

PART V: CONCLUSIONS AND SUBMISSION

A. Conclusions

1. The Tribunal has been presented with two approaches to the delimitation in this case, which stand in stark contrast to each other.

i. Newfoundland's Flawed Approach

2. Newfoundland and Labrador proposes a delimitation based solely on geography – in fact, on its subjective version of geography. In both the creation of its proposed line and the test of the line's equitability, Newfoundland urges the Tribunal to dispense with any consideration of other relevant circumstances. The circumstances that Newfoundland would have the Tribunal ignore include: the long pattern of conduct of the parties with respect to their mutual boundary; the macrogeographical situation, including most of the other existing and prospective maritime boundaries in the region; and the distribution of resources effected by Newfoundland's proposed boundary.

3. This effort to constrain the factual context open to consideration by the Tribunal carries over to Newfoundland's treatment of the sole circumstance that it considers relevant – geography – beginning with its production of a series of maps that cut off Nova Scotia's coasts at convenient points that it has chosen. Toward the same end, Newfoundland avoids showing the actual result that its proposed line would deliver. The "relevant area" is arbitrarily limited to a narrow band within which Newfoundland's coast is maximized while its maritime area is minimized, and the area is further artificially restricted to an irrelevant 200 nautical mile seaward limit, excluding from consideration vast areas between that limit and the outer edge of the continental margin that fall to Newfoundland.

4. Newfoundland's exceedingly selective approach to the relevant circumstances and equitable criteria, and thus to the delimitation and the testing of the result, is built upon a number of fundamental errors respecting the principles of international

law governing maritime delimitation and the application of those principles to this case.

5. First, Newfoundland fails to acknowledge that there are no mandatory relevant circumstances or equitable criteria that must be applied in every case. Contrary to the approach sanctioned by international law, it pre-determines both the circumstances and criteria that it applies – all of them geographic – based solely on their use in other, quite distinct cases. This approach runs counter to a consistent theme in the jurisprudence: the relevance of any particular circumstance, just as the equitableness of a given criterion, must be determined on the unique facts of each case, and not merely by reference to their use in some previous delimitation. Furthermore, Newfoundland's approach violates the fundamental norm of boundary delimitation, which requires a delimitation to be effected in the light of all, not some, of the relevant circumstances.
6. Second, Newfoundland acknowledges that a close connection to the nature and origin of legal entitlement to the zone in issue is what keeps an equitable delimitation within the framework of law. Newfoundland fails, however, to consider the nature and origin of the "offshore areas" that comprise the zone in issue here and that are the sole focus of this delimitation. Instead, it incorrectly assumes that the offshore area is a juridical continental shelf, and justifies its narrow focus on geography, and the exclusion of such critical factors as the conduct of the parties, by reference to the supposed inherent and *ab initio* nature of the provincial entitlements. The facts are clear – the offshore areas are negotiated entitlements, not projections of coastal sovereignty – but Newfoundland has simply failed to address them.
7. Newfoundland's proposed delimitation is, by its own argument,¹ built upon the foundation of its interpretation of the parties' legal entitlements. That interpretation, however, is demonstrably wrong on the facts, and if the foundation is gone, the structure constructed upon it cannot stand.

¹ Newfoundland Phase Two Memorial, paras. 82-83, 85-86.

8. Third, Newfoundland's proposed delimitation departs from the principle that, in an equitable delimitation, it is the result that is predominant. This is amply demonstrated by the fact that, as noted above, Newfoundland fails even to show in its Phase Two Memorial the full impact of the boundary that it asks the Tribunal to draw. It argues for a line to the outer edge of the continental margin, but shows a result, defined by its artificial "relevant area", that stops well short of that limit, at 200 nautical miles. The lateral extent of Newfoundland's "relevant area" is also restricted, by its selective use of coastal perpendiculars. It is, quite simply, impossible to see, let alone assess, the result of Newfoundland's delimitation on the basis of its Phase Two Memorial.
9. Finally, all of Newfoundland's efforts at narrowing the range of factual circumstances and equitable criteria available to the Tribunal lead in a direction that is fundamentally contrary to the underlying approach to equitable maritime boundary delimitation, as it has developed in the jurisprudence. From the *North Sea Cases* onward, the general thrust of the caselaw has been to achieve a "balancing up" of all the relevant factors, with appropriate weight assigned to each. This is consistent with the requirement that every delimitation be based upon its own facts, so that the "balance" is one that reflects the circumstances, and thus the equities, of a delimitation that is by definition unique.
10. Newfoundland's approach is to employ one set of circumstances, chosen without reference to the facts of this case (including the critical facts related to the nature of the zone in question and the parties' entitlements within that zone). This is fundamentally at odds with any notion of a broad-based balancing of considerations drawn from the unique facts of each case, and is thus contrary to the principles of international law that govern maritime boundary delimitation.
 - ii. **Nova Scotia's Proposed Delimitation**
11. Nova Scotia's case, in contrast to that presented by Newfoundland, proceeds from the unique facts of this case, and is unquestionably aimed at an equitable balancing-up of all, not some, of the relevant considerations. The arguments for

the delimitation proposed by Nova Scotia are summarized in Part IV above, and need not be fully restated here, but the following are some of the key elements of Nova Scotia's position:

- Nova Scotia defines the overlapping entitlements of the parties which comprise the relevant area, not by reference to a previous delimitation, but by the objective criteria that determine the outer limits of the offshore areas as defined in the *Accord Acts*;
- The overwhelming evidence of relevant conduct of the parties relating to their mutual boundary, as reflected in the factual record, is taken into account; conduct is applied as one of the primary equitable criteria in this case. The relevance of conduct (including negotiations) is enhanced, on the unique facts of this case, by the fact that the zones in question were created and defined as negotiated entitlements;
- Geography is as well an important consideration. Its role in the delimitation is reflected both in the second primary criterion applied by Nova Scotia – equal (or at least equitable) division of overlapping entitlements – and in the use of a proportionality test in assessing the overall result;
- Resource location and access is identified as an auxiliary equitable criterion, in recognition of the limited and highly specific purpose of the offshore areas, and thus the significance of resource allocation in understanding the equity of the result.

