

NEWFOUNDLAND AND LABRADOR – NOVA SCOTIA  
**Case Concerning The Line Dividing Their Respective Offshore Areas**

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TERRE-NEUVE ET LABRADOR – NOUVELLE-ÉCOSSE  
**Affaire portant sur les limites de leurs zones extracôtières respectives**

L. Yves Fortier, C.C., Q.C.

Agent for the Province of Nova Scotia

March 12, 2001

1. **Opening Remarks**

- It is a distinct honour for me and my colleagues to represent the Province of Nova Scotia in this important arbitration;
- It is also an honour for me and my colleagues to appear before an international Tribunal composed of such distinguished jurists;
- I am the Agent for the Province of Nova Scotia. The names of all members of the legal team, representatives of the Province present here this morning and the Province's legal advisors appear on a list which we have filed with the Registrar;
- To demonstrate the vital importance to the Province of Nova Scotia of this arbitration, the Premier, the Honorable John Hamm has decided that he would attend before the Tribunal today. The Premier will make the initial submission to the Tribunal on behalf of the Province.

Premier Hamm:

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2. **Division of Labour**

Today and tomorrow, my colleagues and I will present Nova Scotia's first round of oral submissions. In order that you can follow and indeed anticipate Nova Scotia's oral argument, I will outline, briefly, the division of labour between members of the Nova Scotia legal team.

- i) Initially, it will be my responsibility to provide the Tribunal with an overview of Nova Scotia's case. I will then review the precise mandate of your Tribunal as well as the law applicable to this phase of the present arbitration;
- ii) I will be followed at the bar by the Deputy Agent of Nova Scotia, Mr. Stephen Drymer, who will address the relevant events leading to and surrounding the conclusion in 1964 of the Agreement between the five East Coast provinces, including the Parties to the present arbitration: Nova Scotia and Newfoundland and Labrador;
- iii) Mr. Drymer will be followed by Mr. Jean Bertrand who will review the various aspects of the Parties' conduct – including the many pertinent meetings held, documents executed, provincial and federal legislation passed – during the period after the conclusion of the 1964 Agreement to the present;

- iv) Mr. Phillip Saunders will then refer the Tribunal to the conduct of the Parties to the 1964 Agreement, including Nova Scotia and Newfoundland, as manifested specifically by the issuance of oil and gas permits in their respective offshore areas, demonstrating their respect and application of the agreed line;
- v) Ms. Valerie Hughes will review the law and its application to the facts put in evidence by the Parties;
- vi) Finally, my colleague Mr. Jean Bertrand, in my absence on Tuesday afternoon, will conclude Nova Scotia's first round submission.

*Nota bene:* As members of the Tribunal are aware, in my capacity as an *ad hoc* judge on the International Court of Justice, I have been convened to The Hague for a meeting of the Court on Wednesday morning. Regrettably, and I mean no disrespect to the Tribunal, I must leave Fredericton at the conclusion of the hearing today and fly to The Hague overnight. I plan to return to Canada on Wednesday afternoon and, in the event that the ICJ and Air Canada cooperate with me, I will be present before the Tribunal at the opening of its session on Thursday morning.

3. Overview of Nova Scotia's Case

In this, the first, and, Nova Scotia is confident, the only phase of this arbitration, this Tribunal must 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. (T. of R. 3.2(i))

1. Thus, the present case is not, in essence, about a boundary. It is about an Agreement. An Agreement concluded nearly 40 years ago among the Governments of Canada's five East Coast Provinces, in good faith. An Agreement that has stood unchallenged and on which the five governments have relied since that time, to their benefit. An Agreement to which, today, one of the five governments, Newfoundland and Labrador, claims it never agreed.
2. As Nova Scotia demonstrated in its Memorial and Counter Memorial, the Agreement was concluded in 1964 and provided for the delimitation of the offshore areas of the five Provinces, including the line dividing the offshore areas of the Parties to the present arbitration, the Provinces of Nova Scotia and Newfoundland, in respect of the Provinces' rights to mineral resources. The Government of Newfoundland and Labrador now says that it never agreed to the line; the evidence, we submit, including of Newfoundland's conduct over the years, says otherwise.

3. The line in question is not a “Stanfield” line, or a “proposed” line, or a “purported” line, or a “Nova Scotia” line. It is the line, agreed to by the governments of five Provinces in the context of a binding agreement among all regional jurisdictions. It is the existing line, applied in practice by Nova Scotia and Newfoundland and incorporated into federal and provincial law. It is the line that the Parties to this arbitration have resolved by agreement.

