

PART IV: APPLICATION OF THE LAW TO THE FACTS

A. Introduction

1. When the principles of international law examined in Part III are applied to the facts of this case, several conclusions are apparent. First, on September 30, 1964 the five East Coast Provinces, including Newfoundland and Nova Scotia, intended to conclude, and did conclude, a binding agreement that determined, as between and among themselves, the boundaries of their respective offshore areas. Second, those boundaries extended to the outer limits of State jurisdiction at international law, covering all that area of the continental shelf over which Canada could claim rights. Third, the boundaries were intended to apply for any and all purposes related to submarine mineral rights, including the negotiation of jurisdictional and revenue-sharing arrangements with the federal government. These conclusions are evidenced by the terms of the *1964 Agreement* and by the conduct of the five Provinces subsequent to the conclusion of the Agreement including, most particularly, the conduct of Newfoundland. Further, by its conduct Newfoundland has acquiesced in, and is estopped from denying, the *1964 Agreement*.

B. The Application Of The Principles Of International Law Confirms That On September 30, 1964, Nova Scotia And Newfoundland, As Well As The Other East Coast Provinces, Concluded A Binding Agreement Dividing Their Respective Offshore Areas

- i) An Agreement Was Concluded At The Conference Of September 30, 1964
2. Part III of this Memorial, which sets out the law applicable to the dispute, demonstrates that international law recognises a wide range of evidentiary sources in determining the existence of a binding agreement at international law. These sources include declarations, communiqués, minutes of meetings and correspondence.¹ The central issue

¹ See above, Part III B i).

is not the form of the agreement but the probative value of the evidence of such agreement.²

3. The contemporaneous written evidence of the *1964 Agreement*, discussed in Part II, is overwhelming, both in terms of the amount of such evidence and its consistency. The evidence includes:

- (1) The *Communiqué* released after the September 30, 1964 Atlantic Premiers Conference recording that the Premiers “**unanimously agreed**” that the “boundaries described by metes and bounds ... be the marine boundaries of the provinces;”³ (Annex 24) (emphasis added)
- (2) The document prepared by Premier Stanfield, entitled *Matters Discussed on September 30, 1964*, summarising the September 30, 1964 Premiers Conference, which states unequivocally: “[**the**] **Conference agreed** on the marine boundary lines between each of the provinces;”⁴ (Annex 26) (emphasis added)
- (3) The subsequent correspondence between Premier Stanfield of Nova Scotia and Premier Lesage of Québec, seeking Québec’s concurrence in the agreed boundaries, which was undertaken at the express direction of the Atlantic Premiers. In his letter to Premier Lesage, copied to the other Premiers, Premier Stanfield wrote: “**The Conference agreed** that I should advise the Government of the Province of Quebec of our stand on the matter of submarine mineral rights and of the marine boundaries agreed upon by the Atlantic Provinces;”⁵ (Annex 27) (emphasis added)

² *Ibid.*

³ See above, Part II B ii), note 27.

⁴ See above, Part II B ii), note 34.

⁵ See above, Part II B ii), note 35.

An Agreement Was Concluded At The Conference Of September 30, 1964

The Atlantic Premiers ... unanimously agreed: ...

- 5 That the boundaries described by Metes and Bounds ... be the marine boundaries of the Provinces ...

(emphasis added)
(Annex 24: *Communiqué*)

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

(emphasis added)
(Annex 26: *Matters Discussed on September 30, 1964*)

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

(emphasis added)
(Annex 27: Letter to Premier Lesage (October 2, 1964))

... QUEBEC IS IN AGREEMENT WITH THE ATLANTIC PROVINCES ON THE MATTER OF SUBMARINE MINERAL RIGHT AND OF THE MARINE BOUNDARIES AGREED UPON BY THE ATLANTIC PROVINCES

(emphasis added)
(Annex 28: Premier Lesage's response)

This submission is presented on behalf of the four Atlantic Provinces pursuant to agreement reached at the Atlantic Premiers Conference on the 30th of September last.

(emphasis added)
(Annex 31: *Joint Submission* at 19)

(4) Québec's accession to the *1964 Agreement*, evidenced in Premier Lesage's response to Premier Stanfield, dated October 7, 1964, to the effect that "Quebec is in agreement with the Atlantic provinces on the matter of submarine mineral rights and of the marine boundaries agreed upon by the Atlantic provinces;"⁶ (Annex 28) (emphasis added)

(5) The *Joint Submission* presented to the Federal-Provincial Conference on October 14-15, 1964, which incorporated a detailed description of the agreed boundaries and stated clearly: "This submission is presented pursuant to agreement reached at the Atlantic Premiers Conference on the 30th of September last."⁷ (Annex 31) (emphasis added)

4. This evidence demonstrates conclusively the existence of the *1964 Agreement*.

ii) **The Parties Intended To Be Bound By The *1964 Agreement***

5. As explained in Part III, above, the question whether an agreement creates binding legal obligations under international law is fundamentally concerned with whether the "agreement is intended by the parties to be binding, to affect their future relations ... What matters is the intention of the parties ...".⁸ The question of intent, including the intent of the parties to create binding relations, is a factual question to be considered in the light of the available evidence.⁹ In the case of the *1964 Agreement*, the evidence to be considered includes the terms of the *1964 Agreement*, as evidenced in writing, taken in their ordinary meaning and considered in their context and in the light of the object and purpose of the Agreement, as well as the conduct of the five Provinces, in particular the

⁶ See above, Part II B ii), note 38.

⁷ See above, Part II B ii), note 41.

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

⁹ Annex 108: Sir Robert Jennings and Sir Arthur Watts, eds.: *Oppenheim's International Law* (New York: Longman, 9th edition (paper), 1996) at 1202: "The existence or otherwise of such an intention [to create international legal rights and obligations between the parties] will need to be determined in the light of all the circumstances of each case."

There is no reason based on its informality why such a record should not constitute adequate evidence of an international engagement. International law prescribes no form for international engagements. There is no legal distinction between formal and informal engagements. 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.

(**Annex 86:** Lord McNair, *The Law of Treaties*
(Oxford: Oxford University Press, 1961) at 15)

conduct of Newfoundland and Nova Scotia, subsequent to the conclusion of the *1964 Agreement*.

a) The Terms Of The *1964 Agreement* Demonstrate Binding Intent

• *The Plain Words Of The 1964 Agreement*

6. There can be no doubt that the *1964 Agreement*, as evidenced in the written documents referred to above and examined in Part II, was intended to result in binding legal obligations. Apart from the repeated declarations that the Provinces had “agreed” their offshore boundaries, the *1964 Agreement* included an “undertaking” to request federal legislation to enshrine the agreed boundaries in law. The *Communiqué* distributed after the September 30, 1964 meeting, and transmitted to Premier Lesage of Québec was explicit on this point, stating that the Premiers had “unanimously agreed” as follows:¹⁰ (Annex 24)

That the Parliament of Canada be asked to define the boundaries as approved by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland under the provisions of Section 3 of the British North America Act of 1871.

7. In the *Joint Submission* to the Federal-Provincial Conference of First Ministers of October 1964, Premier Stanfield, on behalf of the Atlantic Provinces and in the presence of the other Premiers, carried through on this undertaking and publicly confirmed the desire of the Provinces for federal legislation confirming their agreed boundaries:¹¹ (Annex 31)

Speaking on behalf of the Province of Nova Scotia and as authorised by the Premiers of the Provinces of New Brunswick, Prince Edward Island and Newfoundland, I request the Federal authorities to give effect to the

¹⁰ See above, Part II B ii), note 27.

¹¹ See above, Part II B ii), note 41. Section 3 of the *British North America Act of 1871* gives the federal government to power to legislate changes to the boundaries of the Provinces, effectively giving constitutional status to the legislation. It is beyond question that such legislation, of constitutional effect, would have been binding upon the Provinces. *Supra* Part II, note 31.

boundaries thus agreed upon by legislation, pursuant to Section 3 of the British North America Act, 1871.

8. The Provinces did not consider that the *1964 Agreement* was in any way dependent upon federal legislation. Indeed, as stated in the same paragraph of the *Joint Submission*, the Provinces viewed the matter of their boundaries as primarily “a matter for agreement among the Provinces concerned”.¹² (Annex 31) Rather, the legislation was requested for the express purpose of giving constitutional effect to the boundaries established in the *1964 Agreement*, manifest proof of the parties’ full intention of being bound to their mutually agreed boundaries.

