CHAPTER V THE LAW

I. Introduction

151. There is a paradox at the heart of the Nova Scotia argument. It begins with the orthodox proposition that the basis of title is the primordial consideration in a delimitation based on the principles of international law. It ends by relegating the basis of title as recognized by international law – the coastal geography – to a rank at or near the bottom of the hierarchy of relevant circumstances. In the process, the substance of international law governing maritime delimitation is transformed beyond recognition. The ostensible acceptance of the principles of international law is little more than a prelude to a repudiation of those principles as they have been understood and applied throughout the history of this branch of the law.

152. Specifically, the Nova Scotia argument departs from the accepted principles of international law in the following respects, many of which also involve significant factual errors:

a) Nova Scotia deprives the basis of title of any real meaning by treating it as a mere *sui generis* negotiated arrangement under Canadian law, ignoring the reality that the substantive content of the Accords deals with continental shelf areas adjacent to the coasts of the two parties, and the fact that the Terms of Reference require the parties to be treated as if they were sovereign states.

b) As a result of this misconceived definition of the basis of title, Nova Scotia contradicts the first premise of the law of maritime boundaries that the basis of title is territorial sovereignty over the coasts abutting the relevant area, and in fact proposes a conceptual framework in which it would be impossible to apply the international law of maritime delimitation in any meaningful way.

c) Nova Scotia approaches the delimitation as the "apportionment of ... an undivided whole," contradicting an equally fundamental tenet set out in the *North Sea Cases*[130] and in the subsequent jurisprudence.

d) The reliance on the aggregate distribution of oil and gas resources seeks to transform the delimitation into "a question of distributive justice,"[131] relies on factors that do not pertain to the relevant area, and appeals to considerations of relative wealth and poverty contrary to the stated principles of the international jurisprudence.

e) By relegating the basis of title as recognized in international law to a secondary status, Nova Scotia is attempting to open the door to an arbitrary and self-serving selection of relevant circumstances whose weight is divorced from any objective criterion, and thus to transform the arbitration into a form of adjudication *ex aequo et bono*.

f) The substance of the Nova Scotia argument is in most respects identical to its position in Phase One with purely cosmetic changes, and amounts to an attempt to transform Phase Two into an adjudication *de novo* of the issues addressed in the first phase.

153. The use of geographical considerations in the Nova Scotia Memorial is not only subordinate but also legally inconsistent with the jurisprudence, *inter alia* in the following respects:

a) The proposition that delimitation involves an equal division of "overlapping entitlements;"[132]

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[130] *North Sea Cases*, pp. 22-23, para. 20. Supplementary Authorities # 9

[131] *Libya* v. *Malta*, p. 40, para 46. Supplementary Authorities # 14.

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

b) The definition of a grotesquely exaggerated relevant area that extends far beyond any relevant area based on accepted principles, in pursuit of the underlying strategy of seeking a delimitation based on the apportionment of an undivided whole;

c) The identification of relevant coasts that do not face the delimitation area;

d) The suggestion that the entire continental shelf area appertaining to both parties is a relevant circumstance;

e) The use of an off-lying incidental feature (Sable Island) as the pivotal point of the entire delimitation;

f) The incorrect definition of the "zone of opposition" (opposite coasts);

g) The use of macro-geography on a continental scale to support arguments that have no basis in law (the consideration of the relative proportion of "blocked" coasts and the assertion that Nova Scotia suffers from a "general concavity" defined by reference to features lying far beyond the relevant area).

II. An Unprecedented Conception of the Basis of Title as Recognized by International Law

154. In its Phase One Award, the Tribunal found that the Terms of Reference direct it "to those principles binding upon Canada which govern the delimitation of adjacent areas of continental shelf."[133] The Nova Scotia Memorial puts this seemingly uncontroversial statement directly in issue. For Nova Scotia, the dispute is not concerned with the delimitation of the continental shelf, but with a zone and with entitlements "that are entirely

[133] Phase One Award, p. 16, para. 3.10.

and state practice relevant to international maritime boundary delimitation ceases to apply and second, delimitation loses its juridical character because it no longer reflects the recognized basis of title.

159. In fact, the conundrum is entirely of Nova Scotia's own making. Provincial offshore entitlements could not literally be continental shelf rights from the perspective of

the creation of negotiated arrangements implemented in Canadian law."[134] Nothing could speak more eloquently about the Nova Scotia line than this attempt to divorce the delimitation from accepted legal principles.

155. The implications are profound, and control the entire structure of the Nova Scotia case. The essence of the law relating to the delimitation of the continental shelf, the principle from which all else follows, is that entitlements are based upon territorial sovereignty over the abutting coasts; that the "land dominates the sea;"[135] and competing claims must therefore be evaluated in relation to the coastal geography

156. For Nova Scotia, none of this applies. Because the rights of the parties are based on a mere "negotiated arrangement," the basis of title is to be found, as Nova Scotia would have it, not in the geographical situation but in the negotiating history; in other words, in the same record of events that formed the subject matter of Phase One. Geographic circumstances and criteria, we are told, are therefore "less relevant to the present delimitation."[136] The practical result is that geographic considerations are relegated to the last rank of the relevant circumstances, below conduct, resource distribution and other delimitations in the region. Geographic circumstances are treated in effect as mere "auxiliary criteria"[137] in the terminology of *Gulf of Maine*, capable at most of confirming or leading to an adjustment of the line, but not of providing the essential basis of the delimitation.

157. This literally turns the law of maritime delimitation on its head. Geographic considerations have always been treated as inherent in "the very philosophy of maritime jurisdiction:"

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

[135] *North Sea Cases*, p. 51, para. 96 Supplementary Authorities # 9.

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

[137] *Gulf of Maine*, p. 339, para. 230. Supplementary Authorities # 13.

> From the moment States were recognized as having rights over areas of the sea – that is to say, for as long as there has been such a thing as the territorial sea – those rights have been based on two principles which have acquired an almost axiomatic force, the justification for which it would now be impossible to challenge: *the land dominates the sea* and it dominates it *by the intermediary of the coastal front*; these two ideas fuse in the concept of adjacency.[138]

158. The Chamber in *Gulf of Maine* (which preferred the expression "criteria" to "principles") observed that the equitable criteria of international law "are essentially to be determined in relation to what may properly be called the geographical features of the area."[139] Remove them from centre stage and two consequences follow: first, most of the body of precedent and state practice relevant to international maritime boundary delimitation ceases to apply and second, delimitation loses its juridical character because it no longer reflects the recognized basis of title.

159. In fact, the conundrum is entirely of Nova Scotia's own making. Provincial offshore entitlements could not literally be continental shelf rights from the perspective of international law, since provinces are not sovereign states, cannot enjoy sovereign rights, and do not enjoy the territorial sovereignty on which such rights are based. Given the lack of an inherent constitutional title, moreover, such rights must necessarily be derived and not original, which means that they have to be negotiated – or, more precisely, legislated – entitlements. That does not, however, imply that such offshore rights cannot be treated as genuine continental shelf entitlements for the limited purpose of applying the international law of maritime boundary delimitation as incorporated by reference into the relevant domestic instruments.

160. The reference to the international law of maritime delimitation in a dispute between provinces, in order to be meaningful, requires the adoption of a legal fiction and of a legal

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[138] P. Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge: Grotius Publications Ltd., 1989) at p. 115. Supplementary Authorities # 8.

[139] *Gulf of Maine*, p. 278, para. 59. Supplementary Authorities # 13.

assumption for the limited purpose of the delimitation exercise. The legal fiction is that the parties are subjects of international law; in other words sovereign states. The legal assumption is that the subject matter of the dispute is within the scope of this branch of public international law; in other words, that the zones at issue are either identical or substantially similar to those to which the international law of maritime delimitation applies – the territorial sea, the continental shelf, or the exclusive economic zone as the case may be. Without those very modest legal fictions or assumptions, the exercise becomes a logical impossibility. Once they are made, however, there is not the slightest impediment to the straightforward application of the principles of international law respecting maritime delimitation, which principles do not in fact even require any "modifications" to suit the circumstances.[140]

161. These assumptions or legal fictions are logically implicit in the statutory adoption of public international law as the governing law. They have to be implicit because international law is not in itself directly applicable to the provinces. The assumption respecting the sovereign status of the parties is, of course, made explicit in the Terms of Reference, which state that international law is to be applied "as if the parties were states."[141] If they were states – as we are required to assume – their seabed entitlements beyond the territorial sea would be continental shelf entitlements. The Terms of Reference therefore provide a short but

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[140] It is of interest that in the United States the former Coastal Energy Impact Program (CEIP) was required to determine seaward lateral boundaries between the coastal States of the United States for the revenue sharing purposes of that program. Where such boundaries had not been established by interstate compact or judicial decision, statutory authority resided in the administrator of the program to determine the boundaries in accordance with international law. The administrator established a procedure of hearings that had the characteristics of an arbitration before a panel of experts that included Professor Richard Baxter, Professor Jonathan Charney and Dr. Hyman Orlin. The administrator acted on the report of this panel of experts. In this situation no conceptual difficulty was encountered in applying international law as between the States in a straightforward fashion, as if those States were in fact sovereign entities with inherent shelf rights. The reports of the panel of experts were based, as in the case of international delimitations, squarely and almost exclusively on geography. There was no suggestion that the principles of international law had to be overturned because unique legislated entitlements were at issue. In fact, the "boundaries" in question served only as a basis of revenue sharing, and were therefore far more remote from "true" continental shelf entitlements than the offshore areas at issue here. See J. Charney, "The Delimitation of Lateral Seaward Boundaries between States in a Domestic Context" (1981) 75 *American Journal of International Law* 28 Supplementary Authorities # 2

[141] Terms of Reference, Article 3.1, Appendix A.

complete answer to the Nova Scotia approach to the basis of title and the hierarchy of relevant circumstances.