**A. The Dispute**

4. The *Terms of Reference* establishing the Tribunal provide that the “dispute” in this case concerns portions of the line dividing the respective offshore areas of Nova Scotia and Newfoundland and Labrador.
5. The dispute arises in relation to the description of the term “offshore area” as set out in legislation enacted by the Parliament of Canada and the legislatures of the two Provinces. This legislation applies only to the petroleum and natural gas resources of the seabed and subsoil of the “offshore area” defined for each Province. It has no application to fisheries or to any other matters related to the water column.
6. At the outset, I will examine briefly the key provisions of certain instruments as they apply to the dispute that the Tribunal has been mandated to resolve, and I will describe the fundamental nature of the dispute itself.

i) **The Underlying Legislation**

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

7. In 1985 and 1986, respectively, the Government of the Province of Newfoundland and Labrador and the Government of Nova Scotia each concluded a bilateral *Accord* with the Government of Canada, establishing an administrative regime to govern the management of oil and gas exploration and development in its offshore area. Each of those *Accords* was subsequently implemented by means of “mirror” federal and provincial legislation.
  
8. The essential purpose of the two *Accords* and their implementing legislation was to set aside longstanding constitutional differences between the Provinces and the Government of Canada, regarding **jurisdiction** over the mineral and other resources of the seabed and subsoil of the waters offshore of each Province. To that end, each *Accord* and its corresponding legislation established a management and revenue-sharing regime administered by a joint federal-provincial “Offshore Petroleum Board”. The Boards enjoy specified authority over exploration and development in each of the Nova Scotia and Newfoundland offshore areas, including the authority to issue permits for exploration and exploitation purposes. The scope of the legislation, and thus the operations of the Boards that they establish, is limited to the “offshore area” as defined in each *Accord Act*.

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

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

Thence northeasterly in a straight line to a point at latitude 47°45’40” and longitude 60°24’17”, being approximately the midpoint between Cape Anguille (Nfld.) and Pointe de l’Est (Que.);

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

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

thence southeasterly in a straight line and on an azimuth of 135°00’00” to the outer edge of the continental margin.

10. The boundary defined in Schedule I of the 1988 *Canada-Nova Scotia Accord Act* is the very boundary between the respective offshore areas of Nova Scotia and



Newfoundland that had been established twenty-four years earlier, in the agreement concluded by the five Provinces of Nova Scotia, Newfoundland, New Brunswick, Prince Edward Island and Quebec on September 30, 1964.

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

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11. The *Canada-Newfoundland Accord Act*, in contrast to the *Canada-Nova Scotia Accord Act*, does not specify the limits of Newfoundland’s offshore area. It provides instead a generic definition of “offshore area”, leaving the precise definition to be “prescribed”. Section 2 (“Interpretation”) of the *Canada-Newfoundland Accord Act* states as follows:

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

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

12. To date, no “line” has been “prescribed” pursuant to that provision.

ii) **The History Of The Dispute**

13. The dispute in the present case was initiated by the Province of Newfoundland and Labrador in an effort to evade the obligations it willingly assumed in 1964 and to claim for itself a greater offshore area than that established in the *1964 Agreement*. As Premier Hamm stated earlier, the implications of this claim are profound. Newfoundland would ask the Tribunal effectively to undo the *1964 Agreement*, erase its agreed boundary with Nova Scotia – erase, indeed, **all** of the interprovincial boundaries agreed to by the five East Coast Provinces in 1964 – and thereby throw into disarray over 37 years of regional stability.

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14. In late 1997/early 1998, further to communications between the Governments of **Newfoundland** and Canada, the Federal Minister of Natural Resources determined that a dispute had arisen and put in place a process of consultations between the Parties to establish the *Terms of Reference*. (See Section 48 of the *Canada-Nova Scotia Accord Act* conferring authority on the Minister.) The central element of that process was akin to a mediation in which both provinces participated actively. At the conclusion of the mediation, the mediator submitted his report and recommendations to the Minister.
15. In the fullness of time, on May 31, 2000, after the lengthy consultations, the federal Minister of Natural Resources wrote to the Parties, advising them of his

decision to “establish an arbitration process with two distinct phases.” Attached to the Minister’s letter were the *Terms of Reference* governing the arbitration. Both the Minister’s letter and the *Terms of Reference* provide that, in Phase I, the Tribunal’s sole mandate is to determine whether a boundary **has been resolved by agreement.**

4. **Overview Of Nova Scotia’s Argument**

16. The argument for Nova Scotia can be simply stated.

17. In the Autumn of 1964, Nova Scotia and Newfoundland, together with New Brunswick, Prince Edward Island and Quebec, concluded a binding agreement, of immediate effect, providing for the division of those areas of the seabed adjacent to the five Provinces for the purpose of delimiting their respective rights to the mineral resources of those areas.

