

PART I: INTRODUCTION

A. The Case

1. One issue is crystal clear. Nova Scotia has always understood, and acted in accordance with the understanding, that the line dividing its offshore area from that of Newfoundland and Labrador was settled long ago, in fact if not (as the Tribunal has found) in law. Its practice and its declarations in this regard, including in this arbitration, have been clear and consistent. The line that both provinces applied for many years and that Nova Scotia applies to this day, the line that is defined in the “offshore area” régime which forms the exclusive and entire basis of the entitlements that are at issue in this case, the line that Newfoundland and Labrador now seeks to repudiate, is the same line that the two provinces negotiated in good faith and the line that they affirmed, both mutually and independently, in their practice.¹
2. “[T]he line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has not been resolved by agreement.” With these words of the Tribunal, Phase Two – the delimitation phase – of this arbitration opens, in which, under the *Terms of Reference*, the mandate of the Tribunal is to decide “**how ... the line dividing the respective offshore areas of [the parties] shall be determined.**”²
3. The finding, that the agreement by which the parties initially determined the location of their boundary was not legally binding, changes little from Nova

* Figures and annexes referred to in this Phase Two Memorial that were also referred to in either the Nova Scotia Memorial, the Nova Scotia Counter-Memorial or the Nova Scotia Oral Presentation bear the numbers originally assigned to them with the exception of cases and treaties, which, for ease of reference have been reassigned new numbers in this Phase Two Memorial. Figures appearing for the first time in this Phase Two Memorial are numbered 32 to 57 and B-1 to B-8 while the new annex numbers referred to herein begin at number 174. All references to the Memorials and Counter-Memorials of the parties are to Phase One materials.

¹ Phase One Award, May 17, 2001, p. 83 (hereinafter “Phase One Award”).

² *Terms of Reference*, Article 3.2(ii) (emphasis added). The *Terms of Reference* may be found under a separate tab in this binder.

ARTICLE THREE

THE MANDATE OF THE TRIBUNAL

- 3.1 Applying the principles of international law governing maritime boundary delimitation with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.
- 3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.
- (i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.
 - (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.

Scotia's perspective. International law requires that a delimitation be effected "... by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographical configuration and other relevant circumstances, an equitable result".³ The equitableness of the result is the dominant consideration; other considerations are subordinate to that goal. In the circumstances of this case, the evidence reveals that Nova Scotia and Newfoundland and Labrador agreed on the location of the line that should divide their respective rights in the offshore, and they applied that line in practice. The boundary line arising from that conduct comprises the most accurate possible expression of **what the parties themselves considered to be a reasonable, fair and equitable delimitation of the areas, entitlements and resources that are at issue in this arbitration.**

4. For Newfoundland and Labrador to attempt to seize upon the Tribunal's Award in the Phase One of the arbitration so as to claim an even greater share of the offshore than that which it agreed to and implemented in practice, would be tantamount to a disavowal of the good faith conduct of its agents, representatives and political leaders of the past. It would amount to a disavowal of the obligations assumed by it with respect to all of its neighbours, including Nova Scotia but including as well New Brunswick and Prince Edward Island, with which it participated in negotiations, and particularly Québec, with which it also shares boundaries. And it would constitute a repudiation of the good faith reliance of third-party oil and gas companies in the boundaries that emerged from those negotiations and subsequent practice, on which they relied to apply for permits and invest substantial sums in offshore exploration.
5. Indeed, the *de facto* delimitation effected by the parties on the basis of the information available to them and by methods agreed after many years of negotiation, was not only considered by them to be equitable in the circumstances,

³ **Annex 174:** Case Concerning Delimitation of the Maritime Boundary in the *Gulf of Maine* Area (Canada v. United States of America) [1984] I.C.J. Rep. 246 at 299-300 (hereinafter *Gulf of Maine*).

it was, and remains, an equitable delimitation. By any reasonable test, the location of the boundary as agreed in 1964 and as arising from the practice of both parties proves in fact to be equitable, and thus “an equitable result” of the delimitation to be carried out in this arbitration. While, as demonstrated in this Memorial, certain circumstances could justify awarding to Nova Scotia a portion of what is currently Newfoundland’s “offshore area”, having regard to all of the relevant circumstances of the case, disturbing what is a manifestly equitable situation, is unwarranted.

6. In sum, the position of Nova Scotia in this phase of the arbitration is that the line established by the parties’ conduct, as reflected both in their mutual agreement and their unilateral yet perfectly matching practice, was considered by them to be equitable, was treated by them as such for over three decades, and in fact provides an equitable solution to the delimitation to be effected by the Tribunal, having regard to all of the relevant circumstances. It will be seen that Nova Scotia’s position in this phase of the arbitration is entirely consistent with the position it advocated during the previous phase. This is neither accident nor guile, strategy nor stratagem. It is dictated wholly by the circumstances of this unique case.
7. Having raised the dispute that is subject to arbitration, Newfoundland and Labrador presumably takes the opposite position, although in the 37 years that have elapsed since the parties agreed the location of their boundary it has never explained its claim or identified the specific areas to which it considers itself entitled. Since Article 6.1 of the *Terms of Reference* provides for the simultaneous filing of written pleadings, Nova Scotia must anticipate a case that has yet to be articulated by Newfoundland and Labrador. Thus, this Memorial must necessarily be of a preliminary character, and a response to the Newfoundland and Labrador position will be made in later pleadings once Newfoundland and Labrador has stated its claim. **Figure 1⁴** shows the continental

⁴ **Figure 1:** The Continental Shelf Off the East Coast of Canada.

shelf off the East Coast of Canada, encompassing the areas that are at issue in this dispute.

B. Nova Scotia's Memorial

8. The Nova Scotia Memorial is divided into several Parts, each of which addresses a particular aspect of the delimitation process.
9. Part II describes very briefly certain key facts. It is not intended to provide a detailed or even a summary review of all of the relevant facts, since these were addressed in the parties' pleadings in the first phase of the arbitration and are presumed known to the members of the Tribunal. Rather, Part II notes the "broad lines" of the factual record. It also addresses certain relevant aspects of the record regarding which the parties disagree and on which the Tribunal has not ruled, as well as facts not considered in the first phase of the arbitration.
10. Part III sets out the law applicable to the delimitation in this case, and examines in detail "the fundamental norm" of maritime delimitation.
11. Parts IV and V comprise what is in effect the application of the law to the facts of the case. Specifically, Part IV describes the "relevant circumstances" that define this case and distinguish it from all others, and which are to be taken into account at each stage of the delimitation process. Part V consists of "effecting the delimitation" in the light of those circumstances: first, by identifying the equitable criteria according to which the delimitation must be carried out; second, by determining the practical methods which best satisfy those criteria and by which the boundary is to be drawn; and third, by demonstrating the equitableness of the result thus obtained.
12. Part VI addresses the concepts of acquiescence and estoppel, and demonstrates that these provide an alternative basis on which the Tribunal could declare the existing boundary to be the line dividing the parties' respective offshore areas.

13. Part VII sets out the conclusions drawn from the foregoing and defines the boundary which Nova Scotia asks the Tribunal to declare to be the line dividing the respective offshore areas of the parties.

* * * * *