

PART V: EFFECTING THE DELIMITATION

A. Introduction

1. The relevant circumstances of this case, which have been fully addressed in Part IV above, must now be applied in effecting the delimitation of the respective offshore areas of the parties. The delimitation is to be carried out in three general stages: selection of equitable criteria appropriate to the case; identification of a suitable practical method for drawing the line; and testing the equitableness of the result (which may lead to revisions to the line as provisionally drawn). These steps were described by the Chamber in the *Gulf of Maine* case:¹

In this final phase of the decision-making process, the Chamber must therefore arrive at the concrete determination of the delimitation line that it is required to draw (a) while basing itself for the purpose on the criteria which it finds most likely to prove equitable in relation to the relevant circumstances of the case and (b) while making use, in order to apply these criteria to the case, of the practical method or combination of methods which it deems the most appropriate; all this with the final aim in view of reaching an equitable result in the above circumstances.

...

Its last remaining task ...will be to ascertain whether the result thus arrived at may be considered as intrinsically equitable, in the light of all the circumstances which may be taken into account for the purposes of that decision.

2. As this passage demonstrates, the relevant circumstances are to be brought to bear at all three stages of the delimitation – each step in the process is influenced by those circumstances. Equitable criteria are those “most likely to prove equitable in relation to the relevant circumstances”. Methods adopted so as to give effect to those criteria are those “called for by ... the circumstances”.² These criteria and

¹ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 326, 339-340.

² Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 315: “Above all there must be willingness to adopt a combination of different methods whenever that seems to be called for by differences in the circumstances that may be relevant in the different phases of the operation and with reference to different segments of the line.”

methods are selected with the “final aim” in view, namely, an equitable result. And whether a particular result is “intrinsically equitable” is determined according to the circumstances.

3. The process of maritime delimitation has also been described as involving a “balancing up” of the circumstances and criteria applicable in a given case, so as to arrive an overall approach to the delimitation that best reflects the various equitable criteria that may be applicable and the range of circumstances considered relevant.³ This balancing up is readily achieved when, as in the present case, most or all of the considerations point in the same direction.⁴
4. Certain equitable criteria, by their very nature, may offer little by way of direct application in the definition of practical methods, but are nonetheless highly relevant to assessing the equitable nature of the result. For example, resource location and access can be useful in testing the equitableness of a given line, but, as illustrated in the *Gulf of Maine* case, it is difficult to determine an appropriate method solely on this basis.⁵ Furthermore, a particular criterion may be directly

³ Annex 188: *North Sea Cases*, *supra* Part III, note 25 at 50.

⁴ It does, however, arise in certain cases that the application of a practical method, dictated by one equitable criterion, could result in inadequate consideration being given to another factor. Apart from circumstances where the resulting conflict is such that an entirely different method must be selected, this possibility can be dealt with by adjustment of a provisionally-drawn line, so as to take account of the counterbalancing concerns. See, for example, Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 335-337 the modification of the general median line in the central segment of the *Gulf of Maine* to allow for the disproportion in coastal lengths, and the localised effect of Seal Island, Nova Scotia. The median line was a clear application of the criterion of “equal division”, but given that particular geographic circumstance, its unmodified application would have been inequitable. See also the adjustment of the provisional median line in Annex 193: *Denmark/Norway*, *supra* Part III, note 45 at 68-69, 72, 79-81, to account for the significant differences in coastal lengths, and the respective access to resources. In addition, the final test of the equitableness of the result should disclose any obvious conflicts with criteria not directly employed in drawing the line. See the discussion of proportionality, below.

⁵ In the absence of the type of ecological continuum unsuccessfully argued by the United States in the Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 316-317.

applicable to the drawing of a line in one case, but only to testing the result in another – depending on the relevant circumstances.⁶

5. This feature of the delimitation process led the Chamber in the *Gulf of Maine* case to distinguish between “primary” and “auxiliary” criteria; the former are those most directly applicable to the actual drawing of the line, while the latter are of relevance mainly as a means of correcting a provisional line or testing the result.⁷ The same approach is adopted here, with the *caveat* that the distinction is not meant to be rigid, in that a criterion used to select a practical method could also be considered in assessing the equitableness of the result.