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18. The terms of the *1964 Agreement* are clear from the plain words of the contemporaneous documents evidencing the Agreement, and as interpreted with reference to their object and purpose. Those terms are also confirmed by the subsequent conduct of the Parties. First, the Agreement delimited the entire area

of the seabed adjacent to the East Coast Provinces that might be claimed by Canada under international law.

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19. Second, the Agreement established, accurately and completely, the boundary lines as between the five East Coast Provinces for all purposes relating to the exploration and development of offshore minerals, including arrangements with the federal government for sharing of jurisdiction and benefits, such as the *Canada-Newfoundland Accord* of 1985 and the *Canada-Nova Scotia Accord* of 1986.

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20. As demonstrated in our written pleadings, the *1964 Agreement* is evidenced by an extensive and authoritative documentary record that leaves no doubt that an Agreement was concluded and that all Parties intended it to be binding. Further, the conduct of the Parties subsequent to the conclusion of the *1964 Agreement*, over a period of nearly 40 years, evidences their consistent adherence to, and reliance upon, the boundaries established in the Agreement, in numerous contexts. The *1964 Agreement* has been applied by all of Canada's East Coast Provinces, including Newfoundland and Labrador, in both joint and unilateral assertions of jurisdiction, in legislation defining provincial offshore areas, in jurisdictional

agreements with the Government of Canada and in the issuance of permits for private exploration rights. It is abundantly clear that the Provinces understood that in concluding the *1964 Agreement* they undertook to be bound by its terms.

21. Nova Scotia's conduct has been clear, consistent and unequivocal: from the conclusion of the *1964 Agreement* to the present day, Nova Scotia has, in good faith, openly, and with precision, applied its boundaries as established in the *1964 Agreement* for all purposes relating to offshore mineral rights.
22. New Brunswick, Prince Edward Island and Quebec all continue to respect, apply and rely upon the boundaries established in 1964.
23. Of the five Parties to the *1964 Agreement*, only Newfoundland, and only relatively recently, has ever indicated that it does not consider itself bound by the *1964 Agreement* or suggested that the boundaries of its offshore area could be other than those established in the *1964 Agreement*. Nonetheless, the facts, set out and reviewed in our written briefs, clearly show that Newfoundland considered the *1964 Agreement* to be binding when it entered into it and applied the agreed boundaries in its own practice after the *1964 Agreement* was concluded. Indeed, Newfoundland still relies on the boundary when it is advantageous for it to do so, and has to Nova Scotia's knowledge never protested the consistent and public application by the other East Coast Provinces of the boundaries established in the *1964 Agreement*.

24. The facts show that the Government of Newfoundland agreed to the boundary as defined in the *1964 Agreement* and as legislated in the 1988 *Canada-Nova Scotia Accord Act*, and that it benefited from it over the years, both through the stability it provided in the development of the offshore oil and gas industry and because defined boundaries were considered to be the *sine qua non* of the Provinces' claims, as against the Government of Canada, to jurisdiction over the offshore. Now, however, Newfoundland and Labrador has decided that it would prefer a line other than the one it agreed to in 1964.

5. **What This Case Is Not About**

25. The case is only about delimiting Nova Scotia's and Newfoundland's respective rights under the **existing, valid** regime of joint Federal-Provincial administration and revenue sharing which I referred to earlier. It is not, as Newfoundland argues, about the Canadian Constitution, it is not, as Newfoundland menacingly submits, about Parliamentary supremacy.

26. In its selective account of the history of the development of interprovincial offshore boundaries, Newfoundland, in its pleadings, concentrates almost exclusively on the **federal-provincial** dimension of the issue. By doing so, Newfoundland seeks to divert attention from the **interprovincial** relationships and agreements – including the relationship and agreement between Nova Scotia and Newfoundland – that must be the **true focus** of the arbitration. The question

the Tribunal has to determine, whether the Nova Scotia/Newfoundland boundary “has been resolved by agreement”, obviously refers to an agreement **between the Parties** to the present arbitration, not to an agreement between the provinces and the federal government.

