PART II: THE APPLICABLE LAW

Introduction

1. As the Phase Two Memorials of Nova Scotia and Newfoundland and Labrador illustrate, the parties are in agreement on a number of significant issues with respect to the law that governs the arbitration. For example, both have argued, albeit for different reasons, that the *1958 Geneva Convention on the Continental Shelf*[1] (hereinafter *GCCS*) is not directly applicable to the present case. They also agree that, under Canadian as well as international law, the seaward limits of their "offshore areas", the boundary between which the Tribunal will decide in this case, are to be defined by the criteria and methods provided in Article 76 of the 1982 *United Nations Convention on the Law of the Sea* (hereinafter *LOS 1982*).[2] Both parties also acknowledge that the objective of the delimitation is to achieve an equitable result in the circumstances, and both assert that recognition and respect for the nature and origin of the parties' legal entitlements is of central importance to the delimitation process.[3]

2. There are, however, critical features of the applicable law which are either misstated or simply ignored in the Phase Two Memorial of Newfoundland and Labrador. As is demonstrated in this Part, these errors are of such fundamental significance to the structure of Newfoundland's case that they can lead only to the complete rejection by the Tribunal of both the general approach to the delimitation espoused by Newfoundland and its proposed line.

3. The principal errors in law upon which the Newfoundland Phase Two Memorial is based fall under two general categories: fundamental misconceptions regarding the principles of international law governing maritime boundary delimitation; and

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1 **Annex 185**: April 29, 1958, 499 U.N.T.S. 311, 1970 C.T.S. 4 (entered into force June 10, 1964).

2 **Annex 186**: December 10, 1982, UN Doc. A/CONF. 62/122 (entered into force November 16, 1994).

3 Newfoundland Phase Two Memorial, para. 68; Nova Scotia Phase Two Memorial, Parts III B i, iv.

specific misstatements regarding particular aspects of the law. These are examined, in turn, below.

4. As will be seen, the entire thrust of Newfoundland's case is to limit the range of circumstances, both legal and factual, to be taken into account by the Tribunal in effecting the delimitation. This is, in a word, the **opposite** of what the law requires.

A. The Fundamental Misconceptions Of Law That Underlie Newfoundland's Case

5. Newfoundland's case is built upon three fundamental misconceptions regarding the law according to which the delimitation is to be carried out. These are:

- Misconceptions concerning the nature of the legal principles governing maritime delimitation, in particular, the distinction between principles of law and equitable criteria;
- Misconceptions regarding the basis of the parties' legal title to the zone to be delimited;
- Misconceptions as to the authority and applicability to this delimitation of findings made in other delimitation cases.

i. Newfoundland Misconceives The Nature Of The Legal Principles Governing Maritime Delimitation

a) Newfoundland Incorrectly Equates Equitable Principles And Relevant Circumstances With Mandatory Rules Of Law

6. From the outset, Newfoundland skews its treatment of the applicable law by misconstruing key tenets of the international law governing maritime boundary delimitation. After acknowledging that "[t]hose principles are based on equity in

the light of the relevant circumstances",[4] Newfoundland goes on to argue as follows:[5]

> 68. ... Specifically, they [the principles of international law] include the following:
>
> a) A state is *prima facie* entitled to the areas in front of its coast, as the "natural prolongation" of its territory to which it has inherent rights.
>
> b) Any effect of encroachment on these areas, or cut-off, is to be avoided. Incidental coastal features or irregular coastal configurations should not be allowed to have a disproportionate effect.
>
> c) There should be a reasonable degree of proportionality between areas allocated by a line and the lengths of the relevant coasts.
>
> 69. These are among the fundamental principles recognized by the jurisprudence. Provided they are respected, there is no method of delimitation that is sacrosanct ... The essential requirement is a result that is equitable in terms of the particular geographical configuration of the relevant area.

7. There are several serious errors manifested in this statement of "the law". First and foremost, Newfoundland's formulation confuses, and effectively merges, the discrete concepts of **principles of law**, which govern the process of maritime delimitation, and **equitable principles**, which are one of the factors to be applied as part of that legal process. The distinction between the two has been consistently emphasised in the jurisprudence: as explained in the Nova Scotia Phase Two Memorial,[6] the principles of international law governing maritime boundary delimitation require the application, *inter alia*, of equitable principles, but those

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4 Newfoundland Phase Two Memorial, para. 68.

5 Newfoundland Phase Two Memorial, paras. 68-69.

6 Nova Scotia Phase Two Memorial, pp. III-14, 15. It is interesting to note that Newfoundland has reworded the *Terms of Reference* in this section of its Phase Two Memorial, stating that the "arbitration is **governed** by the principles of international law **relating to the delimitation of maritime boundaries**." (Newfoundland Phase Two Memorial, para. 68 (emphasis added)). The *Terms of Reference*, of course, refers to the Tribunal's mandate as follows: "**Applying** the principles of international law **governing maritime boundary delimitation**...". (*Terms of Reference*, Article 3.1 (emphasis added). The *Terms of Reference* may be found under a separate tab in this binder). If the intention is to leave room – "wiggle room", as it were – to argue that the list of "principles" that follows is meant to refer only to the equitable principles that "relate to" but do not "govern" maritime delimitation, and not to mandatory legal principles, it fails entirely when one considers the references in Newfoundlands submissions to "principles of international law", "fundamental principles" and a requirement that these principles be "respected" in every delimitation (see below).

ARTICLE THREE

THE MANDATE OF THE TRIBUNAL

3.1 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.

3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.

...

(ii) In the second phase, the Tribunal shall 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.

(*Terms of Reference*, May 31, 2000 at 2)

equitable principles "... are not in themselves principles and rules of international law."[7]

8. This is precisely why, as noted in the Nova Scotia Phase Two Memorial, the Chamber in the *Gulf of Maine* case stated its preference for the term "equitable criteria" as opposed to "equitable principles". No mere question of style, the word "criteria" was regarded by the Chamber as preferable to "principles", when used in this context, "for reasons of clarity",[8] that is, specifically so as to avoid any confusion between equitable criteria/principles and true principles of international law. It is this clarity that Newfoundland sacrifices as it anoints as "principles and rules of international law", indeed as "fundamental principles", the concepts of non-encroachment, avoidance of cut-off and proportionality. In fact, all of these concepts have been clearly identified in the jurisprudence as equitable criteria. International courts and tribunals have explicitly declined to accord them the status of principles of law.[9]

9. Newfoundland's objective in conflating legal principles and equitable criteria, thereby according to the latter a status which they do not enjoy, seems clear: the erection of a framework within which its "equitable principles" are to be treated

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7 **Annex 174**: *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada* v. *United States of America*), [1984] I.C.J. Rep. 246 at 292 (hereinafter *Gulf of Maine*). See also discussion at Nova Scotia Phase Two Memorial, pp. III-14, 15.

8 **Annex 174**: *Gulf of Maine*, *supra* note 7 at 292; Nova Scotia Phase Two Memorial, pp. III-14, 15.

9 **Annex 174**: *Gulf of Maine*, *supra* note 7 at 292, 298-299; **Annex 187**: *Case Concerning the Continental Shelf* (*Libyan Arab Jamahiriya* v. *Malta*), [1985] I.C.J. Rep. 13 at 39 (hereinafter *Libya/Malta*); **Annex 188**: *North Sea Continental Shelf Cases* (*Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *Netherlands*), [1969] I.C.J. Rep. 3 at 50 (hereinafter *North Sea Cases*); **Annex 189**: *Case Concerning the Continental Shelf* (*Tunisia* v. *Libyan Arab Jamahiriya*), [1982] I.C.J. Rep. 4 at 79-80 (hereinafter *Tunisia/Libya*).

as mandatory, that is, applicable in all maritime delimitations.[10] This is, of course, in contrast to established law, for there is no criterion, or list of criteria, that is of mandatory application in the delimitation process. All such criteria are to be selected with reference to their appropriateness on the facts of a given case. This point was stressed with absolute clarity by the Chamber in the *Gulf of Maine* case, in respect of two of the equitable criteria ("non-encroachment" and "no cutting-off") that Newfoundland would now imbue with mandatory status:[11]

> The error lies precisely in searching general international law for, as it were, a set of rules which are not there. This observation applies particularly to certain "principles" advanced by the parties as constituting well-established rules of law ... One could add to these the ideas of "non-encroachment" upon the coasts of another State or of "no cutting-off" of the seaward projection of the coasts of another State ... which may in given circumstances constitute equitable criteria, provided, however, that no attempt is made to raise them to the status of established rules endorsed by customary international law.

10. The same position was reflected by the full Court, in its decision in *Libya/Malta*, regarding the criterion of "proportionality". Far from constituting a "principle of international law" – one of "[the] fundamental principles recognized by the jurisprudence", as pleaded by Newfoundland and Labrador[12] - the Court found that proportionality was but one among numerous factors potentially to be taken into account, as warranted by the circumstances of the case: [13]

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10 Newfoundland does state, in respect of its list of equitable principles, that: "Provided they are respected, there is no method of delimitation that is sacrosanct." Newfoundland Phase Two Memorial, para. 69. In this ambiguous statement, Newfoundland acknowledges that no practical method of delimitation is mandatory (or "sacrosanct"), while at the same time suggesting that its list of chosen equitable criteria are deserving of greater deference ("providing they are respected ..."). At other points in its Phase Two Memorial, Newfoundland again states the correct position that there are no mandatory practical methods of delimitation (see Newfoundland Phase Two Memorial, paras. 122, 126, 163, 166). Tellingly, however, its Phase Two Memorial carefully avoids admitting the equally important point that there are likewise no mandatory equitable criteria or relevant circumstances.

11 **Annex 174**: *Gulf of Maine, supra* note 7 at 298-299.

12 Newfoundland Phase Two Memorial, paras. 68-69.

13 **Annex 187**: *Libya/Malta*, *supra* note 9 at 44 (footnote omitted): The Court went on to state that the "pertinent general principle...is that there can be no question of 'completely refashioning nature'; the method chosen and its results must be faithful to the actual geographical situation." This observation, of course, was made in the context of a continental shelf delimitation, in which, for the reasons discussed in the Nova Scotia Phase Two Memorial pp. III-21, 22, and addressed further below, geographical factors have played a more central role.

> It follows – and this is also evident from the 1969 Judgement [in the *North Sea Cases*] – that proportionality is one possibly relevant "factor" among several other factors ... "to be taken into account". It is nowhere mentioned amongst the "principles and rules of international law applicable to the delimitation" ...

11. In sum, the critical error identified by the Chamber in the *Gulf of Maine* case, as by the Court in the *Libya/Malta* case, is precisely the error that Newfoundland makes in its statement regarding what it considers "principles of international law relating to the delimitation of maritime boundaries":[14] it attempts to cloak the concepts of "natural prolongation", "no cut-off" and "proportionality" with the mantle of universality reserved only for true principles of law. The effort is belied by the jurisprudence, however, which makes clear that such concepts fall under the category of principles, or criteria, which can be determined to be "equitable", or not, only by reference to the circumstances of a given case. And of course, it is only criteria which are thus determined to be equitable that are selected to play a role in the delimitation process.

b) Newfoundland Incorrectly Limits The Range Of Circumstances Relevant To The Delimitation Process

12. A further error in Newfoundland's statement of what it refers to as "principles of international law", closely related to those already identified, flows directly from its theme of limiting the considerations which are to be taken into account in the delimitation. Newfoundland and Labrador declares that "[t]he essential requirement [of a delimitation effected according to principles of international law] is a result that is equitable in terms of the particular geographical configuration of the relevant area".[15] In other words, of the potentially vast range of circumstances pertinent to any given case – circumstances by reference to which the criteria and methods of delimitation are to be selected and the overall equity of the result is to be measured – only one is relevant in Newfoundland's

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14 Newfoundland Phase Two Memorial, para. 68.

15 Newfoundland Phase Two Memorial, para. 69 (emphasis added).

estimation: geography. This refrain recurs throughout the Newfoundland Phase Two Memorial. For example:

- "[T]he present dispute can and should be resolved exclusively on the basis of the coastal geography of the delimitation area";[16]
- "The geography is overwhelmingly the most important factor, and most often it is the only relevant factor".[17]

13. The justification offered by Newfoundland and Labrador for this stunningly narrow interpretation of the law is assessed below in this Counter-Memorial. What is important to note here is that Newfoundland's single-minded focus on geography, to the exclusion of other, non-geographic circumstances of obvious relevance to the present case, is consistent with its implicit dual proposition that legal principles and equitable criteria are indistinguishable, and that its own list of geographically-oriented criteria, in particular, have somehow been elevated to the status of mandatory rules of law.