B. The Applicable Equitable Criteria

6. The circumstances of this case lead directly to the identification of two equitable criteria of primary importance to the process of delimitation:
 - First, the delimitation should, to the extent possible, give effect to those methods and actual lines which the parties, as demonstrated by their prior conduct, “may have considered equitable or acted upon as such”;⁸
 - Second, the delimitation should reflect, to a reasonable degree, the equal division of the overlapping legal entitlements of the parties to the zone in question.

⁶ The oft-stated criterion of proportionality of maritime area to relevant coastal length could, in a case of extreme variation in coastal length, be of such importance that it precludes the adoption of certain methods, and favours others. In other circumstances, however, the difference in coastal lengths may be of a lesser order, requiring consideration only at a later stage, in ensuring that no disproportion has in fact resulted. See Annex 187: *Libya/Malta*, *supra* Part III, note 25 at 48-49; Annex 189: *Tunisia/Libya*, *supra* Part III, note 25 at 59.

⁷ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 328.

⁸ Annex 189: *Tunisia/Libya*, *supra* Part III, note 25 at 84.

7. In addition, the circumstances give rise to the following auxiliary criteria, which can be employed to test the equitableness of the result:

- The “element of a reasonable degree of proportionality”⁹ between relevant coastal lengths and maritime areas;
- The equitable division of access to resources; and
- The avoidance of “cut-off” of either party’s coasts, and consideration of the macro-geography of the region (including any other delimitations).¹⁰

i. **The Conduct Of The Parties**

8. The single most dominant feature of this case is the overwhelming record of both mutual and “matching” conduct that effectively establishes a line that the parties themselves, in their good faith negotiations and subsequent practice, considered to be an equitable solution in the circumstances.

9. The basis in law for giving effect to the previously-expressed views of the parties as to an equitable result, even where it falls short of tacit agreement or estoppel, is well-accepted. In *Tunisia/Libya*, as discussed above, the ICJ was adamant 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”.¹¹ This principle was endorsed, if anything in more explicit terms, in

⁹ Annex 188: *North Sea Cases*, *supra* Part III, note 25 at 53-54.

¹⁰ These auxiliary criteria will be considered in more detail below, after the specification of the provisional delimitation line.

¹¹ Annex 189: *Tunisia/Libya*, *supra* Part III, note 25 at 84 (emphasis added). Judge De Aréchaga, at 131-132 in his *Separate Opinion*, was even more forceful with respect to conduct. In dealing with the actions of the Italian authorities in exercising authority over sponge fishing for a period of more than 30 years, and despite the lack of any “...positive evidence of the express acceptance by the authorities of the Tunisian Protectorate...”, he found that “it would be unthinkable for the Court to assign to one Party an area which was controlled by the other for more than 30 years...”.

Libya/Malta, where the Court referred to “its duty” to take into account “... any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court.”¹²

10. The reasons for such ready acceptance of this consideration as one of the criteria of delimitation are obvious. The freely expressed views and conduct of parties, established **before** they decide to litigate a boundary, generally provide a more accurate picture of what they regard as an equitable result than an excessive claim concocted in the heat of a dispute and for the purposes of an adjudication.¹³ Indeed, the determination of an equitable solution involves a complex trade-off of interests, often including interests of a highly subjective nature, that are better understood and balanced by the parties themselves than by a court or tribunal.
11. At a more fundamental level, the acceptance of prior conduct as an important criterion is grounded in general principles of equity. Where, as here, two parties have engaged in an extensive pattern of conduct – including the mutual determination of a line, matching permit issuance along that line, and acquiescence in the use of the line both by governments and private industry – there are compelling reasons in equity to give effect to that line.
12. The most fundamental obligation of States with respect to maritime boundary delimitation, as confirmed by the Chamber in the *Gulf of Maine* case, is the obligation to seek a delimitation by means of agreement, “following negotiations conducted in good faith and with the genuine intention of achieving a positive result.”¹⁴ This is, in itself, reflective of broader principles of equity, which recognize that good faith is at the heart of dealings between States.¹⁵ When, as here, the parties were engaged in negotiations that must be presumed to have been

¹² **Annex 187:** *Libya/Malta*, *supra* Part III, note 25 at 29 (emphasis added). The Court did not find on the facts that there was evidence of such conduct in that case.