27. Newfoundland’s tunnel vision pervades its Memorial and Counter Memorial. For example, its account of the critical events of 1964 is largely restricted to a discussion of the October 1964 *Joint Submission* presented by the Provinces to the federal government. The actual interprovincial Agreement concluded on September 30, 1964, on which the *Joint Submission* was itself in part based, is in turn, misinterpreted or treated to only passing reference. Newfoundland goes to great lengths to confuse the two events, holding out the *Joint Submission* as the Agreement by which, it says, Nova Scotia argues that the Provinces determined their offshore boundaries. It then purports to analyse whether the *Joint Submission*, standing alone, constitutes a binding interprovincial agreement – which of course it does not. Having asked the wrong question, Newfoundland naturally reaches the wrong conclusion.
28. Newfoundland’s blinkered approach is also reflected in the evidence it proffers regarding the Parties’ conduct subsequent to 1964. The Newfoundland briefs – especially its Memorial – reveal an obsessive and unhelpful reliance on the views of federal officials and politicians as to the supposedly non-binding nature of the

*1964 Agreement*. Yet these statements are reflective only of the federal view that, until the federal government agreed, the Provinces' claim to ownership of the offshore and the interprovincial boundaries that they asked the federal government to recognise were not **opposable to the federal government**. What Newfoundland fails to overcome in its Memorial and Counter Memorial is the overwhelming evidence that **the Provinces** – the Parties to the *1964 Agreement* – regarded their boundaries as binding **between themselves** and that they acted accordingly for more than 3 decades.

29. Finally, Newfoundland grossly exaggerates both the nature of the Agreement that is at issue in this case and the impact of the Tribunal's decision, suggesting that matters such as legislative supremacy are in question. In fact, (it bears repetition) the Tribunal has been tasked by the Government of Canada solely to determine whether the boundary between the offshore areas of the Provinces of Nova Scotia and Newfoundland and Labrador "has been resolved by agreement", for the purposes of the *Accord* legislation – **and for no other purpose**. A finding, as requested by Nova Scotia, that that boundary **has** been resolved by agreement, will not constitute, once the Tribunal's award is translated into law, an alteration of the Provinces' boundaries as set out in Canada's Constitution. Nor will it encroach in any manner on the principle of the supremacy of Parliament. It will merely determine – as the Tribunal has been asked to do by the Government of



Canada – one aspect of the Provinces’ respective rights and obligations arising under **existing, valid administrative arrangements**.

30. Newfoundland, in its pleadings, erects a straw man – it construes the “agreement” that it says Nova Scotia must prove exists as **an agreement between the Provinces and Canada, binding under domestic Canadian law** – and then proceeds to knock it down, by showing that such an agreement was not concluded. This exercise is completely beside the point.

31. Canada is not a party to this dispute or to the present arbitration, and the law applicable to the arbitration, as I will demonstrate presently, is not Canadian but international law. The question at issue in the arbitration is not whether Canada agreed with the Provinces, but **whether the Parties agreed, between themselves**, on the line dividing their respective offshore areas.

32. I will now turn to the mandate of your Tribunal and the law applicable to this Phase of the Arbitration.

## 6. The Mandate Of The Tribunal

33. Before I consider the mandate of the Tribunal in the first phase of the arbitration and, in particular, the application of principles of international law to the dispute to be resolved, it is useful to highlight two fundamental characteristics of

international maritime boundary delimitation. First, in the vast majority of cases, the maritime boundaries between and among States are determined by agreement of the States concerned. Second, the case law of the International Court of Justice and other international tribunals on maritime boundaries is overwhelmingly concerned with those atypical cases in which agreement between States has not been possible.

34. It is not surprising that States prefer to negotiate boundary agreements rather than rely on adjudication to delimit their maritime areas. In a negotiation, the parties are able to assess their own positions and make those compromises and trade-offs that they determine best reflect their interests. The give and take of negotiations, and the unique nature of agreements concluded as a result of such a process, cannot be duplicated by a tribunal in an adversarial proceeding. This is particularly the case where, as is the case with the *1964 Agreement*, multiple parties are involved. Given these advantages, it is also not surprising that international law accords precedence to boundaries resolved by agreement, and that international tribunals are reluctant to substitute their judgement for the freely expressed will of the parties.
35. Where there is no agreed boundary in place, international tribunals are called upon either to create a boundary or to instruct the parties as to the appropriate principles upon which such a boundary should be negotiated. The body of

international law that has developed around maritime boundary delimitation is, as a result, largely concerned with the principles that govern the drawing of a boundary *tabula rasa*.

