

## INTRODUCTION

1. This Memorial is filed in accordance with Article 6.1(i) of the Terms of Reference<sup>1</sup> established by the federal Minister of Natural Resources on May 31, 2000, pursuant to the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c.3 (the *Canada-Newfoundland Act*)<sup>2</sup> and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c.28 (the *Canada-Nova Scotia Act*).<sup>3</sup>
2. On May 17, 2001, the Tribunal determined that “the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has not been resolved by agreement.”<sup>4</sup>
3. Thus, in accordance with Article 3.2(ii) of the Terms of Reference, the Tribunal is now to move to Phase Two of this dispute and “determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.”<sup>5</sup>
4. In this Memorial, Newfoundland and Labrador will set out the relevant geographical framework for the delimitation of the offshore boundary between Newfoundland and Labrador and Nova Scotia. It will describe the principles of international law governing maritime boundary delimitation and explain how they are to be applied in the circumstances of this case. It will consider appropriate methods of delimitation and show, in the light of the geographical circumstances, which of those methods are to be applied to the area to be

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<sup>1</sup> For the Terms of Reference, see Appendix A.

<sup>2</sup> See Statutory Instruments # 3. The parallel provincial legislation is the *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*, S.N. 1986, c.37. See Statutory Instruments #2.

<sup>3</sup> See Statutory Instruments # 5. The parallel provincial legislation is the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c.3. See Statutory Instruments # 4.

<sup>4</sup> Phase One Award, p. 83.

<sup>5</sup> Terms of Reference, Article 3.2(ii), Appendix A.

delimited. It will also show that the method of delimitation proposed by Newfoundland and Labrador produces a result that is equitable.

5. In doing so, Newfoundland and Labrador will show that the principal considerations in this case relate to geography. It will show that under the law of maritime delimitation each state is *prima facie* entitled to the territory that is the natural prolongation of its coast, that encroachment or cut-off of that area is to be avoided, incidental features should not be allowed to have a disproportionate effect on any line and that there should be a reasonable degree of proportionality between lengths of coasts and areas allocated as a result of the delimitation.
6. Newfoundland and Labrador will also show that a provisional application of the equidistance method to the geographical circumstances of this case demonstrates that it is not the appropriate method. It will then show that a proper delimitation requires the use of methods that respond to the particular geography of the area to be delimited. This involves the division of the area outside the Gulf of St. Lawrence into sectors and the application of different methods to each sector. It also involves the application of a method that is appropriate for the circumstances of the area inside the Gulf of St. Lawrence.
7. Within the Gulf of St. Lawrence, the appropriate boundary is a line perpendicular to the closing line of the Gulf from Cape Ray to Money Point extending to the limits of the jurisdiction of Newfoundland and Labrador and Nova Scotia within the Gulf.
8. Outside the Gulf of St. Lawrence, the delimitation begins within a coastal concavity and extends into an outer area of open sea as far as the limit of the continental shelf. The first segment of the proposed Newfoundland and Labrador line outside the Gulf, in the area of Cabot Strait, is a bisector of the angle formed by the coasts of Newfoundland and Labrador and Nova Scotia. The second segment, beyond the area of Cabot Strait, is also a coastal-front bisector, adjusted in this case to reflect the relative lengths of the coasts of the parties within the concavity. The third segment of the proposed line, extending beyond the concavity

to the limit of continental shelf jurisdiction, is a perpendicular to the closing line of the concavity.

9. This Memorial is divided into five chapters. Chapter I will discuss the implications of the Terms of Reference for Phase Two of this case. Chapter II will describe the physical setting in which the delimitation is to take place, in particular the geographical considerations relevant to this dispute. Chapter III will set out the principles of international law governing the delimitation of maritime boundaries that are applicable to this dispute. Chapter IV will discuss the method of delimitation that is appropriate in the circumstances of this case and set out the Newfoundland and Labrador claim. Chapter V will show that the line claimed by Newfoundland and Labrador produces a result that is equitable in the circumstances of this case.
10. There is, however, a preliminary matter arising out of the Phase One proceedings concerning the conduct of the parties. In its Phase One Award, the Tribunal noted that its mandate was solely to determine whether the boundary in the offshore between Newfoundland and Labrador and Nova Scotia had been resolved by agreement. Thus, its decision in that Phase was without prejudice to its consideration of the relevance of the conduct of the parties in Phase Two.<sup>6</sup> The fact that a line had not been resolved by agreement did not, in the Tribunal's view, "exclude the relevance of such considerations in the next phase of the arbitration."<sup>7</sup>
11. The conduct of the parties was reviewed in detail in the Phase One proceedings. A review of those proceedings shows that it is clear that, in fact, there is no conduct in this case that is relevant to the determination of an equitable result. And, there is certainly no conduct that suggests that the line proposed by Newfoundland and Labrador is inequitable. In the end,

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<sup>6</sup> Phase One Award, p. 7, para. 1.5.