14. Contrary to Newfoundland's interpretation, the "essential requirement" of the law of maritime boundary delimitation, as stated by the Court in the *Libya/Malta* case, for example, is that delimitation "must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an equitable result".[18] **All** the relevant circumstances, not just the geographic circumstances, are to be considered. This principle of law is amply confirmed in other delimitation cases. In the *North Sea Cases*, for example, the Court stated explicitly that delimitation must take account of "all the relevant circumstances",[19] a position affirmed as well in the *Tunisia/Libya* case[20] and the *Case Concerning Continental Shelf Area Between Iceland and Jan Mayen*.[21] In

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16 Newfoundland Phase Two Memorial, para. 84.
17 Newfoundland Phase Two Memorial, para. 90.
18 **Annex 187**: *Libya/Malta, supra* note 9 at 38.
19 **Annex 188**: *North Sea Cases*, *supra* note 9 at 53.
20 **Annex 189**: *Tunisia/Libya*, *supra* note 9 at 37.
21 **Annex 193**: (*Denmark* v. *Norway*), [1993] I.C.J. Rep. 38 at 62-63 (hereinafter *Denmark/Norway*).

the *Gulf of Maine* case, in its formulation of the "fundamental norm" of maritime delimitation, which Newfoundland quotes but apparently declines to apply where its own interests are at stake, the Chamber stated unequivocally:[22]

> [D]elimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area **and other relevant circumstances**, an equitable result.
>
> (emphasis added)

15. Ultimately, the choice of relevant circumstances, as with the selection of equitable criteria, must be made in the light of the particular facts of each case. There is no single circumstance or set of circumstances that can be identified as an "essential requirement" in every instance.[23] Nor can any circumstance be accorded an *a priori* status as a primary or dominant factor, as Newfoundland attempts to do in respect of geography.[24] Such a determination can only be made in the light of all of the facts.[25]

ii. Newfoundland Ignores The Basis Of Legal Entitlement In This Case

16. As noted in the introduction to this Part, there is no dispute between the parties as to the significance of the nature and origin of their legal entitlements to the zone in question. Nova Scotia and Newfoundland and Labrador agree that this consideration is of central importance in the present delimitation, as indeed in any maritime delimitation conducted according to principles of international law. The

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22 Annex 174: *Gulf of Maine, supra* note 7 at 299-300, Newfoundland Phase Two Memorial, para. 79.

23 The one exception, on which the parties agree, is the central role of the basis of title: See Newfoundland Phase Two Memorial, para. 68; Nova Scotia Phase Two Memorial, Parts III B iv.

24 See, for example, Newfoundland Phase Two Memorial, para. 90 (footnote omitted): "Therefore, when the law refers to the "relevant circumstances," what is meant is first and foremost the coastal geography and its relationship to the delimitation area—the "geographic correlation between coast and submerged areas off the coast" as it was expressed in *Tunisia* v. *Libya*. The geography is overwhelmingly the most important factor, and most often it is the only relevant factor."

25 It must be noted that Newfoundland does, later in its Phase Two Memorial, quote the correct statement of the fundamental norm of maritime boundary delimitation, as articulated in the *Gulf of Maine* case (Newfoundland Phase Two Memorial, para. 79). It does not, however, expand upon that statement to deal with the need to select relevant circumstances based on the facts, and not on a pre-determined list; nor does it ever depart from its original, erroneous position that certain equitable principles are of mandatory effect.

basis of legal title is crucial to determining what other factors, including the relevant circumstances and equitable criteria, will shape a particular delimitation. The parties differ, though, in their commitment to applying this facet of the applicable law in the circumstances of this case. Where Nova Scotia asks the Tribunal to consider the actual basis of the parties' entitlements, Newfoundland asks the Tribunal, in its Phase Two Memorial, in effect to delimit the parties' respective offshore areas without giving any consideration to the true, juridical nature of those areas or the provinces' entitlements over them. [26]

a) The Parties Agree On The Central Relevance Of Basis Of Entitlement

17. Both parties, in their Phase Two Memorials, acknowledge that the law of maritime delimitation, whether in respect of the continental shelf or other juridical zones, is centered on equity, but that this refers to "equity *infra legem*", or within the law.[27] Furthermore, both provinces recognize that in order for equity to be applied within a legal framework, the first consideration is the basis of legal title, or entitlement, to the zone to be delimited. Newfoundland puts the point as follows: [28]

> Specifically, the equity of the international law of maritime delimitation is applied within a definite legal framework from four points of view:
>
> a) First and most important, it is based on "relevant circumstances," which must be **linked to the legal institution** of the continental shelf or the exclusive economic zone, primarily in terms of the **basis of legal title**. This points toward the coastal geography as the main consideration.
>
> (...)
>
> (emphasis added)

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26 Newfoundland uses the term "title", while Nova Scotia generally prefers "entitlement". Both expressions are used in the caselaw to refer to the same concept. However, since no legal title as such passes in the shelf, and even less so in the "offshore areas", the terminology of "entitlement", as used in *Denmark/Norway*, is generally preferable. **Annex 193**: *Denmark/Norway*, *supra* note 21 at 64.

27 Nova Scotia Phase Two Memorial, Part III B ii a). Newfoundland Phase Two Memorial, para. 81.

28 Newfoundland Phase Two Memorial, para. 82.

18. In Newfoundland's view, then, the relevant circumstances (and, of necessity, the equitable criteria which flow from those circumstances) "must be linked to the legal institution" of the zone that is the object of the delimitation, "primarily in terms of the basis of legal title". It is this characteristic of delimitation law which ensures that equity is applied *infra legem*, that is, within a legal framework.

19. This is entirely consistent with the position advocated by Nova Scotia – with the qualification that Nova Scotia also notes the significance of the basis of title to the determination of the "areas relevant to a delimitation": [29]

> In sum, the legal nature of the zone or of entitlement to the zone is central to the process of equitable delimitation in at least three ways. First, the juridical character and origin of entitlement will assist in determining which other circumstances are truly relevant to the choice of equitable criteria. Second, the nature of the entitlement constitutes a particularly relevant circumstance that may, on its own, motivate the choice of a particular criterion in a given case. Finally, the origin of the entitlement is directly connected to the critical definition of the seaward limits of a State's legal entitlement and, thus, the areas relevant to a delimitation.

b) Newfoundland Ignores The Basis Of Title To The "Offshore Areas"

20. Although the parties agree on the importance of "title" as one of the primary considerations underlying the selection of relevant circumstances and equitable criteria, they disagree completely with respect to the particular circumstances and criteria to be selected in this case. The reason lies in the fact that, while Newfoundland asserts that the legal basis of title is of central importance in any delimitation, it fails to consider the basis of title to the zone to be delimited here.

21. The zone to be delimited in this arbitration, as stipulated in the *Terms of Reference* and their underlying statutes, is the parties' "offshore areas", as defined

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[29] Nova Scotia Phase Two Memorial p. III-24.

TERMS OF REFERENCE

Terms of Reference to Establish an Arbitration Tribunal for the Settlement of a Dispute Concerning Portions of the Limits of the Respective Offshore Areas as Defined in the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and the *Canada-Newfoundland Atlantic Accord Implementation Act*

CONSIDERING that a dispute has arisen between the Province of Newfoundland and Labrador and the Province of Nova Scotia concerning portions of the limits of their respective offshore areas ("offshore areas") as defined in the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 18 ("Canada-Newfoundland Act") and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 3 ("Canada-Nova Scotia Act");

...

ARTICLE THREE

THE MANDATE OF THE TRIBUNAL

3.1 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.

3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.

(*Terms of Reference*, May 31, 2000 at 1-2)

in the two *Accord Acts*[30]. The Tribunal has no other mandate.[31] As demonstrated in Nova Scotia's Phase Two Memorial, the statutory definition of the term "offshore area" in each Act denotes "an area within which Nova Scotia, on the one hand, and Newfoundland and Labrador, on the other, share certain limited rights with the Government of Canada in respect of hydrocarbon mineral resources."[32] Those rights exist solely by virtue of the two *Acts*, which are themselves the implementing instruments for the negotiated *Accords*.

22. Newfoundland, despite having acknowledged that the legal basis of title is crucial to the delimitation process, never poses in its Phase Two Memorial the obvious, next question: what is the legal basis of title to the "offshore areas" that are the objects of this delimitation? Apart from a brief mention of the fact that the "offshore areas" are defined in the *Accord Acts*, and that they "extend from within the Gulf of St. Lawrence to the outer limits of Canada's continental margin",[33] Newfoundland eschews any consideration of the origin or basis of the parties' legal entitlements to these areas. This is truly remarkable, given the significance that Newfoundland attaches to the issue in its treatment of the applicable law, and the care that it lavishes on other aspects of the delimitation process.

23. In fact, as outlined above in this Part and explained in greater detail in the Nova Scotia Phase Two Memorial, the answer to the question "what is the legal basis of title to the 'offshore areas'?" is both simple and undeniable, not to say close at hand: the provinces' rights (or entitlements) with respect to their "offshore areas" derive entirely from the negotiated *Accords* and implementing legislation, and are clearly defined in those instruments.

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30 **Annexes 1 and 2**: *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3 (hereinafter *Canada-Newfoundland Accord Act*); *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28 (hereinafter *Canada-Nova Scotia Accord Act*). Both acts are collectively referred to as the *Accord Acts*.

31 *Terms of Reference*, Articles 3.1 and 3.2(ii).

32 Nova Scotia Phase Two Memorial, p. III-4.

33 Newfoundland Phase Two Memorial, para. 19.

c) Newfoundland Proposes The Delimitation Of A Juridical Zone – The Continental Shelf – That Is Not The Object Of This Arbitration

24. Newfoundland's approach, as manifested in its Phase Two Memorial, is to assume that the Tribunal is mandated to delimit the "continental shelf" areas of the parties:[34]

> This dispute deals with the continental shelf alone. Strictly speaking, therefore, it is the rules respecting the shelf that apply. Those rules, however, are substantially similar to the rules governing the delimitation of the exclusive economic zone, or a "single maritime boundary" of the kind determined in *Gulf of Maine* and *Canada* v. *France*.

25. The fallacy contained in this statement is that the "dispute", as defined in the *Terms of Reference*, does **not** deal with the juridical continental shelf, but with aspects of the physical shelf. The legal regime of the "offshore areas" is fundamentally different from the institution of the continental shelf and cannot be assimilated to it.[35] Moreover, as Nova Scotia and Newfoundland both argued in Phase One of this arbitration,[36] the application of international law to this dispute does not permit, nor even require, any alteration of the facts. One unassailable fact is that neither Nova Scotia nor Newfoundland and Labrador exercises continental shelf jurisdiction; the rights (jurisdiction) that they do possess and exercise, which, as set out in the *Terms of Reference*, are actually at issue here, are defined exclusively by the *Accord Acts*.

26. The Tribunal is required to apply the law "as if the parties were states subject to the same rights and obligations of the Government of Canada at all relevant times".[37] Yet, even assuming that, if they were States, the parties would be entitled to a continental shelf, the mandate of the Tribunal is only to determine (delimit) "the line dividing the respective offshore areas of the [parties]".[38] This

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34 Newfoundland Phase Two Memorial, para. 70.
35 Nova Scotia Phase Two Memorial, pp. III-3-6.
36 See Transcript of Oral Argument, March 19, 2001, pp. 836 ff; see also Newfoundland Counter-Memorial, paras. 112-116.
37 *Terms of Reference*, Article 3(1).
38 *Terms of Reference*, Article 3(1).

TERMS OF REFERENCE

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(*Terms of Reference*, May 31, 2000 at 1-2)

fact cannot be altered, no matter how fervently Newfoundland might wish it were otherwise.

27. If two States, parties to a "joint development zone" agreement, were to ask a Tribunal to delimit their respective areas of royalty entitlement within that zone, the Tribunal would in no way acquire the mandate to delimit the parties' continental shelf jurisdictions, even assuming that they each possessed inherent rights to the shelf. Similarly, in the present case, the Tribunal's mandate to delimit the "offshore areas" of the parties does not incorporate or imply a mandate to define and delimit their continental shelves (even assuming that they possessed shelf rights).

28. In any event, whether or not the law of continental shelf delimitation is applicable in this case is a moot question, when the actual content of that "law" is considered. The parties agree that the "rules" that govern delimitation of the shelf, in all cases, are the same as those governing delimitation of any maritime zone. As explained in Nova Scotia's Phase Two Memorial, the only principle of law of general application to all zones, in all cases – including the "offshore areas" to be delimited in this case – is that enunciated by the Chamber in the *Gulf of Maine* case:[39]

> 112. The Chamber therefore wishes to conclude this review of the rules of international law on the question to which the dispute between Canada and the United States relates by attempting a more complete and, in its opinion, more precise reformulation of the "fundamental norm" already mentioned. ... What general international law prescribes in every maritime delimitation between neighbouring States could therefore be defined as follows:
>
> (1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

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[39] Annex 174: *Gulf of* Maine, *supra* note 7 at 299-300.

> (2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.

