PART IV: THE RELEVANT CIRCUMSTANCES

A. Introduction

1. As explained in Part III above, the fundamental norm of maritime delimitation requires that the selection of criteria and practical methods appropriate to a particular delimitation, as well as the ultimate assessment of the result, be made in the light of a full consideration of the relevant circumstances of the case. The equitableness of a given criterion or method depends entirely on the particular facts of the case.

2. The point was clearly made in the *Gulf of Maine* case, in which the Chamber, after considering a list of potentially applicable criteria, emphasized the need to assess each such criterion with reference to the facts:[1]

> With regard to these and other possible criteria, the Chamber does not think it would be useful to undertake a more or less complete enumeration in the abstract of the criteria that are theoretically conceivable, or an evaluation, also in the abstract, of their greater or lesser degree of equitableness. As the Chamber has emphasized a number of times, **their equitableness or otherwise can only be assessed in relation to the circumstances of each case**, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases.
>
> (emphasis added)

3. The facts of this unique case, as set out in Part II above, and, more broadly, as examined in Phase One, disclose a number of circumstances of great relevance to the present delimitation. These are examined in this section, under the following general categories:

   - Circumstances related to the conduct of the parties as regards the boundary between their respective offshore areas;

---

1 **Annex 174**: *Gulf of Maine, supra* Part I, note 3 at 313.

- Circumstances related to the distribution of relevant resources within the parties' offshore areas;

- Circumstances arising from other delimitations, actual and prospective, in the region;

- Circumstances of a geographic nature.

4. Prior to addressing these circumstances, two "preliminary" circumstances are examined, which themselves affect the determination of the other circumstances of relevance to the delimitation, as well as the choice of criteria and methods according to which the delimitation is carried out. These are:

- The nature and origin of the legal zone that is the subject of the dispute;

- The definition of the maritime area relevant to this delimitation.

B. The Legal Zone And The Basis Of Entitlement

5. It is clear from the discussion of the applicable law in Part III, above, that the nature and origin of the maritime zone in issue is a circumstance of such central significance that it influences the determination of those other circumstances that are of legitimate relevance to the delimitation. In the *Gulf of Maine* case, the Chamber considered that the nature of the zone it was asked to delimit with a "single boundary" – a zone that would encompass both the continental shelf and the water column – constituted a feature that distinguished that case "... from all

those previously adjudicated".[2] This fact was found by the Chamber to constitute:[3]

> ... a special aspect of the case which must be taken into consideration **even before proceeding to examine the possible influence of other circumstances on the choice of applicable criteria.**
>
> (emphasis added)

6. The Chamber's assessment of the significance of the nature of the zone in that case applies even more forcefully to the "offshore area" that is the subject of the present delimitation. It is clear from the discussion of the legal status and substantive content of the offshore area regime, in Part III above, that this arbitration involves a maritime zone of a legal nature that is truly *sui generis* to the *Accord* legislation. The Tribunal is not concerned with a continental shelf claim, or with jurisdiction over the water column. The "offshore areas" as defined in the Accord Acts do not involve "sovereign rights" even remotely similar to those at stake in any previous delimitation at international law. The Tribunal is solely concerned with a zone and with entitlements that are constrained in nature and scope and that are entirely the creation of negotiated arrangements implemented in Canadian law.[4]

7. The unique nature and origin of the juridical zone to be delimited means, among other things, that it must influence the selection of other relevant circumstances, and indeed must underlie all aspects of the delimitation. As in the *Gulf of Maine*

---

2 Annex 174: *Gulf of Maine, supra* Part I, note 3 at 267.

3 Annex 174: *Gulf of Maine, supra* Part I, note 3 at 326.

4 The term "offshore area" defines a maritime zone that is *sui generis* to the *Accord* legislation and to the underlying agreements which that legislation is intended to implement. There has never been an adjudicated delimitation involving such a zone. Indeed, Newfoundland's position in Phase One, confirmed by the Tribunal in its Award, was that no delimitation involving this particular zone, either agreed or adjudicated, has ever been effected.

case, this aspect of the case distinguishes the delimitation from all those previously adjudicated, and must of necessity be given great weight.[5]

8. Three characteristics of the "offshore area" as a maritime zone merit special consideration:

- The origin of the offshore area as a negotiated entitlement;

- The substantive limitation of the offshore area regime to hydrocarbon resources and the parties' limited rights respecting those resources;

- The definition of the seaward extent of the offshore area.

i. The "Offshore Area" Regime Is A Negotiated Entitlement

9. It is abundantly clear from the evidence and submissions presented in Phase One that the very existence of the offshore areas, and any rights over those areas accruing to the parties, are derived from a negotiated entitlement. The *Accord Acts*, which are the sole legal basis for the existence and definition of the offshore areas, are nothing more or less than the implementing legislation for the two negotiated offshore *Accords*.[6] The limited provincial rights which are exercised in the offshore areas do not derive from the seaward projection of a land-based

---

[5] This is not to say that analogies cannot be drawn from delimitations involving the continental shelf, a maritime zone which deals with the same seabed resources as the offshore areas (but with other resources and uses as well). Rather, the point is that caution must be exercised in the use of such analogies, and it cannot be assumed that circumstances which were highly relevant in a shelf delimitation will automatically have that status in this case. The dominant concern must be to achieve an equitable result as defined in the context of the zone in this particular case.

[6] **Annex 1:** *Canada-Newfoundland Accord*; **Annex 2:** *Canada-Nova Scotia Accord*.

sovereignty, but rather from what the provinces were able to negotiate with the federal government.[7]

10. The specific negotiations that produced the two *Accords*, in 1985 and 1986, were the culmination of a long process of negotiation (and litigation) between the provinces, on the one hand, and the federal government on the other – a process dating back to the late 1950s and early 1960s. This history was reviewed in detail in the Nova Scotia Memorial in Phase One[8], and is restated in brief in Part II above.

11. Although there were periods during which no negotiations were under way, and during which the provincial united front broke down,[9] the essential continuity of the process was maintained by the persistence of the provinces' claims throughout the relevant period.[10] More important, however, is the fact that each successive stage built upon the last, so that the ultimate resolution as found in the *Accord* legislation is clearly the product of what went before.[11] Newfoundland, having lost its case before the Supreme Court of Canada in 1984,[12] negotiated a deal – the 1985 *Atlantic Accord*[13] – that clearly represented a return to the shared management approach which had its genesis in the discussions of 1972-1973 and

---

7 **Annexes 1 and 2**: The *Accords* are structured to avoid the constitutional issue: see s. 3. In the absence of the deal represented by the *Accords*, the entire area of both zones would be under federal jurisdiction (as indeed it is even under the *Accords*), but with no shared management or direct provincial access to benefits. It must be borne in mind, however, that Nova Scotia's claim to rights over the offshore has not been litigated in the Canadian courts.

8 Nova Scotia Memorial, Part II.

9 Newfoundland initiated separate negotiations with the federal government regarding jurisdiction over submarine minerals in 1973. See Nova Scotia Memorial, Part II E.

10 Thus, for example, permits were issued by Newfoundland from 1964 onwards as part of a "strategy to assert exclusive jurisdiction" over the offshore: see Newfoundland Counter-Memorial, para. 211.

11 Thus, the negotiations of 1964 formed the basis for the renewed assertion of provincial claims in 1972: Nova Scotia Memorial, Part II D; Nova Scotia Counter-Memorial, Part III C. The federal rejection of provincial claims in 1972 was accompanied by the counter-proposal on administrative arrangements and royalty sharing, which formed the basis of negotiations with all five East Coast provinces in 1972-1973, and with the three Maritime provinces in 1976 (leading to the 1977 *Memorandum of Understanding*): Nova Scotia Memorial, Parts II D and II F; Nova Scotia Counter-Memorial, Part III C. The 1982 *Canada-Nova Scotia Agreement* carried on from the failure of the 1977 arrangement, but built on the fundamental approach undertaken in 1972-1973: Nova Scotia Memorial, Part II F; Nova Scotia Counter-Memorial, Part III C.

12 **Annex 182**: *Hibernia Reference*, *supra* Part II, note 63.

13 **Annex 1**: *Canada-Newfoundland Atlantic Accord.*

which was based in part on the model already put in place under the 1982 *Canada-Nova Scotia Agreement.*[14]

12. The process of negotiation that culminated in the *Accords* also included the negotiation of mineral rights boundaries between and among the five East Coast Provinces. The parties agree that the definition and description of the provinces' boundaries were agreed in 1964 and 1972, subject to their recognition by the federal government as part of a resolution of the provinces' offshore claims.[15] Thus, the location of the parties' boundaries was negotiated and agreed by them in the context of the same negotiations that eventually led to the resolution of the jurisdictional question. This question will be addressed further below, with respect to the conduct of the parties.

ii. The Parties Have Only Limited Entitlements To Hydrocarbon Resources In The Offshore Areas

13. The provincial interest in the offshore areas, as defined in negotiations and as implemented in the *Accord* legislation, is limited both as to the type of resources involved and the substantive nature of the rights possessed by the provinces. The limited nature of the parties' substantive legal rights in their offshore areas, which are restricted to defined participation in shared management and benefits, was discussed in Part III, above. In addition to these limited legal rights, the offshore area regime is restricted to certain resources. For both Nova Scotia and Newfoundland, the *Accord Acts* currently apply only to petroleum and natural gas.[16] No other seabed resources are engaged, nor is there any regulatory power

---

[14] **Annex 68:** "Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue-Sharing" (2 March 1982). Like the 1982 *Agreement*, the 1985 *Accord* provided for shared management rights and joint management boards.

[15] See, for example, the statement by the Agent for Newfoundland during oral argument, responding to a question as to whether the parties could have agreed upon what would ultimately go into an agreement: "...[N]o one denies on the Newfoundland and Labrador side that they did set out those as in the September 30th '64, the boundaries that they were referring to. And those were the boundaries that were to go into the agreement". Transcript of Oral Argument, March 15, 2001, p. 398. See also Transcript of Oral Argument, March 15, 2001, p. 397: "I said it was an agreement. It was desirable to conclude an agreement on certain defined boundaries. So we accept that the boundaries were described and defined."

[16] See **Annexes 1** and **2:** *Accord Acts.*

over such uses as foreign pipelines or cables. This limitation makes it possible to focus, in the consideration of the impact of a delimitation, on the sole resources which actually fall within the jurisdiction of either offshore area. No consideration need be given to other seabed resources or uses, or to the water column.

iii. The Offshore Areas Run From The Coast To The Outer Limits Of Canadian Jurisdiction

14. The *Accord Acts* specify that, except where otherwise provided, the offshore areas begin at the low water mark of the provinces,[17] a definition which extends to some areas of internal waters within the provinces and to the territorial sea.[18] The outer limit is defined as the "outer edge of the continental margin".[19] By virtue of the *Oceans Act*, the outer edge of the continental margin defines the limit of Canadian shelf jurisdiction.[20] The margin is to be:[21]

> [D]etermined in the manner under international law that results in the maximum extent of the continental shelf of Canada, the outer edge of the continental margin being the submerged prolongation of the land mass of Canada consisting of the seabed and subsoil of the shelf, the slope and the rise, but not including the deep ocean floor with its oceanic ridges or its subsoil.

15. As shown in Part III, this definition is phrased in conformity with the provisions of Article 76 of the *LOS 1982*. The provision effectively asserts Canada's intention to adopt the definition of the juridical shelf found in Article 76, which provides for the "maximum extent" of the shelf under international law. Accordingly, any assessment of the seaward extent of either offshore area must take that definition as its starting point (see **Appendix B**, below, for a further discussion of this definition).

---

17 **Annex 1:** *Canada-Newfoundland Accord Act*, s. 2; **Annex 2:** *Canada-Nova Scotia Accord Act*, s. 2 and Sch. I.

18 **Annex 1:** *Canada-Newfoundland Accord Act*, s. 2; **Annex 2:** *Canada-Nova Scotia Accord Act*, s. 2 and Sch. I.

19 **Annexes 1 and 2:** *Accords Acts*, s. 2.

20 **Annex 113:** *Oceans Act*, s. 17(1)(a). Where the outer edge of the continental margin does not extend to a distance of 200 nautical miles from the baselines of the territorial sea, the outer edge of the margin is 200 nautical miles from the baselines: *Oceans Act*, s. 17(1)(b).

21 **Annex 113:** *Oceans Act*, s. 17(1)(a).

16. It is important to note that the adoption of the "outer edge of the continental margin" – the seaward extent of the continental shelf of Canada – as the limit for the provinces' offshore areas does not in any way imply that the offshore areas themselves are to be treated as continental shelf entitlements. As shown above, this would be plainly inconsistent with the origin of the offshore area as a negotiated entitlement, and with its substantive scope. Rather, the *Accord* legislation in effect adopts by reference the definition of the outer limit of the continental shelf of Canada, which is the only definition that would be relevant given that the "offshore area" regime applies throughout the Canadian continental shelf. This adoption of a definition of the outer limit of the zone cannot, of course, change the substance of what falls within the zone.

C. The Area Relevant To The Delimitation

17. As discussed in Part III, above, the definition of the area relevant to a delimitation, which can affect the selection of equitable criteria and practical methods, as well as the overall assessment of the equitableness of the result, is directly related to the origin and nature of a State's claim to a maritime zone. At the most fundamental level, this is nothing more than common sense – if the purpose of a delimitation is to divide areas that are the object of competing claims, then the extent of the conflicting entitlements must be understood.

18. This basic proposition is reflected in the jurisprudence, where the "relevant area" has been determined by different methods, of varying degrees of precision,[22] deemed appropriate to the particular circumstances of the zones under consideration. The underlying approach, however, remains that stated in the *North Sea Cases* and endorsed in *Tunisia/Libya*, by which the relevant area is defined as the area "where one claim encroaches on the other".[23] The concept was

---

[22] See, for example, **Annex 187:** *Libya/Malta, supra* Part III, note 25 at 25-26, where the nature of the area and the impact of other possible delimitations involving third States, were taken into account by the Court in determining the geographic scope of its inquiry. It referred to the relevant area as "so much at large": *supra* Part III, note 25 at 53.

[23] **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 61; **Annex 188:** *North Sea Cases, supra* Part III, note 25 at 51-52.

further refined by the ICJ in *Denmark/Norway*, in which the notion of a "claim" was explained as including, in the particular context of maritime boundaries, "... areas which each State would have been able to claim had it not been for the presence of the other State":[24]

> The "area of overlapping claims"... between the two lines representing the Parties' claims, is of obvious relevance to any case involving opposed boundary claims. But maritime boundary claims have the particular feature that there is an **area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other State;** this was the basis of the principle of non-encroachment in the *North Sea Continental Shelf* cases ...
>
> (emphasis added)

19. This "area of overlapping entitlements", therefore, provides the basis for the critical definition of the area relevant to the delimitation.[25] Determining the area of overlap requires, first, a definition of each side's maximum entitlement (the area that it would have been able to claim but for the presence of the other party) under the law which governs the seaward extent of the zone in question, and, second, a determination of where those claims overlap.[26]

i. Overlapping Entitlements Under The *Accord Acts*

20. On the facts of this case, the exercise of determining the area of overlapping entitlements is relatively straightforward, and does not require analysis of factors such as "relevant" coasts or supposed coastal projections. Given that the dispute concerns solely the delimitation of the parties' respective offshore areas as

---

24 **Annex 193:** *Denmark/Norway, supra* Part III, note 45 at 64.

25 In the circumstances of the *Denmark/Norway* case, the Court found it necessary to look at both the overlapping "claims" and the overlapping "entitlements", but this did not change the basic point, addressed by the Court, that it is necessary to consider all areas of potential overlap: **Annex 193:** *Denmark/Norway, supra* Part III, note 45 at 64.

26 It bears reiterating that another unusual feature of the present case is that, although Newfoundland and Labrador has raised a dispute concerning the delimitation of the boundary of the parties' respective "offshore areas", it has never articulated its objections to the location of the boundary negotiated by the parties or definitively stated its claim as to where that boundary should properly lie.

defined in the *Accord Acts* – Article Three of the *Terms of Reference* mandates the Tribunal to determine the line dividing these areas (and no other) – the question can be put as follows: **what is the offshore area which each Province would have been able to claim had it not been for the presence of the other, and where do those competing entitlements overlap?** The answer, not surprisingly, is found in the *Accord Acts* themselves, which define the nature and scope of each party's offshore area.

