PART III: THE APPLICABLE LAW

A. The *Terms Of Reference* Require The Application Of International Law

1. The *Terms of Reference* require the Tribunal to determine whether the line dividing the offshore areas of Nova Scotia and Newfoundland "has been resolved by agreement."[1] Further, the *Terms of Reference* require that the Tribunal, in answering this question, apply "the principles of international law governing maritime boundary delimitation with such modifications as the circumstances require".[2] In this respect, the *Terms of Reference* mirror the terms of the *Canada-Nova Scotia Act* and the *Canada-Newfoundland Act.*[3] This "choice of law" is made feasible by the additional requirement in the *Terms of Reference* that the Tribunal consider Nova Scotia and Newfoundland "as if [they] were states subject to the same rights and obligations as the Government of Canada at all relevant times."[4]

2. It is a fundamental principle of international law governing maritime boundary delimitation that, where there is an agreement "in force between the States concerned, questions relating to the delimitation of the continental shelf [or any other zone] shall be determined in accordance with the provisions of that agreement."[5] In interpreting agreements that resolve questions relating to a delimitation, the principles of international law governing binding agreements in general are applicable. For example, in the *Jan Mayen Case*, in which Norway asserted that the method of delimitation to be applied between Norway and Denmark had been settled by prior agreement between the parties, the International Court of Justice recognised the need to deal with the issue of prior

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1 See above, Part I A and *Terms of References,* Article 3.2 (i).

2 *Ibid.*, Article 3.1.

3 See Part I A.

4 Article 3.1. This additional specification enables the Tribunal, first, to apply international law to parties that would otherwise not be subject to international law, and second, identifies a body of special law applicable to the parties in addition to the customary international law. That is, the Tribunal can assume that the parties had acquired the same rights and obligations as those acquired by Canada at the relevant times, including those arising under any binding agreements to which Canada was a party.

5 **Annex 82**: *United Nations Convention on the Law of the Sea*, 10 December 1982, U.N. Doc. A/CONF.62/122, (entered into force 16 November 1994), Article 83. See also **Annex 83**: *Convention on the Continental Shelf*, 29 April 1958, 499 U.N.T.S. 312 (entered into force 10 June 1964), Article 6.

agreement first, and applied the principles of international law applicable to agreements in general for the purpose of determining whether the agreement in question should be interpreted as governing the delimitation.[6]

3. In the present case, the Tribunal must apply the principles of international law governing the conclusion and interpretation of international agreements in order to determine, as provided in its mandate in phase I, "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."[7]

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6 Annex 84 : *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway),* [1993] I.C.J. Rep. 38 at 48-53. Similarly, in the *Guinea – Guinea Bissau Maritime Delimination* case, Award of 14 February 1985, the Tribunal first addressed the question of whether a colonial-era treaty had disposed of the maritime boundary. Annex 85: Award of 14 February 1985, 77 I.L.R. 636 at 659, 674.

7 The *Terms of Reference* confirm that the Tribunal is to apply principles of international law to questions relating to the conclusion and interpretation of an agreement. The preambular paragraph of Article 3.2 states that the determination of whether the line has been "resolved by agreement" is to be carried out "in accordance with Article 3.1", and Article 3.1 requires the application of international law. See Part I A, above.

ARTICLE THREE

THE MANDATE OF THE TRIBUNAL

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

3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.

(i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.

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

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

B. The Fundamental Requirement For Conclusion Of A Binding Agreement At International Law Is The Parties' Intent To Be Bound

i) International Law Requires No Particular Form For Binding Agreements

4. International law does not require any particular form[8] for the conclusion of a binding agreement.[9] Such an agreement may be concluded orally or in writing,[10] and may be signed or unsigned.[11] Thus, in the *Legal Status of Eastern Greenland* case, [12] the

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8 For a source which is contemporaneous with the negotiation and conclusion of the *1964 Agreement*, see **Annex 86**: Lord McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961) at 6. See also **Annex 87**: D.P. O'Connell, *International Law*, Vol. 1, 2nd ed., (London: Stevens & Sons, 1970) at 195 and **Annex 88**: I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998) at 610. Canadian law, apart from the *Extradition Act*, which defines extradition arrangements with foreign States as those made by Her Majesty, does not prescribe any particular form for the conclusion of an international engagement. Form is therefore a matter of convenience for the Canadian Government. **Annex 89**: A. E. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968) at 21, indicates that between 1907 and 1967 Canada used as many as 37 different forms of international agreements, including less formal types such as an agreed minute, a declaration, an exchange of letters, an exchange of notes, a joint statement, a *procès-verbal*, a statute and a supplementary exchange of notes. Gotlieb also points out, *ibid.* at 84, that "over seventy per cent of all Canadian bilateral treaties have, since the last war, been in exchange-of-notes form".