¹³ **Annex 189:** *Tunisia/Libya*, *supra* Part III, note 25 at 84.

¹⁴ **Annex 174:** *Gulf of Maine*, *supra* Part I, note 3 at 299.

¹⁵ **Annex 203:** *Nuclear Tests Cases (Australia v. France)*, [1974] I.C.J. Rep. 253 at 268. More specific doctrines such as acquiescence and estoppel, are really manifestations of this more general requirement of good faith: **Annex 174:** *Gulf of Maine*, *supra* Part I, note 3 at 305.

in good faith, their freely-expressed views as to the appropriate boundary must be regarded as a genuine assessment of the equitable nature of that boundary.

13. Similar reasoning applies to “matching” conduct by which two parties express their views – albeit by a different means – as to where a boundary is located. This is particularly so when, as here, one party (Nova Scotia) is led to rely on the positive conduct and acquiescence of the other (Newfoundland), and act according to that reliance in creating obligations with third parties – in this case, the federal government and private oil and gas exploration companies. The point was stated in common-sense terms by Minister Allard of Québec on June 13, 1969, in the course of reaffirming Québec’s prior acceptance of the boundaries in the Gulf of St. Lawrence. Minister Allard's words could easily be taken as summarizing Nova Scotia’s position for many years *vis-à-vis* Newfoundland:¹⁶

Québec accepted these boundaries in good faith and further in good faith undertook certain actions and made certain commitments concerning the area within these boundaries Québec accepted the boundaries at the request of the four Atlantic Provinces, which request was considered by Québec to have been seriously made and no one has objected to its actions or activities within those boundaries.

14. The evidence of conduct demonstrating the parties’ earlier acceptance of a boundary line is stronger here than in any recorded maritime boundary case. The parties agreed on the location or “identification of the boundary lines” in 1964 (and again in 1972),¹⁷ and in their subsequent practice in issuing permits they confirmed the establishment of a *de facto* line which is clearly referable to that agreement. At critical junctures Newfoundland acquiesced in the application of this same line by both the federal and Nova Scotia governments. Throughout the period in which this conduct was established, Nova Scotia acted in reasonable

¹⁶ Newfoundland Document # 35: “Minutes of Meeting of Joint Mineral Resources Committee Held at the Parliament Buildings”, June 13, 1969.

¹⁷ Transcript of Oral Argument, March 16, 2001, p. 697.

An Agreement Was Concluded At The Conference Of September 30, 1964

The Atlantic Premiers ... unanimously agreed: ...

- 5 That the boundaries described by Metes and Bounds ... be the marine boundaries of the Provinces ...

(emphasis added)
(Annex 24: *Communiqué*)

The **Conference agreed** on the marine boundary lines between each of the provinces.

(emphasis added)
(Annex 26: *Matters Discussed on September 30, 1964*)

The Conference agreed that I should advise the Government of the Province of Quebec of our stand on the matter of submarine mineral rights and of the marine boundaries agreed upon by the Atlantic Provinces.

(emphasis added)
(Annex 27: Letter to Premier Lesage (October 2, 1964))

... **QUEBEC IS IN AGREEMENT WITH THE ATLANTIC PROVINCES ON THE MATTER OF SUBMARINE MINERAL RIGHT AND OF THE MARINE BOUNDARIES AGREED UPON BY THE ATLANTIC PROVINCES**

(emphasis added)
(Annex 28: Premier Lesage's response)

This submission is presented on behalf of the four Atlantic Provinces **pursuant to agreement reached** at the Atlantic Premiers Conference on the 30th of September last.

(emphasis added)
(Annex 31: *Joint Submission* at 19)

reliance on Newfoundland's actions and applied the line in its dealings with the federal government and with private industry.

