

## **PART III: NEWFOUNDLAND'S FLAWED DELIMITATION**

### **Introduction**

1. As demonstrated in Part II above, the foundation of Newfoundland's proposed delimitation – its statement of the applicable law – is inherently defective. It is no surprise, then, that the edifice it constructs on that basis, the line that Newfoundland asks the Tribunal to adopt, is itself flawed.
  2. This Part of Nova Scotia's Counter-Memorial comprises an analysis of the various elements of the delimitation proposed by Newfoundland and Labrador. Step by step, it becomes clear how Newfoundland's fundamental errors of law play out in the construction of its proposed line, and how each successive stage in the process – from the determination of relevant circumstances to the selection of equitable criteria to the testing of the equitableness of the line – relies upon and amplifies the effect of the errors embedded in the previous stage.
  3. Instead of building on the relevant facts of this case, Newfoundland relies for its proposed line upon circumstances deemed relevant and criteria determined to be equitable in other cases, in the context of delimitations of entirely different maritime zones, having regard to entirely different facts. So antithetical to the process of maritime delimitation sanctioned by international law is Newfoundland's approach, and so flawed is the resulting delimitation, that it would be futile to attempt to adjust or "tinker" with the line that Newfoundland has proposed. Newfoundland's delimitation is beyond repair.
- A. Newfoundland's Selection of "Relevant" Circumstances And "Equitable" Criteria**
4. The major flaws in Newfoundland's selection of relevant circumstances and equitable criteria emanate and flow directly from the legal errors already described in Part II, and need not be discussed in detail in this Part. The restrictive focus on geographical factors alone, and the over-reliance on findings in the

*St. Pierre and Miquelon Award*, eliminate from consideration what, to any reasonable, objective observer, are clearly relevant circumstances on the facts of this case.

5. Similarly, the equitable criteria chosen by Newfoundland are selected based on the results of other cases, with little or no reference to the facts of this case, and specifically so as to pre-judge the outcome of the arbitration. The cumulative effect of these errors is, as shown in Part II, that Newfoundland's proposed delimitation is divorced from the facts, and thus from the legal requirements for an equitable delimitation.
6. There are as well serious errors in Newfoundland's treatment of even those facts which it does address in its Phase Two Memorial. These include: a truncated and dismissive presentation of the facts related to the parties' conduct; a flawed approach to the issue of islands, generally, and to the two islands – both in Nova Scotia – whose presence and effect Newfoundland attempts to “wish away”; and the inapplicability of Newfoundland's main criterion, non-encroachment, in the geographical context of this case.

**i. The Conduct Of The Parties**

7. As discussed in Part II, the main thrust of Newfoundland's argument respecting conduct is the elaboration of what it calls a “very stringent test” that is actually found nowhere in the jurisprudence. By way of alternative argument, however, Newfoundland does make some brief – and incorrect – statements regarding certain key facts. These are addressed in the following paragraphs.
8. Newfoundland's contentions boil down to three: the “political” conduct of the parties discloses nothing of any relevance to the delimitation; the parties' “administrative” behaviour, specifically their issuance of exploration permits, was inconsistent; and, in any event, all of the parties' conduct respecting the establishment, division and use of their offshore entitlements was of too limited a duration to allow it to be considered as a relevant circumstance in this arbitration.

a) The "Political Relations" Of The Parties

9. What Newfoundland refers to as the "political relations of the parties"<sup>1</sup> apparently encompasses the entire record of negotiations and consensus agreements reached by the provinces relating to the establishment and division of their offshore entitlements. The specific events that make up these "relations" – including, *inter alia*, the 1964 agreement, its 1972 confirmation and the contemporaneous statement of Premier Moores to his House of Assembly – are not mentioned by Newfoundland. Instead, one is informed that "the factual background so thoroughly analyzed in Phase One also suffices to dispose of any suggestion that the political record is relevant either as a basis of acquiescence or estoppel, or as a relevant circumstance under the law of maritime boundary delimitation."<sup>2</sup>
10. Yet, as acknowledged by Newfoundland, the findings of the Tribunal in Phase One were restricted – explicitly so – to whether the boundary had been "resolved by agreement". The Tribunal did not address – again, explicitly so – the question whether the facts before it constituted "relevant circumstances" in the context of a delimitation, an exercise entirely separate and apart from that conducted in Phase One. Of course, the record cannot "suffice" to dispose of this issue, as Newfoundland blithely claims. What is required is appropriate analysis of the conduct in question.
11. Newfoundland's analysis of the "political" conduct of the parties is limited to the following assertion:<sup>3</sup>

---

<sup>1</sup> Newfoundland Phase Two Memorial, para. 13.

<sup>2</sup> Newfoundland Phase Two Memorial, para. 13.

<sup>3</sup> Newfoundland Phase Two Memorial, para. 13.

In brief, the proposals exchanged in the early stages of this dispute were always predicated on the understanding that federal and provincial legislative implementation would be required, a condition whose fulfillment would have vindicated the substantive claims of the provinces. **The failure of this condition provides a complete answer to any possible suggestion that these proposals might have some continuing relevance at this stage of the arbitration.**

(emphasis added)

12. This assessment is obviously contrary to the findings in the *Tunisia/Libya* decision, in which the ICJ explicitly referred to the relevance of “interim solutions”, and remarked on Libya’s concession that the *de facto* line “was one that did ‘suggest the kinds of lines that, in the context of negotiations, might have been put forward for discussion’, that is to say, with a view to achieving an agreed delimitation.”<sup>4</sup> By any measure, the conduct of the parties here, as set out in Nova Scotia’s Phase Two Memorial and its written submissions in Phase One, clearly meets, and indeed exceeds, this standard.
13. There is a further, logical defect in Newfoundland’s argument. What Newfoundland appears to claim is that mutual conduct is irrelevant in maritime delimitation unless it rises to the level of a binding agreement in law; an agreement, moreover, that has actually been implemented by statute. This exceeds by far even the stringent test for the relevance of conduct proposed by Newfoundland in its arguments on the applicable law, and raises the obvious question as to how conduct could ever be a relevant circumstance in a delimitation. If the conduct must already have led to a binding agreement, implemented in legislation, the boundary at issue would be settled.
14. Newfoundland’s position respecting the “political conduct” of the parties is, therefore, without merit. As no further facts or arguments on the extensive mutual conduct of the parties, including their negotiations and agreements respecting the boundary, are raised in Newfoundland’s Phase Two Memorial, Nova Scotia relies on its position as stated in its Phase Two Memorial and will respond, as

---

<sup>4</sup> Annex 189: *Tunisia/Lybia*, *supra* Part II, note 9 at 84.

necessary, to any substantive submissions from Newfoundland if and when they are made.

b) Permit-Related Conduct

15. Newfoundland's theory regarding the relevance of its permitting practice along the parties' boundary is simple, and baseless:<sup>5</sup>

With respect to administrative acts, first, the meagre conduct of the parties in the relevant period was not mutual, consistent or clear. There was never any mutual conduct that consistently respected a particular line.

16. It continues in the same vein:<sup>6</sup>

The few permits issued by Newfoundland and Labrador during the period 1965 to 1971 follow no particular pattern, and in particular disclose no *de facto* western boundary corresponding to any eastern boundary reflected in Nova Scotia permitting practice.

17. Newfoundland does not identify any of the various permits that it issued during the 1965 to 1971 period, such as the 1967 Mobil permit or the 1971 Katy permit, which manifestly do disclose the existence of some sort of "western boundary" (and a corresponding eastern boundary for Nova Scotia's permits). Indeed, the Tribunal will recall that, in addition to being addressed in the parties' written submissions, these permits were the subject of much discussion during the Phase One hearing, at which it was demonstrated graphically that, barring the most amazing coincidence, they could only have been constructed by reference to an agreed interprovincial boundary.
18. Newfoundland also makes two factual assertions not raised in Phase One. The first is its claim, by way of support for the proposition that its own oil and gas permits should be ignored, that "with the promulgation of the *Newfoundland and Labrador Petroleum Regulations, 1977*, all prior permits in the relevant area

---

<sup>5</sup> Newfoundland Phase Two Memorial, para. 14.

<sup>6</sup> Newfoundland Phase Two Memorial, para. 14.

lapsed and were not grandfathered into the post-1977 provincial regime".<sup>7</sup> While this may be so, it is entirely beside the point.

19. It is not the lapsing, but the **issuance** of permits that is relevant. The question of when Newfoundland's permits may have terminated is a red herring. The "continuing legal significance" of its permits (and of Nova Scotia's permits, for that matter) has nothing to do with whether they were or were not incorporated into "the current regime".<sup>8</sup> Their enduring legal significance resides in the fact of their issuance in the first place, and in the "actual situation" thereby established. By their conduct in issuing such permits, Newfoundland and Nova Scotia both clearly acknowledged the existence of a boundary dividing their respective offshore entitlements.
20. Newfoundland's second "new" submission relates to the permits issued by it after 1971, which, because they appeared to cross the boundary, were presented by Newfoundland in Phase One as significant evidence tending to disprove the existence of a consensus, or *de facto*, boundary.<sup>9</sup> Newfoundland now states that because these permits were limited only to seismic exploration rights, "they did not correspond to any real, on-the-ground conduct of the sort that might be considered significant."<sup>10</sup> It will be recalled that this was precisely the point made by Nova Scotia during the Phase One hearing.<sup>11</sup>

---

<sup>7</sup> Newfoundland Phase Two Memorial, para. 14 (footnote omitted). Newfoundland has not identified the section of the regulations that terminated the permits (Newfoundland Phase Two Memorial, para. 14, footnote 10), and in response to a discovery request, informed Nova Scotia that it did not know when the prior permits were terminated; Annex 213: Letter from D. Paquette, Deputy Agent for Newfoundland and Labrador to H.M. Hobart, Registrar, Newfoundland and Labrador/Nova Scotia Tribunal (23 March 2001); Letter from D. Paquette, Deputy Agent for Newfoundland and Labrador, to S.L. Drymer, Deputy Agent for the Province of Nova Scotia (8 August 2001); The Mobil permit of 1967 did contain a provision terminating it in the event of regulations, but with a proviso that the permittee was entitled to a permit under any new regulations. Annex 80: "Government of Newfoundland and Labrador Department of Mines, Agriculture and Resources Interim Permit" issued to Katy Industries, Inc. (19 May 1971), with correspondence (11 May 1971) and Map; "Interim Permit" issued to Mobil Oil Canada Limited (15 September 1967) with correspondence (1 August 1967) and Map.

<sup>8</sup> Newfoundland Phase Two Memorial, para. 14.

<sup>9</sup> Newfoundland Phase Two Memorial, para. 14.

<sup>10</sup> Newfoundland Phase Two Memorial, para. 15.

<sup>11</sup> Transcript of Oral Argument, March 13, 2001, pp. 298-306.

c) The Duration Of Conduct

21. Newfoundland declares that “even if any conduct in the early stages of this dispute were relevant, such conduct was in any event extremely short-lived”.<sup>12</sup> It claims that the “window” of potentially relevant conduct in this case, which it defines as “from 1965 to approximately 1972”, is too brief, and that as a result the parties’ conduct ought not to be taken into account by the Tribunal.<sup>13</sup> Its position is flawed in several respects.<sup>14</sup>
22. First, Newfoundland’s proposition, read in its entirety, is that conduct that is determined to be “relevant” must nonetheless be ignored unless it meets some undefined criterion of duration. This is incorrect. The duration of conduct might well be a factor in determining the weight to be accorded that conduct as a circumstance affecting the delimitation, but it in no way justifies the complete dismissal of that conduct from consideration by a court or tribunal.
23. Newfoundland also seriously misconstrues the “window” of relevant conduct in this case, limiting it to 1965-1972. In fact, the relevant conduct – relating to the negotiation, establishment, division and use of the provinces’ offshore entitlements – dates from the beginning of the parties’ discussions, in the late 1950s, and spans the period at least until Newfoundland’s acquiescence in the use of the line in legislation, by Nova Scotia and the federal government, in 1984.<sup>15</sup> The October 6, 1972 letter from Minister Doody (which Newfoundland regards as the end of the relevant period), signaled the existence of certain questions regarding the boundary, but it also acknowledged the existence of some form of boundary agreement, reaffirmed the methods by which the parties’ boundary had

---

<sup>12</sup> Newfoundland Phase Two Memorial, para. 16. It is not clear what Newfoundland means by “conduct in the early stage of this dispute”. There has been no evidence brought forward by Newfoundland to indicate any dispute over the boundary in the “early stages” of the relevant conduct of the parties, the first intimation of any questions being the Doody letter of 1972, which was never pursued.

<sup>13</sup> Newfoundland Phase Two Memorial, para. 16.

<sup>14</sup> Newfoundland refers to the duration of the relevant conduct primarily with reference to permits, but it is clearly a broader issue affecting all aspects of the parties’ conduct in this case, including their mutual agreements and the acquiescence of Newfoundland to various acts by Nova Scotia.

<sup>15</sup> Nova Scotia Phase Two Memorial, pp. II-16-17.

been drawn and was silent as to the permits in question here. It was not the definitive “closing of the window”.<sup>16</sup>

24. Finally, Newfoundland has misstated the caselaw respecting duration of conduct. For example, it refers to the *Tunisia/Libya* case to bolster its contention that what is required is conduct over a “long period of time”. It fails to remark that this quote is drawn from a passage of the ICJ’s judgement dealing, not with permits, but with “historical justification for the choice of a method”.<sup>17</sup> Moreover, the Court in the *Tunisia/Libya* case found only that the conduct in question there did not extend over a sufficiently long period of time; it emphatically did not, as Newfoundland does, attempt to establish and quantify any rule based on a “long period of time” applicable to conduct generally.
25. Indeed, as regards the specific matter of permits as a reflection of conduct, the Court chose a different means of determining their relevance than that suggested by Newfoundland, one less concerned with duration than with substance. The concessions in that case which were found to follow the *de facto* line were in fact issued over a relatively short period, and very quickly became subject to overlap and protest. Libya issued its first offshore concession in 1968, while Tunisia’s first permit tracking the *de facto* had been issued in 1966. By 1974, the parties had issued overlapping permits – in Tunisia’s case, asserting a boundary inconsistent with the previous line – and formal protests followed in 1976.<sup>18</sup> Despite its brief duration, and notwithstanding the overlaps and even formal protests, the Court found that the *de facto* line reflected the “actual situation” and that the conduct of the parties was of “great relevance”.<sup>19</sup>
26. Newfoundland also relies on the *Gulf of Maine* case, claiming that a time-period similar to the present case was “considered ... as ‘too brief’ to be relevant”.<sup>20</sup> In

---

<sup>16</sup> Nova Scotia Phase Two Memorial, pp. IV-37-38.

<sup>17</sup> Newfoundland Phase Two Memorial, para. 16; Annex 189 : *Tunisia/Libya*, *supra* Part II, note 9 at 70-71.

<sup>18</sup> Annex 189 : *Tunisia/Libya*, *supra* Part II, note 9 at 35-36, 83-84, 93.

<sup>19</sup> Annex 189 : *Tunisia/Libya*, *supra* Part II, note 9 at 84 (emphasis added).

<sup>20</sup> Newfoundland Phase Two Memorial, para. 16 (footnote omitted).



the *Gulf of Maine* case, however, the Chamber properly observed that the permit conduct in question related solely to the continental shelf,<sup>21</sup> which on the reasoning of that case would make it of dubious value in a single maritime boundary delimitation.<sup>22</sup> In addition, the primary objective in Canada's use of conduct in that case was a determination that the parties, through permit issuance in a relatively small area, had essentially defined a method of delimitation that could be extrapolated across a much larger zone.<sup>23</sup> In the present arbitration, by contrast, the conduct at issue covers almost the full length of the boundary; and it not only defines a method of construction, it effectively draws the line. Finally, in the *Gulf of Maine* case, there was no earlier agreement, analogous to the 1964 agreement, in the context of which and by reference to which the permits were issued.<sup>24</sup>

ii. **Newfoundland Misstates The Law And The Facts Respecting Islands**

27. Newfoundland makes a number of erroneous statements respecting the treatment of islands in the international law of maritime delimitation, as well as unproven factual claims regarding islands involved in this case. For its part, Nova Scotia has not relied upon the position of islands in its proposed delimitation. Nonetheless, proper consideration of the status and effect of certain islands, especially St. Paul and Sable, is pertinent to assessing the equity – or, in this case, the inequity – of the boundary proposed by Newfoundland.

a) The Treatment Of Islands In International Law

28. Newfoundland refers to islands as the “classic instance of ‘special circumstances’ or circumstances creative of inequity”.<sup>25</sup> It ignores, however, the most basic element of delimitation law as it relates to islands, or indeed any geographic feature: it is the effect that a feature may have on a delimitation, not its mere

---

<sup>21</sup> Annex 174 : *Gulf of Maine*, *supra* Part II, note 7 at 304.

<sup>22</sup> Annex 174 : *Gulf of Maine*, *supra* Part II, note 7 at 326.

<sup>23</sup> Annex 174 : *Gulf of Maine*, *supra* Part II, note 7 at 304.

<sup>24</sup> Nova Scotia Phase Two Memorial, p. IV-29.

<sup>25</sup> Newfoundland Phase Two Memorial, para. 140.

presence, that determines whether an inequity is created. Stated differently, islands are not inequitable *ipso facto*; it is their effect which may or may not be so. This point was made by Sir Derek Bowett, an authority also cited by Newfoundland, when commenting on the meaning of “special circumstances” in Article 6 of the *GCCS*, and on the work of the International Law Commission and the delegates to the 1958 Conference on the issue.<sup>26</sup>

Although not limited to islands, it is clear that islands were regarded as capable of giving rise to “special circumstances”.

However, it was not conceivable that every island would constitute a “special circumstance”, for the frequency with which islands occur would in this event have destroyed the general rule.

29. Professor Bowett also notes, with respect to partial effect solutions, that “even this kind of modification of the full effect of islands would not occur automatically, but only where a party could demonstrate that a departure from the median/equidistance line was ‘justified’.”<sup>27</sup>
30. Although written with reference to Article 6, this statement clearly reflects both customary law and common sense. In all aspects of delimitation, it is the result that is predominant – the same is obviously true with respect to islands. As in other areas, Newfoundland simply assumes, without proof, and indeed without any analysis whatsoever, that Nova Scotia’s islands create inequity.
31. Newfoundland goes on to argue that it is “often appropriate to give an island no effect at all”,<sup>28</sup> but its few examples are unconvincing. It refers, first, to the discounting of Filfla in the *Libya/Malta* case, but neglects to mention that the

---

<sup>26</sup> Annex 212: Bowett, *supra* Part II, note 89 at 152-153.

<sup>27</sup> Annex 212: Bowett, *supra* Part II, note 89 at 154.

<sup>28</sup> Newfoundland Phase Two Memorial, para. 146. Later, Newfoundland offers the following circular argument: “[D]epending on the circumstances, no effect is as typical a solution as half effect or enclaving where islands or similar off-lying features would otherwise constitute a source of distortion.” The key condition, “depending on the circumstances”, makes this a non-argument. It is equally true that, “depending on the circumstances”, full effect is as typical a solution as half effect.

feature is, in the words of the Court, an “uninhabited rock”, and thus not an island at all.<sup>29</sup>

32. Newfoundland next refers to the large island of Jerba in Tunisia, which was discussed in the *Tunisia/Libya* case. With no citation to the decision, Newfoundland states that the island “was given no effect at all in the establishment of the coastal front serving as the basis of the perpendicular line.”<sup>30</sup> However, as shown above, the Court in the *Tunisia/Libya* case never established a front in precise terms, but rather compared the concession line to a rough assessment of the perpendicular, finding that “any margin of disagreement would centre around the 26° line...”. Even for this limited purpose, however, the Court was quite explicit that it was simply using a shorter coastline than would reach the island of Jerba, because of the small seaward area involved in the first segment of the line. Contrary to Newfoundland’s assertion, it said not a word about giving the island “no effect”.<sup>31</sup>

[T]he Court is at this stage confining its attention to the delimitation of the sea-bed area which is closer to the coast at Ras Ajdir, so that in assessing the direction of the coastline it is legitimate to disregard for the present coastal configurations found at more than a comparatively short distance from that point, for example the Island of Jerba.