9 According to the usage of some publicists, including McNair, the term "treaty" is reserved for formal written agreements, whereas the words engagement and agreement are used more broadly to include oral and other agreements also giving rise to binding obligations. See McNair, *Law of Treaties*, *supra* note 8 at 4-7; (**Annex 86**). Compare to D.P. O'Connell, *International Law*, *supra* note 8 at 195, who defines a treaty more broadly as "an agreement between States and/or international organizations governed by international law as distinct from municipal law, the form and manner of which is immaterial to the legal consequences of the act". O'Connell's definition is not limited to written agreements or formal instruments (**Annex 87**). In the present case, the issue is simply whether a binding agreement was concluded, whatever the particular nomenclature.

10 If the representatives of the States concerned are authorized to bind their States, "there is nothing to prevent an international agreement from being made orally": McNair, *The Law of Treaties, supra* note 8 at 8-10, **Annex 86**. See also Brownlie, *Principles of Public International Law*, *supra* note 8 at 610, **Annex 88**; Gotlieb, *Canadian Treaty - Making, supra* note 8 at 22, **Annex 89**. Although **Annex 90**: The *Vienna Convention on the Law of Treaties* (hereinafter "*Vienna Convention*"), 23 May 1969, C.T.S. 1980 No. 37, applies only to agreements in written form, Article 3 recognizes that arguments not in written form may have legal force and are governed by the rules of customary international law.

11 The rules of customary international law concerning signature for the purpose of authentication of the agreed text or, where the treaty is not subject to ratification, for the purpose of expressing consent to be bound, clearly apply to formal written instruments only. See, e.g., Brownlie, *Principles of Public International Law*, *supra* note 8 at 610 (**Annex 88**), where it is noted that many of the requirements found in the *Vienna Convention* "are not relevant" to oral agreements. In **Annex 91**: The *Aegean Sea Continental Shelf Case* (*Greece v. Turkey*), the International Court of Justice affirmed that a joint Communiqué of the Greek and Turkish Prime Ministers, although unsigned, could nonetheless constitute "an international agreement to submit a dispute to arbitration or judicial settlement": *International Boundary Cases: The Continental Shelf* (Cambridge: Grotius Publications Limited, 1992), vol. 1 at 638.

12 **Annex 92**: The *Legal Status of Eastern Greenland* case (1933) P.C.I.J. (Ser. A/B) No. 53, 22 (hereinafter "*Eastern Greenland*" case).

Permanent Court of International Justice found that an oral undertaking made by the Norwegian Foreign Minister to the Danish Minister accredited to Norway, was sufficient to create binding legal obligations on Norway. The Foreign Minister had declared that "the Norwegian Government would not make any difficulty" with respect to Denmark's plans to settle Greenland; the Court was clear as to the binding effect of this oral undertaking: [13] **(Annex 92)**

> The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by a diplomatic representative of a foreign power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

5. Similarly, in the *Nuclear Tests* cases,[14] the International Court of Justice dealt with the effect of unilateral declarations made by the French Minister for Foreign Affairs and the Minister for Defence, and noted, *inter alia*, that the question of form was irrelevant to the creation of obligations: [15] **(Annex 93)**

> With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. **Whether a statement is made orally or in writing makes no essential difference,** for such statements made in particular circumstances may create commitments in international law, which does not require that they be should couched in written form...
>
> (emphasis added)

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[13] *Ibid.* at 71, Annex 92.
[14] Annex 93: (*Australia* v. *France*), [1974] I.C.J. Rep. 253.
[15] *Ibid.* at 267: Annex 93.

