

PART IV: RESTATEMENT OF NOVA SCOTIA'S CASE

Introduction

1. Any delimitation governed by principles of international law must have as its objective a result that is equitable in the circumstances. This entails proceeding from a consideration of the factual circumstances of the case, to the selection and application of equitable criteria and practical methods determined to be best suited to attain this end. In order that the delimitation be carried out within the framework of law, the most fundamental consideration is the legal nature and origin of the zone to be delimited (and of the parties' entitlements to that zone). Determining an equitable result also requires that all of the relevant circumstances of the case be taken into account. The arguments presented in Nova Scotia's Phase Two Memorial, which are summarized below, are based upon these central premises.¹

A. Nova Scotia's Proposed Delimitation: An Equitable Result In All The Relevant Circumstances

i. The Applicable Law

2. The fundamental norm governing maritime boundary delimitation at customary international law requires that delimitation be effected by the application of equitable principles, or criteria, taking into account all the relevant circumstances, in order to achieve an equitable result.²
3. This recognizes that every delimitation is unique and must be carried out in the light of the factual circumstances of that case and no other. The norm is not, however, devoid of legal structure. Delimitations are not to be conducted *ex aequo et bono*. The selection of relevant circumstances and equitable criteria must

¹ Nova Scotia maintains and reasserts all of the arguments made in its Phase Two Memorial, whether or not referred to in this summary.

² Nova Scotia Phase Two Memorial, Part III B i.

be closely tied to the substantive legal basis of title to the zone in question, in order to ensure that the delimitation takes place within a framework of law.³

4. Even allowing for the constraint imposed by the necessary connection to the origin of title, the range of potentially relevant circumstances and equitable criteria is exceptionally broad. No one circumstance or criterion is of mandatory application; the relevance and applicability of each must be assessed and its selection determined by its suitability to ensuring an equitable result. The same is true of the practical methods of delimitation, which give effect to the equitable criteria thus selected. Identifying the relevant circumstances, and thus the equitable criteria and practical methods according to which the delimitation will be carried out, requires that the unique facts of each case be considered in their entirety. Only then will it be possible to determine whether a given result is truly “equitable in the circumstances”.⁴
5. From the forgoing, it is evident that the weight accorded to specific circumstances or criteria in the ultimate “balancing up” of factors, will depend not only upon their significance in the light of all the facts of the case, but also upon proof of their ability to contribute to an equitable result. In the final analysis, it is the result that is the paramount consideration.

ii. **The Relevant Circumstances Of This Case**

a) The Legal Zone And The Basis Of The Parties' Entitlements

6. The mandate of the Tribunal in this arbitration is to delimit the “offshore areas” of Nova Scotia and Newfoundland and Labrador, as those areas are defined under the parties' respective *Accord Acts*. These juridical zones have a number of

³ Nova Scotia Phase Two Memorial, Part III B ii a).

⁴ Nova Scotia Phase Two Memorial, Part III B ii b).

distinguishing features which are of significance in determining the other circumstances and the equitable criteria that are relevant in this delimitation:⁵

- The offshore areas are negotiated entitlements, not inherent rights of the provinces. The limited management and benefit-sharing entitlements that the provinces exercise in these areas derive entirely from their negotiated settlements with the federal government, as reflected in legislation. Furthermore, the boundaries between the two offshore areas were negotiated and agreed by the provinces (albeit in non-binding fashion) in the context of the same process that ultimately led to the creation of their offshore area entitlements;
- The provinces' entitlements in their offshore areas are restricted to petroleum and natural gas resources of the shelf;
- The provinces' offshore areas, the delimitation of which the Tribunal is mandated to determine, are defined as running from the low water mark of each province to the outer edge of the continental margin. The parties are agreed that the applicable definition of the outer edge of the continental margin, both in Canadian and in international law, is that set out in Article 76 of the *LOS 1982*.⁶

⁵ Nova Scotia Phase Two Memorial, Part IV B i, ii.

⁶ Nova Scotia Phase Two Memorial, Appendix B; Newfoundland Phase Two Memorial, paras. 63-66.

b) The Area Relevant To The Delimitation

7. The area relevant to the delimitation is defined by the overlapping potential legal entitlements of the parties.⁷ Those entitlements must be determined by reference to the actual zone in question – the “offshore areas”. The extent of the legal entitlements of the parties in this case is defined by the *Accord Acts*, and it is common ground between the parties, as noted above, that the applicable definition of the extent of the offshore areas is that found in Article 76 of the *LOS 1982*.
8. The Article 76 definition is based on a combination of geological, geomorphological and distance criteria and limits. It is not based on “frontal” projection, and it does not restrict the seaward limit of entitlement to a unidirectional or “facing” coastal prolongation. This is illustrated by the wording of the *Canada-Newfoundland Accord Act*, which defines Newfoundland’s entitlement as: “[T]hose submarine areas lying seaward of the low water mark of the Province **and extending, at any location**, as far as ... the outer edge of the continental margin ...”⁸
9. Nova Scotia has provided the Tribunal an estimate of the outer limits of the provincial entitlements, extending to the edge of the continental margin, and an illustration of those areas and the resultant areas of overlap (see Figure 36).⁹ Newfoundland, by contrast, has cut the relevant area short, at 200 nautical miles, and has urged the Tribunal to extend its proposed boundary blindly into the vast areas beyond, without viewing or considering the result.¹⁰
10. In addition to the “relevant area” *per se* (the area of the overlapping potential legal entitlements of the parties), the total offshore areas of the parties (as shown

⁷ Annex 193: *Denmark/ Norway*, *supra* Part II, note 21 at 64; Nova Scotia Phase Two Memorial, Part IV C i.