29. This two-part fundamental norm is "the law" of delimitation. In the words of the Chamber, it is "what general international law prescribes in every maritime delimitation". Newfoundland does not contest this point.

30. However, Newfoundland does not simply apply this fundamental norm – the law that governs all delimitations – so as to arrive at an appropriate division of the parties' respective offshore areas. Newfoundland also assumes, as the keystone of its proposed delimitation, that the "offshore areas" have exactly the same legal characteristics as the "continental shelf" under international law, and that the origin and nature of the parties' entitlements are the same in both instances. It describes those entitlements as follows, in a manner that unintentionally highlights the essential differences between a shelf delimitation and the delimitation actually at issue in this arbitration:[40]

> Equally fundamental is the principle, also laid down in the *North Sea Cases*, that states are entitled to a continental shelf *ipso facto* and *ab initio*: "Its existence can be declared ... but does not need to be constituted." In other words, continental shelf rights are inherent and need not be claimed or exercised ...

31. In no way can this passage be said to describe, even remotely, or by analogy, the sort of zone or rights that are at issue in this case. The "offshore areas", are neither *ab initio* entitlements nor based on the extension of coastal sovereignty.[41] As mentioned earlier, Newfoundland does not simply apply the law of continental shelf delimitation, which can be properly argued to be the same as the law of delimitation in general. Nor does it attempt to analogize from the experience of continental shelf delimitations. Rather, it alters one of the critical factual circumstances in this arbitration, by assigning to the "offshore areas" an origin and characteristics that they do not in fact have. From this point onwards,

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40 Newfoundland Phase Two Memorial, para. 83 (footnote omitted).

41 See Nova Scotia's Phase Two Memorial, pp. III-2-6, for a more complete analysis of the distinction between continental shelf and "offshore area" entitlements.

Newfoundland's argument is based, not on the facts of this case, but on the wholly unsupported fiction regarding the areas to be delimited and the legal basis of the provinces' title to those areas. That fiction is developed and unfolds as follows:[42]

> The relevant circumstances are almost always dominated by the coastal geography. Indeed, the present dispute can and should be resolved exclusively on the basis of the coastal geography of the delimitation area. This follows the pattern of all the leading cases, including the two delimitations of greatest interest to Canadians ...
>
> The reason for the fundamental importance of coastal geography was best explained in *Libya* v. *Malta*: it is because sovereignty over the coast is the basis of title under the principle of the *North Sea Cases* that "the land dominates the sea" ...

32. At the end of the day, the question at issue is not "which delimitation law applies", since there is only one delimitation law, but "which type of zone is to be delimited". It is the answer to this second question that has far-reaching consequences for this, or any, delimitation.

d) The Consequences Of Newfoundland's Error Are Pervasive

33. The outgrowth and impact of Newfoundland's fallacious assumption regarding the origin and nature of the entitlements giving rise to the parties' dispute are manifested in virtually every element of its proposed delimitation, from its definition of relevant circumstances, to its selection of relevant coasts and relevant area, to its testing of the equitableness of its proposed line.

34. As the passages from the Newfoundland Phase Two Memorial quoted above illustrate, Newfoundland justifies its virtually exclusive focus on geography in the construction of its proposed line by reference to a fictitious basis of entitlement to the offshore areas, one drawn from the institution of the continental shelf. This

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[42] Newfoundland Phase Two Memorial, paras. 84, 85 (footnote omitted).

geography/continental shelf justification is stressed repeatedly in the Newfoundland and Labrador Memorial. For example:[43]

> 83. ... Except in cases that meet the strict conditions for the application of the doctrines of estoppel or acquiescence, state conduct is a secondary consideration, and never the primary basis for establishing a line. What counts, instead, is the inherent title emerging from the facts of geography.
>
> 84. The relevant circumstances are almost always dominated by the coastal geography. Indeed, the present dispute can and should be resolved exclusively on the basis of the coastal geography of the delimitation area. ...
>
> 85. The reason for the fundamental importance of coastal geography was best explained in *Libya* v. *Malta*: it is because sovereignty over the coast is the basis of title ...
>
> 86. [S]overeignty over the land is the ultimate source of continental shelf rights, it is in practice the coast ... that generates title. ...
>
> 87. [T]he delimitation must be based on the coastal geography, not on considerations that have nothing to do with title to maritime areas ... Since the coast is the source of title, it is the primary consideration that is "pertinent to the institution of the continental shelf as it has developed within the law".
>
> 88. The most fundamental implication of the geographical basis of title is that states are entitled to the areas situated in front of their coasts.
>
> 89. ... The present case deals only with the continental shelf ... All the leading cases delimiting the continental shelf alone have been based primarily or exclusively on the coastal geography ...
>
> 90. Therefore, when the law refers to the "relevant circumstances," what is meant is first and foremost the coastal geography ... The geography is overwhelmingly the most important factor, and most often it is the only relevant factor. ... only those circumstances that are demonstrably relevant to the legal institution of the continental shelf are to be taken into account.

35. In closing, it bears reiterating that the entitlements of the parties in this delimitation are not derived from any "*ab initio* entitlement" or "inherent title" based on "coastal geography" or "sovereignty over the coast". The parties'

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[43] Newfoundland Phase Two Memorial, paras. 83-90.

entitlements derive from specific legislation which implements negotiated joint management and revenue-sharing agreements – a factual context, or framework, that cries out for a consideration of a far broader range of relevant circumstances and criteria than merely the geographical.

iii. Newfoundland Misconceives The Role Of Previous Decisions

36. The third basic misconception at the heart of Newfoundland's treatment of the applicable law relates to the role it assigns to the decisions of courts and tribunals in other delimitations, in particular to the decision in the *Gulf of Maine* case and the *Case Concerning Delimitation of Maritime Areas Between Canada and The French Republic.*[44]

a) Newfoundland Applies The Results But Ignores The Reasoning In Previous Decisions

37. Much of the customary international law of maritime boundary delimitation is derived from the jurisprudence of the ICJ and other international tribunals. Although such decisions do not constitute primary sources of international law, in and of themselves,[45] the nature of boundary delimitation, in which each negotiated arrangement is both unique to the particular facts of a case and based on a wide range of considerations known fully only to the parties, makes it difficult to discern precise customary rules from state practice. As a result, the statements of the Court and other tribunals regarding the nature and application of the principles of law governing maritime delimitation, though they are not binding "precedent", are particularly instructive and persuasive.

38. The cases themselves articulate the constraints that limit their application in other settings.[46] In general terms, decisions made in previous cases can be properly applied in subsequent disputes in two ways. First, as noted, such decisions may

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44 **Annex 194**: (1992), 31 I.L.M 1145 (hereinafter *St. Pierre and Miquelon Award*). It is to be noted that Newfoundland refers to the *St. Pierre and Miquelon Award* as the Canada/France case.

45 Article 38, Statute of the International Court of Justice.

46 See for example **Annex 174**: *Gulf of Maine*, *supra* note 7 at 298-299.

yield statements of principles or rules of law in terms sufficiently general as to be readily applicable to new factual situations.[47] A perfect example is the "fundamental norm" of maritime boundary delimitation, as articulated by the Chamber in the *Gulf of Maine* case. Second, the manner in which a tribunal has applied the law in the circumstances of a particular case may serve as a useful example, or analogue – that is, as an approach that may be applied "by analogy" – in other factual situations, in other cases displaying sufficient similarity.

39. Newfoundland, throughout its Phase Two Memorial, displays a patently self-serving willingness to embrace certain of the conclusions reached in previous delimitations, and to adopt and apply such conclusions to the present case, without however bothering to consider – certainly without explaining – the reasons why they were found to be appropriate in the first place. Examples of this cherry-picking approach in the Newfoundland Phase Two Memorial include the following:

- Newfoundland's entire focus on geographic features to the exclusion of other circumstances, already discussed above, is supported by the fact that geography was a dominant consideration in other cases. It does not mention that those cases involved jurisdictional zones which are entirely distinct from the offshore areas;

- The outer limits of the "relevant area" examined in Newfoundland's Phase Two Memorial are restricted to 200 nautical miles, for no other reason than that the same was done in the *St. Pierre and Miquelon Award*.[48] This, of course, fails to acknowledge that this was an appropriate limit in that arbitration only because the dispute itself was limited to the parties' 200 nautical mile zones;

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[47] The decisions may also provide guidance on the process by which the principles are applied. See Nova Scotia Phase Two Memorial, Part III B iii.

[48] Newfoundland Phase Two Memorial, paras. 61-62.

- Newfoundland justifies its use of a perpendicular to a closing line (discussed later in this Counter-Memorial) with reference to a similar method employed in the *Gulf of Maine* case, but never examines the factual circumstances that the Chamber explicitly used to support the application of the method in the geographic and other circumstances of that case.[49] Similarly, Newfoundland supports its use of the perpendicular by reference to the *Arbitral Award in the Question of the Delimitation of a Certain Part of the Maritime Boundary Between Norway and Sweden*,[50] without noting that the prior conduct of the parties was a significant reason for adoption of the perpendicular in that case;[51]

- The use of perpendiculars to coastal directions to define the outer limits of the relevant area, as applied by Newfoundland, is largely unsupported in international law. Newfoundland does, however, refer to the use of this method in the *Case Concerning the Maritime Delimitation Between the State of Eritrea and the Government of the Republic of Yemen*[52], while neglecting to consider that the perpendiculars were applied to opposite coasts in that case, thus crossing over a median line with minimal effect on either party, and were not extended seaward over long distances;[53]

- Newfoundland "shifts" the starting point of its proposed outer line significantly towards Nova Scotia, based solely on the ratio of inner coasts, and cites the use of a similar technique in the *Gulf of*

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49 Newfoundland Phase Two Memorial, paras. 159, 238-242. At paragraphs 238 and 239 of its Phase Two Memorial, Newfoundland refers to the use of the method in the *Gulf of Maine* case, but concentrates on the reasons a perpendicular is "generally appropriate in this type of situation". As will be shown in Part III below, the more specific reasons for the use of the perpendicular in that case, including its similarity in general orientation to prior claims of the parties and the correspondence of the closing line to the mainland coast, are not replicated in the present case.

50 (1909), [1916] The Hague Court Reports 121 (hereinafter *Grisbadarna Case*).

51 Newfoundland Phase Two Memorial, para. 157.

52 Award of December 17, 1999 (Permanent Court of Arbitration) (hereinafter *Eritrea/Yemen*).

53 Newfoundland Phase Two Memorial, para. 258. See also the discussion at Part III below.

Maine case in support.[54] It notes but does not address the fact that the inner coasts in the *Gulf of Maine* case were the only relevant coasts in issue, and never considers that the shorter length of the perpendicular in the *Gulf of Maine* case, compared to Newfoundland's proposed line, limited the actual effect of the shift.[55]

40. Newfoundland's approach is based on what the ICJ has called an "overconceptualization" of the rules, principles and methods used by the Court and by other tribunals in previous cases, a practice which the Court cautioned against in the *Tunisia/Libya* decision:[56]

> Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt should be made here to overconceptualize the application of the principles and rules relating to the continental shelf.

b) Newfoundland Applies Factual Findings From the *St. Pierre and Miquelon Award* As "Facts" In This Case

41. The most pervasive, inappropriate and misleading use of caselaw by Newfoundland consists of its reliance on the *St. Pierre and Miquelon Award*. There is no doubt that the award of the Court of Arbitration is of great interest in this case, as are the other decisions that comprise the international jurisprudence on maritime delimitation. Newfoundland, however, attributes to the *St. Pierre and Miquelon Award* an importance far beyond its role in the development and definition of the international law of delimitation, and it treats certain factual determinations made in that case as if they were directly applicable in the present arbitration, which they are not. Indeed, its adherence to certain elements of the *St. Pierre and Miquelon Award* is so rote as to suggest that Newfoundland regards

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54 Newfoundland Phase Two Memorial, para. 228.

55 Newfoundland Phase Two Memorial, para. 227. See also the discussion at Part III below.

56 **Annex 189**: *Tunisia/Libya, supra* note 9 at 92. See also **Annex 174**: *Gulf of Maine, supra* note 7 at 290, where the Chamber noted that "each specific case is, in the final analysis, different from all the others...".

many of the issues to be decided by the Tribunal in this delimitation as *res judicata*,[57] rather than *res controversa* or *res litigiosae*, as they are.[58]

42. Examples of this include Newfoundland's assertion that the line dividing the parties' respective offshore areas "must" run to the South and West of the line determined in the *St. Pierre and Miquelon Award*;[59] or its willingness apparently to save the Tribunal the trouble of examining the so-called "coastal fronts" on which so much of its proposed delimitation hinges, on the ground that "[a] series of coastal fronts has already been **determined and approved** in *Canada* v. *France*, based apparently on the lines proposed by Canada for the purpose of measuring the lengths of the relevant coasts".[60]

43. The error of law underlying Newfoundland's reliance upon the *St. Pierre and Miquelon Award* is readily apparent. At international law, decisions of courts and tribunals are binding only on the parties to the litigation. Moreover, the very essence of the law of maritime delimitation is the concept of an equitable result in the circumstances of the particular case. The fundamental norm cannot accommodate the extraordinary notion that a decision found to be equitable in the circumstances of a given case can be applied, equally equitably, and without careful analysis, to another. For good reason did the Chamber in the *Gulf of Maine* case write that "each specific case is, in the final analysis, different from all the others ... it is monotypic".[61]

44. Newfoundland merely lifts the reasoning of the *St. Pierre and Miquelon Award*, which is based on the geographic and other circumstances of that case, and

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57 Even if it were applicable at international law – which it is not – it could not be applied here, where the parties and the question are different.