33. If there were any remaining doubt, it should be noted that in computing the coastal length of Tunisia, the Court treated Jerba as if it were a coastal promontory.<sup>32</sup> In reality, this supposed instance of “no effect” amounts to nothing at all.
34. Newfoundland’s final example, the treatment of the Bijagos Islands in the *Guinea—Guinea-Bissau* case, is equally unhelpful to its position. As shown in Newfoundland’s Figure 10, the delimitation in that case was based on a very long coastal direction line, reflecting the macrogeography of the region. That line did

---

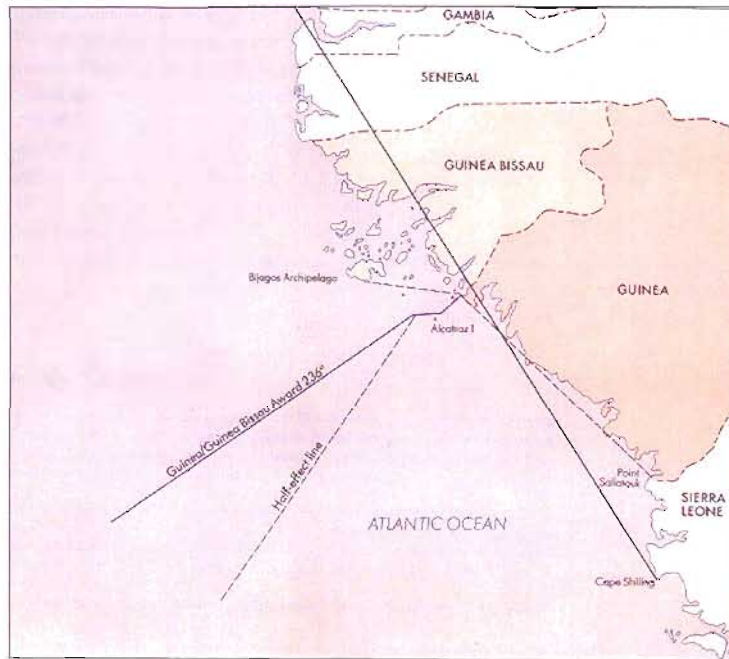
<sup>29</sup> Annex 187: *Libya/Malta*, *supra* Part II, note 9 at 20.

<sup>30</sup> Newfoundland Phase Two Memorial, para. 147.

<sup>31</sup> Annex 189: *Tunisia/Libya*, *supra* Part II, note 9 at 85.

<sup>32</sup> Annex 189: *Tunisia/Libya*, *supra* Part II, note 9 at 91.

**The Bijagos Islands Were Given Little Effect in *Guinea v. Guinea-Bissau***



The macro-geographical method used to draw the offshore boundary in this case had the effect of taking the Bijagos Islands out of the picture altogether, along with the considerable advantage they would have brought to Guinea-Bissau.

*Canada v. France*; Canadian Memorial, 1 June 1990, following p. 144.

**Figure: 10**

(Newfoundland Figure 10: The Bijagos Islands Were Given Little Effect in *Guinea v. Guinea-Bissau*)

indeed ignore the Bijagos Islands, but it also cut out of consideration large areas of the land masses of Senegal and Gambia. On this authority, it would be feasible in the present case to cut out features in Newfoundland on the scale of the Burin and Avalon Peninsulas.

35. In sum, the law relating to islands requires that their inequitable effect, not merely their existence, be proven before any “remedial” measures are necessary. Furthermore, the evidence for the common use of “no effect” solutions for islands on the order of St. Paul and Sable, as discussed below, is simply non-existent.

b) Newfoundland's Errors Regarding The Islands In This Case

36. In seeking to minimize the importance of both St. Paul Island and Sable Island, Newfoundland resorts to a number of rhetorical devices and distortions of the facts. St. Paul Island, for example, is referred to as a “barren wilderness”,<sup>33</sup> but, whatever this means, Newfoundland offers no evidence. In fact, St. Paul has two fresh water lakes, large parts of the island are forested, and it sustained a population for many years.<sup>34</sup> With respect to Sable Island, Newfoundland goes further, and refers to the island, inaccurately and again without any evidence, as “little more than an exposed reef.”<sup>35</sup>
37. Newfoundland also misstates the situation with respect to its own islands, claiming that there are no significant islands on the Newfoundland side, so that “there is no balance in the distribution of such distorting offshore features”.<sup>36</sup> In fact, as will be shown below in the discussion of the inner sector line, both the Ramea Islands (approximately 15 km. offshore) and Colombier Island (approximately 21.5 km. offshore) are important basepoints in Newfoundland

---

<sup>33</sup> Newfoundland Phase Two Memorial, para. 180.

<sup>34</sup> For a historic, geographic overview and photographs, see the following website: Annex 214: On-line: A History of St. Paul Island «[http://www.geocities.com/Heartland/Estates/6001/St\\_Paul\\_Island.htm](http://www.geocities.com/Heartland/Estates/6001/St_Paul_Island.htm)» (date accessed: 15 October 2001).

<sup>35</sup> Newfoundland Phase Two Memorial, para. 181.

<sup>36</sup> Newfoundland Phase Two Memorial, para. 177.

contributing to the median line in the inner sector and thus “balancing” St. Paul Island in the inner area.

38. It is with respect to the legal status of Sable Island, however, that Newfoundland makes its most assertive, and distorted, claim. Noting that the *Constitution* assigns legislative and proprietary interests in Sable Island to the federal government, Newfoundland goes on to state that this status excludes the island from any consideration in this delimitation:<sup>37</sup>

The purely nominal interest Nova Scotia holds over Sable Island—having regard to the jurisdiction, power and beneficial interest of the federal government—would fall well short of sovereignty if Nova Scotia were in reality a sovereign state. On that ground alone it is clear that Sable Island should not be used as a source of Nova Scotia entitlements to continental shelf areas at the expense of Newfoundland and Labrador.

39. While earning full marks for creativity, this argument is wrong on too many levels to be given any serious consideration:

- As stated repeatedly in this Counter-Memorial and in Nova Scotia’s Phase Two Memorial, the Tribunal has not been asked to delimit the continental shelf entitlements of the parties, but their “offshore areas”. These are not an incident of sovereignty, but a creature of negotiation and legislation;
- Newfoundland cannot pick and choose which parts of s. 91 of the *Constitution Act, 1867* to apply. The federal government under s. 91 exercises all of the powers of a sovereign state with respect to all of the territories of both parties to this arbitration. Even if this were a shelf delimitation, therefore, on Newfoundland’s reasoning neither party could claim a shelf, and that would be the end of the arbitration;

---

<sup>37</sup> Newfoundland Phase Two Memorial, para. 184.

- Newfoundland misstates the extent of the Nova Scotia government's role on Sable Island. The Government of Nova Scotia participates in the management of the island and contributes funds for that purpose.<sup>38</sup>
40. What cannot be ignored is that Sable Island is a part of Nova Scotia, a fact confirmed by the *Constitution Act (1867) (Third Schedule)*, cited by Newfoundland. This provision lists Sable Island as one of a number of cases of "Provincial Public Works and Property to be the Property of Canada";<sup>39</sup> this treatment would not have been necessary were Sable Island outside Nova Scotia, and thus federal property *ab initio*.
41. In fact, in the context of this delimitation the significance of Sable Island is greater, not less, than other islands within the parties' offshore areas. Under the *Canada-Nova Scotia Accord Act*, Sable Island is given particular attention: certain management decisions that would otherwise require joint federal-provincial approval are, on Sable Island and within an area of water immediately surrounding it, subject only to provincial approval.<sup>40</sup> Thus, with respect to the only issue that matters in this delimitation – shared control over the offshore areas for purpose of oil and gas exploration – the federal and Nova Scotia government

---

<sup>38</sup> Annex 215: Letter from S. MacLean, Secretary to the Executive Counsel, Government of Nova Scotia to K. MacAskill, Minister of Natural Resources, Government of Nova Scotia (16 October, 1997); Memorandum to Cabinet: Protection of Sable Island (1 August 1997); Annex 216: Document entitled: "Well History Report for Mobil Sable Island #1, Nova Scotia, Canada" (1 April 1968) including: Letter from B.B. Christie, Southern Canada Exploration Area, Mobil Oil Canada, Ltd. to J.P. Nowlan, Deputy Minister of Mines, Nova Scotia Department of Mines (3 November 1971); Letter from B.B. Christie, Southern Canada Exploration Area, Mobil Oil Canada, Ltd. to J.P. Nowlan, Deputy Minister of Mines, Nova Scotia Department of Mines (11 February 1972); General Data, pp. 4-5; Letter from J.P. Nowlan, Deputy Minister of Mines, Nova Scotia Department of Mines, to B.B. Christie, Southern Canada Exploration Area, Mobil Oil Canada, Ltd. (20 March 1972); Telegram from J.P. Nowlan, Deputy Minister of Mines, Nova Scotia Department of Mines, to B.B. Christie, Southern Canada Exploration Area, Mobil Oil Canada, Ltd. (20 March 1972).

<sup>39</sup> Newfoundland Statutory Instrument #1.

<sup>40</sup> See Annex 2: *Canada-Nova Scotia Accord Act*, *supra* Part II, note 30, s.2, s. 35(i)(b). By Section 2, Sable Island includes "the area, whether above or under water, that is within the limits described in Schedule III." Section 35(i)(b) provides that the Provincial Minister acting alone may overrule "fundamental decisions" of the joint Board.

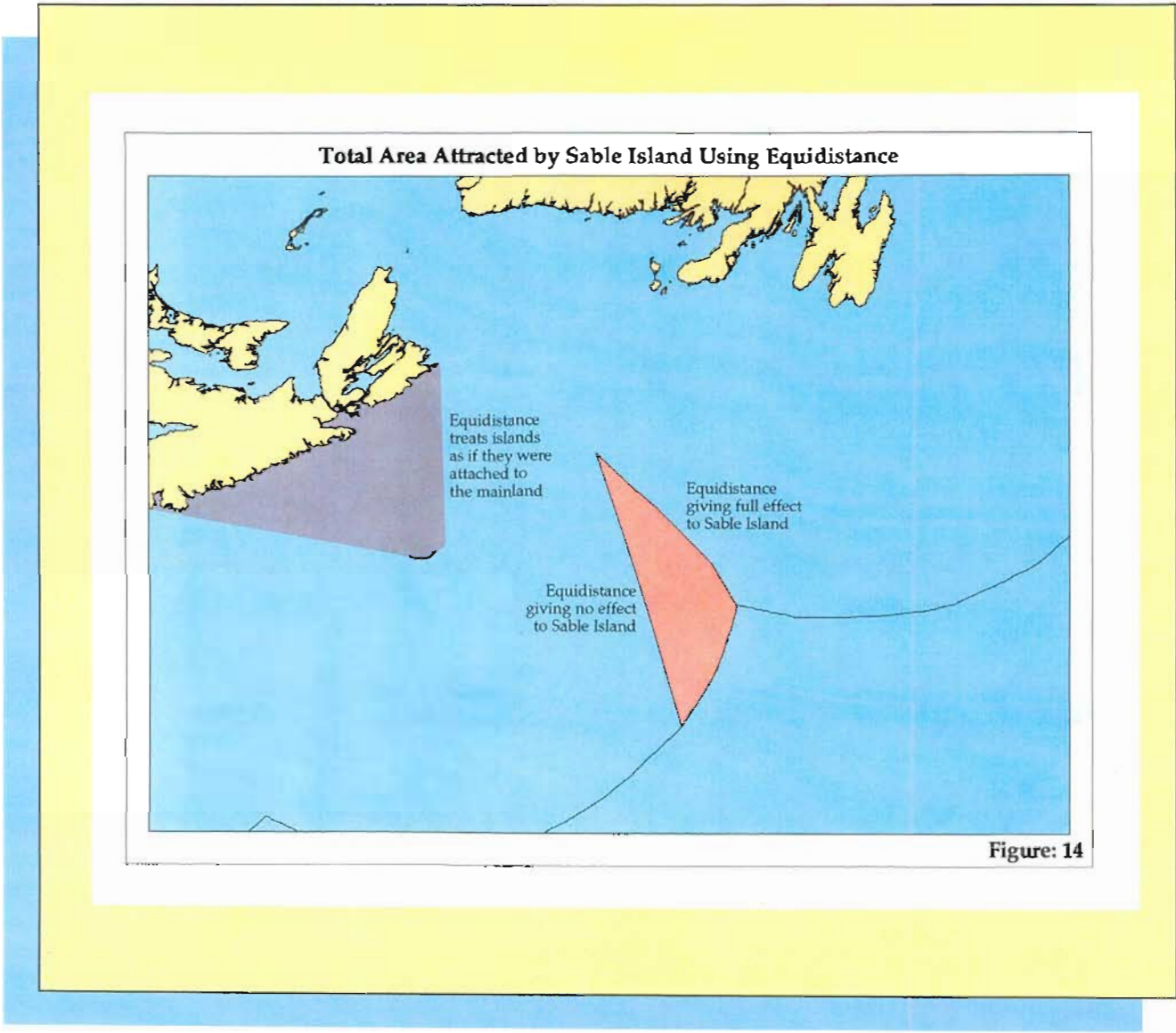


Figure: 14

(Newfoundland Figure 14: Total Area Attracted by Sable Island Using Equidistance)



have agreed that Sable Island is entirely Nova Scotia's, and subject to special rules that reflect that status.

c) The True Impact Of St. Paul And Sable Islands

42. As stated above, the key point in the consideration of islands is their effect, not their presence. The minimal impact of St. Paul Island is clearly demonstrated in the discussion of a median line in the inner sector (see below) – in brief, it would have no disproportionate effect at all, were a median line employed.
43. Sable Island is less directly relevant, in that neither party proposes using a primary method of delimitation relying on equidistance in the outer sector. However, three points are worth noting. First, as was shown in the Nova Scotia Phase Two Memorial, the parties agreed in 1964 to treat islands on the same footing as peninsulas. Newfoundland never disavowed that aspect of the agreement, and indeed confirmed its continuing acceptance of the methodology in 1972.<sup>41</sup>
44. Second, Newfoundland claims to depict, in approximate form, the impact of Sable on a hypothetical equidistant line (see Newfoundland's Figure 14). It states that in the "outer reaches of the delimitation area, Sable Island pushes [the line] ever further to the east".<sup>42</sup> Yet it never actually shows the line in these "outer reaches", where coastal points in Newfoundland, such as Cape St. Mary's could be expected to have an effect. It purports to illustrate the "broad swath of maritime territory" affected by Sable Island,<sup>43</sup> but makes no effort to demonstrate why this would produce an unreasonable or inequitable result, especially given the need to ameliorate the possible effect of the concavity that defines the mainland coast of Nova Scotia.<sup>44</sup> Instead, Newfoundland shows an area that it does not measure or

---

<sup>41</sup> Nova Scotia Phase Two Memorial, pp. V-11-12.

<sup>42</sup> Newfoundland Phase Two Memorial, para. 178.

<sup>43</sup> Newfoundland Phase Two Memorial, para. 181.

<sup>44</sup> Nova Scotia Phase Two Memorial, pp. IV-71-72.

compare to the overall offshore areas to be delimited, and is content merely to declare that such a result is "self-evident".<sup>45</sup>

45. As was noted above, much of Newfoundland's argument on islands is irrelevant, given that neither side places primary reliance upon equidistance. It is, however, interesting to note the result that Newfoundland obtains by use of Sable Island. One of the central justifications for Newfoundland's choice of method in the outer area is the potential impact of Sable Island on an equidistant line. Its proposed line, however, runs even further to the West than the "no effect" line shown by Newfoundland in its Figure 14. By its own calculation, Newfoundland's proposed delimitation is less than "no effect" for Sable Island.
46. Newfoundland, then, has not just moderated, or even eliminated, the impact of Sable Island in the delimitation; it has used the hypothetical impact of Sable Island to justify a line that is even less favourable to Nova Scotia than would be the case if the island did not exist. Even if all of Newfoundland's arguments relating to Sable Island were correct, which they are not, it is difficult to understand how the presence of an island could constitute a valid reason to reduce a party's maritime entitlement from what it otherwise would be if the island did not exist.

**iii. The Criterion Of Non-Encroachment Is Of Limited Usefulness Here**

47. The concept of non-encroachment is central to much of Newfoundland's case regarding the choice of methods. Indeed, Newfoundland includes in its list of equitable criteria non-encroachment, the seaward extension of coasts (which is part and parcel of non-encroachment), and proportionality.<sup>46</sup> Non-encroachment in fact reappears in various guises to justify a number of elements in Newfoundland's proposed delimitation:<sup>47</sup>

---

<sup>45</sup> Newfoundland Phase Two Memorial, para. 182.

<sup>46</sup> Newfoundland Phase Two Memorial, Chapter III V.

<sup>47</sup> Newfoundland Phase Two Memorial, paras. 68, 203, 237.

68. [The principles of international law relating to the delimitation of maritime boundaries] 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 ...
203. This is not an area [South and East of St. Pierre and Miquelon] where the natural prolongations of two jurisdictions can be said to meet and overlap. An equidistant line would not therefore effect an equitable division of an area of overlapping projections ... It would, on the contrary, violate the principle of non-encroachment ...
237. 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.
48. It is clear, then, that Newfoundland relies heavily on the principle of non-encroachment, and nowhere more so than in the outer sector of its proposed line, where Newfoundland’s approach would bar Nova Scotia from any claim to the East of St. Pierre and Miquelon. The flaws in this argument, particularly with respect to the definition of the coastal “frontal projections” that define the areas of supposed encroachment, have been partly addressed in Part II above (and are considered again, in the light of their application to the facts, in later sections of this Part).
49. There is, however, one fundamental factual circumstance that militates against the use of non-encroachment as an important consideration in this case, particularly in the outer sector, to be addressed here. This is the great distance from shore over which the boundary in this case must extend – to the outer edge of the continental margin. By contrast, in the *North Sea Cases*, the concept of non-encroachment was addressed in the context of areas relatively close to shore, as where the Court

referred to circumstances in which the equidistance line would “swing out laterally across the former’s coastal front, cutting it off from areas situated directly before that front.”<sup>48</sup>

50. This point was specifically addressed by Judge de Aréchaga in his Separate Opinion in the *Tunisia/Libya* case:<sup>49</sup>

[T]he “non-encroachment” in front of and close to the coasts of a State is the correct interpretation of the principle. It is true that there may be geographical configurations in which a boundary line cannot avoid “cutting across” the coastal front of one State or of both. But the principle of non-encroachment, being an equitable principle, is not a rigid one. It admits a corrective element, which is the factor of distance from the coast. If the above-described geographical situation occurs, then the “cutting-off” effect should be allowed to take place at a point as far as it may be possible to go, seawards, from the coastal front of the affected State.

51. In the present case, even if Newfoundland’s notion of the frontal projection of its South coast were accepted (which is not conceded), any conceivable “encroachment” would take place well away from shore. The overall maritime areas in question extend several hundred miles from shore, rendering any ideas of non-encroachment irrelevant in the outer sectors.
52. More broadly, the limitations of natural prolongation as an operational principle led to an early awareness in the jurisprudence that its corollary, non-encroachment, was of questionable usefulness where, as in the present case, parties share a continuous shelf. The following statement from the *Arbitration between the United Kingdom of Great-Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf*, referring back to the conclusion respecting non-encroachment in the *North Sea Cases* is illustrative of the problem:<sup>50</sup>

So far as delimitation is concerned, however, this conclusion states the problem rather than solves it. The problem of delimitation arises

<sup>48</sup> Annex 188: *North Sea Cases*, *supra* Part II, note 9 at 31-32.

<sup>49</sup> Annex 189: *Tunisia/Libya*, *supra* Part II, note 9 at 119.

<sup>50</sup> Annex 190: (1977), 54 I.L.R. 6 at 59 (hereinafter *Anglo-French Award*).

precisely because in situations where the territories of two or more States abut on a single continuous area of continental shelf, it may be said geographically to constitute a natural prolongation of the territory of each of the States concerned.

53. In the present case, the parties have agreed that they share a continuous shelf. In this context, non-encroachment, as was noted in *Denmark/Norway*, is best reflected by the division of overlapping areas of potential entitlement.<sup>51</sup> Moreover, the applicability of Article 76 of the *LOS 1982* to the definition of the seaward limits of the offshore areas to be delimited in this case, as noted earlier, provides a clear and objective basis on which to determine those areas.

#### **B. Newfoundland's Subjective Definition Of "Relevant" Coasts And Maritime Areas**

54. The definition of the coasts and maritime areas that are relevant to a particular case constitutes an important step in any delimitation, both for effecting the delimitation and for testing the equity of the result.<sup>52</sup> In the case of the delimitation proposed by Newfoundland, however, the designation by it of certain coasts and areas as "relevant" – or not – is the factor which underlies its entire argument. This is because, contrary to the law of maritime delimitation, Newfoundland has pre-determined that the sole measure of the equity of the result in this case, and thus the sole determinant of its proposed line, is "a reasonable degree of proportionality ... between the length of the relevant coasts of [the parties] and the seabed area appertaining to each".<sup>53</sup>
55. Given the absolutely central significance to Newfoundland's position of its designations of coasts and areas as either relevant or irrelevant, one might have expected to find in its Phase Two Memorial an explanation of the criteria by which, in its view, coasts and areas are to be considered "relevant" in this case.

---

<sup>51</sup> Annex 193: *Denmark/Norway*, *supra* Part II, note 21 at 64.

<sup>52</sup> Nova Scotia Phase Two Memorial, pp. IV-8-9. The analysis in this Part is based on the shared assumption of the parties that the areas within the Gulf of St. Lawrence are not significant to the assessment of relevant coasts and areas (or of proportionality).

<sup>53</sup> Newfoundland Phase Two Memorial, para. 256. See, more generally, Newfoundland Phase Two Memorial, paras. 253-260.

One would then have expected to be guided through a careful application of such criteria to the relevant geographic and other facts, leading to the identification of those coasts and areas that Newfoundland has selected as being relevant.

