SUMMARY OF NEWFOUNDLAND AND LABRADOR PHASE TWO COUNTER-MEMORIAL

GEOGRAPHY

According to Nova Scotia, its coast lies within a concavity comprising the east coast of North America. This allegedly raises the possibility that Nova Scotia's offshore area might be "squeezed" by maritime zones on either side. But Nova Scotia's depiction of this concavity is misleading. It shows the North American coastline projected horizontally, using southern hemisphere parameters. The use of standard projection parameters reveals that there is no such concavity (Figure 2). Nova Scotia's selection of end points, moreover, is arbitrary. It is engineered to produce a concavity.

Nova Scotia also claims that a smaller proportion of Newfoundland's coasts is "blocked" by the coasts of other jurisdictions than is the case for Nova Scotia. Blocking is irrelevant in international law, however. It takes into account geography that is completely outside the area to be delimited.

Nova Scotia's characterization of the relevant coasts is arbitrary and departs from the approach in *Canada v. France*. There, the Court accepted the Canadian position that the coasts fronted onto the area to be delimited. But in an attempt to expand the area to be considered by the Tribunal, Nova Scotia seeks to include coasts that do not face the area. In addition, it uses seemingly arbitrary coastal points that do not coincide with the points that the Court selected in *Canada v. France*. Curiously, Nova Scotia appears to abandon those points in assessing the proportionality of its proposed line.

Nova Scotia also distorts the relationship of coasts that do face onto the relevant area. It seeks to continue a relationship of oppositeness into an area where the coasts are adjacent. It does this by drawing an equidistance line southeast of Cabot Strait out to 46 degrees N. This line is then used to define the area of opposition. But this is the reverse of the standard procedure, which is to first determine the relationship of oppositeness and then draw a provisional equidistance line. Nova Scotia's method permits any two coasts to be defined as "opposite."

Nova Scotia's definition of the relevant area is also seriously flawed. Departing from the settled approach to maritime boundary delimitation, Nova Scotia derives a relevant area from

notional "entitlements" drawn from a capricious interpretation of the Accord legislation. The resulting area, drawn from coasts which projections do not converge, has no relationship to the geography of the area (Figure 4).

CONDUCT OF THE PARTIES

Political Relations

Nova Scotia submits that, notwithstanding the Tribunal's decision in Phase One, the parties agreed in 1964 to both a boundary and a methodology for drawing that boundary. Neither claim is correct. The Tribunal's determination that the 1964 meeting did not lead to a binding agreement applies equally to methodology. Minister Doody's 1972 statement that he was "not questioning the general principles which form the basis of the present demarcation" was nothing more than a statement of fact about the basis upon which certain lines had been drawn. The Tribunal stated, moreover, that even if it had found there to be an agreement, it would have extended no further than Turning Point 2017.

Nova Scotia's further claims regarding the Doody letter are equally erroneous. Doody did not simply reject the 125 degree line in the Stanfield map. Nova Scotia refers to a "partially erased" line on the map half-way between Doody's "tentatively suggested line" and the 125 degree line. But the this line is simply the western limit of the Mobil permit. Minister Doody was using a map showing existing Newfoundland permits. He was not erasing a line, as Nova Scotia claims, reflecting the parties' permit practice. In any event, the Tribunal found in Phase One that this letter would probably be treated in international law as the beginning of a dispute. And contrary to Nova Scotia's contention, the Tribunal found that there was no reply to the letter from Nova Scotia. The Tribunal characterized Nova Scotia's eventual response (from Michael Kirby) as confirming that the line's location was negotiable.

Nova Scotia now admits that there is no evidence that the federally-prepared map at issue in Phase One was presented to the east coast Premiers in June, 1972. But it continues to assert that the map was used at the Premiers' meeting of August 2, 1972. It argues that the map that federal

official Crosby presented to Premier Moores in 1972 must have contained the 1964 boundary because Crosby's notes of that meeting include area calculations. But this is simply an assumption. It does not account for the fact that Crosby's notes contain many more calculations than appear on the map.