58 Newfoundland might well have been inspired by the maxim: "*res judicata facit ex albo, nigrum; ex nigro, album; ex curvo, rectum; ex recto, curvum* – a thing adjudged makes white, black; black, white, the crooked, straight; the straight, crooked". That is, to stretch the analogy somewhat, Newfoundland might wish that it could bend the circumstances of this case to suit its purposes, or colour the relevant facts with the same brush used, in different circumstances, by the Court of Arbitration in the *St. Pierre and Miquelon Award*.

59 Newfoundland Phase Two Memorial, para. 237.

60 Newfoundland Phase Two Memorial, para. 216 (emphasis added).

61 Annex 174: *Gulf of Maine, supra* note 7 at 290.

applies it to the present delimitation, in which the factual context, and thus the relevant circumstances, are entirely different. It does not address the obvious, significant distinctions between the two cases, the mere mention of which is sufficient to defeat Newfoundland's effort to assimilate the two. These include:

- The fundamentally different nature and origin of the legal zones in question, as well as their extent ("offshore areas" reaching to the edge of the continental margin in this case, as opposed to a 200-mile EEZ in the *St. Pierre and Miquelon Award*);

- The different resources at issue (oil and gas exclusively *vs.* primarily fisheries);

- The impact of other delimitations in the region (none of any consequence in the *St. Pierre and Miquelon Award*);

- The nature and history of the parties' conduct (nothing in the *St. Pierre and Miquelon Award* approaching the sort of "agreement" that Newfoundland itself acknowledges was reached by the parties in this case[62]).

45. Even as regards the geographical similarities between the two cases, Newfoundland overreaches, straining credulity. Though slightly more restrained in its embrace of elements of the *St. Pierre and Miquelon Award* than other passages in the Newfoundland Phase Two Memorial, the following statement demonstrates the centrality of that decision to several of Newfoundland's principal contentions:[63]

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62 Nova Scotia Phase Two Memorial, Part II B i a).

63 Newfoundland Phase Two Memorial, para. 37.

> *Canada* v. *France* provides a point of departure for the analysis of the geographical configuration of the area off Newfoundland and Nova Scotia outside the Gulf of St. Lawrence. The positions taken by the parties and the findings of the Court of Arbitration are highly significant because **the general area of the delimitation is essentially the same.**
>
> (emphasis added)

Coastal Geography, Coastal Relationship and Relevant Coasts

46. The passage from Newfoundland's Phase Two Memorial just quoted reveals several critical errors. First, and most important, the statement ignores the true relevance of "geographical configuration" as a factor in delimitation. The key to that relevance lies not in the particular configuration of any one or more of the relevant coasts of the parties, but rather in the **relationship** between those coasts. This is demonstrated by the terminology employed to assess and describe the significant geographic features present in a given case. For example, the relevance of coastal geography to the drawing of a particular line is directly related to the degree of "opposition" or "adjacency" that is observed,[64] or even to "distance",[65] all of which describe, not coasts belonging to one party or another, but forms of "coastal relationship" between parties to a delimitation.

47. The Court of Arbitration in the *St. Pierre and Miquelon Award* was never asked to consider or describe the relationship between the coasts of Nova Scotia and Newfoundland. Nor would such an exercise have been relevant to the Court's mandate, for the obvious reason that those coasts, which in the present case are to be regarded as if they were the territory of two sovereign States, were in the *St. Pierre and Miquelon Award* treated as but components of Canada's Atlantic coast. Thus, the decision can hardly be considered as the basis of an analysis of a coastal relationship – between Nova Scotia and Newfoundland – that the Court never actually addressed.

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64 **Annex 174**: *Gulf of Maine, supra* note 7 at 331; **Annex 187**: *Libya/Malta, supra* note 9 at 47; **Annex 188**: *North Sea Cases, supra* note 9 at 36-37.

65 **Annex 187**: *Libya/Malta, supra* note 9 at 33-35, 55-56.

48. This point is clearly, if inadvertently, demonstrated in the Newfoundland Phase Two Memorial, in a passage quoting the Court of Arbitration's views on the relationship between the Canadian coast in Nova Scotia and that of St. Pierre and Miquelon.[66] The Court took the view that, if St. Pierre and Miquelon and Nova Scotia were hypothetically to be considered as two States, their coasts would be treated as opposite for the purposes of delimitation. Yet, as both Newfoundland and Nova Scotia agree, the relationship between the coasts of the two provinces in the outer areas is primarily adjacent.[67] In its brief consideration of the Nova Scotia coast with reference to St. Pierre and Miquelon, then, the Court defined a relationship which is entirely different from that between Nova Scotia and Newfoundland – a relationship which, as noted, it never considered.

49. Newfoundland simply adopts the restricted definition of Nova Scotia's relevant coasts from the *St. Pierre and Miquelon Award*.[68] There is no consideration of whether the different coastal relationship of the current parties, combined with the fact that their potential "offshore area" entitlements cover a maritime area extending far seaward than that delimited in the earlier case, might engage further Nova Scotia coasts to the South and West of Cape Canso – coasts which legitimately relate to these wider disputed areas.

50. Not content to refer repeatedly to the views of the Court of Arbitration in the *St. Pierre and Miquelon Award*, Newfoundland resorts to the arguments of the parties in that case to support its claims. It sees great significance in the "common assumptions" of Canada and France regarding the irrelevance, in the circumstances of that case, of any portion of Nova Scotia's coast South of Cape Canso: "Neither party to *Canada* v. *France*, nor the Court of Arbitration itself, at any point suggested that the mainland coasts of Nova Scotia were relevant ...".[69]

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66 Newfoundland Phase Two Memorial, para. 236.
67 Newfoundland Phase Two Memorial, para. 53. Nova Scotia Phase Two Memorial, p. IV-67.
68 Newfoundland Phase Two Memorial, para. 59.
69 Newfoundland Phase Two Memorial, para. 43.

51. It would, of course, have been difficult for Canada to maintain the relevance of the mainland coasts of Nova Scotia in a case in which it advocated a narrow "enclavement" of St. Pierre and Miquelon, specifically on the grounds that the French islands were situated within a concavity defined by the coasts of Newfoundland and Cape Breton Island.[70] Nor is it surprising that France would have refrained from advocating the relevance of Canada's extensive East coast along the Nova Scotia mainland. What is more interesting, though less than surprising, is Newfoundland's apparent rejection of France's position regarding the irrelevance of other parts of Canada's coasts in the area, namely, much of the South coast of Newfoundland.[71]

The Area Of The Delimitation

52. A further error in the passage from Newfoundland's Phase Two Memorial quoted above lies in the ill-considered, almost offhand assertion that "the general area of delimitation is essentially the same". Only when viewed through Newfoundland's rosy glasses is this so – "*ex albo, nigrum*".

53. As discussed more amply in Part III below, the *St. Pierre and Miquelon Award* dealt with a delimitation of the parties' 200-mile claims – more specifically, those claims as limited to the areas which might conceivably be claimed by France within 200 nautical miles of St. Pierre and Miquelon. The Court of Arbitration never considered the area at stake in this arbitration, which involves the full extent of the offshore areas of Newfoundland and Nova Scotia, to the outer edge of the continental margin, nor did it have either occasion or need to consider the coasts that might relate to those vast maritime areas.

54. The *St. Pierre and Miquelon Award* and the present case simply cannot be said to concern "essentially the same" area of delimitation in any meaningful sense. Nonetheless, the conclusions in the former case regarding the location, direction

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70 **Annex 201**: *Memorial Submitted by Canada*, Court of Arbitration, *Delimitation of the Maritime Areas between Canada and France*, June 1, 1990, at 24-26.

71 **Annex 194**: *St. Pierre and Miquelon Award*, *supra* note 44 at 1161.

and length of the relevant coasts of the provinces,[72] and regarding the size and shape of the area of the delimitation,[73] are applied *holus bolus* to the latter by Newfoundland.

Newfoundland's Supposedly "Dominant" Coast

55. The errors underlying Newfoundland's treatment of the *St. Pierre and Miquelon Award* also play out in its ambitious attempt to invoke the decision as grounds for its characterisation of the Newfoundland South coast as "dominant" in the present case.[74] The germ of Newfoundland's claim in this regard is found in the following paragraph of its Phase Two Memorial:[75]

> The implications for the present delimitation cannot be ignored. If—as the Court of Arbitration determined in *Canada* v. *France*—St. Pierre-et-Miquelon has an unobstructed seaward projection toward the south, which does not converge with any competing projection from Nova Scotia, then *a fortiori* the coastal front of Newfoundland east of the French islands must also enjoy a similar unobstructed projection. It follows that, east of the corridor appertaining to St. Pierre-et-Miquelon, the entire area is situated within the unobstructed seaward projections of the south coast of Newfoundland—and not those of Nova Scotia. A maritime boundary extending the Nova Scotia continental shelf into that outer area would, **as a matter of pure logic**, constitute an encroachment on the natural prolongation of the Newfoundland and Labrador coast. **The line must therefore follow a course that is sufficiently southerly in its bearing to avoid any such effect of encroachment.**
>
> (emphasis added)

56. These so-called "implications" for the present delimitation are astonishing indeed. Once again, the outcome of the *St. Pierre and Miquelon Award*, a case involving neither of the present parties and few if any of the present circumstances, is revealed to determine, "as a matter of pure logic", one of the primary questions to be determined by this Tribunal: the parameters within which the line dividing the parties' respective offshore areas must be drawn. Given that "[t]he line must ... follow a course that is sufficiently southerly in its bearing to

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72 Newfoundland Phase Two Memorial, para. 59.
73 Newfoundland Phase Two Memorial, paras. 61-62.
74 Newfoundland Phase Two Memorial, para. 242.
75 Newfoundland Phase Two Memorial, para. 237.

avoid any such effect of encroachment [on what the Court of Arbitration determined to be **Canada's** maritime area]", it appears that the Tribunal's work has already largely been done. One wonders why an arbitration was at all necessary in this case.

57. However, it is only rhetoric, not logic, that is capable of evoking the image conjured up by Newfoundland. The *St. Pierre and Miquelon Award* holds that St. Pierre and Miquelon (France) does not have any maritime projection East of the "corridor" awarded to it. The decision says absolutely nothing about Nova Scotia's potential entitlements in that area, least of all in a delimitation in which it and Newfoundland are regarded "as if they were states".

58. What the Court of Arbitration recognized, as acknowledged in the Newfoundland Phase Two Memorial, was that:[76]

> In the hypothesis of a delimitation exclusively between Saint Pierre and Miquelon and Nova Scotia, as if the southern coast of Newfoundland did not exist, it is likely that corrected equidistance would be resorted to, the coasts [of Nova Scotia and St. Pierre and Miquelon] being opposite. In that event it is questionable whether the area hypothetically corresponding to Nova Scotia, would reach the maritime areas towards the south appertaining to Saint Pierre and Miquelon.

59. There is not a word here regarding the adjacent – not opposite – coastal relationship of Nova Scotia and Newfoundland in the area in question, or regarding the coasts of those provinces that would inevitably be relevant to a delimitation of the broad shelf, as opposed merely to the area within 200 nautical miles of Canada and France. As already mentioned above, the Court of Arbitration never considered these questions. Nor did it consider which Nova Scotia coasts might "project frontally" into the zone in question "[i]n the hypothesis of a delimitation exclusively between" the two provinces. Such issues were simply immaterial in the context of a dispute opposing, not Nova Scotia and Newfoundland, but Canada and France. The southerly projection of the French

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[76] Annex 194: *St. Pierre and Miquelon Award*, *supra* note 44 at 1171. Newfoundland Phase Two Memorial, para. 236.

zone around St. Pierre and Miquelon, out to 200 nautical miles (the "baguette"), was determined to be equitable in the circumstances, in the light of the relationship between St. Pierre and Miquelon and Canada. It proves nothing as regards an equitable solution in the circumstances of the present case.