15. The pattern of both active and passive conduct is clear and convincing, and this evidence must be taken into account, as stated by the ICJ in *Tunisia/Libya*, *Libya/Malta and Denmark/Norway*, and by the Chamber in the *Gulf of Maine* case. The line established and respected by the parties provides the clearest indication of what they considered as "equitable" in the circumstances.¹⁸

ii. The Equal Division Of Overlapping Entitlements

16. The equal division of the area of the parties' overlapping legal entitlements has been identified as a criterion of delimitation which, *prima facie*, offers the potential for an equitable solution in many situations.¹⁹ As was noted by the ICJ in *Denmark/Norway*, the concept of overlapping entitlements was the "basis of the principle of non-encroachment enunciated in the *North Sea Continental Shelf* cases".²⁰ In the *North Sea* cases, the Court considered the basis of entitlement to be natural prolongation, and expressed the principle of non-encroachment with reference to the equal division of those areas where the parties' entitlements overlapped.²¹

101(C) (1) [D]elimitation is to be effected ... in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory...

¹⁸ Indeed, had the parties in fact been States, it is almost certain that the boundary would have been settled long ago. Newfoundland itself argued in the first phase of the arbitration that at least part of the line would have been implemented immediately but for the inability of the provinces to do so without the concurrence of Canada in their plan. If the parties had been States dividing what were their own entitlements, the result would have been a binding boundary in 1964.

¹⁹ In the Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 328, the Chamber, with perhaps a touch of hyperbole, referred to this as "a criterion which need only be stated to be seen as intrinsically equitable."

²⁰ Annex 193: *Denmark/Norway*, *supra* Part III, note 45 at 64 (footnote omitted).

²¹ Annex 188: *North Sea Cases*, *supra* Part III, note 25 at 53.

...

(2) If, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions, or, failing agreement, equally...

(emphasis added)

17. In the *Gulf of Maine* case, the Chamber applied the same criterion, but again expressed the area of overlap in a manner consistent with its understanding of the basis of the particular entitlements of the parties in that case. The combined water column-shelf boundary at issue led to a definition of entitlement based on “maritime projections of the coast”, but the criterion itself – equal division of the area of the parties’ overlapping entitlements – remained the same.²²

[T]he division – in principle, equal division – of the areas of convergence and overlapping of the maritime projections of the coastlines of the States concerned in the delimitation ...

18. This criterion of equal division of the area of overlapping entitlements is particularly appropriate and equitable in the circumstances of the present arbitration. Not only is the nature and basis of entitlement unique in this case, the parties conceived their claims to the offshore with some relationship to their respective coastlines, as confirmed by their agreement on the boundary location and methodologies, and they were certainly aware of and concerned with the areas within which their respective benefits and management rights were to be enjoyed.²³ Even more to the point, this approach is reflected in the definition of the extent of the offshore areas in the two Accord Acts, which relies in part upon criteria related to distance from the coasts, as well as geophysical and geomorphological factors (see Part IV above).

²² Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 328.

²³ See, for example, the discussions of offshore area and revenue shares at the Atlantic Premiers’ Meeting of August 2, 1972. 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.

19. The Accord legislation also provides an objective, measurable means of determining the area of overlapping entitlements. As demonstrated earlier, the Accord Acts stipulate that the parties' respective "offshore areas", in the absence of any other line, run to the outer edge of the continental margin - the application of this definition to both parties (as described in Part IV and Appendix B) is the basis for the definition of the area of overlapping entitlements.
20. The principle of "equal" division of overlapping entitlements is not, of course, an absolute or determinative criterion. The Chamber in the *Gulf of Maine* case was careful to point out that equal division, even though it was applied as the only primary criterion in that case, was but a "starting-point", and that the application of other, auxiliary, criteria (such as proportionality) would be used to ameliorate any inequity that might result.²⁴

[I]n the Chamber's view, the adoption of this starting-point must be combined with the parallel and partial adoption of the appropriate auxiliary criteria in so far as it is apparent that this combination is necessitated by the relevant circumstances of the area concerned...