⁸ Annex 1: *Canada-Newfoundland Accord Act*, *supra* Part II, note 30, s. 2 (emphasis added).

⁹ Figure 36: Overlapping Offshore Area Entitlements: Nova Scotia and Newfoundland.

¹⁰ Newfoundland Phase Two Memorial, paras. 63-64. The parties agree that it is not necessary for the Tribunal to make any determination on the location of the outer limits of Canadian jurisdiction. It is sufficient for the purposes of this arbitration to estimate the most likely effect of that eventual determination, and the impact on the respective offshore areas of the two parties.

in Figure 37)¹¹ is also relevant in assessing the overall equitableness of the result. This is the area that the provinces divided among themselves, out of the previously undivided “whole” of federal jurisdiction. On the basis of that division, that is, on the basis of the existing boundary, Newfoundland got a very favourable deal indeed.

c) The Conduct Of The Parties

The Parties' Conduct Is Relevant

11. As demonstrated by Nova Scotia, both in its Phase Two Memorial and in response (in Part II above) to Newfoundland's statement of the applicable law, the conduct of the parties with respect to the delimitation line and area in question may be, in certain cases, and is undeniably, in this case, an especially significant “relevant circumstance” in determining an equitable result, regardless of whether that conduct meets the standards required to establish acquiescence or estoppel.
12. The extent, the detail and the compelling nature of the factual record of the parties' dealings regarding their mutual boundary are such that it would be inconceivable to regard the conduct of the parties as anything but highly relevant to this delimitation. Furthermore, as mentioned, when, as here, one is considering the delimitation of a zone created by negotiation, the conduct of the parties in the context of those negotiations, especially when it concerns the division of their respective entitlements, acquires particular relevance.
13. Acknowledging the importance of such conduct in the delimitation is entirely in keeping with the principle that the “relevant circumstances”, as indeed all elements of the delimitation, must be tied to the nature and origin of the legal entitlements at issue. Here, the legal entitlements at issue are negotiated, and the conduct of the parties in the course of those negotiations is obviously relevant.

¹¹ Figure 37: Total Offshore Areas as Divided by the Existing Boundary.

Summary Of The Parties' Conduct

14. It is unnecessary to recount the extensive history of the parties' conduct relating to the line dividing their respective offshore areas. This has been done elsewhere.¹² The overall impact of that conduct may be stated succinctly: in the 1960s and early 1970s, Nova Scotia and Newfoundland acted on the understanding that there was at least a *de facto* boundary in place between their respective offshore zones. This is evident from overlapping and mutually reinforcing conduct of three types:¹³

- Mutual agreement on the location of the line, and on the methodology used to construct the line;
- The issuance of "matching" oil exploration permits in the area of the boundary, which defined a concordant situation in fact and was clearly linked to the agreement previously reached by the parties; and
- Acquiescence by Newfoundland in actions by Nova Scotia and the federal government which confirmed the line established in practice.

15. The conduct of the parties, then, is not defined in this case by an isolated incident, or by one particular type of activity, restricted in scope or time. Rather, it consists of numerous and various acts, all pointing in the same direction. It is the cumulative effect of this conduct that must be appreciated in assessing the weight to be accorded to the *de facto* boundary established by the parties.

¹² See Nova Scotia Memorial, Part II; Nova Scotia Phase Two Memorial, Part II.

¹³ Nova Scotia Phase Two Memorial, Part IV D i, ii, iii.

16. The practical impact of this conduct is clear, and is graphically demonstrated in Figure 40:¹⁴

- The parties agreed upon the method of delimitation and on the turning points of the boundary in 1964. Seaward of the last turning point (the outer segment), the boundary ran Southeast on a 135° azimuth line;
- The parties subsequently determined the technical coordinates of these points, which were approved by the Premiers in 1972. The delimitation and delineation of the boundary were thus agreed, subject only to federal acceptance and implementation;¹⁵
- From turning point 2017 Southeast to latitude 46° N, the parties adopted, in their permit issuance practice, a line that followed the 135° azimuth line, which also closely approximated a straight-line extension of the line between the last two turning points in the inner segment (turning points 2016 and 2017; the azimuth of the line between these two points is within 1° of 135°);¹⁶
- From approximately 46° N to 45° N, the practice of the parties was based on a further extension of a line drawn according to the same method. Examples of practice confirming the existence of such a

¹⁴ Figure 40: Overall Conduct of the Parties.

¹⁵ Nova Scotia Phase Two Memorial, Part IV D i. This line was also respected by the parties in their subsequent practice: the permits issued by Nova Scotia in this segment followed the line exactly; and in 1977, Newfoundland applied the line in its *Petroleum Regulations*.