The True Impact Of Newfoundland's Use Of The St. Pierre And Miquelon Award

60. The *St. Pierre and Miquelon Award* lies at the heart of three of Newfoundland's main contentions. It is described as the "point of departure for the analysis of the geographical configuration";[77] it is thus used to justify a restricted and erroneous definition of the relevant Nova Scotia coasts[78] as well as of the relevant delimitation area;[79] and it is also used as authority (which it is not) for Newfoundland's proposition regarding the supposed "dominant position of the Newfoundland coasts in the outer area".[80]

61. However, while the *St. Pierre and Miquelon Award* is certainly binding on Canada and France, the findings of the Court of Arbitration are in no way determinative of any of the issues to be decided by the Tribunal in this arbitration. Newfoundland's undue reliance on those findings to support – and in many instances, to prejudge – its claims in this case, effectively undermines its very position.

iv. Summary And Conclusion

62. The general errors in law which are set out above all tend to be directed towards restricting or predetermining the range of considerations that the Tribunal will take into account in effecting the delimitation. Newfoundland's treatment of its chosen equitable criteria as though they were mandatory, and its boilerplate application of findings regarding the relevant circumstances in other cases, effectively divorce the critical determinations to be made in this arbitration from

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77 Newfoundland Phase Two Memorial, para. 37.
78 Newfoundland Phase Two Memorial, para. 59.
79 Newfoundland Phase Two Memorial, paras. 61-62.
80 Newfoundland Phase Two Memorial, para. 242.

the circumstances that truly obtain. In the same way, the erroneous assumption that this is a continental shelf delimitation, and that the offshore areas share the same juridical basis as the continental shelf, de-links Newfoundland's reasoning from one of the most distinctive and essential factual elements in this case.

B. Newfoundland's Particular Errors Of Law

63. As shown above, Newfoundland considers that the present delimitation ought to be carried out on the basis of constraining considerations taken into account in previous continental shelf and multi-purpose zone delimitation cases. In doing so, it effectively prejudges the outcome of this case, and invites the Tribunal to do so as well, by constraining the relevant circumstances and equitable criteria according to which the line is to be drawn and tested to those considered equitable in other cases.

64. Beyond this fundamental defect in approach, however, so contrary to the law of maritime delimitation, Newfoundland also misstates specific aspects of the caselaw. Even assuming, *arguendo*, that it were correct to approach this case as a true continental shelf delimitation, Newfoundland's statement of the applicable law would still be flawed. True to its theme of restricting the scope of the Tribunal's review of the facts, Newfoundland seriously misstates the range of considerations and the nature of the criteria that have been considered in previous cases.

65. There are five particular issues in respect of which the Newfoundland Phase Two Memorial discloses a distorted and erroneous view of the jurisprudence:

- The impact of other delimitations;
- The difference between inequity in theory and inequity in fact;
- The meaning and role of "frontal projection" of coasts;

- The significance of resource location and access; and,
- The relevance of prior conduct.

i. The Impact Of Other Delimitations

66. The parties agree that maritime delimitations must take account of other delimitations in the region, whether actual or prospective.[81] Newfoundland, however, ignores the **reason** for this principle, which, as emphasized in the *Guinea–Guinea-Bissau Maritime Delimitation Case*,[82] is to ensure that the macrogeographical effect of all delimitations in the region is considered in determining an equitable solution in any given case. Instead, Newfoundland chooses, once again, to focus exclusively on one such relevant consideration: the actual delimitation effected in the *St. Pierre and Miquelon Award.*

67. Newfoundland declares, as if it were fact, that "all of the area allocated to France is 'carved out' of the area that would otherwise belong to Newfoundland and Labrador".[83] Here too, Newfoundland effectively asks the Tribunal to accept that the outcome of the present arbitration has been prejudged. Whether the area from which France's jurisdiction is "carved out" appertains to Newfoundland or to Nova Scotia is precisely the issue to be determined in this case.

68. In Nova Scotia's Memorial, all actual or prospective delimitations in the region, including in the Gulf of Maine, the Laurentian Channel and the Gulf of St. Lawrence, are considered. This is the only means of ensuring that all, and not just a handy selection, of the macrogeographic circumstances are taken into account. On this basis, and bearing in mind that it remains to determine whether France's gain will prove to be Newfoundland's or Nova Scotia's loss, Newfoundland's plaintive assertion that "it has already paid the price — as Nova Scotia has not — of the delimitation resulting from the presence of these islands [St. Pierre and

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81 Newfoundland Phase Two Memorial, para. 47. Nova Scotia Phase Two Memorial pp. IV- 61-62.

82 **Annex 191**: Award of February 14, 1985 (1988) 77 I.L.R. 636 at 676-77 (hereinafter *Guinea–Guinea-Bissau*).

83 Newfoundland Phase Two Memorial, para. 47.

Miquelon] off the Canadian coast"[84] is seen for what it is: the most self-regarding and specious of assertions – *ex recto, curvum*.

69. Nova Scotia, of course, "paid the price", as Newfoundland has not, of the delimitation in the Gulf of Maine. However, the question is not simply whether one or other province has suffered a "loss" as a result of other delimitations in the region – the maritime zones appertaining to other States are geographic facts as immune to refashioning as any other geographic feature. The issue is whether the effect of those delimitations (including, for example, the "squeeze" on Nova Scotia's zone resulting from its location between Newfoundland in the North and the United States in the South), affects the equitableness of the result in the present case.

ii. Inequity In Theory And Inequity In Fact

70. Consistent with the general principle that the equitableness of the result is the predominant consideration in a delimitation,[85] any "inequity" allegedly resulting from particular geographic features, coastal orientations or delimitation methods must, wherever possible, be demonstrated and assessed in concrete terms. Inequity in a given case cannot be presumed, even where a particular feature or method has been found to give rise to an inequity in other situations.

71. Still less can inequity be presumed from the mere existence of certain geographic features. Yet, the Newfoundland Phase Two Memorial does just this, building trumped up claims of inequity on the presence of certain features, such as islands,[86] and on illusory descriptions of such things as coastal lengths[87] and

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84 Newfoundland Phase Two Memorial, para. 207. Oddly, while referring to the "price" paid by Newfoundland, its Phase Two Memorial never computes it. As shown in the Nova Scotia Phase Two Memorial, p. IV-62, the total areas involved are insignificant when compared to the size of Newfoundland's overall zone.

85 Nova Scotia Phase Two Memorial, Part III B ii c); **Annex 189**: *Tunisia/Libya, supra* note 9 at 59: "The result of the application of equitable principle must be equitable ... It is ... the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result."

86 Newfoundland Phase Two Memorial, paras. 140-147.

87 Newfoundland Phase Two Memorial, paras. 117-121.

directions.[88] That is, Newfoundland alleges that such features exist and cause inequity. It rarely deigns to demonstrate that this is so in fact, by testing its hypotheses.

72. This tendency is perhaps most pronounced in Newfoundland and Labrador's analysis of the "inner" sector (as it defines it), an issue that is addressed in more detail in Part III below. For example, Newfoundland makes a number of declarations regarding the effects of a "provisional" median line in the inner sector, yet it neither constructs nor depicts such a line, which would allow those alleged effects to be assessed.

73. Similarly, with respect to islands, Newfoundland asserts that St. Paul Island would have an inequitable impact on a median line, but it offers no proof of any sort to back up the claim. Islands, as Newfoundland acknowledges, are **potential** sources of inequity, and no more – until, that is, an inequity is proven to result from the presence of a specific feature in the particular geographic circumstances of the case.[89]

iii. Natural Prolongation, Seaward Extension And Frontal Projections

74. Newfoundland relies heavily on what it calls "the principle of the coastal front", or "frontal projection",[90] which it effectively merges with the concept of the seaward extension of coasts, leading to the following sweeping assertion: [91]

> It is above all the coastal geography that constitutes the basis of title. The idea of a frontal projection is fundamental. The "most natural prolongation" or "seaward extension" of each party is the area directly in front of its coasts.

75. These assertions, proceeding yet again from Newfoundland's erroneous assumptions about the origin of title in this case, provide the foundation for

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88 Newfoundland Phase Two Memorial, paras. 32, 53.

89 **Annex 212** : D. Bowett, *The Legal Regime of Islands in International Law* (Dobbs Ferry: Oceana Publications, 1979) at 152-153.

90 Newfoundland Phase Two Memorial, paras. 106-109, 155-161.

91 Newfoundland Phase Two Memorial, para. 162.

critical aspects of Newfoundland's case. The definitions of relevant coasts and relevant areas, which provide the sole basis for testing the equity of Newfoundland's result, are constructed on this formulation of "frontal projection".[92] Furthermore, Nova Scotia is denied any possibility of entitlements in the area to the East of St. Pierre and Miquelon, on the basis of this approach.[93]

76. These applications of Newfoundland's frontal projection theory are dealt with in greater detail in Part III below, but it is necessary here to deal with the legal basis for Newfoundland's claims. These are built upon a flawed series of propositions as to how concepts such as natural prolongation, seaward extension and coastal fronts are defined and relate to each other.

a) The Structure Of Newfoundland's Argument On Frontal Projection

77. The essence of Newfoundland's argument on frontal projection can be summarized in four main propositions, which are scattered throughout its Phase Two Memorial:

- Natural prolongation, which Newfoundland assumes is the legal basis for entitlement, is best reflected as the "seaward extensions of the coasts" of the parties;[94]

- The seaward extension of a coast is then defined as "the areas directly in front of that coast",[95] or in some instances as the maritime areas towards which the coasts "face";[96]

- Seaward extension is also linked to the concept of a "coastal front", or general direction of a coastline. Specifically, Newfoundland argues that the areas "in front of a coast" can be

92 Newfoundland Phase Two Memorial, paras. 39-43, 60-62, 254-255.
93 Newfoundland Phase Two Memorial, para. 237
94 Newfoundland Phase Two Memorial, para. 107.
95 Newfoundland Phase Two Memorial, para. 107.
96 Newfoundland Phase Two Memorial, para. 39.

defined on the basis of the seaward projection of the general direction of the coast – or "frontal projection";[97]

- Finally, for the purposes of defining a relevant maritime area, the seaward "frontal projection" of the coasts can be defined by use of a perpendicular to the general direction of the coastline.[98] This use of a perpendicular, as will be shown below, means that "frontal projection" becomes "unidirectional frontal projection", with coasts having no angular or radial projection into relevant maritime areas beyond the perpendicular.

78. The end-product of this reasoning is the restricted definition of Nova Scotia's relevant coasts and the artificial limitation of Newfoundland's maritime area, as is discussed in detail in Part III. The following sections, however, focus on the errors in law that underlie Newfoundland's use of frontal projections, both with respect to the definitions of the separate concepts involved, and the relationships between and among those concepts.

b) Natural Prolongation, Seaward Extension And The Impact Of Article 76 of the *LOS 1982*

The Definition Of Natural Prolongation And Seaward Extension

79. The notion of natural prolongation as the basis of continental shelf rights provides a starting point for Newfoundland's argument on frontal projection. But this argument is premised on the mistaken assumption identified earlier – the zone in question here is not a continental shelf, but an offshore area, and it is not "coastal geography that constitutes the basis of title",[99] but rather a negotiated arrangement. The implication of this different status is clear: the areas of potential entitlement in this case are to be defined differently than in previous cases

97 Newfoundland Phase Two Memorial, para. 162.
98 Newfoundland Phase Two Memorial, para. 254.
99 Newfoundland Phase Two Memorial, para. 162.

involving the continental shelf. In particular, it is neither necessary nor appropriate in this case to focus, as Newfoundland does, on identifying "in an approximate fashion"[100] the seaward extensions of coastlines as an expression of the maritime projection of land-based sovereignty. Rather, as discussed below, the extent of the parties' entitlements is readily quantifiable.

76. The concept of seaward extensions or projections of coasts, which Newfoundland adopts as the definition of natural prolongation, is but one means of determining areas of overlapping potential entitlements. In the *Denmark/Norway* case, the Court made it clear that non-encroachment, which is directly related to the idea of seaward extension, is really an issue of overlapping legal entitlements: [101]

> [T]here is an area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other State; **this was the basis of the principle of non-encroachment enunciated in the *North Sea Continental Shelf* cases** ...
>
> (emphasis added)

77. The determination of how and where coasts "project" and overlap, therefore, must be connected to the legal entitlements of the parties, and thus to the juridical nature of the zone in question. As Newfoundland itself has argued, to do otherwise would sever the cord tying the delimitation to the legal title at stake, resulting in a delimitation outside the law.[102]

78. In the present case, as the Tribunal is by now well aware, the "offshore areas" to be delimited are defined in statute, and their seaward limits are to be defined in accordance with the provisions of Article 76 of the *LOS 1982*, a point conceded by Newfoundland.[103] This definition of the zone to be delimited, which is the only

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100 Newfoundland Phase Two Memorial, para. 107.

101 Annex 193: *Denmark/Norway*, *supra* note 21 at 64. This view is also confirmed, but then abandoned by Newfoundland (Newfoundland Phase Two Memorial, para. 39) : "The relevant coasts in a maritime delimitation are those that face toward the delimitation area, creating a potential 'overlap and convergence' of maritime entitlements."