- *The Object And Purpose Of The 1964 Agreement*

9. Moreover, the object and purpose of the *1964 Agreement* demonstrate that the Provinces intended to create mutually binding obligations regarding their boundaries. A central purpose of the *1964 Agreement* was to provide the East Coast Provinces with the certainty they desired, both for negotiations with the Government of Canada, regarding jurisdiction, and for the granting of exploration and development rights to industry. These aims would have been frustrated had the boundaries established by the *1964 Agreement* been anything other than binding.
10. International law recognises that there may be instruments characterised by the parties as “agreements” that are not in fact intended to be binding, and which are really statements of policy or common purpose.¹³ Boundary agreements, however, are fundamentally different from such statements of policy or common purpose. Given the specific, concrete and dispositive nature of a boundary agreement – Professor D.W. Bowett has referred to the boundary treaty as the “dispositive treaty *par excellence*”¹⁴ – it is difficult to imagine that such an agreement could be intended as anything other than binding upon

¹² See above, Part II B ii), note 45.

¹³ See McNair, *The Law of Treaties*, citing the example of the Atlantic Charter of 1941, at 6, *supra* Part III, note 8 (Annex 86).

¹⁴ Sir Robert Jennings and Sir Arthur Watts, eds.: *Oppenheim's International Law*, *supra* note 9 at 663, n. 2 (Annex 108).

the parties.¹⁵ The special quality of boundary agreements in international law, and the need for stability in such agreements, are recognised, *inter alia*, in the fact that they normally survive State succession. In addition, their special status is acknowledged in Article 62(2) of the *Vienna Convention on the Law of Treaties*,¹⁶ which specifically prohibits States from invoking a fundamental change of circumstances as a ground for withdrawing from or terminating a “treaty [that] establishes a boundary” :

62(2) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; ...

(...)

b) The Subsequent Conduct Of The East Coast Provinces, In Particular Newfoundland And Nova Scotia, Demonstrates Their Intent To Be Bound

11. The conduct of the East Coast Provinces, in particular Newfoundland and Nova Scotia, subsequent to the conclusion of the *1964 Agreement*, is especially probative of their intentions at the time the Agreement was concluded.¹⁷ This conduct, which encompasses positive acts and passive acquiescence, including the absence of protest,¹⁸ reinforces the conclusion that the *1964 Agreement* was “intended by the parties to be binding, to affect their future relations.”¹⁹

- *The Conduct Of Newfoundland*

12. The conduct of Newfoundland subsequent to September 30, 1964, both in positive acts and in its failure to object to the actions of other Provinces, particularly Nova Scotia,

¹⁵ There may be arguments about *de facto* permit lines or interim arrangements, but these are questions which relate either to the *existence* of an agreement, or to the proper *interpretation* of the scope of its provisions, and not to the binding nature of the obligation. Thus an interim boundary agreement would still be binding, but only to the extent and for the time period specified in such an agreement. There is no evidence from the *1964 Agreement* of any such limitation.

¹⁶ *Supra* Part III, note 10 (Annex 90). A similar provision is found in Article 62 of the *Convention on the Law of Treaties Between States and International Organizations and Between International Organizations*.

¹⁷ See above, Part III B ii).

¹⁸ See above, Part II.

¹⁹ McNair, *The Law of Treaties*, *supra* Part III, note 25 (Annex 86).

leaves not the slightest doubt that it regarded the *1964 Agreement* as binding on itself and its partners, and that it intended the Agreement to be binding from the outset. The history of Newfoundland's conduct in this regard is recounted in Part II of this Memorial, and may be summarised briefly as follows:

- (1) Newfoundland failed to object to the clear statements that an "agreement" had been concluded at the September 30, 1964 Atlantic Premiers' Conference, as set out in the official *Communiqué* and in Premier Stanfield's *Matters Discussed on September 30, 1964*;²⁰ (Annex 24)
- (2) Newfoundland failed to object to representations about the *1964 Agreement* in the subsequent letter to Premier Lesage of Québec, a letter explicitly intended to draw Québec into the Agreement;²¹ (Annex 27)
- (3) Newfoundland participated in and failed to object to the characterisations of the *1964 Agreement* made in the *Joint Submission* to the Government of Canada during the Federal-Provincial Conference of October 14-15, 1964;²² (Annex 31)
- (4) Newfoundland participated in and failed to object to the request to the federal government, in the *Joint Submission*, to enact legislation of constitutional effect so as to bind Newfoundland and the other East Coast Provinces by law;²³ (Annex 31)

²⁰ See above, Part II B ii), note 27.

²¹ See above, Part II B ii), note 35.

²² See above, Part II B ii), note 41.

²³ See above, Part II B ii), note 45.

- (5) In 1965, 1967 and 1971, Newfoundland issued offshore exploration permits conforming to its agreed boundaries with Québec, in the Gulf of St. Lawrence, and with Nova Scotia, near the Laurentian Channel;²⁴ (Part II H ii))
- (6) Newfoundland participated in the technical work of the *JMRC* from 1968 through 1972, verified and confirmed the latitude/longitude coordinates plotted by the Technical Committee for the turning points established in the *1964 Agreement*, and convened the May 1972 meeting at which the *JMRC* confirmed those coordinates and urged the five Premiers to do the same. This technical work, which consisted of assigning coordinates to turning points previously established, would have had no purpose had the *1964 Agreement* not been binding;²⁵ (Part II D)
- (7) Premier Moores of Newfoundland agreed to the technical delineation and description of the boundary at a Conference of Premiers of the East Coast Provinces, on June 17-18, 1972, and announced the agreement to the Newfoundland House of Assembly the following day;²⁶ (Annex 58)
- (8) Newfoundland made no objection to the resolution at the Premiers' meeting of August 1972 that confirmed the June 17-18, 1972 agreement;²⁷ (Annex 54)
- (9) Newfoundland's September 1973 proposal to the Government of Canada, copied to Nova Scotia, implicitly acknowledged the agreed boundaries, and failed to suggest in any way that Newfoundland no longer considered itself, or any of the other East Coast Provinces, bound by them;²⁸ (Annex 63)

²⁴ See above, Part II H ii).

²⁵ See above, Part II D.

²⁶ See above, Part II D ii); Annex 58.

²⁷ See above, Part II D ii), note 75.

²⁸ See above, Part II E ii), note 93.

- (10) Newfoundland did not object to the explicit use of the Nova Scotia-Newfoundland boundary, as established in the *1964 Agreement*, in the *1977 Memorandum of Understanding* between the Maritime Provinces and the Government of Canada;²⁹ (Annex 67)
- (11) Newfoundland promulgated *Petroleum Regulations* in 1978 that recognised the applicability of offshore boundaries with the other Provinces;³⁰ (Annex 109)
- (12) Newfoundland did not object to the use of its *1964 Agreement* boundary with Nova Scotia in the *1982 Canada – Nova Scotia Agreement*, nor to the inclusion of that boundary in the 1984 provincial and federal implementing legislation. An analysis of the *1982 Agreement* published by the Government of Newfoundland at the time made no mention of the boundary as a contentious issue;³¹ (Annex 110)
- (13) The *1985 Canada-Newfoundland Atlantic Accord* offered no objection to the agreed boundaries, and merely referred to limits based on “appropriate” lines of demarcation with the other Provinces;³² (Annex I)
- (14) Permits issued by the Canada-Newfoundland Offshore Petroleum Board up to the present time in the Gulf of St. Lawrence (with the consent of the Government of Newfoundland) conform to the Newfoundland boundaries established in the *1964 Agreement*.³³ (Part II H ii))

²⁹ See above, Part II F i), note 99.

³⁰ The Regulations are discussed further in Appendix A.

³¹ Annex 109: *The Newfoundland and Labrador Petroleum Regulations, 1977*, Nfld. Reg. 139/78. Section 12 provides as follows: “Notwithstanding section 8 [dividing all provincial areas into quadrangles], the boundaries of all quadrangles shall conform with the province’s onshore and offshore boundaries with the other provinces and the Northwest Territories and shall conform with those established by any lawfully established international seabed.” See above, Part II F ii). See also Annex 110: Petroleum Directorate, Government of Newfoundland and Labrador, “An Analysis of the Impact of a Nova Scotia Type Offshore Agreement on Newfoundland” (August 1982).