¹⁶ Nova Scotia Phase Two Memorial, pp. IV-46-48. Permits issued by Nova Scotia in the sector, never protested by Newfoundland, clearly followed the 135° line. The construction line by which Newfoundland drew the western limit of the 1967 Mobil permit was based on the existence of a boundary - the construction line is drawn to connect with a point on the inner segment of the boundary. Furthermore, the line shown by Newfoundland in its 1977 *Regulations* followed this line from the tri-junction point to approximately 46° N.

line in this sector include, for Nova Scotia, its various permits issued in the area, and for Newfoundland, the exploration permit issued to Mobil in September 1967, which follows the line precisely and defines the northwestern “corner” of the permit by reference to the *de facto* boundary;

- Seaward of latitude 45° N, the conduct of the parties in the issuance of permits confirms that the general approach described above was adopted along the entire outer segment of the boundary. From 45° N to 44°30' N, permits issued by Nova Scotia precisely tracked a further extension of the 135° azimuth line. From approximately 46° N to 43° N, the western limit of the permit issued by Newfoundland to Katy Industries in 1971 (reconfirmed in 1972) was drawn on the basis of a straight-line extension of the segment between turning points 2016 and 2017;
- In addition to the practice applicable to specific portions of the boundary, other elements of the parties' conduct demonstrate that a consensus was reached with respect to the line in its entirety. These include Newfoundland's failure to raise any objection to the East Coast Offshore maps prepared by the federal government in 1972, which showed a boundary consistent with the line described above, and Newfoundland's failure to object to the use of the line in the 1982 *Canada-Nova Scotia Agreement* or the 1984 implementing legislation.¹⁷

¹⁷ Nova Scotia Phase Two Memorial, pp. II-16-18. The 1984 legislation, adopted after the Supreme Court of Canada had confirmed federal jurisdiction over Newfoundland's offshore in the **Annex 182: Reference Concerning Property In and Legislative Jurisdiction Over the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland**, [1984] 1 S.C.R. 86 (hereinafter *Hibernia Reference*), included precise coordinates and the 135° azimuth, and did not include any provision for amendment in the event of a dispute regarding the boundary.

Newfoundland's Purported Objections Or Contrary Conduct

17. There is no evidence in the record of conduct by Newfoundland sufficient to displace the conclusion that a common position on the location of the boundaries did emerge in fact. Whatever acts may have arguably called into question the emergence of this common position or the *de facto* line thus established, were entirely unilateral.
18. Moreover, Newfoundland's alleged "objections", unlike those in the *Tunisia/Libya* case, were made only after the *de facto* line had been established in practice.¹⁸ Further, Newfoundland never objected to, and indeed participated in, the crucial permit practice that contributed to the emergence of the line. Finally, and again in contrast to the *Tunisia/Libya* case, Newfoundland's objections were limited in scope, equivocal¹⁹ and contradicted by all of its other conduct.

Summary

19. The line defined by the parties' mutual and matching conduct over a number of years – which is reflected in the existing, legislated line – provides the clearest and best possible evidence of what the parties themselves considered to be an equitable division of their respective maritime entitlements. The record of conduct is thus an exceptionally relevant circumstance in the present delimitation.

d) Resource Location And Access

20. The jurisprudence establishes that resource location and access (including prospective but identifiable resources) may be a relevant circumstance, particularly in assessing the equitableness of the result of a delimitation. In the present case, the fact that the parties' entitlements to the zone in question are

¹⁸ Nova Scotia Phase Two Memorial, Part IV D iv.

¹⁹ See, for example, the Doody letter of 1972, in which Minister Doody challenged the placement of the 125° line on the map from 1964, but confirmed the existence of a boundary and acceptance of the "principles which form the basis of the present demarcation." Newfoundland Document # 57 at 1.

- limited to a single category of resources makes it more feasible to give some effect to this factor.
21. The overall distribution of resources achieved under the present delimitation establishes a massive advantage in favour of Newfoundland. It is not surprising that Newfoundland should have regarded the consensus delimitation disclosed in the agreement of 1964, and in the subsequent conduct of the parties, as an entirely equitable, not to say advantageous, result: it obtained the lion's share of the resources in question.
22. Within the Laurentian Sub-basin, which is a particularly significant and prospective structure in the area of the boundary and likely the true "prize" in the delimitation, it is not possible to locate with precision the areas of greatest resource potential within the overall structure. In one sense, however, the issue is moot. Newfoundland's proposed line, in conformity with its publicly stated objective in this arbitration, would place virtually the entire Sub-basin within Newfoundland's offshore area.
23. The line proposed by Nova Scotia, on the other hand, in addition to effecting a fair division of resources, generally, would leave to both provinces significant areas of the Sub-basin within which to carry out prospecting activities. By this standard, which was applied by the Chamber in the *Gulf of Maine* case,²⁰ the delimitation proposed by Nova Scotia clearly delivers an equitable result in the circumstances.

e) Other Delimitations In The Region

24. The parties are agreed that the impact of other delimitations in the region, whether actual or prospective, must be taken into account in assessing the equitableness of any proposed line. Newfoundland, however, has considered only the boundary between Canada and France (St. Pierre and Miquelon), and has somehow found

²⁰ Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 343.

that the burden of that delimitation falls entirely on its shoulders. But this assertion, of course, is conditional on where the Tribunal delimits the parties' boundary in this case.

