NEWFOUNDLAND AND LABRADOR – NOVA SCOTIA

Case Concerning The Line Dividing Respective Offshore Areas

APPLICATION OF THE LAW TO THE FACTS

Submissions by

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Over the past two days my co-counsel have set out the facts and reviewed the evidence filed by both Parties to the arbitration. My task is to discuss the applicable law.

In doing so, I will demonstrate that applying the law to the facts of this case leads inevitably to the conclusion that the line dividing the respective offshore areas of Newfoundland and Nova Scotia has been resolved by agreement.

Burden of Proof

A brief word about burden of proof. Newfoundland has suggested that the burden of proof lies on Nova Scotia throughout. In fact, that is not so. The burden of proof, as a matter of law, rests with the party that asserts a particular fact. Nova Scotia maintains that the line has been resolved by agreement. It was for Nova Scotia to prove its assertion and it has, in our submission, met that burden.

Newfoundland must meet the burden of proving its assertions. In paragraph 4 of Newfoundland's Memorial, Newfoundland asserts that it will establish that there was no agreement on the line dividing the offshore areas between Newfoundland and Nova Scotia. Newfoundland alleges that the provinces merely agreed on a negotiating position in order to assist their claims to jurisdiction vis-à-vis Canada. Newfoundland has failed to meet its own standard, and has failed to meet its burden of proof in this arbitration.

In any event, the important point is this – the Tribunal has a clear mandate: it must determine, regardless of the burden of proof, whether the line dividing the

offshore areas between Newfoundland and Nova Scotia has been resolved by agreement.

Applicable Law is International Law

As explained yesterday by Mr. Fortier, the applicable law is international law governing maritime boundary delimitation, with such modification as the circumstances require.

The parties to this arbitration are deemed to be States, and it is international law that governs the relations between States. Domestic law, by definition, does not.

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The words of Sir Gerald Fitzmaurice, taken from an article cited by Newfoundland in its Counter-Memorial, are instructive. Sir Gerald wrote:

> National law is not and cannot be a rival to international law in the international law field, or it would cease to be national and become international, which, *ex hypothesi*, it is not. National law, by definition, cannot govern the action of or relations with other States.
>
> [Annex 162: H. Thirlway, "The Law and Procedure of the International Court of Justice, 1960 – 1989" (1989) Brit. Y. B. Int'l L. 60 at 114, n. 406.]

The *Terms of Reference* are abundantly clear: the Tribunal must decide the question before it "applying the principles of international law governing

maritime boundary delimitation with such modification as the circumstances require ... as if the parties were states ... at all relevant times."

It must be borne in mind that the *Terms of Reference* were determined following more than a year of negotiations. Its terms are deliberate. They did not come out of the blue. Moreover, the *Terms of Reference* are derived from the legislation, federal and provincial, implementing the *Accords*. The Parties have provided in their own legislation that the applicable law is international law governing maritime boundary delimitation is the applicable law.

International Law Governing Maritime Boundary Delimitation

Newfoundland seeks, albeit inconsistently, to have this Tribunal confine itself to but a **part** of the international law governing maritime boundary delimitation.

It argues that 'principles of international law governing maritime boundary delimitation' is restricted to a:

> body of law [that] includes relevant circumstances, equitable principles, natural prolongation, non-encroachment and proportionality, and a range of methods leading to an equitable result. (NF CM, para. 100)

I would mention in passing that Newfoundland does not confine its own arguments to these matters, for it seeks to rely on the doctrine of intertemporal law, although incorrectly in Nova Scotia's submission.

But leaving that aside for the time being, let's come back to Newfoundland's definition of 'principles of international law governing maritime boundary delimitation.'

Newfoundland of course wants the Tribunal to confine itself to its interpretation because Newfoundland wants you to believe there is a legal vacuum – to throw up your hands and make up your own rules on the applicable law for this phase – perhaps the only phase – of the arbitration. In other words, if all you have to rely upon is non-encroachment and proportionality and equidistance, you will be hard pressed to apply those so-called "principles" to make your decision as to whether or not the line has been resolved by agreement. Newfoundland offers its solution – ignore the *Terms of Reference* and apply Canadian domestic law.