Nova Scotia's reliance on Newfoundland's failure to object to the 1984 Accord legislation is also mistaken. By 1980 both the federal government and the provinces were aware that there was a live dispute over the boundary. The 1982 Canada-Nova Scotia Agreement, moreover, made specific reference to amendment in the event of a dispute with a neighbouring jurisdiction. Newfoundland would have understood this proviso as protecting its legal rights. The 1984 legislation did not undermine any commitment made in the Agreement.

Lastly, Nova Scotia's contention that it published a map showing the 135 degree line is not supportable. There is no evidence that such a map was either published or in the public domain.

Administrative Practice

Nova Scotia's discussion of its permitting practice elides the role of the federal government. Nova Scotia Figure 33 purports to show wells drilled under Nova Scotia permits (Figure 6). But the companies who drilled these wells also obtained federal permits. Nova Scotia's contention that its permits were the basis for significant expenditures is misleading. Given the constitutional environment, industry likely relied much more heavily on the federal permits. Indeed, many companies payed monies pursuant to Nova Scotia permits under protest.

Similarly, the seismic exploration referred to in Nova Scotia Annex 178 does not, as Nova Scotia claims, prove that companies conducted work under Nova Scotia permits. The exploration was conducted under federal permits. Nova Scotia did not require seismic permits. It merely allowed companies to credit non-permitted seismic work against their provincial permit obligations.

Nova Scotia's permitting practice also fails to support its claim that work was conducted along the alleged 1964 boundary. In 1967 Canada and France agreed to a moratorium on

petroleum exploration in the area south of St. Pierre and Miquelon. All of Mobil's Nova Scotia (and federal) permits in the vicinity of the boundary were within this block. Mobil respected the moratorium and did not explore in this area. The source of confusion is the *Nova Scotia Petroleum Regulations*. They required licensees to expend certain amounts for each permit. But they also allowed licensees to "group" licenses, so that expenditures made on one license could be applied to any other within the group. Annex 178 simply shows that companies were planning to allocate expenditures incurred in other areas to groups including permits along the boundary. It does not demonstrate that work was actually conducted under boundary permits. Even if work had been done, it would show nothing more than work performed by federal permit holders. And even if Nova Scotia had been able to prove activity under permits abutting the 135 degree line, it is unclear what prejudice would result from the drawing of another line. Finally, most Nova Scotia permits were surrendered in the mid-1970s. And any remaining permits were terminated by the 1984 Accord legislation.

Nova Scotia's treatment of Newfoundland's permitting practice is similarly flawed. Its claim that Newfoundland issued no permits from the tri-junction to Point 2017 is simply wrong. Newfoundland issued interim permits to Katy Industries, Hudson's Bay, and Texaco that were located inside Point 2017. Nova Scotia's assertion that Newfoundland never issued relevant permits conflicting with the 135 degree line is also wrong. Newfoundland pointed in Phase One to numerous permits overlapping the Nova Scotia line (Figure 8). Nova Scotia also argues that Newfoundland's issuance of a permit to Mobil on September 15, 1967 reflects Newfoundland's acceptance of the 135 degree line. But given the fact that Newfoundland issued the permit after Nova Scotia had issued one, it is just as likely that Newfoundland simply conformed to Mobil's request. And contrary to Nova Scotia's submission, the Katy permit did not adhere to the 135 degree line. Transposed onto a chart containing a permit grid, the permit's western limit extends to the west of the 135 degree line (Figures 9-10). Lastly, Nova Scotia's reliance on maps attached to the White Paper and to the 1977 *Newfoundland and Labrador Petroleum Regulations* is unfounded. The sketches are imprecise, but they clearly do not depict a 135 degree line.

