CHAPTER VI ACQUIESCENCE AND ESTOPPEL

I. Acquiescence and Estoppel are Irrelevant

244. Acquiescence and estoppel have no more place in Phase Two of these proceedings than they did in Phase One. Acquiescence and estoppel were irrelevant in Phase One because the only issue was the existence of a binding agreement, and neither doctrine addresses the creation of legal obligations by agreement. In Phase Two, the only issue is how the principles of international law governing maritime boundary delimitation should be applied to determine – to establish – a line. The Terms of Reference do not ask whether an "existing line" has already been established by the conduct of the parties under the doctrines of acquiescence and estoppel.

245. This is not merely a technical argument about the precise wording of the Terms of Reference. Rather, it addresses the essence of what Phase Two is all about – the establishment of a line by this Tribunal through application of principles of maritime boundary delimitation law. Nova Scotia's submission that such a line already exists because of acquiescence and estoppel is an attempt to frustrate the Tribunal's central – indeed, under the Terms of Reference, its only – task in Phase Two. If acquiescence and estoppel have produced an "existing line," as argued by Nova Scotia, there is no opportunity to apply principles of maritime boundary law to delimit a line. If a line already exists, there is no object to Phase Two.

246. Phase One conclusively disposed of the issue of whether a line had already been established. The only issue remaining is how, in the absence of such a line, one should now be established. And the Terms of Reference are clear that the only legal basis upon which that inquiry is to proceed is through the application of principles of international law governing maritime boundary delimitation, including conduct as a relevant circumstance Conduct, as it relates to acquiescence and estoppel, or to any other body of international law other than maritime delimitation law, is simply not relevant to the task before this Tribunal.

II. Acquiescence and Estoppel Are Stringently Defined in International Law

247. Even if considered relevant in these proceedings, the law of acquiescence and estoppel has been exhaustively described in Newfoundland and Labrador's Phase One Counter Memorial and need not be repeated in detail here.[243] It suffices to recall briefly the essential and exacting requirements of both doctrines. Acquiescence requires the notorious assertion of a clear and unambiguous claim, which is not protested over a long period of time in circumstances where such protest ought to have been made in order to avoid adverse legal consequences [244] It requires a clear and consistent pattern of acceptance, which will be defeated by a single protest.[245] Estoppel requires an unambiguous and unconditional representation of fact to another state which relies on that representation to its demonstrated detriment.[246]

248. Nova Scotia does not even seriously attempt to describe, let alone satisfy, these onerous requirements. Indeed it is remarkable, yet emblematic of Nova Scotia's Phase Two Memorial, that it at once places extensive reliance upon, while summarily dismissing the significance of the result of, the only precedent with remarkable factual similarities to the present dispute – the *Gulf of Maine* case. Canada in that case not only urged that administrative practice between 1965 and 1972, including mineral permitting and exploration, had given rise to a *de facto* line, but also that the same facts gave rise to the application of principles of acquiescence and estoppel. It is instructive to recall what the Chamber said when rejecting Canada's argument. "It is . . . possible that Canada was reasonably justified in hoping that the United States would ultimately come round to its view. To conclude from this, however, in

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[243] Counter Memorial of Newfoundland and Labrador, Phase One, Chapter VI, pp 90-108. Newfoundland and Labrador refers to and relies upon its Phase One submissions on acquiescence and estoppel to the extent necessary in Phase Two.

[244] Counter Memorial of Newfoundland and Labrador, Phase One, pp. 95-100, paras. 255-64

[245] *North Sea Cases*, pp. 18-19, paras. 9, 12, Counter Memorial of Newfoundland and Labrador, Phase One, pp. 100-101, paras. 265-66. Supplementary Authorities # 9.

[246] Counter Memorial of Newfoundland and Labrador, Phase One, pp. 101-102, paras 267-268; pp. 103-104, para. 273.

legal terms, that by its delay the United States had tacitly consented to Canadian contentions, or had forfeited its rights is, in the Chamber's opinion, overstepping the conditions required for invoking acquiescence and estoppel."[247] The remarkable similarity of the nature and duration of the alleged conduct in *Gulf of Maine* and this case is self-evident and yet Nova Scotia simply sets the case aside on the fantastic assertion that its facts "bear no resemblance to the facts before this Tribunal." No better illustration could be given of Nova Scotia's willingness to ignore law and precedent in the pursuit of its claim