162. The Nova Scotia approach leads to an impasse; in fact it would lead to a *non liquet* in the present proceedings. The proposition that the object of this delimitation is not the continental shelf but merely an *ad hoc* negotiated entitlement under Canadian law would imply that the delimitation could not – contrary to the legislation and the Terms of Reference – be effected on the basis of the international law of maritime delimitation. That body of law, in so far as seabed areas beyond the territorial sea are concerned, applies to the continental shelf as a legal institution. Its content and application has been derived from the outset from the legal nature and source of continental shelf rights. If the subject matter of the dispute were, as Nova Scotia asserts, "fundamentally at odds"[142] with the continental shelf, then it would not be within the scope of application of the international law of maritime delimitation – which does not, of course, apply in its own right to "negotiated arrangements implemented in Canadian law."[143] The result would be a total frustration of the statutory adoption of international law, and of this arbitration.

163. This impasse is implicit in the Nova Scotia argument, which holds that Article 6 of the 1958 *Geneva Convention on the Continental Shelf*[144] does not apply (a conclusion accepted by Newfoundland and Labrador for entirely different reasons) because the continental shelf regime is "inherently different from the regime of joint management and revenue sharing that is the object of the delimitation."[145] If that were true, it would also preclude the application of the customary international law of continental shelf delimitation, for exactly the same reasons. Since the relevant international law of maritime delimitation could not be that

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

[143] Nova Scotia Memorial, Phase Two, III-3, para. 6.

[144] *Geneva Convention on the Continental Shelf*, 29 April 1958, 499 U.N.T.S 312, 1970 Can T S No 4 (entered into force 10 June 1964, entered into force for Canada 8 March 1970) (hereinafter *1958 Convention*).

[145] Nova Scotia Memorial, Phase Two, III-3, para. 6

relating to the territorial sea or the exclusive economic zone, there would be no law that could be applied, contrary to the terms of both the legislation and the Terms of Reference.

164. The implications of this aberrant legal framework developed by Nova Scotia cannot be overstated. In practical terms, it would allow Nova Scotia to invert the hierarchy of relevant circumstances, making a failed negotiating process the primordial dominant consideration at the expense of the geography, and in fact reducing geography to the status of a mere afterthought. This is not consistent with any of the principles of the jurisprudence – not even with *Tunisia* v. *Libya* where conduct featured far more prominently than in any other case, but hardly to the extent of rendering the coastal geography irrelevant.

165. This aberration is also the source of most of the other errors discussed below. The assertion that the basis of title is not the coastal geography but a mere negotiated arrangement takes the basis of title as conceived by international law out of the picture; and in so doing, it strips all the decided cases – the only source from which the principles of this branch of international law can be derived – of their meaning and relevance so far as the present delimitation is concerned. As noted in *Gulf of Maine*, the methods used must flow from the geography which constitutes the basis of title: "the practical methods in question can likewise only be methods appropriate for use against a background of geography."[146]

166. To say that the basis of title is simply a negotiated arrangement is, of course, to refer the matter to the subjective intentions of the parties and to remove the conception of title from the delimitation exercise altogether The subjective intentions of the parties to the negotiated arrangements of the two *Accords*[147] would be of no utility, in contrast to the interpretation of a treaty or agreement, since the offshore areas to be delimited have been established under

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[146] *Gulf of Maine*, p. 329, para. 199. Supplementary Authorities # 13.

[147] *The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing* (February 11, 1985) (hereinafter *Atlantic Accord*); *Canada-Nova Scotia Offshore Petroleum Resources Accord* (August 26, 1986) (hereinafter *Nova Scotia Accord*).

two separate agreements concluded by different parties. The result, no doubt intended by Nova Scotia, would be to deprive the delimitation operation of any objective benchmark whatsoever.

167. It is, in any event, plainly incorrect to suggest that the basis of title in this case is simply an *ad hoc* "deal" that had nothing to do with the continental shelf as understood in international law, or with the geographic situation of the parties It is no coincidence that the statutory definition of "offshore area" in the *Canada-Newfoundland Act* and *Canada-Nova Scotia Act* refer to the outer edge of the continental margin.[148] On the contrary, it is an unmistakable indication of the juridical nature of the zones that form the object of the *Accords*.

168 The *Accords* are not in fact unrelated to the international law of the continental shelf. They would be inconceivable except between coastal jurisdictions, and they would be incomprehensible except as an internal division of the continental shelf rights that international law accords to Canada. Their delimitation provisions treat the two parties as if they were sovereign states with continental shelf entitlements in their own right.[149] This means that the rights at issue are deemed to flow from the same basis of title that is the basis of the continental shelf entitlements of sovereign states – territorial sovereignty over the adjacent coasts. It is on this basis – and only on this basis – that it is possible to apply the international law of maritime delimitation without disregarding its very essence.

169 Nova Scotia argues as well that the delimitation does not relate to the continental shelf because the negotiated regime does not cover each and every element of the continental shelf regime. In particular, it does not cover the "sedentary species"[150] of the seabed (a limited category of shellfish in constant contact with the seabed and subsoil) or non-hydrocarbon

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[148] *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, s. 2 (hereinafter *Canada-Newfoundland Act)* and *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28, Schedule I (hereinafter *Canada-Nova Scotia Act).*

[149] *Atlantic Accord*, para 68 and *Canada-Nova Scotia Accord*, paras 1.04, 43.

mineral resources; nor does it refer to the rules relating to foreign pipelines. Not one of these distinctions raises the slightest practical or conceptual impediment to the application of the law relating to the delimitation of the continental shelf. Hydrocarbons have always been the principal component and the driving force of the continental shelf regime. The importance of these resources overwhelms every other aspect of the continental shelf, both in this region and around the world, and it always has.

170. There is, in short, no reason why the tail should wag the dog, allowing the exclusion of a few secondary and incidental details to sideline the entire seabed regime as it exists under international law. And – more important – if the rights of the parties were treated as being "fundamentally at odds"[151] with those of the continental shelf, so that the law relating to the delimitation of the continental shelf could not be applied, the terms of the statutes and the Terms of Reference would be utterly frustrated.

171. An objective basis of title, rooted in sovereignty over the adjacent coastlines, is what gives the law of delimitation a truly juridical character. To disregard it is to enter the realm of the arbitrary. The net result would be tantamount to an adjudication *ex aequo et bono*, contrary to the requirements of the legislation and the Terms of Reference.

172. The practical results are plainly evident in the Nova Scotia Memorial. Reducing the basis of title to the meaningless category of a "negotiated arrangement" would diminish or eliminate the significance of the judicial and arbitral precedents and even of state practice, all of which have taken the geographical basis of title as the point of departure and the crucial controlling factor It would also create a framework in which the relevant circumstances can be selected at will, and assigned whatever priority and weight happen to suit the needs of the argument, on a purely arbitrary and discretionary basis. In short, it would allow Nova Scotia to

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

[151] Nova Scotia Memorial, Phase Two, II-5, paras. 11-14

subordinate the coastal geography to a self-serving version of conduct in a manner that amounts to a "re-make" of the Phase One proceedings.

III. The "Apportionment of an Undivided Whole" Based on "Relative Wealth and Poverty"

173. No less remarkable, and no less unorthodox, is the Nova Scotia contention that the total offshore area of the provinces is relevant – an area extending from the Arctic to the "Hague Line" off the coast of southwest Nova Scotia and New England. Nova Scotia states that "the area that is the object of the delimitation in this case comprises an integral, undivided whole: Canada's jurisdiction over the continental shelf," resulting in "a fundamentally different situation than that of a true shelf delimitation."[152] This, of course, is the basis of all the Nova Scotia arguments based either on the "Total Offshore Areas as Divided by the Existing Boundary" or on the distribution of oil and gas resources throughout the length and breadth of the Canadian east coast offshore.

174. These contentions are not simply incorrect: they contradict the very concept of delimitation as expounded in the *North Sea Cases*. Surprisingly, the relevant passage is quoted at length in the Nova Scotia Memorial.[153] In the *North Sea Cases*, Germany argued that the delimitation should be based on the principle of a "just and equitable share"[154] in an undivided whole, leading to a division of the North Sea into pie-like slices reflecting a European version of the so-called "sector theory." The Court responded that delimitation is not an "apportionment of something that previously consisted of an integral, still less an undivided whole," and that delimitation is concerned only with a "marginal or fringe area,"

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

[153] Nova Scotia Memorial, Phase Two, VI-12-13, para. 27.