36. This arbitration is very different. It is **not a typical case** of maritime boundary dispute submitted to a tribunal for adjudication. What is typical, and in fact quite representative of State practice, is that the Parties have actually negotiated a delimitation. In this case, however, the dispute arises because one party, the Government of Newfoundland, seeks to disavow that Agreement. The Tribunal, therefore, is asked to determine a boundary where the slate is **not** clean. As a result, the *Terms of Reference* defined by the Minister require this Tribunal first to adjudicate on the validity of the boundary established by the parties' Agreement.

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

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

ARTICLE THREE

THE MANDATE OF THE TRIBUNAL

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

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- 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.

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

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38. The sole question to be determined by the Tribunal in the first phase of the arbitration is “whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.” This is **the only** issue in dispute and constitutes the full extent of the Tribunal’s jurisdiction at this time. Once the question “whether the line ... has been resolved by agreement” is answered in the affirmative, that resolves the dispute. Only if it is determined that there is no agreement, would the Tribunal acquire a mandate to determine, in a second, separate phase, **how** the boundary should be drawn.
39. If the parties agreed upon a delimitation, the *Terms of Reference* explicitly require that the Tribunal defer to the Parties regarding the merits of that delimitation. Indeed, insofar as the line has been resolved by agreement, there is no need – and no justification – for the Tribunal to search for the rationale of the agreed line or to examine whether it is equitable. Once the Parties have determined a line, it is to be assumed that they regard it as equitable.

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

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40. In answering the question “whether the line ... has been resolved by agreement,” the *Terms of Reference* require the Tribunal to apply “the principles of

international law governing maritime boundary delimitation with such modification as the circumstances require ... as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.”

41. The *Terms of Reference* mandate that the Tribunal shall answer the question raised in Article 3.2(i) (first phase), as well as, if necessary, the question raised in Article 3.2(ii) (second phase), “in accordance with Article 3.1.” That is, the Tribunal is required to resolve all aspects of the dispute by “[a]pplying the principles of international law governing maritime boundary delimitation ...”

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42. Because the Provinces of Nova Scotia and Newfoundland are not subjects of international law, however, the *Terms of Reference* also expressly provide that international law shall apply “as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.” In other words, the nature and effect of the Parties’ conduct **throughout the relevant period** is to be viewed through the prism of international law. The question to be answered in the first phase, therefore, in accordance with Article Three of the *Terms of Reference*, is **whether two states which conducted themselves as have Nova Scotia and Newfoundland would be found to have**

resolved their mutual boundary by a binding agreement as defined by international law.

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43. The *Terms of Reference* were, of course, determined in accordance with the underlying legislation, federal and provincial, implementing the *Canada-Newfoundland Accord* and the *Canada-Nova Scotia Accord*. All of these instruments mandate that where a “dispute” arises “in relation to ... any portion” of the line (*CDA-NS Act*, s. 48(2)),

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or “in relation to a line or portion thereof” (*CDA-N&L Act*, s. 6(2)) the dispute shall, if necessary, be referred to arbitration.

44. Clearly – the present dispute, “whether the line has been resolved by Agreement” is a dispute “in relation to a line” (or “portion thereof”).
45. And where a dispute “in relation to the line” is referred to arbitration, the legislation is unequivocal: “where the procedure for the settlement of a dispute ... involves arbitration, the arbitrator shall apply the principles of international law governing maritime boundary delimitation ...” (*CDA-NS Act*, s. 48(4) and *CDA-N&L Act*, s. 6(4)). Thus there can be no question but that

the Tribunal must apply international law – to the exclusion of domestic law – to resolve the present dispute.

46. Indeed, by the terms of their respective *Accords* and provincial implementing *Acts*, the parties have, therefore, expressly consented to the choice of international law as the governing law of the arbitration.

47. In sum, the Tribunal is asked to determine whether, on the facts of this case, two sovereign States would be found to have concluded a binding agreement at international law regarding the boundary dividing their offshore areas.

7. **Newfoundland Is Wrong Regarding The Applicable Law**

48. In our submission, the most fundamental and pervasive error in the Newfoundland Memorial and Counter Memorial is its contention regarding the law applicable to the arbitration.