6. In those cases in which a binding agreement has been concluded orally, international law recognises that evidence of its existence and terms may be found in a variety of sources, such as the minutes or *procés-verbal* of a conference,[16] joint communiqués,[17] declarations (whether joint or unilateral[18]) and correspondence. In the *Eastern Greenland* case, referred to above, a minute prepared by the Norwegian Minister of Foreign Affairs, describing his oral undertaking, was accepted as sufficient evidence both that a binding agreement was concluded at the meeting and of the terms of that agreement.[19] In the *Aegean Sea Continental Shelf Case*,[20] the International Court of Justice was prepared to accept an unsigned Joint Communiqué as "constituting an international agreement",[21] and emphasized that the real issue was the nature of the underlying transaction, of which the Communiqué was evidence:[22] **(Annex 91)**

> Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form – a communiqué – in which that act or transaction is embodied. On the contrary, **in determining what was indeed the nature of the act or transaction** embodied in the Brussels Communiqué, **the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.**

7. In sum, the form of evidence, as with the form of agreement, is irrelevant. What matters, and what a tribunal must determine, is the reliability and probative value of the evidence

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16 McNair, *The Law of Treaties*, *supra* note 8 at 15 (**Annex 86**); **Annex 94**: D.H.N. Johnson, "The Conclusions of International Conferences" (1959) 35 Brit. Y.B. Int'l L. 1 at 1-2, 28-33; Brownlie, *Principles of Public International Law*, *supra* note 8 at 610, **Annex 88**.

17 E. Lauterpacht, (1959) 9 I.L.Q. at 186-187 cited in McNair, *The Law of Treaties, supra* note 8 at 23, *n.* 2 (**Annex 86**) notes as an example The Inter-Allied Declaration against Acts of Dispossession committed in Territories under Energy Occupation and Control of January 5, 1943. This declaration was given effect as an international agreement in several foreign courts. For example, the Court of Appeal in Paris in 1953 attributed the force of a treaty to this declaration. See **Annex 95**: *Werner* v. *Widow Rotschild*, (1953) I.L.R. 406 at 406-407.

18 *Nuclear Tests* case, *supra* note 14, **Annex 93**.

19 *Eastern Greenland* case, *supra* note 12 at 72, **Annex 92**.

20 *Supra* note 11; **(Annex 91)**.

21 *Ibid.* at 638 **(Annex 91)**. See also para. 107: The Communiqué was found, upon interpretation, not to have the meaning alleged, and no agreement was found, but for reasons of substance and not form. *Ibid.* at 639 **(Annex 91)**.

22 *Ibid.* at 638 **(Annex 91)**.

adduced to prove the existence and terms of a binding agreement, that is the underlying "act or transaction" which is the obligation.

ii) The Parties' Intent To Be Bound Is The Key

8. The fundamental requirement for the conclusion of a binding international agreement[23] is not a matter of form, but of the intention of the parties to be bound. The central importance of the intentions of the parties, and the clarity with which those intentions are established, was summed up by the International Court of Justice in the *Case Concerning the Temple of Preah Vihear (Preliminary Objections)*: [24] **(Annex 96)**

> Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.

9. Lord McNair confirmed this principle as follows, quoting advice provided to the British Foreign Office: [25] **(Annex 86)**

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23 There are three essential preconditions for the existence of an international agreement: that it be concluded between States or other subjects of international law with the capacity to enter into agreements; that it be governed by international law; and that it be concluded by representatives authorized to bind the parties. The first two of these elements are, of course, prescribed by the *Terms of Reference* and the underlying federal and provincial legislation. See (Part I A, above.) The third, dealing with the authority of the representatives, has already been alluded to in Part II A, above, where it was noted that provincial Premiers are Heads of Government. In cases of agreements concluded by Heads of Government, there is no question as to the capacity of the representatives, and no proof of capacity is required. See Brownlie, *Principles of Public International Law*, *supra* note 8 at 610, *n.* 24: "[H]eads of state, heads of government, and Foreign Ministers are not required to furnish evidence of their authority.", **Annex 88**. See also *Nuclear Tests* case, *supra* note 14 at 269 (Annex 93) on the application of the same approach to acts of the President of France as Head of State, which were taken to be acts of the French State. Indeed, "L'état c'est moi" is not inapposite to the conduct and approach of former Newfoundland Premier Smallwood, who concluded the *1964 Agreement* on behalf of Newfoundland.

24 **Annex 96**: (*Cambodia* v. *Thailand*), Preliminary Objections, (26 May 1961), [1961] I.C.J. Rep. 17 at 31.