[154] *North Sea Cases*, pp. 20-21, paras. 17-18. Supplementary Authorities # 9.

not with the determination *de novo* of entire areas already appertaining in principle to the coastal state.[155]

175. This, as the Court of Arbitration noted in the *Anglo-French Continental Shelf Case*, was a conclusion derived from the "fundamental rule" that continental shelf rights attach to coastal states *ipso facto* and *ab initio* by virtue of their sovereignty over the land.[156] It is a distinction upon which the International Court based its definition of delimitation. It is simply not possible to speak of an application of the principles of international law governing maritime boundary delimitation if this distinction between a global apportionment and a true delimitation is to be disregarded. Nova Scotia is seeking to reverse over thirty years of jurisprudence, to overturn the very concept of maritime delimitation as it has been articulated in the cases.

176. The reliance on access to resources[157] and the alleged disparity between the petroleum resources available to each party is also misplaced, in part because it is a reflection of the global apportionment theory, and in part because it is based almost exclusively on resources lying far beyond the relevant area – principally on the Hibernia development and on resources off Labrador Above all, however, it is a reversion to a theme that has been conclusively rejected by the Courts: relative wealth and poverty. In *Tunisia* v. *Libya* the Court responded to Tunisia's plea based on its relative poverty that these are:

> virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country

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[155] *North Sea Cases*, pp. 22-23, para. 20. Supplementary Authorities # 9.

[156] *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* (1977), 18 R.I.A.A. 3 at p.48. para.77 (hereinafter *Anglo-French Continental Shelf Case*) Supplementary Authorities # 10; *North Sea Cases*, p.22, para.19. Supplementary Authorities # 9.

[157] Nova Scotia Memorial, Phase Two, IV-54-58, paras. 114-123

> might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource....[158]

177. Similarly, in *Libya* v. *Malta*, the Court did not "consider that a delimitation should be influenced by the relative economic position of the two states in question....Such considerations are totally unrelated to the underlying intention of the applicable rules on international law."[159] The rejection of this factor has been so conclusive and unequivocal that it is only on a basis of a wholesale rejection of the jurisprudence, as explained above, that Nova Scotia can once again put it in question. As a leading author has observed:

> Since they have no role to play at the level of legal title, it is logical that considerations to do with the existence, importance and location of natural resources cannot be regarded as relevant for the purposes of delimitation. That is how the criterion of legal relevance stated in *Libya/Malta* normally works.
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> As a result, if the provisional line allocates all of a particular resource to one of the parties, equity does not require it to be shifted so as to allocate part of it to the other.... In short, resources are where they are, and the boundary is where it is.[160]

178. The statement in the *dispositif* of the *North Sea Cases* that negotiations should take account of natural resources "so far as known or readily ascertainable"[161] provides no assistance to Nova Scotia in this regard. Not only was the Court referring to negotiations; as explained above, the statement was made in the context of a definition of delimitation as an exercise relating to a "marginal or fringe area,"[162] and not the apportionment of an undivided whole. Adjustments can be made along the course of the boundary, through the principle of "unity

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[158] *Tunisia* v. *Libya*, p. 77, para 107. Supplementary Authorities # 11.

[159] *Libya* v *Malta*, p 41, para. 50. Supplementary Authorities # 14.

[160] P Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge: Grotius Publications Ltd., 1989), pp. 258-259. Supplementary Authorities # 8

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

of a deposit"[163] or similar schemes, or minor shifts in the precise course of the line, to take account of known resources or the existence of oil wells. Such pragmatic considerations lend no support to Nova Scotia's contention that the sharing out of resources throughout the Canadian continental shelf should be a governing principle of this delimitation. The creation of an "Atlantic pool" was once a possible outcome of negotiations – but one that was rejected close to thirty years ago.[164] It was never a legal principle upon which a delimitation of the continental shelf pursuant to international law could even conceivably be based.

179. The historical disparities in wealth and income between Newfoundland and Labrador and the rest of Canada, including Nova Scotia, are a matter of common knowledge. There is a touch of irony, and a sense of unreality, in this legally discredited attempt by the wealthier of the two provinces to have the boundary shifted in its favour, as a form of compensation for Newfoundland and Labrador's resources situated far from the delimitation area.

IV. An Adjudication *De Novo* of Phase One

180. In paragraphs 7.8 and 7.9 of its Phase One Award, the Tribunal left open the possibility that conduct could be a relevant circumstance in the second phase of this arbitration.[165] Nova Scotia, however, has gone much further. In substance, the Nova Scotia Memorial amounts to an attempt to seek a re-determination of the issues addressed in the Phase One Award.

181. There is nothing subtle about this strategy. The sheer volume of material that simply duplicates the factual allegations made by Nova Scotia in Phase One puts it beyond doubt. The changes in presentation are largely cosmetic. It is as if nothing had been decided; as if Phase One – on which Nova Scotia insisted for so long, and with success – had been an

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[162] *North Sea Cases*, p. 22, para. 20. Supplementary Authorities # 9

[163] *North Sea Cases*, p. 52, para. 99 See also p 53, para. 101(C)(2). Supplementary Authorities # 9.

[164] Memorial of Newfoundland and Labrador, Phase One, pp 19-21, paras. 48-53; p. 23, para 57.

[165] Phase One Award, pp. 80-81.

exercise in futility, or at best a dress rehearsal for the main event. Reflecting this assumption, the Nova Scotia Memorial refers over and over again to the "1964 Agreement"[166] or the "boundary agreed in 1964,"[167] as if Phase One had in fact been decided in its favour.

182. The basis of this implausible outcome – apart from the purely factual distortions in the Nova Scotia Memorial – is the denial that the basis of title in this case is in any way comparable to that of "true shelf delimitation."[168] As noted above, this allows Nova Scotia to argue for an inversion of the hierarchy of relevant circumstances, making a failed negotiating process rather than geography the essential benchmark of an equitable delimitation

A. The Purported 1964 Agreement

183. The purported agreement of 1964, the focal point of Phase One, remains the heart of the Nova Scotia case. The significance that Nova Scotia seeks to attach to this failed initiative, to these events that transpired so many years ago, has implications that offend common sense. Nova Scotia argues "[f]or the purpose of determining the relevant circumstances of the delimitation, a political agreement is an agreement."[169] This would mean, in effect, that the determination made in Phase One is simply irrelevant. It would also mean that an "agreement" that was neither binding nor dispositive, is nevertheless now to be made legally determinative – as much so, in fact, as if it had been binding in the first place. And it would be determinative for once and for all – as permanent and irrevocable as any boundary based on a legally binding and operative agreement. What all this amounts to is an assertion that Nova Scotia is entitled to prevail in Phase Two on precisely the same factual grounds that

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[166] See for example, Nova Scotia Memorial, Phase Two, IV-20, heading D(i)(e); IV-29, heading D(ii)(b); IV-31, para 65; IV-32, para 69; and IV-38, para 83.

[167] Nova Scotia Memorial, Phase Two, II-9, para. 18, IV-31, para 66.

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

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

were considered insufficient in Phase One, but with a dramatically lowered threshold of legal significance.

184. Nova Scotia argues that even if the purported agreement on which it relies never entered into force, it should be treated as decisive because of its "intended finality."[170] A moment's reflection shows this proposition to be untenable. Every proposed boundary in a boundary negotiation – maritime or terrestrial – is ultimately intended to be final. That is inherent in the nature of a boundary, and in the special stability which international law accords to boundaries through doctrines such as *uti possedetis*, the exception to the fundamental change of circumstances rule, and the treatment of boundaries in cases of state succession. But boundaries and negotiating proposals must be distinguished. A boundary proposal is intended to be final if – and only if – the negotiations succeed and the stipulated formal and substantive conditions for the entry into force of the resulting lines are fulfilled. And it is for precisely these reasons that the proposed boundaries relied upon by Nova Scotia are without legal significance either as boundaries *per se* or as a relevant circumstance.

185. The critical area in this dispute is, of course, the outer area – the area beyond Turning Point 2017. It is remarkable that throughout its discussion of the conduct of the parties, and the proposed lines of 1964 and 1972, Nova Scotia makes not the slightest allusion to the fact that beyond Point 2017, no line was determined on even a tentative or a preliminary basis. The final paragraph in the Conclusions of the Tribunal in Phase One is crystal clear on this point. The Tribunal stated "even if the interprovincial boundary up to Point 2017 had been established by agreement, the question of the boundary to the southeast would not have been resolved thereby and a process of delimitation would still have been required in that sector."[171] The 135 degree line, in other words, was never part of the tentative and

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[170] Nova Scotia Memorial, Phase Two, IV-17, para 38; IV-19-20, paras 44-45. See, contra, Phase One Award, pp. 76-79, paras. 7.1-7.5.

[171] Phase One Award, pp. 81-82, para 7.10.

provisional consensus reached by the provinces in the years before the negotiations broke down.

186. That means the issues landward and seaward of Point 2017 are quite distinct. Beyond Point 2017, no line had been agreed upon on even a political or a conditional basis.[172] With respect to the area that the JMRC actually addressed, the line, as Phase One has demonstrated, was to come into force only as a result of legislation by both provincial and federal governments, and this legislation was never enacted.[173] This condition was not only formal but substantive, because the federal legislation would not only have entrenched the boundaries; it would have constituted an irrevocable recognition of the provincial claims to continental shelf jurisdiction.