102 Newfoundland Phase Two Memorial, para. 85.

103 Newfoundland Phase Two Memorial, para. 63.

definition applicable in this case, must be the basis of any determination of the "projection" seaward of the contending coasts of the parties.

The Impact Of Article 76 of The LOS 1982

79. Article 76 defines the continental shelf of a state as comprising:[104]

> [T]he sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

80. The term "natural prolongation" is not specifically defined, insofar as it might apply short of the outer limits set in Article 76 – that is, there remains a certain ambiguity as to how natural prolongation could be used to divide the claims of two states where two separate natural prolongations might exist.[105] Here, however, the parties are in agreement that the continental shelf off the East coast is an undivided unity, and that natural prolongation cannot be the basis for any division of their claims.[106]

81. The only continuing relevance of natural prolongation as the basis of seaward extension, therefore, is in determining the outer limits of the parties' potential entitlements, and in this context Article 76 is unambiguous. Beyond 200 nautical miles, the outer edge of the continental margin, as determined by the Article 76 criteria, defines the natural prolongation of a state for purposes of claiming its shelf entitlements, even if a more subjective definition of natural prolongation might have permitted a broader claim. This is the method adopted as the definition of the seaward extension of the "offshore areas" under the *Accord Acts*,

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104 **Annex 186**: *LOS 1982, supra* note 2, art. 76.

105 Newfoundland itself notes this ambiguity: Newfoundland Phase Two Memorial, para. 94.

106 Newfoundland Phase Two Memorial, paras. 63-66; Nova Scotia Phase Two Memorial, pp. IV-64-65.

and applied by Nova Scotia in its Phase Two Memorial to determine the area of overlapping of entitlements.[107]

82. Newfoundland does deal briefly with the impact of Article 76 on the definition of natural prolongation and seaward extension, but only with respect to the provision that "deems" continental shelf claims to exist out to 200 nautical miles.[108] It recognizes that the advent of Article 76 means that "...'natural prolongation' can now be identified with the so-called 'distance principle' within the 200 nautical mile limit."[109]

83. It should be noted, of course, that even within 200 nautical miles, Newfoundland does not give any effect to the "distance principle" that it identifies, but rather continues to define the area of overlap by reference to "frontal projection", rather than by a projection in all directions out to 200 nautical miles, as would be required if distance were used as the basis for entitlement. This point was concisely explained by Professor Prosper Weil in his dissent in the *St. Pierre and Miquelon Award*:[110]

> A maritime projection defined by a certain distance from the coast is not effected only in a direction perpendicular to the general direction of the coastline and over the breadth of that coastline. It radiates in all directions, creating an envelope of ocean around the coastal front. In a word, it is radial.

84. Newfoundland, then, describes but does not give any effect to the Article 76 definition as it applies to the offshore areas within 200 nautical miles. Beyond that limit, it simply ignores the impact of the Article 76 definition, apart from claiming that the delimitation should be extended to the outer edge of the margin, but

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107 Nova Scotia Phase Two Memorial, Appendix B.

108 Newfoundland Phase Two Memorial, para. 92.

109 Newfoundland Phase Two Memorial, para. 92.

110 **Annex 194**: *St. Pierre and Miquelon Award*, *supra* note 44 at 1200. Newfoundland justifies its departure from the nature of title by pointing out that the distance principle does not mandate the use of equidistance, which is correct (Newfoundland Phase Two Memorial, para. 95). However, this does not explain why distance should not be used, not as the basis for a delimitation method, but as the most accurate representation of the overlapping entitlements.

without ever considering the seaward extent of the resultant zones.[111] However, just as Article 76 has changed the approach to defining entitlements (and thus overlaps) within 200 nautical miles, it has clearly done the same beyond 200 nautical miles.

85. The application of the Article 76 definition to the outer limits of the provinces' offshore areas is fully explained in the Nova Scotia Phase Two Memorial.[112] It is a hybrid definition based on both geology/geomorphology and distance, resulting in an extension of a State's potential entitlement in all directions from its coast. Article 76 does not impose any limit on the direction or angle of the seaward projection defined therein, an approach that is explicitly confirmed for the offshore areas in the *Canada-Newfoundland Accord Act*, which provides that the Newfoundland offshore area extends "at all locations" to the outer edge of the continental margin.[113]

86. In sum, whether within 200 nautical miles or beyond, the legal entitlements of the parties in the present arbitration – the offshore areas – are based on definitions of seaward extension that project radially, in all directions from the coast. There is no justification for defining the relevant areas, which must be based on the overlapping potential entitlements of the parties, by criteria that do not reflect the fundamental characteristics of the legal zone in issue. Unidirectional frontal projection, as argued by Newfoundland, has no connection to the legal definition of the offshore areas.

c) There Is No Authority For Newfoundland's Frontal Projection Theory

87. Even if this were a delimitation of the continental shelf, as opposed to the parties' offshore areas, Newfoundland's approach to frontal projection would still be incorrect. Newfoundland has drawn on the concept of the "coastal front", but

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111 Newfoundland Phase Two Memorial, paras. 62, 64.

112 See Nova Scotia Phase Two Memorial, **Appendix B**.

113 **Annex I**: *Canada-Newfoundland Accord Act, supra* note 29, s. 2.

applied it in a new and, indeed, extreme manner, based largely on a misapplication of the decision in the *St. Pierre and Miquelon Award*.

88. The concept of coastal fronts, as opposed to frontal projection, is uncontroversial. Newfoundland correctly identifies its origins in the *North Sea Cases*, although it misstates the import and use of the concept in the decision of the Court.[114] Nonetheless, the simplification of the general direction of coastlines has indeed been a common method used in various cases, as a matter of practicality. Newfoundland, however, goes well beyond this use of coastal fronts and makes two further, and incorrect, claims: [115]

> The idea of a frontal projection is fundamental. The "most natural prolongation" or "seaward extension" of each party is the area directly in front of its coasts.

89. Newfoundland, then, transmutes the common usage of "coastal fronts" into a definition of seaward extension based entirely on "frontal projection", and it additionally claims that this projection can be described as areas "in front of" the coasts.[116] Finally, these assertions are, in turn, used by Newfoundland to support the proposition that, for purposes of defining a relevant offshore area, coasts **only** project frontally, that is, in a direction perpendicular to the general direction of the coast.[117]

90. Newfoundland claims that "[t]his notion of a frontal projection is a pervasive theme, implicit or explicit, throughout the jurisprudence",[118] citing as support the *North Sea Cases*, as well as the *Gulf of Maine*, *Tunisia/Libya* and

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114 According to Newfoundland, the ICJ explained the "the principle of the coastal front": Newfoundland Phase Two Memorial, para. 155. In fact, the ICJ referred to the concept in a manner that recognized the difference between a "principle" and a technical "method", and between assertions made by the parties and conclusions adopted by the Court: "One **method discussed in the course of proceedings**, under the name of the principle of the coastal front, consists in drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines." **Annex 188**: *North Sea Cases*, *supra* note 9 at 52 (emphasis added).

115 Newfoundland Phase Two Memorial, para. 162.

116 **Annex 188**: *North Sea Cases*, *supra* note 9 at 30. The inherent imprecision of terms such as "in front of the coast" was noted by the Court.

117 Newfoundland Phase Two Memorial, para. 257. Newfoundland's approach to the definition of the relevant coasts and areas is explained more fully in Part III below.

118 Newfoundland Phase Two Memorial, para. 108.

unobstructed.[122] There is no indication that this factual "tendency" constitutes a legal principle or rule, or any suggestion that by projecting "frontally, in the direction in which they face", coasts are somehow barred from generating maritime areas other than strictly perpendicular to the coastal front.

94. Newfoundland expands upon its error, declaring: "This is why, in *Canada* v. *France*, the Court of Arbitration awarded France a narrow 200 nautical mile corridor extending to the south and a broader area ... toward the west."[123] In fact, the Court's use of the narrow corridor was motivated by the need to accord some seaward projection to St. Pierre and Miquelon, while not cutting off "a parallel frontal projection of the adjacent segments of the Newfoundland southern coast".[124] As always, the result was the dominant consideration: [125]

> In order to achieve this result the projection towards the south must be measured by the breadth of the coastal opening of the French islands towards the south.

95. The Court of Arbitration's choice of method, then, was conditioned by the peculiar geographic situation of a small island situated immediately off a mainland coast, and to the "parallel" projections of the two considered in relation to each other. There is nothing here that suggests the existence of a rule of general application with respect to coastal projections, nor is the method remotely applicable to the completely different coastal relationships of the parties to the present arbitration.

96. Newfoundland has also misstated the context in which frontal projection was used in the *St. Pierre and Miquelon Award*. It is clear from the above passages that the concept was used as part of the method of delimitation; again, only because it was appropriate to the actual circumstances of the case. Newfoundland, however, applies its unidirectional frontal projection theory to the definition of the relevant

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122 Newfoundland claims that the Court of Arbitration referred to this geographic tendency "with approval", though how the Court could approve or disapprove of a factual tendency is unclear. Newfoundland Phase Two Memorial, para. 108.

123 Newfoundland Phase Two Memorial, para. 109.

124 **Annex 194**: *St. Pierre and Miquelon Award, supra* note 44 at 1170.

125 **Annex 194**: *St. Pierre and Miquelon Award, supra* note 44 at 1170.

coasts and relevant areas. As will be shown in Part III below, the method was not applied in the *St. Pierre and Miquelon Award* in that context.

97. For the purposes of this Part, it is sufficient to note that it is clear from other passages in the *St. Pierre and Miquelon Award* that the Court of Arbitration did not believe that relevant coasts projected in the manner claimed by Newfoundland – that is, solely perpendicular to the general direction of the coast. Its inclusion of the Nova Scotian coast as far as Cape Canso among the "relevant coasts" could only have been justified on the basis of a radial coastal projection. The following statement makes it clear that the Court considered that coasts naturally project **both** "frontally" and "laterally", depending on the circumstances:[126]

> But the coastlines that France wants to exclude form the concavity of the Gulf approaches and all of them face the area where the delimitation is required, **generating projections that meet and overlap, either laterally or in opposition.**
>
> (emphasis added)

d) Newfoundland's Theory Of Primary And Secondary Coasts

98. The practical difficulty with Newfoundland's theory of "frontal projection" is graphically shown in **Figure 58**[127]. As was pointed out by Professor Weil in his dissent in the *St. Pierre and Miquelon Award*,[128] the unidirectional frontal projection theory cannot explain any Newfoundland entitlement to the area South and East of Cape Race. This is an area that, on Newfoundland's definition, is no more directly "in front" of Newfoundland than it is in front of Nova Scotia. Furthermore, as is also shown in **Figure 58**, an Article 76 projection would put the area squarely within the potential entitlements of both parties. By what other criterion, then, is this area solely within the projection of Newfoundland?

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126 **Annex 194**: *St-Pierre and Miquelon Award, supra* note 44 at 1161. Nor is the Court's view compatible with Newfoundland's assertion in the title to Figure 6: "The Seaward Extensions of Opposite Coasts Meet and Overlap; The Projections of Adjacent Coasts Do Not".

127 **Figure 58**: The Practical Difficulty with Newfoudland's "Frontal Projection" Theory.

128 **Annex 194**: *St. Pierre and Miquelon Award, supra* note 44 at 1202.

99. The answer lies in the real purpose and effect of Newfoundland's use of "frontal projection", which is to revive, under a new guise, the discredited theory of "primary" and "secondary" coasts, as advanced by the United States in the *Gulf of Maine* case.

100. In that case, the United States maintained that the so-called "primary" nature of certain coasts was such that they dominated, and projected into maritime areas off other, "secondary" coasts, regardless of proximity.[129] The close connection between the notions of "primary coasts" and "frontal projection", so essential to the United States' theory (as it is to Newfoundland's), was clearly recognized by the Chamber, as when it described the American position as "that of the frontal projection of the primary coastal front".[130]

101. The response of the Chamber to the "primary coast / frontal projection" theory proposed by the United States, was unequivocal:[131]

> The very legitimacy of such a distinction which, throughout the case, has been the subject of lengthy debate between the United States, which supports it, and Canada, which is opposed to it, is very dubious.
>
> ...
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> [This] distinction, which the Chamber has already called unacceptable both in geography and law, between coasts defined as 'primary' ... and coasts defined as 'secondary' ... [T]he United States has purported to establish the principle of the preferential nature of the relationship between 'primary' coasts and the maritime and submarine areas situated frontally before them. In terms of practical consequences, this preferential relationship should allegedly prevail over the relationship with 'secondary' coasts, even if these are closer. The maritime areas lying off the primary coast should therefore be reserved to that coast and not to the secondary coast, irrespective of the latter's proximity. The 'proximity' concept should therefore yield to that of the "geographic

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129 **Annex 174**: *Gulf of Maine, supra* note 7 at 271, 298, 318.