12. This brief list highlights two critical distinctions between the respective positions of Nova Scotia and Newfoundland and Labrador. First, every one of the considerations identified by Nova Scotia is firmly rooted in the facts of this case,

and no other. Similarly, the choice of equitable criteria, especially the conduct of the parties and the equal division of overlapping entitlements as defined under the *Accord Acts*, are closely tied to the relevant factual circumstances of this case. The contrast with Newfoundland's argument, in which the criteria are presented as a mandatory list unrelated to the factual context,² is unmistakable.

13. The second crucial issue in respect of which the provinces' positions diverge concerns the notion of "balancing up". Nova Scotia, clearly, relies on the conduct of the parties as a means to assess the equitable nature of its proposed line – as stated in the *Tunisia/Libya* decision, the conduct of the parties provides an excellent indicator of what they regarded as equitable in the circumstances. What Nova Scotia has not suggested, however, is that the Tribunal should consider conduct alone, with no reference to other relevant circumstances.
14. Nova Scotia's case is based on a consideration of all of the relevant circumstances, including geography, in order to allow the balancing-up which is at the heart of the fundamental norm of maritime boundary delimitation. When that balancing up is conducted, the following facts become clear:
 - The delimitation proposed by Nova Scotia, which is the existing boundary, respects and applies the *de facto* line established and respected in the conduct of the parties over many years;³
 - This delimitation also reflects an equitable division of the overlapping entitlements of the parties, as defined in the applicable legislation (equal division would require a shift of the line in favour of Nova Scotia);

² The disconnection from the facts includes, of course, the failure to even consider the nature and origin of the offshore areas as a form of legal entitlement.

³ In the outer sector, this line also precisely reflects the application of the method of delimitation agreed to by the parties in 1964, a method which utilized mid-points between prominent coastal features.

- The delimitation effects an equitable division of the resource potential of the offshore areas, allowing for the fact that the geography dictates that Newfoundland will continue to benefit from the lion's share of those resources;
 - The result, in terms of the allocation of maritime area compared to relevant coasts, shows a disproportion to the advantage of Newfoundland, but Nova Scotia acknowledges that this is counter-balanced by the long history of conduct supporting the existing line;
 - The line is very similar to that which would be obtained by another method, namely, the extension of an inner equidistant line.
15. In sum, the delimitation proposed by Nova Scotia is based on the application of equitable criteria in the light of all the relevant circumstances of this case, and it produces an entirely equitable result. As such, it is fully in conformity with the fundamental norm of maritime boundary delimitation.
16. The choice between the contending positions of the parties is clear. Nova Scotia has proposed a line which is founded on the facts of this case, has been in use for many years, and which produces a clearly equitable result. Newfoundland has relied entirely on a selective and abstract representation of geography to construct a line that is so over-reaching that it far exceeds anything ever suggested by Newfoundland prior to this dispute and delivers to Newfoundland almost all of the main geological structure that appears to have been its reason for initiating this dispute in the first place.
17. Seemingly the best explanation for Newfoundland's extreme claim is that it was prepared in anticipation of a decision that would "split the difference" between the parties' proposed lines, an exercise which Nova Scotia regards as entirely inappropriate. Nova Scotia would reiterate that the Tribunal is mandated to effect

a delimitation according to principles of international law, not to achieve a compromise through what would amount to conciliation. Nova Scotia and Newfoundland and Labrador reached their compromise many years ago, a compromise reflected in the existing line.

B. Submission

18. For all of the reasons expressed in this Phase Two Counter-Memorial, and as set out in Nova Scotia's Phase Two Memorial, *may it please the Tribunal to determine and adjudge, in accordance with Article Three and Article Thirteen of the Terms of Reference:*

(1) THAT the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia is delimited as follows:

- From a point at latitude 47° 45' 40" and longitude 60° 24' 17", being approximately the midpoint between Cape Anguille (Newfoundland) and Pointe de l'Est (Québec);
- Thence southeasterly in a straight line to a point at latitude 47° 25' 28" and longitude 59° 43' 33", being approximately the midpoint between St. Paul Island (Nova Scotia) and Cape Ray (Newfoundland);
- Thence southeasterly in a straight line to a point at latitude 46° 54' 50" and longitude 59° 00' 30", being approximately the midpoint between Flint Island (Nova Scotia) and Grand Bruit (Newfoundland);

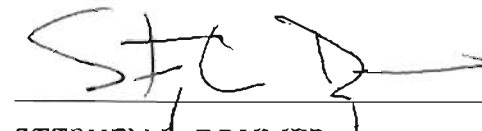
- Thence southeasterly in a straight line and on an azimuth of 135° 00' 00" to the outer edge of the continental margin;

(2) THAT the line defined in sub-paragraph (1) above is correctly set out in the *Canada-Nova Scotia Offshore Petroleum Resources Implementation Act* (S.C. 1988, c. 28), Schedule I, as it relates to the limits of the offshore area of Nova Scotia along the boundary with Newfoundland and Labrador;

THE WHOLE, respectfully submitted by the Province of Nova Scotia.

October 17, 2001.


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