187. It follows that in political as well as in legal terms, the failure of this essential condition provides a complete answer to the contention that the alleged agreement should now be considered a legally relevant circumstance, even landward of Point 2017. Nor can it be assumed that because the Premiers, in June 1972, were willing to accept the JMRC lines as part of a strategy to secure constitutionally entrenched ownership and jurisdiction, they would have been prepared to accept them in return for something less. There were indeed hints later on, principally from Nova Scotia Premier Regan, that something less might have to be considered as a result of the federal rejection of the June position.[174] So far as Newfoundland and Labrador was concerned, however, nothing short of ownership was ever

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[172] Phase One Award, pp 48-49, para 5.7, pp. 68-69, para. 6.6(5), (6). See also Memorial of Newfoundland & Labrador, Phase One, pp. 30-31, para. 72; pp. 31-32, para. 75, p. 34, para. 81; pp 44-45, para. 110.

[173] Phase One Award, pp. 78-79, para. 7.5.

[174] Phase One Award, pp 66-67, para. 6.5.

[180] *Gulf of Maine*, pp. 310-311, paras. 148-152. Supplementary Authorities # 13.

countenanced.[175] Premier Moores' political endorsement of the JMRC lines in June was predicated on the "full package,"[176] and cannot be considered relevant, even as a political matter, to the substantially different regime that finally emerged.

B. The Early Permits Issued by the Parties

188. The other main theme of Nova Scotia's case is that the subsequent practice of the parties in issuing permits reflects a "concordant practice" that "confirmed the establishment of a *de facto* line which is clearly referable to [the 1964] agreement."[177] The factual basis of the Nova Scotia argument is deeply flawed, as the last chapter has explained. The legal objections are no less compelling.

189. Once again, a distinction must be drawn between the area landward of Point 2017 and the outer area. With respect to the area landward of Point 2017, Nova Scotia asserts that Newfoundland and Labrador in fact issued no permits during the 1965-1972 period and that it allegedly failed to protest the Nova Scotia permits.[178] It seems elementary, however, that conduct amounting to no more than a provisional application of an element in a proposed agreement, in the course of an unsuccessful negotiation, is neither binding nor prejudicial in the event that the negotiations fail. In 1974, after the negotiations had broken down,

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[175] Phase One Award, pp. 58-60, para. 5 21; p. 70, para. 6.6(8). Contrary to the implications of the Nova Scotia Memorial at IV-23-24, a willingness to consider administrative cooperation does not in the slightest imply an intention to relinquish the claim to constitutional ownership. Indeed, as the Tribunal noted in Phase One, the 1973 Newfoundland and Labrador Proposal was seen by the federal government as the province "seeking a unilateral authority over offshore mineral resources within which some territory is beyond the boundaries of the Province." The two are complementary, not inconsistent. See Phase One Award, pp. 63-65, paras. 5 26-5 27.

[176] Phase One Award, pp. 56-57, paras. 5.18-5.19.

[177] Nova Scotia Memorial, Phase Two, V-6, para 14.

[178] Nova Scotia Memorial, Phase Two, IV-27-28, paras. 55-59; IV-32-35, paras 70-75.

Newfoundland and Labrador did issue permits in the boundary area north of Point 2017. Significantly, those permits fail to conform to or reflect the JMRC line.[179]

190. So far as this area is concerned, therefore, the answer to Nova Scotia is that neither the line itself nor any conduct pertaining to the line is a relevant circumstance, since both transpired in the context of a negotiation that never came to fruition. As the approach of the Chamber in *Gulf of Maine* confirms, moreover, the greatest caution should be exercised in attributing legal significance to alleged *de facto* or *modus vivendi* lines adopted in the course of negotiations [180] Attempts to do so have been aptly described as giving rise to a "delicate problem," potentially limiting the ability of the parties "to control the scope and intensity of their dispute."[181] It would not serve the interests of international order – or of federal relations – to attach prejudicial consequences to patterns of conduct that are motivated by considerations of political cooperation and comity.

191. Beyond Point 2017, the administrative conduct alleged is not only sparse, and remote in time; it lacks the support of any proposed or tentative delimitation agreed upon by the parties. Every element of the record undercuts the momentous importance Nova Scotia is seeking to attach to a handful of exploratory or interim permits, long since expired and always *ultra vires*, issued over a relatively short period in a unique jurisdictional and political context.

192. In fact, the Nova Scotia argument for the legal relevance of the permits issued in the outer area as a "relevant circumstance" rests almost exclusively on a single precedent the 26 degree line adopted for the initial portion of the delimitation in *Tunisia* v. *Libya*. As the Court made clear, however, that line was amply supported by the purely geographical

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[179] Counter Memorial of Newfoundland and Labrador, Phase One, pp. 83-84, paras 224-226; Counter Memorial of Newfoundland and Labrador, Phase One, Figures 13, 14.

[180] *Gulf of Maine*, pp. 310-311, paras 148-152 Supplementary Authorities # 13

circumstances: it was a perpendicular to the coast in the area where the land boundary reached the sea. The exceptional character of the importance given to state conduct in this case has been noted.[182] More typical, in fact, is the outcome in *Jan Mayen*, where the Court attached no legal significance to arguments concerning the conduct of the parties.[183]

193. Despite its frequent references to *Gulf of Maine*, Nova Scotia fails to mention a critical passage in that judgment that puts the *Tunisia* v. *Libya* treatment of state conduct in its proper factual context, and demonstrates that the latter decision has no application to the facts in the present case, even setting aside the differences between the parties on issues of fact. In *Gulf of Maine,* Canada had argued that the practice of the parties for a period of seven years (1965 to 1972) created a *de facto* maritime limit, which was a relevant circumstance independent of the doctrines of acquiescence and estoppel. The Chamber pointed out, however, that the inferences drawn from conduct in *Tunisia* v. *Libya* were inseparable from a *modus vivendi* established during the colonial period:

> ...even supposing that there was a *de facto* demarcation between the areas for which each of the Parties issued permits...this cannot be recognized as a situation comparable to that on which the Court based its conclusions in the *Tunisia* v. *Libya* case. It is true that the

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[181] B.H. Oxman, "Political, Strategic, and Historical Considerations" in J. Charney and L. Alexander, eds, *International Maritime Boundaries*, vol. 1 (Dordrecht: Martinus Nijhoff Publishers, 1993) 3, pp. 36-37. Supplementary Authorities # 7.

[182] See P. Weil, *The Law of Maritime Delimitation – Reflections* (Cambridge: Grotius Publications Ltd., 1989) at p. 258: "It is perhaps significant that, apart from a discreet use of this concept in *Libya/Malta*, the courts have not endorsed the *Libya/Tunisia* approach.... This highly questionable relevant circumstance is likely, from now on, to come into play only very exceptionally." Supplementary Authorities # 8. Nova Scotia cites *Guinea* v. *Guinea-Bissau* in connection with the relevance of "the contemporary practice of the parties" (Nova Scotia Memorial, Phase Two, IV-29, para. 61, footnote 89). The paragraphs or pages referred to in footnote 89 seem to be in error and do not correlate with the earlier footnote referred to therein. In any event, this passage brings out the ambiguity of the word "contemporary," since what the Tribunal referred to in this connection was (as in *Tunisia* v. *Libya*) the early colonial practice of the metropolitan powers (France and Portugal) in the years going back to 1886. See *Guinea* v *Guinea-Bissau*, p. 160, para 25; p.174, para. 62; pp. 187-188, paras 105-107 of the judgment. The relevant passages were in any event not concerned with the continental shelf portion of the boundary but with an inshore area from the "thalweg" at a river mouth, and through a coastal archipelago to the 12-mile limit, an area of "eaux territoriales." See p. 190, para. 111 of the judgment. *Affaire de la Délimitation de la Frontière Maritime entre la Guinée et la Guinée-Bissau* (1985), 19 R.I.A.A. 149; Supplementary Authorities # 15

[183] *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, [1993] I.C.J. Rep. 38 at pp 53-56, paras. 33-40; pp. 76-77, para. 86. Supplementary Authorities # 16

> Court relied upon the fact of the division between the petroleum concessions issued by the two States concerned. But it took special account of the conduct of the Powers formerly responsible for the external affairs of Tunisia-France – and of Tripolitana-Italy--, which it found amounted to a *modus vivendi*, and which the two States continued to respect when, after becoming independent, they began to grant petroleum concessions.[184]

194. The practice referred to in this passage was a colonial line of delimitation relating to the sponge-banks of the *Tunisia* v. *Libya* area, dating back to 1913 and formalized in 1919.[185] The line had historical depth; it represented a settled pattern of conduct, in striking contrast to the ephemeral and transitory events invoked by Nova Scotia. It also had continuity; it was tacitly respected after the colonial period and it continued to be respected in the nearshore area up to the time the matter was submitted to the International Court of Justice.[186] This is also in striking contrast to this case, where even on the basis of the Nova Scotia scenarios, the alleged "concordant practice" cannot have endured beyond 1978, the latest time at which the interim permits of Newfoundland and Labrador could possibly have been in force.

