CHAPTER II AN OVERVIEW

I. Introduction

6. The Memorials filed in Phase Two are like ships passing in the night. Newfoundland and Labrador has presented an essentially geographical case, reflecting the basis of title as defined in the international law of maritime delimitation. Nova Scotia has adopted a radically different approach. It holds that the basis of title in this case is merely a negotiated entitlement implemented in Canadian law,[1] a matter of which the international law of maritime delimitation could scarcely take cognizance. This idiosyncratic definition of the basis of title leads to a conception of the hierarchy of relevant circumstances that turns the Nova Scotia case into a reiteration of its position in Phase One.

7. There are, in addition to this overarching divergence, a number of critical differences on factual issues. Nova Scotia's geographical arguments, while given a secondary status, are equally unorthodox, and equally untenable under international law. These issues will be identified in this overview and discussed in greater detail in the chapters that follow.

II. Nova Scotia's Version of the Applicable Law

A. The Legal Framework

8. Nova Scotia has done its utmost to establish a legal framework that is nominally based on the international law of maritime delimitation, but in which the substantive content of that body of law can scarcely be recognized. There is nothing half-hearted about its position: it holds that this "is a fundamentally different situation than that of a true shelf delimitation,"[2] and that it "covers rights of a different legal order."[3]

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[1] Nova Scotia Memorial, Phase Two, IV-3, para. 6.

[2] Nova Scotia Memorial, Phase Two, IV-12, para. 27.

9. These statements place the Nova Scotia case in direct conflict with the Terms of Reference and the legislation governing this arbitration. It would not be possible to apply the international law of maritime delimitation to a subject matter that is completely foreign to that body of law. The Terms of Reference, in any event, provide the answer to an illusory difficulty that is entirely of Nova Scotia's own making. They require the Tribunal to treat the parties as if they were sovereign states, which means they must be treated as entities with inherent continental shelf rights under international law.[4]

10. The entire Nova Scotia case flows from the false premise that the basis of title is "fundamentally at odds"[5] with that recognized by international law. The basis of title, as Nova Scotia recognizes, is the keystone of the international law of maritime delimitation. But, the basis of title in international law has always been associated with the coastal geography. Without this assumption the jurisprudence and state practice would no longer make sense. The international law of maritime delimitation would be drained of its substantive content.

11. More specifically, the legal framework proposed by Nova Scotia has the following consequences. The proper hierarchy of relevant circumstances is inverted. The coastal geography is said to be "less relevant to the present delimitation,"[6] and is relegated to a very low rank in the hierarchy of relevant circumstances. A failed negotiating process, remote in time, is made "the single most dominant feature of this case."[7] Phase Two of this arbitration becomes in substance a replay of Phase One, ostensibly through a "different lens,"[8] but with

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[3] Nova Scotia Memorial, Phase Two, III-25, para. 62

[4] Terms of Reference, Article 3 1, Appendix A

[5] Nova Scotia Memorial, Phase Two, III-5, para. 12.

[6] Nova Scotia Memorial, Phase Two, IV-63, para. 137.

[7] Nova Scotia Memorial, Phase Two, V-4, para 8.

[8] Nova Scotia Memorial, Phase Two, IV-13, para. 30.

little real change in substance. The practical result is that an alleged "political agreement"[9] that is not legally binding or dispositive is said to be legally determinative, as if the very distinctions had no meaning at all.

12. Once the basis of title as recognized and applied by international law is abandoned, as Nova Scotia proposes, the admissibility and weight of the relevant circumstances can be juggled at will. The delimitation can no longer be guided by a settled body of precedent. It takes on the arbitrary character of an *ex aequo et bono* distribution. All of this is contrary to the letter and the spirit of the governing legislation and the Terms of Reference.

B. A Misconceived Criterion: the "Equal Division of Overlapping Areas"

13. The proposition that the basis of title in this case is "fundamentally at odds"[10] with the basis of title addressed by the international law of maritime delimitation leads to further anomalies. Nova Scotia constructs an area of "overlapping entitlements"[11] that would mystify any international lawyer attempting to apply the recognized principles. Newfoundland and Labrador is said to enjoy entitlements stretching to Georges Bank and the Gulf of Maine, as well as the low water mark of Nova Scotia, while the entitlements of Nova Scotia reach areas over 700 nautical miles[12] from its shores and encompass the entire Grand Banks of Newfoundland as well as the Hibernia oil field.