The problem with Newfoundland's approach, as explained by Fortier yesterday, is that it contravenes the *Terms of Reference* and their underlying legislation.

Moreover, Newfoundland's definition of international law governing maritime boundary delimitation is in marked contrast to the position of the International Court of Justice, as well as of other international tribunals.

This is borne out by a number of cases, but let's look for example at the *Gulf of Maine* case. There, in considering what law it should apply to decide the delimitation before it, the Chamber of the Court said that "equitable criteria ... are not in themselves principles and rules of international law" and it drew an "essential" distinction between the principles and rules of international law, and the methodology and criteria used to ensure a result in accordance with those rules and principles. The Chamber said:

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> It seems above all essential to stress the distinction to be drawn between what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules in question.
>
> [Annex 106: *Gulf of Maine* case, para. 80]

So what is the law that a court or tribunal must apply in a delimitation case? What is meant by 'international law governing maritime boundary delimitation'?

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The *Gulf of Maine* Chamber explained that "in its reasoning on the matter, [it] must obviously begin by reference to Article 38(1) of the Statute of the [International Court of Justice]" [*Gulf of Maine* case, para. 83], which of course sets out the sources of international law.

The Chamber proceeded to review those sources --- conventions, international custom, and the decisions of the Court and other international tribunals. At the end of its review, the Chamber formulated, as Mr. Fortier pointed out yesterday, what the Chamber called the "fundamental norm" of maritime boundary delimitation:

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> 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.
>
> (NS CM, II-4; Annex 106: *Gulf of Maine* case at 299).

This is as true today as it was when the Chamber of the Court formulated the fundamental norm in 1984. Indeed, customary law on continental shelf delimitation as codified in Article 83 of the Law of the Sea Convention provides:

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Delimitation of the continental shelf
between States with opposite or adjacent coasts

1. The delimitation of the continental shelf between States ... shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

[NS CM II-2, Annex 82]

Newfoundland seeks to have the Tribunal confine itself to applying "equitable criteria and practical methods" used in maritime boundary delimitation. But

to do so would be to defy the law, for making a decision applying the principles of international law governing maritime boundary delimitation is not a technical task restricted to the expertise of hydrographers or cartographers. It is a legal exercise, involving a thorough review of the relevant international law, including conventions, customary law, decisions of courts and tribunals and the teachings of the most highly qualified publicists.

An examination of those sources reveals, as stated by the Chamber in the *Gulf of Maine* case and in Nova Scotia's Memorial and Counter-Memorial that the most fundamental aspect of the law of maritime boundary delimitation is that such delimitation must be effected by agreement.

So what does this mean for our case?

Let's return to Article 83 of the LOS Convention, which also provides:

> 4. 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.
>
> [Annex 82]

Application of the law of maritime boundary delimitation must therefore begin with an inquiry as to the existence of an agreement on the matter. And if there is one, it must of course be analyzed to determine its import. It is the international law on agreements that informs such an analysis.

International law governing maritime boundary delimitation, therefore, undoubtedly includes international law governing agreements. These

principles are part and parcel of the international law governing maritime boundary delimitation.

Indeed, we have seen that the international courts and tribunals have adopted this very approach – that is, relying on the international law of agreements -- in several delimitation cases, including in the *Aegean Sea Continental Shelf* case [Greece v. Turkey, 1978], the *Jan Mayen* case [Denmark v. Norway, 1993], *Botswana* v. *Namibia* [1999], and *Guinea - Guinea Bissau* [1985].

Contrary to Newfoundland's assertions, there is no legal vacuum in this case. The Tribunal need not confine itself to "equitable principles" and "methods of delimitation." The applicable law in this case, the law governing maritime boundary delimitation, includes the law on international agreements.