195. The weight the 26 degree line was given in *Tunisia* v. *Libya*, as noted above, was also inseparable from its geographical basis as a perpendicular to the coast. The 26 degree line was adopted only for the first segment of the boundary close to the coast. In discussing this sector, the Court made it clear that the geographical rationale of the line was always central to its reasoning:

> ...the factor of perpendicularity to the coast and the concept of prolongation of the general direction of the land boundary are, in the view of the Court, relevant criteria to be taken into account in

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[184] *Gulf of Maine*, p. 310, para. 150. Supplementary Authorities # 13.

[185] *Tunisia* v *Libya*, p. 70, para. 93 Supplementary Authorities # 11.

[186] *Tunisia* v. *Libya*, p. 35, para. 21; p. 66, para. 86; p. 71, para 96. Supplementary Authorities # 11.

> selecting a line of delimitation calculated to ensure an equitable solution....[187]

When its attention shifted to the second and final sector of the line, the Court again invoked geographical considerations – the change in the direction of the Tunisian coast and the presence of the Kerkennah Islands – to explain the shift in the direction of the boundary it prescribed.[188]

196. In sum, the abutting oil concessions along the 26 degree line were taken into account as part of a complex of relevant circumstances, including the colonial line of delimitation and, above all, the geography. This is apparent in the passages set out above, and in the reference to "all appropriate factors."[189] It is also apparent in the structure of the *dispositif*, which lists state conduct as only one of five relevant circumstances, the other four being of a geographical character. This multi-factoral and in fact largely geographical perspective was reiterated in the subsequent 1985 judgment of the Court on an application for revision made by Tunisia, where the Court cited the *dispositif* in its original judgment and added a strong statement that the so-called petroleum concessions line of 26 degrees was "by no means the sole basis"[190] and " by no means the sole consideration taken into account by the Court."[191]

197. The permits in the present case were granted in a context of notorious jurisdictional uncertainty. It is a recurring theme of the Nova Scotia Memorial that substantial expenditures were incurred by companies under the permits that it issued. The reality, as explained elsewhere, is that the vast majority of the Nova Scotia permits simply replicated

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[187] *Tunisia* v. *Libya*, p. 85, para. 120. Supplementary Authorities # 11.

[188] *Tunisia* v. *Libya*, p. 88, para. 127. Supplementary Authorities # 11.

[189] *Tunisia* v. *Libya*, pp. 85-86, para 121. Supplementary Authorities # 11.

[190] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, [1985] I.C.J. Rep. 192, p. 211, para. 35 (hereinafter *Application for Revision and Interpretation*). Supplementary Authorities # 12.

[191] *Ibid.*, p 210, para. 35. Supplementary Authorities # 12.

the coverage and the rights granted under matching federal permits. Federal permits blanketed the area, and little if anything was done without the backing of a federal permit.[192] Any Nova Scotia permits not matched by federal permits simply disappeared with the implementation of the 1982 *Canada-Nova Scotia Accord*. The interim Newfoundland and Labrador permits cited by Nova Scotia failed to survive even that long, having been extinguished by the *Newfoundland and Labrador Petroleum Regulations, 1977*, at the latest.[193] In short, the permit practice adduced by Nova Scotia was artificial, ephemeral, remote in time, and of no continuing legal effect. It is difficult to see the parallel with the *Tunisia* v. *Libya* concessions on which Nova Scotia has placed such great reliance.

198. Quite apart from the continuing factual dispute over the geographical coverage of the Katy permit and the circumstances surrounding the Mobil permit, it strains credulity to suggest that two interim permits that expired a quarter of a century ago should be considered prejudicial at this late stage. In its discussion of the permits issued by Newfoundland and Labrador from 1973 to 1975, beyond the present 135 degree line, Nova Scotia refers to a passage in the *Gulf of Maine* case where Canadian seismic exploration was described as being "of minor importance" because it "involved neither drilling nor the extraction of petroleum."[194] Those words, though for slightly different reasons, are fully applicable to the permits in the present case to which Nova Scotia would attribute such decisive importance.

199. A further consideration is the extreme brevity of the period during which the *de facto* concordance of interim permits is alleged to have endured. In *Gulf of Maine*, the Chamber noted in connection with the Canadian argument that a relevant *de facto* line had emerged, that the period from 1965 to 1972 was "too brief to have produced a legal effect of this

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[192] Chapter IV, para. 116. See also Figure 6.

[193] *Newfoundland and Labrador Petroleum Regulations, 1977*, No. 233/77.

[194] Nova Scotia Memorial, Phase Two, IV-41, para. 86 See also *Gulf of Maine*, pp. 306-307, para 136. Supplementary Authorities # 13

kind."[195] 1965 to 1972 is precisely the period Nova Scotia invokes as the span of years during which the "consistent permit behaviour of the parties" is said to be legally relevant. The strikingly similar pattern of facts, so far as the duration of the allegedly relevant conduct is concerned, establishes beyond all doubt that even if every other proposition in the Nova Scotia permits argument were to be conceded, the period at issue was "too brief" to be legally relevant.

200. It is argued that Newfoundland and Labrador should have protested the issuance of permits by Nova Scotia along a 135 degree azimuth. The very concept of "protest" is part of the language of international law and diplomacy; it is foreign to the relations between Canadian provinces, especially in the context of a negotiation in which the opposite party was the federal government and it was crucial that the provinces should avoid internal squabbles and maintain a "united front." It was not incumbent on Newfoundland and Labrador to file a diplomatic protest. The Terms of Reference require that the parties be treated as if they were sovereign states for the limited purpose of allowing the international law of maritime delimitation to be applied. As the Tribunal itself noted, they do not require one to re-write the facts of history retroactively, or to impose standards of conduct and practices that would have been inappropriate to their status as provinces, unequipped with the apparatus of diplomacy and unaccustomed to its practices and norms.[196] Further, to the extent that any requirement of "protest" might be applied by analogy to the conduct of the two provinces at the relevant time, the Doody letter provides a complete answer to the Nova Scotia submissions.[197]

201. It is significant that Nova Scotia deals with the concepts of acquiescence and estoppel as an alternative argument, in a separate Chapter toward the end of its Memorial. Logically, either

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

[196] Phase One Award, pp 25-26, para. 3.23; pp. 27-28, para 3.26.

[197] Phase One Award, p. 62, para. 5.24

concept, if applicable, would figure as the principal ground for the resolution of the dispute, eliminating any need to proceed with delimitation on the basis of the relevant circumstances.

202. There are, in any event, at least three conclusive answers to the argument. First, the conduct of the parties, even setting aside all the factual errors and exaggerations of the Nova Scotia Memorial, could not begin to present the clear and consistent pattern of acceptance that the doctrine of acquiescence at international law would require. Second, the doctrine forms part of *general* international law, not part of the specialized branch of international law pertaining to maritime delimitation. This is not merely a technical point: it would be plainly inappropriate to apply concepts and standards of conduct inherently related to international relations and diplomacy to the relations between two Canadian provinces, and to do so on a retroactive basis. Third, it is incorrect to say that there was an absence of protest: as indicated in the *North Sea Cases*, a single protest (such as that constituted by the Doody letter) is sufficient.[198] As to "estoppel," it suffices to note that no substantive effort has been made to address or satisfy its distinctive requirements such as detrimental reliance.

V. A Radical Departure from Accepted Geographical Principles

A. A Capricious Definition of the Relevant Area

203. When Nova Scotia finally addresses the true basis of the delimitation, the "geographic correlation"[199] of the coasts and the delimitation area, its approach is seen to be equally at odds with the accepted principles of international law.

204. Nova Scotia has, in fact, proposed two separate conceptions of the relevant area – the so-called area of "overlapping entitlements" and the total offshore area appertaining to the parties under the two *Accords*. Its principal definition is that illustrated in Figure 54 and

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[198] *North Sea Cases*, pp 18-19, para 9 (German Aide-Mémoire) and para 12, Supplementary Authorities # 9.

[199] Nova Scotia Memorial, Phase Two, III-23, para. 56

elsewhere, which is described as the "overlapping offshore area entitlements" of the parties.[200] It is virtually impossible to grasp the basis on which this area has been constructed, and still harder to relate it to the principles of maritime delimitation consistently expounded in the international jurisprudence.

205. As shown, this "relevant area" extends over 700 nm from the Nova Scotia coasts to a point far to the northeast of St. John's, and over 500 nm southwest of the Newfoundland coasts, to the "Hague line" – the international maritime boundary with the United States as determined in *Gulf of Maine*. This area encompasses the entire continental shelf off Nova Scotia (including a portion of Georges Bank) and most of the Grand Banks of Newfoundland. No explanation for the arbitrary angle of the line limiting the area on the north has been provided, but it invites speculation that the sole object was to include the entire Hibernia field to better support the Nova Scotia *ex aequo et bono* plea for enhanced "access to resources."

206. This bizarre construction is said to flow from the statutory definitions of the offshore areas. The *Canada-Newfoundland Act* refers to the areas seaward of the low-water line and, in the absence of any "prescribed line,"[201] to the outer edge of the Canadian continental margin or the 200-mile limit.[202] The *Canada-Nova Scotia Act* refers "to the outer edge of the Canadian continental margin.[203] The infinitely elastic Nova Scotia interpretation, bringing Hibernia within the Nova Scotia "entitlements" and Sable Island as well as Georges Bank within the Newfoundland and Labrador "entitlements," is extravagant to the point of fantasy. The *Accords* legislation must be interpreted in accordance with the rule of reason, and subjected to implied constraints based on notions of geographical adjacency and frontal projection.

