jurisdiction and benefits, such as the *Canada-Newfoundland Accord* of 1985 and the *Canada-Nova Scotia Accord* of 1986.

36. The *1964 Agreement* is evidenced by an extensive and authoritative documentary record that leaves no doubt that an Agreement was concluded and that all parties intended it to be binding. Further, the conduct of the parties subsequent to the conclusion of the *1964 Agreement*, over a period of more than 30 years, evidences their consistent adherence to, and reliance upon, the boundaries established in the Agreement, in numerous contexts. The *1964 Agreement* has been applied by all of Canada's East Coast Provinces, including Newfoundland and Labrador, in unilateral assertions of jurisdiction, in legislation defining provincial offshore areas, in jurisdictional agreements with the Government of Canada and in the issuance of permits for private exploration rights. Clearly, the Provinces understood that in concluding the *1964 Agreement* they were bound by its terms.
37. Nova Scotia's conduct has been clear and unequivocal: from the conclusion of the *1964 Agreement* to the present day, Nova Scotia has, in good faith, openly, and with precision, applied its boundaries as established in the *1964 Agreement* for all purposes.
38. New Brunswick, Prince Edward Island and Québec all continue to respect, apply and rely upon the boundaries established in 1964.
39. Of the five parties to the *1964 Agreement*, only Newfoundland, and only relatively recently, has ever indicated that it does not consider itself bound by the *1964 Agreement* or suggested that the boundaries of its offshore area could be other than those established in the *1964 Agreement*. Nonetheless, the facts clearly show that Newfoundland considered the *1964 Agreement* to be binding when it entered into it and applied the agreed boundaries in its own practice after the *1964 Agreement* was concluded. Indeed, Newfoundland still relies on the boundary

when it is advantageous for it to do so, and has never protested the consistent and public application by the other East Coast Provinces of the boundaries established in the *1964 Agreement*.

40. There is simply no credible case to be made that Newfoundland did not agree to its boundary with Nova Scotia, as defined in the *1964 Agreement* and as legislated in the 1988 *Canada-Nova Scotia Accord Act*. On the contrary, the facts show that the Province of Newfoundland agreed to the boundary and benefited from it over the years, both through the stability it provided in the development of the offshore oil and gas industry and because defined boundaries were considered to be the *sine qua non* of the Provinces' claims, as against the Government of Canada, to jurisdiction over the offshore. Now however, it appears to have decided that it would prefer a line other than the one it agreed to in 1964.
41. As is demonstrated in this Memorial, the boundary between Nova Scotia and Newfoundland established by the *1964 Agreement*, which is precisely implemented in the *Canada-Nova Scotia Accord Act*, is binding upon the parties to this arbitration for the purpose of determining the boundary between offshore areas. For this reason, it is submitted that, at the end of the day, after considering the facts and the law to be presented to it during this first phase of the arbitration, the Tribunal will have no alternative but to confirm, in accordance with its mandate, that "...the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement." That determination will resolve the dispute.

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