25. It hardly lies in Newfoundland's mouth to propose, as it has done, a massive grab of the relevant area, and then to complain that, if it is successful, "the burden of the zone awarded to France is to be borne exclusively by Newfoundland and Labrador. This is not something that can be changed ..."²¹

26. In fact, this is something that can be changed, and it would be changed if the Tribunal were to accept Nova Scotia's proposed delimitation, in which the entire regional pattern of current and prospective delimitations are taken into account, as required by international law. The situation of actual and potential delimitations in the region is as follows:

- Given the continued good faith acceptance by Nova Scotia of its agreed boundaries with New Brunswick, Prince Edward Island and Québec, and the fact that those provinces have likewise accepted and implemented these boundaries, the boundaries between Nova Scotia and those provinces may be regarded as conclusive;
- The prospect of a new delimitation in the Gulf of St. Lawrence, as a result of Newfoundland's repudiation of its boundary with Québec, does not give rise to any likely additional losses to Newfoundland's offshore area. The boundary with Québec has always been accepted by that province, and there is no reason to believe that Newfoundland would lose any of its current offshore area in future negotiations;

²¹ Newfoundland Phase Two Memorial, para. 207 (emphasis added).

- The Canada-France boundary has resulted in a zone which cuts into both the Nova Scotia and Newfoundland offshore areas, as defined by the existing, legislated boundary between the two provinces. That boundary, which is the boundary proposed by Nova Scotia, distributes the “losses” from the French zone equitably as between the parties, and in any event, the total areas involved in the French zone are small. Further losses arising as a result of a French broad shelf claim cannot be estimated, but if the current boundary is maintained, any areas thus lost to Canada would lie within the Nova Scotia offshore area;

- The single maritime boundary with the United States creates a barrier to the seaward extension of the Nova Scotia offshore area to the Southwest. This constriction emphasizes the general concavity of the Nova Scotia coast, and raises the possibility that the boundary to be determined in this case, depending on its course in the outer segment (beyond point 2017), could result in Nova Scotia’s offshore area being “squeezed” between the jurisdictions of the United States and Newfoundland.

f) Geographic Circumstances

27. Geographic circumstances are of obvious relevance to this delimitation, and must be taken into account in the search for an equitable result. This is nothing more than to state that the law of maritime boundary delimitation requires consideration of **all** relevant circumstances. Nova Scotia emphatically rejects Newfoundland’s contention, however, that geography provides the **only** relevant circumstances. Indeed, in the circumstances of this case, in particular the nature and origin of the zone in question and the overwhelming evidence of conduct by the parties relating to the establishment and division of that zone, it is evident that geography is not the dominant relevant circumstance.

28. The relevant geographic (and geomorphological) circumstances in this case may be summarized as follows:

- The parties are agreed²² that the continental shelf in the region constitutes a single, uniform structure, and that “natural prolongation” provides no basis for a delimitation between the two offshore areas. As there is thus no break in the shelf that could be regarded as forming a “natural” barrier to the extension of the parties’ respective offshore areas (other than its outer margin) each province’s potential entitlement runs without break to the Northeast and the Southwest;
- In the inner segment of the boundary, from the tri-junction point with Québec to point 2017, and from there to approximately 46° N latitude, the relationship of the relevant coasts is primarily opposite. In the outer segment, the relationship is primarily adjacent, with the exception of Sable Island, which lies opposite some coastal features in Newfoundland;
- The macrogeographic configuration is such that the mainland coast of Nova Scotia falls within a coastal concavity defined by the coasts of the United States and Newfoundland. This concavity is not pronounced, and is partly ameliorated by the presence of Sable Island, but the boundary in the Gulf of Maine, and the East-West orientation of the South coast of Newfoundland (as opposed to the Northeast-Southwest orientation of Nova Scotia), combine to raise

²² Nova Scotia Phase Two Memorial, Part IV G i; Newfoundland Phase Two Memorial, paras. 63-66.

the possibility of Nova Scotia's offshore area being "squeezed" by claims on both sides (Figure 49).²³

29. All of the circumstances set out above – the nature and origin of the zone, the conduct of the parties, the location of and access to resources, the other delimitations in the region, and the geographic configuration – are drawn directly from the unique facts of this case, and all are relevant to the delimitation that must be effected in this arbitration. In contrast to Newfoundland's proposal, Nova Scotia's case relies upon a balanced consideration and appropriate weighting of all of these circumstances.

iii. **The Applicable Equitable Criteria**

30. The equitable criteria to be applied to a delimitation should be those "most likely to prove equitable in relation to the relevant circumstances of the case",²⁴ a requirement that dictates that criteria should be chosen with direct reference to the factual context. Criteria may be either "primary" (those most directly applicable to the drawing of the line) or "auxiliary" (those mainly of relevance in testing the result).²⁵

a) Primary Criteria: Conduct And Equal Division Of Overlapping Entitlements

31. The relevant circumstances in the present case lead to the identification of two primary equitable criteria:

- The delimitation should, to the extent possible, give effect to those methods and actual lines which the parties, as demonstrated by

²³ Figure 49: General Concavity of the East Coast of North America.

²⁴ Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 326.

²⁵ Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 328.

their prior conduct, “may have considered equitable or acted upon as such”;²⁶

- The delimitation should reflect, to a reasonable degree, an equal division of the parties’ overlapping legal entitlements to the zone in question (subject to adjustment in the event of any significant disproportion in result).