21. As defined by section 2 of the *Canada-Newfoundland Accord Act*, the "offshore area" with respect to which Newfoundland may share in the administration and revenues encompasses:[27]

> [T]hose submarine areas lying seaward of the low water mark of the Province and extending, at any location, as far as
>
> (a) any prescribed line, or
>
> (b) where no line is prescribed at that location, the outer edge of the continental margin or a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea of Canada is measured, whichever is the greater ...

22. There is, of course, no prescribed line under the Act. Beginning at the low water mark, therefore, Newfoundland's offshore area entitlement runs "... at any location, as far as ... the outer edge of the continental margin" of Canada,[28] which is, as noted earlier, defined by application of the "broad shelf" provisions of Article 76 of the *LOS 1982*. Thus, the Newfoundland *Accord* legislation establishes a potential entitlement to the outer edge of the continental margin, as it would be defined under Article 76. **Figure 34**[29] depicts the total extent of Newfoundland's potential offshore area claim, "but for" the presence of Nova

---

27 Annex 1: *Canada-Newfoundland Accord Act*, s. 2.

28 One apparent impact of this definition is to extend Newfoundland's claim to the low water mark of Nova Scotia. Although it is assumed that this was neither Newfoundland's intent at the time the *Accord* and implementing legislation were drafted nor its position today, to date Nova Scotia has never had the opportunity to consider an actual claim by Newfoundland.

29 **Figure 34**: Maximum Newfoundland Offshore Area Entitlement.

Scotia.[30] The methodology and technical data supporting this depiction are described in **Appendix B**, below.

23. The full extent of Nova Scotia's potential offshore area entitlement is also defined in the relevant legislation. Section 2 of the *Canada-Nova Scotia Accord Act*[31] states: "'*offshore area*' means the lands and submarine areas within the limits described in Schedule I;" and Schedule I describes an area extending from the low water mark seaward to the continental margin.[32] The total potential offshore area claim for Nova Scotia, calculated and depicted by the same method as for Newfoundland, is shown in **Figure 35**[33].

24. **Figure 36**[34] shows the area in which the parties' respective entitlements converge and overlap. This area, coupled with the much smaller area involved in the Gulf, form the area primary of relevance to this delimitation, for the purposes both of effecting the delimitation and testing the equitableness of the result.[35]

ii. The Total Offshore Areas Of The Provinces

25. In addition to the area of overlap of the parties' respective entitlements, consideration of the parties' total offshore area entitlements is also relevant, especially as a means of assessing the overall equitableness of the result of the

---

30 The continental margin is depicted using the best available data. The Gulf of St. Lawrence is excluded due to the complexity added by attempting to determine with precision the likelihood of any Newfoundland claims against Québec, and because the total area is not significantly affected by any possible overlap in the Gulf. Similarly, the depiction in **Figure 34** begins at the baselines from which the territorial sea is measured, which excludes some areas below the low water mark and thus within the offshore areas. This is done for convenience in measurement, and, as with the maritime area within the Gulf of St. Lawrence, it is submitted that the overall calculation is not affected significantly by this exclusion. The same methodology is applied with respect to Nova Scotia's potential "offshore area" entitlement.

31 **Annex 2:** *Canada-Nova Scotia Accord Act*, s. 2 and Sch. I.

32 The "offshore area" described Schedule I is bounded, in the Atlantic, by the Canada-U.S. line in the Gulf of Maine and by the negotiated Nova Scotia-Newfoundland boundary in the north. The fact that the inclusion of the boundary with Newfoundland effectively "blocks" what would otherwise be the full reach of Nova Scotia's entitlement to the south and east is obviously irrelevant – Newfoundland presumably would not at the same time deny the applicability of the line while insisting upon its application in the context of an assessment of Nova Scotia's potential entitlement.

33 **Figure 35**: Maximum Nova Scotia Offshore Area Entitlement.

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

35 See **Annex 187:** *Libya/Malta, supra* Part III, note 25 at 25-26, 49-50, where the Court referred to "relevant area" for both effecting the delimitation and testing the result.

delimitation exercise. **Figure 37**[36] depicts this area, illustrating the offshore area pertaining to each party under the terms of the governing legislation.

26. Several factors underscore the relevance of this consideration. As noted in Part II, above, in the negotiations that eventually led to the *Accords,* the entire East Coast offshore (including the Gulf of St. Lawrence) was at stake, as reflected, *inter alia*, in the proposal for revenue-sharing among the provinces based on the concept of an overall "Atlantic Pool".[37] From the very beginning, in their negotiations with the federal government, and with each other, that led eventually to the *Accords*, the provinces were attempting to divide, or apportion, this "whole" amongst themselves. One need look no further than **Figure 37** to see just how good a deal Newfoundland got in the resolution of the offshore dispute.

27. More fundamentally, the area that is the object of the delimitation in this case comprises an integral, undivided whole: Canada's jurisdiction over the continental shelf. This is a fundamentally different situation than that of a true shelf delimitation, for example, in which the assumption (as stated in the *North Sea Cases*) is that the delimitation:[38]

> [I]nvolves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area ...
>
> (...)
>
> Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division has been

---

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

37 See Part II, above. See also **Annex 52**: "Notes related to Revenue – Sharing Map for Briefing Session with Premiers Moores" from D.G. Grosby (19 May 1972); **Annex 47**: Memorandum from J. Austin, Deputy Minister of Energy, Mines and Resource, Government of Canada to Donald Macdonald, Minister of Energy, Mines and Resources, Government of Canada (15 May 1972).

38 **Annex 188**: *North Sea Cases, supra* Part III, note 25 at 22-23.

> made. **But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.**
>
> (emphasis added)

28. Unlike in the *North Sea Cases*, the parties in this arbitration have no *ab initio* entitlements to the area to be delimited, waiting only to be "found" by the Tribunal. Their respective entitlements over Canada's East Coast continental shelf derive entirely from the *Accord Acts*. As explained above, the effect of the Tribunal's decision in this case will be to determine which *Accord Act* applies where; the integral, undivided nature of Canada's jurisdiction over the continental shelf will remain intact.[39]

29. For these reasons, any assessment of the equitableness of the line by which the parties agreed to delimit their respective entitlements in the past, or by which their "offshore areas" are to be delimited now, must also take account of the whole of the area that is, in fact, apportioned between them by the *Accord* legislation.[40]

D. The Conduct Of The Parties

30. In Phase One, the Tribunal found that the conduct of the parties was insufficient to demonstrate that they had concluded a binding agreement on the line dividing their respective offshore areas.[41] In Phase Two, however, the relevance of the parties' conduct must be viewed through a different lens. The question here is not whether the conduct of the parties confirms the existence of a binding agreement, but whether that conduct is relevant to effecting an equitable delimitation. For the reasons explained below, Nova Scotia submits that the conduct of the parties in this case is highly relevant.

---

39 The *Accords Acts* are structured to set aside the issue of jurisdiction. Nova Scotia's claim to the offshore has never been litigated in the Canadian courts.

40 The definition of the potential claims of the provinces, as discussed above, is limited to what would be available under the Article 76 of the *LOS 1982* which would not permit, for example, extension of the Nova Scotia claim across the land mass of Newfoundland to those areas north of the overlap shown in **Figure 37** above. This does not mean, however, that the other areas, which were and are part of the undivided federal jurisdiction that stands to be apportioned, are not relevant to understanding the equities of the delimitation.

41 Phase One Award, para. 7.5.

31. The potential relevance of the prior conduct of parties involved in a maritime delimitation case has consistently been recognized in previous adjudications, even where the facts have not been such as to justify its direct application. This position was confirmed in *Libya/Malta*,[42] *Gulf of Maine*,[43] *Guinea-Guinea-Bissau*[44] and *Denmark/Norway*.[45] One of the clearest statements of the relevance of this factor is found in the decision of the Court in the *Tunisia/Libya* case. In considering the significance of a line established by matching oil exploration concessions, the Court declared:[46]

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

32. The legal consequences that might be attached to the conduct of the parties in a delimitation case could include a finding that one party has acquiesced in, and is estopped from denying, a particular state of affairs; or a determination that a given practice is indicative of what the two parties themselves consider to be an equitable delimitation.[47]

---

42 **Annex 187:** *Libya/Malta, supra* Part III, note 25 at 29.

43 **Annex 174:** *Gulf of Maine, supra* Part I, note 3 at 303: "The question, which the Parties have argued at length during the present case, is whether the conduct of the Parties over a given period of their relationship constituted acquiescence by one of them in the application to the delimitation of a specific method ...or whether such conduct might have resulted in a *modus vivendi*, respected in fact, with regard to a line corresponding to such an application."

44 **Annex 191:** *Guinea-Guinea-Bissau, supra* Part III, note 33 at 682: The Court of Arbitration took into account the respect accorded a particular limit, derived from an earlier land boundary treaty, "during activities concerned with the installation and maintenance of beacons and buoys, the laying of certain submarine cables, the control of navigation in peace and war, customs patrols, etc...".

45 **Annex 193:** *Denmark/Norway, supra* Part III, note 45 at 53-56, 75-77.

46 **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 84.

47 **Annex 174:** *Gulf of Maine, supra* Part I, note 3 at 304.

33. Relevant conduct may include, *inter alia*: mutual actions by which the parties jointly agree upon some line (for example, as an agreed *modus vivendi*); independent but concordant actions establishing a *de facto* line (as with matching oil concession lines);[48] and unilateral actions accompanied by acquiescence of the other party[49] (for example, silence in the face of a clearly conflicting boundary claim). As will be shown below, all three types of relevant conduct are present in this case – and all point to the same result.[50]

i. The Parties Agreed On The Location Of The Boundary

34. An overview of the relevant conduct of the parties in respect of the negotiation and implementation of an agreed boundary is set out in Part II, above. That evidence demonstrates that after negotiations extending over a number of years, Nova Scotia and Newfoundland and Labrador (and the other East Coast Provinces) agreed in 1964 upon the location of the boundaries delimiting their respective zones. Subsequently, the boundary turning points were specified by coordinates agreed by provincial representatives, and the delineation and description of the boundaries was agreed by the five Premiers in 1972, as confirmed in Premier Moores' statement to the House of Assembly the following day.[51]

35. The Tribunal has determined that the agreement on boundaries was not legally binding, in part because of its "conditional character and its linkage to a provincial claim to existing legal rights to the offshore."[52] Nonetheless, there can be little doubt that the provinces agreed upon **something** in 1964 and 1972, even if that agreement was not legally binding.

---

48 **Annex 189:** *Tunisia/Libya*, *supra* Part III, note 25 at 83-84.

49 See, for example, the consideration of the *modus vivendi* respecting sponge fishing that arose during the colonial period, based on assertion by Italy and acquiescence by France in **Annex 189:** *Tunisia/Libya*, *supra* Part III, note 25 at 70-71.

50 Conduct has also been argued as relevant where one party is alleged to have adopted a position on delimitation principles and methods in other delimitations, or more generally. See, for example, **Annex 193:** *Denmark/Norway, supra* Part III, note 45 at 75-78. This form of conduct is not relevant to the present case.

51 See also Nova Scotia Memorial, Part II B, C and D.

52 Phase One Award, para. 7.5.

36. Indeed, as noted in Part II, above, Newfoundland has conceded as much with respect to the events of 1964.[53] As variously described by counsel for Newfoundland during the March 2001 hearing, the parties' agreement could be described as encompassing, *inter alia*: "a present indication of what those boundaries are going to be";[54] "an agreement on what they [the provinces] will conclude in their future agreement";[55] "an agreement to agree in the future";[56] or, "what the boundaries will be when an agreement is entered into."[57]

37. The distinction upon which Newfoundland relied so heavily in Phase One – between legally binding agreements and good faith political commitments which it was free to discard subsequently[58] – is irrelevant to the factual question at issue here. For the purposes of determining the relevant circumstances of the delimitation, a political agreement is an agreement. It constitutes evidence of the most compelling kind regarding what the parties themselves believed to be an appropriate resolution of their dispute and an equitable delimitation of their respective claims. As set out above, the key points of agreement were the actual turning points out to the Flint Island – Grand Bruit midpoint and the S.E./southeasterly line, as well as the technical specification of the turning points by the *JMRC*, approved by the Premiers in 1972.

---

53 As for the events of 1972, Newfoundland claimed in Phase One that Premier Moores' statement of June 19, 1972, did not reflect any agreement. The Tribunal, at para. 5.18 of its Award, rejected this argument and found that Premier Moores "evidently supported" the "agreements which he had just announced to the House of Assembly".

54 Transcript of Oral Argument, March 15, 2001, p. 394.

55 Transcript of Oral Argument, March 15, 2001, p. 394.

56 Transcript of Oral Argument, March 15, 2001, p. 394.

57 Transcript of Oral Argument, March 15, 2001, p. 395. See also Transcript of Oral Argument, March 15, 2001, p. 397 for a description of the "defined" element of an agreement.

58 See, for example, Newfoundland Counter-Memorial, para. 17, where the distinction between "binding agreements" and "political undertakings or policy agreements" is stressed. Newfoundland's view of the status of the political agreements is, of course, clear. Counsel for Newfoundland, in reference to the status of the admittedly common position on the location of some boundaries taken by the Premiers in 1972, used the following words: "It at most resolved it until a different position was taken. It was a resolution on a political level.": Transcript of Oral Argument, March 15, 2001, p. 516.

38. The significance of this agreement between the parties on the location of the boundary, and its special relevance in the present delimitation, is heightened by at least five factors:

- The high degree of mutuality involved in the conduct;
- The nature of the agreement and the reason for its eventual non-implementation;
- The intended finality of the agreed boundaries;
- The object and purpose of the agreement;
- The conduct of the parties subsequent to the agreement.

a) The Degree of Mutuality

39. The agreement reached by the parties in 1964 and confirmed (with greater precision) in 1972 represents the highest possible level of "mutuality" – the parties negotiated and jointly determined their boundary. This is not a situation of "matching" yet independent actions resulting in a *de facto* concordance in practice, as was the case with the oil concessions in *Tunisia/Libya*[59] or with the various administrative measures taken by the parties in *Guinea-Guinea-Bissau*.[60] Nor does the conduct in question here involve a unilateral act combined with a claim of acquiescence.

40. In 1961-1964, and again in 1968-1972, the parties, with the three other East Coast Provinces, acted in concert to create their mutual boundaries and to define the methods by which those boundaries were drawn. These boundaries and methods,

[59] **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 84.
[60] **Annex 191:** *Guinea-Guinea-Bissau, supra* Part III, note 33 at 682.

therefore, must be taken to represent the product of the parties' good faith efforts to determine an equitable solution to the delimitation of their respective maritime claims.

41. At international law, the most fundamental obligation of States involved in a maritime delimitation dispute is to seek a resolution "effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result".[61] If it is assumed that both parties acted in good faith in their negotiations, then the consensus reached by them regarding both the methodology to be employed and the location of their boundaries must be highly relevant, if not determinative, in assessing what they themselves considered to be an equitable resolution of their boundary.

b) The Reasons For Non-Implementation

42. At the heart of Newfoundland's argument in Phase One was the contention, with which the Tribunal agreed, that the agreement of the parties as expressed in 1964 and 1972 was conditional primarily upon acceptance of the provinces' ownership claims by the federal government. Newfoundland made this point quite clearly during the hearing. Referring to paragraph 5 of the *Joint Communiqué* of 30 September 1964, in which the boundaries as set out in the 1961 *Notes Re: Boundaries* are stated by the Premiers to "be the marine boundaries of the Provinces",[62] the Agent for Newfoundland argued: [63]

> What I'm suggesting ... is that paragraph 5 sets out a statement by the Premiers of what the boundaries are going to be in the agreement which they will -- when they conclude the agreement. It's a present indication of what those boundaries are going to be, so **in that sense they have come to an agreement on what they will conclude in their future** agreement. But as I mentioned before, that's still an agreement to agree in the future and they still haven't entered into that agreement. And as we would

61 Annex 174: *Gulf of Maine, supra* Part I, note 3 at 299.
62 Annex 24: *Communiqué* issued by Atlantic Premiers Conference, Halifax, Nova Scotia, September 30, 1964 (30 September 1964).
63 Transcript of Oral Argument, March 15, 2001, pp. 393-394.