56. Instead, as is demonstrated below, Newfoundland has carried out this critical exercise – the granting or withholding of the all-important stamp of “relevance” – on the basis of no identifiable criteria and with no useful reference to the relevant facts. Rather than a principled application of the law to the facts, Newfoundland offers a skewed treatment of the issue that is evidently designed to deliver a pre-conceived result.

i. Newfoundland’s Selective Choice Of “Relevant” Coasts

a) The Relevant Coast Of Newfoundland

57. Interestingly, the parties agree on the length of the relevant coast of Newfoundland and Labrador, as measured for the purpose of assessing proportionality.<sup>54</sup> They arrive at this agreed measurement, however, by different means, which leads to certain difficulties.
58. As explained in its Phase Two Memorial,<sup>55</sup> Nova Scotia’s determination of the relevant coasts of the parties is based on the principle that all coasts contributing to the generation of **the parties’ respective entitlements to the maritime zone at issue** (as determined by the *Terms of Reference* and underlying legislation, including by reference to Article 76 *LOS 1982*), and, in particular, to the area of the parties’ **overlapping entitlements**, are relevant.

---

<sup>54</sup> Nova Scotia Phase Two Memorial, p. V-21; Newfoundland Phase Two Memorial, paras. 40-41; Newfoundland Phase Two Memorial, Figure 3: Relevant Coasts. In fact, Nova Scotia has assessed the relevant Newfoundland coast as a few miles longer than that advocated by Newfoundland: 599 km., or 323.4 nautical miles, versus 319 nautical miles as determined by Newfoundland. This is perhaps a first in a maritime delimitation case; it demonstrates forcefully that Nova Scotia has avoided the temptation to exaggerate its claim (here, specifically, the temptation to exaggerate the impact of restrictions on the length of the relevant coasts of the other party, while waxing rhapsodic when describing the broad expanses of its own coastline), a temptation that has apparently proven irresistible to Newfoundland.

<sup>55</sup> Nova Scotia Phase Two Memorial, Part IV C.

59. Newfoundland, on the other hand, argues that only “frontally projecting” coasts that “face directly” on the area of delimitation are to be regarded as relevant. Newfoundland’s measurement of its relevant coast, however, even using the method that it advocates, is significantly overstated. On the basis of that method, properly applied, the length of the relevant Newfoundland coast is actually shorter than depicted in the Newfoundland and Labrador Phase Two Memorial. This issue is addressed below; for present purposes, the “agreed” measurement of the relevant coast of Newfoundland will be used.

b) The Relevant Coast of Nova Scotia

60. Newfoundland argues that the relevant coast of Nova Scotia is confined to the segments running from Money Point to Scatarie Island and thence to Cape Canso, for a total length of 141.3 nautical miles.<sup>56</sup> This claim is visually, if illusorily, supported by Newfoundland’s decision to exclude from the maps presented in its Phase Two Memorial the entire East coast of Nova Scotia Southwest of Cape Canso. Of the thirteen figures produced by Newfoundland that illustrate portions of the parties’ outer coasts,<sup>57</sup> none actually depicts the entire East coast of Nova Scotia and six exclude the mainland altogether by showing Nova Scotia’s coast cut off either at Cape Canso (approximately 460 km. from the tip of the East coast) or points further to the North.<sup>58</sup> According to Newfoundland’s poetical description, “the south coast of Newfoundland remains a constant presence as the eye moves seaward and the coast of Nova Scotia recedes into the background”,<sup>59</sup> which is unsurprising, given that the bulk of the Nova Scotia coast is nowhere to be seen in its maps.

61. The selective cropping of maps – a none-too-subtle effort at refashioning geography to suit one’s purposes – obviously makes it impossible for “the eye” to

---

<sup>56</sup> Newfoundland Phase Two Memorial, para. 191.

<sup>57</sup> Newfoundland Phase Two Memorial, Figures 1, 2, 3, 4, 14, 15a, 16, 17, 18, 20, 22, 23, 24 (these are original maps produced by Newfoundland, and do not include maps that are described as “reproduced” or “taken” from other sources).

<sup>58</sup> Newfoundland Phase Two Memorial, Figures 2, 3, 15a, 16, 17, 18.

<sup>59</sup> Newfoundland Phase Two Memorial, para. 190.

assess either the overall geographical setting of the delimitation or the particular impact of the various geography-based arguments made in Newfoundland's Phase Two Memorial. Newfoundland offers the following two justifications for this optical ruse and its idealized description (quoted above) of what it regards as the relevant geography:

- These are the coastlines selected as relevant in the *St. Pierre and Miquelon Award* – in which “[n]either party ... nor the Court of Arbitration itself, at any point suggested that the mainland coasts [i.e., the East coast] of Nova Scotia were relevant”<sup>60</sup> – a fact that Newfoundland considers important since, it claims, the area delimited in that case is “essentially the same” as the area under consideration here;<sup>61</sup> and
- Unlike the South coast of Newfoundland from the Burin Peninsula to Cape Race, which supposedly “faces directly toward the outer sector of the delimitation area”,<sup>62</sup> the mainland coasts of Nova Scotia “face toward the open Atlantic, away from the delimitation area, and not toward Newfoundland”.<sup>63</sup>

62. Neither of these justifications provides any rational basis for Newfoundland's limitation on the measurement of the relevant coast of Nova Scotia, the effect of which, as will be seen, is to prejudge the subsequent assessment of the equitableness of the result.

*The Inapplicability Of The Findings In St. Pierre And Miquelon*

63. The defects in the reasoning underlying Newfoundland's reliance on the findings of the Court of Arbitration in the *St. Pierre and Miquelon Award* were demonstrated in Part II above. However, the vacuity of its position is perhaps

---

<sup>60</sup> Newfoundland Phase Two Memorial, para. 43.

<sup>61</sup> Newfoundland Phase Two Memorial, para. 43.

<sup>62</sup> Newfoundland Phase Two Memorial, para. 41.

<sup>63</sup> Newfoundland Phase Two Memorial, para. 43.



most apparent when one attempts to apply Newfoundland's reasoning to the facts of this case. As noted above, Newfoundland insists that "the findings of the Court of Arbitration are important in the present case because the area under consideration is essentially the same."<sup>64</sup> This statement is demonstrably false.

64. In the first place, the *St. Pierre and Miquelon Award* concerned the respective maritime entitlements of Canada and France extending out to 200 nautical miles – not to the edge of the continental margin, as in the present case. Moreover, in the light of the relevant circumstances of the *St. Pierre and Miquelon Award* – in particular, the fact that the maximum reach of France's 200-mile claim did not extend as far seaward as Canada's, given the position of St. Pierre and Miquelon – the Court of Arbitration chose to define the seaward limit of the area to be delimited particularly narrowly.<sup>65</sup>
65. Insofar as the impact of that determination on the present case is concerned, the effect of that choice is to magnify what was already a huge disparity in size between the delimitation area relevant in the *St. Pierre and Miquelon Award* and the area at issue here. **Figure 59** illustrates the delimitation area in the *St. Pierre and Miquelon Award*, as determined by the Court of Arbitration, compared with the area of the overlapping potential shelf entitlements of Nova Scotia and Newfoundland.<sup>66</sup>
66. At least two things are immediately apparent from **Figure 60**.<sup>67</sup> First, given the extensive area to be delimited by the Tribunal, seaward of the "relevant area" in the *St. Pierre and Miquelon Award*, the proposition that "the area under

---

<sup>64</sup> Newfoundland Phase Two Memorial, para. 43. Newfoundland conveniently departs from this position, however, and claims that the findings of the Court of Arbitration "should be modified", so as to include in its calculation of relevant coasts segments of the Newfoundland coast (north of Burin) which were excluded in the *St. Pierre and Miquelon Award*: Newfoundland Phase Two Memorial, para. 57.

<sup>65</sup> **Annex 194: *St. Pierre and Miquelon Award***, *supra* Part II, note 44 at 1170-71. The Court did not define a northern limit to the relevant area, and **Figure 59** simply closes off the northern area at Cabot Strait – that area is not relevant to the argument in this section.

<sup>66</sup> **Figure 59: The Relevant Area from the *St. Pierre and Miquelon Award***. This figure also shows the division of these areas effected by Newfoundland's proposed line.

<sup>67</sup> **Figure 60: The Relevant Area from the *St. Pierre and Miquelon Award* and the Proposed Newfoundland Line**.

consideration [in the two cases] is essentially the same” is patently untenable. The maritime area at issue in this case is of a different nature, and extends much further seaward. It is erroneous to suggest, as does Newfoundland, that the coasts of Nova Scotia that may have been “relevant” to the maritime area under consideration in the *St. Pierre and Miquelon Award* are also **the only** coasts that are relevant to the more extensive area at issue here: the maritime areas lying outside those defined in the *St. Pierre and Miquelon Award* must, by definition, engage additional, longer segments of the Nova Scotia coast than those determined to be relevant in the *St. Pierre and Miquelon Award*.<sup>68</sup>

67. Second, even if the full area of overlapping entitlements in this case is not considered, **Figure 60** demonstrates that the proposed Newfoundland boundary itself runs into maritime areas that were outside the consideration of the Court of Arbitration in the *St. Pierre and Miquelon Award*. These additional areas, running to the southwestern extent of the Newfoundland claim, must be considered as potentially engaging further relevant coasts of Nova Scotia to the South and West of Cape Canso.
68. The fallacy of Newfoundland’s position – that the coasts relevant to one maritime area are *ipso facto* to be regarded as the relevant coasts for another, entirely different area – is clear. It is further apparent that in the construction of its proposed line, Newfoundland has ignored the important question of **why** the Court of Arbitration selected Cape Canso as the appropriate cut-off point in the geographic configuration of that case. Newfoundland implies that the choice was

---

<sup>68</sup> This is true even if the full extent of the parties’ offshore area entitlements lying to the West and East of the area in the *St. Pierre and Miquelon Award* are not considered – the mere seaward extension of the “relevant area” defined by the Court of Arbitration and adopted by Newfoundland as its own is enough to draw in new coasts.

based on a change in direction of the coast at Cape Canso,<sup>69</sup> but the Court never said this.

69. The Court of Arbitration in the *St. Pierre and Miquelon Award* in fact based much of its definition of the relevant area on the overlapping 200 nautical mile entitlements of the parties to that case. It is highly significant that the 200 nautical mile arc around St. Pierre and Miquelon passes very close to Cape Canso, which is the most prominent coastal feature in the vicinity (see **Figure 61**).<sup>70</sup> It is not surprising that the Court of Arbitration would have chosen a terminal coastal point at the outer limits of the maximum potential French claim, or that it selected Cape Canso for this purpose, yet those facts are utterly irrelevant in the context of this arbitration.

*Newfoundland's Subjective Definition Of Where Coasts "Face"*

70. As indicated above, one of the major justifications underlying Newfoundland's dismissal of the bulk of Nova Scotia's coasts is the assertion that, South of Cape Canso, the mainland coasts of Nova Scotia do not face the delimitation area, but face rather in some other, irrelevant direction.<sup>71</sup>

Those coasts do not face the delimitation area ... The mainland coasts of Nova Scotia face toward the open Atlantic, away from the delimitation area, and not toward Newfoundland.

71. It is, however, of no significance that the coast of Nova Scotia South of Cape Canso does not face "toward Newfoundland". The coastlines of Nova Scotia and Newfoundland in this area, as agreed by the parties, are adjacent. Neither coast can be said to "face toward" the another; if they did, the coastal relationship would be characterised as "opposite". This does not, however, mean that one coast acquires dominance over the other for delimitation purposes.

---

<sup>69</sup> Newfoundland Phase Two Memorial, para. 43. Newfoundland states that it was an "assumption" of the Court that the "mainland" coasts of Nova Scotia (i.e. beyond Canso) "face toward the open Atlantic, away from the delimitation area". Given that the Court found the Cape Breton coast up to Canso relevant, the clear implication is that the two coastal segments must "face" in different directions. See also the discussion of change in direction, below.

<sup>70</sup> **Figure 61**: St. Pierre and Miquelon 200 Nautical Mile Arc.

<sup>71</sup> Newfoundland Phase Two Memorial, para. 43.

72. Newfoundland's main contention here is that the Nova Scotia coasts "face ... away from the delimitation area". Leaving aside for the moment the problem that the "delimitation area" has not yet been defined at this point in Newfoundland's argument, making it difficult to assess whether any coast faces towards it, this unsupported factual assertion follows on from a statement of the law that is manifestly incorrect:<sup>72</sup>

The relevant coasts in a maritime delimitation are those that face toward the delimitation area, creating a potential "overlap and convergence" of maritime entitlements. If a coast does not face toward the delimitation area, it must be excluded from consideration. Examples of this general approach abound in the leading cases.

73. Of the two cases cited by Newfoundland, *Tunisia/Libya* and *Gulf of Maine*, neither contains any reference to the so-called general approach claimed by Newfoundland, namely, a requirement that coasts that do not "face toward" a delimitation area "must be excluded from consideration". In fact, the terminology of coasts "facing" either "toward" or "away" from the delimitation area does not even appear in the passages cited. What these two decisions do demonstrate, clearly and simply, is that the most important consideration is whether a coast can be seen as contributing to the area of overlapping potential entitlements.<sup>73</sup>
74. The principles that govern the proper approach to relevant coasts and areas, in these and other cases, are addressed in more detail below. It is sufficient here to note that the two decisions cited by Newfoundland involved changes in the direction of both parties' coasts. The critical factor, as noted in the *Tunisia/Libya* case, was the **relationship** between their coasts and not, as suggested by

---

<sup>72</sup> Newfoundland Phase Two Memorial, para. 39.

<sup>73</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 328 : In *Gulf of Maine* the Chamber spoke of the equal division of overlapping "maritime projections", a term that reflected the potential legal entitlements of the parties. Annex 189: *Tunisia/Libya*, *supra* Part II, note 9 at 61-62: In the *Tunisia/Libya* case the Court excluded from consideration any coast that "because of its geographic situation, cannot overlap with the extension of the coast of the other", and of maritime areas that "constitute an area of overlap of the extensions of the territories of the two parties...". These references clearly relate to overlaps of the legal entitlement as defined for the continental shelf, which was the subject of that delimitation.

Newfoundland, solely the relationship between one party's coast and an independently-defined "delimitation area":<sup>74</sup>

It is clear from the map that there comes a point on the coast of each of the two Parties beyond which the coast in question no longer has a relationship with the coast of the other Party relevant for submarine delimitation.

75. The parties are agreed that the coast of Newfoundland in the outer sector proceeds in a generally easterly direction from the Burin Peninsula to Cape Race, and that this coast is adjacent to the Nova Scotia coast from Scatarie Island to Cape Canso (which both parties regard as a relevant coast but which Newfoundland considers to be the only relevant coastline on Nova Scotia's East coast). If Newfoundland is to claim that the coast of Nova Scotia South of Cape Canso is irrelevant, it must demonstrate that the coastal relationship has somehow changed, as between its own coast and the Nova Scotia coast South of Cape Canso. Given the relatively consistent direction of the Burin Peninsula-Cape Race coast as defined by Newfoundland, the only source of such an alteration would be a marked change in direction of the Nova Scotia coast South of Cape Canso.
76. In fact, the Nova Scotia coast does not exhibit any material shift in direction at Cape Canso – the single coastal direction line from Scatarie Island to Cape Sable, as shown in **Figure 47**<sup>75</sup> (in Nova Scotia's Phase Two Memorial), is entirely faithful to the direction of the coast of Nova Scotia. Nor does the adjacent relationship of the parties' coasts, also depicted in **Figure 47**, change in any real way at that point.
77. The Court of Arbitration in the *St. Pierre and Miquelon Award* did of course find that the Nova Scotia coast from Scatarie Island to Cape Canso "faced" the delimitation area determined to be relevant to that case,<sup>76</sup> but it certainly did not exclude the mainland coast because of any sudden change in direction at Cape Canso. Rather, in a finding that is not among those quoted and applied by

---

<sup>74</sup> Annex 189: *Tunisia/Libya*, *supra* Part II, note 9 at 61-62.

<sup>75</sup> Figure 47: The "Outer" Segment : Adjacency of the Coasts.

<sup>76</sup> Annex 194: *St. Pierre and Miquelon Award*, *supra* Part II, note 44 at 1161.

Newfoundland, the Court explicitly stated that the coastal direction from Scatarie Island all the way to the southern tip of Nova Scotia, including both Cape Breton Island and the mainland, runs “in the same direction”:<sup>77</sup>

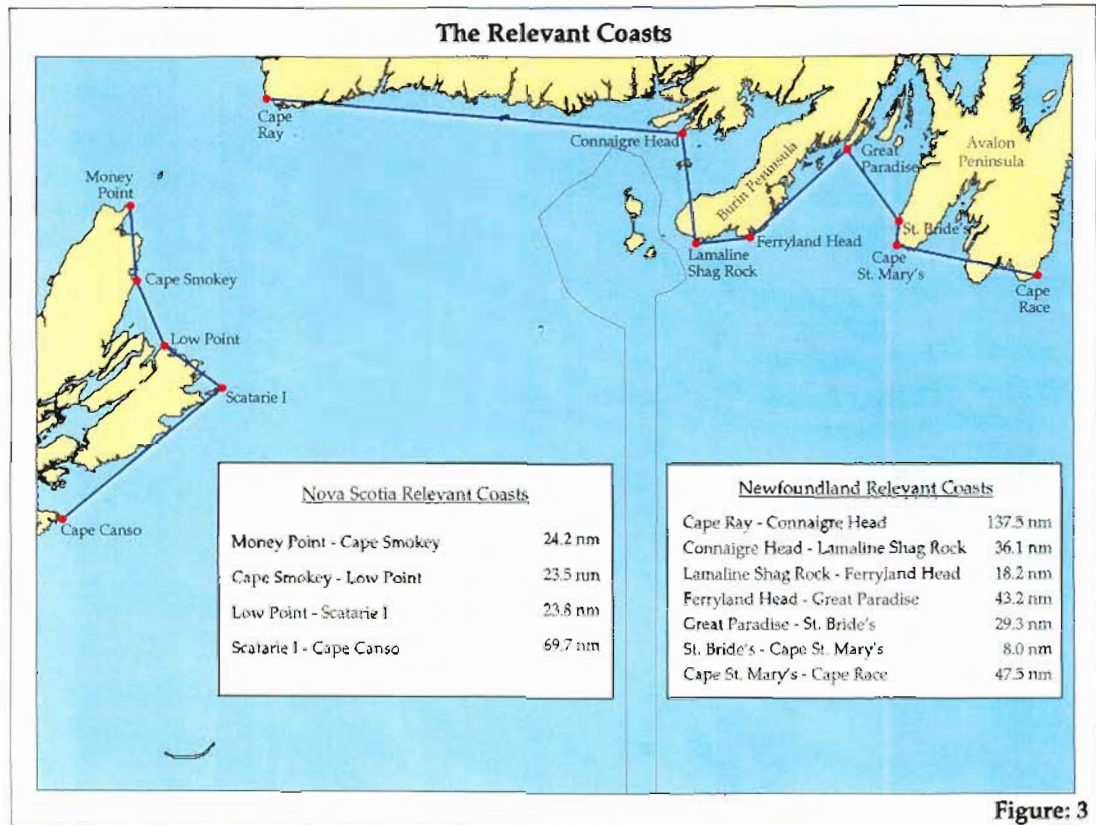
The east coast of the island [Cape Breton] stretches in a direction slightly east of south for 67 nautical miles to Scatarie Island lying a mile offshore. There it turns to a southwesterly direction for a further 70 nautical miles, **after which the east coast of mainland Nova Scotia continues in the same direction.**

(emphasis added)

78. It is neither necessary nor appropriate for the Tribunal in the present arbitration to base its decision on this finding, although Newfoundland, having chosen to rely on the geographic determinations in the *St. Pierre and Miquelon Award*, could at least have been expected to rely on them in their entirety. In any event, as noted above, an examination of the geography discloses no change of coastal direction at Cape Canso of any significance. Newfoundland’s effort to portray the East coast of Nova Scotia North and South of Cape Canso as facing in two different directions implies an ability to judge coastal directions and frontal projections to a nicety. Moreover, it shows a willingness to attribute massive consequences – in this instance, the complete exclusion of the bulk of Nova Scotia’s coasts from any consideration in the present delimitation – to an entirely insignificant geographic feature.
79. In its Phase Two Memorial, Newfoundland avoids facing these undeniable geographic facts, which undermine its proposed delimitation, by the simple expedient of refusing to depict them. A textbook example is Newfoundland’s Figure 3, the only figure appearing in its Chapter II C on “Relevant Coasts”, which arbitrarily amputates the East coast of Nova Scotia at Cape Canso. The general direction of the coastline to the South of Cape Canso, which would be readily apparent on most other maps, is thus ignored, as if it did not exist.

---

<sup>77</sup> Annex 194: *St. Pierre and Miquelon Award*, *supra* Part II, note 44 at 1159.