³² See above, Part II I, Annex 1.

³³ See above, Part II H ii).

13. The only reasonable conclusion to be drawn from this conduct, both active and passive, spanning four decades, is that, on September 30, 1964, Newfoundland concluded an Agreement that it fully intended to be binding on itself and on the other East Coast Provinces. Further, at no time prior to its initiation of the present dispute did Newfoundland disavow to its partners the nature, effect or content of the *1964 Agreement* – including, in particular, the agreed line dividing its offshore area from that of Nova Scotia – or evidence any objection that could possibly counterbalance the overwhelming weight of the conduct described above.³⁴

- *The Conduct Of Nova Scotia*

14. Nova Scotia's conduct subsequent to the *1964 Agreement* demonstrates a consistent application of and reliance on the boundaries established in that Agreement, in particular the agreed line dividing its offshore area from that of Newfoundland, in all of its actions up to the present day. This conduct includes agreements with the Government of Canada and the other East Coast Provinces, provincial legislation and the issuance of oil and gas exploration permits.³⁵ Indeed, Nova Scotia respected the boundaries established in the *1964 Agreement* even when it might have been advantageous for it to ignore them, so as to seek a larger share of the offshore, for example, in bilateral negotiations with the Government of Canada.
15. The evidence is conclusive. Nova Scotia considered itself to have entered into a binding Agreement with Newfoundland and the other East Coast Provinces in 1964, and it has applied that Agreement in good faith at every opportunity.

³⁴ As explained in Part II (E i) above, to the knowledge of Nova Scotia, a Newfoundland official requested certain technical information about the agreed boundaries, but there was never any assertion that Newfoundland rejected the *1964 Agreement* or suggestion that no Agreement had ever been concluded, until Newfoundland initiated this dispute.

³⁵ See above, Part II F and H i).

- *The Conduct Of New Brunswick, Prince Edward Island And Québec*

16. The other East Coast Provinces have all applied, and continue to apply, the *1964 Agreement* as the basis of their jurisdictional claims, offshore legislation and issuance of exploration permits.³⁶ They have done so in the absence of any offshore accord, or any federal legislation requiring them to do so, thus demonstrating their conviction that they concluded a binding Agreement in 1964.

C. The Application Of The Principles Of International Law Confirms That The Provinces Agreed In 1964 To Boundaries That Extend To The Outer Limits Of State Jurisdiction Over The Continental Shelf

- i) **The Terms Of The *1964 Agreement* Confirm That The Provinces Established Boundaries Extending To The Limits Of The Continental Shelf Subject To State Jurisdiction**

17. Having established both the existence of the *1964 Agreement* and the Provinces' intention to be bound by that Agreement, the principles of treaty interpretation, described in Part III, may be applied so as to confirm that the *1964 Agreement* established boundaries extending to the limits of the continental shelf over which Canada exercised jurisdiction. Those principles, it will be recalled, stipulate, *inter alia*, that 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."³⁷

- a) The Plain Words Of The *1964 Agreement* Reveal That The Provinces Established Boundaries Extending To The Limits Of The Continental Shelf Subject To State Jurisdiction

18. The ordinary meaning of the words used in the documents evidencing the *1964 Agreement* leave no doubt that the Provinces in particular, Newfoundland and Nova

³⁶ See above, Part II G.

³⁷ Article 31 of the *Vienna Convention on the Law of Treaties*. *Supra*, Part III C, note 30, Annex 90.

Scotia - intended to establish boundaries delimiting their respective offshore areas to the limits of State jurisdiction.

19. The relevant evidence includes the *Communiqué* issued following the Conference of Atlantic Premiers of September 30, 1964, declaring the Premiers' agreement that "the boundaries described by Metes and Bounds in Schedule A and shown graphically on Schedule B be the marine boundaries of the Provinces...";³⁸ in Schedule A to the *Communiqué* (the *Notes Re: Boundaries* of 1961), the line dividing the offshore areas of Newfoundland and Nova Scotia is described as follows:³⁹ (Annex 31)

From the above common point [the tri-junction point with Nova Scotia and Quebec], 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.

20. Premier Stanfield's summary of the September 30, 1964 meeting at which the *1964 Agreement* was concluded, *Matters Discussed on September 30, 1964*, is also relevant and probative. The document states that "[t]he Conference agreed on the marine boundary lines between each of the provinces," and further notes the Premiers' agreement that Premier Stanfield would "prepare a presentation for the pending Federal/Provincial Conference setting out the position of the four Atlantic Provinces with respect to submarine mineral rights and the agreed marine boundaries."⁴⁰ (Annex 26) The presentation in question became the *Joint Submission* presented to Prime Minister Pearson at the Federal-Provincial Conference of October 14-15, 1964. The *Joint Submission* confirmed that the "description of the boundaries [the *Notes Re: Boundaries*] and map represent the agreement of the Atlantic Provinces" and declared:⁴¹ (Annex 31) (emphasis added)

"the Provinces are entitled to the ownership and control of submarine minerals underlying territorial waters, including, subject to

³⁸ See above, Part II B ii), notes 29 and 30.

³⁹ See above, Part II B ii).

⁴⁰ See above, Part II B ii), note 34.

⁴¹ See above, Part II B ii), note 47.

International Law, areas in the Banks off Newfoundland and Nova Scotia, on legal and equitable grounds.

(emphasis added)

- *The Method Used To Delimit The Outer Segment Of The Boundary*

21. As evidenced in the *Joint Submission* to the Federal-Provincial Conference of October 14-15, 1964, the line dividing the offshore areas of Nova Scotia and Newfoundland was described by “metes and bounds” in the *1964 Agreement*. As regards the outer segment of that line, the “**Boundary of Newfoundland with Nova Scotia**” described it as a straight directional line, or constant “azimuth”, beginning at the last defined midpoint (between Flint Island, Nova Scotia and Grand Bruit, Newfoundland) and running “thence S.E. [Southeast] to International waters.”⁴² (Annex 31) Similarly, the “**Boundary of Nova Scotia with Newfoundland**” also described the outer segment of the Nova Scotia-Newfoundland boundary in terms of a constant azimuth, running from the last defined midpoint and “thence southeasterly to International waters.”⁴³ No terminal point was specified for this directional line, other than “International waters”.
22. This use of a line running on a constant azimuth out to international waters was intended to, and did, provide for the division between Newfoundland and Nova Scotia of the entire continental shelf over which Canada enjoyed rights under international law, “**whatever the extent and nature of those rights may be.**”⁴⁴ Indeed, the use of a constant azimuth line with an indeterminate terminus is an accepted method of delimiting segments of a boundary where an endpoint cannot be specified, whether because of uncertainty regarding the outer limits of the continental shelf or because of the potential impact of the boundary on third parties. This delimitation method, which is recognised in State

⁴² See above, Part II C.

⁴³ *Ibid.*

⁴⁴ See above, Part II B ii), note 43.

practice⁴⁵ and in international jurisprudence,⁴⁶ permits a final description of a boundary, as between the parties, while providing for the automatic extension (or retraction) of the azimuth line to whatever terminus, or endpoint, is ultimately determined to apply. This is precisely the case here, as regards the offshore boundary between Nova Scotia and Newfoundland.