THE LAW

The Basis of Title

For Nova Scotia, this dispute is not concerned with the delimitation of the continental shelf, but rather with a zone created by negotiated arrangements implemented in Canadian law. This characterization has the effect of relegating geography – the "very philosophy of maritime jurisdiction" – to a secondary role in the delimitation process. It is true that provincial offshore entitlements cannot literally be continental shelf rights. Provinces are not states and cannot therefore enjoy the territorial sovereignty on which those rights are based. Given the lack of inherent constitutional title, moreover, such rights must necessarily be derived from original rights. But this does not mean that offshore rights cannot be treated as genuine shelf entitlements for the limited purpose of applying the international law of maritime boundary delimitation. This arbitration requires the adoption of the legal fiction that the parties are sovereign states subject to international law. This assumption is explicit in the Terms of Reference, which state that international law is to be applied "as if the parties were states." And if they were states, then their seabed entitlements beyond the territorial sea would be continental shelf entitlements. Nova Scotia's position would preclude the application of the customary international law of continental shelf delimitation. In the result, no law could be applied, contrary to the terms of both the legislation and the Terms of Reference.

In any event, it is incorrect to suggest that the basis of title in this case is simply an *ad hoc* "deal" that had nothing to do with international continental shelf law or geography. The Accords treat the two parties as if they were sovereign states with their own shelf entitlements. The Accord Acts refer to the outer edge of the continental margin. The fact that the negotiated regime deals only with hydrocarbon resources is immaterial. Hydrocarbons have always been the driving force of the continental shelf regime.

Apportionment and Resource Location

Nova Scotia submits that the total offshore area of the provinces is relevant to this delimitation. It similarly argues that the object of this delimitation comprises an integral, undivided whole. These contentions contradict the fundamental concept of delimitation expressed in the *North Sea Cases*. The Court rejected Germany's argument that the delimitation should be based on the principle of a "just and equitable share." Delimitation, it held, is concerned with the division of marginal areas, not the determination *de novo* of entire areas already appertaining in principle to the coastal state. This 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.

Nova Scotia's reliance on the alleged disparity between the petroleum resources available to each party is also misplaced, in part because it reflects the global apportionment theory, and in part because it is based almost exclusively on resources lying far beyond the relevant area (principally Hibernia and resources off Labrador). But it also invokes a theme – relative wealth and poverty – that courts have conclusively rejected. Minor adjustments can be made along a boundary's course to take account of known resources. But such pragmatic considerations lend no support to Nova Scotia's contention that the sharing of resources throughout the continental shelf should be the governing principle of this delimitation.

The Parties' Conduct

Nova Scotia argues that even if the purported 1964 agreement never became binding, it should be treated as decisive because of its intended finality. Every proposed boundary is intended to be final, but only if negotiations succeed and the conditions for entry into force of the agreement are fulfilled. This did not happen in the present case. The proposed 1964 boundary is therefore not a relevant circumstance. Whatever consensus existed as to the location of the proposed boundary expired upon the federal government's rejection of the parties jurisdictional claims. It cannot be assumed that because the Premiers, in June 1972, were willing to accept the

JMRC lines as part of a strategy to secure ownership, they would have been prepared to accept them in return for something less. So far as Newfoundland was concerned, nothing short of ownership was ever contemplated. In any case, the Tribunal found definitively in Phase One that the alleged outer sector boundary (the 135 degree line) was never part of the consensus. Beyond Point 2017, the parties did not even agree on a political or conditional basis.

The parties' permit practice also lacks the legal effect that Nova Scotia claims for it. The fact that Newfoundland did not object to Nova Scotia permits (and issued no permits of its own) in the inner area during the 1965-1972 period does not constitute a relevant circumstance. The provisional application of a proposed agreement is neither binding nor prejudicial in the event that negotiations fail. In 1974, after negotiations had broken down, Newfoundland did issue permits in the inner sector. Those permits did not conform the JMRC line.

Beyond Point 2017, the parties' permit conduct lacks the support of any proposed or tentative delimitation. Nova Scotia argues nevertheless that Newfoundland should have protested Nova Scotia's issuance of permits along a 135 degree azimuth. But Newfoundland and Nova Scotia are not sovereign states. It was not incumbent on Newfoundland to file a diplomatic protest. Nova Scotia also relies here on *Tunisia v. Libya*. But as the Court in that case made clear, the line indicated by the parties' concession practice was amply supported by purely geographical circumstances. Commentators have been critical of the treatment of conduct in *Tunisia v. Libya*, moreover, and subsequent courts have confined it to its unique facts. The line there represented a settled and continuous pattern of conduct dating back to 1913. This contrasts with the present case, where even on Nova Scotia's version of the parties' conduct, the alleged "concordant practice" could not have endured beyond 1978, when the last of the Newfoundland interim permits expired. In *Gulf of Maine*, the Chamber found that a seven year period of concordant practice was too brief to have produced a legal effect. This is precisely the same period (1965-1972) that Nova Scotia invokes as the span during which the parties' consistent permit behaviour is said to be relevant.