25 McNair, *The Law of Treaties*, *supra* note 8 at 15 **(Annex 86)**.

> **If an agreement is intended by the parties to be binding, to affect their future relations, then the question of the form it takes is irrelevant to the question of its existence.** What matters is the intention of the parties, and that intention may be embodied in a treaty or convention or protocol or even a declaration contained in the minutes of a conference.
>
> (emphasis added)

10. This position has been affirmed repeatedly in international jurisprudence[26] and in the works of publicists.[27] It is, moreover, reflective of the principle of *pacta sunt servanda*, and of the fundamental importance of good faith to the creation and fulfillment of obligations in international law. In the *Nuclear Tests* case, the International Court of Justice, in dealing with the narrow question of the effect of unilateral declarations, also addressed the broader issue of the role of good faith in international law:[28] (**Annex 93**)

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith... Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.

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26 See, for example, the statement of Judge Read in his Separate Opinion in **Annex 97**: The case of *International Status of South-West Africa,* Advisory Opinion, [1950] I.C.J. Rep. 128 at 170. In considering the question whether, as the result of a series of acts and declarations of the Government of South Africa, an agreement had been brought about between the United Nations and South Africa, Judge Read stated: "It is unnecessary to discuss the juridical nature of an international agreement. It is sufficient, for present purposes, to state that an 'arrangement agreed between' the United Nations and the Union [of South Africa] necessarily included two elements: a meeting of minds; and an intention to constitute a legal obligation".

27 According to Oppenheim, the decisive factor in ascertaining whether an instrument is a treaty is "whether it is intended to create legal rights and obligations between the parties." **Annex 98**: L. Oppenheim, *International Law, A Treatise*, vol. I - *Peace*, 8th ed. (London: Longman Group, 1955) at 899-900; McNair defined "treaty" as a written agreement by which two or more States "create or intend to create a relation between themselves operating within the sphere of international law": McNair, *The Law of Treaties*, *supra* note 8 at 4 [footnotes omitted], **Annex 86**. Fawcett, writing in 1953, considered that an essential element of a legally binding international agreement, as opposed to international agreements of political obligation, was the intention of the parties to create legal relations between them: **Annex 99**: J.E.S. Fawcett, "The Legal Character of International Agreements" (1953) 30 Brit. Y.B. Int'l L. 381 at 385. Although the definition of treaty in the *Vienna Convention* does not include any explicit reference to an intention to create relations under international law, the commentary of the International Law Commission on its draft articles makes it clear that the element of intention is embraced in Article 2 in the phrase "governed by international law". **Annex 100**: International Law Commission, *Reports of the Commission to the General Assembly*, 1966, UN Doc. A/6309/Rev.1 in *Yearbook of the International Law Commission*, vol. II (New York: United Nations, 1967) 169 at 188-189.

28 *Supra* note 14 at 268 (**Annex 93**).

11. The fundamental principle of **good faith** in the conclusion and performance of agreements and the corresponding centrality of the **intention of the parties to be bound**, constitute the measure by which the parties' conduct is to be judged in this arbitration. As is demonstrated in Parts II and IV of this Memorial, Nova Scotia and Newfoundland clearly intended to be bound by the *1964 Agreement*. Nova Scotia has acted in good faith ever since to apply and respect that Agreement. So, too, did Newfoundland, until it chose to initiate this dispute.

C. The Principles Of International Law Governing The Interpretation Of Agreements Are Well Settled

i) Agreements Are to Be Interpreted in Good Faith in Accordance with the Ordinary Meaning of their Terms

12. The principles applicable to the interpretation of international agreements are well settled. As the International Court of Justice and other international tribunals have confirmed on numerous occasions, international law requires, first and foremost, an interpretation in good faith of the words of the agreement, taken in their ordinary meaning in the context, and in the light of the object and purpose of the agreement. This approach was concisely stated by the International Court of Justice in the *Libya – Chad* case:[29] **(Annex 35)**

> ...[A] treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty.

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[29] Annex 35, *supra* Part II, note 53. As is indicated in this passage, resort to the preparatory work leading to a treaty, and to the circumstances of the conclusion of the treaty, is available as a supplementary means of interpretation only, where the text is ambiguous or unclear, or where the words would lead to an absurd result. This principle is codified in Article 32 of the *Vienna Convention, supra* note 10 **(Annex 90)**. Recourse to preparatory work may also be had to verify or confirm a meaning that emerges as a result of the textual approach. See generally, H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958) at 116-141; see also McNair, *The Law of Treaties, supra* note 8 at Chapter XXIII.