- *The Direction Of The Outer Segment Of The Line Dividing The Parties' Offshore Areas: The 135° Azimuth*

23. As regards the direction of the outer segment of the line, the *1964 Agreement* describes this portion of Newfoundland's and Nova Scotia's respective boundaries in nearly identical terms. The outermost segment of the "Boundary of Newfoundland with Nova Scotia" is described as a line running "S.E.", which is the abbreviation for "Southeast" (the compass point, or azimuth, midway between South (180°) and East (90°); that is, 135°).⁴⁷ (Annex 31) In the same manner, the outer segment of the "Boundary of Nova

⁴⁵ See, for example, Annex 111: *The Agreement Between The Gambia and the Republic of Senegal*, June 4, 1975, in force August 27 1976, in which Article Two defines the outer boundaries (northern and southern) as extending along a parallel of latitude with no defined end-point (Senegal claimed a continental shelf to the 200 meter depth line.): as reproduced and analyzed in J. Charney and L. Alexander, eds., *International Maritime Boundaries Vol. I* (Dordrecht: Martinus Nijhoff Publishers, 1993) at 849-855. See also Exchange of Notes between Kenya and the United Republic of Tanzania on the Delimitation of the Maritime Boundary between the Two States, December 17, 1975 (Kenya) and July 9, 1976 (Tanzania). Paragraph 2 (d) of the Kenyan Note (defining the boundary) established the last segment of the boundary as "the latitude extending eastwards to a point where it intersects the outermost limits of territorial water boundary or areas of national jurisdiction of two States." Reproduced and analyzed in *ibid.*, at 875-883.

⁴⁶ See the *Guinea-Guinea Bissau Maritime Delimitation* case, *supra* Part III, note 6 (Annex 85) at 691, where the final seaward segment of the boundary is defined as following "a loxodromic line on an azimuth of 236° from point C above to the outer limit of the maritime territories of each State as recognized under general international law." See also the map attached to the decision, which makes it clear that no seaward terminus was defined. (Annex 85)

⁴⁷ In the *Libya-Chad* case, *supra* Part II, note 53 (Annex 35), the International Court of Justice considered a description of a portion of a boundary which read "thence to the south-east". The Court, at paragraph 58, noted that the reference was ambiguous, but *only* because the description was prefaced by the words "in principle", which raised "some question as to whether the line was to be strictly south-east". The implication was that, in the absence of such ambiguity, "south-east" would be taken on its "strict" meaning. In any event, the meaning of the provision was settled by a subsequent agreement (discussed at paragraph 59) that stated the meaning of "south-east" in the original agreement to conform to a defined point-to-point line. The Court, at paragraph 59, found that this later agreement on interpretation meant that the line "was not to run directly south-east", a finding which also implies that, otherwise, the words "south-east" would have been taken to mean just that: a strict south-east line.

Scotia with Newfoundland” is described in the *1964 Agreement* as a line running “southeasterly” – that is, “toward the Southeast” – to international waters.⁴⁸

- *The Extent Of The Line: “To International Waters”*

24. While the description of the outer segment of the Nova Scotia – Newfoundland boundary does not specify a precise terminus, it does state that the line runs Southeast to “International waters”, the meaning of which is not difficult to ascertain. As used in the *1964 Agreement*, the term “International waters” refers to an area lying beyond the continental shelf that the East Coast Provinces divided among themselves for jurisdictional purposes; a readily identifiable area, and one that the Provinces did not believe was necessary to define with any greater precision. As noted in the *Joint Submission*, the Provinces recognised that the issue of submarine mineral rights involved “questions of International Law respecting the extent of such rights in coastal areas, the manner in which and the base from which such limits are to be measured...”. (Annex 31) The precise determination of “International Law respecting the extent of such rights in coastal areas ...”, however, was simply not regarded by the Provinces as an issue that they needed to resolve:⁴⁹ (Annex 31)

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

(emphasis added)

25. The “extent and nature” of the rights at issue, and hence of the line, are further clarified in both the *Communiqué* issued at the close of the September 30, 1964 Atlantic Premiers’

⁴⁸ See above, Part II B ii), note 41 and Part II C. The only other line described in the *1964 Agreement* as having no defined endpoint is the outer segment of the boundary of Nova Scotia with New Brunswick, which is described in similar fashion as follows: “[from] a point midway between Whipple Point and Southwest Head; thence generally south-west to International waters.” (emphasis added) Just as the outer segment of the Newfoundland-Nova Scotia line runs Southeast, or 135°, this line runs Southwest, that is, 225°, being the compass point, or azimuth, midway between South (180°) and West (270°).

⁴⁹ See above, Part II B ii), note 43.

Conference,⁵⁰ and in the *Joint Submission* to the Government of Canada.⁵¹ The Provinces asserted ownership and control over an area described as follows:⁵² (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.

26. It is clear that the words “territorial waters” were intended to refer to the entire area within Canada’s continental shelf jurisdiction under international law, extending at least as far as “the Banks”.⁵³

- *The Map Depicting The Boundaries Established In The 1964 Agreement*

27. The *Joint Submission* was accompanied by a map representing the boundaries agreed by the East Coast Provinces (see Figure 4). In accordance with the description by metes and bounds of the Nova Scotia-Newfoundland boundary, examined above, the map depicted the outer segment of the line dividing their respective offshore areas as a constant azimuth, or straight directional line, beginning at the last defined turning point (the midpoint between Flint Island, Nova Scotia, and Grand Bruit, Newfoundland) and running Southeast to an undefined point.

28. The role of maps and their use in the interpretation of boundary agreements under international law have been extensively canvassed in decisions of the International Court of Justice. Maps constitute evidence that can assist in the determination of the proper interpretation of the terms of an agreement. Technical issues such as scale and accuracy must be carefully considered, among other factors, in considering the evidentiary weight

⁵⁰ See Part II B ii), note 34 (Annex 24).

⁵¹ See Part II B ii), note 41.

⁵² See Part II B ii), note 47.

⁵³ It is equally clear that the words “territorial waters” were not used as a term of art to refer to the “territorial sea”. At the time, the breadth of Canada’s (and other States’) territorial sea was 3 nautical miles, which could not conceivably have encompassed “...areas in the Banks off Newfoundland and Nova Scotia”.

of a particular map. Further, the purpose for which a map was prepared and the instructions given the draughtsman, must always be taken into account in determining the probative value of a map with respect to a particular interpretative issue.⁵⁴

29. The facts of the present case illustrate perfectly this point regarding the origin, nature and use of maps. The *Joint Submission* states that the interprovincial boundaries established in the *1964 Agreement*, including the line dividing the respective offshore areas of Newfoundland and Nova Scotia, were accurately described (“set out”) by the Provinces by metes and bounds, and then transferred to the map: “These boundaries have been set out by metes and bounds and have been graphically delineated on a map.”⁵⁵ (Annex 31) The map, obviously, provides useful evidence in determining the location of the boundaries established in the *1964 Agreement*, but the *Joint Submission* states clearly that the actual boundaries agreed to by the Provinces are contained in the metes and bounds descriptions. In any event, it is apparent from the map depicting the boundaries agreed by the Provinces (see **Figure 4**) that, from the last defined turning point along the Nova Scotia-Newfoundland boundary, the line makes a slight, though very definite, turn toward the East and runs in a straight line to an undefined terminus. This depiction is entirely consistent with the metes and bounds description of the boundary.⁵⁶

⁵⁴ Annex 112: *Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, [1986] I.C.J. Reports 4. The Court noted, at paragraph 54, as a “statement of principle”, that maps “constitute information which varies in accuracy from case to case.” Except where maps are made an “integral part” of an official text, “maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.” See also *ibid* at paragraph 55 on the issue of reliability and the weight to be attributed to maps. This view was confirmed in the *Botswana – Namibia Case*, *supra* Part III, note 31 at paras. 84-85 (Annex 101).

⁵⁵ See above, Part II B ii), note 45. In this context, note that “graphical delineation” is a technical exercise subsidiary to the definition of the boundary. A similar view was expressed by the ICJ in *Libya/Chad*, in which use of the term “demarcation” was taken to imply that a previous delimitation had already occurred.