**Figure: 3**

(Newfoundland Figure 3: The Relevant Coasts)

ii. **The Relevant Maritime Area**

80. The companion piece to Newfoundland's subjective selection of relevant coasts is its equally flawed definition of the relevant maritime area. As with the matter of relevant coasts, this element of its proposed delimitation is also based on the misinterpretation and misapplication of the *St. Pierre and Miquelon Award*, and on an attempt to manipulate geography.

a) The Relevant Maritime Area As Defined By Newfoundland

81. Newfoundland contends that although "the 'relevant area' cannot be defined with the same degree of precision [as the 'relevant coasts'] ... it is not difficult to identify a general area in which the effect of the delimitation can be assessed."<sup>78</sup> After noting that the Court of Arbitration in the *St. Pierre and Miquelon Award* had defined the relevant area in that case in part by lines drawn South from Cape Race in Newfoundland and approximately Southeast from Cape Canso in Nova Scotia,<sup>79</sup> it proposes the following:<sup>80</sup>

Since the definition of that area was based on limits traced from the French islands it cannot be applied without modification in the present case. However, a relevant area based on the same general approach is easily devised with respect to the delimitation area outside the Gulf. The simplest option would be to extend lines perpendicular to the general direction of the coasts from Cape Race and Cape Canso to the 200 nautical mile limit. While this approach does not encompass the indeterminate shelf areas lying beyond the 200 nautical mile limit, there is no reason to believe that the addition of those areas would significantly alter the proportions accruing to either party.

82. This option is indeed simple, and simplicity can be a consideration in maritime boundary delimitation. It cannot, however, justify the definition of a relevant area that has no rational connection either to the nature of the maritime zone in question or to the potential entitlements of the parties. Yet this is precisely what Newfoundland does, through its application of an irrelevant 200 nautical mile

---

<sup>78</sup> Newfoundland Phase Two Memorial, para. 60.

<sup>79</sup> Newfoundland Phase Two Memorial, para. 61; Annex 194: *St. Pierre and Miquelon Award*, *supra* Part II, note 44 at 1176.

<sup>80</sup> Newfoundland Phase Two Memorial, para. 62 (footnote and figure reference omitted).



seaward limit, and the arbitrary use of perpendiculars to define the lateral limits of the relevant area.

b) The 200 Nautical Mile Limit Is Irrelevant In This Arbitration

83. As the foregoing passage demonstrates, Newfoundland's "simplest option" for defining the relevant area includes limiting the seaward extent of the area, as was done in the *St. Pierre and Miquelon Award*, to the 200 nautical mile limit from the coast of Canada (which, it is important to note, uses Sable Island as a basepoint). Yet, the 200 nautical mile limit was used for this purpose in the *St. Pierre and Miquelon Award* precisely because that was the seaward extent of the zone that the Court of Arbitration was required to delimit.<sup>81</sup> In the present case, as acknowledged by Newfoundland, the Tribunal's mandate is to delimit the offshore areas to the outer edge of the continental margin.
84. Newfoundland itself recognizes that to define the relevant area otherwise than by reference to the legal nature of the zone in question, which naturally includes the legal definition of its seaward extent, would be insupportable in law.<sup>82</sup> In essence, however, what Newfoundland has proposed is that the Tribunal carry out the delimitation in this case, and assess the equitableness of the result, on the basis of an area that may have been relevant in other circumstances, but is surely irrelevant in the light of the Tribunal's mandate as prescribed in the *Terms of Reference*.

*The Alleged Irrelevance Of The Outer Shelf – According to Newfoundland*

85. Newfoundland's primary justification for its departure from the approach followed in every previous adjudicated delimitation is that there is no appreciable difference in result between the 200 nautical mile limit and the outer edge of the margin.<sup>83</sup>

---

<sup>81</sup> Annex 194: *St. Pierre and Miquelon Award*, *supra* Part II, note 44 at 1172.

<sup>82</sup> Newfoundland Phase Two Memorial, para. 62.

<sup>83</sup> Newfoundland Phase Two Memorial, para. 62.

While this approach does not encompass the indeterminate shelf areas lying beyond the 200 nautical mile limit, there is no reason to believe that the addition of those areas would significantly alter the proportions accruing to either party.

86. As with so much in the Newfoundland and Labrador Phase Two Memorial, the truth of this assertion is nowhere checked against the facts. Nova Scotia has demonstrated in its Phase Two Memorial that the overlapping potential entitlements of the provinces, as defined in the *Accord Acts* and in virtue of the Article 76 definition that Newfoundland concedes is applicable, extend to a much larger maritime area than that regarded by Newfoundland as relevant (see Figure 59)<sup>84</sup>. Further, it is clear that most of the area beyond 200 nautical miles already falls to Newfoundland as a result of the current boundary, an effect which would be exacerbated if Newfoundland's proposed delimitation were accepted.
87. Figure 62<sup>85</sup> depicts Newfoundland's definition of the relevant area, but with its limits extended to the outer edge of the continental margin so as to encompass the areas lying beyond the 200 nautical mile limit. It is immediately apparent from this illustration that Newfoundland's contention that "the addition of those areas would [not] significantly alter the proportions accruing to either party" is completely untenable.
88. The areas beyond 200 nautical miles that Newfoundland would thus allocate to itself (but which it fails to show on any map or figure in its Phase Two Memorial) comprise fully 99.8% (53,854 km.<sup>2</sup>) of this outer shelf area, as opposed to 0.2% (130.5 km.<sup>2</sup>) for Nova Scotia. As Figure 62 reveals, the effect of "the addition of those areas", far from being insignificant, would actually be to increase Newfoundland's percentage share of the relevant area, from 69.4% (of the area out to 200 nautical miles) to 74.6% (of the overall area). This increase **alone** – that is, the 53,854 km.<sup>2</sup> windfall accruing to Newfoundland beyond 200 nautical

---

<sup>84</sup> Figure 59: The Relevant Area from the *St. Pierre and Miquelon Award*.

<sup>85</sup> Figure 62: Extending the Newfoundland Relevant Area to the Outer Edge of the Continental Margin.

miles – would be equal to approximately 70% of the total area allocated to Nova Scotia under the Newfoundland scheme.<sup>86</sup>

89. As mentioned, Newfoundland does not depict in its Phase Two Memorial the full extent of its proposed boundary, to the edge of the continental margin. Had it done so, Newfoundland would have revealed that its proposed line actually **crosses over** the western lateral limit (the perpendicular running southeasterly from Cape Canso) of its relevant area, almost as soon as the line reaches the 200 nautical mile limit. As a result, Newfoundland is in the unusual position of claiming areas up to and beyond the limits of what it maintains is the area relevant to the delimitation.

*The Significance Of Canada's Potential Article 76 Claim*

90. Newfoundland acknowledges that the outer limit of the parties' respective offshore areas will be determined based on the definition contained in Article 76 of the *LOS 1982*.<sup>87</sup> It argues, however, that the Tribunal should not attempt to define the outer limits of Canada's eventual claim.<sup>88</sup>

Newfoundland and Labrador submits that the Tribunal in the present proceedings should not attempt to identify the exact point at which the Canadian continental shelf meets the international area, but should decide that the line of delimitation shall be continued indefinitely to the limit of national jurisdiction on the bearing at which it intersects the 200 nautical mile limit. This approach . . . avoids international delimitation issues with which the federal government will eventually have to deal.

91. In fact, both parties have proposed the use of an azimuth in the outer sector of the boundary, which effectively obviates any problem arising by virtue of the fact that "the exact limits [of the shelf] have not yet been established".<sup>89</sup> However, in asking the Tribunal to **consider** the likely extent and impact on the delimitation of

---

<sup>86</sup> The corollary to this point, of course, is that in Newfoundland's view the Nova Scotia share of the relevant area must be so small that 70% of it would be of no significance in this delimitation. The impact is even greater if areas immediately to the East of the eastern (Cape Race) limit of Newfoundland's "relevant area" are also considered relevant, as they must be (discussed below).

<sup>87</sup> Newfoundland Phase Two Memorial, paras. 63, 92.

<sup>88</sup> Newfoundland Phase Two Memorial, para. 64.

<sup>89</sup> Newfoundland Phase Two Memorial, para. 63.

the parties' broad shelf entitlements under Article 76 of the *LOS 1982*, the seaward limits of which define the limits of their "offshore areas", it should be evident that Nova Scotia is in no way asking the Tribunal to define or rule on those limits. Rather, it is only necessary that the Tribunal take into account, as proposed by Nova Scotia, the most likely result of the outer shelf claim (based on the policies and criteria laid down in the *LOS 1982* and in the Commission's guidelines) as a means of assessing the equitableness of the offshore areas that will ultimately be divided between Newfoundland and Nova Scotia.

92. This task is no different from that involved in assessing the likely impact of prospective delimitations – a factor that the parties agree is within the proper scope of the Tribunal's considerations. Indeed, Newfoundland refers to the determination of the outer limit of the continental margin as engaging "international delimitation issues", which it does, in the sense that the outer shelf limit divides Canadian jurisdiction from the International Seabed Area.<sup>90</sup> As with other "prospective delimitations", the Tribunal is entirely justified in considering, but not ruling upon, the likely effect of a precise definition of the margin, as it affects the allocation of areas between the parties in this case.

c) Newfoundland's Use Of Perpendiculars To Define The Relevant Area

93. As Newfoundland makes clear, a crucial element in its definition of the relevant area is its use of perpendiculars to the general direction of the relevant coasts, to set the lateral limits of the area. Notwithstanding the importance of this choice of method, however, Newfoundland offers surprisingly little by way of justification. After noting that the Court of Arbitration in the *St. Pierre and Miquelon Award* drew seaward lines from Cape Race and Cape Canso to limit the relevant area in that case, Newfoundland argues that the "same general approach" can be used to devise lateral limits for the relevant area at issue here:<sup>91</sup>

---

<sup>90</sup> Annex 186: *LOS 1982*, *supra* Part II, note 2, art. 1(1).

<sup>91</sup> Newfoundland Phase Two Memorial, para. 62.

The simplest option would be to extend lines perpendicular to the general direction of the coasts from Cape Race and Cape Canso to the 200 nautical mile limit.

94. Later in its Phase Two Memorial, Newfoundland briefly returns to the point and adds the following to the "simplicity" justification:<sup>92</sup>

Perpendiculars were used to define the area within which proportionality was to be tested in *Eritrea v. Yemen*. There, the Court of Arbitration used a line at "right angles" to the general direction of the coast to define both the northern and the southern boundaries of the area for testing proportionality.

*Newfoundland Does Not Adopt The "General Approach" From The St. Pierre And Miquelon Award*

95. Although Newfoundland's use of the 200 nautical mile limit does derive, albeit inappropriately, from the decision in the *St. Pierre and Miquelon Award*, Newfoundland offers no proof regarding the use of such perpendiculars in that case.<sup>93</sup> In fact, as shown in Figure 63,<sup>94</sup> the southwestern limit of the relevant area in the *St. Pierre and Miquelon Award* was defined **not** by a perpendicular, as maintained by Newfoundland, but by a line drawn from Cape Canso to the intersection of the arcs representing the 200 nautical mile limits from St. Pierre and Miquelon and Cape Breton Island. Cape Canso, as already noted, lies at the limit of the potential French claim in that case, and the intersection of the two outer limit arcs is likewise based on the maximum potential entitlements of the parties.
96. Both end-points of this line defining the limit of the relevant area in the *St. Pierre and Miquelon Award*, therefore, are rooted in the nature of the **legal zone** in question and the extent of the potential **entitlements** that could be claimed by the parties. In Newfoundland's proposal, in contrast, the line from Cape Canso is drawn without any reference to the nature and extent of the zone or of the parties'

---

<sup>92</sup> Newfoundland Phase Two Memorial, para. 258.

<sup>93</sup> It should be noted that Nova Scotia is not arguing for adoption of the lines used in the *St. Pierre and Miquelon Award* - the point made here is simply that Newfoundland has not chosen these lines, as it claims, with reference to any approach discernible in that decision.

<sup>94</sup> Figure 63: The Relevant Area from the *St. Pierre and Miquelon Award* and 200 Nautical Mile Arcs.

- entitlements. The perpendicular, in short, is chosen for no particular reason whatsoever – its alleged connection to the *St. Pierre and Miquelon Award* having been disproved – other than to satisfy Newfoundland's subjective ends in this arbitration.
97. To the East, the lateral limit in the *St. Pierre and Miquelon Award* was drawn as a line due South – not as a perpendicular – from Cape Race to the intersection with the 200 nautical mile arc from Newfoundland. In addition, here too the relationship between this lateral limit of the relevant area and the potential claims of the parties is telling. When the 200 nautical mile arc drawn from St. Pierre and Miquelon is considered (see Figure 63), it is evident that this limit of the relevant area represents a reasonable, easily measured approximation of the limit of France's 200 nautical mile claim in the East. In any event, there can be no disputing that, as mentioned, the line was not drawn by the Court of Arbitration as a perpendicular to the coast. Contrary to Newfoundland's repeated claims, therefore, its own use of a perpendicular in this case bears no comparison to the delimitation effected in the *St. Pierre and Miquelon Award*.
98. It must be emphasised that these numerous departures from the approach taken in the *St. Pierre and Miquelon Award* (and the vast gulf between the rhetoric and the fact of Newfoundland's methodology) are not of equal effect on the parties in this case. Figure 64<sup>95</sup> demonstrates the point graphically, by comparing the lateral lines proposed by Newfoundland to those used in fact in the *St. Pierre and Miquelon Award*.
99. In the West, Newfoundland's line drawn seaward from Cape Canso restricts Nova Scotia's coastal length to that adopted in the *St. Pierre and Miquelon Award*, but departs from the angle of the seaward line in that case so as to add approximately 30,000 km.<sup>2</sup> to the relevant maritime area attributed to Nova Scotia (based on Newfoundland's proposed boundary). To the East, Newfoundland takes its full

---

<sup>95</sup> Figure 64: The Relevant Area from the *St. Pierre and Miquelon Award* and the Newfoundland Relevant Area.

coastline, as in the *St. Pierre and Miquelon Award*, but again changes the angle of the seaward line drawn from Cape Race, so as to decrease the maritime area attributed to Newfoundland by approximately 20,000 km.<sup>2</sup>

100. The effect is obvious. By maximizing the length of the relevant coast of Newfoundland while minimizing its maritime area, and at the same time minimizing Nova Scotia's coastal length while maximizing the province's maritime area, Newfoundland has effectively "tweaked" its proposed delimitation (as well as the results of the *St. Pierre and Miquelon Award*) to its advantage: it has altered the equation between the respective coasts and areas of the parties.
101. This is no doubt extremely helpful to Newfoundland's effort to demonstrate the proportionality, and thus the equity, of its chosen result. It is not, however, based on any apparent principle, but on the arbitrary selection of limits to the relevant area designed purely to serve Newfoundland's aims. Nor is it explained in the Newfoundland and Labrador Phase Two Memorial.

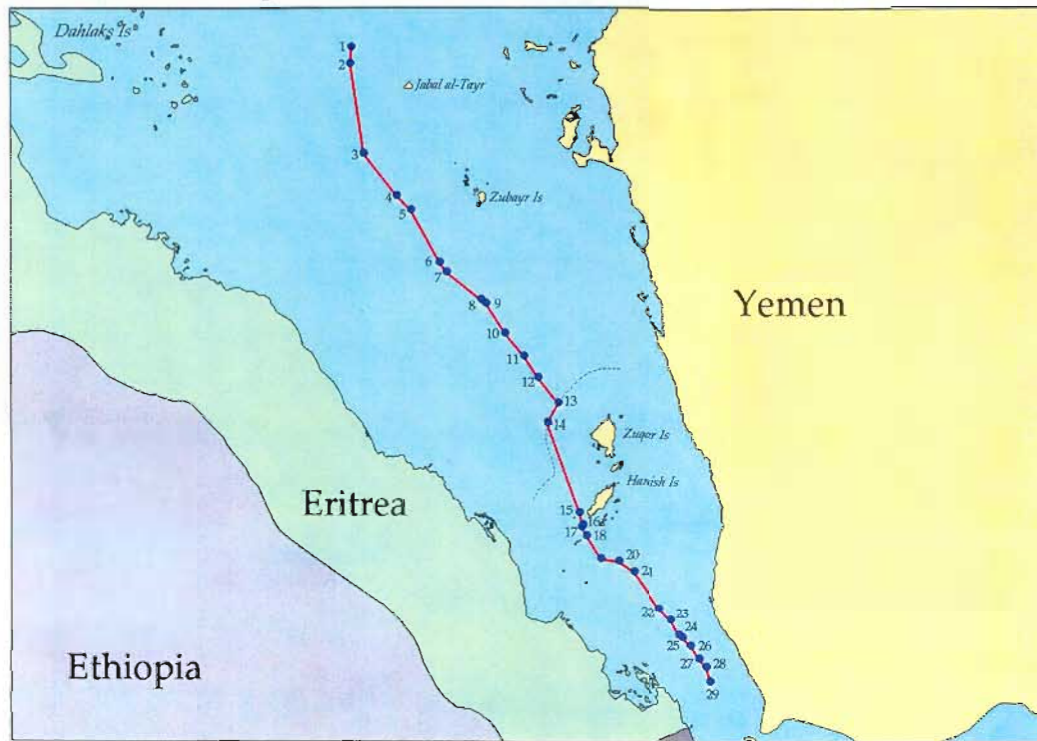
*The Eritrea/Yemen Decision Is Inapplicable To This Case*

102. Newfoundland, as noted above, relies as well on the use of coastal perpendiculars by the Permanent Court of Arbitration in the *Eritrea/Yemen* decision<sup>96</sup> to define the relevant area in that case. It is, however, difficult to imagine a case less analogous to the present one, particularly with respect to the application of perpendicular lines.
103. In the *Eritrea/Yemen* case, the geographic situation was one of opposite coasts fronting a narrow, tightly enclosed maritime area (see Newfoundland Figure 11). As a consequence, the perpendiculars employed to define the northern and southern limits of the relevant area (which were drawn with reference to only one coast, not two), were quite short. More important, they crossed over a boundary drawn between two opposite coasts, so that the effect of the lines would in any event be distributed across both maritime areas.

---

<sup>96</sup> *Eritrea/Yemen*, *supra* Part II, note 51.

Minimizing the Distortion of Incidental Features in *Eritrea v. Yemen*



Based on *Eritrea v. Yemen*, [1999] (17 December 1999) The Hague (Permanent Court of Arbitration).

Figure: 11

(Newfoundland Figure 11: Minimizing the Distortion of Incidental Features in *Eritrea v. Yemen*)



104. In the present case, in contrast, Newfoundland proposes the use of perpendicular lines that would necessarily run far out to sea – as far as 648 km. (350 nautical miles), the approximate distance from Cape Race to the outer edge of the continental margin, measured along the perpendicular.<sup>97</sup> In these geographic circumstances, the use of perpendiculars raises issues that simply could not, and did not, arise in the *Eritrea/Yemen* case.
105. Figure 65<sup>98</sup> illustrates the exaggerated impact of even a minor change in the selected coastal direction, when a line drawn perpendicular to that coast is extended seaward. In this example, the choice of a terminal point a mere 17.25 km. from Cape Race can be seen to result in a slight shift to the North of the general direction line of the South coast of Newfoundland (as compared to the direction depicted in the Newfoundland Phase Two Memorial). This relatively insignificant change, with nothing further, adds over 21,000 km.<sup>2</sup> to the area that would fall to Newfoundland on the basis of its proposed boundary.
106. It is precisely this kind of distorting effect that dictates caution in the use of perpendiculars to define relevant areas, especially where, as in the present delimitation, such perpendiculars involve long lines drawn over vast maritime areas.

*The Differential Application Of The Perpendiculars*

107. More generally, it must be remembered that, unlike in the *Eritrea/Yemen* case, the perpendiculars proposed by Newfoundland in this case are applied differently to the parties' coasts, with different effects. For Nova Scotia, Newfoundland situates the perpendicular a short way along an essentially unidirectional coast, such as to exclude most of what is clearly Nova Scotia's relevant (East) coast. For itself, on

---

<sup>97</sup> From Cape Canso to the outer limit, the perpendicular runs for approximately 617 km. (330 nautical miles). Even within the restricted seaward limits imposed by Newfoundland, the distances are substantial – the distance from Cape Canso to the 200 nautical mile limit used by Newfoundland is approximately 543 km. (293 nautical miles).

<sup>98</sup> Figure 65: The Use of Perpendiculars to Define Relevant Areas Magnifies Small Changes in the Coastal Direction.

the other hand, Newfoundland places the perpendicular at the end of its (South) coast, before a marked shift in coastal direction. The effect of this, as demonstrated, is to maximize the length of the relevant coastline claimed by Newfoundland, while minimizing its maritime area, by excluding from consideration the large areas immediately to the East of the perpendicular (areas which would otherwise be regarded as accruing to Newfoundland from within the "relevant area" if that area were defined by a line drawn from Newfoundland's coast at an angle greater than 90°).