13. This approach to interpretation has been codified in Article 31 of the *Vienna Convention on the Law of Treaties*:[30] (**Annex 90**)

> **Article 31**
>
> *General Rule of Interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> (...)
>
> 3. There shall be taken into account together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> (...)

ii) The Subsequent Conduct Of The Parties

14. Article 31, which has repeatedly been found to be reflective of customary international law,[31] makes it clear that the subsequent conduct of the parties, including agreements between them regarding interpretation as well as "any subsequent practice ... which establishes the agreement of the parties" regarding interpretation, "shall be taken into account together with the context." The rule respecting the importance of subsequent practice in the interpretation of agreements long pre-dates the *Vienna Convention*. Its status as a well-settled rule of customary international law was emphasized by the

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30 *Vienna Convention*, *supra* note 10 (**Annex 90**).

31 See, for example, **Annex 101**: *Case Concerning Kasikili/Sedudu Island* (*Botswana* v. *Namibia*), (1999) I.C.J. General List No. 98, at para. 18, (hereinafter referred to as the "*Botswana-Namibia Case*"). See also the *Libya-Chad Case*, *supra* note 29, at para. 41.

International Court of Justice in the *Case Concerning Kasikili / Sedudu Island (Botswana v. Namibia)*, in which the Court, *inter alia*, confirmed both the significance and the familiarity of the principle, quoting with approval from the work of the International Law Commission:[32] **(Annex 101)**

> 49. (...)As regards the "subsequent practice" referred to in subparagraph (b) of [Article 31(3)], the Commission ... indicated its particular importance in the following terms:
>
> > "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes **objective evidence of the understanding of the parties as to the meaning of the treaty.** Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals."...
>
> 50. Indeed in the past, when called upon to interpret the provisions of a treaty, the Court has itself frequently examined the subsequent practice of the parties in the application of that treaty (...)
>
> (emphasis added)

15. It is clear from the discussion above that the conduct of the parties subsequent to an agreement, whether active or passive,[33] is an important element to be taken into account in the interpretation of an agreement. As Lord McNair noted, this principle merely recognises that "**[the] relevant conduct of the contracting parties** after the conclusion of the treaty...has a **high probative value** as to the intent of the parties at the time of its conclusion", a proposition that he aptly referred to as "**both good sense and good law.**"[34] **(Annex 86)** This is by no means a recent development; a similar position was adopted in the Commentary on the Harvard Draft Convention on the Law of Treaties in 1935: [35] **(Annex 86)**

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32 *Botswana v. Namibia, ibid.* at paras 49-50 **(Annex 101)**.

33 See, for example, in **Annex 102**: the *Case Concerning the Temple of Preah Vihear, (Cambodia v. Thailand) (Merits)*, the Court not only found that Thailand, having failed to object to a critical map, was precluded from asserting that it had been rejected, it also considered that Thailand's failure to object constituted evidence of its "original acceptance" of the map. [1962] I.C.J. Rep. 6 at 32-33 (hereinafter "the *Temple of Preah Vihear* case").

34 McNair, *The Law of Treaties, supra* note 8 at 424 **(Annex 86)**.

35 This passage is cited in McNair, *The Law of Treaties, supra* note 8 at 424 **(Annex 86)**.

The Effect of the Subsequent Practice of the Parties

HERE we are on solid ground and are dealing with a judicial practice worthy to be called a rule, namely that, when there is a doubt as to the meaning of a provision or an expression contained in a treaty, **the relevant conduct of the contracting parties** after the conclusion of the treaty (sometimes called 'practical construction') has a **high probative value** as to the intention of the parties at the time of its conclusion. This is **both good sense and good law**.

(footnote omitted)
(emphasis added)

(**Annex 86:** Lord McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961) at 424)

> In interpreting a treaty, the conduct or action of the parties thereto cannot be ignored. If all the parties to a treaty execute it, or permit its execution, in a particular manner, that fact may reasonably be taken into account as indicative of the real intention of the parties or of the purpose which the instrument was designed to serve.