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[200] Nova Scotia Memorial, Phase Two, Figure 545 (after V-18); Figure 55 (after V-21), Figure 56 (after V-23).

[201] *Canada-Newfoundland Act*, s. 2.

[202] *Canada-Newfoundland Act*, s 2

[203] *Canada-Nova Scotia Act*, Schedule I.

Otherwise, each definition would indeed encompass the entire Canadian continental shelf and arguably even more – including, on a rigidly "literal" approach, the shelf areas under United States and French jurisdiction, which are not excluded by the express terms of the definitions.

207. Nova Scotia has in fact recognized the extravagance of its relevant area by depicting an arbitrary limit on the north. Pursued to its logical (or more properly, illogical) conclusion, the Nova Scotia "offshore area" would encompass the whole continental shelf, from New England (or beyond) to the Arctic, none of which is bounded by any "prescribed line."

208. In support of its novel approach to the relevant area, Nova Scotia invokes an eccentric reading of the jurisprudence. It states that the question is "what is the offshore area which each Province would have been able to claim had it not been for the presence of the other, and where do those competing entitlements overlap?"[204] It relies on the *Jan Mayen* case, where the idea of an area "which each State would have been able to claim had it not been for the presence of the other State" made perfect sense, given the precisely defined overlapping 200-mile arcs created by the presence of the opposite coasts of the parties.[205] It is difficult to grasp what the concept could possibly mean here. If Newfoundland and Labrador were physically removed from the map in the manner in which the Court was able to speculate on the absence of *Jan Mayen*, the continental shelf at issue in this case would either disappear as well or accrue to some other jurisdiction. This of course takes the concept of "refashioning geography" into the realm of science fiction

209. What is clear is that, in a framework of international law, the areas depicted as "overlapping entitlements" in the Nova Scotia pleadings are nothing of the sort. Under international law, no state could consider itself entitled, *prima facie* or otherwise, to areas 700 nm off its coast, lying directly in front of the territory of neighbouring states. One need only consider the

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[204] Nova Scotia Memorial, Phase Two, IV-10, para 20

[205] *Jan Mayen*, p. 64, para. 59, see also map at p. 80

delineation of the relevant coasts and areas in cases such as *Tunisia* v. *Libya* and *Gulf of Maine* to see how remote this notion is from the accepted principles of the jurisprudence and state practice. Ecuador, for example, has no *prima facie* title off Chilean Patagonia or to areas off central Mexico. Such limitations do not have to be spelled out because they are inherent in the very notion of adjacency without which the international law of delimitation could not be applied in a coherent fashion.

210. In fact, of course, the relevant area in those and other cases has been defined in terms that imply some notion of frontal projection, and involve identifying those coasts whose seaward projections constitute an area of overlap and then identifying that area of overlapping projections as the relevant area. Thus in *Tunisia* v. *Libya* the area beyond Ras Tajoura and Ras Kaboudia was deemed irrelevant,[206] as were the Atlantic coasts of Nova Scotia and New England outside the Gulf of Maine, and in each case the relevant coasts served to identify the limits of the relevant area.

211. In the international law of maritime delimitation, therefore, the delineation of the relevant area starts with identification of the relevant coasts and of their maritime projections. Nova Scotia utterly ignores the relevant coasts identified in *Canada* v. *France*, notwithstanding the fact that because the French islands are a laterally aligned feature of the south coast of Newfoundland, situated mid-way along that coast, the area concerned is substantially the same. Neither Canada, nor France, nor the Court of Arbitration at any point suggested that the coasts of mainland Nova Scotia, from Cape Canso to the southwest end of the Peninsula, might be relevant.[207] They cannot in fact be considered relevant, because their maritime projections do not extend into the delimitation area so as to create an area of potential overlap. This is apparent from **Figure 11**. Those coasts, simply because they lie to the southwest of the area of potential convergence, and because they face more to the south than to the east, should not be taken into account.

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[206] *Tunisia* v. *Libya*, p 64, para 80. Supplementary Authorities # 11.

212. Less significant, perhaps, but equally inexplicable, is the inclusion of the coasts at the two extremities of Nova Scotia's model, from Cape Race up the outer coast of Newfoundland to Cape Spear near St. John's, and from Cape Sable toward the Bay of Fundy to Cape Fourchu. The maritime projection of the former is straight out into the Atlantic Ocean, while the maritime projection of the latter is toward the Gulf of Maine and the United States. One is prompted to ask, why Cape Spear and not the entire Atlantic coast of Newfoundland and Labrador? And, why Cape Fourchu and not the entire Gulf of Maine coastline as accepted by the Chamber in *Gulf of Maine*? Each of these terminal segments serves only to demonstrate the lack of any coherent principle in the Nova Scotia definition of the relevant coasts, save to provide a spurious justification for its arguments about "apportionment," "access to resources," and "proportionality."

213. A practical example of the exaggerated conception of the relevant area can be found in Nova Scotia's treatment of other delimitations "in the same region,"[208] in which Nova Scotia includes the "prospective delimitation to the North of Labrador"[209] and the delimitation in the Gulf of Maine. Plainly those delimitations lie hundreds of miles beyond the broadest possible definition of the relevant area. In this regard, it is surprising and regrettable that Nova Scotia adopts the position of France, and contradicts the position of Canada, in describing the Canada-France maritime boundary as "only partially delimited."[210] The Court of Arbitration left this issue open as beyond its jurisdiction. The position of the Government of Canada is that France enjoys no rights beyond the 200-mile limit from its coasts, and that the delimitation is therefore complete. Indeed, the Agent for Canada in *Canada* v. *France*, writing after the decision of the Tribunal, described the French claim beyond 200 miles as

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[207] *Canada* v. *France*, pp. 1160-1162, paras. 24-33.

[208] Nova Scotia Memorial, Phase Two, IV-58-59, para. 125.

[209] Nova Scotia Memorial, Phase Two, IV-58-59, para. 125.

[210] Nova Scotia Memorial, Phase Two, IV-62, para 136

"preposterous."[211] In a domestic arbitration under Canadian legislation, it is clear that the Tribunal – and the parties – should avoid espousing positions in important matters of international controversy that directly contradict the policies of the national government.

B. The "Equal Division of Overlapping Entitlements"

214. Having set up a relevant area that has no basis in the international law of maritime delimitation, Nova Scotia compounds the confusion by postulating a principle that is equally misconceived: the "criterion of equal division of the area of overlapping entitlements."[212] The *Gulf of Maine* case and *North Sea Cases* are cited as authority. In fact, a cursory reading of either decision shows that the Nova Scotia formulation is a profound distortion of the criteria set out in those cases, both in its expression and in its practical application.

215. What *Gulf of Maine* actually referred to was a "criterion" that "one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap."[213] The reference – as repeated a few paragraphs later – is to an area of "convergence and overlapping of maritime projections,"[214] not to an area of "overlapping entitlements." The governing concept is that of "maritime projections." As illustrated in this case and elsewhere, this reflects the underlying notion, ultimately derived from the *North Sea Cases*, of a frontal projection and of areas that lie in front of more than one coast, creating an area of overlap and convergence.[215]

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[211] F.A. Mathys, "The Canada-France Maritime Boundary Arbitration: A Corridor for All Purposes" (1992) 4 *Niobe Papers* 109 at 118. Supplementary Authorities # 6.

[212] Nova Scotia Memorial, Phase Two, V-18, para. 42.

[213] *Gulf of Maine*, p 327, para. 195. Supplementary Authorities # 13.

[214] *Gulf of Maine*, p. 328, para. 197. Supplementary Authorities # 13.

[215] *North Sea Cases*, pp. 17-18, para. 8. Supplementary Authorities # 9

216. The criterion, as Nova Scotia in fact recognizes elsewhere in its Memorial, is primarily useful in the case of opposite coasts, where such an effect of convergence is likely to arise. The essential point, however, is that both conceptually and in its practical application, the concept could not be more remote from the idea of "overlapping entitlements," as illustrated in the Nova Scotia Memorial in terms of vast areas extending hundreds of miles up and down the two coasts, far from any areas where the "maritime projections" of the parties could possibly be said to overlap or converge.

217. Nova Scotia has misstated what the Chamber in *Gulf of Maine* actually said. It fails to mention the proviso with which the Chamber introduced its criterion: that it must be applied "having regard to the special circumstances of the case."[216] The formulation is thus essentially a paraphrase of the "equidistance-special circumstances" rule of Article 6,[217] which is identical in substance to the notions of equitable principles and relevant circumstances of customary international law.

218. In short, Nova Scotia has taken concepts relating to the well-established geographical perspective of the converging and overlapping maritime projections of coastal fronts, and applied them to a non-geographical notion of entitlement that has no basis in international law.