32. Both of these criteria are rooted firmly in the relevant circumstances of this case. The single most dominant feature of the factual record is the overwhelming evidence of both mutual and “matching” conduct that effectively establishes a line that the parties themselves, in their good faith negotiations and subsequent practice, considered to be an equitable solution in the circumstances.
33. The basis in law for giving effect to the previously-expressed views of the parties as to an equitable result, even where it falls short of tacit agreement or estoppel, is well-accepted. In the *Tunisia/Libya* case, the ICJ found that “the Court must take into account whatever indicia are available of the line or lines which the parties themselves may have considered equitable or acted upon as such”.²⁷ The acceptance of prior conduct as an important criterion is also grounded in general principles of equity.²⁸
34. The evidence of conduct demonstrating the parties’ earlier acceptance of a *de facto* boundary is arguably stronger here than in any previous maritime boundary adjudication. The provinces agreed on the location of the boundary, or “identification of the boundary lines”, in 1964 (and again in 1972).²⁹ In their subsequent practice in issuing permits, they confirmed the establishment of a *de facto* line that was clearly referable to that agreement. At critical junctures, Newfoundland and Labrador acquiesced in the application of this same line by

²⁶ Annex 189: *Tunisia/Libya*, *supra* Part II, note 9 at 84.

²⁷ Annex 189: *Tunisia/Libya*, *supra* Part II, note 9 at 84.

²⁸ See Nova Scotia Phase Two Memorial, pp. V-5-6.

²⁹ Transcript of Oral Argument, March 16, 2001, p. 697.

- both the federal and Nova Scotia governments. Throughout the period in which this conduct occurred, Nova Scotia acted in reasonable reliance on Newfoundland's actions and consistently applied the line in its dealings with the federal government and with private industry.
35. The pattern of both active and passive conduct in this case is clear and convincing. Such evidence must be taken into account, as established by the ICJ in the *Tunisia/Libya*, *Libya/Malta* and *Denmark/Norway* cases, and by the Chamber in the *Gulf of Maine* decision. The line established and respected by the parties provides the clearest indication of what they themselves considered "equitable" in the circumstances.
36. The second primary criterion, equal division of overlapping areas of entitlement, reflects both the geographic and legal circumstances of this case. Equal division of overlapping entitlements is a criterion that, *prima facie*, offers the potential for an equitable delimitation in many geographic configurations.³⁰ Any inequity that might result from provisional application of a method based on this criterion can and will be identified and corrected by the test of proportionality, which is founded in the geographic circumstances.
37. The criterion of equal division of overlapping entitlements is also suited to the legal nature of the "offshore areas" that are to be delimited. The definition of those areas in the two *Accord Acts* provides a straightforward, objective and measurable methodology for determining the area of overlapping entitlements; a methodology explicitly agreed to and legislated by both Nova Scotia and Newfoundland and Labrador. Both *Accord Acts* stipulate that the parties' respective "offshore areas" run to "the outer edge of the continental margin", and the parties agree that the proper method for defining this limit is that articulated in Article 76 of the *LOS 1982*. The availability of a definitive means for establishing the area of overlapping entitlements makes the criterion of equal division especially practicable in this case.

³⁰

Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 328.

b) Auxiliary Criteria

38. In addition to the two primary equitable criteria identified above, the circumstances of this case also give rise to the following auxiliary criteria, which are of relevance to testing the equitableness of the result:

- The “element of a reasonable degree of proportionality”³¹ between relevant coastal lengths and maritime areas, in further recognition of the proper role of geography in this delimitation;
- The equitable division of access to resources, given that the parties’ interests are limited exclusively to shares in the management of and benefits from hydrocarbon resources; and
- The avoidance of “cut-off” of either party’s coasts, and adequate consideration of the macro-geography of the region (including any other actual or prospective delimitations).

iv. **The Practical Method – Drawing the Line**

39. The primary equitable criteria set out above – the conduct of the parties and the equal division of overlapping entitlements – both point to the choice of the same practical methods of delimitation, to be applied so as actually to draw “the line dividing the respective offshore areas of the [parties]”.

a) Methods Based On The Conduct Of The Parties

40. The continuity and relevance of the conduct of the parties in the present case is such that the practical methods for drawing the line dividing their respective offshore areas can, *prima facie*, be determined by reference to that conduct:

³¹ Annex 188: *North Sea Cases*, *supra* Part II, note 9 at 53-54.

- Beginning in the Gulf of St. Lawrence, at the “tri-junction” point with Québec (point 2015, as designated by the *JMRC*), the line may be drawn by straight line segments joining the points defined by the agreement of the Premiers in 1964 and later delineated with coordinates in 1972 (points 2015-2016-2017) (the inner segment);
 - Seaward of point 2017 (the outer segment), the practical method that best reflects the conduct of the parties is a 135° azimuth line extending to the outer edge of the continental margin. This line, which has its origins in the 1964 agreement, was also used by the parties as the basis for permit issuance along the boundary, and conforms to the understanding of the Premiers as to the location of the boundary, being clearly marked on the map used by them at their meeting of August 1972. Finally, this method was used by Parliament to define the outer segment of the boundary in the 1984 legislation implementing the *Canada-Nova Scotia Agreement*, all without protest from Newfoundland.
41. Alternatively, the outer segment of the boundary can be drawn, to the same effect, by direct reference to the general methods of delimitation agreed to by the Premiers in 1964. Those methods, never disavowed by Newfoundland,³² were set out in the *Notes Re: Boundaries*:³³
- “Islands lying between Provinces and belonging to one or another Province are considered as if they were peninsulas”;

³² See Nova Scotia Phase Two Memorial, pp. V-11-13.

³³ **Annex 31:** “Submission on Submarine Mineral Rights by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland” with Annex entitled “*Notes Re Boundaries of Mineral Rights as between Maritime Provincial Boundaries*”, presented to Federal-Provincial Conference of Prime Ministers (14-15 October 1964).