Lastly, the parties' conduct does not present the clear and consistent pattern of acceptance

that the doctrine of acquiescence requires. Even if it did, the doctrine of acquiescence is part of general international law, not the specialized branch pertaining to maritime delimitation. It would be inappropriate to retroactively apply standards of conduct related to international relations to Canadian provinces. In any case, Newfoundland did protest. In international law, a single protest (such as that constituted by the Doody letter) is sufficient. As to estoppel, it is sufficient to note that Nova Scotia has made no substantive effort to address its distinctive requirements, including detrimental reliance.

Geographical Principles

Nova Scotia's definition of the relevant area – the parties' "overlapping offshore area entitlements" – bears no relationship to accepted principles of maritime delimitation. Nova Scotia's area encompasses the entire continental shelf off Nova Scotia and most of the Grand Banks of Newfoundland. In Nova Scotia's view, this flows from the statutory definitions of offshore areas that refer to the outer edge of the continental margin. But the statutory definition must be constrained by reason, and more specifically by notions of adjacency and frontal projection. Otherwise it would encompass the entire Canadian continental shelf and perhaps even areas under United States and French jurisdiction. Nova Scotia recognizes the extravagance of its relevant area by depicting an arbitrary limit to the north of the area.

Under international law, no state could consider itself entitled, *prima facie* or otherwise, to areas 700 miles off its coast, lying directly in front of the territory of neighbouring states. Relevant areas are always defined in terms of overlapping coastal projections. So in *Canada v. France*, which involved substantially the same delimitation area as in the present case, neither the parties nor the Court considered Nova Scotia's mainland coasts to be relevant. They lie to the southwest of the area of potential convergence, facing more south than east (Figure 11). Less significant, but equally inexplicable, is Nova Scotia's inclusion of the coasts from Cape Race up the outer coast of Newfoundland to Cape Spear, and from Cape Sable toward the Bay of Fundy to Cape Forchu. The maritime projection of the former is straight out into the Atlantic Ocean,

while that of the latter is toward the Gulf of Maine.

Nova Scotia's postulation of a principle of "equal division of the area of overlapping entitlements" is equally misconceived. In *Gulf of Maine*, the Chamber referred not to overlapping entitlements but rather to an area of "convergence and overlapping of maritime projections." And in the *North Sea Cases*, the Court referred to an equal division of areas of overlap. But it cautioned that this principle only operates where the application of basic principles (agreement, relevant circumstances, natural prolongation, and non-encroachment) still leaves an area of overlapping claims. It is a residual provision, not the "primary criterion" of delimitation asserted by Nova Scotia.

Nova Scotia also submits that the 135 degree line is an application of the principles set out at the beginning of the *Notes: Re Boundaries* tabled in 1964. This derives from the preamble to the *Notes*, which states *inter alia* that islands "between" provinces will be treated as peninsulas. The 135 degree line is midway between Sable Island and Cape St. Mary's. The preamble, however, refers to islands situated "between" opposite coasts, not islands lying "off" a province's coast. The *Notes* also refer to the principle that prominent landmarks are to be selected so far as possible along "parallel shores." Sable Island and Cape St. Mary's are not "parallel shores."

Further, the *Notes* set out the pairs of "basepoints" on which the lines it describes were based. It refers to "a point midway between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland)," then adding the 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" 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."

In addition, the selection of Sable Island and Cape St. Mary's has no geographical rationale. There is no reason why Cape St. Mary's should be singled out as the single controlling point along the eastern portion of Newfoundland's southern coast. More important, the selection of Sable Island makes an incidental feature the pivotal point for the entire delimitation, completely

reconfiguring the alignment of the Nova Scotia coasts (Figure 13). The Nova Scotia approach would give Sable Island a much greater effect than a strict application of the equidistance method.