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In sum:

(1) international law governing maritime boundary delimitation gives pride of place to resolving the matter through agreement between the parties;

(2) the law governing maritime boundary delimitation includes the law governing international agreements;

(3) there is no legal vacuum in this case.

<u>The Law on International Agreements</u>

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I will now move to an examination of the law on international agreements and will demonstrate that the law supports Nova Scotia's position that the line

dividing the respective offshore areas of Newfoundland and Nova Scotia has been resolved by agreement.

(a) Procedural Conditions

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Nova Scotia stated in its Memorial that three procedural conditions must be met in order to conclude an international agreement. [NSM, III-6, n. 23]

The agreement must be:

(1) concluded between States;

(2) governed by international law; and

(3) concluded by representatives authorized to bind the parties.

The *1964 Agreement* meets all three criteria.

The first two conditions, of course, are met by virtue of *Terms of Reference*. As for the third criterion, there is no question about the capacity of the representatives who entered into the Agreement on behalf of the parties. The *1964 Agreement* was concluded by Premiers, heads of government – equivalent to heads of State for the purposes of this arbitration. Under international law, heads of government do not require any special authority to bind their States.

To quote Professor Brownlie:

> Heads of state, heads of government, and Foreign Ministers are not required to furnish evidence of their authority.
>
> (NSM, III-6, note 23; Annex 88.]

The same principle was enunciated in the *Nuclear Tests* cases, where acts of the President of France were considered as acts of the French State.

> Of the statements made by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State.
>
> [Annex 93 at 269.]

So the three procedural conditions for the existence of an international agreement have been met.

(b) Form of Agreement

What about the form of an international agreement?

As Nova Scotia demonstrated in its Memorial [III-3, III-4], international law requires no particular form for binding agreements. An international agreement

does not have to be in writing -- an oral agreement can be binding. An international agreement does not have to be signed. Even a unilateral declaration can constitute an international agreement.

This is a fairly well-settled principle, enunciated in numerous cases – *Legal Status of Eastern Greenland*, *Nuclear Tests*, *Aegean Sea*, *Qatar* v. *Bahrain* to name a few. The Tribunal will no doubt be familiar with the following words of the Court from the *Nuclear Tests* case:

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> With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements.
>
> (*Nuclear Tests* case, NSM, Part III-4; Annex 93 at 267]

Canada seems to favour the exchange of notes format for concluding international agreements, but its practice includes all manner of forms, including very formal agreements, agreed minutes, declarations, joint statements, and *procès verbal*. [Gotlieb, NSM III-3, n. 8]

International agreements are thus evidenced in a variety of ways. In this case, the *1964 Agreement* is not expressed in a formal, single, written agreement signed by all the parties. Rather, it finds expression in several documents, in the circumstances of its conclusion and in the subsequent conduct of the parties to the agreement, including both parties to this case.

(c) Intent to be bound

The fundamental requirement for the conclusion of a binding agreement at international law is not a matter of form, but of the intention of the parties to be bound.

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Lord McNair put the rule this way:

> 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.
>
> [NSM, III-7, Annex 86 at 15.]

Newfoundland has also argued that intent to be bound is fundamental.

So the Parties are agreed: intent is the key. The Parties disagree, however, as to how to determine the parties' intentions. More precisely, Newfoundland denies that the methods offered by Nova Scotia, including examination of the plain words of the Agreement, its context, its object and purpose and the subsequent conduct of the parties, can assist in determining the parties' intent.

In this, Newfoundland is just plain wrong.

Indeed Newfoundland does not appear to sanction any method for determining the parties' consent to be bound, other than through the formal methods described in Article 11 of the *Vienna Convention on the Law of Treaties*, including signature, ratification or accession. [NF Statutes # 10]

But we know that Newfoundland's view cannot be correct, because that would imply that international agreements must be expressed in written form, a proposition we know to be at odds with the law.

In fact it is well established that international law does not require consent to be bound to be expressed in any particular form. [*Vienna Convention on the Law of Treaties*, Article 11.]