21. In any delimitation, "It is ... the result which is predominant; the principles are subordinate to the goal."²⁵ In the circumstances of this case, and as explained more fully below, the application of the two principles described above as the primary criteria for the delimitation lead to a result that is fully equitable and requires no adjustment.

²⁴ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 328.

²⁵ Annex 189: *Tunisia/Libya*, *supra* Part III, note 25 at 59. See also Part III, above.

C. Practical Methods Of Delimitation

i. Methods Based On The Conduct Of The Parties

a) The Line Drawn By The Parties

22. The extraordinary continuity and relevance of the conduct of the parties in the present case, regarding precisely the issues at stake in the arbitration, is such that the practical methods for drawing the line dividing their respective “offshore areas” can be, *prima facie*, determined by reference to that conduct. The applicable methods disclosed by that conduct are as follow:

- Beginning in the Gulf of St. Lawrence, at the “tri-junction” point (point 2015, as designated by the *JMRC*), the line may be drawn by straight line segments joining the points defined by the agreement of the Premiers in 1964 and later delineated with coordinates in 1972 (points 2015-2016-2017) (the inner segment);
- From point 2017, the practical method that best reflects the prior conduct of the parties is a 135° azimuth line extending to the outer edge of the continental margin (the outer segment).

23. The method employed in the inner segment is confirmed unequivocally in the practice of the parties, most particularly (though not exclusively) in their 1964 agreement and later technical delineation.

24. The method employed seaward of 2017 – the 135° line – also arises from the 1964 agreement; moreover, the line is confirmed **precisely** by all of Nova Scotia’s permits in the area, as well as in Newfoundland’s Mobil permit of 1967. It is closely followed in Newfoundland’s permit issued to Katy Industries (the relevant limit of which was apparently drawn by reference to the straight-line

extension of the line between points 2016 and 2017). Furthermore, this method conforms to the understanding of the Premiers as to the location of the boundary, clearly shown on the map used by them at their meeting in August 1972, and is precisely the method used by Parliament to define the outer segment of the boundary in the 1984 legislation implementing the *Canada-Nova Scotia Agreement*, without protest from Newfoundland.

b) Applying The Methods Used By The Parties In The Inner Segment To Delimit The Outer Segment Of The Boundary

25. The facts as summarized above make it clear that the 135° line in the outer segment is the best reflection of the parties' conduct in the area, as shown in their record of permit issuance. In the alternative, however, this same segment can also be defined by direct reference to the conduct of the parties in 1964. Specifically, the boundary seaward of point 2017 could also be delimited by the Tribunal by applying the general methods of delimitation agreed to by the Premiers in 1964 and applied at the time to the delimitation of all of the maritime boundaries in the region. Those methods, as set out in the *Notes Re: Boundaries* and incorporated into the provinces' 1964 agreement are as follows:²⁶

2. Islands lying between Provinces and belonging to one or another Province are considered as if they were peninsulas.

3. Mineral right boundaries are so drawn as to join median points between prominent landmarks selected so far as possible along parallel shores.

26. These methods were never disavowed by Newfoundland and were, in fact, reaffirmed by Minister Doody, in his letter of October 6, 1972. Although the Tribunal has found that the issues raised by Minister Doody in his letter (combined with Nova Scotia's apparent silence) confirms that the boundary had

²⁶ 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).

not been resolved by binding agreement, Minister Doody did more than ask for information regarding the boundary. He also referred to, and endorsed, the “principles” that were the basis for the existing boundary:²⁷

[T]he Government of Newfoundland is not questioning the general principles which form the basis of the present demarcation.

(emphasis added)

27. Application of the methods agreed by the parties to the area seaward of point 2017 requires the identification of “prominent landmarks selected so far as possible along parallel shores” and the determination of “median points” between those landmarks:²⁸

- To the South and West of Flint Island (the Nova Scotia coastal point used in the definition of point 2017) there are no available coastal points, either in Cape Breton or on the Nova Scotia mainland, that could be used to locate a mid-point “... between prominent landmarks ... along parallel shores”. Scatarie Island, where the coast turns sharply toward the Southwest, has no convenient opposite point in Newfoundland (it is in fact directly opposite St. Pierre and Miquelon), and is so close to Flint Island as to diminish greatly its usefulness in any event. The next relevant point in Nova Scotia is therefore Sable Island, which is of course “... considered as if [it] were [a] peninsula ...” and is, moreover, directly opposite Newfoundland in the area of the outer segment of the boundary;

²⁷ Newfoundland Document # 57: Letter from C. William Doody to Michael J. Kirby (6 October 1972) at 1.