219. Nova Scotia refers as well to paragraph C(2) of the *dispositif* in the *North Sea Cases*, where – subject to a number of qualifications – the Court referred to an equal division of any areas of overlap remaining after the application of the principles laid down in the preceding paragraph.[218] Apart from the qualifications, it is obvious that this passage lends no support whatever to the sweeping concept proposed by Nova Scotia. The Court was referring here to an entirely different kind of "overlap." As set out in the judgment, this proviso applies

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[216] *Gulf of Maine*, p. 327, para 195. Supplementary Authorities # 13.

[217] *1958 Convention*, Article 6.

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

only where the application of the basic principles in the preceding paragraph – delimitation by agreement, the use of relevant circumstances, the concept of natural prolongation, and non-encroachment – still leaves an area of overlapping claims that is not fully delimited. Paragraph C(2) is a residual provision, calling for the "tidying up" of the boundary in the fringe areas, and not the "primary criterion" of delimitation asserted in the Nova Scotia Memorial.

C. The Use of an Incidental Feature as the Pivotal Point of the Delimitation

220. In an effort to link its geographical analysis to its principal argument based on conduct, Nova Scotia submits that the 135 degree line is in fact an application of the principles set out at the beginning of the *Notes: Re Boundaries* tabled in 1964.[219] This, apparently, is because the 135 degree line is midway between Sable Island and Cape St. Mary's and because point two of the preambular principles in the *Notes* says that islands "between" the provinces will be treated as peninsulas.[220] But the word "between" is simply not applicable. It refers to islands situated between opposite coasts, not islands lying "off" the coast of a province. As elsewhere, the language, coupled with the detailed descriptions within the document itself, demonstrate that what the drafters had in mind was the geography of the Gulf, where islands are properly described by the word "between." Nova Scotia refers as well to the principle in the *Notes* that refers to "prominent landmarks selected so far as possible along parallel shores."[221] Sable Island and Cape St. Mary's are patently not "parallel shores." Nova Scotia, in effect, treats Sable Island as if it were attached to mainland Nova Scotia. **Figure 12.**

221. There is an even more conclusive answer to this particular Nova Scotia argument. The detailed description in the *Notes* sets out the pairs of "basepoints" on which the lines then under consideration were based. It refers to "a point midway between Flint Island (Nova

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[219] Nova Scotia Memorial, Phase Two, II-5, para. 8; V-11, para. 25.

[220] Nova Scotia Memorial, Phase Two, V-12-13, para. 27, Figure 51 (after V-13)

[221] Nova Scotia Memorial, Phase Two, V-11, para. 25

Scotia) and Grand Bruit (Newfoundland)," then adding the indeterminate phrase "thence southeasterly to international waters. As the Tribunal held in Phase One, the *Notes* do not provide "any rationale for the direction or length of the line"[222] beyond Point 2017. If the drafters had contemplated that a point midway between Sable Island and Cape St. Mary's was to have been part of the grid they would simply have added the necessary language before the phrase "thence southeasterly..." Their failure to do so shows that this, along with so much else, is simply an invention, an *ex post facto* rationalization of the result that Nova Scotia seeks.

222. Since the *Notes* provide no support to Nova Scotia, and in any event fail to constitute either an agreement or a relevant circumstance, the only question that remains is whether this newly discovered point midway between Sable Island and Cape St. Mary's has any independent geographical or legal rationale. In fact, it simply serves to highlight the inequitable and disproportionate character of the 135 degree line. First, there is no reason why Cape St. Mary's should be singled out as the single controlling point along the eastern portion of the south coast of Newfoundland. If, for example, the headland of the Burin Peninsula at Lamaline-Shag Rock had been selected, the Nova Scotia thesis would no longer work. Cape St. Mary's in fact is only one of a series of landmarks along the coast, situated at an intermediate point that deprives it of any claim to constitute a defining feature of the configuration.

223. But that, obviously, is not the main objection to the Nova Scotia rationalization of the 135 degree line. What overshadows the arbitrary selection of Cape St. Mary's is the fact that Nova Scotia's argument makes an incidental feature, Sable Island, the pivotal point of the entire delimitation – one that would far outstrip the importance of all other relevant coasts in the construction and justification of the line. It would completely reconfigure the alignment of the coasts of Nova Scotia. **Figure 13.** Remarkably, the Nova Scotia justification would give Sable Island a much greater effect than a strict application of the equidistance method.

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[222] Phase One Award, p. 41, para. 4.22.

Such a result would be impossible to reconcile with basic principles of maritime delimitation, for the reasons set out in the Memorial of Newfoundland and Labrador in Phase Two. To recapitulate those reasons, Sable Island is an incidental feature, an "isolated sandy island,"[223] 88 nm off Nova Scotia, which is totally out of alignment with the general direction of the Nova Scotia coasts. It would, under an equidistance scenario – and all the more so with the 135 degree line – have an effect equivalent to extending the landmass of Nova Scotia 88 nm out to sea.[224]

D. The Use of a Single Straight Line

224. The Memorial of Newfoundland and Labrador sets out a full analysis of a provisional equidistant line, demonstrating that such a line could not be expected to produce an equitable result in this configuration.[225] All those reasons apply with even greater force to the 135 degree line. In particular, such a line would take no account of the substantial disparity in coastal lengths in favour of Newfoundland and Labrador, and for that reason it would not lead to an equitable result. It would, as noted in the preceding section, give a disproportionate effect to an incidental feature that profoundly distorts the general direction of the coasts. It would disregard the distinctions called for by the existence of an inner concavity and an outer area, the basic framework of this configuration as identified by the Court of Arbitration in *Canada* v. *France*.[226] And it plainly fails to avoid the pitfall of a "cut-off" within the inner concavity, resulting from the concave shape of the Newfoundland coast in the area to the west of the Burin Peninsula.

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

[224] Memorial of Newfoundland and Labrador, Phase Two, pp. 70-71, paras. 180-182.

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

[226] *Canada* v. *France*, p. 1160, para. 22.

225. All these issues arise, therefore, in the context of the 135 degree line as much or more than they do in the context of equidistance. Any objection to the strict equidistant line is, in fact, automatically applicable to the 135 degree line, because that line is situated on the Newfoundland side of an equidistant line. That, of course, is the basis of the point just made – that if an equidistant line giving full weight to an incidental feature such as Sable Island, as well as St. Paul Island, is manifestly inequitable and inconsistent with accepted principles and precedents, the same must hold true *a fortiori* for the 135 degree line.

226. But the 135 degree line gives rise to a further issue. There can be no possible rationale, in this configuration, for a single straight line that runs hundreds of miles from the area of the Cabot Strait to the outer edge of the continental margin, without the slightest change of bearing. It is self-evident that such a line takes no account of the varying geographical features that differentiate the inner concavity and the outer area. As just pointed out, the Court of Arbitration – as well as both parties – identified this as a decisive characteristic of the configuration. The existence of two areas necessarily implies the existence of two sets of geographical circumstances, which in turn suggests that there should be variations in the course of the line.

227. There can, of course, be cases where a delimitation beginning within a coastal concavity and extending into an area of open sea can properly be composed of a single straight line. That could be appropriate, for example, where the land boundary is situated in the center of the back of the concavity, there are no relevant coasts outside the concavity, and the coasts are of similar length. **Figure 14.** In the vast majority of instances, however, a delimitation beginning in a concave area and extending to the open sea implies one or more changes in the course of the line. This is simply a reflection of the fact that varying geographical circumstances are likely to be encountered as the line emerges from a relatively enclosed to a

relatively open-ended area. It is the logical consequence of the "two-area"[227] approach consistently adopted in these situations.

228. In the present case, it is evident that the 135 degree line takes no account at all of coasts outside the inner concavity. It appears to be, in approximate terms, an extension seaward of the initial segment beyond the Cabot Strait closing line, a segment based on full weight to St. Paul Island and on the landmarks of Grand Bruit and Flint Island. But as Newfoundland and Labrador has demonstrated in its Memorial, the line should turn before it emerges from the concavity, just as it has turned in the other cases involving a coastal concavity, in order to take account of the geographical characteristics of the broader configuration, including the coasts abutting the outer area.[228] The 135 degree line is untenable because it consists in its entirety of an indefinite projection of an initial segment apparently based on coastal features just seaward of Cabot Strait, but taking no account of the geography of the outer area or indeed of the more seaward portions of the inner concavity itself, and disregarding the decisive disparity in the coastal frontage of the two parties.

E. A Misconceived "Zone of Opposition"

229. One of the most important changes in the geography as the line moves in this case from the inner to the outer area is the gradual change from an opposite-coast relationship to an adjacent-coast relationship. A single straight line throughout the course of the delimitation, of course, necessarily disregards this change.

230. Nova Scotia has extended what it calls the "zone of opposition"[229] (*i.e.* the area where the prevailing relation is one of opposite coasts) far beyond the generally accepted meaning of the term. The accepted meaning of "opposite" is, essentially, the area where the delimitation

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[227] *Gulf of Maine*, p. 270, para 33. Supplementary Authorities # 13.

[228] Memorial of Newfoundland and Labrador, Phase Two, p. 68, para. 171; pp. 83-85, paras. 219-228.

[229] Nova Scotia Memorial, Phase Two, V-14-16; paras 31-34.

is to run between the relevant coasts. Areas where the line is no longer between the coasts but rather off the coasts are characterized by an adjacent-coast relationship.