- “Mineral right boundaries are so drawn as to join median points between prominent landmarks selected so far as possible along parallel shores.”
42. Application of these agreed methods to delimit the segment of the boundary seaward of point 2017 results in the selection of two “prominent landmarks”: Sable Island in Nova Scotia and Cape St. Mary’s in Newfoundland.³⁴ The “mid-point” between these landmarks falls almost precisely on the boundary defined by the 135° azimuth (see Figure 51). It is evident that the methodology agreed by the parties in 1964 and applied by them in the inner segment, results in the 135° azimuth.
43. In sum, the practical method of delimiting the inner segment of the boundary (out to point 2017) that reflects the conduct of the parties is a line beginning at point 2015 and running to points 2016 and 2017 (see Figure 52).³⁵ In the outer segment (seaward of point 2017), the line may be drawn either by reference to the *de facto* line that emerged from the conduct of the parties or by the direct application of the methodology agreed by the them in 1964 and applied at the time in the inner sector; the results are identical under the two methods.

b) Methods Based On Equal Division

44. Where coastlines are opposite one another, a median line is more likely to effect an equal division of overlapping areas, and can be applied on a provisional basis, subject to testing for equitableness of the result.³⁶ In the present case, the “zone of opposition” of the parties’ coasts extends from point 2015 to approximately 46° N latitude. Within that zone, the current boundary is effectively a simplified median

³⁴ For the details of this selection, see the Nova Scotia Phase Two Memorial, pp. V-11-13.

³⁵ Figure 51: A 135° Azimuth Boundary Line in the Outer Segment is Consistent with the Methods Used in the 1964 Agreement for the Inner Segment; Figure 52: The Boundary: the Existing Boundary Line.

³⁶ The parties are agreed on the usefulness of the provisional median line in such circumstances although, as noted above, Newfoundland never actually draws or tests the line in this sector.

line (see **Figure 53**),³⁷ so that the criterion of equal division suggests exactly the same line in this sector as does the conduct of the parties.

45. In the outer segment beyond 46° N latitude, no particular method is suggested by the equal division criterion, although it would be possible to draw the line by simple iteration to achieve an equal division, subject to adjustment in the event of disproportion. Given that the current division of areas is in favour of Newfoundland, and any disproportion is to the disadvantage of Nova Scotia (see below), any such method would result in a line more favourable to Nova Scotia than that proposed by it in this arbitration.

v. **Testing The Equitableness Of The Result**

a) Testing The Delimitation

46. Even though the boundary proposed by Nova Scotia (equivalent to the boundary as currently drawn) reflects the conduct of the parties and represents what they viewed as an equitable solution, the equity of the result must still be verified. As demonstrated persuasively in Nova Scotia's Phase Two Memorial, that boundary, tested with reference to the primary and auxiliary equitable criteria appropriate in this case, proves to deliver an equitable result. Briefly:

- The proposed line is obviously in accord with the conduct of the parties, in that it is drawn directly from that conduct;
- The line effects a delimitation that reflects an equal division of maritime areas in the inner segment, even allowing for adjustments for proportionality. When the entire boundary is considered, in both the inner and outer segments (from point 2015 to the outer

³⁷ **Figure 53: The Current Boundary vs. a Simplified Median Line.**

edge of the continental margin) the division is not equal, but any disadvantage is to Nova Scotia;

- The line effects an equitable division of the relevant resources within the parties' total offshore areas. The division is not equal, but it is not inequitable, given that no boundary could (or should) redress the massive imbalance in favour of Newfoundland. In the area of the Laurentian Sub-basin, the line divides the structure so that both provinces retain reasonable access to this area of prospectivity;
- The direction of the line, running as it does in a similar orientation as Canada's single maritime boundary with the United States, prevents any further impact from the coastal concavity of Nova Scotia, and avoids an inequitable "squeezing" of the Nova Scotia zone that would result from a line oriented further to the South;
- On the basis of the existing boundary, the impact of the area awarded to France in the *St. Pierre and Miquelon Award* is equitably distributed between the parties.

b) Proportionality of Result

47. Because the proposed line is primarily drawn with reference to the conduct of the parties (although it is also based on equal division of overlapping entitlements), the test of proportionality acquires particular importance. Proportionality is essentially a **geographic** test, being based on the ratio of relevant coasts to relevant maritime areas. A result that is favourable when judged according to this criterion – that is, a "proportional" result – will ensure that there is no geographic

- inequity arising from the application of non-geographic criteria as may be dictated, as in this case, by the factual circumstances.
48. The relevant area in this case is defined by the overlapping potential entitlements of the parties, an approach that is wholly consistent with the jurisprudence. Moreover, unlike in most other cases, the undeniable applicability of Article 76 of the *LOS 1982* to define the outer edge of the continental margin (which in turn defines the outer limit of the “offshore areas”) means that the area of the parties’ potential entitlements, and thus the overlap, can be defined with reasonable precision and, more importantly, according to objective criteria. The overlapping areas of the potential offshore area entitlements of Nova Scotia and Newfoundland are depicted, along with the boundary proposed by Nova Scotia, in **Figure 55**.³⁸
49. **Figure 55** also illustrates the relevant coasts, for purposes of comparison with the maritime areas. In contrast to Newfoundland’s definition of the relevant coasts, which rests entirely on a subjective, *a priori* selection of those coasts which Newfoundland regards as “dominant” and as facilitative of its excessive claim, Nova Scotia’s approach to the matter is closely connected to the nature of the zone itself. The relevant coasts are those which contribute to the generation of the overlapping offshore areas, under the Article 76 definition and as provided for in the applicable legislation. Article 76 allows any coast to project in any direction seaward, up to the appropriate distance or other limits, but of course does not permit projection through or around a land mass, or outside the clear “line of sight” from any coastal point.
50. For most of the coasts shown in **Figure 55**, this designation presents no difficulty. The inner segment coasts are clearly relevant, and consistent with the Article 76 theory of coastal projection. Nova Scotia has included as relevant even those segments of Newfoundland’s coast that would be excluded by its own “frontal projection”, or “facing”, approach. In the outer segment, all of the coasts shown