⁵⁶ The map is not sufficiently precise to have allowed for an accurate determination of the azimuth (especially given that, at the time the map was prepared, the coordinates for the turning points had not yet been plotted). In any event, the line between the last two turning points, as plotted by the Technical Committee of the *JMRC* and agreed by the East Coast Premiers in 1972, proves to be an azimuth of 136° 13' 1.45". From the last turning point, therefore, an azimuth running southeast, or 135°, would make a slight turn to the East.

b) The Object And Purpose Of The 1964 Agreement Confirm That The Provinces Established Boundaries Extending To The Limits Of The Continental Shelf Subject To State Jurisdiction

30. The proper interpretation of the terms of the *1964 Agreement* must be informed by the overall object and purpose of the Agreement. The fundamental purpose of the *1964 Agreement* was to delimit the Provinces' respective offshore areas, so as to facilitate eventual settlements with the federal government and set the stage for exploration and development.⁵⁷ Moreover, the Provinces' approach was premised, from the very beginning, on a claim to rights over the full extent of the continental shelf within the limits of Canadian jurisdiction as defined at international law. Any boundaries dividing the shelf as between the Provinces, therefore, in order to have the effect desired by them, would have to cover the entire shelf so far as it could be claimed by Canada.
31. This point is clearly made in the *1964 Agreement* itself, as discussed above, and further evidence can be found in the discussions and other developments that led to the Agreement, including the legal opinion of 1959,⁵⁸ Premier Stanfield's statement to the Atlantic Premiers' Conference of September 1960,⁵⁹ and the Memorandum of Meeting of the Attorneys-General of the Maritime Provinces which recommended that the boundaries be approved by the Atlantic Premiers at their upcoming Conference of September 30, 1964.⁶⁰
32. The geographic scope of Canada's shelf claim admissible under international law at the time would have been determined by reference to the two-part formula set out in Article I of the 1958 *Geneva Convention on the Continental Shelf*:⁶¹ the 200-metre isobath was regarded as a State's **minimum** claim; on the basis of the "exploitability" criterion, broader but undefined claims, subject to expansion as technology approved, would also

⁵⁷ See above, Part II B i). The initial request for the federal government legislation is a clear example of the understanding of the Parties that the boundaries as agreed were to be the basis for dealing with the federal government.

⁵⁸ See above, Part II B i), note 7 (Annex 10).

⁵⁹ See above, Part II B i), note 8 (Annex 11).

⁶⁰ See above, Part II B i), note 21 (Annex 21).

⁶¹ *Supra*, Part III, note 5 (Annex 83).

Convention on the Continental Shelf, Done at Geneva, on 29 April 1958

(...)

Article 1

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

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

United Nations Convention on the Law of the Sea, 10 December 1982

PART VI

(...)

CONTINENTAL SHELF

Article 76. Definition of the continental shelf

1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

(...)

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured ...

(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))

- have been possible.⁶² The practical impact of the foregoing to the present case is that, where the East Coast Provinces defined a boundary with an undefined terminus – such as the line dividing the outer segment of the offshore areas of Nova Scotia and Newfoundland – the outer limits of those areas could expand over time, as new areas became subject to exploitation.
33. The definition of the continental shelf at international law is, however, less significant to an assessment of the Provinces' purpose in concluding the *1964 Agreement* than what they actually knew of the Canadian continental shelf claim in 1964, and what they in fact **did** to assert their own claims after the conclusion of the *1964 Agreement* (the conduct of the East Coast Provinces subsequent to the conclusion of the *1964 Agreement* is reviewed below, in Part IV C ii)).
34. In September 1964, the Provinces would certainly have had before them, as evidence of Canada's continental shelf claim, the offshore exploration permits issued by Canada in the period prior to the *1964 Agreement*. **Figure 20**, which depicts federal permits issued before September 1964, demonstrates that Canada considered its shelf claim to run to at least 300 miles from the shores of Newfoundland.⁶³ Those permits were of public record and their issuance was reported in trade journals.⁶⁴ As discussed above, in 1964, the Provinces were claiming and dividing among themselves those areas of the continental shelf subject to Canadian jurisdiction. They could hardly have had in mind an area of lesser extent than that already being claimed, by means of permits issued, by the Government of Canada.

⁶² Canada in 1964 had not stated the outer limit of its continental shelf, although evidence that its claim extended out to the edge of the shelf can be found in its issuance of permits during the period (see **Figure 20** below). Indeed, even today the full extent of the Canadian claim is not stated in detail, although it is known that Canada asserts a claim to the maximum limits available under international law. See **Annex 113: The Oceans Act**, S.C. 1996, c. 31, s. 17(1)(a). Section 17 is consistent with the language in Article 76 of the 1982 *Law of the Sea Convention*, *supra* Part III, note 5 (**Annex 82**).

⁶³ **Figure 20: Government of Canada Offshore Exploration Permits to 1970**. A copy of the original map is found in **Annex 114: Canada East Coast Offshore Federal Permit Map**.

⁶⁴ See, for example, **Annex 115: "Pan Am pushes work off Newfoundland"** *The Oil and Gas Journal* (26 April 1965) 48 and 49, which includes a sketch map depicting federal permits and a review of permit holders.

ii) **The Subsequent Conduct Of The Parties Confirms That The *1964 Agreement* Established Boundaries To The Limits Of The Continental Shelf Subject To State Jurisdiction**

35. As reviewed in Part III, above, international law recognises that the subsequent conduct of parties to an agreement constitutes valid and significant evidence regarding the proper interpretation of the terms of their agreement. The relevant conduct of the East Coast Provinces subsequent to the *1964 Agreement* has been discussed in detail in Part II, above, and is referred to here, briefly, to illustrate the fact that the Provinces, in particular Nova Scotia and Newfoundland, fully intended to establish, and did establish, boundaries extending to the outer limits of State jurisdiction over the continental shelf.

a) Offshore Permit Issuance By Nova Scotia And Newfoundland

36. The pattern of issuance of offshore exploration permits by the parties is described in Part II H, above (as well as in **Appendix A**). Nova Scotia's issuance of permits far out from shore in the 1960s is well documented, and supports the proposition that the intention of the East Coast Provinces, and in particular Nova Scotia and Newfoundland, was to claim, vis-à-vis the Government of Canada, and divide among themselves, the entire continental shelf over which Canada claimed jurisdiction.

37. However, it is the conduct of Newfoundland immediately after the *1964 Agreement* was concluded that is particularly compelling on this point. As early as January 1965, Newfoundland had received applications for exploration permits offshore on the Grand Banks.⁶⁵ By the end of that year, according to a report prepared by the Government of Canada, Newfoundland had issued permits over a vast acreage encompassing much of the Grand Banks and extending up to 300 miles from shore (see **Figure 21**).⁶⁶ In 1967 and

⁶⁵ See, for example, Annex 116: The letter of application from J.A. Flynn, Vice-President, Alberta Export Refining Company Limited to J.R. Smallwood, Premier and Minister of Economic Development, Government of Newfoundland, 23 January 1965; letter of application from Stirling, Ryan, Goodridge, Caule, Gushue & Goodridge to W.J. Keough, Minister of Mines, Agriculture & Resources, Government of Newfoundland (11 May 1965).

⁶⁶ **Figure 21**: Newfoundland and Labrador Offshore Exploration Permits to 1965. *Supra*, Part II H ii), note 123 (Annex 79).

- 1971, as well, Newfoundland issued permits far offshore and, in certain instances, abutting its agreed boundary with Nova Scotia (these later permits are discussed below and in **Appendix A**).
38. There can be no reasonable explanation for Newfoundland's behaviour in issuing permits as it did in 1965, 1967 and 1971, other than that it regarded the East Coast Provinces' (and its own) claim to offshore jurisdiction as extending to the entire continental shelf that could be claimed by Canada. Moreover, Newfoundland's conduct in this regard could only mean that, when it agreed to boundaries that ran "to International waters", it intended that those boundaries would extend as far as was necessary to divide the entire continental shelf.
39. Further, it is clear from even a cursory examination of the parties' conduct subsequent to the conclusion of the *1964 Agreement* that both Nova Scotia and Newfoundland regarded the outer segment of their mutual boundary to be defined by the 135° azimuth line. The details of this conduct are set out in Part II above, but the key events at which the direction of the line was confirmed by the Parties are summarised in the following paragraphs.
40. The official Nova Scotia Permit Map as of 1971 (see above Part II H, **Figure 16**), and all of the permits shown on it that are seaward of the final turning point on the agreed boundary with Newfoundland, apply the 135° azimuth line exactly (**Appendix A**). No protest of this open use of the 135° azimuth line was ever voiced by Newfoundland, as would have been expected if Newfoundland regarded the line as an incorrect or inappropriate interpretation of the *1964 Agreement*.
41. This absence of protest is explained, of course, by the fact that Newfoundland was itself applying the 135° azimuth line in the issuance of its own permits, in 1967 and 1971, well to the seaward of the last turning point. As discussed in detail in **Appendix A**, and as shown in **Figure 18**, Newfoundland applied the 135° azimuth line as its boundary when issuing two large permit blocks to Mobil Oil, in 1967, and to Katy Industries, in 1971. As explained in Part II H ii, above (as well as in **Appendix A**), the Katy Industries permit

appears to extend slightly over the boundary, but it is clear from close examination of the permit and attached map that this was due to cartographic error and the fact that precise geographical coordinates were not specified in the permit itself. What is also clear is that the intent and practice of Newfoundland was to issue permits in accordance with the agreed Newfoundland / Nova Scotia boundary as defined by the 135° line; a single, minor drafting error cannot negate the truth that there is no other line in the vicinity that could have been the basis for the limits of that particular permit.