14. This bizarre construction is based on an interpretation of the legislative definitions that focuses on the outer limits of the Canadian continental shelf, but produces absurd results by ignoring any concept of geographical adjacency. The resulting area is neither fish nor fowl; while divorced from any basis in international law, it is inexplicably bounded on the north by

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[9] Nova Scotia Memorial, Phase Two, IV-16, para. 37

[10] Nova Scotia Memorial, Phase Two, III-5, para. 12.

[11] Nova Scotia Memorial, Phase Two, V-7-9, heading B(ii), paras. 16-21

[12] Nautical miles are hereinafter abbreviated to "nm"

a diagonal line extending northeast from Cape Spear. A systematic application of the Nova Scotia interpretation, taking the outer limits of the Canadian continental shelf as the sole point of reference and divorced from any notion of adjacency to the province, would have extended the Nova Scotia entitlements as far as the Arctic.

15. Nova Scotia then compounds the confusion by positing a rule that does not exist in international law: the "equal division of overlapping entitlements."[13] This is intended as a paraphrase of a criterion stated in *Gulf of Maine*: that, subject to special circumstances, the delimitation should aim at an equal division of areas where the maritime projections of the parties "converge and overlap."[14] This criterion of convergence and overlap was, as the circumstances of the decision demonstrate, based on a notion of frontal projection that is entirely disregarded in the Nova Scotia pleadings.

C. The Legally Discredited Concepts of an "Apportionment of an Undivided Whole" and "Relative Wealth and Poverty"

16. The Nova Scotia Memorial unravels thirty years of jurisprudence by taking issue with one of the most fundamental doctrinal propositions of the *North Sea Cases*. The International Court began its reasoning by explaining its view of the concept of delimitation, which it held to be concerned with fringe areas and which it distinguished from the "apportionment...of an undivided whole."[15] This of course was linked to its concept of continental shelf rights as inherent, which Nova Scotia also asks the Tribunal to set aside for the purposes of this arbitration.

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[13] Nova Scotia Memorial, Phase Two, V-7, heading B(ii).

[14] *Case Concerning the Delimitation of Maritime Boundaries in the Gulf of Maine Area (Canada* v. *United States of America)*, [1984] I.C.J. Rep. 246 at p. 327, para. 195 (hereinafter *Gulf of Maine*). Supplementary Authorities # 13.

[15] *North Sea Continental Shelf Cases (Federal Republic of Germany* v *Denmark; Federal Republic of Germany* v. *Netherlands)*, [1969] I.C.J. Rep. 18 at pp. 22-23, para. 20 (hereinafter *North Sea Cases*). Supplementary Authorities # 9.

17. The distinction between a delimitation and a global apportionment was central to the very definition of maritime delimitation as conceived by the Court in this seminal judgment. Nova Scotia asks the Tribunal to disregard it in two different respects. In the first place, its geographical argument invokes considerations related to the "total offshore area"[16] from Georges Bank to the Arctic. In the second place, it invokes the aggregate distribution of oil and gas resources throughout the offshore areas of the two parties as a legally relevant consideration.[17] This derives absolutely no support from the criteria stated in the decided cases, which were concerned with "known or readily ascertainable resources"[18] in the boundary area. An appeal to the overall distribution of resources throughout the continental shelf, most of them nowhere near the delimitation area, is simply a covert way of reviving the discredited idea of a global apportionment of the entire continental shelf. It is also in direct conflict with the unequivocal rejection of "relative economic position"[19] of the parties as an "extraneous factor"[20] by the International Court of Justice.

III. Nova Scotia's Geographical Framework

A. The Relevant Coasts and the Relevant Area

18. Nova Scotia's geographical arguments, even though relegated to a secondary rank, are also incompatible with accepted principles. Perhaps the most striking example lies in its depiction of the relevant coasts and the relevant area. On the one hand, as discussed above, Nova Scotia contrives an unprecedented notion of "overlapping entitlements" as the basis of its

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[16] Nova Scotia Memorial, Phase Two, V-23-24, paras. 55-57

[17] Nova Scotia Memorial, Phase Two, IV-54-57, paras. 114-122.

[18] *North Sea Cases*, p 54, para. 101(D)(2). Supplementary Authorities # 9.

[19] *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya* v *Malta)*, [1985] I.C.J. Rep 13 (hereinafter *Libya* v *Malta*), p 41, para. 50. Supplementary Authorities # 14.