So what does international law stipulate about determining parties' intentions to create international legal obligations?

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In *Oppenheim's International Law*, Jennings and Watts put the matter succinctly: they state that the existence or otherwise of the intent to be bound is "determined in the light of all the circumstances of each case."

(NSM IV, para. 5, n. 9; Annex 108: *Oppenheim's International Law* at 1202).

Paul Reuter recognized that consent to be bound may be expressed in different ways; he said such intention may be "derive[d] merely from an oral declaration, an act or particular conduct." (NF Authorities # 19 at 55)

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Sir Gerald Fitzmaurice's writing was in the same vein. He said:

> ... the question of determining *whether* the instrument concerned does or does not create or give rise to binding legal obligations ... is partly a question of interpretation (of the text itself) and partly a question of substance that may depend on considerations extraneous to the actual text ...
>
> [footnote omitted] [emphasis in original]
> [Annex 164: G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" (1957) 33 Brit. Y. B. Int'l L :. 203 at 230.]

Sir Gerald addressed the issue of evidence of a party's intentions in his Separate Opinion in the *Temple of Preah Vihear* case. The following excerpt appeared in Nova Scotia's Memorial:

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> It is a general principle of law, which has been applied in many contexts, that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence – in relation to the same or closely connected matter – of his attitude, state of mind or intentions at an earlier date also; ...Similarly – and very important in cases affecting territorial

> Sovereignty – the existence of a state of fact, or of a situation, at a later date, may furnish good presumptive evidence of its existence at an earlier date also
>
> ....
>
> (Annex 102, NSM, III-11.]

In the *Aegean Sea Continental Shelf Case*, the ICJ ruled that the actual terms of the agreement and the particular circumstances in which it is drawn up are an indication of whether an international agreement has been entered into. The Court said:

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> ... whether the Brussels Communiqué does or does not constitute [an international agreement] essentially depends on the nature of the act or transaction to which the Communiqué gives expression... In determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, **the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.**
>
> [emphasis added][NSM III-5; Annex 91 at 638]

In order to determine whether there was an intent to create a binding obligation through the Communiqué, the Court analyzed the terms of the Communiqué itself, and considered the parties' positions on the import of those terms.

In addition, in considering what it referred to as the "context" in which the Communiqué was drawn up, the Court reviewed diplomatic notes and exchanges between the governments concerned in the months **prior to** and **after** the issuance of the Brussels Communiqué. [Annex 91, paras. 95 – 107.]

In the *Nuclear Tests* cases, the Court found that public declarations made by senior French Government officials and by the French President were binding on France, because, the Court said, France **intended to be bound** by its commitment to stop atmospheric testing.

The Court considered significant, in determining whether or not there was intention to be bound or to create legal obligations, the identity of the person making the statement on behalf of the State, as well as the public nature of the statement. These are the Court's words:

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> There can be no doubt, in view of [the President's] functions, that his public...statements ... as Head of State, are in international relations acts of the French State. ... Thus in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.
>
> (...)
>
> ... It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are

> clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect.
>
> [Annex 93 at 269]

This brief review of the writings of publicists and the decisions of international tribunals reveals that international law confirms Nova Scotia's approach to ascertaining the parties' intention to create binding legal obligations. In other words, having regard to the terms of the *1964 Agreement*, as evidenced in various documents, and the circumstances of its conclusion, the object and purpose of the Agreement, as well as the conduct of the five East Coast Provinces subsequent to the conclusion of the *1964 Agreement*, provides a highly reliable means of interpreting whether the East Coast Provinces, and in particular the Parties to this case, intended to create binding legal obligations.

Having confirmed that Nova Scotia's approach to ascertaining binding intent is consistent with international law, let us now turn to that analysis as it relates to the facts of this case.

(1) The Terms of the *1964 Agreement* and the Circumstances of Its Conclusion

Consider first the terms of the documents evidencing the *1964 Agreement* and the circumstances of its conclusion.