108. As explained above, the theory that coasts project or "face" in only one direction has no place among the principles of international law governing maritime delimitation. Newfoundland may wish to support its use of perpendicular lines by reference to that theory, but its efforts are no more valid than the theory to which they give practical expression.
109. In sum, just as the selection of a perpendicular results in completely different effects than a line drawn at another angle, so too the arbitrary selection of the coastal point from which a perpendicular runs will have a significant impact on the delimitation. The various means by which Newfoundland has endeavoured to maximize its relevant coastline while minimizing its maritime area, and at the same time to minimize the relevant coast of Nova Scotia, seem all to be aimed at skewing the proportionality test by which the equity of its proposed delimitation must ultimately be measured. The two perpendiculars are apparently used for no other reason than that they achieve this objective.

**iii. The Circularity Of Newfoundland's Argument On Relevant Coasts And Areas**

110. The result-driven nature of Newfoundland's use of perpendiculars is but one facet of a larger problem with Newfoundland's argument. Newfoundland's treatment of the twin issues of "relevant coasts/relevant areas" is effectively circular, with a distinct "chicken or egg" character. The argument runs as follows:

- The length and direction of the relevant coasts are supposedly chosen by reference to the relevant maritime areas: coastlines that “face toward” the “delimitation area” (that has yet to be determined) are deemed relevant, while those that “face away” are not;<sup>99</sup>
- The relevant maritime areas are then defined by reference to the relevant coasts: perpendiculars are drawn based on the selected coastal directions and end-points (that were supposedly chosen by reference to the relevant areas).<sup>100</sup>

111. The illogic of this argument is apparent. In the end, the “relevance” of the coasts and areas that Newfoundland has selected – the very framework of its proposed delimitation – proves to be ephemeral.

112. A similar arbitrariness, coupled with a refusal to acknowledge the true extent of the overlapping entitlements of the parties in this case, is evident in Newfoundland’s use of the 200 nautical mile limit as the seaward extent of the relevant area. The problem consists of Newfoundland’s attempt to apply the concept of “overlap and convergence” of frontal projections to a maritime area characterized by adjacent coasts – that is, to an area within which the notion of converging projections is largely unworkable given the lack of readily defined coasts and areas.<sup>101</sup> The problem has been neatly summarized as follows:<sup>102</sup>

In fact, the concept [of overlap and convergence] works best when the zone of overlap can be correlated with the frontal extension of the coasts. Such a depiction is possible when the boundary is being drawn between two coasts that face each other to any significant degree – for example, between truly opposite coasts or within a deep concavity like the Gulf of Maine. In other situations the concept is at best an approximation. The Georges Bank area seaward of the Gulf of Maine again illustrates the point. Although this area cannot be depicted in terms of converging

---

<sup>99</sup> Newfoundland Phase Two Memorial, para. 39.

<sup>100</sup> Newfoundland Phase Two Memorial, paras. 60-62.

<sup>101</sup> This is consistent with the view of the Court in the *North Sea Cases*, noted earlier, that seaward extension and non-encroachment are both of lesser relevance at greater distances from the coast.

<sup>102</sup> Annex 192: Willis, *supra* Part II, note 167 at 43 (footnote omitted).

frontal extensions, the Chamber spoke of overlapping maritime projections here as well. In open areas of this kind, however, the notion lacks any real precision and can only be described in somewhat circular fashion in terms of areas that can *prima facie* be considered subject to competing claims.

(emphasis added)

iv. **The Correct Approach To The Definition Of Relevant Coasts And Offshore Areas**

113. The correct approach to the definition, and the interaction, of relevant coasts and maritime areas is hinted at, but never applied, in Newfoundland's Phase Two Memorial:<sup>103</sup>

The relevant coasts in a maritime delimitation are those that face toward the delimitation area, creating a potential "overlap and convergence" of maritime entitlements.

(emphasis added)

114. In turn, the overlapping entitlements of the parties can only be defined by reference to the legal basis of the zone in question, and in particular to the principles by which its seaward extent is measured. Those principles will determine both the extent of the zone which might be claimed by each party and the coasts that contribute to the generation of that zone.
115. This method is in fact consistent with the general approach adopted in the cases cited by Newfoundland, when the circumstances of each case are taken into account. The construction of the relevant area in the *St. Pierre and Miquelon Award*, for example, was discussed above, and is shown in **Figure 63**.<sup>104</sup> While the area does not perfectly match the overlapping potential claims of the parties in that case, the most important elements of its definition are derived, not from any frontal projection theory, but from considering the 200 nautical mile claims generated by the coasts of the parties. Furthermore, these limits are expressed as

<sup>103</sup> Newfoundland Phase Two Memorial, para. 39.

<sup>104</sup> **Figure 63**: The Relevant Area from the *St. Pierre and Miquelon Award* and 200 Nautical Mile Arcs.

arcs, which can only imply radial projection of the relevant coasts, consistent with the nature of a zone defined by distance.

116. The only area in which the limit of the “relevant area” departs appreciably from the “area of overlapping entitlements” in the *St. Pierre and Miquelon Award* is in the East, where the St. Pierre arc would extend beyond the line drawn South from Cape Race. Even here, however, the departure is not so significant as to detract from the validity of this overall approach.
117. In fact, relevant coasts are those that create the “potential ‘overlap and convergence’ of maritime entitlements” referred to in the passage from Newfoundland’s submissions quoted above.<sup>105</sup> As has been demonstrated, however, coasts do not “face” in only one direction – perpendicular to their general direction – as suggested by Newfoundland, and so the “overlap and convergence” of entitlements is not restricted to situations in which relevant coasts “face towards” the delimitation area (as Newfoundland construes the term).
118. In support of its claim, that coasts should be included or excluded from consideration based solely on where they supposedly “face”, rather than with reference to whether they generate a particular maritime area, Newfoundland refers to the *Gulf of Maine* decision, noting that “although Canada had argued that the coasts of Nova Scotia facing the open Atlantic should be considered, the Chamber did not take them into account in its calculations”.<sup>106</sup> For Newfoundland, this is proof positive that if “a coast does not face toward the delimitation area, it must be excluded from consideration.”<sup>107</sup> The Chamber, however, said no such thing.
119. Newfoundland’s précis of the *Gulf of Maine* decision also ignores important factual considerations in that case. **Figure 66**<sup>108</sup> which depicts the delimitation area from the *Gulf of Maine* case, reveals that a peculiar feature of the case was

---

<sup>105</sup> Nova Scotia Phase Two Memorial, pp. V-20-21.

<sup>106</sup> Newfoundland Phase Two Memorial, para. 39 (footnote omitted).

<sup>107</sup> Newfoundland Phase Two Memorial, para. 39.

<sup>108</sup> **Figure 66:** The Perpendicular in the *Gulf of Maine* Case.

that the parties had agreed to the definition of a “triangle” within which the boundary to be drawn by the Chamber must terminate.<sup>109</sup> The effect of that agreement is also illustrated in Figure 66 – the only maritime areas that could possibly be subject to division between the parties, outside the Gulf itself, fell within the lines drawn from Cape Sable, Nova Scotia and Cape Cod, Massachusetts to the northern and southern limits of the triangle, respectively.<sup>110</sup>

120. The implications of this limitation are evident. The maritime areas adjacent to the “outer” coasts of Nova Scotia and Massachusetts could not possibly be considered as part of the area subject to the delimitation – the “relevant area” – because the parties’ agreement on the boundary’s terminal zone put them outside the area to be divided by the Chamber. To include them as relevant coastlines, they would have to be seen as generating a maritime area at a distance, as it were, “jumping over” the areas immediately adjacent to the coast.<sup>111</sup>
121. Finally, Figure 66 deals a forceful blow to Newfoundland’s contention that the Chamber viewed as “relevant” only those coasts that “face toward” the delimitation area. None of the relevant Canadian coasts, as defined by the Chamber, “face toward” the outer maritime areas delimited by the Chamber. On Newfoundland’s theory of unidirectional, perpendicular projection, the last segment of Canadian coast, from Whipple Point to Cape Sable, could only face inwards, towards the Gulf. In fact, the only coast that would meet Newfoundland’s criterion for a “facing” or “dominant” coast with respect to the outer area would be that along the inner coast of the United States, in Maine. Under that scenario, Canada would have had no coasts relevant to the outer area, in which case the line drawn by the Chamber, awarding significant portions of the outer area to Canada, would be inexplicable.

---

<sup>109</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 339.

<sup>110</sup> These lines, as shown in Figure 66, also closely approximate the outer limits of the 200 nautical mile arcs drawn from Canada and the United States.

<sup>111</sup> As will be seen below, however, this approach is in fact analogous to what Newfoundland has done with the projection of part of its coast through the land mass of St. Pierre and Miquelon.

122. In fact, the Chamber considered arguments by the United States to the effect that the coasts of Nova Scotia abutting the Gulf of Maine (including the Whipple Point – Cape Sable line) were “secondary” coasts, as compared to the “primary” coast of Maine, with the consequence that the critical area of Georges Bank was, in the view of the U.S., “situated off and opposite the coast of Maine”.<sup>112</sup> This argument, which is analogous to that advanced by Newfoundland with respect to its South coast, was emphatically rejected by the Chamber.<sup>113</sup>
123. The proper approach to the definition of relevant coasts and relevant areas, as explained in Nova Scotia’s Phase Two Memorial<sup>114</sup> and as supported in the cases, must be rooted in the definition of the legal zone in dispute. The relevant maritime areas should be, to the extent that it is practical to define them, the overlapping potential entitlements of the parties. The relevant coasts are those that can legitimately be regarded as contributing to the generation of the areas of overlap, according to the criteria by which the seaward limits of the legal zone in question are determined.
124. In the present case, as already shown, the provincial legal entitlements to the “offshore areas” are defined with reference to the criteria found in Article 76 of the *LOS 1982*. The relevant coasts are therefore those which are capable of generating areas of overlapping claims, according to the Article 76 methodologies. This is entirely consistent with the fundamental approach adopted in other cases. It is the method that Nova Scotia has proposed as the means to determine the areas and coasts relevant to this delimitation.<sup>115</sup>

---

<sup>112</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 318.

<sup>113</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 318, 320.

<sup>114</sup> Nova Scotia Phase Two Memorial, Part IV C.

<sup>115</sup> Nova Scotia Phase Two Memorial, Appendix B.

### C. Newfoundland's "Inner Sector" Delimitation

125. Given the approach adopted in the Newfoundland and Labrador Phase Two Memorial, it is most convenient to consider the methods adopted, and their justifications, with reference to the separate "sectors" defined by Newfoundland.
126. In this section, the two segments of Newfoundland's proposed line in the area between Cabot Strait and the "closing line" drawn from Scatarie Island to Lamaline Shag Rock (off the Burin Peninsula) are analysed. As will be seen, it is the construction of the line in this area that allows Newfoundland to "set up" its excessive claim in the outer sectors of the boundary. In fact, it emerges that the methods adopted in the inner sector can only be understood by reference to their impact on the boundary as it runs to sea in the final, outer area.
127. The sector within the Gulf of St. Lawrence (to the West of Cabot Strait) which the parties agree is of lesser importance than the other boundary segments, is delimited by Newfoundland by means of a perpendicular to the "closing line" of the Strait, with no effect for St. Paul Island. This element of Newfoundland's proposed delimitation will be addressed, briefly, in a later section of this Counter-Memorial.

#### i. The Provisional Median Line In The Inner Sector

##### a) The Alleged Inequity Of Equidistance: Where's The Beef?

128. Newfoundland prefaces its treatment of the various practical methods of delimitation by declaring its intent to conduct an analysis of a "provisional equidistant line":<sup>116</sup>

While there is no legal presumption in favour of equidistance, the use of a provisional equidistant line as a first step in the analysis is an approach that has frequently been followed by international courts and tribunals, and that will be adopted for present purposes by Newfoundland and Labrador.

---

<sup>116</sup> Newfoundland Phase Two Memorial, paras. 167, 169.



...

Following this general approach, the present Chapter will begin with a consideration of a provisional equidistant line in order to determine if it produces an equitable result in this case.

129. The undertaking is further described, in some detail, a few paragraphs later:<sup>117</sup>

The construction of a provisional equidistant line is a straightforward mathematical exercise: this is what makes it possible to construct such a line on a purely provisional basis, without prejudging the issues in any way. An equidistant line is one on which every point is at an equal distance from the nearest points on the baselines on the coast of each party from which the breadth of the territorial sea, and of the 200 nautical mile limit and other relevant zones of jurisdiction, are measured. **The provisional line considered below has been constructed on the basis of this definition.**

(emphasis added)

130. Strangely, and, Nova Scotia submits, significantly, Newfoundland never shows the equidistance line that it promises to construct. Figure 14 of its Phase Two Memorial reveals only a portion of the equidistance line, in the outer sector, which Newfoundland has described as approximate, developed for “illustrative purposes”.<sup>118</sup>
131. Newfoundland’s Phase Two Memorial Figure 15 contains the only depiction of equidistance in the inner sector, showing what is purported to be the “combined effect of the French and Nova Scotian zones of jurisdiction under an equidistance scenario ...”.<sup>119</sup> In reality, however, this “scenario” does not illustrate an equidistance line as it would actually be drawn. Instead, the diagram depicts a **hypothetical** median line such as might have been drawn had the Court of Arbitration in the *St. Pierre and Miquelon Award* granted France the full extent of its claim. Indeed, in the southern segment of this farfetched scenario, Newfoundland does not even construct the line as promised (as a line “on which every point is at an equal distance from the nearest points on the baselines on the

---

<sup>117</sup> Newfoundland Phase Two Memorial, para. 175.

<sup>118</sup> Annex 217: Letter from D. Paquette, Deputy Agent for Newfoundland and Labrador to L. Y. Fortier, Agent for the Province of Nova Scotia (20 September 2001) at 2.

<sup>119</sup> Newfoundland Phase Two Memorial, para. 195.

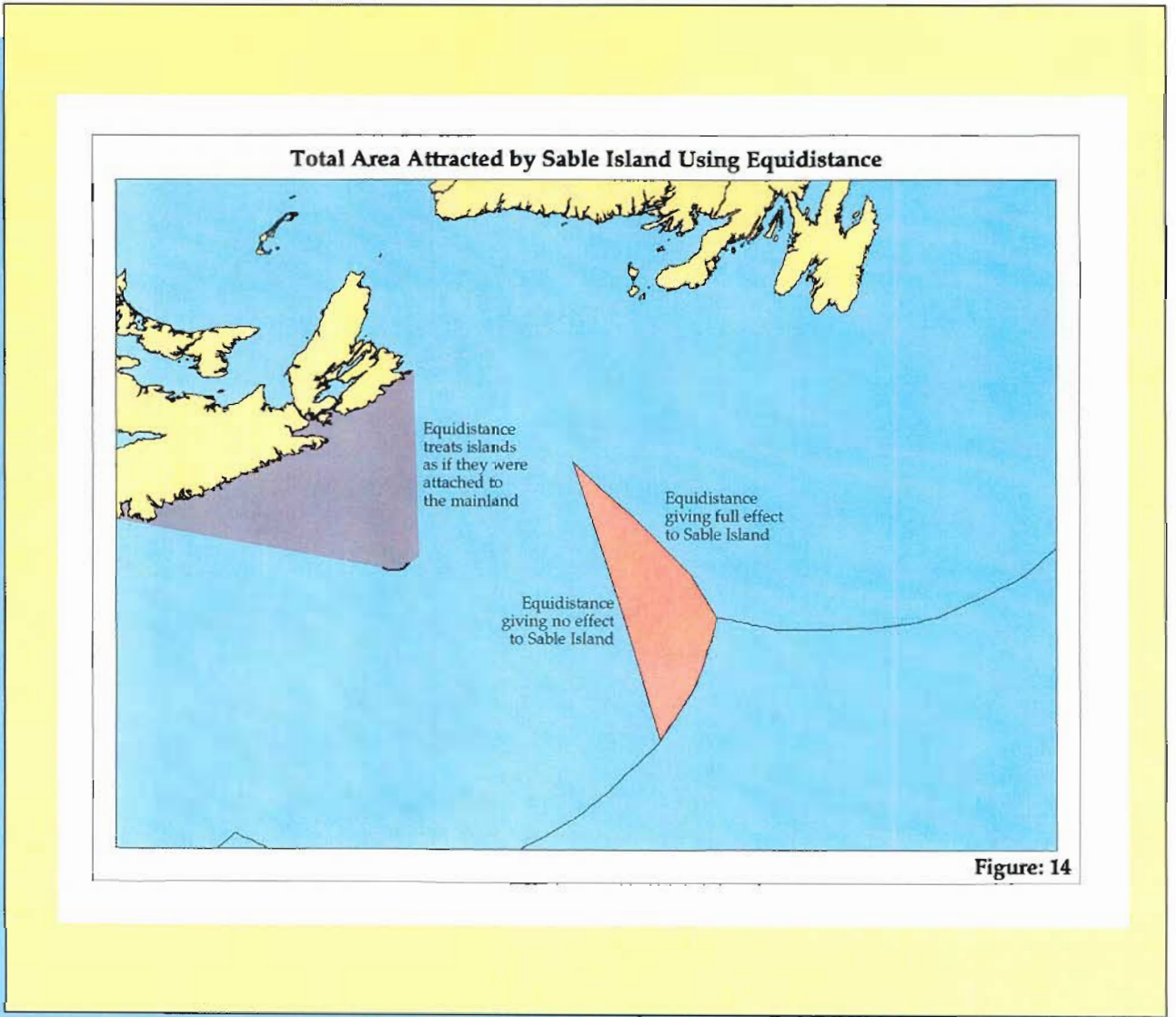
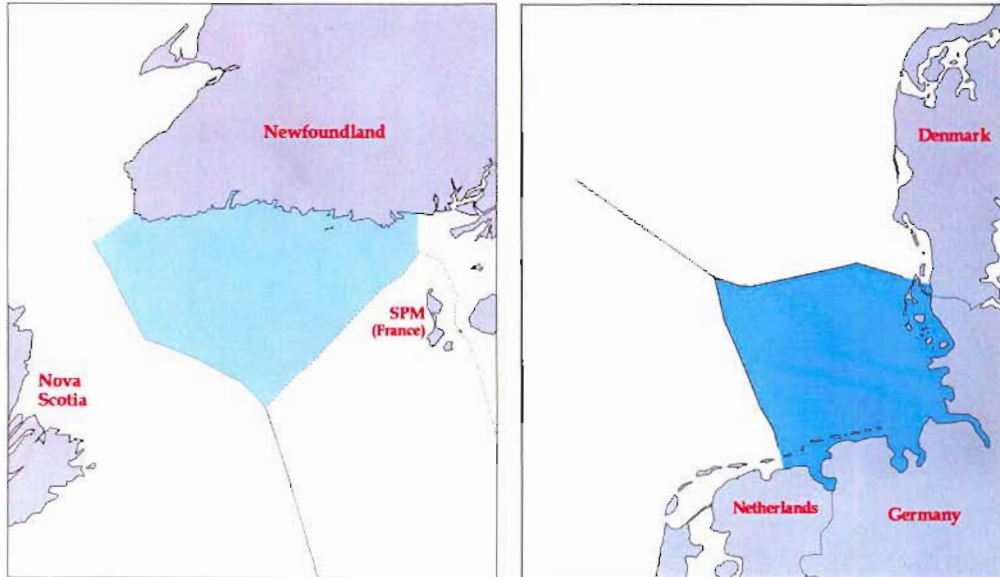


Figure: 14

(Newfoundland Figure 14: Total Area Attracted by Sable Island Using Equidistance)

**Cut-off Effects in Inner Concavity and the North Sea Using Equidistance**



The coast of Newfoundland between Cape Ray and the Burin Peninsula is squeezed between the jurisdictions of France and Nova Scotia, just as Germany was squeezed between Denmark and the Netherlands.

Based on *North Sea Cases*, [1969] I.C.J. Rep., following p. 15.

**Figure: 15**

(Newfoundland Figure 15: Cut-off Effects in Inner Concavity and the North Sea Using Equidistance)

coast of each party”),<sup>120</sup> but merely transposes to its diagram the French claim from the *St. Pierre and Miquelon Award*;<sup>121</sup> a claim which was, of course, rejected by the Court of Arbitration.

132. Notwithstanding that it never produces an accurate representation of the equidistance line in the inner sector, Newfoundland maintains that such a line would result in serious inequities.<sup>122</sup> Indeed, it is these alleged inequities that motivate Newfoundland's choice of two separate bisectors to delimit the inner sector of the boundary. But, since it omits even to construct an equidistance line, its purported analysis of this practical method of delimitation is, in the end, purely abstract. This omission is particularly glaring when it is remembered that, as demonstrated by Nova Scotia in its Phase Two Memorial (**Figure 53**),<sup>123</sup> the delimitation proposed by Nova Scotia – the existing delimitation – is essentially a **simplified median line** in the inner areas.

133. In the following paragraphs, the use of a median line in the inner sector is examined. The results obtained with both a rigorous and adjusted median line are contrasted with Newfoundland's contentions regarding the effect of equidistance in this geographical configuration, generally, and with the results obtained from Newfoundland's proposed line, specifically.

b) The Median Line In The Inner Sector

134. The rigorous median line in the inner sector, and the coastal basepoints from which it is derived, are depicted in **Figure 67**.<sup>124</sup> The line is extended North to the tri-junction point with Québec and South to 46° North latitude (beyond Newfoundland's closing lines at Cabot Strait and between Scatarie Island and Lamaline Shag Rock), so as to illustrate the overall context of the immediately

---

<sup>120</sup> Newfoundland Phase Two Memorial, para. 175.