42. The lack of protest regarding Nova Scotia's application of the 135° azimuth, coupled with Newfoundland's own application of the line, demonstrate beyond doubt that Newfoundland regarded the outer segment of the line dividing its offshore area from that of Nova Scotia to be a constant 135° azimuth.

b) The 1972 Technical Delineation Of The Turning Points

43. Under international law, subsequent conduct includes "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."⁶⁷ By 1972, when the Premiers confirmed the latitude/longitude coordinates plotted for the turning points described in the *1964 Agreement*, the permit activity that had taken place since 1964 and the current status of that activity would have made it obvious that what was at stake was the entire continental shelf off Canada's East Coast.
44. Had there existed any doubt in this regard, it would have been promptly dispelled by the presentation to the East Coast Premiers of a map of the East Coast Offshore, (reproduced in **Figure 9**⁶⁸), which depicted the outer segment of the Newfoundland-Nova Scotia boundary as a straight line running to the projected "base of [the] continental slope." (emphasis added) The map included estimates of the size of the offshore areas accruing to Nova Scotia and Newfoundland, figures that were subsequently used, *inter alia*, in

⁶⁷ See above, Part III C ii), note 30 (Annex 90).

⁶⁸ See above, Part II D ii), note 73. A copy of the original map is found at Annex 51.

Section 3. Interpretation of Treaties

Article 31

General rule of interpretation

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.

(our emphasis)

(Annex 90: *The Vienna Convention on the Law of Treaties*, 23 May 1969, C.T.S. 1980 No. 37)

discussions at the Premiers' meeting of August 2, 1972.⁶⁹ If Newfoundland had any other intention than the division of the entire continental shelf, the use of this map would surely have been rejected by Premier Moores of Newfoundland.

45. In addition to illustrating the size of the areas being delimited by the Provinces, this map showed the outer segment of the Newfoundland-Nova Scotia boundary as a line clearly intended to be a 135° azimuth. Figure 22 reproduces the East Coast Offshore map (Figure 9), but with the boundaries established in the *1964 Agreement*, including the coordinates plotted in 1972, overlaid in red. The two lines are a near perfect match.⁷⁰ Clearly, the purpose of the East Coast Offshore map was to depict the agreed boundaries. The visual impact of that map, alone, is striking, and its intent would have been obvious to the assembled premiers. Had Newfoundland been in any way surprised by this depiction of the agreed boundary with Nova Scotia, Premier Moores would certainly have said so before confirming his agreement with the coordinates plotted as part of the technical delineation of that boundary.

c) The 1973 Newfoundland Proposal To The Federal Government

46. In 1973, having withdrawn from the common front of East Coast Provinces for reasons relating to the scope of administrative control vis-à-vis the Government of Canada (and having nothing to do with interprovincial boundaries),⁷¹ Newfoundland prepared a negotiating proposal for the federal government, and provided a copy of its proposal to Nova Scotia.⁷² In the definition of the "adjacent submarine area" covered by its proposal, after acknowledging that its offshore area was subject to the limits imposed by "lines of demarcation agreed to" with other Provinces, that is, the boundary lines established in

⁶⁹ Annex 50: See above, Part II D ii), note 73.

⁷⁰ Figure 22: 1972 East Coast Offshore Map with 1964 Agreement Boundaries. The map is not a Mercator projection, and is therefore not fully suitable for showing the 135° azimuth as a straight line. However, the map is nevertheless appropriate to illustrate the boundaries established in the *1964 Agreement*, as these were well known to the Premiers. The boundaries of the *1964 Agreement* (in red) were overlayed on the boundaries as drawn (in black), using the same method as was used in the original (i.e., as straight lines on this projection).

⁷¹ See above, Part II E i).

⁷² See above, Part II E ii), note 93

1964, Newfoundland stated its understanding of the seaward extent of its offshore:⁷³
(Annex 63)

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

(emphasis added)

47. In 1973, therefore, Newfoundland clearly enunciated its position to the effect that its offshore comprised the entire continental shelf which might be claimed by Canada under international law.

d) The 1982 Canada – Nova Scotia Agreement And Implementing Legislation

48. In 1982, Canada and Nova Scotia entered into the *1982 Canada–Nova Scotia Agreement*, described in Part II F, above. As regards the seaward extent of the line dividing the offshore areas of Nova Scotia and Newfoundland, the Agreement provided as follows:⁷⁴
(Annex 68)

[Beginning at] the midpoint between Cape Anguille [Newfoundland] and East Point [Magdalen Islands, Québec];

From this point the boundary 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 the outer edge of the continental margin.

(emphasis added)

⁷³ *Ibid.*, Article 2(ii)(a) (Annex 63).

⁷⁴ See above, Part II F ii), note 101 (Annex 68).

49. These words are unambiguous. It will be recalled that this description is also incorporated into the 1984 federal and provincial legislation implementing the *1982 Canada–Nova Scotia Agreement*, with added precision for the outer segment of the line, defined as running “southeasterly in a straight line and **on an azimuth of 135° 00' 00" to the outer edge of the continental margin**”.⁷⁵ (emphasis added) Again, Newfoundland stated no objection and raised no protest, as regards either the extent of the line or its direction. In fact, Newfoundland prepared and published an “analysis” of the Agreement that says absolutely nothing about any potential concerns regarding the boundary.⁷⁶
50. The map accompanying the *Canada – Nova Scotia Agreement*, which was intended “generally” to depict the boundary specified by metes and bounds in the Agreement, also applied a 135° azimuth line to the outer segment (see above, **Figure 10**). The map is not definitive of the boundary, of course, but in this respect it confirms the meaning of the words contained in the metes and bounds description (“thence **southeasterly [toward the Southeast, or 135°] to the outer edge of the continental margin**”). (emphasis added) Newfoundland made no protest and offered no objection.
51. If Newfoundland truly had some other line in mind as the appropriate interpretation of the outer segment of its boundary with Nova Scotia, surely the plain words of the Nova Scotia and federal legislation, if not the clear depiction of the boundary on the 1982 map, would have sparked an immediate and vocal protest. None was forthcoming, and the legislation was duly passed and came into force.

⁷⁵ See above, Part II F ii), notes 105 and 106 (Annex 70).

⁷⁶ Newfoundland was fully aware of the *1982 Canada – Nova Scotia Agreement*, having prepared and published an analysis of it (*supra*, note 31, Annex 110). No mention was made of any difficulty with this outer segment of the boundary, nor did Newfoundland protest the inclusion of the above definition in the 1984 legislation.

D. The Boundaries Established In The *1964 Agreement* Apply For “Any And All” Purposes

i) The Terms Of The *1964 Agreement* Require The Provinces To Apply Their Agreed Boundaries For Any And All Purposes Relating To Submarine Minerals

52. As noted in Part I, above, the *1964 Agreement* was concluded in the context of a federal-provincial dispute regarding jurisdiction over offshore resources, with the aim of enabling the Provinces to articulate their claims for some form of jurisdiction within defined areas. The fundamental purpose of the *1964 Agreement* was to facilitate eventual settlements with the federal government and set the stage for exploration and development.⁷⁷

53. The *Joint Submission* of October 1964, by which the *1964 Agreement* was presented to the Government of Canada, explicitly distinguished the issues of jurisdiction and boundaries; the agreed boundaries were stated to apply as between the Provinces no matter what the outcome of the discussions with the federal government regarding jurisdiction. The East Coast Provinces thus obligated themselves to respect and apply the boundaries established in the *1964 Agreement* among themselves, which included in any agreement on offshore jurisdiction to be negotiated with the federal government.

ii) The Subsequent Conduct Of The Provinces Supports This Interpretation

a) In 1972, The Provinces Were Already Considering A Range Of Possible Jurisdictional Deals

54. As early as 1972, when the East Coast Premiers agreed to confirm the latitude/longitude coordinates plotted for the turning points described in the *1964 Agreement*, and thus reaffirmed their continuing commitment to the boundaries established in that Agreement, the Provinces were considering a range of options in their negotiations with the

⁷⁷ See above, Part II B i).