> suggest, **the reason they don't is that it is all tied to this issue of offshore ownership**.
>
> ...
>
> They are **setting out the terms** on which, when they do enter into an agreement, they will use these terms. And that is consistent with -- we would suggest, with the process that continued. They refined the turning points in the boundary. **And these -- the terms -- if they ever got ownership of the offshore they would enter into an agreement on these terms**.
>
> (emphasis added)

43. In other words, the reason the agreement reached by the parties regarding the location of their boundary never became binding on them was the refusal of the federal government to accede to the provinces' jurisdictional demands – a matter beyond the control of the parties and completely unrelated to the actual determination of their boundaries *inter se*. Had the federal government responded favourably in October 1964, then presumably Newfoundland would in good faith have fulfilled its agreement and implemented the boundaries. The federal refusal, no matter that it might have been fatal as regards the conclusion of a binding legal agreement, does not detract from the fact that the parties, after many years of consideration, agreed on a boundary that they regarded as an appropriate division of their respective offshore claims.

c) The Intended Finality Of The Agreed Boundary

44. In *Tunisia/Libya*, the ICJ found that a *modus vivendi*, even if applied as an interim solution pending resolution of the parties' dispute, could be considered relevant as an indicator of what the parties considered to be an equitable solution.[64]

---

[64] **Annex 189:** *Tunisia/Libya*, *supra* Part III, note 25 at 70-71, 84-85. This aspect of the decision has been subject to criticism, on the grounds that parties should be encouraged to adopt interim solutions on a no-prejudice basis, so as to prevent conflict and permit development pending resolution of a dispute. If States fear that such actions will be held against them in later litigation, the incentive may be to insist upon exaggerated claims. See **Annex 184:** *Charney*, *supra* Part III, note 2 at 236. This concern is irrelevant in the present case, for the reason expressed below.

45. In the case of Nova Scotia and Newfoundland and Labrador, the position is even clearer, for their agreement on the location of the boundary was intended, not as an interim solution, but as the final boundary. The only matter left unresolved when the parties concluded their agreement in 1964 involved claims as **between the provinces and federal government**. There was no pending dispute on the location of the boundaries between or among the provinces in the period 1964-1972 (the period after 1972 is dealt with below). There is no evidence whatsoever that the provinces regarded their boundary agreement as an "interim" solution. Newfoundland itself acknowledges, as noted above, that the parties intended that the agreed boundaries would become binding upon federal recognition and acceptance of the provinces' jurisdictional claim. This intended finality increases the relevance of the agreed line in the present delimitation.

d) The Object And Purpose Of The 1964 Agreement

46. The agreement concluded in 1964 and reaffirmed in 1972 related specifically to the provinces' entitlements with respect to submarine minerals – no claim to fisheries or other jurisdiction was ever made. The provinces requested implementation of the boundaries under section 3 of the *BNA Act (1871)*,[65] which provides for the alteration of a province's territory. Although this was an impossibility in the light of the legal status of the continental shelf,[66] there is no indication that this was anything other than an attempt to find the constitutional means best suited to their ends.[67] The claim to "control" or "ownership" was restricted throughout to submarine minerals, and from the very outset the provinces' focus was control in relation to hydrocarbon resources.

65 **Annex 25:** *British North American Act, 1871* (U.K.), 34&35 Vict., c. 28 (U.K.) s. 3 (now the *Constitution Act, 1871)*.

66 See Phase One Award, para. 3.6.

67 In oral argument in Phase One, counsel for Newfoundland advanced the view that the section 3 approach might have been the "only obvious vehicle to fix" the problem posed by the fact that the shelf was possibly outside the provinces: Transcript of Oral Argument, March 16, 2001, p. 564.

47. The parties' boundary agreement, then, was concerned precisely with the resources that are the object of the *Accords* and implementing legislation and that are, today, the sole object of the parties' entitlements within the "offshore areas" to be delimited in this arbitration.

48. In *Tunisia/Libya*, the oil concession practice of the parties was found to be "highly relevant", in large part because of the central role of such resources to the dispute between the parties:[68]

> [T]he line was not intended as a delimitation of a fisheries zone, or of a zone of surveillance. It was drawn by each of the two States separately, Tunisia being the first to do so, for purposes of delimiting the eastward and westward boundaries of petroleum concessions, a fact which, in view of the issues at the heart of the dispute between Tunisia and Libya, has great relevance.

49. In the present case, issues related to benefits from oil and gas resources are not just "at the heart" of the parties' dispute, they comprise **the entire dispute**. The agreement reached by the parties in 1964, albeit non-binding, clearly reflects their attitudes regarding an appropriate division of their respective entitlements to hydrocarbon resources within Canada's East Coast continental shelf. As such, it is an especially significant circumstance in the context of the present delimitation.

50. Moreover, the factual record clearly reveals that the parties understood throughout that the boundary as agreed by them in 1964, as well as the *de facto* line that appears from their mutual practice and acquiescence (discussed below), was to be applicable "for all purposes", no matter the nature of the "control" to be exercised by them over the hydrocarbon resources of the shelf.[69]

51. The Tribunal has determined that the agreement reached by the provinces in 1964 was "... predicated on the (eventually unfulfilled) hope of federal recognition of the provincial claim for ownership"[70], and that this was one reason why it "... did

[68] **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 84.
[69] Nova Scotia Memorial, Part IV D; Nova Scotia Counter-Memorial, Part IV B.
[70] Phase One Award, para. 7.2.

not amount to a definitive agreement".[71] It also found that, in 1972, "... the Federal Government was prepared to accept the agreed lines for the purposes of revenue distribution, but the provinces never collectively accepted any such proposal."[72] These findings, however, by no means negate the significance of other instances of the parties' conduct that tend to confirm that they viewed the boundary emerging from their conduct as applicable in the context of a shared management and royalty regime such as those they eventually agreed to under the *Accords*. The most important examples of such conduct include the following:

- The May 12, 1969 letter from Minister Allard of Québec, Vice Chairman of the *JMRC*, in which, *inter alia*, he sought assurances from the other provinces on six points, including;[73]

> 3. That the boundaries are effective **for all purposes**, and in particular, mineral rights in the submarine areas are the property of the Province within whose boundaries the area is.
>
> (emphasis added)

- Premier Smallwood's January 29, 1970 letter to Prime Minister Trudeau.[74] Responding to the Prime Minister's December 2, 1969[75] proposal regarding "governmental administrative

---

71 Phase One Award, para. 7.5.

72 Phase One Award, para. 7.5.

73 **Annex 43:** Letter from P.-E. Allard, Vice-Chairman, Joint Mineral Resources Committee to P. Gaum, Minister of Mines, Government of Nova Scotia (12 May 1969) at 4. See Nova Scotia Memorial, Part IV B. The Tribunal has found that "[r]esponses from the other provinces [to the Allard letter] varied.": Phase One Award, para. 5.13. However, it also found that "[t]he closest the provinces came to a definitive agreement was in 1972, when Minister Allard sought explicit assurances on the JMRC boundaries "for all purposes" ... No doubt it was a legitimate provincial tactic in the course of extended negotiations with the Federal Government to maintain that position [i.e., to maintain the provinces' ownership claims, and thus to leave unresolved the "all purpose" nature of the boundaries]. But if the provinces had actually owned the offshore, one might have expected a delimitation agreement to be more carefully considered — as a minimum, to have been signed.": Phase One Award, para. 7.7.

74 Newfoundland Document # 40. See also Nova Scotia Memorial, Part IV B.

75 Newfoundland Document # 38.

arrangements"[76] between Canada and Newfoundland, including the use of mineral resource "administration lines"[77] that would provide the provinces with administrative responsibility over part of the offshore, the Newfoundland Premier "agree[d] **fully ... as to the urgency of establishing administrative arrangements** for the orderly exploration and subsequent development of petroleum and natural gas off Canada's sea coasts."[78] Premier Smallwood further declared that this very objective – the establishment of "administrative arrangements" – was "precisely ... the motivation" underlying the provinces' efforts: [79]

> Indeed, **this precisely was the motivation of the Premiers of the Eastern Provinces in 1964** when they made provision for the establishment of the existing Joint Mineral Resources Agreement.
>
> Pursuant to that Agreement, the Ministers of Mines of the five Provinces have been meeting frequently over the past year in the light of your proposal of December, 1968. The objective of their meetings, of course, has been **the evolution of a plan of administration in respect of the waters off Canada's East Coast.**
>
> (emphasis added)

- The May 9, 1972 meeting between Premier Moores and his Minister of Mines, Mr. Doody (as well as other Newfoundland Ministers and officials), and Donald Macdonald, the federal Minister of Energy, Mines and Resources.[80] In the course of a discussion on offshore issues, the matter of " the Provincial portion of offshore revenues " was addressed, as was the question of

[76] Newfoundland Document # 38 at 1.
[77] Newfoundland Document # 38 at 2.
[78] Newfoundland Document # 40 at 1 (emphasis added).
[79] Newfoundland Document # 40 at 1 (emphasis added).
[80] See Nova Scotia Memorial, Part II D and Nova Scotia Counter-Memorial, Part IV B for a full discussion of this meeting.

boundaries, as revealed by a memorandum recording the meeting:[81]

> 7) Premier Moores raised the question of the distribution of **the Provincial portion of offshore revenues** amongst the Provinces, and was reminded by Mr. Doody that **the five Atlantic Provinces had, some years ago, agreed on boundary lines and spheres of interest.**
>
> (emphasis added)

- Premier Moores' June 19, 1972 statement to the Newfoundland House of Assembly, in which he sought to reassure the House that, despite the Provinces' seven-point agreement, including their boundary agreement, no concrete decisions had been made regarding such matters as the "**arrangements**" or "**delegation of ... administration**", both of which, according to the Newfoundland Premier, the East Coast Provinces were "**prepared to discuss with the Federal Government**".[82]

- The meetings of the East Coast Premiers that took place on August 2, 1972, at which the provinces determined that it was "desirable that there be some form of joint Provincial-Federal body to administer the offshore area",[83] and publicly declared, *inter alia*:[84]

---

81 **Annex 47:** Memorandum from J. Austin, Deputy Minister of Energy, Mines and Resources, Government of Canada to Donald Macdonald, Minister of Energy, Mines and Resources, Government of Canada (15 May 1972) at 2. See also Nova Scotia Memorial, Part II D, para. 48 and note 71, referring to the further briefing of Premier Moores on June 6, 1972 regarding jurisdiction over the continental shelf and offshore resource exploration.

82 **Annex 58**: Newfoundland, 36th General Assembly, "Statement by Premier Moores" in *Verbatim Report*, 1st session, Vol. 1, No. 33 (19 June 1972) at 2491 (emphasis added). Newfoundland filed a version of Premier Moores' Statement as Document # 50. See the discussion in Nova Scotia's Counter-Memorial, p. IV-13ff.

83 Nova Scotia Memorial, p. IV-28; **Annex 56**: "Minutes of Meeting of First Ministers of the Five Eastern Provinces on Nova Scotia Memorial, Offshore Minerals Held in the Cabinet Room, Province House, Halifax, Nova Scotia, August 2, 1972"; delegation list, agenda and Communiqué attached at 2 (hereinafter "*Minutes of August 2, 1972 Meeting*").

84 Nova Scotia Memorial, p. IV-28. See also Nova Scotia Memorial, p. II-28 and **Annex 56** at attachment "Communiqué Issued Following the Second Meeting of the First Ministers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoudland and Quebec" at 2.

> The First Ministers agreed that the matter of offshore minerals can be settled amicably by the Provincial and the Federal Governments, and [that] **the methods of administrative co-operation between the Governments can be developed.**
>
> (...)
>
> A suitable regional agency with representation from the five Eastern Provinces and the Federal Government would be desirable to administer certain aspects of the offshore oil and gas industry.
>
> (emphasis added)

- The August 23, 1972 meeting of the Prime Minister of Canada and the East Coast Premiers, the purpose of which was to discuss new proposals submitted by the federal government. As recorded in notes of the meeting made by federal officials, the First Ministers' discussion concerned joint administration – not ownership:[85]

> Premier Regan opened the meeting by setting out a couple of basic points; the first being that the **resolution of the ownership of off-shore resources question should be set aside for the moment** as not being essential to arriving at a general solution. The Prime Minister agreed with this suggestion and The Honourable Mr. Levesque, on behalf of the Province of Quebec, said that that was Quebec's position as well. Premier Regan also suggested that there should be created a **joint Federal-Provincial body for the administration of the resources of the region** ...
>
> (emphasis added)

- Newfoundland and Labrador's acquiescence in the 1984 federal legislation implementing the 1982 Canada-Nova Scotia Agreement, which, as demonstrated in Part II above,[86] was clearly opposable to Newfoundland, having been adopted **after** the Supreme Court of Canada had conclusively determined that

---

[85] **Annex 136:** "Notes from a Meeting of the Premiers of the four Atlantic Provinces, and the Vice-Premier of Quebec, with the Prime Minister on August 23, 1972" (25 August 1972) (hereinafter "D.S. Macdonald; Notes from a Meeting") at 1.

[86] See also Nova Scotia Memorial, Part II F; Nova Scotia Counter-Memorial, Part IV C.

jurisdiction over the offshore claimed by Newfoundland – and hence jurisdiction to delimit the area, for any purpose – was possessed not by the province but by the federal government.

e) The Parties' Conduct Subsequent To The 1964 Agreement

52. As illustrated in Part II, the boundaries agreed on September 30, 1964 were not, in practice, abandoned with the federal rejection of the provinces' jurisdictional proposals in October of that year. Rather, they were the basis of the joint technical demarcation exercise conducted in 1968-1969 and they were explicitly reaffirmed in 1972 when the provinces agreed on that demarcation. Indeed, as demonstrated in greater detail in the first phase of the arbitration, the record discloses a consistent pattern of conduct by the parties; simply put, the boundaries agreed by them in 1964 have in practice been respected and applied by them ever since. This continuity alone is sufficient to enhance the relevance of that agreement.

ii. The Parties' Oil And Gas Permit Issuance

53. The parties' conduct in respect of the issuance of oil and gas permits in the vicinity of the agreed boundary is summarized in Part II, above. This Part examines certain aspects of that conduct and demonstrates its central relevance to the delimitation.

a) The Concordant Practice Revealed By The Permits

54. The permit practice of the parties displayed a consistent approach to the maritime boundary between the parties, an approach that can be described in relation to four sectors:

- The sector of the boundary from the tri-junction point with Québec to point 2017;

- The sector of the boundary from point 2017 to the parallel of 46°N;
- The sector of the boundary from 46° N to 45°N;
- The sector from 45° N seawards to the Southeast.

55. From the tri-junction point to point 2017, Newfoundland issued no permits. Nova Scotia did, however, issue permits in this area, which conformed to the agreed line out to point 2017. In this sector, the permits merely confirmed a boundary the location of which was clearly agreed by both parties and which was never disavowed by Newfoundland until the present dispute.

56. From point 2017 to the parallel of 46° N (**Figure 16**), further Nova Scotia permits conformed to the 135° azimuth. To Nova Scotia's knowledge, none of these permits were ever subject to any objection or query by Newfoundland. On the published Nova Scotia permit grid map, this segment of the boundary was clearly labelled: "Mineral Rights Boundary Line". (This sector also includes the beginning of the Katy Industries permit, which is discussed further below).

57. From 46° N to 45° N (**Figure 16**), a series of Nova Scotia permits continued the pattern of conformity with the 135° line. In addition, the Newfoundland permit issued to Mobil Oil in September, 1967 is in this area (**Figure A-5**). As was shown in Part II, the western limit of the Mobil permit was drawn by a method that joined an identified point at the Southeast corner of a permit issued to Mobil by Nova Scotia, on its side of the line, with a point to the North on the boundary. The result is a permit boundary that is effectively identical to the 135° line.