<sup>121</sup> **Annex 217**: Letter from D. Paquette, Deputy Agent for Newfoundland and Labrador to L. Y. Fortier, Agent for the Province of Nova Scotia (20 September 2001) at 2.

<sup>122</sup> Newfoundland Phase Two Memorial, paras. 178, 182, 198.

<sup>123</sup> **Figure 53**: The Current Boundary vs. a Simplified Median Line.

<sup>124</sup> **Figure 67**: The Rigorous Median Line in the “Inner” Segment.

surrounding areas – areas which, in any event, fall within the zone of opposite coasts.<sup>125</sup>

135. This median line provides a useful and entirely reasonable basis for testing Newfoundland's assertions about the effect of equidistance in this region. It will be recalled that three issues are given particular prominence in Newfoundland's Phase Two Memorial:

- The alleged impact of St. Paul Island;
- The alleged effect of a combined coastal convexity (of Cape Breton Island) and coastal concavity (of Newfoundland); and
- A further concavity supposedly resulting from the combined effect of Cape Breton Island and St. Pierre and Miquelon.

c) The Impact Of St. Paul Island On A Median Line

136. Newfoundland's assertions regarding St. Paul Island, and its failure to note similar islands on the Newfoundland side of the line, have been addressed in the first section of this Part, and need not be revisited here. The central point regarding islands, as with any other geographic feature, is simply stated: islands are not inequitable *per se*, but rather must be shown to produce an inequitable effect before they will be given any special treatment.

137. The pertinent question with respect to St. Paul Island, then, concerns its practical impact on the median line – and that is perhaps the one question that Newfoundland avoids. Instead, it merely postulates an inequitable effect:<sup>126</sup>

Under the equidistance system, however, it [St. Paul Island] would have the effect of shifting the Nova Scotia landmass one quarter the way to Newfoundland. The inequity of such a disproportionate effect needs no elaboration. This is a case where the equidistance method would effectively “refashion geography” if it were applied.

---

<sup>125</sup> Nova Scotia Phase Two Memorial, pp. IV-70-71.

<sup>126</sup> Newfoundland Phase Two Memorial, para. 180.

138. Figure 68<sup>127</sup> shows the rigorous median line with full effect given to St. Paul Island, contrasted with the line giving no effect to the island, within the limits of the “inner sector” as defined by Newfoundland. As can readily be seen, the total maritime area generated by St. Paul Island within this sector is 637 km.<sup>2128</sup> Moreover, the geography of the area and the geometry of the median line are such that other controlling points along the parties’ coasts override the effect of the island quite quickly, with the result that St. Paul Island affects the line only for a distance of 74 km. The dire effects forecast by Newfoundland, such as the creation of “an unwarranted boost to Nova Scotia at the very beginning of the line”,<sup>129</sup> simply do not occur.

d) The Alleged Impact Of Convex And Concave Coasts

139. At the heart of Newfoundland’s pretensions regarding the inner sector is its claim of two distinct, though related, impacts allegedly resulting from the combined effect of coastal convexity and concavity. First, Newfoundland alleges that the “receding” coast of Newfoundland (running from West to East), coupled with the convex “salient” of the Cape Breton coast, combine to reduce the maritime area of Newfoundland.<sup>130</sup> Second, Newfoundland claims that the combined effect of the positions of St. Pierre and Miquelon and Cape Breton Island is to leave Newfoundland as a concave coast, restricted in its seaward projection. (In fact, Newfoundland has combined these two arguments to a great degree, but they are sufficiently distinct that they are best addressed separately.)

140. Newfoundland claims that as the equidistant line runs southwards in the inner sector, the “convex” shape of Cape Breton combined with the “recessed coast” of

---

<sup>127</sup> Figure 68: The Rigorous Median Line with Full vs No Effect for St. Paul Island.

<sup>128</sup> This diagram “closes off” the polygon between the no-effect and full-effect lines to the North with a straight line joining the two, in order to allow measurement of the area.

<sup>129</sup> Newfoundland Phase Two Memorial, para. 178.

<sup>130</sup> Newfoundland Phase Two Memorial, paras. 194, 197.

Newfoundland causes the line to veer towards Newfoundland to an unwarranted extent.<sup>131</sup>

Apart from the position of St Paul Island, there is nothing objectionable about the general course of an equidistant line in the vicinity of Cabot Strait. As it reaches the central portions of the inner concavity, however, it swings back toward the coast of Newfoundland, simultaneously pushed and pulled toward the Newfoundland coast—pushed outward by the protruding coasts of Cape Breton and Scatarie Island and pulled in toward Newfoundland by the controlling basepoints along its recessed coast in the deepest portion of the concavity.

141. Newfoundland does not demonstrate any of these effects, or depict the “controlling basepoints”, but rather leaves it to the reader’s imagination to conjure up the image evoked by its prose. In fact, as **Figure 67**<sup>132</sup> illustrates quite clearly, the equidistance line does not “swing back” toward Newfoundland to the East of Cabot Strait. What actually occurs is that the line first trends toward Cape Breton, reflecting the indentation (“concavity”; “recession”) in the Nova Scotia coast, and only then turns back toward Newfoundland. Even then, the effect is ameliorated by Newfoundland basepoints in the Ramca Islands and Colombier Island, and later by basepoints on the Burin Peninsula.
142. The overall course of the line, despite its shifts toward the coast of one party or the other, remains relatively constant around a central axis. It is neither pushed nor pulled unduly in any particular direction, nor is there any marked effect arising from the shape of Cape Breton Island, which Newfoundland describes excitedly as a “protruding, right-angled shape [which] forms a salient that thrusts the Nova Scotia coasts out toward the centre of the inner concavity”.<sup>133</sup> It is, in sum, a surprisingly regular line, without any of the dramatic effects suggested by Newfoundland’s evocative, but erroneous, descriptions.

---

<sup>131</sup> Newfoundland Phase Two Memorial, para. 194.

<sup>132</sup> **Figure 67: The Rigorous Median Line in the “Inner” Segment.**

<sup>133</sup> Newfoundland Phase Two Memorial, para. 197. Not surprisingly, Newfoundland’s coast, and presumably its proclivities (in the arbitration), are portrayed in softer, less forceful language – it is “almost exactly the opposite, receding as it approaches the deep indentation of Fortune Bay”.

143. As was shown in Nova Scotia's Phase Two Memorial, the current boundary line is essentially a simplified median line in this sector, and the degree of variance of the rigorous median line on either side of that straight line is negligible (see Figure 53).<sup>134</sup>
144. The basis of Newfoundland's errors is a fundamental misunderstanding of the nature of the coastal relationships in the region, and of the properties of a median line in a situation of opposite coasts. The first problem concerns the impact of a "receding" coast, as distinct from a "concave" coast. Newfoundland, in discussing its southern coast to the East of Cape Ray, mixes these two terms, referring to that coast both as receding and as concave.<sup>135</sup> But the coast is not, in fact, concave; it runs in a uniform direction as far as Fortune Bay, which in any event is neither a substantial feature nor one that has any negative impact on the median line (see Figure 67). Any optical impression of concavity is due to Burin Peninsula, but even with that feature the coast is most aptly described as **straight**, with a large protuberance at one end – most certainly not as concave.
145. As far as its recessive traits are concerned, to say that the South coast of Newfoundland "recedes", is to say that it recedes relative to Nova Scotia, in the sense that, as the Newfoundland coast runs in its easterly direction, it can be said to move away from the general Northeast–Southeast direction of the Nova Scotia coast on Cape Breton Island. By the same token, the Nova Scotia coast "recedes" from that of Newfoundland – which is to say no more than that the two coasts recede **from each other**.
146. Newfoundland goes on to state, but not to prove, that this recession creates inequitable effects for it. This untested hypothesis derives from the second error identified above, relating to the properties of a median line in the particular geographic circumstances of this case. Figure 69<sup>136</sup> shows, in schematic form, the

---

<sup>134</sup> Figure 53: The Current Boundary vs. a Simplified Median Line.

<sup>135</sup> See, for instance, Newfoundland Phase Two Memorial, paras. 53, 55, 197, 198.

<sup>136</sup> Figure 69: The Use of a Median Line in Situations of Receding Coasts Need Not Create Inequity where the Coasts Are Opposite.



impact of a median line in a situation of opposite coasts, where the coasts “recede” from each other. As one coast moves away from the parallel (to the extent that the parallel can be defined by a particular coast, with the other said to “move away”), the median line does indeed move with it. This does not, however, create any inequity. Rather, the recession results in a greater maritime area to be divided, and the shift in the median line merely maintains the equal division of the area.

147. In a context of adjacent coasts, of course, the situation is different and inequity may result from the use of an equidistance line. A receding adjacent coastline, though it may be quite substantial, will be given little or no effect, as the equidistance line is governed by the more prominent coastal points on the other coastline due to the orientation of the coasts. The eastern coast of Nova Scotia is in just such a disadvantaged situation, as has been acknowledged by Newfoundland.<sup>137</sup> Ironically, Newfoundland’s solution to the problem of receding coasts in a situation of adjacency, is to ignore the coasts altogether.<sup>138</sup>
148. Newfoundland relies on a related hypothesis when it claims that the use of the median line in the inner sector would result in a line that is inherently inequitable because of the difference in the parties’ respective coastal lengths:<sup>139</sup>

[T]he geometrical properties of the equidistance method will drive the boundary inexorably toward the middle of the closing line of the concavity, however great the disparity in the coastal relationship inside or beyond the concavity. Such a result is wrong, not only because it fails to reflect the geographical relationship in the area of the closing line, but—sometimes even more significantly—because it determines the trajectory of the line through the outer area on a basis that is inequitable and unsound.

149. When tested, this hypothesis proves unsound. To Newfoundland, the use of equidistance in a situation of differing coastal lengths may be suspect, but in fact,

---

<sup>137</sup> Newfoundland Phase Two Memorial, paras. 49, 190.

<sup>138</sup> Newfoundland Phase Two Memorial, paras. 39, 42-43 and Figure 3.

<sup>139</sup> Newfoundland Phase Two Memorial, para. 189.

as demonstrated in Figure 70,<sup>140</sup> its effect depends entirely on the particular coastal configuration. In many instances, the equidistance line may in fact reflect the differing coastal lengths by the dominance of the controlling points on the longer coast.

150. Newfoundland also ignores the fact that the median line, as it crosses the “closing line” constructed by it (between Scatarie Island and Lamaline Shag Rock) and heads to sea, is controlled by Colombier Island offshore Newfoundland, and, further Southeast, by the long protrusion of the Burin Peninsula.

e) The Alleged Concavity Created By St. Pierre And Cape Breton

151. One of the more cartographically creative arguments in the Newfoundland and Labrador Phase Two Memorial is the attempt to portray Newfoundland as trapped in a classical situation of concavity (as was Germany in the *North Sea Cases*) between the surrounding coasts of St. Pierre and Miquelon and Cape Breton Island.<sup>141</sup>

The problem at the heart of the *North Sea Cases* was the cut-off produced by equidistance in a situation where one state is caught at the back of a concavity between the protruding coasts of two other states, with the result that its zone would be restricted to a relatively small triangle, as illustrated by the sketches included in the decision. The combined effect of the French and Nova Scotian zones of jurisdiction under an equidistance scenario would lead to precisely the same phenomenon, and on a similar scale, compressing or “squeezing” the maritime entitlements of Newfoundland and Labrador into a relatively small triangle off this portion of its coast.

152. In the *North Sea Cases*, the Court was indeed confronted with this sort of problem. Specifically, it was required to resolve the issues arising from the use of equidistance lines in circumstances in which three adjacent States are situated along a single coast characterised by a distinct concavity, such that the coasts and maritime areas of the “middle” state (in that case, Germany, at the back of the concavity) are “squeezed” by those of its two neighbours. (see the sketch from the

---

<sup>140</sup> Figure 70: The Use of a Median Line between Coastlines of Different Lengths.

<sup>141</sup> Newfoundland Phase Two Memorial, para. 195 (footnote and figure reference omitted).

*North Sea Cases*, opposite). The same effect could potentially arise as between two adjacent States, such as Nova Scotia and Newfoundland and Labrador, for example, if one coastline receded significantly from the other. What is not clear, however, is why this effect should be of concern here, in the inner sector.

153. Newfoundland purports to illustrate its alleged disadvantage with the aid of its Figure 15, which is reproduced in (Nova Scotia) **Figure 71**.<sup>142</sup> Newfoundland's figure contains two blue polygons, one off Newfoundland and one drawn to reflect the situation in the *North Sea Cases*. It also contains the following caption:<sup>143</sup>

The coast of Newfoundland between Cape Ray and the Burin Peninsula is squeezed between the jurisdictions of France and Nova Scotia, just as Germany was squeezed between Denmark and the Netherlands.

154. In reality, there is no such "squeeze". In the diagram that purports to illustrate the circumstances of the present case (Newfoundland Figure 15a), Newfoundland has simply drawn and shaded a polygon that roughly matches the outlines of that found in the *North Sea Cases* (Newfoundland Figure 15b). Despite its claim to the contrary, though, it does so with absolutely no regard to the reality of the "jurisdictions" that it purports to depict. As discussed above, Newfoundland has simply ignored the *St. Pierre and Miquelon Award*, preferring to present, for the purpose of this arbitration, the French claim as though it represented the true "jurisdictional" line.<sup>144</sup> To state the obvious: France lost; the Court of Arbitration awarded it only a small belt around St. Pierre and Miquelon (as well as the corridor to the South).
155. Given its willingness to adopt the findings in the *St. Pierre and Miquelon Award* as authority for so much of its case, it is more than a little ironic that

---

<sup>142</sup> **Figure 71: The Alleged "Squeeze" of Newfoundland's Coast.**

<sup>143</sup> Newfoundland Phase Two Memorial, Figure 15: Cut-off Effects in Inner Concavity and the North Sea Using Equidistance.

<sup>144</sup> **Annex 217: Letter from D. Paquette, Deputy Agent for Newfoundland and Labrador to L. Y. Fortier, Agent for the Province of Nova Scotia (20 September 2001).**

- Newfoundland ignores the one aspect of that case regarding which there can be no doubt, having been settled definitively: the French zone around the islands.
156. A further example of Newfoundland's artistic licence is its depiction of the eastern and western "wings" of its supposedly concave coast (lines a-b and c-d on Map B of **Figure 71**). As mentioned, these are drawn to resemble the similar lines in the *North Sea Cases* diagram. Yet, in the *North Sea Cases*, the "wings" represented the actual equidistance lines that would result from those coasts. In Newfoundland's drawing of the present situation, they are lines over open water that do not mark the limit between Newfoundland and any other jurisdiction, and that represent nothing more than Newfoundland's wish to show a coloured area with the same general shape as that in the *North Sea Cases* diagram.
157. **Figure 71** includes a "corrected" version of Newfoundland's Figure 15, with an indication of where the true equidistance line would lie, given the actual decision in the *St. Pierre and Miquelon Award*, with the artificial lateral limits of Newfoundland's waters removed. It should be noted that this line is approximate, in the light of the poor detail provided by the Newfoundland sketch and its erasure of an important feature forming part of Nova Scotia's geography, St. Paul Island (once again).<sup>145</sup>
158. Newfoundland acknowledges that the *St. Pierre and Miquelon Award* removed any possibility that the hypothetical boundary line could ever come into existence, but it still goes on to claim that the "concavity" effect persists, due to the impact on its coast of the coast of Cape Breton Island:<sup>146</sup>

The Court of Arbitration was obviously powerless to address the other half of the problem. This is the cut-off created from the other side of the configuration by the coasts of Cape Breton Island, causing the equidistant line to swing directly across the coastal front of southwestern Newfoundland.

---

<sup>145</sup> Newfoundland Phase Two Memorial, Figure 14: Total Area Attracted by Sable Island Using Equidistance; Transcript of Oral Argument, March 13, 2001, p. 296.

<sup>146</sup> Newfoundland Phase Two Memorial, para. 196.

159. This claim, however, is no more accurate than Newfoundland's diagram. The median line does not "swing directly across the coastal front of southwestern Newfoundland", which would imply a nearly parallel relationship between the relevant coasts of the parties. In fact, the angle formed by the intersection of the median line (the average trajectory of which is very nearly 135°) and the general direction of the coast of Newfoundland, as defined in its Phase Two Memorial, is approximately 40°. By contrast, the first bisector line proposed by Newfoundland is at an angle of 29° to the coastal direction line – clearly, "swinging across" the Newfoundland coast to a greater degree than the median line.<sup>147</sup>

f) Comparing The Results Of The Median Line And The Newfoundland Line

160. In the end, checking the effect of the median line in the inner sector requires drawing that line and assessing the allocation of maritime space that results. As already mentioned, Newfoundland does not perform this obvious step. If it had, it would have quickly discovered that the median line delivers a result that is very similar to that obtained with the line proposed by Newfoundland for this sector – a line which Newfoundland presumably views as equitable.

161. **Figure 72**<sup>148</sup> shows the total allocation of maritime areas between the parties in the inner sector (adopting for the sake of argument the inner polygon defined by Newfoundland), as effected by: the rigorous median line; the line proposed by Newfoundland; and the existing boundary. The results are telling. The rigorous median line allocates to Newfoundland only 544 km.<sup>2</sup> less than would the Newfoundland proposed line. The existing boundary, which is effectively a simplified median line, provides a similar result: Newfoundland is allocated only 1120 km.<sup>2</sup> less than it would receive by applying its proposed line, and further areas are "traded off" between the parties if the line is continued South to 46°N.<sup>149</sup>

<sup>147</sup> See Newfoundland Phase Two Memorial, Figure 17, where the bisector is set at 123.9°.

<sup>148</sup> **Figure 72: "Inner Sector" Maritime Area Allocations.**

<sup>149</sup> See **Figure 53: The Current Boundary vs. a Simplified Median Line.**

162. In sum, even by its own measure of equity, Newfoundland cannot demonstrate any inequity from the use of either the rigorous median line or the existing simplified median line in this sector. The nominal differences noted in the preceding paragraph are hardly of significant magnitude, and bear no relationship to Newfoundland's sonorous claims regarding the dire effects of the median line. If Newfoundland's proposed line is equitable, then so is the median line, or its simplified version.

**ii. Newfoundland's Proposed Lines In The Inner Sector**

163. The boundary proposed by Newfoundland in the inner sector is divided into two segments: a bisector of general coastal directions; and a bisector of specific coastal directions.

a) The Bisector In The Area Of Cabot Strait: A Means To An End

164. In the first part of this segment, Newfoundland establishes two coastal direction lines, one on the East coast of Cape Breton Island and one on the opposite, South coast of Newfoundland, running East from Cape Ray. The angles of these lines are bisected, and the resulting bisector is applied to run from a starting point mid-way between Money Point (Nova Scotia) and Cape Ray (Newfoundland), giving no effect to St. Paul Island.

165. The use of a bisector in this area would not, in itself, raise any serious difficulties, in that a bisector may produce an effect similar to a median line, but with smaller coastal features discounted. In Newfoundland's proposal, however, St. Paul Island is not discounted, but excluded, which is completely unjustified given the size and significance of that island.

166. More significant is the observation that the bisector, even with the removal of St. Paul Island, is less favourable to Newfoundland in this segment than either the median line or the existing boundary. Barring a sudden burst of generosity on the part of Newfoundland, this raises the question of why Newfoundland would not

simply opt for the median line, especially in the light of its position that such a line would, *prima facie* at least, deliver an equitable result in an area of opposite coasts.

167. The answer is clear. If Newfoundland committed to the median line in this portion of the boundary in the inner sector, it would have been difficult for it to justify the sudden change in both method and direction of the line in the next portion, and in particular the radical shift to the South and West that is so vital to Newfoundland's further claims (see below).

168. In the final analysis, the use of the bisector in this area is significant not for what it accomplishes in that sector of the boundary, but for what it contributes to Newfoundland's claim in the outer sectors.

b) The Termination Of The First Bisector And The New "Coastal Front"

169. Newfoundland asserts that a new "coastal front" becomes dominant on its coast, part way through the inner sector, requiring a shift in the direction of the boundary line toward the South:<sup>150</sup>

This turn to the south is a necessary implication of the framework of coastal fronts adopted in *Canada v. France*. On the Newfoundland side there is not one but two coastal fronts framing the concavity, and both must be given their effect at the appropriate points along the delimitation. The long coastal front from Cape Ray to Connaigre Head should control the first segment of the line ... At Connaigre Head, however, a new coastal front comes into play. The general direction of the Newfoundland coast turns sharply to the south in the area of Fortune Bay, crossing that Bay to meet the headland of the Burin Peninsula at Lamaline-Shag Rock, where the coastline resumes its broadly east-west orientation in its final segment ending at Cape Race.