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The contemporary written evidence of the *1964 Agreement* referred to yesterday by Mr. Drymer is overwhelming, both in terms of its extent and consistency.

I do not propose to repeat what you have already heard about those documents and would simply recall that the documents evidencing the *1964 Agreement* includes:

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(1) The *Communiqué* issued by the Premiers following their meeting on September 30, 1964 recording that the Premiers "unanimously agreed" that the boundaries described by metes and bounds be the boundaries of the provinces;

(2) The *Matters Discussed* memorandum recording the Premiers' agreement on boundaries;

(3) The correspondence from the Premier of Québec confirming his government's agreement to the boundaries; and

(4) The *Joint Submission* presented to the federal government.

An analysis of the terms of the Agreement is straightforward in this case: the repeated declarations that the Provinces had "agreed" their boundaries reveal the parties' clear intention to create binding obligations in terms of the boundary delimitation.

Turning to the circumstances of the conclusion of the *1964 Agreement*, the Tribunal will of course be aware that, sometimes, governments make statements prior to or upon adopting a text of an instrument indicating that

they do not intend to undertake legal obligations. (See, for example, statements made in connection with the adoption of the Universal Declaration of Human Rights). (Annex 108: *Oppenheim's*, p. 1202].

In the case of the *1964 Agreement,* the opposite sentiment is strikingly apparent.

The Premiers' agreement was announced publicly, immediately after their meeting in an official *Communiqué.* In addition, the fact of their Agreement was officially conveyed to the Government of the Province of Quebec a few days later, and then to the federal government two weeks later at a conference attended by the Prime Minister of Canada and all Canadian provincial premiers. The provinces even asked to have their boundaries enshrined in the Constitution, a sure sign of their commitment to them.

Newfoundland suggests that this evidence – the terms of the documents evidencing the *1964 Agreement* and the circumstances of its conclusion -- is consistent with its own theory that the parties agreed on a proposal, nothing more. My colleagues have already demonstrated that the record does not support that position. Indeed, neither does the law.

International law puts boundary treaties on a special footing; they are not of the character of policy statements or political undertakings. They are, by their very nature, of a more permanent quality.

In the *Temple of Preah Vihear*, the Court said that "[I]n general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality." [Annex 96 at 34]

Professor Bowett has described the boundary treaty as the "dispositive treaty *par excellence*." [NSM, IV-5]

The special quality of boundary agreements is also recognized in the fact that they normally survive State succession, and that they are excluded from the operation of the "fundamental change in circumstances" rule in Article 62 of the *Vienna Convention on the Law of Treaties*. [NSM IV-6]

(2) Object and Purpose of the *1964 Agreement*

The object and purpose of the *1964 Agreement* is relevant in ascertaining an intention to be bound.

Mr. Drymer referred yesterday to one very practical reason for agreeing on maritime boundaries in 1964. As he mentioned, oil companies were keen to start exploring the continental shelf off the Atlantic Coast. The economic benefits of such development were obvious, and the East Coast Provinces believed the mineral resources of the seabed belonged to them. It was not for some years that the Supreme Court of Canada would decide otherwise (at least as far as Newfoundland is concerned). [NSM II-1]

One object of the Agreement, therefore, was to secure among the Provinces mutual recognition of their rights to grant permits to the oil and gas companies in their respective zones. It was to provide for some stability in the offshore oil and gas regime, with a view to securing economic benefits for the Provinces. These aims would have been frustrated had the boundaries established by the Agreement been anything other than binding.

(3) Subsequent Conduct of the Parties to the *1964 Agreement*

The conduct of the east Coast Provinces subsequent to the conclusion of the *1964 Agreement* has been reviewed in detail by Mr. Bertrand and Mr. Saunders. I do not of course propose to go back into the details of that conduct.

I would say only this in terms of how that subsequent conduct relates to intention to be bound. From the moment the Agreement was concluded in September 1964, Nova Scotia took its commitment seriously. From the word "go," Nova Scotia operated as if it were bound, and it has never wavered in its conviction to this day.