³⁸ **Figure 55: Relevant Coasts.**

contribute to the generation of the overlapping maritime areas, under the Article 76 definition.³⁹

51. The outcome of the proportionality test, based on these objective definitions, is clear. With 52% of the relevant coastline, Nova Scotia has 47% of the relevant area. Newfoundland has 48% of the relevant coasts, but receives 53% of the overlapping areas.⁴⁰ There is, therefore, some disproportion in favour of Newfoundland, but this is counterbalanced by the equitable consideration that the parties, by their conduct, established the existing line and evidently viewed it as a reasonable solution.
52. A similar result is obtained when the total offshore areas of the parties are calculated. Newfoundland, with approximately 69% of the combined coastlines of the parties, is allocated 71% of the total offshore area. Nova Scotia, with 31% of the coastline, receives 29% of the offshore area. At either scale of consideration, therefore, the line established and respected in the conduct of the parties delivers a result that is fully proportional, albeit somewhat to the advantage of Newfoundland.⁴¹

c) The Concordance Of The Proposed Line With Other Methods

53. In its Phase Two Memorial, Newfoundland sweepingly asserts that the existing boundary (the boundary claimed by Nova Scotia in the arbitration) is “unsustainable as a matter of international law” because it is allegedly “not based on any discernable [*sic*] principle”. In Newfoundland’s view, there are “methods

³⁹ Nova Scotia Phase Two Memorial, pp. V-21-23. The small segments on the western coast of Nova Scotia and the eastern coast of Newfoundland are added to allow for the fact that they contribute to some of the overlapping areas. The limits of these coasts are set at the points closest to the extremities of the overlapping areas. Neither of these segments is long enough to significantly affect the proportions involved.

⁴⁰ These relationships can also be expressed as ratios. The ratio of the Nova Scotia’s relevant coastal length to that of Newfoundland is approximately 1.07:1; the ratio of Nova Scotia’s relevant area to that of Newfoundland, on the basis of the proposed delimitation, is 1:1.14.

⁴¹ Nova Scotia Phase Two Memorial, pp. V-23-24.

that are plainly wrong”, and this includes the present line.⁴² This statement is, of course, completely contrary to the correct position in law – that there are no mandatory methods to be applied, and, conversely, no methods that are automatically ruled out. The statement also fails to acknowledge that the parties are free to choose and to regard as equitable any line they wish. Finally, Newfoundland's assertion ignores the fundamental principle that it is the equity of the result, and not the use of any particular method or methods, which must be predominant.

54. These errors are sufficient to dispense with Newfoundland's dramatic, offhand dismissal of the entire boundary developed by the parties in their practice. There is, however, a further claim implicit in its statement that is equally flawed, but from a factual, rather than a legal, perspective. Newfoundland assumes, again without any proof, that the current line is distinct from all forms of boundary delimitation known to international law. This assumption is incorrect.
55. In the sector of the proposed line that runs from the tri-junction point to approximately 46° N latitude, the boundary is a simplified median line. Newfoundland must surely concede that a line drawn to this method would conform to a well-known approach in international practice. Beyond that point, the line is defined by means of an azimuth line designated by the parties, one which essentially continues the inner line. Again, there is nothing strange or unusual about this method.⁴³ Furthermore, the same line can be drawn by joining the mid-points as calculated from prominent coastal points (Sable Island in Nova

⁴² Newfoundland Phase Two Memorial, para. 166.

⁴³ In the sector of the proposed line that runs from the tri-junction point to approximately 46° N latitude, the boundary is a simplified median line. Newfoundland must surely concede that a line drawn to this method would conform to a well-known approach in international practice. Beyond that point, the line is defined by means of an azimuth line designated by the parties, one which essentially continues the inner line. Again, there is nothing strange or unusual about this method. Furthermore, the same line can be drawn by joining the mid-points as calculated from prominent coastal points (Sable Island and Cape St. Mary's), a method that was certainly understood by the parties in 1964.

Scotia and Cape St. Mary's in Newfoundland), a method that is certainly consistent with the methods used by the parties in 1964 to delimit the inner sector.