III. There is No Factual Basis for Acquiescence or Estoppel

249. As Nova Scotia's acquiescence and estoppel argument in Phase One was not confined to the existence of a binding agreement, but extended also to the alleged existence of a boundary, so too did Newfoundland and Labrador's rebuttal of that argument. The argument now advanced by Nova Scotia is virtually indistinguishable from its earlier version. In particular it relies, with the exception of limited new evidence of third party exploration activity and expenditures, on precisely the same set of facts. Accordingly, Newfoundland and Labrador relies upon its Phase One submissions on acquiescence and estoppel, and in particular its factual rebuttal of Nova Scotia's version of the alleged facts[248] That rebuttal shows conclusively that there is simply no factual basis at all for the application of acquiescence or estoppel in this case.

250. The essence of the factual inadequacies of Nova Scotia's acquiescence and estoppel arguments may briefly be recalled, however. Essentially Nova Scotia relies on two types of conduct which it says give rise to acquiescence and estoppel: (1) the negotiating history between the parties which it says discloses at least political agreement on the line it now

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[247] *Gulf of Maine*, p. 308, para. 142 Supplementary Authorities # 13.

[248] Counter Memorial of Newfoundland and Labrador, Phase One, Chapter VI, particularly pp. 100-101, paras. 255-266; pp. 103-108, paras. 273-282.

advances; and (2) the administrative and permitting practice of the parties which it says confirms the existence and respect of a political agreement on that line.

251. On the first of these, the negotiating history, it has already been fully demonstrated that the proposals exchanged in the early stages of this dispute were always conditional on eventual federal recognition of offshore provincial ownership, and were predicated on the understanding that federal and provincial legislative implementation would be required In short, the claims and the proposals were conditional, contrary to an essential requirement of acquiescence and estoppel. They were also unclear, never having proceeded beyond the stage of working proposals, violating another essential requirement of acquiescence and estoppel. Moreover they were of limited duration, the conditions having failed and disagreement on the nature of the proposals themselves having emerged between the parties by 1973 at the latest. In any case they did not relate to anything resembling the line now advanced by Nova Scotia, in itself a complete answer to any suggestion that they now give rise to acquiescence or estoppel in relation to such a line.[249]

252. On the second category of conduct, the alleged administrative and permitting practice of the parties, it has been exhaustively demonstrated that none of it was mutual, consistent or clear, again fatally undermining its relevance as a basis for acquiescence or estoppel.

253. In terms of its own administrative practice, Nova Scotia points to its issuance of permits abutting its proposed line (adding now the allegation that some exploratory drilling actually took place under some of those permits) and contends that Newfoundland and Labrador ought to have protested. Yet what it has failed to show (as opposed to allege) is that such practice was notorious or published in any way that came to the attention of Newfoundland and Labrador;[250] or that Newfoundland and Labrador would have had any reason to protest,

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[249] See Chapter IV, paras. 82-109.

[250] See Chapter IV, para 109, Counter Memorial of Newfoundland and Labrador, pp. 30-31, paras. 74-79.

given the common provincial front vis-à-vis the federal government,[251] and the fact that the parties were provinces and not states between which legal effects might be expected to flow from a failure to protest. Most fatally, it ignores the fact that Newfoundland and Labrador did contest the location of any proposed line between the parties by 1973 at the latest, as evidenced by the Doody letter.[252]

254. Moreover, the evidence recently disclosed by Nova Scotia as to the location of exploratory activity does not support the conclusion that any such activity in fact occurred under permits abutting its line, or indeed that any of it occurred under provincial permits, as opposed to federal permits, at all. Similarly, purported expenditures by third-party private entities, even if they could be relevant to acquiescence or estoppel in favour of Nova Scotia, were far more likely incurred under federal permits than under their corresponding Nova Scotia "ghosts."

255. Nova Scotia also considers Newfoundland and Labrador's alleged failure to protest various subsequent agreements between other parties to be significant. Altogether aside from the evidence already in the record that most of those agreements were conditional, ambiguous and in fact protested in various ways, none of them could reasonably have been expected to be of any legal significance at all to Newfoundland and Labrador.[253] Not only were they *res inter alios acta* and hence, as found by this Tribunal in Phase One with respect to the *Canada-Nova Scotia Act*, "not opposable to Newfoundland and Labrador,"[254] they were also concluded in a domestic Canadian legal and constitutional context in which failure to protest could not possibly have been expected to produced adverse legal effects. Thus, to the extent the contents of such subsequent agreements or understandings with other parties were intended by Nova Scotia as unilateral assertions of right, they were manifestly unfounded.