58. From 45°N to 43°N (**Figure 16**), additional permit practice confirmed the general approach described above. Nova Scotia permits, placed along the same line as those to the North, extended as far as 44° 30' N. On the Newfoundland side, the Katy permit, issued in May 1971, ran from approximately 45° 10' N to 43°N, a

distance of approximately 263 nautical miles (**Figure A-7**). As was shown in Part II above (and more fully in Phase One), the only plausible explanation of the method used for this permit is that it was drawn as a straight-line extension of the line between the last two turning points on the boundary (points 2016 and 2017, a method that produced a line in general conformity with the line already in place between the parties. [87])

59. In sum, then, the consistent permit behaviour of the parties, which continued from 1965 to 1972, discloses the following :

- In the portion of the boundary identified by turning points (the inner segment of the boundary), permits and maps issued by Nova Scotia, without protest by Newfoundland, conformed exactly to the boundary location as agreed in 1964 and 1972.

- In the successive sectors Southeast of point 2017 (the outer segment), extending as far South as latitude 43° N, the parties issued permits that respected a boundary drawn either as a 135° azimuth or as a straight-line extension of the line between points 2016 and 2017, the two lines being in close concordance. This practice was consistent throughout the area and over time, and the permits thus issued were never questioned by either party.

- As noted in Part II, oil exploration companies obtained permits from both provinces in good faith, and, at least on the Nova Scotia side of the boundary, made substantial expenditures under those permits.

[87] A straight line extension of the inner segment on a Mercator chart produces a line which is within one degree of the 135° line.

b) The Permits Are Referable To The 1964 Agreement

60. In *Tunisia/Libya*, the general concordance between the oil concession line used to establish the first segment of the boundary and an earlier *modus vivendi* on sponge fishing jurisdiction in place between the Italian and French colonial powers, was given significant weight by the Court. The fact that the concessions had some connection to the earlier practice or agreement, even though the concordance was not precise, was regarded by the Court as reinforcing the relevance of the concession lines and provided added justification for giving effect to them in the delimitation.[88]

61. Similarly, in the *Guinea-Guinea-Bissau* arbitration, the connection between the contemporary practice of the parties, with respect to the placement and maintenance of navigation aids, and an earlier treaty between them on the land boundary through a region of islands, enabled the Court to adopt the resulting *de facto* line for the delimitation of one segment of the disputed boundary. [89]

62. Conversely, in the *Gulf of Maine* case, the evidence of the parties' oil permit practice adduced by Canada was found not to be referable to any previous practice or agreement, but to stand in isolation. For this reason, among others, the Chamber was not prepared to accept that the practice was sufficiently indicative of the parties' position regarding an equitable delimitation.[90]

63. In sum, it is clear that the relevance of conduct, generally, and of permit issuance, specifically, is heightened if there is evidence that the practice in question is related to some consensus or agreement previously reached by the parties. This is true even if the earlier agreement is not legally binding (as in *Tunisia/Libya*; and as found by the Tribunal in this case), or if the agreement is not specifically related to the type of maritime jurisdiction that is the object of the conduct (*Guinea-Guinea-Bissau*).

[88] **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 84-85.
[89] **Annex 191:** *Guinea-Guinea-Bissau, supra* Part III, note 33 at 83, 103.
[90] **Annex 174:** *Gulf of Maine, supra* Part I, note 3 at 310-311.

64. In its Award of 17 May 2001, the Tribunal found that the parties' permit practice since 1972 did not provide evidence of an existing boundary established by binding legal agreement, since "there is no unequivocal indication that practice was referable to an earlier agreement on boundaries which was treated by the parties as binding."[91] In the present phase of the arbitration, however, the matter at issue is fundamentally different. For the purpose of assessing the relevance of the parties' permit practice to a delimitation of the boundary, the question is simply whether that practice "... [is] referable to an earlier agreement on boundaries", whether or not that earlier agreement was considered by the parties to be binding. In the light of the facts of this case, there can be no doubt but that the permit practice of both Nova Scotia and Newfoundland is directly referable to the agreement regarding the location of their boundary reached by them in 1964 and reaffirmed in 1968-69 and 1972.

65. As regards Nova Scotia's practice, the following key facts underscore this conclusion:

- A number of the permits, including some to the Southeast of point 2017, refer on their face to permit areas "bordering upon the common boundary line of Nova Scotia and the Province of Newfoundland";[92]

- The published Petroleum Grid Map of Nova Scotia explicitly refers to the boundary line shown thereon as the "Mineral Rights Boundary Line", in conformity with the *Notes Re: Boundaries* that

91 Phase One Award, para. 6.8.

92 See Nova Scotia Memorial, p. II-48. **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.

form part of the provinces' 1964 agreement and which use the term "mineral right boundaries" to refer to the agreed boundaries;[93]

- The Petroleum Grid Map was drawn according to the agreed turning points, and the points are clearly marked on the large scale maps that accompanied the overall grid map;

- The permits utilizing the boundary were first issued in 1965, immediately following the agreement in 1964.[94]

66. In addition to the foregoing, it is significant that Nova Scotia has never issued a permit that violates the location of the boundary agreed in 1964.

67. Newfoundland's practice, on its side of the line, points in precisely the same direction:

- The Mobil permit issued in September, 1967 was drawn with explicit reference to a defined segment of the line agreed in 1964. As such, it clearly related the placement of the boundary of the permit to the agreed line.

- The Katy permit issued in May, 1971, although on its face lacking a precise methodology, perfectly matches a line drawn as a straight-line extension of the inner segment of the agreed boundary. Furthermore, the other permit areas issued to Katy on the same day, in the Gulf of St. Lawrence, are drawn so as to match precisely the location of Newfoundland's boundary with Québec agreed by the East Coast Provinces in 1964.

---

93 Annex to Annex 31: "*Note re Boundaries of Mineral Rights as between Maritime Provincial Boundaries*", presented to Federal-Provincial Conference of Prime Ministers (14-15 October 1964).

94 See generally Nova Scotia Memorial, Part II-H.

68. If these circumstances reflect mere coincidence – and no other, convincing explanation has to date been offered by Newfoundland – it is a coincidence of stunning improbability.

69. In any event, as demonstrated above, it is not necessary for the Tribunal to find that Newfoundland issued the permits in question in the belief that the 1964 agreement was legally binding, or even that the agreement included the precise Southeast extension that the permits themselves followed. The fact that the permits issued by Newfoundland either perfectly matched or generally conformed to the previously agreed boundary, extending far beyond turning point 2017, suggests that they were issued, at the very least, with reference to that boundary and to the parties' understanding of how it was defined along its outer segment.

c) Nova Scotia's Permits Were Never Protested By Newfoundland

70. The permits issued by Nova Scotia were shown on published maps, clearly linked to the agreed "mineral rights boundary line", that were readily available to Newfoundland. To Nova Scotia's knowledge, Newfoundland never protested, or even queried, the location of these permits. (Newfoundland's purported objections to the boundary itself, and their relevance to the delimitation, are addressed below, in sub-section iv).

iii. Newfoundland's Conduct As Demonstrated By Acquiescence

71. Apart from Newfoundland's acquiescence in the issuance of permits by Nova Scotia (which of course matched its own permit practice), there were numerous other opportunities for Newfoundland to object to or protest either the location of the line agreed in 1964 or Nova Scotia's conduct with respect to that line. As demonstrated in this and the following section, however, the record reveals that Newfoundland remained silent at critical moments, in the face of unambiguous actions by Nova Scotia to which it should have objected, and surely would have objected, if in fact it had any objections. The few instances in which

Newfoundland did raise questions concerning the location of the parties' boundary were isolated and *post facto*, occurring well after the actual situation had been established in practice; whether taken either individually or collectively, those actions are insufficient to displace its earlier acquiescence in the line.

72. Newfoundland's acquiescence was canvassed in some detail in Phase One, but its relevance at that time was restricted to two specific arguments: as a demonstration of Newfoundland's belief that the agreed line was legally binding; and to support an argument for estoppel against Newfoundland's denial of the binding nature of the line. The question of the binding status of the line is now settled; and the estoppel argument is addressed in Part VI, below.

73. Newfoundland's acquiescence is nonetheless extremely relevant in the delimitation phase of this case, as it provides unequivocal support for the conclusions derived from an analysis of the positive conduct of the parties. Specifically, Newfoundland's acquiescence constitutes further compelling evidence that the parties' conduct, both mutual (negotiations and agreement on a boundary) and unilateral (permit issuance), discloses a consensus regarding the location and application of their boundary. As was clearly stated by the Court in *Tunisia/Libya*, such acquiescence, even if insufficient to ground a claim of estoppel, is clearly relevant to confirming the views of the parties on a *de facto* line.[95]

74. The most salient examples of Newfoundland's conduct demonstrating acquiescence, and their relevance to the delimitation, can be summarized as follows:

- Newfoundland never protested Nova Scotia's issuance of permits along the boundary;

[95] **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 83-84.

- On August 2, 1972, at the East Coast Premiers' meeting, Newfoundland did not object to the clear depiction of the boundary on the map considered by the Premiers, nor to the calculations of the offshore area accruing to each province, based on that boundary, that were also shown on the map.[96] (In fact, Newfoundland confirmed its agreement on the location of the boundaries at the same meeting.)

- At a further meeting of the East Coast Premiers, on August 23, 1972, Newfoundland joined in the view of the Premiers that the boundary issue had been "settled".[97]

- In 1977, Newfoundland did not protest the incorporation of the 1964 line into the *1977 MOU*. This failure is particularly noteworthy given that the Government of Canada was a party to the *MOU* and, by virtue of the 1967 decision of the Supreme Court of Canada in the *B.C. Offshore Reference*, the federal government could only have been regarded by the provinces as having at least *prima facie* authority to divide the East Coast offshore in this manner, with effect against Newfoundland.[98]

- In 1982, Newfoundland again failed to object to the inclusion of the agreed boundary line in the *Canada-Nova Scotia Agreement*, despite the ostensible jurisdiction of the federal government to dispose of the offshore in this fashion.[99]

---

[96] Newfoundland's factually incorrect treatment of this map and its use is dealt with in Part II above; see also **Figure 9**: East Coast Offshore Map presented to Premiers in 1972..

[97] **Annex 56**: "*Minutes of August 2, 1972 Meeting*", *supra* note 83.

[98] Nova Scotia Counter-Memorial, p. IV-18.

[99] *Ibid.*

- In 1984 – **after** the Supreme Court of Canada had confirmed unequivocally, in the *Hibernia Reference*, that Canada possessed full jurisdiction over the continental shelf offshore of Newfoundland – Newfoundland still did not object to the use of the 1964 boundary in the federal and provincial legislation implementing the *1982 Canada-Nova Scotia Agreement*. As shown in Part II, the Nova Scotia–Newfoundland boundary set out in the legislation defined the boundary with precision over its entire length, and included no mechanism for its alteration by arbitration or otherwise.

75. The record discloses that, time and again, from the moment the location of the boundary was agreed in 1964 through to at least 1984, Newfoundland remained silent in the face of conduct by Nova Scotia – and by Canada – that was obviously referable to the agreement and that, in certain instances, was without question opposable to Newfoundland.

iv. Newfoundland's Later "Objections" Do Not Displace Its Prior Conduct

76. The decision of the Tribunal in Phase One was founded, in part, on its finding that various statements or practice by the parties during the relevant period demonstrated that they did not regard their boundary as settled in a legally binding manner. While such conduct was held to contradict the assertion that the boundary had been definitively settled by binding agreement, its significance with respect to the parties' views of what constituted an equitable solution is an entirely different matter, and one that requires fresh consideration.

77. In *Tunisia/Libya*, the ICJ considered the relationship between conduct that appeared to establish a *modus vivendi* or *de facto* line, on the one hand, and conflicting legal claims and practice, on the other. In that case, both parties formulated claims that conflicted with a line that divided, *de facto*, the areas

within which each party granted oil concessions.[100] Moreover, Tunisia issued permits, soon after the original concessions were granted, that clearly crossed the *de facto* line, and the concessions that formed the basis of the *de facto* line themselves became the object of protests by both parties.

78. The Court's response to this tangle of practice and legal claims was straightforward. Neither the legal claims formulated contemporaneously with the emergence of the *de facto* line nor the subsequent practice or protest of the parties was sufficient to displace the fact that **a concordant situation had at one point existed in practice.** The significance of that circumstance – what the Court described as "the actual situation" – was described as follows: [101]

> The result [of the prior practice] was the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference or (until 1976) protests, by the other. The Court does not of course overlook the fact that the areas to which a legal claim was asserted by both Parties were more far-reaching ... The actual situation, however, was that which has just been described.

79. In the present case, unlike in *Tunisia/Libya*, only one party, Newfoundland and Labrador, has ever departed from or otherwise contradicted the parties' agreement or the general line that has appeared in practice. All of the contrary conduct alleged by Newfoundland is unilateral in nature.[102] Further, all of this conduct dates from 1972 or later; during the crucial 1964-1972 period, when the permit practice defining the general line occurred, there were neither conflicting legal claims to the areas in question nor any protest by either party regarding the other's permit activity. Even during the subsequent period, when Newfoundland did raise certain questions regarding the boundary as agreed by the Premiers in 1964 (these are examined below), Newfoundland never protested or otherwise queried any of the Nova Scotia permits, despite the fact that it is these very permits which,

---

100 **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 83-84.
101 *Ibid.* at 84.
102 Thus it cannot be used to establish a line in opposition to Nova Scotia, whatever its significance might be in assessing the mutual conduct.

when considered alongside the permits issued by Newfoundland during the same period, illustrate the appearance of a mutually-respected line running Southeast. Finally, Newfoundland never issued any relevant permits conflicting with that line.

80. With these facts in mind, the evidence of Newfoundland's various "objections" to the boundary will be considered, with a view to assessing their relevance to the mandate of the Tribunal in the present phase of the arbitration.

a) The Doody Letter Of 1972

81. The letter from Minister Doody of Newfoundland to Michael Kirby of Nova Scotia, dated October 6, 1972, contained the first intimation that Newfoundland might have some questions respecting the location of the boundary. That letter, and the absence in the record of any definitive response from Nova Scotia, was among the evidence found by the Tribunal to undermine the claim that the boundary had been resolved by agreement between the parties. The following points remain relevant, however, regarding Minister Doody's initiative.

82. Minister Doody clearly understood that some sort of agreed boundary was in place:

- His letter refers to: "the interprovincial boundary"; "the present demarcation"; and "the present version of the boundary";[103]

- He specifically stated that Newfoundland was "not questioning the principles which form the basis of the present demarcation";[104]

103 Newfoundland Document # 57 at 1.
104 Newfoundland Document # 57 at 1.

- The prior agreement that Minister Doody had in mind included a line that extended far beyond turning point 2017, as evidenced by the map that he attached to his letter (both the 125° line shown on the original map and the 145° line drawn on it by Minister Doody extended beyond point 2017); (**Figure 38**)

- His stated concerns related solely to the proper placement of the line in that outer sector.[105]

83. Moreover, on the face of the documents themselves, it is apparent that Minister Doody only ever objected to the 125° line in the outer segment that was shown on the original version of the map attached to his letter:

- His map (**Figure 38**) was a copy of the map annexed to the 1964 agreement, with the final segment shown on an approximate azimuth of 125°;

- His reaction to this outer line was a line drawn on the same map, roughly on an azimuth of 145°, which he was careful to describe as: "... meant for explanatory purposes only and ... itself inaccurate";[106]

- He never objected to a line drawn closer to 135°, which would have not only accorded with "the actual situation" at that time, based on the contemporaneous permit practice of the parties, but

---

[105] Phase One Award, paras. 5.22, 5.23. See Newfoundland Document # 57: "The Government of Newfoundland feels that if a find were made in an area immediately adjacent the present version of the boundary at a point where it is inaccurately established, then a severe strain would be placed on the regional agreement". See **Figure 38**: The 135° Azimuth Line Transposed on the Doody Map.

