CHAPTER I THE TERMS OF REFERENCE

18. Article 3.1 of the Terms of Reference provides:

Applying the principles of international law governing maritime boundary delimitation with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.¹⁶

- 19. As Newfoundland and Labrador pointed out in its Phase One Memorial,¹⁷ the "respective offshore areas" of Newfoundland and Labrador and Nova Scotia are those areas defined in section 2 of the *Canada-Newfoundland Act*¹⁸ and in section 2 of the *Canada-Nova Scotia Act*.¹⁹ These offshore areas extend from within the Gulf of St. Lawrence to the outer limits of Canada's continental margin. It is that area, therefore, that is to be delimited by the Tribunal.
- 20. Article 3.1 requires the application of "the principles of international law governing maritime boundary delimitation" to the determination of the boundary in the offshore between Newfoundland and Labrador and Nova Scotia. As the Tribunal said in its Phase One Award of May 17, 2001, the Terms of Reference clearly require the application of international law to both phases of the arbitration.²¹
- 21. The application of the principles of international law governing maritime boundary delimitation can be made "with such modification as the circumstances require." In its Phase

¹⁶ Terms of Reference, Article 3.1, Appendix A.

¹⁷ Phase One Memorial, p. 3, para. 10.

¹⁸ See Statutory Instruments # 3.

¹⁹ See Statutory Instruments # 5.

²⁰ Terms of Reference, Article 3.1. Appendix A.

²¹ Phase One Award, pp. 26-27, para. 3 24,

One Award, the Tribunal considered the implications of the phrase "with such modification as the circumstances require" for the purposes of resolving the issue of whether there was an agreement between the parties. It said: "The phrase is no doubt intended to give the Tribunal some flexibility in applying rules of international law, as it were retrospectively, to transactions which took place within Canada by reference to Canadian law and politics." In short, there was recognition by the Tribunal that although international law was to be applied, the reality was that it is to be applied to the actions of provinces of Canada.

- 22. In Newfoundland and Labrador's view, similar considerations would apply in Phase Two. However, as Newfoundland and Labrador will point out later in this Memorial, the line that is appropriate for the resolution of this dispute can be drawn in accordance with the principles of international law governing maritime boundary delimitation without any such modification.
- 23. The fiction that the provinces are to be treated as states is made explicit in the additional wording of Article 3.1, "as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times." However, these words do not alter in any material way the task of the Tribunal to apply the principles of international law governing the delimitation of maritime boundaries.
- As will be pointed out in Chapter III, the reference to "principles of international law governing maritime boundary delimitation," which appears in the Terms of Reference, is derived from the governing statutes. It must therefore be given the same meaning as it has in the legislation, especially since the Minister has no authority to alter the substantive law whose application is prescribed in the governing statutes. Because the expression is unqualified in the legislation, it must be taken to refer *prima facie* to general or customary international law and not to the *lex specialis* of a particular treaty rule.

²² Phase One Award, pp. 27-28, para. 3.26.

²³ Terms of Reference, Article 3.1, Appendix A.

- 25. As the Tribunal said in its Phase One Award, the phrase "as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times" directs the Tribunal to "those principles binding upon Canada which govern the delimitation of adjacent areas of continental shelf." While Canada is a party to the 1958 Geneva Convention on the Continental Shelf and is bound by it vis-à-vis other states that have also ratified it, Canada is also bound by the principles of customary international law governing the delimitation of maritime boundaries developed through the practice of states and the decisions of international courts and tribunals. Thus, the substantive law governing this phase of the arbitration is customary international law.
- In any event, as will also be pointed out in Chapter III, international courts and tribunals have made clear that there is no opposition between the principles of customary international law governing delimitation and the Article 6 rule in the 1958 *Convention*. Both require that delimitation take account of all relevant circumstances in order to achieve an equitable result. In short, the additional words in Article 3.1 of the Terms of Reference do not change the mandate of this Tribunal to determine the boundary in the respective offshore areas through the application of principles of international law governing the delimitation of maritime boundaries.

²⁴ Terms of Reference, Article 3.1, Appendix A.

²⁵ Phase One Award, p. 16, para. 3.10.

²⁶ 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). See Statutory Instruments #8.

27. As the following chapters of this Memorial will point out, application of the principles of international law governing the delimitation of maritime boundaries to the particular geographical circumstances of this case results in the boundary set forth by Newfoundland and Labrador in Chapter IV. That boundary, viewed in the light of the appropriate tests of proportionality, produces an equitable result.