16. The principle that subsequent conduct provides evidence of high probative value as to the intention of the parties at an earlier time, extends equally to the parties' intention to assume binding legal obligations. The question of intent to be bound is a factual one, to be answered in the light of the available evidence, and it is clear from the authorities that the subsequent conduct of the parties provides highly reliable and relevant evidence of that intent. The following passage from the Separate Opinion of Judge Fitzmaurice in the *Temple of Preah Vihear* case is particularly instructive in this regard: [36] **(Annex 102)**

> It is a general principle of law, which has been applied in many contexts, that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence – in relation to the same or a closely connected matter – of his attitude, state of mind or intentions at an earlier date also; provided of course that there is no direct evidence rebutting the presumption thus raised. Similarly – and very important in cases affecting territorial sovereignty – the existence of a state of fact, or of a situation, at a later date, may furnish good presumptive evidence of its existence at an earlier date also, even where the later situation or state of affairs has in other respects to be excluded from consideration...

17. The same point was made with specific reference to the intention of a State to assume legal obligations in the case of the *International Status of South-West Africa*, in which the Court found that the evidentiary value of subsequent conduct by South Africa extended to the recognition of its binding obligations, as well as the proper interpretation of terms: [37] **(Annex 97)**

> These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations

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36 *Temple of Preah Vihear case, supra* note 33 at 61 **(Annex 102)**.

37 *International Status of South-West Africa, supra* note 26 at 135-136 **(Annex 97)**.

> under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.
>
> (emphasis added)

18. On the facts of the present case, as set out in Part II above, there is abundant evidence of conduct by Nova Scotia and Newfoundland subsequent to the *1964 Agreement,* confirming both their intent to be bound, and the proper interpretation of the *1964 Agreement*. In the words of Lord McNair, it is "good sense and good law" to recognize the superior probative value of that evidence.

19. The interpretive principles defined by customary international law, as set out in Article 31 of the *Vienna Convention* and as enunciated by eminent authorities, must be applied by the Tribunal in this case to the interpretation of the *1964 Agreement* and, specifically, to the determination whether the line dividing the parties' respective offshore areas has been resolved by that Agreement. The discussion in Part IV, below, demonstrates that, applying these principles to the facts of this case, one arrives at the inescapable conclusion that the *1964 Agreement* was intended, and does, bind Newfoundland to the boundaries established in that Agreement.

D. The Principles Of Acquiescence And Estoppel Constitute Alternative Grounds For Finding That The Boundary Between Nova Scotia And Newfoundland Has Been Resolved By Agreement

i) The Principles Of Acquiescence And Estoppel Are Well Recognised At International Law

20. As well as serving as compelling evidence of the existence and proper interpretation of binding obligations previously assumed by a party, under the international law principles of acquiescence and estoppel a party's conduct may also be such that it is found to constitute the root of obligations owed by that party to another and, in certain cases, to preclude a party from denying the "truth" implied by its conduct.

21. In 1924, Lord McNair wrote that "the doctrine of estoppel does not appear to have received much attention in the sphere of international law"[38], although he noted that "international jurisprudence has a place for some recognition of the principle that **a State cannot blow hot and cold**..."[39] **(Annex 103)** (emphasis added) Some thirty years later, Professor MacGibbon characterised estoppel as having acquired the status of "one of the general principles of law recognised by civilised nations."[40] **(Annex 104)** Today, modern writers such as Professor Brownlie and Professor Bowett confirm that "the principle of estoppel undoubtedly has a place in international law"[41] **(Annex 88)** and that "the essentials of the rule ... [have been accepted] into the jurisprudence of international tribunals." [42] **(Annex 105)**

ii) The Concepts Of Acquiescence And Estoppel Are Interrelated

22. Professor Brownlie has acknowledged that "... acquiescence ... and estoppel form an interrelated subject-matter, and it is far from easy to establish the points of distinction. It is clear that in appropriate conditions acquiescence will have the effect of estoppel." [43] The Chamber of the International Court of Justice in the *Gulf of Maine* case[44] described acquiescence and estoppel as "different aspects of one and the same institution ... both follow from the fundamental principles of good faith and equity."[45] **(Annex 106)**

23. While it is perhaps difficult to distinguish the concepts of acquiescence and estoppel, it is nonetheless possible to articulate certain of their common as well as their divergent aspects. Acquiescence is regarded as "silence or absence of protest in circumstances