49. In view of the clarity and conclusiveness with which, as discussed, the legislation and Terms of Reference deal with this issue, we do not believe that the Tribunal need spend much time considering the matter. However, we are prepared to address, as we have done in our Counter-Memorial, Newfoundland's arguments in this regard.

50. The Newfoundland Memorial concludes that "Canadian law ... is the applicable law for the determination of the question before the Tribunal in Phase One."



51. The reasoning underlying this assertion would result in the complete subversion of the *Terms of Reference* and of the *Accord Acts*, all of which require that the dispute be resolved according to principles of international law.

**B. The Applicable Law Is International Law**

52. Newfoundland's argument on the matter of applicable law boils down to one, fundamentally misguided, proposition: that the *Terms of Reference* "**provide no specific guidance on the applicable law for the question in Phase One.**" This proposition is manifestly wrong.

53. Newfoundland's reasoning relies, first, on the assumption of a non-existent distinction between delimitation **by application of principles of international law** and delimitation **by agreement**, and, second, on a reading the *Terms of Reference* so extraordinarily selective as to constitute, in effect, a wholesale rewrite of the Tribunal's mandate.

**i) The False Distinction Between "Delimitation Under International Law" And "Delimitation By Agreement"**

54. Newfoundland claims that the issue in the first phase of the arbitration – whether the Nova Scotia-Newfoundland boundary has been resolved by agreement – is somehow distinct from the Tribunal's overall mandate to determine, in

accordance with international law, the line dividing the parties' respective offshore areas.

55. It is obviously true that, in the first phase of the arbitration, the Tribunal shall determine “whether the line dividing the respective offshore areas of Newfoundland and Labrador and Nova Scotia has been “**resolved by agreement**”.” What is patently incorrect, however, is Newfoundland’s assertion that this task does not require the Tribunal to apply “the principles of international law governing agreements.”
56. As the International Court of Justice declared in the *North Sea Continental Shelf Cases*, delimitation by mutual agreement and delimitation in accordance with equitable principles, as enunciated in the Truman Proclamation, “have underlain all the subsequent history of the subject” of maritime boundary delimitation.
57. The 1958 *Geneva Convention on the Continental Shelf* and the 1982 *United Nations Convention on the Law of the Sea* enshrine the rule that delimitation of the continental shelf between States with opposite or adjacent coasts “shall be determined by agreement between them” and “shall be effected by agreement on the basis of international law ...” It is only if there is no agreement between the States concerned that the delimitation is effected by other means.

58. In addition, the 1982 *United Nations Convention on the Law of the Sea* provides that “where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.”

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59. The concept of “mutual agreement” was recognised as integral to the international law of maritime boundary delimitation as well by the Chamber of the International Court of Justice in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*. In its statement of the “fundamental norm” of maritime boundary delimitation, the Chamber found as follows:

No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result.

60. The notion that a delimitation by agreement of the Parties is not a subject-matter encompassed by the international law governing maritime boundary delimitation is without any foundation; and of course the Newfoundland briefs offer not a single authority to support its claim in this regard. In fact, the authorities are categorical: the delimitation of maritime boundaries **by agreement** is part and

parcel of the international law governing maritime boundary delimitation. Newfoundland's claim to the contrary is wrong.

ii) **Newfoundland Ignores The Plain Words Of The *Terms of Reference***

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61. The extraordinary exercise in exegesis on which Newfoundland's argument is based is, in fact, absolutely unnecessary. As I have submitted, the *Terms of Reference* are unequivocal; they do not distinguish, as Newfoundland wishes to do, between the law applicable to the first phase of the arbitration and the law applicable to the second phase of the arbitration. Having engaged in such an exercise, however, Newfoundland obliges both Nova Scotia and the Tribunal to follow suit, and to dissect what are patently transparent terms.
62. As I have argued, there is not the slightest ambiguity in the *Terms of Reference* regarding the applicable law, nothing whatsoever to suggest, as does Newfoundland, that international law would be applicable in the second phase of the arbitration but is somehow **not** applicable in the first phase.
63. Nonetheless, from the false distinction between a maritime delimitation resolved by international legal principles and a maritime delimitation resolved by agreement of the Parties, Newfoundland arrives at the conclusion that the *Terms*

*of Reference* are in fact **silent** regarding the law applicable in the first phase of the arbitration. And it goes further, arguing that since international law does not regulate agreements between sub-units of States, there is in effect no “international law” that could apply in this phase of the arbitration.