Government of Canada over jurisdiction in the offshore.⁷⁸ This fact is evidenced by the material provided to the Premiers in advance of their June, 1972 meeting,⁷⁹ the *Communiqué* issued after their June 17-18, 1972 Conference,⁸⁰ and the subject-matter of the Premiers' subsequent talks, in August 1972.⁸¹

55. It was demonstrated in Part II D, above, that the East Coast Premiers, in advance of their June 17-18, 1972 meeting, were specifically referred to the letter dated May 12, 1969 from Paul-E. Allard (Minister of Natural Resources for Québec and Vice-Chairman of the *JMRC*), which set out the background and basis of the technical recommendations of the *JMRC*. This letter put the intended scope of the *1964 Agreement* squarely before the Premiers, and made it clear that the boundaries were binding as between the Provinces **regardless of the precise form of jurisdictional settlement that a Province might conclude with the federal government:**⁸² (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 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)

56. Similarly, the *Communiqué* issued after the June 17-18, 1972 Conference of East Coast Premiers,⁸³ and sent by telegram to the Prime Minister of Canada,⁸⁴ reveals the Provinces' confirmation of the boundaries established in the *1964 Agreement*, while at the same time acknowledging their willingness to discuss arrangements with the federal

⁷⁸ See above, Part II D ii).

⁷⁹ *Supra*, Part II, note 67 (Annex 46).

⁸⁰ *Supra*, Part II, note 75 (Annex 54).

⁸¹ *Supra*, Part II, note 77 (Annex 56).

⁸² *Supra*, Part II, note 62, Annex 43.

⁸³ *Supra*, Part II, note 75 (Annex 54).

⁸⁴ The telegram was copied to all Premiers. See Part II, note 76, Annex 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.

(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))

government that entailed something other than full jurisdictional control over the offshore. Specifically, after declaring their agreement on the technical delineation of the boundaries (in paragraph 2), and re-asserting their position on full “ownership” of the mineral resources of the seabed “within the agreed boundaries” (in paragraph 3), the Premiers went on to signal their willingness to discuss lesser forms of control: (Annex 54)⁸⁵

(...)

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.

57. On August 2, 1972 the Premiers of the five East Coast Provinces met again, and discussed a letter from Prime Minister Trudeau in which he had asserted federal jurisdiction over the offshore (and threatened possible court action), while at the same time opening the door to negotiations on other matters, such as revenue-sharing.⁸⁶ The Premiers agreed amongst themselves that a political settlement would be preferable to litigation, and that it was “desirable that there be some form of joint Provincial-Federal body to administer the offshore area.”⁸⁷ (Annex 56) The official *Communiqué* issued at the close of the August 2, 1972 meeting declared that the matter should “be settled amicably by the Provincial and Federal Governments, and [that] methods of administrative co-operation between the Governments can be developed.”⁸⁸ (Annex 56) Toward this end, the Premiers created a “Continuing Committee of Officials”, to develop

⁸⁵ *Supra*, Part II, note 75 (Annex 54).

⁸⁶ Annex 117: Letter from P. Trudeau, Prime Minister of Canada, to G. Regan, Premier, Province of Nova Scotia (22 June 1972).

⁸⁷ *Supra*, Part II, note 77 (Annex 56 at 2).

⁸⁸ *Ibid.*, *Communiqué* at 2 (Annex 56).

negotiating positions. All of this occurred at a meeting at which the Premiers also reconfirmed their agreed boundaries, as stated during their Conference of June 17-18.⁸⁹

58. Clearly, the East Coast Premiers, including Premier Moores of Newfoundland, considered that the *1964 Agreement* (and 1972 technical delineation) applied to whatever forms of shared management control were henceforth to be the basis of discussions with the Government of Canada. The record in fact reveals that the range of potential jurisdictional and revenue-sharing arrangements contemplated by the East Coast Premiers included some form of shared, or delegated, administration, as mentioned in paragraphs 5 and 6 of their August 2, 1972 *Communiqué*, and in the Minutes of the August 2 meeting. This is, in fact, exactly the type of arrangement that was ultimately agreed in the two Offshore Accords.

b) The Provinces In Fact Incorporated Their Agreed Boundaries In Subsequent Intergovernmental Agreements

59. The subsequent conduct of the East Coast Provinces with respect to agreements entered into with each other and with the Government of Canada also shows that they interpreted the *1964 Agreement* as being applicable to all shared jurisdictional arrangements.

- *Agreements Entered Into By Nova Scotia, New Brunswick And Prince Edward Island*

60. Nova Scotia's consistent application of the *1964 Agreement*, in all of its dealings with the Government of Canada and its neighbouring Provinces, is outlined in Part II, above. The *1977 Memorandum of Understanding* (to which Prince Edward Island and New Brunswick were also party), the *1982 Canada-Nova Scotia Agreement* and the *1986 Canada-Nova Scotia Accord* all applied the boundaries established in the *1964 Agreement* to shared jurisdictional arrangements.

⁸⁹ *Ibid.*, Minutes at 1 (Annex 56).

- *The Conduct of Newfoundland*

61. Newfoundland failed to object to the use of the *1964 Agreement* line in the *1977 Memorandum of Understanding* and *1982 Canada-Nova Scotia Agreement*, thus indicating that its interpretation of the *1964 Agreement* conformed to that of the other Provinces. The *1977 MOU*, in particular, was explicit in its application of the *1964 Agreement*. To Nova Scotia's knowledge, no protest or objection was ever lodged by Newfoundland to this use of the *1964 Agreement*, suggesting that Newfoundland saw no conflict inherent in the use of that Agreement in the context of intergovernmental agreements regarding shared jurisdiction and administration over the offshore.
62. In sum, the terms of the *1964 Agreement* and the subsequent conduct of the Provinces, including Newfoundland, particularly as illustrated by the further agreement of 1972 and subsequent federal-provincial agreements, confirm beyond doubt that the *1964 Agreement* represented a permanent agreement on interprovincial offshore boundaries that were to be applied in any and all dealings with the federal government as well as in unilateral actions by the Provinces. Indeed, the record reveals that the *1964 Agreement* was intended by the Provinces, in particular Newfoundland and Nova Scotia, to be applied in precisely the sort of compromise jurisdictional arrangements found in the *Canada-Newfoundland* and *Canada-Nova Scotia Offshore Accords*. The *1964 Agreement* must therefore be applied to determine the division of offshore areas under the dispute resolution provisions of the Accord legislation, and thus to the determination of the present dispute.

E. Newfoundland Has Acquiesced In The *1964 Agreement* And Is Estopped From Denying Its Agreed Boundary with Nova Scotia

63. The facts and the law examined above demonstrate unequivocally that the East Coast Provinces, including Nova Scotia and Newfoundland, agreed in 1964 to boundaries dividing their respective offshore areas, extending to the outer limits of State jurisdiction over the continental shelf.

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.**

(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 2)

He [Innis MacLeod] said they had agreed on interprovincial offshore boundary lines, and *in response to my direct question* confirmed that these were the same offshore boundaries that had been presented to the Federal Government by the then Premier of Nova Scotia, Mr. Stanfield, at the Federal-Provincial Conference of October 14, 1964 (in other words, the Premiers simply reconfirmed the same offshore boundaries that had been negotiated amongst their predecessors some years before for the purpose of sub-dividing respective so-called areas of provincial jurisdiction in the East Coast Offshore).

(...)

I spoke by telephone with Stu Peters, Executive Assistant to Premier Moores, yesterday afternoon in regard to the meetings of the Premiers of the five Atlantic Provinces held in Halifax on Saturday and Sunday, June 17 and 18.

Dr. Peters had attended the meeting, and said that Premier Regan was the Chairman. In general, he corroborated the information received from Innis MacLeod that morning.