<sup>7</sup> Phase One Award, pp. 80-81, para. 7.9.

therefore, the conduct of the parties is not relevant to the fulfillment by the Tribunal of its mandate in Phase Two.

12. As was amply demonstrated by both parties during Phase One, the conduct of the parties in this case, whether at the political or administrative level, has been sparse, ambiguous, subject to inconsistent claims and positions taken by the parties at various points, and far too brief to meet the stringent requirements for the relevance of conduct that emerge from maritime boundary delimitation cases. None of it has any relevance to this arbitration.
13. The political relations of the parties in this respect were fully canvassed in the first phase of this arbitration. While the findings of the Tribunal were limited to whether the line had been resolved by agreement, the factual background so thoroughly analyzed in Phase One also suffices to dispose of any suggestion that the political record is relevant either as a basis of acquiescence or estoppel, or as a relevant circumstance under the law of maritime boundary delimitation. In brief, the proposals exchanged in the early stages of this dispute were always predicated on the understanding that federal and provincial legislative implementation would be required, a condition whose fulfillment would have vindicated the substantive claims of the provinces. The failure of this condition provides a complete answer to any possible suggestion that these proposals might have some continuing relevance at this stage of the arbitration.
14. With respect to administrative acts, first, the meagre conduct of the parties in the relevant period was not mutual, consistent or clear. There was never any mutual conduct that consistently respected a particular line. The few permits issued by Newfoundland and Labrador during the period 1965 to 1971 follow no particular pattern, and in particular disclose no *de facto* western boundary corresponding to any eastern boundary reflected in Nova Scotia permitting practice.<sup>8</sup> Still fewer permits were issued in the relevant area by Newfoundland and Labrador in the period 1972 to 1976, and these again evidenced no

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<sup>8</sup> Counter Memorial of Newfoundland and Labrador, Phase One, pp. 80-82, paras 213-222.

respect for any particular line and certainly not one shared by Nova Scotia.<sup>9</sup> In any event, with the promulgation of the *Newfoundland and Labrador Petroleum Regulations, 1977*,<sup>10</sup> all prior permits in the relevant area lapsed and were not grandfathered into the post-1977 provincial regime. Thereafter, no further permits were issued at all in the vicinity of any potential boundary with Nova Scotia.<sup>11</sup> Moreover, these early permits were not adopted or incorporated into the current regime of the federal-provincial Atlantic Accord, and accordingly they have no continuing legal significance and are not the subject of any vested rights or interests. In short, nothing approaching the clarity of mutual practice consistently respecting a line, as required by the law, is present in this case.

15. Second, even this limited and inconsistent permitting practice was purely administrative. The permits issued were intended to buttress a jurisdictional claim *vis-à-vis* the federal government in the context of ongoing negotiations over ownership of the offshore. In particular, none of the permits issued by Newfoundland and Labrador after 1971 purported to grant production rights. They were limited to exploratory rights<sup>12</sup> and, as such, they did not correspond to any real, on-the-ground conduct of the sort that might be considered significant.
16. Third, even if any conduct in the early stages of this dispute were relevant, such conduct was in any event extremely short-lived. As evidenced by Minister Doody's letter of October 6, 1972 and subsequent developments, a dispute existed between the parties as to the existence and appropriate location of any boundary between them by 1973 at the latest.<sup>13</sup> Accordingly, the window for potentially relevant conduct in this case is limited to the period 1965 to

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<sup>9</sup> Counter Memorial of Newfoundland and Labrador, Phase One, pp. 83-84, paras. 223-226.

<sup>10</sup> *Newfoundland and Labrador Petroleum Regulations, 1977*, No. 23/77. See Statutory Instruments # 6.

<sup>11</sup> Counter Memorial of Newfoundland and Labrador, Phase One, pp. 84-85, paras. 227-228.

<sup>12</sup> Counter Memorial of Newfoundland and Labrador, Phase One, pp. 83-85, paras. 223-228.

<sup>13</sup> Phase One Award, pp. 62-63, paras. 5.24, 5.26.

approximately 1972, certainly not a "long period of time"<sup>14</sup> and in fact an interval that has been considered in the case law as "too brief"<sup>15</sup> to be relevant in maritime boundary delimitation.

17. In sum, any administrative practice of the parties in this case is simply not supported by any correlative *modus vivendi* of long and uninterrupted duration of the sort required in the relevant case law. On its own, therefore, the conduct of the parties in this case, such as it is, is wholly insufficient to support any conclusions respecting the equity of any particular method of delimitation.

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<sup>14</sup> *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, [1982] I.C.J. Rep. 18 at pp. 70-71, para. 95 (hereinafter *Tunisia v. Libya*). See Authorities # 6.

<sup>15</sup> *Case Concerning the Delimitation of Maritime Boundaries in the Gulf of Maine Area (Canada v. United States of America)*, [1984] I.C.J. Rep. 246 at pp. 310-311, para. 151 (hereinafter *Gulf of Maine*). See Authorities # 7.