[20] *Case Concerning the Continental Shelf (Tunisia* v. *Libyan Arab Jamahiriya)*, [1982] I.C.J. Rep. 18 (hereinafter *Tunisia* v. *Libya*), p 77, para. 107. Supplementary Authorities # 11.

relevant area. On the other, it utterly disregards the relevant coasts as identified in the *Canada* v. *France* arbitration, despite the fact that the area of delimitation is substantially the same.[21]

19. Nova Scotia includes as a relevant coast the mainland seaboard of that Province from Cape Canso to southwest Nova Scotia.[22] Why those coasts should be relevant here when they were deemed to be irrelevant by all concerned in the *Canada* v. *France* arbitration is not explained or even alluded to. In fact, those coasts are irrelevant for the simple reason that they lie to the west of the delimitation area and do not face toward the delimitation area so as to create an area of potential overlap Nor has any justification been proposed for the inclusion of the two strips of coast at either end of Nova Scotia's relevant area, the area facing the Gulf of Maine at the southwest end, and the eastern coast of the Avalon Peninsula at the other.

B. An Incidental Feature as the Pivotal Point of the Delimitation

20. The Memorial of Newfoundland and Labrador addressed the distorting impact of incidental features – in particular Sable Island and St. Paul Island – on the course of a provisional equidistant line.[23] It is remarkable that Nova Scotia's principal geographical justification for its 135 degree line gives Sable Island a prominence that overshadows the entire landmass of the Province.

21. Nova Scotia argues that the 135 degree line is justified, and somehow represents an extrapolation of principles adopted in 1964, because it lies halfway between Cape St. Mary's

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[21] *Case Concerning the Delimitation of the Maritime Areas Between Canada and France* (1992), 31 I.L.M. 1145 at pp. 1160-1161, paras. 22-30 and p. 1171, para. 73 (hereinafter *Canada* v. *France*).

[22] Nova Scotia Memorial, Phase Two, V-22, para. 51.

[23] Memorial of Newfoundland and Labrador, Phase Two, pp. 69-72, paras 174-186.

and Sable Island.[24] There is no explanation why these places were not listed as controlling features along with all the other landmarks identified in the 1964 *Notes: Re Boundaries*, as one would have expected if this theory were anything more than an exercise in historical revisionism.

22. The arbitrary selection of Cape St. Mary's is impossible to overlook. But the more fundamental objection, of course, is to a geographical framework that makes Sable Island the pivotal point of the entire delimitation, and in fact gives it far more than the full weight it would have in a "strict equidistance" scenario. The net result is that in the most extensive and most crucial portions of the delimitation, this "isolated sandy island,"[25] 88 nm from the Nova Scotia mainland, would take on more importance in this delimitation than all the other coasts of Nova Scotia put together.

C. An Idiosyncratic Use of Geography on a Continental Scale

23. The notion of "macro-geography," as reflected in the Nova Scotia Memorial, bears no resemblance to the manner in which this term has been used in the Memorial of Newfoundland and Labrador, which used it to refer to the use of simplified coastal fronts.[26] Nova Scotia uses the term to apply to factors arising from perceived patterns in the geography of the entire continental seaboard, taking the frame of reference far beyond the relevant area as defined in the jurisprudence. In the circumstances of the present case, this approach has no basis in law, and in fact closely resembles the United States arguments based on continental geography that were dismissed in *Gulf of Maine*.[27]

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[24] Nova Scotia Memorial, Phase Two, V-12-13, paras. 27-29.

[25] *Canada* v. *France*, p. 1159, para. 21.

[26] Memorial of Newfoundland and Labrador, Phase Two, p. 92, para 248.

[27] *Gulf of Maine*, p. 271, para. 36. Supplementary Authorities # 13.

24. One of Nova Scotia's two macro-geographical arguments is a complaint that a greater proportion of its total coastline is "blocked" by other coasts from a full seaward extension than is the case with Newfoundland and Labrador.[28] There is no attempt to explain how this could be relevant. The other is based on the alleged "general concavity"[29] of the Nova Scotia coastline. This is a flight of fancy based on features that are remote from the delimitation area, including Cape Hatteras and a location somewhere in the vicinity of the Bahamas. As a peninsular feature, Nova Scotia is of course a convex feature in relation to the neighbouring coasts, a point that did not escape the United States or the Chamber in *Gulf of Maine*.[30]

D. An Expanded "Zone of Opposition"

25. Although it does not propose an equidistant line, Nova Scotia has misconstrued the geography by attempting to establish that the portion of the outer area in which the coasts are opposite extends as far south as the 46th degree of north latitude.