130 **Annex 174**: *Gulf of Maine, supra* note 7 at 318. The Chamber's more detailed summary of the U.S.' position on this point reads as follows: "The United States thus fixed its final position ... which may be summarized as follows: (...) The 'equitable criterion' that must be applied in delimiting the single maritime boundary in the area thus becomes that of the projection or frontal extension of the primary coastal front, which the United States identifies with that of natural prolongation, not in the geological or geomorphological sense, but 'in the geographic sense'." (*Ibid.*)

131 **Annex 174**: *Gulf of Maine, supra* note 7 at 271, 298.

> natural prolongation" of the principal coasts and that of the "extension of the coastal front" of the State to which they belong.
>
> In the Chamber's opinion, the *a priori* nature of these premises and these deductions is as patent as that of the thesis elaborated by the other Party. In both cases the outcome of the parties' efforts can be said to have been preconceived assertions rather than any convincing demonstration of the existence of the rules that each had hoped to find established by international law.

102. Despite having been so soundly rejected by the Chamber, the theory of "primary" and "secondary" coasts is resurrected by Newfoundland, in its Phase Two Memorial, in the numerous references to supposed geographic factors such as the "dominant position of the Newfoundland coasts in the outer area",[132] or the "immediacy of the coastal relationship between the southeastern coasts of Newfoundland and this outer area" (a relationship that Newfoundland believes requires no proof since it is, one is assured, "readily apparent to the eye.")[133]

103. The words of the Chamber, in response to entirely similar claims made before it, prove an entirely apt reply to Newfoundland's pretensions and are, indeed, particularly apposite in the present case:[134]

> Above all, geographical facts are not in themselves either primary or secondary : the distinction in question is the expression, not of any inherent property of the facts of nature, but of a **human value judgment, which will necessarily be subjective and which may vary on the basis of the same facts, depending on the perspectives and ends in view.**
>
> (emphasis added)

iv. Resource Location And Access

104. In its Phase Two Memorial, Newfoundland discusses the natural resources at stake in this case largely in the context of its consideration of the potential relevance of "economic factors"[135] and "economic dependence".[136] The actual **location** of and **access** to those resources are, on the contrary, given short shrift.

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132 Newfoundland Phase Two Memorial, para. 242
133 Newfoundland Phase Two Memorial, para. 202.
134 **Annex 174**: *Gulf of Maine, supra* note 7 at 271.
135 Newfoundland Phase Two Memorial, para. 97.
136 Newfoundland Phase Two Memorial, para. 98.

Although Newfoundland and Nova Scotia differ as to appropriate role of resource location as a relevant circumstance in assessing the equitableness of the result of a delimitation, they nevertheless appear to be agreed on the following points:

- Resource location is not normally a circumstance that contributes directly to the selection of equitable criteria or practical methods of delimitation, given that the aim of a delimitation – an equitable result – does not imply equitable "apportionment";[137]

- The question of relative economic dependence on available resources – as opposed to the location of those resources – is of limited relevance in delimitations.[138]

105. For its part, Newfoundland does acknowledge that the ICJ in the *Denmark/Norway* case took the location and distribution of fisheries resources into account,[139] but it attempts to distinguish that case (and the *Gulf of Maine* case) from the present on the grounds that:[140]

> The economic interests at issue in the *Gulf of Maine* and *Jan Mayen* cases involved a pre-existing and established dependence on known resources—as is normally the case with fishing interests. The resources at issue in a seabed delimitation most commonly represent aspirations, not an established dependence of the kind considered in these two decisions: they are both speculative and prospective.

106. On this basis, Newfoundland contends that:[141]

> [I]t seems clear that economic interests can have no relevance for delimitations of the continental shelf involving unexploited and undiscovered oil and gas resources.

107. It is difficult to understand how Newfoundland reached this conclusion, given the statements respecting the proper role of resource access in the *North Sea Cases*

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137 Newfoundland Phase Two Memorial, para. 96; Nova Scotia Phase Two Memorial, (pp. IV - 51-55, paras. 109-116).

138 Newfoundland Phase Two Memorial, paras. 97-100; Nova Scotia Phase Two Memorial, (p. IV – 109, para. 109).

139 Newfoundland Phase Two Memorial, para. 99.

140 Newfoundland Phase Two Memorial, para. 100.

141 Newfoundland Phase Two Memorial, para. 100.

and in the *Libya/Malta* and *Gulf of Maine* cases. For example, in its *dispositif* in the *North Sea Cases*, the Court found that, for a negotiated boundary: [142]

> [T]he factors to be taken into account are to include ... so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved.

108. There is no mention in the decision of any requirement for "pre-existing and established dependence on known resources", as suggested by Newfoundland. Nor was any such hurdle to the relevance of resource considerations raised by the Court in the *Libya/Malta* case, when it explicitly endorsed the finding in the *North Sea Cases*, in the context of an adjudicated boundary.[143]

109. Indeed, even in the *Gulf of Maine* decision, cited as authority on this point by Newfoundland, the Chamber considered the location and distribution of oil and gas resources as part of its assessment of the equitable nature of the boundary line, despite that fact that those resources were as yet undiscovered, and within the category of what Newfoundland describes as "aspirations ... speculative and prospective":[144]

> As regards the other major aspect to be viewed from the same angle [i.e., in addition to fishery resources], it may be pointed out that the delimitation line drawn by the Chamber so divides the main areas in which the subsoil is being explored for its mineral resources as to leave on either side broad expanses in which prospecting has been undertaken in the past and may be resumed to the extent desired by the parties.

110. Neither this statement in the *Gulf of Maine* case, nor the views expressed in the earlier cases, support Newfoundland's attempt to restrict consideration of resource location to circumstances in which an "established dependency" can be shown. The proper approach, as set forth in the *North Sea Cases* and reprised in the Nova Scotia Phase Two Memorial, is to take account of resource location, "so far as

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142 **Annex 188**: *North Sea Cases, supra* note 9 at 53-54.

143 **Annex 187**: *Libya/Malta, supra* note 9 at 41 (emphasis added): "The natural resources of the continental shelf under delimitation 'so far as known or readily ascertainable' might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation... Those resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them."

144 **Annex 174**: *Gulf of Maine, supra* note 7 at 343.

known or readily ascertainable", as a circumstance relevant to an assessment of the equitableness of a particular result.

111. The application of this approach to the facts of the present case is addressed in Part III below. It is sufficient here to note that Newfoundland has every reason to wish that the Tribunal **not** consider the location, as far as known, of the oil and gas resources that are, in the end, the *raison d'être* of the offshore areas, of the dispute and of the delimitation to be effected: the boundary that it has proposed puts virtually the entire Laurentian Sub-basin, as well as other prospective structures, on the Newfoundland side of the line.

v. The Conduct Of The Parties

112. Just as Newfoundland proposes that the Tribunal delimit the parties' offshore areas without considering how such a delimitation would affect access to the oil and gas which are the true object of the dispute, so Newfoundland proposes that the Tribunal disregard the long history of conduct of the parties with respect to the boundary.

113. This conduct was examined in Phase One of the arbitration and is reviewed in Nova Scotia's Phase Two Memorial.[145] It is for the Tribunal to determine the relevance and weight of such conduct – not merely to turn a blind eye to the evidence, as Newfoundland advocates. The relevant facts are simply too extensive, too consistent and too closely tied to the very issue to be decided by the Tribunal to permit their summary dismissal. This is, however, precisely what Newfoundland has suggested in its Phase Two Memorial – its proposed delimitation, which it asks the Tribunal to adopt, is based on the remarkable assertion that nothing of any relevance to the delimitation ever transpired in the relations of these parties with reference to their offshore boundaries.[146]

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145 Nova Scotia Phase Two Memorial, Parts II and IV D.

146 Newfoundland Phase Two Memorial, paras. 10-17, 101-105.

114. Newfoundland construes the issue of conduct as a "preliminary matter arising out of the Phase One proceedings,"[147] a review of which supposedly "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."[148] These claims, and the cursory, two- or three-page analysis of the non-geographic facts provided in Newfoundland's Phase Two Memorial, stand in stark contrast to the obvious relevance of much of that conduct to this delimitation.

a) Newfoundland Misapplies The Tests For Acquiescence And Estoppel To The Determination Of "Relevant" Conduct

115. Of the five paragraphs that Newfoundland devotes to the issue of conduct in its chapter on the applicable law, three[149] deal entirely with the conditions for a finding of acquiescence and estoppel, and one[150] asserts the claim that the same conditions apply to determine whether conduct may be considered as a relevant circumstance in a delimitation. Newfoundland's position is summed up as follows:[151]

> The conduct of the parties to a maritime boundary dispute can be relevant, but only if it meets a very high standard. It must be **consistent** and **sustained**, and it must **clearly display** an **acceptance of the proposed line** as an equitable basis of delimitation. Conduct that does not meet this standard is simply irrelevant.
>
> (emphasis added)

116. The operative words of this "very stringent test"[152] are derived, of course, from the law relating to acquiescence and estoppel, and have nothing to do with the use of conduct as a relevant circumstance in a delimitation, or as an indicator of what the parties believed to be equitable. As Newfoundland itself recognizes, the Chamber in the *Gulf of Maine* case referred to "clear and consistent acceptance"

147 Newfoundland Phase Two Memorial, para. 10.
148 Newfoundland Phase Two Memorial, para. 11.
149 Newfoundland Phase Two Memorial, paras. 101-103.
150 Newfoundland Phase Two Memorial, para. 105.
151 Newfoundland Phase Two Memorial, para. 101.
152 Newfoundland Phase Two Memorial, para. 105.

as a test for **estoppel**, and to conduct that is "sufficiently clear, sustained and consistent" in respect to **acquiescence**.[153] On this defective basis, however, Newfoundland builds its case:[154]

> The jurisprudence has therefore established a very stringent test, whether under the heading of estoppel, acquiescence or indications of equity. The conduct of the parties is relevant only if it is mutual, sustained, consistent and unequivocal in indicating acceptance. Otherwise it must be disregarded.

117. Not a single example drawn from "the jurisprudence" is offered as evidence of this "very stringent test", or to support the notion that the same test as applies to claims of acquiescence and estoppel applies as well to conduct that is alleged to provide "indications of equity". The so-called test is in fact nothing more than an effort to erect a virtually insurmountable barrier to any consideration whatsoever by the Tribunal of the prior conduct of the parties. Such an approach runs directly counter to the reasoning and methodology adopted in all of the cases that have considered the matter.[155] The nature of Newfoundland's error is highlighted by the following statement of the Court in the *Tunisia/Libya* case:[156]

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153 **Annex 174**: *Gulf of Maine, supra* note 7 at 309; Newfoundland Phase Two Memorial, para. 103. See also **Annex 188**: *North Sea Cases, supra* note 9 at 26, dealing with "clearly and consistently evinced acceptance", in the context of possible acceptance by Germany, not of a particular line, but of the legal obligations under the 1958 *GCCS*.

154 Newfoundland Phase Two Memorial, para. 105.

155 **Annex 187**: *Libya/Malta, supra* note 9 at 29; **Annex 174**: *Gulf of Maine, supra* note 7 at 303: "The question, which the parties have argued at length during the present case, is whether the conduct of the parties over a given period of their relationship constituted acquiescence by one of them in the application to the delimitation of a specific method ... or whether such conduct might have resulted in a *modus vivendi*, respected in fact, with regard to a line corresponding to such an application."; see **Annex 191**: *Guinea–Guinea-Bissau, supra* note 82 at 682 where the Court of Arbitration took into account the respect accorded a particular limit, derived from an earlier land boundary treaty, "during activities concerned with the installation and maintenance of beacons and buoys, the laying of certain submarine cables, the control of navigation in peace and war, customs patrols, etc..."; **Annex 193**: *Denmark/Norway, supra* note 21 at 53-56, 75-77; **Annex 189**: *Tunisia/Libya, supra* note 9 at 84.

156 **Annex 189**: *Tunisia/Libya, supra* note 9 at 84.

> The aspect now under consideration ... is what method of delimitation would ensure an equitable result; and it is evident that the Court must **take into account whatever indicia are available of the line or lines which the parties themselves may have considered equitable or acted upon as such** – if only as an interim solution affecting part only of the area to be delimited.
>
> (emphasis added)

118. This principle was further confirmed in the *Libya/Malta* case: [157]

> The Court has considered the facts and arguments brought to its attention in this respect [*i.e.*, regarding the parties' conduct], particularly from the standpoint of its duty to **'take into account whatever indicia are available of the line or lines which the parties themselves may have considered equitable or acted upon as such'** ...
>
> (emphasis added)

119. These unequivocal formulations of the "duty" of the Court apply equally to the Tribunal in this case. Far from supporting Newfoundland's "very stringent" approach, they underscore the relevance in this case, indeed the significance to the Tribunal's mandate, of **whatever** indicia may be gleaned from an examination of the parties' conduct regarding the line or lines that they may have considered equitable.