²⁸ It should be noted that the series of lines joining defined median points is not an equidistance line – no attempt was made to join only the closest points on the opposing coasts, as would be necessary for equidistance.

- The nearest point to Sable Island on what might be defined as a “parallel”, or opposite, shore in Newfoundland, is Cape St. Mary’s;
 - **Figure 51**²⁹ shows the mid-point on the line joining Sable Island and Cape St. Mary’s. On a construction line which is 517 km in length, the mid-point falls exactly on the boundary defined by the 135° azimuth;³⁰
 - Beyond that point, there are no other relevant coastal points for application of this method. The direction of the line in the outer segment is in any event well-established, with no apparent reason for a further change in direction.
28. The application in the outer segment of the methodology agreed by the parties in 1964 and clearly applied by them in the inner segment, results, therefore, in a line that is precisely the 135° azimuth.

c) The Result

29. The practical methods defined above derive from the clearly stated and precisely applied consensus of the parties, apparent from both their 1964 agreement and their subsequent practice, in the segment of the boundary from point 2015 to point 2017. Beyond 2017, two approaches (both of which are also derived from the parties’ conduct) are possible: application of the line that best reflects the exploration permit practice of the parties; or the application in the outer segment of the agreed methodology (as applied in the inner segment, in 1964).

²⁹ **Figure 51: A 135° Azimuth Boundary Line in the Outer Segment is Consistent with the Methods Used in the 1964 Agreement for the Inner Segment.**

³⁰ A precise calculation of the mid-point on the geodesic line between the Canadian basepoints for Sable Island and Cape St. Mary’s produces a point that is less than 200 metres from the 135° line at that point. On a line of this length (517 km), this is a purely theoretical variance.

30. Fortunately, the results are identical no matter which of these two approaches is adopted – a 135° azimuth line running from point 2017 to the outer edge of the continental margin. The boundary provisionally delimited by these methods can be precisely defined as follows, on the same terms as found in the *Canada-Nova Scotia Accord Act*, Schedule I:³¹

[Beginning at] a point at latitude 47°45'40" and longitude 60°24'17", being approximately the midpoint between Cape Anguille (Nfld.) and Pointe de l'Est (Que.);

thence southeasterly in a straight line to a point at latitude 47°25'28" and longitude 59°43'33", being approximately the midpoint between St. Paul Island (N.S.) and Cape Ray (Nfld.);

thence southeasterly in a straight line to a point at latitude 46°54'50" and longitude 59°00'30", being approximately the midpoint between Flint Island (N.S.) and Grand Bruit (Nfld.);

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

This boundary is depicted in **Figure 52**³².

ii. **Methods Based On The Equal Division Of Overlapping Entitlements**

31. The practical methods described above are equally consistent with the implementation of the other primary criterion – the equal division of overlapping entitlements – in those sectors where it is relevant.
32. As described in Part IV, above, from the starting-point of the boundary at the tri-junction point in the Gulf, seaward to approximately latitude 46° N, the relationship of the parties' coasts is generally one of opposition. This has been described as the "zone of opposition" (**Figure 48**). Where two coasts are opposite to one another, it has been found that a median line may **in general** be expected to

³¹ **Annex 2: Canada – Nova Scotia Accord Act**, Schedule I.