26. Two points are made in support of this expanded zone of opposite coasts. One is a Canadian argument in *Gulf of Maine* that there is a seaward "zone of oppositeness."[31] What this fails to mention is that the Chamber declined to adopt or to give effect to this argument, which has not since been referred to in the jurisprudence. The other argument is equally puzzling: it is that an equidistant line in the outer area would use base points on opposite points of land as far as 46 degrees north. The identification of the area of opposite coasts is simply a matter of determining what areas are "between" the coasts and what areas are "off" the coasts. The arguments made by Nova Scotia in this connection fail to reflect this criterion.

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[28] Nova Scotia Memorial, Phase Two, IV-72, para. 166.

[29] Nova Scotia Memorial, Phase Two, IV-74, para. 168.

[30] *Gulf of Maine*, p 271, para 37. Supplementary Authorities # 13

[31] Nova Scotia Memorial, Phase Two, IV-70, para. 60; Nova Scotia Annex 202

E. A Geographically Untenable Claim

27 The initial portions of the Nova Scotia line are centred inappropriately on a point that gives full weight to an incidental feature, St. Paul Island. Based on the Nova Scotia attempt to rationalize the line, it would make another incidental feature – Sable Island – a crucial determinant of the course of the line in the outer area. As well, the Nova Scotia claim takes no account of the significant disparity in the overall coastal frontage of the parties. As a result, the line is necessarily disproportionate in its effects.

28. The line disregards the French corridor, cutting across that area as if it did not exist and taking no account of the unequal impact of the presence of the French islands in the heart of the delimitation area. West of the corridor, it produces a cut-off of the Newfoundland coasts within the inner concavity. East of the corridor it utterly fails to reflect the dominant presence of the Newfoundland coasts in the outer area, notwithstanding the finding in *Canada* v. *France* that the maritime projections of the Nova Scotia coast do not in fact reach into that area.[32]

29. In a word, the Nova Scotia line has no basis in the international law of maritime delimitation. Each and every defect in the provisional equidistance line analyzed in the Memorial of Newfoundland and Labrador applies with added force to the Nova Scotia line, because that line is largely situated on the Newfoundland side of the equidistance line. More generally, a single straight line in a two-area configuration composed of an inner concavity and an outer area – a factor central to the reasoning of the Court of Arbitration in *Canada* v. *France* – is almost certain to produce an unacceptable result. It treats the delimitation as if the two areas did not exist, and thus fails to respond to the changing characteristics of the geography as the line moves from the confines of the Gulf Approaches to the outer limits of the continental margin

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[32] *Canada* v *France*, p. 1171, para. 73.

IV. Nova Scotia's Version of the History of the Dispute

A. The Political Relations between the Parties

30. The negotiations of 1964 and 1972 are as much at the centre of the Nova Scotia case as they were in Phase One. Even the shift of perspective to "a different lens" is often imperceptible. The wine is old; the bottles have simply been relabelled.

31. The factual differences between the parties are significant, but they are overshadowed by the remarkable legal proposition that for the purposes of maritime delimitation "a political agreement **is** an agreement."[33] This implies that the distinction between a binding agreement and a provisional understanding or consensus is legally meaningless, and reduces Phase One to an exercise in futility.

32. But even as a factual matter, there simply was no "political agreement" in the unqualified sense asserted by Nova Scotia. As the Tribunal put it in Phase One, the *1964 Joint Statement* was not a definitive agreement because of "its conditional character and its linkage to a provincial claim to existing legal rights to the offshore."[34] Those limitations also define and limit the political significance of the understandings It was the intention of the political actors that no legal consequences would flow from their understandings except upon the fulfilment of these conditions, which would have entrenched the boundary and secured the underlying claims at a single stroke. That intention was not merely implicit. It is expressly set out in the documents the politicians endorsed.[35]

33. The Nova Scotia presentation misrepresents the historical realities. It is selective: there is, for example, no mention whatever of the caveat in the boundary Schedule to the 1982 *Canada-*

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[33] Nova Scotia Memorial, Phase Two, IV-16, para. 37.

[34] Phase One Award, p. 78, para 7.5

[35] Phase One Award, pp. 77-79, paras. 7.3-7.6

Nova Scotia Agreement,[36] which is at odds with its present position that the boundary had already been settled.[37] It is also characterized by wishful thinking and exaggeration A few references to administrative cooperation are taken as a decisive shift away from the original objective of ownership, when the Premiers were in fact reaffirming that objective.

34. The examples could be multiplied, but while some of them will be discussed in Chapter IV, there would be no point in overlooking the fact that there is already a very full record on these issues from Phase One. Newfoundland and Labrador will therefore deal with them briefly, while reaffirming its positions as expressed at all stages of the Phase One proceedings.