120. Moreover, the cases themselves highlight the distinction between conduct as an indication of equity and conduct that purports to establish acquiescence or estoppel. Although the Chamber in the *Gulf of Maine* case declined to include conduct among the relevant circumstances of the delimitation in that case, it stated clearly that different considerations applied depending on the ends toward which evidence of the parties' conduct was employed.[158]

121. Arguably the clearest illustration of the practical application of this idea is found in the *Tunisia/Libya* case, where the Court rejected any finding of estoppel based

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157 **Annex 187**: *Libya/Malta, supra* note 9 at 29 (footnote omitted).

158 **Annex 174**: *Gulf of Maine, supra* note 7 at 310.

on the conduct of the parties, but nonetheless accepted that the same conduct was a circumstance of "great relevance" as an indicator of an equitable result:[159]

> It should be made clear that the Court is not here making a finding of tacit agreement between the parties - which, in view of their more extensive and firmly maintained claims, would not be possible - nor is it holding that they are debarred by conduct from pressing claims inconsistent with such conduct on some such basis as estoppel. The aspect now under consideration of the dispute which the parties have referred to the Court, as an alternative to settling it by agreement between themselves, is what method of delimitation would ensure an equitable result; and it is evident that the Court must take into account whatever indicia are available of the line or lines which the parties themselves may have considered equitable or acted upon as such - if only as an interim solution affecting part only of the area to be delimited.

b) Newfoundland Misstates The Rationale In The *Tunisia/Libya* Case

122. The decision of the ICJ in the *Tunisia/Libya* case constitutes one of the most influential treatments of the role of conduct in maritime boundary delimitation. Newfoundland attempts to turn the decision to its own purposes by claiming that the conduct of Tunisia and Libya played but a marginal role in the Court's analysis of the equity of the chosen delimitation:[160]

> In *Tunisia* v. *Libya* ... the conduct of the parties was taken into account, not under the rubric of acquiescence or estoppel, but merely as a corroborating indication of the equity of the chosen line. A line on a 26 degree bearing, corresponding to the perpendicular the International Court of Justice adopted for the inner area in that case, served to divide active oil and gas concession areas between the parties.

123. No citation is provided by Newfoundland to the page(s) or paragraph(s) of the *Tunisia/Libya* decision that support this account of the case, for the reason, simply, that it is incorrect. Nowhere in the *Tunisia/Libya* decision does the Court say that its careful examination of the parties' conduct is only by way of "corroboration". In fact, the decision explicitly refers to the parties' oil and gas

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159 **Annex 189**: *Tunisia/Libya, supra* note 9 at 84.

160 Newfoundland Phase Two Memorial, para. 104.

permit practice as "**highly relevant to the determination of the method of delimitation**".[161]

124. Similarly, Newfoundland suggests that the Court in the *Tunisia/Libya* case "adopted" a perpendicular line in the inner sector, to which the line defined by the parties' conduct corresponded, and that "the conduct of the parties" thereby provided "a corroborating indication of the equity of the chosen line". The decision itself suggests something else entirely.

125. In the *Tunisia/Libya* case, the ICJ found without reservation that the permit conduct of the parties was "highly relevant", and that what it referred to as the "*de facto* line between the concessions" was "of great relevance".[162] Having done so, the Court also considered – as "a **further** relevant circumstance" – the line previously established by the old colonial powers (France and Italy), as a *modus vivendi*, for fishing purposes:[163]

> A further relevant circumstance is that the 26° line thus adopted [in the parties' permit conduct] was neither arbitrary nor without precedent in the relations between the two States ... [I]n the relations between France and Italy during the period when these States were responsible for the external relations of present-day Tunisia and Libya, there came into existence a *modus vivendi* concerning the lateral delimitation of fisheries jurisdiction expressed in *de facto* respect for a line drawn from the land frontier at approximately 26° to the meridian ... which was proposed on the basis that it was perpendicular to the coast.

126. This hardly constitutes the "adoption" by the ICJ of a line ("the perpendicular ... for the inner area"), followed by "corroboration" ("a corroborating indication of the equity of the chosen line") by means of the parties' permit line, as portrayed by Newfoundland. Furthermore, the passage from the decision quoted above makes clear that the "perpendicular" in question is itself a line derived solely from conduct, rather than constructed by the Court. This is contrary to the account provided by Newfoundland, when it refers to the "establishment of the coastal

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161 **Annex 189**: *Tunisia/Libya*, *supra* note 9 at 83-84 (emphasis added).
162 **Annex 189**: *Tunisia/Libya*, *supra* note 9 at 83-84.
163 **Annex 189**: *Tunisia/Libya*, *supra* note 9 at 84-85.

front serving as the basis of the perpendicular line"[164] – in reality, no such operation was undertaken by the Court. The Court's delimitation of the boundary (both in the text of the decision and in the *dispositif*) was carried out by direct reference to the actual permits, complete with permit numbers.[165]

127. If there were any doubt as to the primacy of the parties' conduct among the circumstances discussed here, it is removed by the following passage from the *dispositif* in the *Tunisia/Libya* case, which conveys an entirely different impression of the decision than that conveyed by Newfoundland:[166]

> The relevant circumstances ... to be taken into account in achieving an equitable delimitation include the following:
>
> ...
>
> (4) the land frontier between the parties, and their conduct prior to 1974 in the grant of petroleum concessions, resulting in employment of a line seawards from Ras Ajdir at an angle of approximately 26° east of the meridian, which line corresponds to the line perpendicular to the coast at the frontier point which had in the past been observed as a *de facto* maritime limit ...

128. The role of conduct as "decisive" in this part of the *Tunisia/Libya* decision, and the clear distinction between conduct as an indicator of equity and conduct going to acquiescence, are both summarized in the following assessment written by L.A. Willis:[167]

> The approach here [*re – French acceptance of a basepoint in the Anglo-French Award*] was close, at least in principle, to an application of the acquiescence doctrine as traditionally understood in international law. In the *Tunisia-Libya* case, however, the Court went one step further. It held that conduct not strictly amounting to acquiescence could nonetheless be relevant as one of the "indicia" of equity – and state conduct turned out to be decisive in that case. But state conduct, in this sense, is clearly a

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164 Newfoundland Phase Two Memorial, para. 147.

165 Annex 189: *Tunisia/Libya*, *supra* note 9 at 85, 93. The final consideration of the relevance of the perpendicular by the Court came only after the *modus vivendi* had been addressed, and was limited to pointing out that both the "perpendicularity to the coast" and the "prolongation of the general direction of the land boundary" were relevant criteria to be taken into account in determining a line. The tone is clearly one of justification of the line defined earlier.

166 Annex 189: *Tunisia/Libya*, *supra* note 9 at 93.

167 Annex 192: L.A. Willis, "From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries" (1986) 24 Can. Y.B. Int'l L. 3 at 54.

> special case. It is not a factor that is wholly independent of geography. It is rather an indication of how the negotiating parties saw the geographic equities through their own eyes.

129. This statement of the law is, of course, entirely consistent with Nova Scotia's argument, which is based on a full consideration of conduct as an indicator of what the parties saw as equitable in the geographic circumstances, and which goes on to consider the geographic circumstances in their own right.

c) The Proper Role Of Conduct

130. Ultimately, Newfoundland's attempt to re-cast the *Tunisia/Libya* case as evidence of the merely "corroborative" use of conduct, subject presumably to the "very stringent test" discussed above, simply misses the point. The proper role of conduct is not to provide a pre-conceived or ready-made solution, to be adopted or rejected as the case may be. Rather, as in the *Tunisia/Libya* case, past conduct that is relevant to the issues to be decided is to be considered along with other relevant circumstances. All of these factors can then be taken into account – and the proper weight accorded to each factor - as part of the ultimate "balancing up" exercise.[168]

131. Conduct is relevant to a delimitation if the facts of the case so dictate. Where the facts do indicate that prior conduct is relevant – such as, for example, where the zone in question has its origin as a negotiated entitlement – then conduct must be considered along with the other relevant factors (including, on the facts of the present case, geography, resource location and other delimitations). It is in the balancing up of all these factors that an equitable delimitation is achieved.

C. Conclusion

132. All of the errors and misstatements of law described above are directed towards one overriding end: narrowing the scope of the considerations that the Tribunal may take into account in effecting the delimitation. Newfoundland argues for a

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[168] **Annex 188**: *North Sea Cases, supra* note 9 at 50-51.

pre-determined list of relevant circumstances and equitable criteria based only on geography, regardless of the facts of this case. The actual legal zone to be delimited is never fully described, let alone given any significance. Most critically, Newfoundland attempts to set up artificial legal barriers to the consideration of the conduct of the parties, despite the obvious importance and relevance of that conduct. As a result, the overwhelming record of relevant political and administrative conduct considered in Phase One and reviewed in Nova Scotia's Phase Two Memorial, on Newfoundland's view of the law, is conveniently removed from consideration.

133. Not only does Newfoundland propose a delimitation based exclusively on geographic factors, it also urges the Tribunal to act on a heavily circumscribed view of those geographic facts. Thus, Newfoundland asks that factual findings respecting relevant coasts and areas in the *St. Pierre and Miquelon Award* be adopted without further analysis in this case, despite the different zones and coastal relationships involved. Similarly, all offshore areas beyond 200 nautical miles must effectively be ignored, but nonetheless delimited, by the Tribunal, while the supposedly minimal impact of those areas is assumed without being demonstrated.

134. In a further attempt to limit the facts before the Tribunal, Newfoundland dismisses as irrelevant substantial coasts of Nova Scotia, on the grounds that "the south coast of Newfoundland remains a constant presence as the eye moves seaward and the coast of Nova Scotia recedes into the background."[169] The supposed insignificance of the entire mainland coast of Nova Scotia is enhanced by the fact that Newfoundland has simply cropped all of its maps short, so that the coasts actually relevant to the delimitation, and their relationship to the relevant maritime areas, cannot be seen. Ironically, Newfoundland refers to its delimitation as justified by "macro-geography",[170] despite the fact that not one of its maps shows even the complete coastlines immediately surrounding the delimitation

169 Newfoundland Phase Two Memorial, para. 190.
170 Newfoundland Phase Two Memorial, para. 248.

area, nor the full extent of the maritime area that Newfoundland would be allocated by means of its proposed boundary.

135. Newfoundland's approach to restricting the range of legal and factual considerations to be taken into account by the Tribunal is directly contrary to three fundamental elements of the law of maritime boundary delimitation. It is clear, first of all, that a close connection to the facts is inherent in the fundamental norm discussed earlier. It is essential to the concept of boundary delimitation according to equitable principles, in all the relevant circumstances, that the delimitation take place with close reference to the unique facts of the particular case. The relevant circumstances and equitable criteria cannot be pre-determined, and there is no mandatory list to be applied in every case.

136. Newfoundland's selection of relevant circumstances and equitable criteria, by contrast, are supported not by reference to the facts of this case, but by the fact that they have been used before, in previous and quite different cases. Indeed, Newfoundland's arguments, from the elimination of any consideration of conduct through to the cropping of the coasts, are consistently based on avoiding mention of the facts most pertinent to this arbitration.

137. Another clear and consistent theme in the jurisprudence is the necessity of linking the delimitation to the nature and origin of the legal entitlement. Here, too, Newfoundland's approach is contrary to the law. Despite its acknowledgement that the connection to title is essential to ensuring that a delimitation is carried out according to equity *infra legem*, Newfoundland fails even to address the nature of the parties' entitlements in this case. The offshore areas are founded on negotiated, not inherent, entitlements, and focus on limited rights to one type of resource.

138. Despite this, Newfoundland justifies its dismissal of the relevance of conduct (including the history of negotiations) and resource location largely on the basis of an inherent title that does not exist in this case. From this point on, according to

its own position on the role of title, Newfoundland is arguing for a delimitation outside of the legal framework.

139. Finally, the jurisprudence dating back to the *North Sea Cases* has emphasized the need to engage in a "balancing up" of all the relevant considerations, in order to achieve the result that best reflects an equitable solution in the circumstances of the case.[171] Implicit in this approach is the need for a sufficient breadth in the considerations to be taken into account. As was noted by Court in the *North Sea Cases*:[172]

> In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce the result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.

140. In this delimitation, as is most often the case, it is the "balancing-up of all such considerations" that will satisfy the demands of equity. It would not be appropriate to focus on the conduct of the parties to the exclusion of all other factors. Nor is it appropriate to concentrate, as Newfoundland has proposed, exclusively on geographic factors, if the delimitation to be effected is to constitute an equitable result in the circumstances.

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[171] **Annex 188**: *North Sea Cases*, *supra* note 9 at 50-51.
[172] **Annex 188**: *North Sea Cases*, *supra* note 9 at 50.