Newfoundland's conduct, too, demonstrates that it was in for the long haul; the *1964 Agreement* was manifestly not just a temporary, convenient alliance to be abandoned at will. Newfoundland's conduct over a number of years, including its active and leading role in the work of the JMRC, its permit issuance in conformity with the agreed boundary and its absence of protest of the use of that line in the *Canada-Nova Scotia Accord* and its implementing legislation, is cogent evidence of Newfoundland's very definite intention to be bound by the *1964 Agreement.*

The conduct of the other parties to the agreement also proves there was intent among the five East Coast provinces to commit to a binding boundary agreement. As Mr. Saunders explained, the other East Coast provinces engaged in activities that were decidedly not temporary in nature: they developed official maps depicting the 1964 boundaries; they issued permits respecting those boundaries; and they relied on the boundaries in federal-provincial negotiations and in legislation.

Newfoundland asks the Tribunal to ignore the conduct of the other provinces, arguing that it is not relevant in this arbitration. The irony is that Newfoundland considers significant the views and conduct of the federal government, which is not even a party to the *1964 Agreement*, while it seeks to dismiss the conduct of the actual parties to the Agreement.

Newfoundland's approach is not only illogical; it is also out of step with the approach taken by other international courts and tribunals when assessing the weight to be accorded to the conduct of those not party to a particular dispute. For example, the Court of Arbitration in the *Beagle Channel Arbitration*, in considering the probative value to be attached to maps prepared by States that were not parties to the arbitration, said the following:

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> While maps coming from sources other than those of the Parties are not on that account to be regarded as necessarily more correct or more objective, they have, *prima facie*, an independent status which can give them great value ...they are significant relative to a given territorial settlement where they reveal the existence of a general understanding ... as to what that settlement is ...
>
> [Annex 165: *Beagle Channel Arbitration*, para. 142, emphasis in original]

The subsequent conduct of all the parties to the *1964 Agreement* – as Sir Gerald Fitzmaurice said, is "good evidence" of their attitude, state of mind or intentions at an earlier date – namely, on September 30, 1964.

While on the subject of intent to be bound and subsequent conduct, I should address briefly Newfoundland's suggestion that the inclusion of a dispute resolution clause in the *Canada-Nova Scotia Accord* implementing legislation amounts to an admission on the part of Nova Scotia to the effect that the boundary between Newfoundland and Nova Scotia has not been settled.

This is a rather extraordinary proposition – that a party's willingness to include a dispute resolution clause in an agreement somehow undermines that very agreement! Maybe that's not what Newfoundland really meant to say.

But in any event Newfoundland appears to have misunderstood the dispute resolution provision in the legislation.

The *Canada-Nova Scotia Accord Act* provides in section 48(2) as follows:

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> Where a dispute between the Province and any other province that is a party to an agreement arises in relation to the description of any portion of the limits set out in Schedule I ...[Annex 2]

Schedule I of course, as explained by Mr. Fortier yesterday, sets out the *1964 Agreement* boundary between Nova Scotia and Newfoundland. The dispute resolution provision provides a mechanism to be invoked only if there is a dispute as to the description of "any portion" of that 1964 Agreement line. So rather than casting doubt on the existence of a boundary, the provision, in fact, confirms it.

One final point on intent to be bound. In considering the intention of the parties in concluding the *1964 Agreement*, one must not lose sight of the cardinal principle of the law of international agreements – namely, that agreements are binding upon the parties to them and must be performed by them in good faith. This is, of course, the principle referred to as *pacta sunt servanda*.

The fundamental principle of good faith in the conclusion and performance of agreements, and the corresponding centrality of the intention of the parties to be bound, constitute the measure by which the parties' conduct is to be judged in this arbitration.