Nova Scotia's proposed 135 degree line, like the equidistance line analyzed in the Newfoundland Phase Two Memorial, does not produce an equitable result. It takes no account of the substantial disparity in coastal lengths in favour of Newfoundland. As noted, it gives disproportionate effect to an incidental feature. It "cuts-off" Newfoundland's coast in the inner concavity. And it disregards the distinctions required by the existence of an inner concavity and an outer area. In the vast majority of instances, a delimitation beginning in a concave area and extending to the open sea implies a shift in the course of the line. In the present case, the 135 degree line ignores coasts outside the inner concavity. It effectively extends the "zone of opposition" far beyond its accepted meaning.

ACQUIESCENCE AND ESTOPPEL

Acquiescence and estoppel have no relevance to this case. In Phase Two, the only issue is how the principles of international law governing maritime boundary delimitation should be applied to determine a line. The Terms of Reference do not ask whether an "existing line" has already been established by the parties' conduct. If acquiescence and estoppel have produced an existing line, as argued by Nova Scotia, then there is no opportunity to apply maritime boundary law.

Even if relevant, the strict requirements of acquiescence and estoppel are not met here. Acquiescence requires the notorious assertion of an unambiguous claim; that 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. Estoppel requires an unambiguous and unconditional representation of fact to another state that detrimentally relies on that representation.

Nova Scotia relies on essentially the same facts that the Tribunal in Phase One declined to find constituted acquiescence or estoppel. The proposals exchanged in the early part of the

dispute were unclear, conditional upon federal recognition of offshore provincial ownership, and of limited duration. And the parties' permitting practice was not mutual, consistent, or clear. Nova Scotia's issuance of permits along its proposed line, moreover, was neither notorious nor published in any way that came to Newfoundland's attention. In any case, given the common provincial front *vis-à-vis* the federal government, Newfoundland had no reason to protest. And as evidenced by the Doody letter, Newfoundland did by 1973 contest the location of Nova Scotia's proposed line.

Newfoundland's alleged failure to protest various subsequent agreements between other parties is also irrelevant. Newfoundland could not reasonably have been expected to consider any of them to be legally significant. They were not opposable to Newfoundland and were concluded in a domestic Canadian legal and constitutional context in which failure to protest does not normally produce adverse legal effects.

Lastly, Newfoundland's practice falls well short of establishing acquiescence or estoppel. Newfoundland did not apply the 1964 line to its *1977 Regulations*. And its issuance of interim permits did not in the main respect the Nova Scotia line.

THE EQUITY OF THE RESULT

In applying the proportionality test to its proposed line, Nova Scotia repeats the same mistake it made in defining the relevant maritime area. Rather than determining the relevant area by reference to the surrounding coasts, Nova Scotia defines it as the area of "overlapping entitlements." As a result, coasts that do not face into the area to be delimited are included in the calculation of coastal lengths. This produces a gross exaggeration of the parties' coastal lengths. In *Canada v. France* the Court determined the length of the Canadian coasts in this area to be 455.6 miles. In the present case Nova Scotia claims that Newfoundland's coasts are 379 miles and Nova Scotia's coasts are 403 miles in length. Tested by Newfoundland's proportionality model, Nova Scotia's line results in the following: with 30.6 percent of relevant coasts, Nova Scotia receives 56.9 percent of the area; Newfoundland, with 69.4 percent of the coasts, receives

44.1 percent of the area (Figure 15). Nova Scotia's line also cut-offs the south coast of Newfoundland from its natural prolongation (Figure 16).

Nova Scotia also compares the total offshore areas appertaining to the parties to their coastline lengths, finding the result to be proportional. But it makes no attempt to justify such a comparison on the basis of legal principle. Further, it concludes that the division of resources within the area of overlapping entitlements is equitable. But in the absence of "catastrophic repercussions," which Nova Scotia does not establish, this factor is irrelevant. Finally, Nova Scotia relies on the parties' conduct. But this is not a test of equity. It is simply a restatement of Nova Scotia's claim.