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64. The trick of course is that, even as it refers to “the *Terms of Reference*“, Newfoundland makes the words of Article 3.1 effectively disappear. Read in its entirety, however, Article 3.1 of the Terms of Reference leaves not the slightest room for doubt regarding the law applicable to the Parties in this dispute.

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.**

65. The illusion that Newfoundland tries to create is thus dispelled, in an instant, upon reading the final words of this passage, the meaning of which is clear yet the existence of which is nowhere indicated in the Newfoundland written briefs: international law is the governing law of the arbitration, and it applies to the Provinces of Nova Scotia and Newfoundland and Labrador in this case “**as if [they] were states**” **at all relevant times.**

**iii) The Status Of The Provinces Is Not A Circumstance Requiring Modification Of The Applicable Law**

66. Both the Nova Scotia and the Newfoundland *Accord Acts*, as well as the *Terms of Reference*, provide for the application of international law “with such modification as the circumstances require.”
67. Newfoundland, in its pleadings, uses these words as a wrecking ball, to demolish all distinction between fact and fiction in this case.
68. The only “circumstance” alluded to by Newfoundland as “requiring” the application of domestic Canadian law to the arbitration is the supposed “lack of any body of international law regulating agreements between sub-units of states.” In the particular circumstances of this case, however, this is not an issue. This argument misses the point altogether and, yet again, evidences, on the part of Newfoundland, an obstinate refusal to read and be bound by the plain words of the *Terms of Reference*.
69. The *Terms of Reference* anticipate and deal conclusively with the matter. As we saw, they provide that for purposes of the arbitration, and specifically as regards the law applicable to the determination of whether the Nova Scotia-Newfoundland boundary has been resolved by agreement, the Parties are not regarded as sub-units of a state, but as **States**. Nothing could be clearer.

70. In a final effort to justify the application of Canadian law to this case, Newfoundland attempts to invoke the notion that international law itself provides a convenient “renvoi” to domestic law.
71. Newfoundland seeks to rely on the doctrine of intertemporal law, contending in this regard that the intent of the Parties with respect to the *1964 Agreement* must be considered in the light of the “particular circumstances” of the case; and “the important circumstance” is – **again** – the fact that the Parties are Provinces of Canada as opposed to sovereign States.
72. Newfoundland’s arguments are, here too, completely beside the point. As already mentioned, the *Terms of Reference* state plainly the law to be applied by the Tribunal and settle conclusively the matter of the Parties’ status. The framework for the arbitration imposed by the *Terms of Reference* may be unique; as regards the matter of applicable law, it is also both coherent and complete.
73. The law applicable to the arbitration is international law. For the purpose of the arbitration, and specifically for the purpose of applying international law, the Parties are regarded as States. This is as true for the first as for the second phase of the arbitration, in the unlikely event that a second phase proves necessary. The mandate of the Tribunal is to determine, in the first phase, whether the Nova Scotia-Newfoundland boundary has been resolved by agreement, applying the

principles of international law and assuming, for that purpose, that Nova Scotia and Newfoundland were States at all relevant times.

iv) **Newfoundland Proposes Rewriting The *Terms Of Reference***

74. The application of Canadian domestic law to the arbitration, as proposed by Newfoundland, would constitute something altogether different from a “modification” of the principles of international law. The word **modification** is defined in the *Oxford English Dictionary* as “the action of making changes in an object without altering its essential nature or character,” and in *Webster’s Third New International Dictionary* as “the act of limiting the meaning or application of a concept . . . the act or action of changing something without fundamentally altering it”. Applying Canadian domestic law to determine any aspect of this dispute would not constitute a modification, it would be fundamentally at odds with the *Terms of Reference* and with the legislation from which they were derived.

75. Ultimately, what Newfoundland proposes is that the Tribunal in effect *rewrite* the *Terms of Reference*. This, of course, the Tribunal may not do, any more than a party may substitute its own choice of law for that laid down in the *Terms of Reference*.

[SLIDE 21]



76. It is thus abundantly clear that, for purposes of the present arbitration, your Tribunal is constituted as a **true international Tribunal** whose mandate consists in resolving a dispute between two Parties who are not sub-units of a federal state but **rather sovereign states**.
  
77. As such, your decision will be welcome by the international legal community as a significant and important addition to the long history of the law of maritime delimitation.