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[251] Counter Memorial of Newfoundland and Labrador, Phase One, pp 99-100, paras. 262-264.

[252] Phase One Award, p 62, para 5.24, p. 48, para 5.7.

[253] See Chapter IV, paras. 105-108.

[254] Phase One Award, p. 82, para. 7 10.

And the law of acquiescence and estoppel is clear that manifestly unfounded claims require no response whatsoever.[255]

256. With respect to Newfoundland and Labrador's practice, which is essential if Nova Scotia is to satisfy the requirement of *mutual* conduct, Nova Scotia relies on: (1) the alleged application by Newfoundland and Labrador of "the line" in its *1977 Regulations*; and (2) the alleged issuance of two permits "along the boundary."[256] The first of these purported facts is pure fantasy and requires no further comment.[257] The Nova Scotia case is thus reduced to the issuance of two interim permits (Katy and Mobil). The irony of course is that one of these (Katy) clearly did not in fact respect the line now advanced by Nova Scotia;[258] and the other (Mobil) in fact appears to lie along only a fraction of that line. Just how a single interim permit along a very short segment of Nova Scotia's line could possibly constitute a clear and unambiguous recognition by Newfoundland and Labrador of the whole of that line, producing legally binding effects, is not explained by Nova Scotia. The reason is simple: such a proposition applied to relations between states would be preposterous in international law. Tellingly, not a single authority is cited in which such an argument has ever been ventured, let alone accepted.

257. What is new in the factual record, of course, but which is entirely ignored by Nova Scotia, is that this Tribunal has made a number of factual findings in Phase One that are highly relevant to any purported acquiescence or estoppel in an "existing line." These have been alluded to elsewhere in this Counter Memorial but a selection of the most pertinent in this context are:

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[255] P Cahier, "Le comportement des États comme source de droits et d'obligations" in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva: Institut universitaire de hautes études internationales, 1968) at 254: "[D]evant la prétention manifestement infondée d'un État, l'absence de réaction de l'autre, ne saurait d'aucune manière être interpretée comme un acquiescement à la prétention ou comme une renonciation à un droit." Supplementary Authorities # 1.

[256] Nova Scotia Memorial, Phase Two, VI-3-6, para. 7

[257] See Chapter IV, paras. 146-147. See also Phase One Award, p. 70, para. 6 6(8).

[258] Counter Memorial of Newfoundland and Labrador, Phase One, pp 31-35, paras 80-93; pp 81-82, paras. 218-222.

a) the finding that the *1964 Joint Statement* was of a "conditional character" and "link[ed] to a provincial claim to existing legal rights to the offshore," and that "[i]n neither respect did the *1972 Communiqué* change matters;"[259]

b) the finding that the *1964 Joint Statement* was characterized by "uncertainty and imprecision,"[260] and that "[t]hroughout, the negotiations were characterized by a measure of informality and imprecision;"[261]

c) the finding that the Doody letter, if sent between states, "would probably have been treated as the beginning of a dispute,"[262] and that the origins of a "dispute as to the existence and location of a boundary ... go back to 1973;"[263]

d) the finding that, with respect to the oil permit practice of the parties, "there is no unequivocal indication that that practice was referable to an earlier agreement on boundaries;"[264] and

e) the finding that "at no stage did Newfoundland and Labrador accept or endorse the 135° line," and that "Nova Scotia knew Newfoundland and Labrador disputed that line."[265]

258. Examples could be multiplied, but need not. Each and every one of these findings of fact would suffice, on its own, to dispose conclusively of Nova Scotia's contention that the

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

[260] Phase One Award, p. 41, para. 4 22

[261] Phase One Award, p. 79, para. 7.6

[262] Phase One Award, pp. 62-63, para. 5.24.

[263] Phase One Award, pp. 48-49, para. 5.7

[264] Phase One Award, pp. 70-71, para 6.8.

[265] Phase One Award, p. 75, para. 6.15.

parties have already established, by their conduct, a legally effective maritime boundary. Taken together, along with the rest of the factual record, those findings are devastating to such an argument, again putting acquiescence and estoppel out of this case altogether.