³² **Figure 52: The Boundary : the Existing Boundary Line.**

generate an equitable result.³³ The use of a median line in situations of opposition has by no means acquired the status of even a presumptive “rule”.³⁴ However, it has been found that in situations of coastal 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.³⁵

33. One of the main reasons for adopting a median line in circumstances of opposition was stated by the Chamber in the *Gulf of Maine* case: where coasts are in opposition to each other, the median line (subject of course to modification as required by the circumstances) can be expected to effect the equal division of the overlapping areas of entitlement.³⁶ Similar reasoning was applied in the *North Seas Cases*, where the Court considered the circumstance of overlapping shelf entitlements (as defined by natural prolongation) between opposite states. The Court observed that for opposite coasts a median line, allowing for the potential distortion from “minor coastal projections”, “must effect an equal division of the particular area involved.”³⁷
34. Within the “zone of opposition” of the parties’ coasts in this case, that is, from the tri-junction through to approximately latitude 46° N, the line drawn by the method defined in the previous Section – i.e., the boundary as delineated in the *Canada-Nova-Scotia Accord Act*, Schedule I – is effectively a simplified median line. As **Figure 53**³⁸ illustrates, the rigorous median line “criss-crosses” the existing

³³ Annex 193: *Denmark/Norway*, *supra* Part III, note 45 at 66; Annex 187: *Libya/Malta*, *supra* Part III, note 25 at 47; Annex 188: *North Sea Cases*, *supra* Part III, note 25 at 36-37.

³⁴ Annex 187: *Libya/Malta*, *supra* Part III, note 25 at 47.

³⁵ Annex 190: *Anglo-French Award*, *supra* Part III, note 27 at 66: “Whereas in the case of “opposite” States a median line will normally effect a broadly equitable delimitation, a lateral equidistance line extending outwards from the coasts of adjacent States for long distances may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographic features.”

³⁶ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 334.

³⁷ Annex 188: *North Sea Cases*, *supra* Part III, note 25 at 36. This reasoning was endorsed in Annex 187: *Libya /Malta*, *supra* Part III, note 25 at 47. See also Annex 193: *Denmark/Norway*, *supra* Part III, note 45 at 66, where it was found that for opposite coasts with overlapping entitlements, “the median line... may prima facie be regarded as effecting an equitable division of the overlapping area.”

³⁸ **Figure 53**: The Current Boundary vs. a Simplified Median Line.

boundary in this segment; the boundary agreed by the parties and set out in the Schedule I of the *Canada-Nova Scotia Accord Act* is effectively a “straightened” or “simplified” version of the rigorous median line.

35. The practical effect of this line – and its equitableness - becomes even more apparent when the areas “traded off” by the simplification of the rigorous median line are analysed. The net effect of the current line in this segment is that Nova Scotia receives approximately 515 km² less (and Newfoundland receives 515 km² more) than it would with a rigorous and median line. This area is insignificant given the overall size of the zones.
36. In the segment of the boundary, extending to latitude 46°N, then, the criterion of equal division of the area of overlapping entitlements would suggest the same method as that based on the conduct of the parties. In the area **beyond** 46°N, where the coastal relationship is primarily one of adjacency, no particular practical method is dictated by this criterion. The equal division criterion will nonetheless be relevant to the assessment of the overall equitableness of the result.

iii. The Appropriate Technical Method Is A Loxodrome

37. One final technical matter relating to the practical methods for drawing the line must be addressed. The appropriate method for drawing the line set out above must involve the use of loxodromes, as opposed to geodesics, for the various boundary segments. This method provides a result that is shown as a straight line on a Mercator or similar projection, and is thus most convenient for the practical management of permit areas and exploration activities. It is also consistent with the method applied in the current definition of the boundary in the *Nova Scotia*

Accord Act, which, as explained, is but the current expression of the methods agreed and applied by the parties in practice.³⁹

38. Furthermore, the loxodrome is the only method appropriate to the outer segment of this boundary. The outer edge of the continental margin, although its general parameters can be determined, has not yet been defined in Canadian law with the precision that would allow for the designation by latitude and longitude of a terminus for the Nova Scotia-Newfoundland boundary. Thus, the final segment of the boundary can only be determined on the basis of an azimuth running seaward to a point to be determined in the future. A geodesic line, to be drawn properly, requires the definition of a starting-point and an end-point, which the geodesic joins by the shortest line on the surface of the ellipsoid. Where no end-point is available, the proper option is the loxodrome, which can be defined as a straight line proceeding on a constant azimuth from a single point.⁴⁰