56. Beyond these obvious factual issues, it should also be noted that the current boundary line approximates the result obtained when other well-known methods are applied to these facts. **Figure 79**⁴⁴ depicts a boundary based on an extension of the equidistance line drawn from the last two opposite points on the inner coasts (Scatarie Island, Nova Scotia and Colombier Island, Newfoundland). In the *Anglo-French Award* arbitration, the Court of Arbitration utilized a similar method, taking as the final basepoints the two points closest to each other on the last segment of opposite coasts (Ushant and the Scilly Isles).⁴⁵ The remaining seaward segment of the boundary in that case was drawn as an equidistance line, modified to give partial effect to the Scilly Isles.⁴⁶ No such modification would be required here, as both final points are on islands relatively close to shore, and Sable Island is not used in this construction.
57. This line is not introduced as an alternative delimitation, although it obviously represents a method that is within the array of those available to the Tribunal. The point is that the existing line, defined by the conduct of the parties and consistent with the criterion of equal division, also closely approximates the results obtained with other, well-known methods. Newfoundland's suggestion that the existing line is something so strange and unusual that it is "unsustainable" as a matter of law is completely unsupported in fact, and is, to borrow Newfoundland's phrase, plainly wrong.

⁴⁴ **Figure 79: The Existing Boundary Approximates an Extended Equidistance Line.**

⁴⁵ **Annex 190: *Anglo-French Award*, supra Part III, note 50 at 117-118.**

⁴⁶ **Annex 190: *Anglo-French Award*, supra Part III, note 50 at 118.**

vi. **The “Balancing Up”**

58. “[T]here is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures ...”.⁴⁷ So found the International Court of Justice in the *North Sea Cases*. The Court went in to state: “[M]ore often than not it is the **balancing-up** of all such considerations that will produce this result rather than reliance on one to the exclusion of all others.”⁴⁸
59. In this delimitation, the range of considerations that are relevant all point toward the same equitable result. There is no conflict, for example, between the geographic and other relevant circumstances of this case. Nor is there any tension between the equitable criteria which it is appropriate to apply in the circumstances or between the practical methods by which the parties’ boundary should be delimited. In these circumstances, the task of “balancing up” all of the considerations that go into ensuring that the result of the arbitration – the delimitation of the parties’ respective offshore areas – is equitable, presents no difficulty.
60. The equitable result, considering all of the relevant factors and all of the relevant circumstances, is the boundary that exists in both law and fact today. That boundary was established by the parties themselves, by their conduct; it effects an equitable division of the parties’ overlapping legal entitlements; and it proves in fact to be fully proportional.

B. Conclusion: Taking Account Of *All* Relevant Circumstances

61. The *de facto* line established by the conduct of the parties was not only considered by them to be equitable, it was and remains a fully equitable delimitation in the circumstances.

⁴⁷ Annex 189: *North Sea Cases*, *supra* Part II, note 9 at 50.

⁴⁸ Annex 189: *North Sea Cases*, *supra* Part II, note 9 at 50.

62. This conclusion is inescapable, if the fundamental norm of maritime delimitation at international law is applied, as it must be, in this arbitration. That norm entails the application of equitable criteria in order to achieve an equitable result, taking into account all the relevant circumstances. The result is the predominant concern. In the final analysis, this is the only true “rule” or “principle” of international law governing maritime boundary delimitation, applicable in all cases of adjudicated boundaries.
63. Although the process by which a boundary is thus drawn involves a degree of subjectivity – to the extent that it is necessary to assess and choose among a range of factors and considerations in order to determine what is equitable in the circumstances – overall, the process remains firmly rooted in law. The primary means by which this is assured is the requirement that the Tribunal consider all of the relevant circumstances, according each the weight it deserves, and none is more important than the origin and legal nature of the zone to be delimited and of the parties’ entitlements to that zone.
64. It also involves a balanced assessment of the various factors that come into play, dispensing with “preconceived assertions”⁴⁹ in favour of solutions that are demonstrably equitable.
65. In the present delimitation, Newfoundland has proposed a boundary that, as is demonstrated in Parts II and III of this Counter-Memorial, relies upon just such a “preconception” of important elements of the delimitation process. The delimitation that it has proposed is at least as remarkable for what it expressly excludes as for what is included among the range of factors and circumstances to be taken into account by the Tribunal. Newfoundland has predetermined, for example, that only geographic factors qualify as relevant circumstances for the purposes of this delimitation. Similarly, it has drawn its criteria for the delimitation entirely from other cases, with little if any reasoned consideration of what might be appropriate on the facts of this case. It virtually ignores the nature

⁴⁹ Annex 174: *Gulf of Maine*, *supra* Part II, note 7 at 298.

and extent of the “offshore areas” to be delimited, and proposes instead the delimitation of a “relevant area” derived from a factual and legal context different than the present. It precludes from consideration the extensive conduct of the parties with respect to the boundary, denies the significance of the permits that they issued in the area, including directly on the line, and dismisses the relevance of the very resources – the only resources – which comprise the interests of the parties in the areas to be delimited. Newfoundland’s scheme admits of only one factor: geography. And yet it attempts to distort the facts of nature. The list goes on. Far from producing a solution that is both equitable and grounded in law, the end result is a delimitation disconnected from the factual and legal circumstances particular to this case and these parties.

66. Nova Scotia has approached this arbitration very differently. The delimitation that it proposes takes account of all of the relevant circumstances, all of the considerations that vie for attention in this case. While Nova Scotia certainly proposes that those considerations be weighted according to their ability to contribute to an equitable result overall – certain circumstances, such as the legal basis of title and the extensive record of conduct respecting the establishment, division and use of the parties’ offshore entitlements are of special significance on the facts of this case – it does not propose that the Tribunal turn a blind eye to any factor. It argues only that the facts be considered and their effect assessed, fairly and in their entirety, in order truly to achieve an equitable result in the circumstances.
67. In the circumstances of this case, the existing boundary is the boundary that is equitable.

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