170. The inapplicability of whatever "framework" Newfoundland claims to have identified in the *St. Pierre and Miquelon Award*, and the fact that there are no "necessary implications" to be drawn from that decision, have been amply demonstrated. The more basic flaw in Newfoundland's argument is that, were it

---

<sup>150</sup> Newfoundland Phase Two Memorial, para. 220 (figure reference omitted).

not for Newfoundland's maps and figures, coupled with its earnest directions, it is inconceivable that any reasonable observer would have discovered this new coastal front, nor assigned it the importance that it seems to have.

*The Alleged Turn To The South At Connaigre Head*

171. Figure 73<sup>151</sup> depicts the Newfoundland coastline in the vicinity of Connaigre Head, a feature which, it must be stressed, is but one point chosen along a coastline that runs to the mouth of Fortune Bay at Boxey Point. Contrary to Newfoundland's assertion, there is no "turn", sharp or otherwise, at Connaigre Head.<sup>152</sup> The coastline continues in the same general direction to Boxey Point, and, eventually, back up the northern coast of the Burin Peninsula, but these coastlines do not suit Newfoundland's requirements.
172. In fact, the relevance of Connaigre Head has nothing to do with the feature itself, but with the presence there of an offshore island, Brunette Island, from which Newfoundland draws a line across Fortune Bay (and across the landmass of the Burin Peninsula) to Lamaline Shag Rock, presumably according to the general rules on closure of bays.<sup>153</sup> The reason for this line and its ramifications in Newfoundland's proposed delimitation are examined below.

*The Connaigre Head-Lamaline Shag Rock Line*

173. Newfoundland asserts that its line drawn South from Connaigre Head crosses Fortune Bay "to meet the headland of the Burin Peninsula at Lamaline-Shag Rock".<sup>154</sup> In fact, as shown in **Figure 73**, the line "meets" the Burin Peninsula not at Lamaline Shag Rock, which is on the opposite side of the Peninsula, but at Fortune Head on its northern side. Further, neither of these points is the "headland" of the Peninsula.

---

<sup>151</sup> **Figure 73: "Sharp Turn" to the Right at Connaigre Head?**

<sup>152</sup> Newfoundland Phase Two Memorial, paras. 40, 220.

<sup>153</sup> **Annex 186: LOS 1982, supra** Part II, note 2, art. 10.

<sup>154</sup> Newfoundland Phase Two Memorial, para. 220.



174. It is unclear why Newfoundland has chosen to adopt this line. A line joining Connaigre Head and the headland of the Burin Peninsula may have too obviously “faced” back into the inner sector, rather than toward the area that Newfoundland wishes that so-called “coast” to affect, or it may be that such a line would have violated the 24 nautical mile limit on bay closing lines. Perhaps it is an attempt to avoid the strange impression that would otherwise be created by a “coast” that is almost entirely water – which would result if the line terminated where it actually “meets” the Burin Peninsula. In any event, it is clear that Newfoundland includes the total length of the line – including the portion crossing the land mass of the Burin Peninsula – as part of its second, new “coastal front” in the area.

*The “Projection” Of The “Coastal Front”*

175. Even if it were accepted that a new coastal front has somehow appeared between Connaigre Head and the Burin Peninsula, its use by Newfoundland would still be wholly inappropriate. **Figure 74**<sup>155</sup> illustrates the application of Newfoundland’s unidirectional, perpendicular theory of coastal projection to the “coast” between Connaigre and the Burin Peninsula. It is obvious that only by stretching the line South, to Lamaline Shag Rock, does this “coast” become relevant for Newfoundland’s purposes, since only then can it be said to “project” into the target area at the southeastern end of the inner sector.

176. More fundamental is the question of how this so-called coast “projects” through the **land mass** of St. Pierre and Miquelon. According to Newfoundland, frontal projection is based on the **seaward** projection of coasts. This concept cannot rationally be construed to involve, as it does here, a projection seaward for a few miles, followed by projection over a foreign land-mass, followed by a further seaward projection.

177. Projection through or over waters within the jurisdiction of another State may still be “seaward projection”, but nothing suggests that the term “seaward” includes

---

<sup>155</sup> **Figure 74: Lamaline Shag Rock Is Not the Headland of the Burin Peninsula.**

“over land”. The remarkable course that the projection of Newfoundland’s alleged coastal front must take – toward, around and then past St. Pierre and Miquelon – in order to have the “relevance” claimed for it by Newfoundland, is depicted in **Figure 75** entitled “The Impact of Newfoundland’s Artificial “Coastal Front” between Connaigre Head and Lamaline Shag Rock”.

c) The Westward Shift Along The “Closing Line”

178. The final step in Newfoundland’s proposed delimitation of the inner sector involves the shift toward Nova Scotia of the point along the Scatarie Island – Lamaline Shag Rock closing line which serves as the starting point both for the second bisector in the inner sector, and for the perpendicular line in the outer sector. In establishing this point, Newfoundland, having assessed the relevant inner coasts as 173.6 nautical miles for Newfoundland and 71.5 nautical miles for Nova Scotia (a ratio of 2.42 : 1), claims to make the “adjustment” required so that the point is situated at a location along the closing line that “corresponds to that ratio”. The result is to move the point 34.6 nautical miles, or 64 km., closer to Nova Scotia.
179. Several flaws are apparent in this exercise. First, the disproportion in coastal lengths is not as significant as Newfoundland has alleged.<sup>156</sup> If Newfoundland’s theory of relevant coasts is applied, then only those coasts that project frontally, or “face”, toward a maritime area are relevant, and all others must be excluded. In the inner sector, this would exclude: the coasts that have already been “used” in the delimitation of the territorial sea with France; the entire northern coast of the Burin Peninsula; as well as any areas that “project” through the land mass of St. Pierre and Miquelon. This would significantly reduce the relevant Newfoundland coast and change the resulting ratio.

---

<sup>156</sup> If the methods, which are based on the same theory, are to be adopted, then consistency demands that the same approach to coastal measurement be applied. Nova Scotia adopted a very similar definition of the coastal lengths to that advanced by Newfoundland, but that was based on a consistent approach that defined as relevant all coasts that could generate maritime space under the formulae provided in Article 76, and is only applicable under that approach.

180. Second, Newfoundland never attempts to prove that the division of maritime areas in the inner sector by a provisional median line is so at variance with the ratio of coastal lengths as to require any shift. At law, the question to be determined, before any change is made to a provisional line, is whether the maritime areas allocated to the parties by a particular method are roughly proportional to their coastal lengths – or, more properly, whether the allocation causes a significant disproportion.<sup>157</sup> The concept of proportion/disproportion is based on the **comparison** of the parties' respective maritime areas to their respective coastal lengths. Merely stating that there is a disparity in one element – such as coastal lengths – as Newfoundland has done, says nothing about the existence of any disproportion of result.

181. In certain circumstances, such as where the definition of the relevant area is so open to speculation as to be meaningless, it may be justifiable to dispense with comparisons of the maritime area with the coasts, and to rely on coastal length variations alone.<sup>158</sup> In the present case, however, Newfoundland has defined the inner sector with a closed polygon, and the area is easily susceptible of accurate measurement. As is shown above, the use of simplified equidistance – such as the existing boundary – in the inner sector, with no shift to account for differing coastal lengths, does **not** result in any significant disproportion, or indeed in any significant difference from the line proposed by Newfoundland. In short, the circumstances simply do not warrant any shift, since there is no disproportion to correct.

d) The Use Of The Inner Sector To Manipulate The Result In The Outer Sector

182. The impact of the “adjustment” of Newfoundland’s proposed inner sector line on the delimitation of the inner sector itself is minor. Its impact on the **outer sector**, in which Newfoundland would ask the Tribunal to draw a perpendicular

---

<sup>157</sup> Annex 190: *Anglo-French Award*, *supra*, note 50 at 67-68.

<sup>158</sup> Annex 187: *Libya/Malta*, *supra* Part II, note 9 at 53, 55; see Nova Scotia Phase Two Memorial, pp.V-19-20.

commencing from the starting point so “adjusted”, is an entirely different matter. Newfoundland’s “64 km. adjustment” is magnified across the entire length of the line, to the outer edge of the continental margin (approximately 696 km.<sup>159</sup>), resulting in yet another windfall for Newfoundland, this time of an area measuring 44,544 km.<sup>2</sup> This area, resulting from the use of a method supposedly justified by a disproportion in the inner sector, is in fact **greater than the total area in the inner sector** as defined by Newfoundland.

183. Newfoundland itself acknowledges that it has adjusted the line in the final portion of the inner sector in part because of “its decisive influence upon the division of the outer area”:<sup>160</sup>

Although—as the Chamber [in *Gulf of Maine*] observed—every case is unique, the parallels with the present case are significant. Here there is also a notable disparity of coastal lengths, considerably greater than that identified in *Gulf of Maine*. This is also a case that involves a large coastal concavity and an outer area. And here too the point at which the line emerges from the concavity is important not only in its own right, but in its decisive influence upon the division of the outer area.

184. This argument, however, is both factually and legally flawed, and it ignores important distinctions between the *Gulf of Maine* case and the present arbitration.
185. To begin with, Newfoundland postulates, but once more fails to demonstrate, a disproportion in need of correction in the outer sector. Again, “disproportion” requires a comparison of coastal lengths and maritime areas, and not just an assessment of only one factor in the equation. Furthermore, any alleged disparity in coastal lengths is rooted entirely in Newfoundland’s faulty and self-serving definition of the relevant Nova Scotia coasts.
186. More generally, the logic of using the ratio of coastal lengths in the inner sector to adjust a disproportion between coastal lengths and maritime areas in the outer sector – even if such a disproportion existed, which it does not – is highly suspect.

---

<sup>159</sup> According to the estimated outer edge of the margin as calculated in Nova Scotia Phase Two Memorial, Appendix B.

<sup>160</sup> Newfoundland Phase Two Memorial, para. 226.

This point was made by the Court of Arbitration in the *Anglo-French Award*, in response to France's attempt to use the coasts in the Channel to define the boundary in the open Atlantic:<sup>161</sup>

It is not, therefore, obvious how or why the coasts within the Channel should ... acquire an absolute relevance in determining the course of the boundary itself in the Atlantic region. Nor is this inconsistency removed by invoking an alleged principle of proportionality by reference to length of coastlines: for the use of the Channel, rather than the Atlantic, coastlines is still left unexplained.

187. Newfoundland, as noted, relies primarily on the *Gulf of Maine* decision to support its use of inner coasts to adjust the outer line. But in the *Gulf of Maine* case, the Chamber had decided that only the "inner" coasts (as far as Nantucket in the United States, and Cape Sable in Canada), were relevant to the delimitation.<sup>162</sup> As was shown above, the exclusion of the outer coasts in that case had some justification, given the relatively small area outside the Gulf that stood to be delimited and the close relationship of the inner coasts to that maritime area.
188. Here, by contrast, there is no such easy distinction to be made between supposedly inner and outer coasts, and the outer areas subject to delimitation are massive, however they are defined – they comprise by far the largest part of the parties' offshore areas to be divided by the boundary. Newfoundland, of course, wishes to have its entire southern coast as far as Cape Race included as relevant, and even concedes that some of Nova Scotia's outer coast is relevant. The basic rationale for the Chamber's approach to this issue in the *Gulf of Maine* decision, therefore, is absent from this case.
189. Furthermore, the Chamber based much of its justification for the adjustment on the fact that the "back of the Gulf", a coastline of critical relevance to the delimitation of the outer sector, was occupied entirely by the United States, with the land boundary between the parties situated far to the North.<sup>163</sup> To allow the

---

<sup>161</sup> Annex 190: *Anglo-French Award*, *supra* note 50 at 122.

<sup>162</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 268, 270.

<sup>163</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 334.

protruding Nova Scotia coast effectively to neutralize this fact was seen as inequitable, and provided the Chamber with an important additional reason to make an adjustment in the line.<sup>164</sup> No similar problem with respect to the division of the “backing” coast exists in this case, and there is no analogy here to the relationship between the coasts of Nova Scotia and Maine identified by the Chamber in the *Gulf of Maine* case.

190. It should also be noted that the Chamber in the *Gulf of Maine* case was prepared to give partial effect to Seal Island in defining the median line, and to allow that effect to transfer across the length of the perpendicular line.<sup>165</sup> Newfoundland offers no explanation for its failure to adjust its inner line – and thus the perpendicular – to give effect to St. Paul Island.
191. In any event, Newfoundland has misapplied the approach adopted by the Chamber in the *Gulf of Maine* decision. The Chamber found that the line “outside and over against the Gulf” should “follow or continue the line drawn within the Gulf by reference to the particular characteristics of its coasts”.<sup>166</sup> And the inner lines were drawn with reference to the macro-geographical context of the Gulf as determined by the Chamber, and in particular its overall “rectilinear” shape, with the backing coast occupied by the United States and the wings formed by Massachusetts and part of Nova Scotia.<sup>167</sup>
192. Newfoundland, by contrast, has connected the inner coasts to the orientation of the outer line by reference to a very small section of very dubious coast – the “new” section it creates between Connaigre Head and Lamaline Shag Rock. If the approach in the *Gulf of Maine* case were to be applied properly, the bisector that forms the first part of Newfoundland’s inner line would continue, without shift, into the outer sector. This line reflects the **overall configuration** of the coasts in the inner sector (coasts that do not suddenly “turn” South at Connaigre Head), far

---

<sup>164</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 335.

<sup>165</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 337.

<sup>166</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 338.

<sup>167</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 330-335.

more than the short, "adjusted" second bisector created by Newfoundland so as to drive its claim southward.

#### D. Newfoundland's Proposed Outer Sector Line

193. Newfoundland's proposed delimitation of the outer sector of the boundary is based on a perpendicular to the "closing line" that it has constructed from Scatarie Island to Lamaline Shag Rock. This method results in a single straight line running approximately 696 km. to the outer edge of the continental shelf. For all practical purposes, though, as Newfoundland acknowledges,<sup>168</sup> this straight line is even longer, effectively commencing at the intersection of the first two bisector lines, just a few kilometres from point 2017, the starting-point of the outer segment of the existing boundary.

194. Newfoundland argues that its perpendicular line offers ideal benefits in the circumstances of this case, benefits associated with its constant, straightforward nature:<sup>169</sup>

A perpendicular line, by its very nature, does not veer or swing in either direction but heads straight out to sea on a constant course. It is thus ideally suited to the avoidance of any effect of cut-off.

195. This depends, of course, on the azimuth of the perpendicular, and what base line it is drawn from; but the general point that a perpendicular, properly drawn, gives the benefits of a unidirectional line in seaward portions is correct. Exactly the same can be said, of course, about the existing line, which also uses a constant azimuth. Here, however, Newfoundland describes the method in less wholesome terms.<sup>170</sup>

It is simply an indefinite extension of the last segment of the line outside Cabot Strait, projected blindly into the outer area over vast distances to the edge of the continental shelf.

---

<sup>168</sup> Newfoundland Phase Two Memorial, para. 241.

<sup>169</sup> Newfoundland Phase Two Memorial, para. 157.

<sup>170</sup> Newfoundland Phase Two Memorial, para. 166.

196. “Projecting blindly” or “heading straight” out to sea; “extending indefinitely” or running “constantly” to the edge of the continental margin – it is not entirely clear what the differences are between the two. The fact is that both parties have proposed lines of constant azimuth to delimit the outer sector. The perpendicular has no *a priori* claim to “ideal” status, as its equitability depends on the context in which it is used, and even more so on the result that it delivers.

i. **Newfoundland Over-States The Status Of The Perpendicular Method**

197. Newfoundland’s authority for the use of a perpendicular extends to the *Grisbadarna Case*, *Tunisia/Libya*, and *Guinea–Guinea-Bissau* cases. Both the *Grisbadarna Case* and the *Guinea–Guinea-Bissau* case involved perpendiculars to the coast, however, not to an arbitrary “closing line”, and in the case of the *Guinea–Guinea-Bissau* decision, the perpendicular was applied to a very long coast, reflecting the macrogeographical situation.<sup>171</sup> Furthermore, as shown above, the appropriateness of the perpendicular in the *Grisbadarna Case* was in large part connected to the matter of resource use and location, and to the past conduct of the parties – both of which have been rejected by Newfoundland as potential factors in this case. In the *Tunisia/Libya* case, it has been shown that the perpendicular played only a secondary, supporting role in the delimitation, and in any event the Court explicitly noted that a line based on a perpendicular to the coast becomes less appropriate the farther seaward it runs.<sup>172</sup>

198. None of these cases stand as authority for the use of a perpendicular running several hundred kilometres seaward from an inner sector closing line. For this, Newfoundland refers first, to state practice, and second, to the *Gulf of Maine* decision.

199. With respect to practice, Newfoundland contends that “a line running perpendicular to the closing line of the inner concavity would be consistent with a

---

<sup>171</sup> Annex 191: *Guinea–Guinea-Bissau*, *supra* Part II, note 82 at 683-85.

<sup>172</sup> Annex 189: *Tunisia/Libya*, *supra* Part II, note 9 at 87-88.



considerable body of practice...”,<sup>173</sup> but it offers not one citation to this “body of practice” (Nova Scotia will respond to whatever evidence in this regard may be adduced by Newfoundland).

200. For the rest, Newfoundland relies entirely on the *Gulf of Maine* decision, which it refers to as the “the classic example of a perpendicular to a closing line”.<sup>174</sup> More accurately, it is the **only** example in the jurisprudence, and it was used for reasons that are peculiar to that case. As will be shown below, the circumstances that were present in the *Gulf of Maine* case, and which justified the use of a perpendicular to the closing line, are not replicated here.

ii. **The Adoption Of The Perpendicular In The *Gulf Of Maine* Case**

a) The Geographical Context Of the Gulf of Maine

201. The perpendicular line in the outer sector of the Gulf of Maine delimitation was adopted for reasons that are inapplicable to the present arbitration. Perhaps the most significant of these distinctions is the particular geographical configuration of the Gulf of Maine. The Chamber itself highlighted the fact that, outside the Gulf, there was “no point of reference ... that can serve as a basis for carrying out the final operation required.”<sup>175</sup> This referred both to the abrupt change in direction of the coasts outside the Gulf and to the limited areas of potential overlapping claims which could relate to the so-called outer coasts, given the limitations on the relevant area imposed by the agreed “terminal triangle”.

202. The same cannot be said of the present case. The much greater scope of the parties’ overlapping claims engages coasts well outside the inner sector, and there is no limitation imposed on those claims, as there was in the *Gulf of Maine* case (by virtue of both the 200 nautical mile limit and the “triangle”). These outer coasts must be assessed in their own right, as adjacent coasts affecting claims well

---

<sup>173</sup> Newfoundland Phase Two Memorial, para. 171.

<sup>174</sup> Newfoundland Phase Two Memorial, para. 159.

<sup>175</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 337.

to seaward, with the consequence that the affected maritime areas are not simply adjuncts to the inner area.

203. The Chamber in the *Gulf of Maine* case additionally emphasized that the closing line of the Gulf – to which the perpendicular in the outer area was drawn – was both agreed by the parties<sup>176</sup> and essentially parallel to the critical coast at the “back” of the Gulf.<sup>177</sup>

The direction of the closing line of the Gulf, with which the line would form a right angle, corresponds generally to the direction of the coastline at the back of the Gulf...

204. The perpendicular to the closing line, then, was supported by the fact that it was also perpendicular to the coastline in the inner sector. Not so in this case, where a reflection of the inner coasts would require the use of a bisector to the directions of the two parties' coasts – a line that would be far less favourable to Newfoundland. The Scatarie Island–Lamaline Shag Rock closing line drawn by Newfoundland reflects no actual coast. Indeed, what the Chamber saw as one of the conditions for use of a coastal direction for a perpendicular line is simply not present here:<sup>178</sup>

It is almost an essential condition for the use of such a method in a specific case that the boundary to be drawn in a particular case should concern two countries whose territories lie successively along a more or less rectilinear coast, for a certain distance at least. The ideal case, so to speak, would be one in which the course of the line would leave an angle of 90° on either side.

205. In addition to the failure of the “closing line” proposed by Newfoundland to correspond with any coastline, it should also be noted that Newfoundland has drawn this line by a method that is incompatible with that applied in the *Gulf of Maine* case. The Chamber drew the closing line between the last points on the “inner” coasts that faced each other in a relationship of oppositeness.<sup>179</sup>

---

<sup>176</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 270.

<sup>177</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 338.

<sup>178</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 320.

<sup>179</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 331.

Newfoundland has joined a point on the inner coast of Nova Scotia, at Scatarie Island, with a point on a rock (Lamaline) to the South of Burin Peninsula, clearly on Newfoundland's outer coast.