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38 **Annex 103**: A. McNair, "The Legality of the Occupation of the Ruhr", (1924) 5 Brit. Y.B. Int'l L. 17 at 34.
39 *Ibid.* at 35 **(Annex 103)**.
40 **Annex 104**: I.C. MacGibbon, "The Scope of Acquiescence in International Law", [1957] 33 Brit. Y.B. Int'l L. 143 at 148.
41 Brownlie: *Principles of Public International Law*, *supra* note 8 at 158 **(Annex 88)**.
42 **Annex 105**: D.W. Bowett, "Estoppel Before International Tribunals and Its Relation to Acquiescence," (1957) 34 Brit. Y.B. Int'l L. 176 at 176.
43 Brownlie: *Principles of Public International Law*, supra note 8, at 158 **(Annex 88)**.
44 **Annex 106**: [1984] I.C.J. Rep. 246.
45 *Ibid.* at 305 **(Annex 106)**.

In the *Fur Seal Arbitration* it was demonstrated that some advantage is to be gained by one State, party to a dispute, by convicting the other State of inconsistency with an attitude previously adopted. In that case the United States, having succeeded by cession in 1867 to all the rights of Russia in the Behring Sea, strenuously urged that Great Britain had recognized and conceded in and after 1821 Russia's claim to exclusive jurisdiction over the seal fisheries outside territorial waters, and the arbitrators considered the point of sufficient importance to make an express finding of fact to the contrary. On the other hand, Great Britain was at pains to point out that both she *and the United States* had emphatically protested against the Russian ukase of 1821 advancing these territorial claims. This is not estoppel *eo nomine*, but it shows that international jurisprudence has a place for some recognition of the principle that **a State cannot blow hot and cold** – *allegans contraria non audiendus est.*

(footnote omitted)
(emphasis added)

(**Annex 103 :** A. McNair, "The Legality of the Occupation of the Ruhr", (1924) 5 Brit. Y.B. Int'l L. 17 at 35.)

which generally call for a positive reaction signifying an objection."[46] **(Annex 104)** The Chamber in the *Gulf of Maine* case further elaborated this view, including as regards both the nature **and effect** of acquiescence, before contrasting it with estoppel in the following terms: "acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion."[47] **(Annex 106)** Similarly, in the words of Professor Bowett, estoppel operates "so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another [including statements made "by conduct"[48]] whereby that other has acted to his detriment or the party making the statement has secured some benefit."[49] **(Annex 105)** As Professor Brownlie concisely states: "Estoppel differs [from acquiescence] in that, if it exists, **it suffices to settle the issue because of its unambiguous characterization of the situation.**"[50] **(Annex 88)** (emphasis added)

24. Professor Hersch Lauterpacht's early article on "Sovereignty Over Submarine Areas" provides significant insight regarding the nature and effect of a party's "**absence of protest**" and its elevation, in certain circumstances, to binding estoppel:[51] **(Annex 107)**

> In the first instance, **the absence of protest on the part of other states may be fairly interpreted as meaning that *they* 'accepted as law' – i.e., as being in conformity with existing law – the practice of other states relating to submarine areas.** ...
>
> However, in addition to providing evidence as to the views of governments on the existing legal position ... **the absence of protest may ... in itself become a source of legal right inasmuch as it is related to – or forms a constituent element of – estoppel ...** [T]he far-reaching effect of the failure to protest is not a mere artificiality of the law. **It is an essential element of stability** – a requirement even more important in the international than in other spheres; **it is a precept of fair dealing inasmuch as it prevents states from playing fast and loose**

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46 MacGibbon, *supra* note 40 at 143 (Annex 104).
47 *Gulf of Maine* case, *supra* note 44 at 305 (Annex 106).
48 Bowett, *supra* note 42 at 188 (Annex 105).
49 *Ibid.* at 176 (Annex 105).
50 Brownlie: *Principles of Public International Law, supra* note 8 at 158 (Annex 88).
51 Annex 107: H. Lauterpacht, "Sovereignty Over Submarine Areas", (1950) 27 Brit. Y.B. Int'l L. 376 at 395-396.

ESTOPPEL BEFORE INTERNATIONAL TRIBUNALS AND ITS RELATION TO ACQUIESCENCE

By D.W. Bowett M.A., LL.B., PH.D.

The rule of estoppel, whether treated as a rule of evidence or as a rule of substantive law, operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit. The basis of the rule is the general principle of good faith and as such finds a place in many systems of law.