(...)

In summary, the seven points agreed upon [by the Premiers on June 17-18] were as follows:

(...)

2. The Premiers agreed to mutual interprovincial boundaries in the Offshore.

(...)

There is nothing startlingly new as concerns points 1 through 4. ... **point 2 involves jurisdictional offshore boundaries that were agreed upon by Provincial Governments years ago and presented to the Federal Government in 1964 ...**

(emphasis added)

(Annex 57: 2nd, 4th and 5th page)

64. Newfoundland was present when the *1964 Agreement* was concluded, on September 30, 1964, when the Agreement was presented to the federal government, on October 14-15, 1964, and throughout the 1968-1972 period when the coordinates for the agreed turning points were plotted and confirmed. Newfoundland was represented throughout by the Premier of Newfoundland or by senior Ministers or Deputy Ministers responsible for offshore mineral resources.
65. From 1964 through to the completion, in 1972, of the technical delineation of the boundaries established in the *1964 Agreement*, Newfoundland raised no objection to the agreed boundaries. Specifically, Newfoundland raised no objection to the Newfoundland – Nova Scotia boundary established in the *1964 Agreement*. It raised no objection to the use of its agreed boundary with Nova Scotia in subsequent federal-provincial agreements or in legislation implementing those agreements. Indeed, Newfoundland itself relied on its agreed boundary with Nova Scotia applying it in the issuance of offshore exploration permits.
66. In fact, Newfoundland never disavowed its agreed boundary with Nova Scotia until it initiated the present dispute. By its conduct over many years, Newfoundland must be taken to have acquiesced in the boundaries established in the *1964 Agreement*, including its agreed boundary with Nova Scotia, in accordance with the principles of international law examined in Part III D, above, and affirmed by the International Court of Justice in the *Temple of Preah Vihear* case and the *Libya – Chad* case, as well as by leading publicists.
67. Moreover, Newfoundland is estopped from denying the existence of the boundaries established in the *1964 Agreement*, which includes its boundary with Nova Scotia. All of the “essentials” of estoppel⁹⁰ are present in this case. Newfoundland’s numerous representations regarding its acceptance of the boundaries established in the *1964 Agreement*, both express and tacit, in words and deeds, were “clear and unambiguous”

⁹⁰ See Bowett, “Estoppel Before International Tribunals and its Relation to Acquiescence”; *supra*, Part III D, note 42 (Annex 105).

throughout the period prior to, during and subsequent to the conclusion of the *1964 Agreement*, through the technical exercise of 1972, and thereafter, including in the issuance of oil and gas permits whose limits coincide with the agreed boundaries.

68. Newfoundland's representations have been made "voluntarily" and "unconditionally." It is beyond question that they were "authorised", originating as they did from Premiers Smallwood and Moores, and from senior Ministers and Deputy Ministers responsible for offshore oil and gas administration.
69. Nova Scotia relied on these representations, undertaking legal obligations with private parties through its own issuance of oil and gas permits, as well as in its negotiations with the federal government, limiting its offshore claims to its offshore area as established by the *1964 Agreement*. Nova Scotia respected the agreed Newfoundland – Nova Scotia boundary on the reasonable assumption that it represented a secure and final delimitation of rights to offshore mineral resources opposable to it and Newfoundland, as indeed to all of the East Coast Provinces.
70. Newfoundland had ample opportunity to object to the *1964 Agreement* or to protest the application of the boundaries it established. Had Newfoundland wished to challenge the interpretation or application of the *1964 Agreement*, it surely would have registered its objection to the very public conduct of Nova Scotia in issuing permits along the agreed Newfoundland-Nova Scotia line. Newfoundland would also have declared its objection to the application of the *1964 Agreement* in the *1977 Memorandum of Understanding*. And it would have rallied against the use of the *1964 Agreement* in defining Nova Scotia's offshore area in the *1982 Canada - Nova Scotia Agreement* and the *1986 Canada-Nova Scotia Accord* and the implementing legislation. Instead, Newfoundland was silent, raising but twice minor technical inquiries about the construction of the boundary.⁹¹ Newfoundland did not object to the *1964 Agreement* line; instead, it relied upon it to its benefit in its offshore oil and gas program.

⁹¹ See above, Part II, *supra* notes 91 and 92 (Annexes 61 and 62).

71. Newfoundland cannot be permitted, in the words of Lord McNair, to “blow hot and cold.”⁹² The situation is unambiguous. Having acquiesced in the *1964 Agreement* through its silence, on which Nova Scotia relied to its detriment, Newfoundland cannot now be permitted to disavow its position. In these circumstances, the Tribunal should determine that Newfoundland is estopped from denying the existence of the *1964 Agreement* and the boundaries established therein, in particular its boundary with Nova Scotia, as legislated in the *Canada-Nova Scotia Act*.

F. Conclusions

72. Applying the relevant principles of international law, as summarised in Part III, to the factual record, as set out in Part II, leads to a number of inescapable conclusions regarding the status and meaning of the *1964 Agreement* establishing the offshore boundary between Nova Scotia and Newfoundland.
73. First, in 1964, Nova Scotia and Newfoundland, together with the three other East Coast Provinces, entered into a binding agreement that resolved their offshore boundaries, an Agreement that was confirmed and technically implemented in 1972. The *1964 Agreement* was concluded by the Heads of Government of the Provinces (as was the later confirmation), so that there is no doubt as to the capacity of the provincial representatives to conclude such an Agreement. The clear intention of the Provinces was to create binding legal obligations among themselves, a fact that is demonstrated by the plain words of the *1964 Agreement*, in particular their express wish to have the Agreement enshrined in federal legislation of constitutional effect. The intent to be bound is also confirmed by the object and purpose of the *1964 Agreement*, and by the subsequent conduct of the Provinces, most particularly that of Newfoundland. This conduct, including, *inter alia*, the determination of precise coordinates, the public affirmation of the boundaries in the Newfoundland House of Assembly, and the issuance of exploration permits along Newfoundland’s boundaries with Nova Scotia and Québec, can only be regarded as demonstrating that Newfoundland, as all the East Coast Provinces,

⁹² See above, Part II, *supra* note 38 (Annex 103).

considered itself bound by the *1964 Agreement* from the moment the Agreement was concluded.

74. Second, it is beyond doubt that the boundaries established by the *1964 Agreement* were intended to apply to the entire continental shelf over which Canada could claim rights under international law, whatever the extent and limits of those rights. This is demonstrated by the words of the *1964 Agreement*, interpreted in the light of the overall object and purpose of the Agreement, which was explicitly premised on the division of the entire shelf among the Provinces. The method chosen to delimit the outer segment of the line dividing the offshore areas of Newfoundland and Nova Scotia, a constant azimuth running to an undefined terminus, is a convenient and familiar method for dealing with the outer limits of a boundary that are either indeterminate or subject to change. Moreover, the plain words of the *1964 Agreement*, as confirmed by the subsequent conduct of the parties to the present dispute (including permit issuance and legislation), establish that the agreed line dividing the outer segment of the boundary between Newfoundland and Nova Scotia is a 135° azimuth, running in a straight line to the outer limits of Canadian jurisdiction over the continental shelf. This is, of course, the line set out in the legislation that defines Nova Scotia's offshore area.
75. Third, the only reasonable interpretation of the terms of the *1964 Agreement* is that it was intended to apply for all purposes related to submarine minerals, and to all forms of jurisdictional arrangement with the federal government, including the arrangements represented by the current *Offshore Accords* and *Offshore Accord Acts*. The words of the *1964 Agreement* themselves make this quite clear, and the subsequent conduct of the Provinces, in particular that of Nova Scotia and Newfoundland, is such as to remove any conceivable doubt in this regard. This is especially true as regards the 1972 technical Agreement, which occurred while the very issue of jurisdictional arrangements was squarely before the Premiers, including Premier Moores of Newfoundland.
76. Nova Scotia has never deviated from the good faith application of its agreed boundaries. New Brunswick and Prince Edward Island applied the *1964 Agreement* in the 1977 *Memorandum of Understanding*, and in their own legislation, and Québec has

consistently applied the Agreement as well. Only Newfoundland seems to have decided that its interests would be better served by disavowing the *1964 Agreement*.

* * * * *