This concludes my remarks on intent to be bound, which may be summarized as follows:

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(1) the parties' intent to be bound is the fundamental requirement for the conclusion of a binding agreement at international law;

(2) intention to be bound may be expressed in a variety of ways, none of which is mandatory;

(3) to ascertain whether parties intended to enter into a binding agreement one must consider the terms of the agreement, the circumstances of its conclusion, the object and purpose of the agreement, and the subsequent conduct of the parties.

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Interpretation of the *1964 Agreement*

Over the past two days my colleagues have demonstrated that the various propositions on which Newfoundland's case relies have no basis in fact. Newfoundland's contentions that the boundaries were merely a proposal conditional on federal acceptance, that they were valid only in the context of provincial ownership over the mineral rights of the offshore, that they did not extend to the limit of the continental shelf, and that the outer segment is imprecise or even non-existent, cannot be reconciled with the facts contained in the historical record, or with the conduct of the parties over a period of some 40 years.

Application of principles of international law governing the interpretation of agreements results in the same conclusion – namely that Newfoundland's theories about the *1964 Agreement* have no basis, this time in law.

In deducing this conclusions, Nova Scotia has relied on the principles and rules of treaty interpretation codified in Article 31 of the *Vienna Convention on the Law of Treaties*.

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Article 31

General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(...)

3. There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.]

At this point in the proceedings, coming as it does after detailed consideration of the historical record and the conduct of the parties, it is not necessary to review in detail the arguments set out in Nova Scotia's pleadings regarding the legal interpretation of the documents evidencing the *1964 Agreement.* A few brief points will, I believe, suffice.

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The plain words of the documents and the subsequent conduct of the parties reveal:

(1) not a proposal on jurisdiction, but a binding agreement on boundaries;

(2) not a proposition to take effect only upon Constitutional implementation, but an agreement effective from the moment it was concluded;

(3) not a regime applicable only in the context of full provincial ownership of the mineral rights of the offshore, but a boundary agreement for all purposes;

(4) not a delimitation that was focussed on the Gulf of St. Lawrence, but a complete boundary extending to the outer limit of the continental shelf;

(5) not an imprecise directional line ending at some arbitrary point in the Cabot Strait area, but an accurate directional line extending southeast on an azimuth of 135° to the outer limits of the continental margin.

Acquiescence and Estoppel

One more word about the parties' conduct before concluding my remarks about the applicable law.

In addition to serving as compelling evidence of the existence of binding obligations assumed by a party, a party's subsequent conduct may also give rise to international obligations under the doctrines of acquiescence and estoppel.

Nova Scotia maintains that by its conduct, both active and passive, Newfoundland has acquiesced in the boundary established in the *1964 Agreement*.

Newfoundland was present when the *1964 Agreement* was concluded on September 30, 1964, and it approved the *Communiqué* released after the meeting confirming the Premiers' boundary agreement as described by Metes and Bounds and depicted on a map. Premier Smallwood attended the federal-

provincial meeting on October 14-15, 1964, when Premier Stanfield spoke on behalf of the East Coast Premiers to inform the federal government and the other Canadian provinces that the interprovincial boundaries off the east coast had been agreed. Newfoundland had an active a leading role in the work of the JMRC, and Premier Moores confirmed the continuing application of the *1964 Agreement* when he announced the agreement on turning points before the Newfoundland House of Assembly. Finally, Newfoundland's oil and gas permits from 1965 were in conformity with the agreed boundaries.

Newfoundland has consistently and at times with much ceremony confirmed its commitment to the boundaries established in the *1964 Agreement*. It has benefited from this conduct, and Nova Scotia has relied on it to its detriment.

Newfoundland cannot now be permitted to walk away from the deal it agreed, and never disavowed. Newfoundland must be held to its legal obligations. Indeed, Newfoundland is estopped from as a matter of law from denying the existence of the boundary established in the *1964 Agreement*.

To recall the words of Premier Hamm when he opened these proceedings yesterday, a deal is a deal.

To borrow the words of Lord McNair, which seem particularly apt, "a State [must not be permitted] to blow hot and cold." [NSM, III-3]