206. This may be the reason why Newfoundland has attempted to have Lamaline Shag Rock included as an element of the coastal direction running South from Connaigre Head, but the result is that the line from Scatarie Island "intersects" the Newfoundland coast only obliquely (see Newfoundland Figure 2). If any of the truly "opposite" points on the actual Newfoundland inner coasts were used, the closing line would be shifted considerably toward the North – toward Newfoundland – directing the resulting perpendicular away from Nova Scotia. Rather than use a closing line dictated by geography, then, and accepting the consequences, Newfoundland has elected to draw a line that is convenient but unconnected to any principle or to the geographic circumstances of this case.
207. A final point respecting the use of the perpendicular in the geographical context of the *Gulf of Maine* case concerns the potential impact of the method. As was shown above, one of the dangers of a perpendicular is that minor changes in direction at the beginning of the line are magnified as the line runs seaward. In the *Gulf of Maine* case, that difficulty was mitigated by the combined effect of the relatively short length of the line and the existence of the triangle as a predetermined terminal area. In essence, once the boundary in the middle sector, up to the closing line, was determined, the range of variance in the direction of the outer line was constrained. (see Figure 66).<sup>180</sup> The end result was that the line was approximately 273 km. in length. In the present case, Newfoundland's perpendicular would run approximately 694 km., to the outer edge of the continental margin, unrestricted by any agreed location for its end-point.

---

<sup>180</sup> Figure 66: The Perpendicular in the *Gulf of Maine* Case.



(Newfoundland Figure 2: The Inner Concavity and the Outer Area)

b) Further Justifications For The Perpendicular In The *Gulf Of Maine* Case

208. Newfoundland also neglects to mention that, in considering the appropriateness of the perpendicular method in the Gulf of Maine region, the Chamber took account of factors beyond the mere existence of the closing line. The most important of these was the correlation between the orientation of the perpendicular and the lines advocated by the parties:<sup>181</sup>

The orientation of the final segment of the line proposed by the Chamber is therefore practically the same as the orientation given by the two Parties to the final portion of the lines they respectively envisaged. Hence the Chamber can see no reason for adopting a different orientation.

209. There is, of course, no similar consensus regarding the line proposed by Newfoundland in this arbitration. Furthermore, none of Newfoundland's claimed or suggested lines, prior to this dispute, ever adopted a directional orientation, let alone a westward placement, anywhere near the perpendicular that it now envisages.<sup>182</sup>

210. The Chamber also made explicit reference to the fact that the proposed line provided a reasonable division both of the fishery resources of Georges Bank and of the prospective hydrocarbon potential of the area.<sup>183</sup> Newfoundland ignores this facet of the *Gulf of Maine* decision, perhaps because, as will be shown below with respect to the equity of the result, the perpendicular that it proposes has exactly the opposite effect to that applied by the Chamber.

iii. **Summary And Conclusion**

211. Perpendicular lines can provide an effective method of delimitation, if properly used. Newfoundland's proposed line, however, is deficient in a number of

---

<sup>181</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 338.

<sup>182</sup> The two main examples of Newfoundland's unilateral indications of alternate lines are the letter from Minister Doody of October 6, 1972, and the *Newfoundland and Labrador Petroleum Regulations, 1977*, No. 23/77 (Newfoundland Statutory Instruments # 6). As will be discussed in Part IV below, neither advanced anything like the line now proposed by Newfoundland.

<sup>183</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 342-343.

respects. To begin with, in the present case there exist relevant coasts in the outer section, unlike in the *Gulf of Maine* case, so that the perpendicular method is not required. In addition, the closing line, the direction of which is the sole determinant of the course of the perpendicular in the outer area, is not based on a parallel to some actual inner coast, but on two subjectively-defined end-points. Nor are these end-points the last points that would determine an outer equidistance line, as in the *Gulf of Maine* case. Instead, they have been chosen by Newfoundland specifically for their favourable effect.

212. A perpendicular to a valid (and extended) general direction of the coast essentially mimics the effect of equidistance in an adjacency situation, but removes the impact of smaller features. What Newfoundland has done, however, is to draw a perpendicular based on its choice of two points. As such, the perpendicular (without further adjustment) would simply be an equidistance line drawn, not to the points determined by that method, but chosen by the drafter.
213. Newfoundland provides the following critique of a rigorous equidistant line in a situation of adjacency:<sup>184</sup>
- An equidistant line extending into the open sea off two adjacent coasts is generally controlled by a single pair of basepoints, sometimes causing the line to veer inequitably towards the coast of one of the two parties.
214. It is difficult to comprehend how this deficiency is remedied when two “incidental” points (i.e. the end-points of Newfoundland’s proposed closing line) are carefully chosen, rather than generated according to objective criteria, and the perpendicular line is drawn with reference only to those points. As applied by Newfoundland, the choice of points dictates the line.
215. Newfoundland, of course, goes one step further. Evidently dissatisfied with the maritime area provided by its tailor-made perpendicular, it has shifted the line even further to the West, toward Nova Scotia, on the basis of an alleged disproportion in the “inner coasts”. This, however, only highlights the degree to

---

<sup>184</sup> Newfoundland Phase Two Memorial, para. 130.

which it has veered from the course adopted by the Chamber. Newfoundland offers the rationale that, while the resulting line is not perpendicular to the inner coast, as was the case in the *Gulf of Maine*, it is nevertheless perpendicular to the “averaged” directions of the chosen outer coasts. This raises two questions.

216. First, if the outer coasts are now being used as the basis for the line, then the perpendicular is functionally the equivalent of an equidistance line drawn from those carefully selected coasts, a method expressly rejected by both parties for the outer sector. Moreover, it is equidistance drawn with a starting “boost” to Newfoundland by way of the shift westwards along the closing line. This shift, as mentioned, was justified by Newfoundland entirely by the supposed dominance of the inner coasts, as in the *Gulf of Maine* case. Yet, if the line in the outer sector is to be a quasi-equidistance line, drawn to selected outer coasts, the justification for shifting the starting point westwards (to take account of the now irrelevant inner coasts) disappears.
217. In sum, the authority underlying Newfoundland’s use of a perpendicular to a closing line, the *Gulf of Maine* case, proves to involve completely different facts from the present arbitration, both with respect to the geography involved and the result obtained. In the final analysis, it is no authority at all, and Newfoundland’s inappropriate application of the perpendicular method in this case, as will be shown below, leads only to an inequitable result in the circumstances.

#### **E. Newfoundland’s Test Of The Equitable Nature Of The Result**

218. Newfoundland, in its assessment of the equity of the result obtained with its proposed line,<sup>185</sup> provides an analysis based, first, in a restatement of its justification for selection of the perpendicular, and second, by reference to the supposed proportionality of the result. Any considerations relating to conduct, or to resource location and access, are summarily dismissed.

---

<sup>185</sup> Newfoundland Phase Two Memorial, paras. 249-260.

i. **Newfoundland's Restatement Of Its Earlier Justifications**

219. After its initial rejection of conduct and resource location, Newfoundland begins what purports to be an assessment of the “result achieved by the Newfoundland and Labrador line”<sup>186</sup> with what is actually an assessment of the method that it has employed in the outer sector. Newfoundland claims that the perpendicular method is appropriate because of its alleged “correlation with the basic structure of the coastal geography” in the outer sector,<sup>187</sup> a structure that Newfoundland sees as defined by the average of its two selected “perpendicular” lines defining the limits of the relevant area.<sup>188</sup>
220. The flaws in these arguments with respect to the choice of a practical method have been dealt with above. Here, however, the problem is simply their irrelevance to testing the “result”. What Newfoundland has done is take arguments related to the selection of a practical method of delimitation, and apply them as a substitute for testing the result obtained with that same practical method. The choice of the practical method is justified by reference to the equitable criteria – in this instance the supposed “correlation” of the method with the geographic structure. Whether that method provides an equitable result is then “tested” by reference to exactly the same geographic factor. The circularity of the argument, and the inevitability of the outcome of the “test”, are obvious.
221. Such an approach sidesteps the entire point of testing the equity of the result as part of a separate stage in the delimitation process. If the selection of a practical method that gives effect to the chosen equitable criteria<sup>189</sup> were sufficient, then no such test would be necessary. The jurisprudence, however, has consistently recognized the necessity and usefulness of this final check, or test, of the result –

---

<sup>186</sup> Newfoundland Phase Two Memorial, para. 253 (emphasis added).

<sup>187</sup> Newfoundland Phase Two Memorial, para. 254.

<sup>188</sup> Newfoundland Phase Two Memorial, para. 255.

<sup>189</sup> In Newfoundland's view, the only criteria of relevance are geographic, and it justifies the use of the perpendicular method, as noted above, by reference to geographic factors.



a test that must comprise more than the mere reiteration of the reasons already given for selection of a particular method.<sup>190</sup>

ii. **Proportionality Of Result**

222. The second part of Newfoundland's test is more orthodox, in that it concentrates on the proportionality of the result, defined by a comparison of the ratio of maritime areas allocated under the proposed boundary with the relevant coastal lengths.<sup>191</sup> Nova Scotia agrees that proportionality is a relevant consideration in this context, and it has applied the test in its Phase Two Memorial.<sup>192</sup>
223. The problem with Newfoundland's use of proportionality is that it relies entirely upon incorrect definitions of both the relevant maritime areas and the relevant coasts, the two elements that together provide the basis for any calculation of proportionality.
224. The selective and result-oriented nature of Newfoundland's construction of the relevant areas and coasts has been fully canvassed above. In brief:
- The "relevant" coasts are defined, first, by reference to findings made in a different case dealing with a completely different delimitation area, and second, by the use of a wholly subjective assessment of coasts that "face" in one direction only;
  - The seaward limits of the "relevant" maritime area are artificially restricted to 200 nautical miles, for no apparent reason other than the resultant exclusion from consideration of large areas accruing to Newfoundland;

---

<sup>190</sup> See, for example, **Annex 187: Libya/Malta**, *supra* Part II, note 9 at 54-55; **Annex 194: St-Pierre and Miquelon Award**, *supra* Part II, note 44 at 1175; **Annex 174: Gulf of Maine**, *supra* Part II, note 7 at 339.

<sup>191</sup> Newfoundland Phase Two Memorial, paras. 256-260.

<sup>192</sup> Nova Scotia Phase Two Memorial, Part V D iii.

- The lateral limits of the maritime area are constrained by an arbitrary method – the perpendicular – with no connection to the legal zone to be delimited. Furthermore, these perpendiculars are applied in such a manner as to limit the relevant area falling to Newfoundland while maximizing its coastline, and to limit the relevant Nova Scotia coastline.

225. Newfoundland's calculation of proportionality, therefore, is of no assistance whatsoever in assessing the equity of the actual result. The two elements that contribute to the calculation – relevant coasts and relevant areas – have been defined without reference to any objective criteria, but as a circular exercise in which coasts are relevant because they “face” a maritime area, and the maritime area is relevant because it falls within perpendiculars to the end-points of those same relevant coasts.

226. The alternative to this approach is, as argued by Nova Scotia, the application of objective criteria found in the law that governs the potential extent of the parties' claims to “offshore areas”. The area relevant to the delimitation is the area in which the potential legal claims of the parties overlap. The relevant coasts are those that contribute to the generation of that overlapping area. The proportionality of the result can only be tested by comparing the parties' respective shares of the overlapping areas with their coasts that generate those areas.

### **iii. Conduct Of The Parties**

227. Nova Scotia and Newfoundland are in complete disagreement with respect to the role of the prior conduct of the parties in a maritime boundary delimitation. In its consideration of the equity of the result, Newfoundland has taken the strict

standards it argues for the potential use of conduct as a relevant circumstance and applied them again to the final test of the result:<sup>193</sup>

[T]he conduct of the parties can play no role in testing the equity of the result in this case ... conduct is only relevant in maritime boundary delimitation if it meets exacting standards of consistency, mutuality and longevity. Further, it must evidence real activity on the ground.

228. These standards, as shown above, are entirely the creation of Newfoundland and in fact have never been applied to preclude the consideration of conduct as a relevant circumstance. The Tribunal remains free to consider conduct in the assessment of the equity of the result of the delimitation in this case.
229. The good faith reliance of one party on the conduct of the other, whether active or passive, is clearly a legitimate consideration in determining whether a particular result is “equitable”. Similarly, the Tribunal may consider the fact that none of Newfoundland’s prior conduct – whether in mutual agreements or in unilateral actions – ever approached the breadth of the claim now presented by Newfoundland. Issues such as consistency and mutuality are factors to be considered in determining the weight to be accorded the parties’ conduct – they are not, however, to be used as justifications for the total exclusion of conduct from the purview of the Tribunal’s analysis.

**iv. Resource Location And Access**

230. Nova Scotia, in its Phase Two Memorial, addressed the question of resource location and access at a “macro” level, as the available information was best suited to consideration of resource division based on the entire offshore areas accruing to the parties. Such an analysis is justified because of the origin of these zones, and the purpose for which they were created. Newfoundland has not dealt with the distribution of resources at this level, and Nova Scotia will reserve further comment on the issue until Newfoundland’s position is made known to it.

---

<sup>193</sup> Newfoundland Phase Two Memorial, para. 252 (footnote omitted).

231. Nova Scotia did not present any information or arguments on the distribution of relevant resources within the Laurentian Sub-basin, due to the fact that the current state of exploration information does not permit detailed, precise location of resources within that structure. However, the proposed Newfoundland line has altered this situation – for the reason that it puts the entire Sub-basin, and thus all of the resources of that structure, within Newfoundland's offshore area.
232. Newfoundland denies the potential relevance of resources “where resource exploitation is potential rather than actual”.<sup>194</sup> In doing so, Newfoundland again merges the distinct issues of resource location and economic dependence. As was shown in Part II above, resource location can be a relevant factor in assessing the equity of the result obtained with a particular line, even in the absence of prior dependence or actual exploitation.
233. Newfoundland's reason for denying the relevance of this factor is clearly demonstrated in Figure 76,<sup>195</sup> which shows the impact of Newfoundland's proposed line on the division of the Laurentian Sub-basin. What is immediately apparent is that the Newfoundland line would place virtually the entire Sub-basin within Newfoundland's offshore area. The current line, on the other hand, divides the Sub-basin between the parties, leaving to both provinces substantial areas within which exploration can be conducted (see Figure 76). When confronted with a similar situation involving undiscovered resources, the Chamber in the *Gulf of Maine* case made the following observation:<sup>196</sup>
- [I]t 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.
234. The current line, which is the line proposed by Nova Scotia, accomplishes a similar objective in the present case. Newfoundland's proposed delimitation, by

---

<sup>194</sup> Newfoundland Phase Two Memorial, para. 251.

<sup>195</sup> Figure 76: Approximate Location of the Laurentian Sub-Basin.

<sup>196</sup> Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 343.

contrast, is designed at every stage to meet the objective so clearly enunciated by its Minister of Mines and Energy, Lloyd Matthews, immediately after the delivery of the decision in Phase One of this arbitration:<sup>197</sup>

If we told you we wanted it all, would you be surprised?

235. Given the importance assigned by Newfoundland to the role of the Laurentian Sub-basin in this dispute,<sup>198</sup> it is impossible to say, as Newfoundland now does, that the division of the resources of the Sub-basin is of no relevance to the equity of the result.

## **F. Conclusion: The Nature And Purpose of Newfoundland's Claimed Line**

### **i. Newfoundland's Claim Anticipates A "Compromise" Solution**

236. It is by now apparent that the boundary proposed by Newfoundland and Labrador is based less on principles of law than on the practical desire to divide the parties' respective offshore areas so as to get it all.
237. The primary means deployed to this end is the selective and subjective use of geography and geometry – in theory, objective criteria – to deliver a line that satisfies the aim so candidly stated by Newfoundland and Labrador's Minister of Mines and Energy: to "get it all".
238. This proposed line exceeds any claim ever articulated by Newfoundland in the past. It is an excessive and over-reaching claim, extending far beyond the inter-provincial line defined by the mutual conduct of the parties, and exceeding even the line that Newfoundland unilaterally chose and made public in *The Newfoundland and Labrador Petroleum Regulations, 1977* and maps<sup>199</sup> (see

---

<sup>197</sup> Annex 218: "Boundary Dispute – Critical ruling yet to come" *The [St. John's] Telegram* (18 May 2001) at 3.

<sup>198</sup> See Newfoundland Memorial, para. 210.

<sup>199</sup> Newfoundland Statutory Instrument #6: *Newfoundland and Labrador Petroleum Regulations, 1977*, No. 23/77.

Figure 77).<sup>200</sup> It is more ambitious even than the line suggested to Nova Scotia in Minister Doody's letter of October 6, 1972, in response to the 125° line shown on the 1964 map (see Figure 78).<sup>201</sup>

239. Newfoundland's marked departure from all of its prior positions – its decision to propose in this arbitration, for the first time, a delimitation unlike anything envisaged over the last 40 years – can only be understood as an attempt to use the Tribunal, in effect, to “split the difference” between the parties' divergent claims.
240. This tactic is by no means unknown in maritime boundary delimitations, and indeed international tribunals have had occasion to comment on the tendency of the parties to exaggerate their claims for the purposes of litigation.<sup>202</sup> The law of maritime delimitation, however, does not mandate arbitrators to engage in an exercise in assisted negotiation or conciliation.<sup>203</sup> Unless otherwise agreed by the parties, delimitation must in all cases be carried out within a legal framework, a principle unquestionably to be applied in this case, as acknowledged by both parties.
241. What Newfoundland has effectively proposed, on the contrary, is that the Tribunal act as a more or less passive conduit in what is essentially a bilateral process of negotiation: each party sets out an initial, maximum position – its “line in the sand” – and then attempts to cede as little territory as possible, with the hope that, ultimately, the Tribunal will find some middle ground. This is not the purpose of international adjudication or the objective of the process contemplated in the *Terms of Reference* for this arbitration, and Nova Scotia, for its part, has declined to play Newfoundland's game.

---

<sup>200</sup> Figure 77: The Boundary Line Proposed by Newfoundland Transposed on *The Newfoundland and Labrador Petroleum Regulations, 1977 Map*.

<sup>201</sup> Figure 78: The Boundary Line Proposed by Newfoundland Transposed on the Doody Map; see Nova Scotia Phase Two Memorial, p. IV-37 *et ff.*

<sup>202</sup> Annex 194: *St. Pierre and Miquelon Award*, *supra* Part II, note 44 at 1169.

<sup>203</sup> The danger of an over-broad approach to equity “bringing the judicial decision dangerously close to conciliation” was pointed out by Professor Weil in his dissent in the Annex 194: *St. Pierre and Miquelon Award*, *supra* Part II, note 44 at 1212.

242. In some circumstances, it might be that a division of the overlapping claims of the parties (understood, in this context, as distinct from their overlapping entitlements) actually reflects an equitable result in all the circumstances, in which case the resulting line need not be abandoned merely so as to avoid the appearance of an improper attempt at compromise. This was the view expressed in the Joint Separate Opinion in the *Libya/Malta* case:<sup>204</sup>

However, had the Court actually proceeded to an equal division of that disputed area between the Parties, it might have appeared to have, so to speak, split the difference between their claims. Even so, concern to avoid giving the false impression of having effected a compromise cannot be an adequate reason for the Court to rule out such a solution if there are strong arguments from equity for adopting it.

243. Indeed, it must be acknowledged that, although it is by no means accepted in the jurisprudence, in practice a certain rough justice may be found in a dividing line between two competing claims. To give this heresy some basis in the law, it could even be said, in certain circumstances, that those claims arguably reflect the interests of the parties. The *sine qua non* of this view, however, is that **both parties must have adopted the same approach to the litigation** – they must both be playing the same game. In concrete terms, this means that both parties must assert excessive claims, in anticipation of a “split” or “compromise” result.

244. No such common appreciation of the nature of the arbitration and the consequent mandate of the Tribunal exists in the present case. It is true that Newfoundland has advanced a claim that is demonstrated to exceed anything it ever acted upon or proposed as a possible solution, in the period from the late 1950s up to the initiation of this dispute. But Nova Scotia has clearly not acted in a similar fashion. Nova Scotia's proposed line is the same line that it has applied since the early 1960s, based both on the parties' agreement of 1964 and on their mutual conduct. It is the line implemented in Nova Scotia's oil and gas permit regulations, in its agreements with the federal government in 1986 and 1982 and in its deals with other provinces in 1977. It is the line that reflects the geographic

<sup>204</sup>

Annex 187: *Libya/Malta*, *supra* Part II, note 9 at 90 (Joint Separate Opinion of Judges Ruda, Bedjaoui and Jiménez De Aréchaga).

and other circumstances of relevance to this case. Unlike the line proposed by Newfoundland and Labrador, Nova Scotia's proposed delimitation has obviously not been concocted for the purposes of this arbitration.

245. The implications of this gulf between the parties' approaches to the delimitation are enormous. Even assuming, *arguendo*, that it were justifiable in certain instances for a court or tribunal to use the competing claims of the parties as the basis for some sort of compromise to be effected, such cannot be the case here, in the circumstances of this arbitration. The provinces effectively reached a compromise in 1964 and in their subsequent conduct. **The existing boundary is the result, and the reflection, of that compromise.** Whether or not that boundary was legally binding, Nova Scotia stands by the result, with the consequence that its position in this arbitration already reflects a compromise made by it long ago.

246. Only Newfoundland has chosen to tailor its claim to suit the game that it proposes – a game in which, ultimately, it is the only player. To split the difference between Newfoundland's extreme claim and the claim of Nova Scotia, which is itself the product of hard-fought compromise, would be fundamentally inequitable.

\* \* \* \* \*