[106] Newfoundland Document # 57 at 1.

which had been agreed in 1964 and had been very recently reaffirmed by his Premier (in June and August, 1972);

- He did not object to or question the Nova Scotia permits, or disavow or even query the approximate line established by the combined practice of the parties.[107]

84. To the extent that Minister Doody was "objecting" to anything, then it was to a line (the 125° line) that was clearly in conflict with what he knew to be the actual situation. Whether or not he was truly ignorant of the origin of the line shown on the 1964 map, he nonetheless was correct in believing that its depiction was inaccurate. He suggested an alternative location for the outer segment of the boundary (a 145° line), but qualified both its purpose and accuracy. It is interesting to note that the 135° line that Minister Doody knew to represent the permit practice of the parties,[108] and which indeed shows as a partially erased line on the map attached to his letter, falls half-way between his tentatively suggested line (145°) and the line originally drawn on the map (125°) (**Figure 38**).[109]

---

107 That Minister Doody was well aware of the "actual situation" arising at least from Newfoundland's permit practice, is clear. It will be recalled that, by that time, Newfoundland had concluded its review of past permits, initiated by the recently installed government led by Premier Frank Moores. The review was initiated on March 1, 1972, according to the summary contained in **Annex 78:** Newfoundland, 36th General Assembly, 2nd session, "Budget 1973" (J.C. Crosbie, Minister of Finance and President of the Treasury Board, Government of Newfoundland) (excerpts), p. 41. The date of completion is unclear. **Annex 127:** The Order-in-Council 1125-72 (23 November 1972) revoking some rights and reclassifying others (including Katy and Mobil), was dated November 23, 1972. However, the Budget speech identifies the date of the OIC as October 13, and this date is repeated, and attributed to Mr. Doody, in an industry publication. **Annex 128:** "Newfoundland Clarilies Offshore Permits Status", *Oilweek* (30 October 1972). Given that the Oilweek article cited Mr. Doody as having said the permits were rescinded as of October 13, and that this was published prior to November, the OIC must have been prepared by that time. It is extremely unlikely, therefore, that the results of the review would not have been available to him before October 6.

108 *Ibid.*

109 This is of course consistent with Newfoundland's characterization of the Doody letter as "an effort by Minister Doody to start discussions with Nova Scotia about the area moving off, roughly speaking, turning point 2017.", see Transcript of Oral Argument, March 15, 2001, p. 521.

b) Newfoundland's Seismic Permits: 1973-1975

85. Newfoundland, in its Counter-Memorial in Phase One, produced a number of seismic permits that it had issued during the period 1973-1975. The nature and relevance of these permits were fully addressed by Nova Scotia during the hearing.[110] The main considerations are as follows:

- All of these permits were issued after the period in which the concordant practice of the parties was established; as with the conflicting permits in the *Tunisia/Libya* case, they cannot displace the significance of the original practice;

- As demonstrated by Nova Scotia during the March, 2001 hearing, the permits simply do not demonstrate Newfoundland's "non-respect" of the line, as Newfoundland claims they do: in one instance, Newfoundland simply ignores the *caveat* on the face of the permit, explicitly limiting its effect to areas within Newfoundland's jurisdiction;[111] in another, a request for a permit to conduct seismic work along a single straight line is represented by Newfoundland as an impressively large rectangular permit area;[112]

- Most fundamentally, these permits are all of a type that convey no interest whatsoever in any area of the offshore: they permitted specified seismic work only; they granted no additional exploration rights; and they granted no production rights.[113] Moreover, these

---

110 Transcript of Oral Argument, March 13, 2001, p. 299ff.

111 Transcript of Oral Argument, March 13, 2001, pp. 297, 299, Nova Scotia Oral Presentation, PS-R-12.

112 Transcript of Oral Argument, March 13, 2001, pp. 294-297, March 19, 2001, pp. 828-829, 854 and Nova Scotia Oral Presentation, PS-R-9, PS-R-10.

113 Transcript of Oral Argument, March 13, 2001, pp. 299-302.

permits were non-exclusive; different companies were granted such "permits" for the same area at the same time.[114]

86. The permits issued by Newfoundland during the period 1973 to 1975 demonstrate nothing of relevance to the delimitation and should be treated accordingly. The rejection of any effect for these permits would be consistent with the treatment of similar permits in the *Gulf of Maine* case. In dismissing Canada's contention that the U.S. had acquiesced in a median line, the Chamber noted the United States' description of such permits and their effect: [115]

> [A]t the time in question it [the United States] was confronted on Georges Bank with Canadian seismic exploration of minor importance, which involved neither drilling nor the extraction of petroleum. No special action was therefore necessary on its part.

87. As in that case, the permits in question here are, at best, "of minor importance."

c) The 1977 Newfoundland *White Paper* And Petroleum Regulations

88. The 1977 Newfoundland *Petroleum White Paper* and the related *Petroleum Regulations* contained maps that depicted a line which diverged from the agreed line on the outer segment of the boundary. As with the 1972 Doody letter and the other examples of conduct whereby Newfoundland ostensibly objected to the situation established during the period 1964 – 1972, however, these later indications that Newfoundland may have decided to depart from the earlier consensus cannot change the fact that a concordant situation did, at one point, exist. As in *Tunisia/Libya*, such *post facto* conduct cannot qualify the significance of the "actual situation" established by the parties' prior practice. There are, in addition, specific difficulties with respect to the 1977 *White Paper* and *Regulations*, which severely limit their relevance to this case.

[114] Transcript of Oral Argument, March 13, 2001, pp. 299, 302.
[115] **Annex 174:** *Gulf of Maine, supra* Part I, note 3 at 306-307.

89. The *White Paper* maps are themselves inconsistent: while an apparent attempt at an equidistance line is used to depict the Nova Scotia-Newfoundland boundary (as well as the Newfoundland-Québec boundary) on maps showing "Management Zones", "Quadrangles" and the "Newfoundland Continental Margin", the map showing "provincial permits" issued by Newfoundland does not display any such line.[116] No explanation has been offered as to why this last map, in particular, on which the divergence from the previous practice would have been clear, did not incorporate the line.

90. A more precise statement of areas is found in s. 8 of the *Petroleum Regulations*, which establishes the quadrangles that were to form the basis of a permit system. Section 8 includes detailed latitude and longitude references, and was also illustrated (again, not definitively) on a small-scale map that included what may be in part an equidistance line (**Figure 39**). This section is, however, qualified and its effect modified by s. 12:[117]

> 12. Notwithstanding section 8, the boundaries of all quadrangles shall conform with the province's onshore and offshore boundaries with the other provinces and the Northwest Territories and shall conform with those established by any lawfully established international seabed boundary.

91. Even taken at face value, the unilateral conduct expressed in the *1977 Regulations* map only diverges from the previously existing consensus for **part** of the boundary. From the sector in the Gulf, Southeast to approximately latitude 46° N, the line tracks the boundary as agreed in 1964 and as reflected in the subsequent practice represented by the permits issued in that area (**Figure 39**). From that point onwards, the map appears to use a rough equidistance line.

---

116 Newfoundland Document # 75, **Figures 1, 2, 3** and **5**.

117 **Figure 39**: The 1977 Newfoundland Labrador Regulations Map. **Annex 109**: *The Newfoundland and Labrador Petroleum Regulations, 1977*, Nfld. Reg. 139/78. This section was simply not mentioned by Newfoundland during oral arguments, when it first introduced its contentions respecting this map as "an assertion" and, ambitiously, as "regulations which set out a claim to territory": Transcript of Oral Argument, March 15, 2001, pp. 535, 538. The section was discussed during Nova Scotia's oral argument: Transcript of Oral Argument, March 19, 2001, pp. 817-818, but Newfoundland offered no explanation, either for the section itself, or for its omission of any reference to it.

92. In sum, even taken in the most favourable light possible for Newfoundland, its 1977 *White Paper* and *Regulations* are at best ambiguous. In a similar situation considered in the *Tunisia/Libya* case, the Court found that a prior, unilateral legislative act by Libya in placing a boundary on a map – even though the map in question stated that it depicted "the international frontiers" – was not opposable to Tunisia and was insufficient to displace the mutual practice of the parties in the granting of concessions.[118] Here, the only mutual practice is found in the concordant actions in issuing permits along the 135° line. The Newfoundland *Regulations* were put in place well after the mutual conduct of the parties had established the existing line in fact, and the map (diverging only in part from the agreed line) contained no statement similar to that on the Libyan map regarding the status of that line. The *Regulations* must be regarded as a far weaker example of contrary conduct than that rejected in *Tunisia/Libya*.

d) Other Purported Objections By Newfoundland

93. In the first phase of the arbitration, Newfoundland referred to certain other instances of subsequent conduct purportedly contrary to the existence of any prior agreement. These include comments made by Newfoundland officials in the federal-provincial discussions of 1973,[119] and Newfoundland's unilateral offshore proposal to the federal government in 1973.[120]

118 **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 68-69. See also **Annex 196:** Application for Revision and Interpretation of the judgement of February 24, 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), [1985] I.C.J. Rep. 192 at 212-213 (hereinafter *Tunisia/Libya* (Application for Revision) for a statement of the importance of mutual conduct).

119 Newfoundland Memorial, paras. 63-64.

120 Newfoundland Memorial, paras. 63-64. Newfoundland Counter-Memorial, paras. 164-169.

94. Apart from the ambiguity of such conduct,[121] these purported demonstrations of Newfoundland's "objections" concerned only the question of whether, at the time, the parties viewed the existing line as legally binding. They offer no insight into whether a mutual course of conduct supporting a particular line or methodology had previously been established. As such, this conduct cannot be held to qualify Newfoundland's earlier participation and acquiescence in the establishment of a *de facto* line.

v. The Relevance Of The Parties' Conduct

95. As illustrated above, the object and purpose of the agreement reached in 1964 and confirmed in 1972 were related solely to the ownership and control of offshore minerals – specifically, hydrocarbons. The same is obviously true of the later conduct respecting the issuance of oil and gas exploration permits. This close connection between the nature of the conduct and the subject-matter of the present dispute heightens the relevance of that conduct in the present delimitation.

96. In *Tunisa/Libya*, the oil concession practice of the parties was found to be "highly relevant" in large part because of the central role of such resources in the dispute between the parties: [122]

> [T]he line was not intended as a delimitation of a fisheries zone, or of a zone of surveillance. It was drawn by each of the two States separately, Tunisia being the first to do so, for the purposes of delimiting the eastward and westward boundaries of petroleum concessions, a fact which, in view of the issues at the heart of the dispute between Tunisia and Libya, has great relevance.

---

121 See, for example, the conflicting actions of Leo Barry, the Newfoundland Minister of Mines and Energy, in 1973. Newfoundland, in its Counter-Memorial, para. 167, noted that Mr. Barry in May 1973 stated that Newfoundland "had not decided on a final position" on the boundary (see also Newfoundland Supplementary Document # 13: Memorandum entitled "Matters Discussed at the Atlantic Premiers Conference in Halifax September 30, 1964 Requiring Further Action"). However, later in the same meeting Mr. Barry made no protest when Nova Scotia enquired whether the federal government would accept the interprovincial boundaries, and was told by a federal official that "these boundaries should be acceptable", see Nova Scotia Counter-Memorial, at III-32 and **Annex 62**: "Minutes of Meeting of Federal-Provincial Officials to Discuss East Coast Offshore Mineral Resource Administration – Arrangement of April 9 – Thursday, May 4, 1973" (4 May 1973)."

122 **Annex 189**: *Tunisia/Libya, supra* Part III, note 25 at 84.

97. In the present case, issues related to benefits from oil and gas resources are not just "at the heart" of the dispute, they comprise the **entire** dispute. The agreement reached by the parties in 1964, albeit non-binding, clearly reflects their attitudes regarding an appropriate division of their respective entitlements to hydrocarbon resources within Canada's East Coast continental shelf. As such, it is an especially significant circumstance in the context of the present delimitation.

- Moreover, the factual record clearly reveals that the parties understood throughout that the boundary as agreed by them in 1964 and the *de facto* line that appears from their subsequent mutual practice and Newfoundland's acquiescence were applicable, no matter what the nature of the "control" to be exercised by them over the hydrocarbon resources of the shelf.[123]

vi. The Overall Impact Of The Parties' Conduct

98. The circumstances reviewed above give rise to the inescapable conclusion that the parties, during the 1960s and 1970s, acted on the understanding that there was at least a *de facto* boundary in place between their respective offshore claims. This line resulted from overlapping and mutually reinforcing conduct of three types:

- Mutual agreement on the actual location of the line, and on the methodology to be applied to the line in general;

- The issuance of "matching" oil exploration permits in the area of the boundary which defined a concordant situation in fact, and which were linked to the agreement previously reached by the parties;

[123] See especially Part IV D of Nova Scotia's Memorial and Part IV B of its Counter-Memorial Phase One.

- Acquiescence by Newfoundland in actions by Nova Scotia and the federal government which confirmed the line developed by the practice of the parties.

99. The practical result of the parties' conduct can perhaps best be appreciated by first considering the effect of their actions with respect to the establishment of the boundary in specific sectors, and then with respect to the boundary in its entirety.

a) From The "Tri-junction" To Turning Point 2017

100. As regards the inner segment of the boundary – the segment extending from the Québec-Nova Scotia-Newfoundland tri-junction point (point 2015) in the Gulf of St. Lawrence, through point 2016 to at least point 2017 (**Figure 40**) – the conduct of the parties is clear and convincing, representing the highest degree of mutuality, and its impact on the delimitation is not in serious dispute. In the words of counsel for Newfoundland, the parties agreed on: "a present indication of what those boundaries are going to be"[124] and "the identification of the boundary lines".[125] More particularly:

- There is no dispute regarding the fact that parties agreed upon the method of delimitation and on the turning points of the boundary in this sector in 1964. They subsequently determined the technical coordinates necessary for an accurate delineation, which was approved by the Premiers in 1972;

[124] Transcript of Oral Argument, March 15, 2001, p. 394.
[125] Transcript of Oral Argument, March 16, 2001, p. 697.

- The delimitation and delineation of the boundary in the inner segment were thus agreed, subject only to federal acceptance and implementation;[126]

- The boundary line thus "identified" was 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*.

101. It must be reiterated that Nova Scotia considers that the agreement reached by the parties in 1964 (delimitation) and reaffirmed in 1972 (delineation) concerned the **entire** boundary, in both its inner and outer segments. The conduct referred to below, relating to the outer segment, comprises additional evidence of the parties' understanding respecting the establishment and location of the boundary in that area.

b) From Turning Point 2017 Southeast To 46° N

102. From turning point 2017 Southeast to latitude 46° N (**Figure 40**), the parties adopted in practice a line that followed the 135° azimuth line and 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 existence of this line is illustrated, *inter alia*, in the following instances of the parties' conduct:

- The permits issued by Nova Scotia in the sector, in which Newfoundland acquiesced, clearly followed the 135° line;

---

[126] Although, as the Tribunal has found, the agreement may also have been subject to "ratification" by the provincial legislatures, there is no dispute as to the fact that it was the federal government's refusal to accede to the provinces' "ownership" claims that was the reason why the agreement never became binding.