231. Nova Scotia relies, it seems, on two separate grounds for extending the "zone of opposition" north to the Québec tripoint in the Gulf of St. Lawrence and – more significantly – south to the 46th parallel of latitude. The first is a Canadian argument in the Counter Memorial in *Gulf of Maine* that there exists a seaward "zone of oppositeness."[230] This, of course, was an effort to characterize the area of Georges Bank as one governed by opposite and not adjacent coasts so as to justify the application of an equidistant line in that outer area. The argument was unsuccessful. The Chamber in fact failed to mention it, but the rejection of the argument is implicit both in the practical result and in the analysis in the judgment. The Chamber characterized the segment from points B to C as an area of opposite coasts, leading to the use of an adjusted *median* line. No such terminology, and no such methodology, was invoked in relation to any portion of the line outside the closing line of the concavity. Nor has any of the subsequent jurisprudence referred to or endorsed the concept of a "seaward 'zone of oppositeness'."

232. The other Nova Scotia argument in support of its extended zone of opposition is even more perplexing. It is that the basepoints controlling an equidistant line (Scatarie Island and Colombier Island) as far as 46 degrees would be opposite. Why equidistance should be invoked as the benchmark on this point is unclear; but even in an equidistance scenario the contention is clearly unsound. In fact the equidistance basepoints controlling an offshore delimitation involving laterally aligned or adjacent coasts are, not infrequently, situated on opposite points of land. For example, an equidistant line emerging from a coastal concavity will normally be the headlands – on opposite coasts – of that concavity. The line may extend hundreds of miles from the closing line out to sea. That does not make the entire area seaward of the concavity an area of opposite-coast relationships Indeed, this Nova Scotia contention would make nonsense of many of the diagrams in the *North Sea Cases*, which

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[230] Nova Scotia Memorial, Phase Two, IV-70, para. 160; Nova Scotia Annex 202

showed how an equidistant line initially based on a pair of opposite basepoints can produce distortions as the line moves out to sea into an area properly described as one of adjacent coasts because it no longer lies between the coasts.[231]

F. A Misuse of Macro-Geographical Concepts

233. Nova Scotia has two arguments of a "macro-geographical" character, each of them involving an appeal to factors outside the relevant area, and each of them in any event devoid of merit. The first such argument relates to the "general concavity" of the Nova Scotia coast.[232] The second relates to the relative proportions of each of the two coasts that are "blocked" in their seaward projections by other coasts and therefore cannot generate continental shelf rights to the outer edge of the continental margin.[233] The exact implications of each argument are left deliberately vague.[234]

234. In its own Memorial, Newfoundland and Labrador used the expression "macro-geography" but it did so in an entirely different – and, it is submitted, appropriate – sense. The expression was used to refer to the use of coastal fronts, in other words, simplified lines of coastal direction within the relevant area.[235] The Nova Scotia approach is entirely different. It involves a continental frame of reference in which the Tribunal is asked to consider an area far beyond even the grossly exaggerated Nova Scotia version of the relevant area.

235. This use of macro-geography is inconsistent with the principles of the jurisprudence. Delimitation depends on the relevant coasts and the relevant area as defined in the preceding

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[231] *North Sea Cases*, pp. 17-18, para. 8. Supplementary Authorities # 9.

[232] Nova Scotia Memorial, Phase Two, IV-71-72, para. 165.

[233] Nova Scotia Memorial, Phase Two, IV-72, paras 166-167.

[234] Nova Scotia Memorial, Phase Two, V-24-25, paras 58-60.

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

sections, not on considerations arising from the continental geography. It suffices to consider the fate of the continental macro-geographical submissions by the United States in *Gulf of Maine*. These involved the direction of the North American coast on a continental scale, and a distinction between "primary" and "secondary" coasts that was based on the broad patterns of the continental geography. These arguments were given no effect whatever by the Chamber, which based its analysis exclusively on the characteristics of the geography of the Gulf of Maine.[236]

236. The use of a relatively broad geographical framework in *Guinea* v. *Guinea-Bissau* was not an exception to this approach. It was dictated by the presence of a series of very short coastlines along a limited portion of the West African coastline and the concern that a concave coastline might be "enclaved" – deprived of a maritime projection to the limits of national jurisdiction – by convex neighbors on either side.[237] It was, in other words, a straightforward application of the precepts in the *North Sea Cases* respecting the cut-off of concave coasts and the effect of other actual or prospective delimitations in the region.

237. The so-called "general concavity" of Nova Scotia is described as "not pronounced" (an understatement indeed), and as "partly ameliorated by the presence of Sable Island." However, a threat of "cut-off" is alluded to, with Nova Scotia being "squeezed" by boundaries at both ends – presumably by the United States in the Gulf of Maine and by Newfoundland and Labrador, as well as France, to the northeast.[238] The submission approaches the level of absurdity. It suffices to consider the distance between the Gulf of Maine and the delimitation area in this case to see that no cut-off in the *North Sea* or *Guinea* v. *Guinea-Bissau* sense could possibly arise The position and direction of the boundary in the Gulf of Maine also make a cut-off of the Nova Scotia coast an impossibility.

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[236] *Gulf of Maine*, p 271, para 36; p 320, para. 177. Supplementary Authorities # 13.

[237] *Affaire de la Délimitation de La Frontière Maritime entre la Guinée et la Guinée-Bissau* (1985), 19 R.I.A.A. 149 at p 187, paras. 103-104. Supplementary Authorities # 15.

[238] Nova Scotia Memorial, Phase Two, IV-71-72, para. 165.

238. The absurdity arises above all in connection with the notion that Nova Scotia could possibly be considered concave. It is through a geometrical construction based on points at Cape Hatteras as well as unidentified points somewhere in the Bahamas and a few hundred miles south of Bermuda that Nova Scotia has attempted to depict its coast as "concave," but none of this is even remotely connected with the delimitation area in this case. The idea that Nova Scotia suffers from concavity would have come as a total surprise to the Chamber in *Gulf of Maine*, where the issue revolved around the effects of the relative convexity of Nova Scotia in relation to the United States coast. How, in any event, a very large peninsula, extended in a seaward direction at one end by a very large island, could possibly be described as a concave configuration is a mystery.

239. Nova Scotia reaches a new pinnacle of irrelevance with its other macro-geographical argument, which complains that 60% of its coast (including the Gulf of St. Lawrence) is "blocked" from a full seaward extension, compared to 42% in the case of Newfoundland.[239] No attempt is made to explain how this could be legally relevant and none could be made. If the argument had any conceivable place in an adjudication based on international law, Belgium could argue that it should be compensated vis-à-vis the United Kingdom for the fact that it is "blocked" throughout its coast while the United Kingdom has a vast continental shelf to the north and west; or Uruguay could claim a compensatory shift in the boundary from Argentina to make up for the fact that its coast is short and Argentina's is very long.

240. There can be no question of compensating for inequalities that are inherent in the geography – in the words of the *North Sea Cases*, no "question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline;"[240] or in the words of *Libya* v. *Malta* "no question of refashioning geography or compensating for the

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[239] Nova Scotia Memorial, Phase Two, Figure 50 (after IV-72)

[240] *North Sea Cases*, p. 49-50, paras 91-92. Supplementary Authorities # 9.

inequalities of nature."[241] Nova Scotia's complaint about how much of its coast is blocked, of course, is merely a secondary aspect of Nova Scotia's appeal to an approach to delimitation that was rejected once and for all at the very inception of the development of the law, in the *North Sea Cases*: the notion that delimitation should be considered an apportionment of an undivided whole, and that the result should be based on the allocation of (what Nova Scotia would hold to be) a "just and equitable share" in that whole.[242]

VI Conclusion

241. Nova Scotia's treatment of the law relating to maritime boundary delimitation is deeply flawed. Under the guise of resting its analysis on the basis of title, it rejects the basis of title as recognized by international law – coastal geography – and substitutes it with a concept of title as a negotiated arrangement embodied in the *Accords* legislation. It then proceeds to determine the boundary essentially on the basis of the alleged conduct of the parties, seeking to turn conduct which the Tribunal has already ruled does not constitute an agreement into conduct constituting an agreed boundary nevertheless.

242. In short, Nova Scotia seeks to turn the law governing maritime boundary delimitation on its head, relegating coastal geography to a secondary consideration, providing a distorted geographical appreciation of the area, and inventing a concept of "overlapping entitlements". None of this has any basis in the jurisprudence. And, underlying all of this is the theme of an apportionment of an undivided whole, according to which the Tribunal should delimit the boundary in the light of the relative wealth of the parties' offshore resources.

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[241] *Libya* v. *Malta*, p. 39, para 36; Supplementary Authorities # 14. See also *Anglo-French Continental Shelf Case*, p.58, para. 101; p.92, para. 195; p. 113, para. 244; p.116, paras 248-249. Supplementary Authorities # 10.

[242] *North Sea Cases*, p. 22, para. 20 Supplementary Authorities # 9.

243. From wrongly derived and misapplied legal principles come results that can find no justification in law. As this Chapter has shown, Nova Scotia's line cannot be supported on the basis of the principles of international law governing maritime boundary delimitation.