(footnotes omitted)

(Annex 105: D.W. Bowett, "*Estoppel Before International Tribunals and Its Relation to Acquiescence,*" (1957) 34 Brit. Y.B. Int'l L. 176 at 176)

> with situations affecting others; and it is in accordance with equity inasmuch as it protects a state from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very states.
>
> (emphasis added)

iii) There Is Considerable International Jurisprudence Applying The Doctrine Of Estoppel

25. A leading case illustrating the operation of the principle of estoppel is the *Temple of Preah Vihear* case, decided by the International Court of Justice in 1962.[52] The case concerned a dispute between France (then conducting foreign relations for what is now Cambodia) and Thailand (then Siam) over the location of a boundary. The Court found that because Thailand raised no objection to the boundary line depicted on a map sent to it by France, Thailand must be held to have accepted, or acquiesced in, that boundary.[53] Judge Fitzmaurice confirmed, in his Separate Opinion in that case, that acquiescence could operate as a form of estoppel in certain circumstances.[54]

26. A recent example of the application of the doctrine of estoppel is found in the *Libya – Chad* case.[55] In that case, Chad asked the Court to find that a 1955 treaty had established

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52 *Supra* note 33 (Annex 102).

53 The Court explained: "... it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced": *ibid.* at 23 (Annex 102). In his Separate Opinion, Judge Alfaro explained the consequences of failure to protest: "Passiveness in front of given facts is the most general form of acquiescence or tacit consent ... Failure to protest in circumstances when protest is necessary according to the general practice of States concerned in order to assert, to preserve or to safeguard a right does likewise signify acquiescence or tacit recognition: the State must be held barred from claiming before the international tribunal the rights it failed to assert or to preserve when they were openly challenged by word or deed": *ibid.* at 40 (Annex 102).

54 He said "[estoppel] is quite distinct theoretically from the notion of acquiescence. But acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights ... On that basis, it must be held that Thailand's silence, in circumstances in which silence meant acquiescence, or acted as a representation of acceptance of the map line, operates to preclude or estop her from denying such acceptance ... : *ibid.* at 62-63 (Annex 102).

55 Annex 35: *supra* Part II, note 53.

the Libya-Chad boundaries, while Libya contended that the boundary had never been fixed. The Court found that the boundary had been established by the 1955 treaty and that this was confirmed by the subsequent conduct of the parties. Regarding in particular the doctrine of estoppel, in a Separate Opinion Judge Ajibola noted that there had been many occasions on which Libya could have protested to Chad about the boundary but chose instead to remain silent.[56]

27. It is no doubt true that, in most cases, a party's conduct, including its acquiescence in a given state of affairs, "[is] but part of the evidence ..."[57] Yet even then, "... in instances like the *Temple* case, where much of the evidence is equivocal, acquiescence over a long period **may be treated as decisive.**"[58] **(Annex 88)** (emphasis added) In the present case, the evidence is unequivocal; in Part IV of this Memorial, that evidence is considered in the light of the applicable principles of international law.

E. Summary Of The Applicable Law

28. In determining whether the boundary dividing the offshore areas of Nova Scotia and Newfoundland has been resolved by agreement, the Tribunal is required by the *Terms of Reference* and underlying legislation to apply the principles of international law governing maritime boundary delimitation. These principles include the law applicable to the formation and interpretation of international agreements. International law provides that the fundamental requirement for conclusion of an international agreement is the parties' intent to be bound. In addition, international law stipulates rules for the interpretation of international agreements, which provide, *inter alia*, that the conduct of parties subsequent to the conclusion of an agreement, whether active or passive, is of particular value in determining both the intent of the parties to be bound and the meaning of the provisions of their agreement. Finally, the principles of acquiescence and estoppel

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56 *Ibid.*, Separate Opinion of Judge Ajibola, para. 111 **(Annex 35)**.

57 Brownlie: *Principles of Public International Law*, *supra* note 8, at 158 **(Annex 88)**.

58 Professor Brownlie also states that, despite whatever problems exist with respect to the the operation of estoppel, "before a tribunal the principle may operate to resolve ambiguities and as a principle of equity and justice: here, it becomes part of the evidence and judicial reasoning." *Ibid.* at 646 **(Annex 88)**.

are applicable to determine that, by its very conduct, a party has consented to particular obligations, and, in certain circumstances is precluded from denying that consent. Simply put, the importance of stability in relations between States and the precept of fair dealing require that States be discouraged from playing fast and loose with situations affecting others.

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