- The construction line by which Newfoundland drew the western limit of the 1967 Mobil permit was obviously based on the existence of a boundary - the construction line is drawn to connect with a point on the inner segment of the boundary;

- The depiction of the boundary by Newfoundland in its 1977 *Regulations* followed this line from the tri-junction point to approximately 46° N.

c) From 46° N To 45° N

103. From approximately 46° N to 45° N, the practice of the parties shows a further extension of a line drawn according to the same method - the 135° azimuth line. Examples of the practice that confirms the existence of this line, in this particular sector of the boundary, includes:

- The permit issued by Newfoundland to Mobil in September 1967, which follows this line precisely and which defines the limit of the permit by reference to the northern portion of the consensus boundary;

- The Nova Scotia permits in this sector, all of which completely conform to the same boundary and which were never protested by Newfoundland.

d) From 45° N To 43° N

104. The conduct of the parties in the issuance of permits in this most seaward sector of their boundary confirms that the general approach described above was in fact

adopted for the entire outer segment (**Figure 40**), as demonstrated by the following:

- From latitude 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 (and reconfirmed in 1972) was drawn on the basis of a straight-line extension of the segment between turning points 2016 and 2017. Given that the azimuth of the line between 2016 and 2017 is within 1° of 135°, it is clear that the Katy permit was drawn to a method that was in very substantial conformity with all of the other conduct set out above.

e) <u>Conduct Applicable To The Entire Boundary</u>

105. In addition to the practice applicable to specific portions of the boundary, described in the preceding paragraphs, certain of the instances of the parties' conduct discussed above demonstrate that a consensus was reached by the parties with respect to the line in its entirety. These include the following:

- 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. The boundary was drawn on a map presented to Newfoundland by federal officials in June 1972, and the same boundary was used as

a basis for the assessment of the provinces' respective offshore areas at the Premiers' meeting of August 2, 1972;[127]

- Newfoundland's failure to object to the use of the line in the 1982 *Canada-Nova Scotia Agreement* or the 1984 implementing legislation. The 1984 legislation, adopted after the Supreme Court of Canada had confirmed federal jurisdiction over Newfoundland's offshore in the *Hibernia Reference*[128], included precise coordinates as well as the 135° azimuth, and did not include any provision for amendment in the event of a dispute regarding the boundary.[129]

vii. Conclusions: By Their Conduct The Parties Established A *De Facto* Boundary

106. The cumulative effect of the conduct described in this section is graphically represented on **Figure 40**.[130] From that diagram - which depicts the practical effects of the parties' mutual agreements, "matching" permit issuance and acquiescence with respect to the boundary line - emerges a picture of a *de facto* boundary extending from point 2015 (the tri-junction point with Québec), through points 2016 and 2017 and then Southeast at 135° to the limits of Canadian jurisdiction.[131] This boundary was created, first, by the parties' agreement, and then, by their other conduct on their respective sides of the line throughout its entire course.

107. The evidence of conduct in this case is far stronger than that which was accepted by the Court in *Tunisia/Libya* as an indicator of what the parties believed to be an

[127] **Annex 56**: "Minutes of Meeting of First Ministers of the Five Eastern Provinces on Offshore Minerals held in Halifax in the Cabinet Room, Province House, Halifax, Nova Scotia, August 2, 1972" (2 August 1972); delegation list, agenda and Communiqué attached.

[128] **Annex 182**: *Hibernia Reference, supra* Part II, note 63.

[129] **Annex 70**: *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29.

[130] **Figure 40**: Overall Conduct of the Parties.

[131] Whether the line is defined as 135°, as in most of the relevant practice, or as the almost-identical straight-line extension of the final inner segment, is irrelevant. As discussed above, the close concordance of the practice is sufficient.

equitable line. In that case, the line was viewed by both parties as being of an interim nature, and its use as a boundary was subject to explicit, contemporaneous conflicting claims.[132] In the present arbitration, on the other hand, the parties originally developed the line with the clear intention that it serve as the final boundary, subject to federal implementation.[133] As regards Newfoundland's supposed objections, unlike in *Tunisia/Libya*, they were eventually made only after the *de facto* line had been established in practice. Newfoundland never objected to – indeed, it participated in – the crucial permit practice that contributed to the definition of the line. Furthermore, and again in contrast to *Tunisia/Libya*, Newfoundland's objections were equivocal, and were contradicted by its other conduct.

108. What the evidence of conduct in this case does share with that in *Tunisia/Libya*, is proof that only one line was ever defined by mutual conduct: the line in **Figure 40**. Any Newfoundland proposals or indications of another line were purely unilateral acts and, as in *Tunisia/Libya*, cannot displace the significance of the mutually-defined *de facto* boundary line. That line provides the clearest, best possible evidence of what the parties in this case considered to be an equitable division of their respective offshore entitlements.[134]

E. Resource Distribution

i. The Relevance Of Resource Location And Access

a) Resource Location And Access Are Potentially Relevant Circumstances

109. The location of resources, insofar as it is relates to equitable access to those resources by parties to maritime boundary disputes, has repeatedly been

[132] **Annex 189:** *Tunisia/Libya*, *supra* Part III, note 25 at 68-69, 83-84.

[133] In addition, there is no evidence that the permit issuance along the mutual line was ever intended as an interim measure to deal with a dispute.

[134] **Annex 196:** *Tunisia/Libya* (Application for Revision), *supra* note 118 at 212-213, confirming that mutuality is the key to assessing the effect of a *de facto* line on a later delimitation.

recognized as a relevant circumstance in effecting a delimitation. This circumstance is to be distinguished from the question of the relative socio-economic status of the parties, or their degree of dependence upon particular resources, which have generally been regarded as irrelevant to maritime delimitations.[135]

110. As early as the *North Sea Cases*, the ICJ found that the natural resources of the continental shelf were to be considered, along with coastal geography and proportionality, in the conclusion of (in those cases) negotiated boundaries. [136] The point was reiterated by the Court in *Libya/Malta*, in the context of principles to be applied in adjudication, with an explanation as to why resources are an appropriate consideration: [137]

> The natural resources of the continental shelf under delimitation "so far as known or readily ascertainable" might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation ... **Those resources are the essential objective envisaged by States when they put forward claims to sea-bed areas containing them.**
>
> (emphasis added)

---

135 See, for example, **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 77, in which the "presence of oil wells" was seen as possibly relevant, but in which economic circumstances were rejected : "The Court ... is of the view that these economic considerations cannot be taken into account for the delimitation of the continental shelf areas appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other." See also **Annex 193:** *Denmark/Norway, supra* Part III, note 45 at 74; **Annex 187:** *Libya/Malta, supra* Part III, note 25 at 41. In **Annex 174:** *Gulf of Maine, supra* Part I, note 3 at 342, the Chamber considered the economic impacts, not as a relevant circumstance in determining the line, but only in the limited sense of checking whether the proposed line would have "catastrophic repercussions" for either side.

136 **Annex 188:** *North Sea Cases, supra* Part III, note 25 at 53-54: "[I]n the course of the negotiations, the factors to be taken into account are to include: ... so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved...".

137 **Annex 187:** *Libya/Malta, supra* Part III, note 25 at 41 (footnote omitted). In **Annex 193:** *Denmark/Norway, supra* Part III, note 45 at 70-72, the Court again endorsed the relevance of natural resource location, and actually took account of the location and migration patterns of a critical capelin stock in shifting a provisional median line so as to avoid depriving Denmark of equitable access to the resource. The Court based its decision to move the line partly on the reasoning in *Gulf of Maine*, in which it was found that a delimitation should not cause "catastrophic repercussions" for the populations of either country, but also stated the principle more broadly (at 70), explicitly endorsing the statement of the Court in *Libya/Malta*, quoted above.

111. While the significance of resource access is generally accepted, it is not always applied as a "relevant circumstance" in delimitation cases. The reasons for this relate in all cases to the particular circumstances of the delimitation in question. In *Denmark/Norway*, for example, the location of the fishery resource was given effect in determining the line, but the location of shelf resources was not, for the simple reason that the parties had not provided the Court with sufficient information on the issue.[138] The same situation obtained in *Libya/Malta*, in which the Court, as noted above, accepted that resource access could be relevant but found that the Court had not "been furnished by the parties with any indications on this point."[139]

112. In the *Gulf of Maine* case, a different problem arose with respect to the practical use of resource location. The United States had advanced arguments regarding the relevance to the delimitation of the supposed ecological systems in the area, which the Chamber characterised as the drawing of a line "by the objective of a distribution of fishery resources according to a 'natural' criterion."[140] Apart from the factual problems regarding the reliability of an "ecosystem" approach, the defect inherent in this proposed criterion, according to the Chamber, was the inequitableness of determining a multi-purpose boundary on the basis of a single resource:[141]

> The fundamental fact remains that the criterion underlying the United States line ... was too much geared to one aspect of the present problem for it to be capable of being considered equitable in relation to the characteristics of the case. This criterion may have been justified for a delimitation concerning exclusive fishery zones alone, but less so for a "single" delimitation, in whose purpose the continental shelf and

138 **Annex 193:** *Denmark/Norway, supra* Part III, note 45 at 70: "Little information has however been given to the Court in that respect, although reference has been made to the possibility of there being deposits of polymetallic sulphides and hydrocarbons in the area."

139 **Annex 187:** *Libya/Malta, supra* Part III, note 25 at 41.

140 **Annex 174:** *Gulf of Maine, supra* Part I, note 3 at 317.

141 **Annex 174:** *Gulf of Maine, supra* Part I, note 3 at 317. More broadly, it was precisely this characteristic of the case, as a 'single' delimitation that led the Chamber to prefer what it called "neutral" delimitation criteria, based on geography, so as to avoid giving "... preferential treatment to one of these two objects [shelf and water column] to the detriment of the other" at 327.

especially the resources of its subsoil also play a most important part.

113. The reasons why resource location did not play a role in some of these examples clearly related to the particular circumstances of the delimitations at issue. The extent to which resource location is relevant in the present arbitration, therefore, requires consideration of the particular factual circumstances of this case.

b) The Relevance Of Resource Location And Access In This Case

114. The cases referred to above demonstrate that the issue of resource location **may** be taken into account as a relevant circumstance in maritime boundary delimitations. Whether resource location **should** be taken into account in a particular case depends on the facts. On the facts of the present case, it is clear that the location of resources should be taken into account to the extent that pertinent information is available.

115. The most fundamental reason for considering resource location was stated succinctly by the Court in *Libya/Malta*: resources "... are the essential objective envisaged by States".[142] In this case, access to the benefits of hydrocarbon resources is not merely an "essential" objective, it is the **only** objective, and the Court's observation is, therefore, particularly applicable. Given the nature of the "offshore areas" and of the parties' entitlements that are at issue in this case, the sole object of the delimitation is the division of a limited entitlement to hydrocarbon resources.[143]

116. The location of the mineral resources at issue was, moreover, a factor in the creation of the "offshore areas" themselves. Both Nova Scotia and Newfoundland considered an alternative federal offer that would have involved revenue-sharing

142 **Annex 187:** *Libya/Malta. supra* Part III, note 25 at 41.

143 The problem addressed by the Chamber in the *Gulf of Maine* case (and referred to above), in which the United States proposed that the location of a single resource should determine the delimitation of a zone in which more than one type of resource was at stake, is simply not an issue here. No other use or concern, such as control of foreign pipelines and cables, national security or even sedentary species located on the shelf – no interest other than the right to share with the federal government in the administration and benefits of hydrocarbon resources – is at stake in this delimitation.

based on an Atlantic "pool", under which the two provinces would have had a stake in all of the resources outside the Gulf.[144] One consideration in their rejection of that approach was the belief that the share that might accrue to each province "going it alone" would be greater.[145]

ii. Distribution Of The Relevant Resources

117. In the present case, the available information regarding resource location permits only a general assessment of the total resources accruing to the provinces under the current regime. Oil and gas **potential** in the two offshore areas, as will be seen below, is susceptible of estimation only in a general way – but, as will be shown below, the differences between the two parties' shares is of such an order of magnitude that precision is not really an issue. The assessments of **discovered** resources, moreover, bears out the overall picture that emerges from the more general estimates of potential.[146]

a) Total Potential Resources

118. Estimates by the federal Department of Natural Resources indicate that the total potential oil and gas reserves within the parties' respective offshore areas are as follow (as shown at **Figure 41**):[147]

---

[144] **Annex 56:** "Minutes of Meeting of First Ministers of the Five Eastern Provinces on Nova Scotia Memorial, Offshore Minerals Held in the Cabinet Room, Province House, Halifax, Nova Scotia, August 2, 1972"; Newfoundland Supplementary Annex of Documents, Document # 10.

[145] **Annex 53:** Letter from G.D. Walker, Legislative Counsel, Government of Nova Scotia to L.L. Pace, Attorney General, Government of Nova Scotia, attaching material for the August 2, 1972 meeting of First Ministers (1 August 1972); **Annex 61:** Letter from C. Martin, Legal Adviser to the Minister of Mines, Government of Newfoundland to M.J. Kirby, Principal Secretary to the Premier of Nova Scotia (17 November 1972); **Annex 129:** *A White Paper Respecting the Administration and Disposition of Petroleum Belonging to Her Majesty in Right of the Province of Newfoundland*, Government of Newfoundland and Labrador (May 1977).

[146] Assessing the prospectivity of sea-bed areas is a difficult task. Offshore exploration is a notoriously risky business, in which many dry holes may be drilled for every discovery. With respect to more localized assessments of the resource potential in the immediate area of the current boundary, there simply has not been sufficient exploratory work done, particularly in recent years, to support a precise determination which resources actually fall within which offshore area.

[147] **Figure 41:** Overall Resources.

FIGURE 41

CONFIDENTIAL

FILED IN SEPARATE ENVELOPE

ESTIMATED OIL AND GAS POTENTIAL

	Oil (million cubic metres)	Natural Gas (billion cubic metres)
Nova Scotia	212	686
Newfoundland and Labrador	1,208	1,882

119. This neutral assessment by the federal government suggests that, as the total oil and gas potential of the East Coast is currently divided (on the basis of the existing boundary), Newfoundland's oil potential is in the order of **five to six times greater** than that of Nova Scotia, and that its natural gas potential is **two to three times greater**.

b) Discovered Resources

120. The assessment of the parties' oil and gas potential is confirmed when the far more concrete figures associated with discovered hydrocarbon are considered. The following estimates of the parties' combined "reserves" (referring to proven resources) and "resources" (referring to resources identified as having a 50% probability of occurrence and recovery), are drawn from estimates provided by the Canada-Newfoundland Offshore Petroleum Board and by the Government of Nova Scotia, respectively.[148]

[148] For this distinction, see the estimate of hydrocarbon reserves and resources prepared by the Canada-Newfoundland Petroleum Board: **Annex 197:** Annual Report 2000-2001, Canada-Newfoundland Offshore Petroleum Board, p. 26 (hereinafter "Annual Report 2000-2001"). The Nova Scotia estimates are drawn from **Annex 198:** "Discovered Hydrocarbon Resources – Scotian Shelf", Nova Scotia Department of Natural Resources, Petroleum Resources Section (13 September 1993) (hereinafter "Discovered Hydrocarbon Resources"). Since the 1993 report, there have been no further major discoveries in Nova Scotia, apart from the "Deep Panuke" field, which is an extension of the Panuke field reported in this Annex. It is dealt with below. Natural gas liquids – condensates produced as a proportion of total volumes from natural gas production – are omitted from both sides, as they are derivative of gas production and do not affect the overall shares. For both sides, the figures included both produced and remaining resources.

DISCOVERED OIL AND GAS POTENTIAL

	Oil (million barrels)	Natural Gas (trillion cubic feet)
Nova Scotia	112	6.4
Newfoundland and Labrador	2,003	9.3

121. When the volumes of oil and actually discovered within the two offshore areas are compared, Newfoundland enjoys an advantage over Nova Scotia of almost **18 to 1** for oil, and **1.5 to 1** for natural gas.[149]

122. These numbers are even more striking when one considers that the figures provided for for each party are not entirely comparable. The estimates for Newfoundland are based on the total resources which are assessed as economically and technically recoverable.[150] For Nova Scotia, however, the estimates are based on total volumes of resources "in place",[151] whether recoverable or not. The result is that the disparity between the so-called "discovered" resources within the parties' respective offshore areas is in fact greater than that shown by the figures provided here.

c) Conclusion: The Nature of Newfoundland's Deal

123. The relevance of the information set out above is twofold. First, as with the division of areas between the two parties, it is apparent that Newfoundland received a substantial windfall in the division of resources that was effected by the boundary arising from the parties' 1964 agreement and subsequent conduct.

149 The only new discovery since the Nova Scotia estimates were prepared – Deep Panuke – has not been subjected to detailed assessment. Unconfirmed industry estimates place the total recoverable resource at approximately 1 trillion cubic feet (TCF) of gas: see **Annex 199**: PanCanadian Petroleum Limited, News Release, "PanCanadian begins commercial development of its Deep Panuke natural gas field," (22 February 2001). Even if this is turns out to be correct, this would put the Nova Scotia total in-place resources at over 7.4 TCF, while the Newfoundland offshore area has 9.3 TCF. In other words, Newfoundland would still have 25.6 per cent more discovered natural gas.