B. The Administrative Conduct of the Parties

35. Nova Scotia has made a valiant attempt to build an analogy with the 26 degree line in *Tunisia* v. *Libya* through the permit practice of the parties from 1965 to 1972.[38] The "concordant practice"[39] argument fails on every count. It covers far too short a period. It stands in contrast to *Tunisia* v. *Libya*, which canvassed a history of over sixty years,[40] but resembles the period that *Gulf of Maine* dismissed as "too brief" to produce legal effects.[41] The practice, moreover, is remote in time: these interim and exploratory permits (*ultra vires* from the outset) have long since expired, and on that ground alone can have no current legal significance. The argument depends on interim permits issued by Newfoundland and

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[36] *Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing* (March 2, 1982) (hereinafter *Canada-Nova Scotia Agreement*).

[37] Memorial of Newfoundland and Labrador, Phase One, pp 36-37, paras. 89-91.

[38] Nova Scotia Memorial, Phase Two, IV-21, para. 48.

[39] Nova Scotia Memorial, Phase Two, IV-26-32, heading D(ii), paras. 54-69

[40] *Tunisia* v. *Libya*, pp 70-71, paras. 93-96 Supplementary Authorities # 11

[41] *Gulf of Maine*, pp 310-311, para. 151. Supplementary Authorities # 13

Labrador that ceased to exist in early 1978 at the latest, and with them even the possibility of a continuing situation of concordant practice on the ground.

36. Even from an historical perspective, the importance of the permits has been grossly exaggerated. The most glaring omission in the Nova Scotia account is the existence of a jurisdictional dispute over continental shelf rights with the federal government throughout this period. From 1967 on it was obvious that the odds overwhelmingly favoured the federal government over Nova Scotia. The area was blanketed with federal permits and the Nova Scotia permits generally duplicated the federal permits. The evidence suggests that very little if any exploratory work was done without the backing of a federal permit. Common sense alone would have led to that inference: the federal government would not have tolerated it, and the companies would not have risked the money.

37. The "acquiescence and estoppel" version of these same arguments stands on no better footing. The facts come nowhere close to meeting the clear, consistent, conscious and sustained acceptance that international law requires.[42]

C. A Distorted Presentation of Resource Distribution

38. While the legal irrelevance of this factor is self-evident, the factual distortions in the Nova Scotia presentation should not be overlooked. In Figure 41 Nova Scotia relies on data without providing the source or the date on which it was compiled, and provides no information on matters such as the economic viability of extraction.[43]

39. Moreover, as Nova Scotia fully appreciates, estimates of potential vary widely and change, sometimes dramatically, with new information, better analysis and further discoveries. No

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[42] Memorial of Newfoundland and Labrador, Phase One, pp 90-108, paras. 244-282.

[43] Nova Scotia Memorial, Phase Two, Figure 41 (filed in separate envelope).

one has said this more clearly than Premier Hamm of Nova Scotia who in a speech on May 1 of this year stated:

> Back in the 1970's and early 80's, we were just starting to make our discoveries. Our best guess as to our potential was set at that time at approximately 20 trillion cubic feet. But remember that number was generated two decades ago. In the days before 3-D seismic was available to guide the drill bit. And it was generated well before we knew about deepwater geology and potential. Today we have new exploration data and new geological assumptions. So here's the number your industry is talking about today. More than 40 trillion cubic feet of potential across the Nova Scotia offshore area. Then there are some who think even bigger. The New York investment firm Goldman Sachs did a report last summer that drove the number up to as much as 100 trillion cubic feet.[44]

V. Conclusion

40. Nova Scotia's claim rests on the misconceived notion that the basis of title in this case is to be found in negotiated arrangements under Canadian law and not derived from the principles of international law governing maritime boundary delimitation. From this, it then draws the equally misconceived view that the Tribunal is to provide for an equal distribution of "overlapping entitlements" on the basis of alleged conduct of the parties. This leads Nova Scotia to privilege conduct, a subsidiary consideration in maritime delimitation, and relegate geography, the most critical element in maritime delimitation, to a place of marginal relevance. And then, to cap it all, Nova Scotia gives a distorted account of the geography of the area, extending the delimitation area far beyond anything that conceivably could be relevant to this case.

41. These, and other, errors of fact and law will be elaborated upon in the following chapters.

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[44] Speech by the Honourable John Hamm, Offshore Technology Conference, May 1, 2001, online www.gov.ns.ca/prem/speeches/OTC1_5_2001.htm. Supplementary Documents # 1