150 See **Annex 197**: Annual Report 2000-2001, *supra* note 148 at 26.

151 See **Annex 198**: Discovered Hydrocarbon Resources, *supra* note 148.

Second, any movement of that boundary to the detriment of Nova Scotia will affect not only the resource distribution in the immediate area of the boundary, but will also inevitably add to the already disproportionate advantage enjoyed by Newfoundland with respect to overall resource access.

F. Other Delimitations In The Region

i. The Relevance Of Other Delimitations

124. It is well settled that other delimitations in the same region, both completed and prospective, are relevant considerations in the delimitation at issue, where their impact could be such as to affect the overall equitableness of the result. This was illustrated in the *North Sea Cases*, in which the effects of such delimitations were regarded as directly related to assessing the proportionality of the result.[152] The point was reinforced in very straightforward terms by the panel in the *Guinea-Guinea-Bissau* arbitration: "A delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or to still to be made in the region."[153]

ii. The Impact Of Other Delimitations In This Case

125. In the present case, four delimitations, or sets of delimitations, must be taken into account in assessing the overall impact of any line:

---

[152] **Annex 188:** *North Sea Cases, supra* Part III, note 25 at 54, where it is stated that the factors to be taken into consideration include "the element of a reasonable degree of proportionality ... account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region."

[153] **Annex 191:** *Guinea-Guinea-Bissau, supra* Part III, note 33 at 675. See also **Annex 189:** *Tunisia/Libya, supra* Part III, note 25 at 64, where: "the existing or potential delimitations between each of the Parties" and "other States in the area" was specifically noted as a potentially relevant circumstance.

- Delimitations with the other East Coast Provinces in the Gulf of St. Lawrence and the Bay of Fundy (actual delimitations for Nova Scotia; prospective delimitations for Newfoundland);

- The prospective delimitation to the North of Labrador;

- The delimitation (partly completed) with France in the area of St. Pierre and Miquelon;

- The delimitation (partly completed) with the United States in the Gulf of Maine.

a) <u>The Gulf Of St. Lawrence And Bay Of Fundy</u>

126. For the purpose of determining the "relevant circumstances" in the present case, and in the light of the Tribunal's statement to the effect that its Phase One Award concerns only the boundary as between Nova Scotia and Newfoundland and Labrador,[154] delimitations with New Brunswick, Prince Edward Island and Québec in the Gulf of St. Lawrence, and with New Brunswick in the Bay of Fundy, must be considered as "prospective".

127. However, from a practical perspective, Nova Scotia has never disavowed the boundaries it negotiated in good faith with its neighbouring provinces in 1964, and each of those provinces – New Brunswick, Prince Edward Island and Québec – has legislated or otherwise applied and lived by the boundaries negotiated at that time.[155] Thus, it is Nova Scotia's submission that its boundaries with those provinces are effectively complete and that all considerations of the total offshore area available to Nova Scotia should be calculated on that basis.

---

[154] Phase One Award, para. 7.9.

[155] Nova Scotia Memorial, Parts II F,G and IV D.

128. The situation with respect to Newfoundland is, of course, different, given its position in this arbitration to the effect that no binding agreement has been concluded and its public statements that "**there are no boundaries in the region today**".[156] However, the boundaries adopted by Prince Edward Island and Québec, in accord with the lines agreed in 1964 and confirmed in 1972, join a series of mid-points and thus roughly approximate a modified equidistance boundary. It is therefore unlikely that Newfoundland would gain any significant area in negotiations or litigation involving those provinces.

129. More significantly, Newfoundland is even less likely to lose any area in the Gulf, given that all of the other parties to the 1964 agreement have implemented in good faith the boundaries thus delimited. Accordingly, it is appropriate for the Tribunal to make whatever area calculations may be required on the basis of the lines in the Gulf adopted by Prince Edward Island and Québec, if not by Newfoundland. These lines may not represent the maximum that Newfoundland may claim, but they constitute a reasonable statement of the minimum areas available to it. As such, their use in any area calculation cannot possibly disadvantage Newfoundland (by overestimating the area appertaining to it).

b) North Of Labrador

130. No boundary for the Newfoundland offshore area has been established to the North of Labrador. For the purposes of the calculations in this Memorial, a claim based on approximate equidistance is assumed. Any likely variation from this boundary would not materially affect the maritime areas involved.

[156] **Annex 200**: C. Movers/ The Canadian Press, "N.S. calls for stability in offshore dispute", *The [Halifax] Herald* (20 March 2001); S. Bornais/The Daily News & CP, "Evidence supports boundaries: lawyer", *Cape Breton Post* (20 March 2001); The Daily News & CP, "Boundary deal done in '64, Nfld. trying to 'weasel' bigger share, hearing told", *[Halifax] Daily News* (20 March 2001) 4.

c) The Single Maritime Boundary With The United States

131. The single maritime boundary with the United States defines the limits of Canadian jurisdiction, and thus the limits of the Nova Scotia offshore area, in the Gulf of Maine and Georges Bank areas. In its outer sector, this line runs in a generally southeasterly direction, terminating at latitude 40° 27' 05" N, longitude 65° 41' 59" W.[157] In effect, this boundary creates a barrier to the extension of Nova Scotia's offshore area Southwest of the province (**Figure 42**)[158]; and it emphasizes the concavity of Nova Scotia's coastline with respect to those of the United States and Newfoundland (see below, section iv). These effects, given the relatively constricted East-West extent of Nova Scotia's zone, must be taken into account in assessing the overall effect of any delimitation.

132. It should also be noted that the Canada-United States boundary is only partially settled, in that no delimitation of the broad shelf claims of the two countries has yet taken place. However, Schedule I of the *Canada-Nova Scotia Accord Act*[159] uses a "southeasterly production" (i.e. a straight extension) of the single maritime boundary to the outer edge of the continental margin as the basis for the definition of Nova Scotia's offshore area. For the purposes of the present arbitration, it is appropriate to use that same line. It is unlikely that any future delimitation would provide Nova Scotia with a significantly larger amount of maritime area.

d) St. Pierre And Miquelon

133. The delimitation effected in the *Canada/France* case is obviously of interest, given that the French zone lies between the coasts of the two parties. At least three factors should be taken into account in assessing the impact of this boundary on the present delimitation.

157 **Annex 174:** *Gulf of Maine, supra* Part I, note 3 at 345.
158 **Figure 42:** The Canada-United States Maritime Boundary.
159 Annex 2, Sch. I.

134. First, the boundary between Canada and France defines the territorial sea of France as well as the water and shelf boundary beyond.[160] For the purposes of the present case, it is only the area encompassed in the delimitation of the continental shelf and exclusive economic zone that is relevant, in that France's territorial sea area would not have been part of the potential offshore area appertaining to either Nova Scotia or Newfoundland and Labrador.

135. Second, the southern extension of the French zone (the so-called "baguette" or "stem of the mushroom") crosses over the agreed Nova Scotia-Newfoundland boundary and subtracts from the offshore areas of both provinces. The area "lost" to each province as a result is small - approximately 3,452 $km.^2$ for Nova Scotia and 9,130 $km.^2$ for Newfoundland - and remarkably similar in proportion to the size of their respective offshore areas. (**Figure 43**).[161] On the calculation of the total offshore areas under the current boundary, this represents approximately .058 % of the Newfoundland offshore area, and .053 % of the Nova Scotia area.[162] In sum, the proportional loss to the two sides is at present virtually identical.

136. Third, the Canada-France boundary, as with the Canada-United States boundary, is only partially delimited. The Court of Arbitration in *Canada/France* explicitly limited the effect of its decision to the 200 nautical mile limit.[163] As a result, and as can be seen in **Figure 43**, France's broad shelf claim to the South has yet to be determined. Given the somewhat idiosyncratic nature of that delimitation, it is difficult to predict the extent of the area to be gained by France in any seaward extension of its zone. It is clear, though, that on the basis of the current Nova Scotia-Newfoundland boundary, any area gained by France would be lost from the Nova Scotia offshore area.

---

160 **Annex 194:** *St. Pierre and Miquelon Award, supra* Part III, note 48 at 1170-1171.
161 **Figure 43**: Area Lost to St. Pierre and Miquelon
162 See also Nova Scotia's 23 March 2001 answer to the Tribunal's 16 March 2001 questions.
163 **Annex 194:** *St. Pierre and Miquelon Award, supra* Part III, note 48 at 1171.

G. Geographic Circumstances

137. As demonstrated in Part III above, the centrality of geographic circumstances to most adjudicated delimitations, whether through the application of distance-based criteria or more subjectively defined coastal projections,[164] is necessarily connected to the legal nature of the zones in question. Such circumstances and criteria can be expected, therefore, to be less relevant to the present delimitation, in which the nature of the zone and source of legal entitlement, and thus the area of potentially overlapping entitlements, are based neither on distance (as with the exclusive economic zone), or on the seaward extension of land sovereignty (as with the continental shelf), but on negotiated entitlements to certain restricted rights within a single zone falling under the jurisdiction of a third party.

138. Geographic considerations surely played a role in the development of the "offshore area" regime that is at the heart of this arbitration. The parties' conception of their entitlement to rights in the hydrocarbon resources of the shelf were based at least in part on the notion that provinces should have rights in those areas "adjacent" to their coasts. This is reflected, *inter alia*, in the *Joint Submission* of October 1964, in which it was proposed that "the proprietary right in minerals contained in submarine lands belongs to those Provinces where those submarine lands are contiguous to the Province."[165] Significantly, however, this assertion of ownership was made not with respect to some undefined geographical

164 **Annex 174**: *Gulf of Maine*, *supra* Part I, note 3 at 334, 338.

165 **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).

or geometrical limits, but with reference only to agreed limits as between the provinces.[166]

139. Furthermore, as demonstrated above, the provinces' ownership claims were not at all times restricted to "adjacent" or "contiguous" resources. Also under discussion – even reaching the point of tentative agreement – were proposals that would have seen the provinces share in the benefits of resources with no direct geographical connection to their respective coasts, by means of "pooling" arrangements involving all five East Coast Provinces, including Nova Scotia and Newfoundland.[167]

140. Finally, the basis for the definition of each Party's potential claim in this case is defined in the Accord legislation, which specifies entitlements to the outer edge of the continental margin. This requires application of the provisions of Article 76 of the *LOS 1982*. The Article 76 approach, as explained in **Appendix B**, incorporates elements based on distance from the coast, but relies more extensively on the geology and geomorphology of the area in question.

141. With these *caveats* in mind regarding the weight to be accorded to them, the geographic circumstances relevant to this case will be considered.

i. The Unity Of The Continental Shelf Of The East Coast

142. Prior to addressing the truly "geographical" circumstances of the relevant area, it is necessary to address quickly with one geological or geomorphological isue: the concept of "natural prolongation" provides no basis for finding a delimitation line founded on the physical extent of the shelf in this case.

---

166 **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). **Annex 21:** "MEMORANDUM OF MEETING the 23rd September, 1964, at which were present Mr. H.W. Hickman, New Brunswick, Mr. Graham Rogers, Prince Edward Island, Messrs. I.G. MacLeod, M.C. Jones and John A.Y. MacDonald, Nova Scotia"; **Annex 24:** *Communiqué* issued by Atlantic Premiers Conference, Halifax, Nova Scotia, September 30, 1964 (30 September 1964).

167 *Supra* Part II, note 58.

143. As discussed, the potential extension of the parties' claims is governed, *inter alia*, by the Article 76 approach; and as demonstrated in section B, the two potential claims under that definition overlap, with neither Party's "outer limit" stopping short of the other's potential claim. Moreover, even if a less modern approach to the extent of the parties' potential claim were employed, in the present case the maritime areas lying between the parties' land areas, and indeed off their entire coasts, form part of one continuous continental shelf.[168]

144. As the Chamber stated in the *Gulf of Maine* case, "... the continental shelf of the eastern seaboard of North America, from Newfoundland to Florida ... is a single continuous, uniform and uninterrupted physiographical structure."[169] There is, therefore, no convenient "natural" boundary of any relevance to this dispute.

ii. General Geographic Configuration Of The Region

145. The following paragraphs are intended to describe the geographic configuration of the delimitation area in general – no attempt is made, here, to deal fully with localized changes of direction caused by bays or indentations in the coast, though some are noted. To the extent that these are relevant, they will be dealt with in consideration of coastal lengths and proportionality, in Part V.

146. The general configuration of the coasts of the parties in the area of immediate relevance to the delimitation can be characterized with reference to three general sectors of the maritime areas in question (**Figure 44**):[170]

- The Gulf of St. Lawrence area, from the tri-junction point with Québec Southeast to the Cabot Strait;

168 **Annex 201**: *Memorial Submitted by Canada*, Court of Arbitration, *Delimitation of the Maritime Areas between Canada and France*, June 1, 1990, at 39: "There is a geological continuum throughout the continental shelf off Newfoundland and Nova Scotia...The Scotian Basin is a younger feature extending from the central Grand Banks of Newfoundland to Georges Bank (off the southern tip of Nova Scotia), and is part of a thick sedimentary wedge that blankets the entire continental margin off eastern North America."

169 **Annex 174**: *Gulf of Maine*, *supra* Part I, note 3 at 273-274.

170 **Figure 44**: General Geographic Configuration of the Delimitation Area.

- The area between Cabot Strait and Scatarie Island on the Nova Scotia coast, and Fortune Bay on the Newfoundland coast;

- The area to the South and East of Burin Peninsula, Newfoundland, and to the South and West of Scatarie Island.

147. In the Gulf of St. Lawrence area, the Nova Scotia coast runs in a direction which is generally Southwest-Northeast along the northern coast of Cape Breton, before making a distinct turn to the South at the Cabot Strait, in the vicinity of Cape St. Lawrence and Money Point. On the Newfoundland side, from the area of Cape Anguille, the coast runs in a southerly direction for a short segment to the vicinity of Cabot Strait and Cape Ray, where a marked change in direction to the East occurs. In Cabot Strait, St. Paul Island (Nova Scotia), an island of 6.6 km^2, lies approximately 25 km off the coast of Nova Scotia at Money Point.

148. From Cabot Strait, the coastline of Nova Scotia runs generally in a southwesterly direction, from Cape North to Scatarie Island off Cape Breton. In Newfoundland, the coast runs in a generally easterly direction, from Cape Ray to the mouth of Fortune Bay . (**Figure 44**).

149. At Scatarie Island, the coast of Nova Scotia is characterized by a pronounced shift in direction, turning to run in a generally southwesterly direction along the coast of Cape Breton and mainland Nova Scotia to the Southwest tip of the province, in the vicinity of Cape Sable (not to be confused with Sable Island). Sable Island, as noted above, lies off the mainland coast of Nova Scotia at a distance of 162 km. It is approximately 45 km in length, and has an area of approximately 49 km^2.

150. In Newfoundland, the coast runs in a southwesterly direction, from Fortune Bay to the tip of the Burin Peninsula, then turns to the Northeast on the eastern side of the Peninsula. The southeastern end of Burin itself does not face Nova Scotia, but rather is directly opposite St. Pierre and Miquelon (France). To the East of the Burin Peninsula, the coast of Newfoundland is characterized by the presence of

two main bays (Placentia and St. Mary's) and the Avalon Peninsula. The presence of two peninsulas (incorporating the eastern coast of Burin) and two large bays, with numerous changes in direction, makes determination of a general coastal direction difficult in this sector. In general, however, and allowing for later consideration of the effect of the bays on coastal lengths, the direction is again generally easterly or slightly southeasterly, from Burin to Cape Race. At Cape Race the coast turns to the North, running up the East coast of the island of Newfoundland.

151. The general direction of the Newfoundland coastline in this area, as with the inner segment of the coast, is easterly, but it is "shifted" considerably to the South, an effect magnified by the presence of the two main peninsulas: the long (approximately 126 km.) and thin (approximately 26 km. average width) Burin Peninsula, and the somewhat more substantial Avalon Peninsula. The general direction line shown in **Figure 44**, as a result, encompasses significant areas of water.

iii. The Relationship Of The Relevant Coasts

a) Opposition And Adjacency

152. The designation of coasts as opposite or adjacent in nature is rarely unequivocal, in that many situations will have features of both. A situation of "pure" opposition would be one in which the two coasts are parallel (**Figure 45**).[171] Complete adjacency, on the other hand, would involve coasts lying "beside" each other along a 180° line, as shown in **Figure 45**. In very approximate terms, then, two coasts that are at an angle of 90° might be described as a situation of evenly mixed opposition and adjacency (**Figure 45**); where the angle of intersection is

[171] **Figure 45**: Illustration of Oppositeness, Adjacency and Mixed Oppositeness and Adjacency.

less than 90°, the coasts might be thought of as generally opposite; an angle greater than 90° would indicate a situation of adjacency.[172]

153. Of particular importance is the significance that has been attached to these classifications. In general, it has been found that in situations of opposition a line based on equidistance – a "median" line, when applied to opposite coasts – is more likely to provide an equitable result than it would in the context of adjacent coasts:[173]

> Prima facie, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel.

154. This has never been phrased as a mandatory rule, even in cases where the median line was adopted quite readily.[174] However, the reasoning in favour of a median line, or something close to it, has been consistent from the *North Sea Cases* forward. In essence, a relationship of opposite coasts, assuming that minor distorting coastal features are discounted, presents a situation in which a median line ensures that relatively equal coasts will generate roughly equal maritime areas.

155. In situations of adjacency, on the other hand, application of an approach based on equidistance has been found more likely not to produce an equitable result, since the effects of minor coastal features are magnified when the line which they control is projected seaward.[175] The impact of this effect increases the further from the coast the boundary runs, in that a single coastal feature can be so situated as to affect the course of the line over a very great distance.[176] One of the classic examples of the distorting effect of equidistance in a situation of adjacent coasts is

---

172 **Annex 174:** *Gulf of Maine, supra* Part I, note 3; see also **Annex 202:** *Counter-Memorial Submitted by Canada*, International Court of Justice, *Gulf of Maine*, June 28, 1983 at 45-47 (hereinafter *Counter-Memorial Submitted by Canada*).

173 **Annex 193:** *Denmark/Norway, supra* Part III, note 45 at 66. See also: **Annex 187:** *Libya/Malta, supra* Part III, note 25 at 47. **Annex 188:** *North Sea Cases, supra* Part III, note 25 at 36-37.

174 **Annex 193:** *Denmark/Norway, supra* Part III, note 45, at 66-67; **Annex 187:** *Libya/Malta, ibid.*

175 **Annex 193:** *Denmark/Norway, supra* Part III, note 45, at 66-67; **Annex 188:** *North Sea Cases, supra* Part III, note 25 at 36; **Annex 190:** *Anglo-French Award, supra* Part III, note 27 at 58-59.

176 **Annex 190:** *Anglo-French Award, supra* Part III, note 27 at 58-59.

the problem of concavity, which was at the heart of the *North Sea Cases*.[177] As shown in the diagram used by the Court in the *North Sea Cases* (see opposite page), a State with a coastline that is concave in relation to those of its neighbours will, if an equidistance method is applied, be seriously disadvantaged by the resultant "enclavement" or partial "cut-off".

156. Fortunately, the coastal relationships in the present case are relatively straightforward and easily classified.

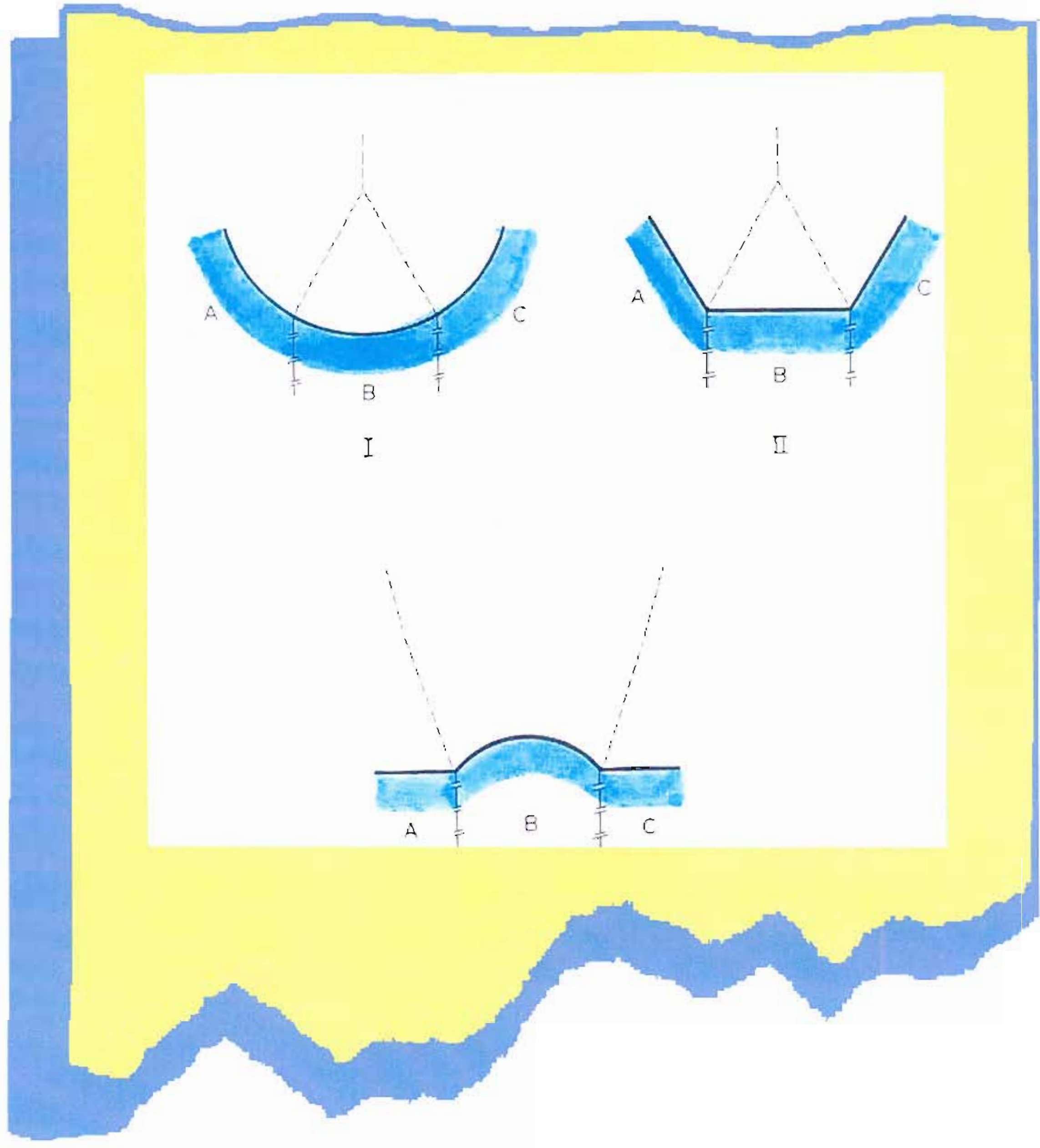
b) In The "Inner" Segment The Coasts Are Primarily Opposite

157. In the area from the tri-junction point to Scatarie Island on the Nova Scotia coast and Fortune Bay on the Newfoundland coast, the parties' coastlines are primarily opposite in their relationship. The general directions of the coastlines in this sector are shown in **Figure 46**,[178] utilizing lines from Cape North to Scatarie Island in Nova Scotia, and from Cape Ray to the mouth of Fortune Bay in Newfoundland. When these general directional lines are extended, they meet at an angle of 60°, indicating a relationship that is primarily one of opposition (as discussed below, this is so, notwithstanding the directions of the coasts within the Gulf of St. Lawrence).

c) The "Outer" Segment Presents Mixed Adjacency and Opposition, But Are Primarily Adjacent

158. Beyond the point of marked change in the direction of the coasts at Scatarie Island (Nova Scotia) and the Burin Peninsula (Newfoundland), a different situation obtains. The azimuths defined by the general direction lines as shown in **Figure 47**[179] (Scatarie-Cape Sable and Burin-Cape Race) are at an angle of 141° to each other – clearly adjacent coasts, and at some distance from each other.

177 **Annex 188:** *North Sea Cases, supra* Part III, note 25.
178 **Figure 46**: The "Inner" Segment: Opposition of the Coasts.
179 **Figure 47**: The "Outer" Segment: Adjacency of the Coasts.



(**Annex 188:** *North Sea Cases*, *supra* Part III, note 25 at 45)

159. There is, however, an element of opposition in the outer sector coastlines when Sable Island is considered. Sable Island could be considered as opposite the Southwest-facing coast of the Avalon Peninsula (**Figure 47**). Although this situation introduces an element of opposition into the coastal relationship in the outer segment, the dominant characteristic is nevertheless adjacency.

d) The Extent Of The "Zone Of Opposition"

160. The maritime area within which relevant coasts may be considered to be "opposite" is not limited to those areas directly between the coasts. As was argued by Canada in the *Gulf of Maine* case, there exists a seaward "zone of oppositeness" defined by the area within which the opposite coasts are still the legitimate determinant of the boundary.[180] Given that the primary impact of the designation of coasts as opposite is to justify the potential application of an equidistant (median) line, it is necessary to determine in each case how far seaward the construction of an equidistant line is still controlled by coastal points on the opposite coasts before the adjacent coasts begin to dominate the line.

161. In the present case, the maritime area within which the coastal relationship can be defined as one of opposition is determined as follows. Northwest of Cabot Strait, in the Gulf of St. Lawrence, the rigorous equidistance line between Nova Scotia and Newfoundland is controlled by "opposite" points on St. Paul Island (Nova Scotia) and Cape Anguille (Newfoundland), at least as far as the area of the tri-junction with Québec (**Figure 48**).[181] For all practical purposes, therefore, the entire area may be viewed as one within which the coasts are opposite.

162. Southeast of Cabot Strait, the last points on the opposite, inner coasts that control the equidistance line are Scatarie Island (Nova Scotia) and Colombier Island, (Newfoundland) (**Figure 48**). These opposite coastal points are the controlling

180 **Annex 202:** *Counter-Memorial Submitted by Canada*, International Court of Justice, *Gulf of Maine*, *supra* note 172 at 45-47.

181 **Figure 48**: Zone of Opposition.

features on the equidistance line seaward to approximately latitude 46° N (**Figure 48**).

163. For the purposes of examining this geographical situation, then, the area within which the coastal relationship can properly be considered as one of opposition runs from the area of the tri-junction with Québec, through the inner sector to approximately 46° N. The implications of this relationship are considered further in Part V below, with respect to the assessment of the equitableness of the delimitation line.

iv. The Overall Impact Of The Macrogeographic Situation

164. Any delimitation must also take account of the broader geographic context within which the delimitation will be effected, if the overall impact is to be assessed.[182] This concern is partly addressed by the consideration of other delimitations, as dealt with above, with a view to ensuring a "delimitation which is integrated into the present or future delimitations of the region as a whole."[183] There are, however, more general geographic features of the region which, although they are closely related to the question of other delimitations, also give rise to independent concerns.

165. In the present case, two general macrogeographic characteristics constitute relevant circumstances. First, it should be noted that when the "long coastline" in the region is considered (as in *Guinea-Guinea-Bissau*) the southeasterly facing coast of Nova Scotia falls within a coastal concavity defined by the coasts of the United States and Newfoundland (**Figure 49**). This concavity is not pronounced and it is partly ameliorated by the presence of Sable Island. Nonetheless, the "wing" created by the boundary in the Gulf of Maine, and the East-West orientation of the South coast of Newfoundland (as opposed to the Southwest-

---

182 **Annex 191**: *Guinea-Guinea-Bissau, supra* Part III, note 33 at 683-684.

183 **Annex 191**: *Guinea-Guinea-Bissau, supra* Part III, note 33 at 683-684.

Northeast orientation of Nova Scotia), combine to raise the possibility of Nova Scotia's offshore area being "squeezed" from claims on both sides (**Figure** 49).

166. The second general consideration is the extent to which the coasts of the two provinces are able to generate the full extent of seaward entitlements available under the definitions of "offshore area" found in the Accord legislation. **Figure 50** shows the generalized coastlines of the parties, and highlights those segments of the coasts that are restricted or "blocked" from a full seaward claim, as well as those for which unrestricted claims are possible. Even allowing (generously) for the entire South coast of Newfoundland to be considered as blocked, in the light of the existing boundary, the results are clear. Of the total Nova Scotia coastline of approximately 1,397 km., 837 km. – **60% of the total** – is blocked from a full claim. For Newfoundland, on the other hand, the situation is reversed. Of the total coastline of approximately 3,096 km., only 1,300 – **42% of the total** – can be considered blocked, while 58% is unrestricted.

167. It is important not to overstate the significance of the macrogeographic situation. Since the *North Sea Cases*, it has been accepted that delimitations cannot be used to "refashion nature" and that "[e]quity does not necessarily imply equality.[184] It has also been accepted, however, that features of geography can result in a situation where, "in a theoretical situation of equality within the same order, an inequity is created."[185] All that is suggested here, and as will be considered further in Part V, is that the actual impact of a delimitation can only be appreciated if the geographic circumstances set out above are taken into account.

H. Conclusion: The Relevant Circumstances

168. A consideration of the facts of the case and an assessment of their significance to the question of *how the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined*, lead to the identification of six broad "circumstances" of relevance

---

[184] **Annex 188:** *North Sea Cases, supra* Part III, note 25 at 49-50.
[185] **Annex 188:** *North Sea Cases, supra* Part III, note 25 at 49-50.

to the delimitation to be effected by the Tribunal. These will be accorded varying degrees of weight in the selection of equitable criteria and practical methods for drawing the line. In brief, the relevant circumstances are:

- Circumstances related to the exceptional and highly specific legal nature of the zone in question, and to the parties' entitlements in that zone. The limited interests of the provinces in their offshore areas are negotiated entitlements, implemented in statute, and do not derive from any independent source. Those entitlements are limited to shared management rights over and shared benefits from hydrocarbon resources, and engage no other resources or uses; [186]

- Circumstances related to the area relevant to the delimitation, defined as "an area of overlapping entitlements".[187] This area is precisely defined by the *Accords* by which the parties' negotiated entitlements were implemented and by virtue of which the Tribunal's mandate arises;

- Circumstances related to the conduct of the parties as regards the boundary between their respective offshore areas. The parties, in the course of the negotiations which led to the creation of their offshore area entitlements, also negotiated and agreed upon the location of boundary lines between their respective claims, subject to federal acceptance and implementation. In addition to this mutual agreement, the parties independently issued exploration permits that demonstrated a consistent concordant practice in recognition of a *de facto* line, and Newfoundland acquiesced in actions by Nova Scotia and the Government of Canada that confirmed that same line;

---

[186] **Annex 174:** *Gulf of Maine, supra* Part I, note 3 at 326.
[187] **Annex 193:** *Denmark/Norway, supra* Part III, note 45 at 105.

- Circumstances related to the location and distribution of relevant resources. As divided by the *de facto* line established by the parties – the line that is the current boundary – Newfoundland and Labrador receives by far the greatest share of the hydrocarbon resources of the offshore areas, and is clearly the major beneficiary of the regime created by the offshore *Accords*;

- Circumstances arising from other delimitations, actual and prospective, in the region. The seaward extent of Nova Scotia's offshore area is blocked by the presence of other jurisdictions, in both the North and the South, and it is possible that the province could eventually stand to lose a portion of its offshore area depending on the outcome of an eventual French broad shelf claim;

- Circumstances of a purely geographic nature, which demonstrate, *inter alia,* the unity of the continental shelf in the region and the geographically disadvantaged situation of Nova Scotia, relative to Newfoundland, arising from the general concavity of its coast.

169. None of these circumstances can be ignored if the delimitation is to be equitable. Each of them comprises factors that must be taken into account at each stage of the delimitation process so as to ensure, as required by international law, that the outcome is an equitable result in the circumstances.

* * * * *