D. The Equitableness Of The Result

39. The preceding section completes the provisional delimitation of the boundary between the respective offshore areas of the parties, subject to verification of the equitableness of the result. This final stage is, of course, the most critical. The jurisprudence is consistent in requiring that, above all else, the delimitation result in an equitable solution.
40. It has been demonstrated that the line as provisionally drawn on the basis of the criteria and methods discussed above, in fact reflects what the parties themselves considered to be an equitable solution. The priority accorded to the equitable nature of the result in international law, however, means that even a delimitation effected on the basis of the parties' clear and consistent conduct must be examined to determine whether it does, in fact, provide an equitable solution.

³⁹ In Schedule I of the *Nova Scotia Accord Act*, the boundary is described by "straight lines", except where the geodetic line forming the single maritime boundary with the United States is referenced: **Annex 2: Canada-Nova Scotia Accord Act**, Schedule I.

⁴⁰ For an explanation of the nature of such lines, see *Nova Scotia Memorial*, Appendix A, para. 26.

This involves assessing the equitableness of the line as drawn in the light of the various equitable criteria, both primary and auxiliary, shown to be appropriate in the circumstances of the case.

i. The Conduct Of The Parties

41. The consistency of the proposed delimitation with the conduct of the parties is obvious. The line derives directly from the practice of the parties. There is, accordingly, no further need to verify that the line gives direct effect to that conduct, and respects the equitable considerations of good faith and reliance in the dealings of the parties.

ii. Equal Division Of Overlapping Entitlements

42. As demonstrated, the criterion of equal division of overlapping entitlements is fully reflected in the drawing of the line in the area of the boundary where the coasts are opposite – that is, from the tri-junction, through point 2017 and seaward to approximately latitude 46°N.
43. This consideration, however, has further relevance in assessing the division of the area of overlapping entitlements achieved by the line throughout its entire extent. **Figure 54⁴¹** shows the overlapping areas of entitlement, as defined in Part IV, above, divided by the proposed delimitation line. Leaving aside the very small areas at stake in the Gulf of St. Lawrence, as before, the division of the relevant areas effected by this line leaves 597,000 km² to Nova Scotia and 686,000 km² to Newfoundland. This is not, on its face, an equal division, as it leaves more of the overlapping entitlement area to Newfoundland, but the respective areas are nonetheless quite close to an equal division given the large areas involved. Moreover, the significance of these figures must in any event be further assessed by reference to the relevant coastal areas.

⁴¹ **Figure 54: Overlapping Offshore Area Entitlements of Nova Scotia and Newfoundland as Divided by the Existing Boundary.**

iii. **Proportionality Of The Result**

a) The Role Of Proportionality

44. The consideration of proportionality of maritime area to coastal length, which has been consistently endorsed in the jurisprudence,⁴² is a criterion that could potentially be relevant both to the determination of equitable criteria and practical methods of delimitation, and to the assessment of the equitableness of the result.⁴³ The former application, however, could only arise where there is a very significant disproportion between the relevant coastal lengths of the parties,⁴⁴ which, as shown below, is an issue that does not arise in the geographic circumstances of this case. Accordingly, the use of proportionality is limited to the assessment of the result of the provisional delimitation line.
45. The overall relevance of proportionality is also somewhat less in the present case - where the source of the parties' legal title to the zone is based, not on their coastlines, but in negotiated arrangements - than it would be in a continental shelf case. However, these arrangements - the "offshore area" regime created by the *Accord Acts* - provide that the seaward extent of the parties' entitlements are to be determined partly by reference to distance from the coasts.⁴⁵ As a consequence, the extent of the zone, though not the entitlement to it, is at least partly dependent upon coastal geography, and proportionality is, therefore, a pertinent consideration.

⁴² See, for example, Annex 187: *Libya/Malta*, *supra* Part III, note 25 at 53-55; Annex 188: *North Sea Cases*, *supra* Part III, note 25 at 54; Annex 190: *Anglo-French Award*, *supra* Part III, note 27 at 67.

⁴³ Annex 187: *Libya/Malta*, *supra* part III, note 25 at 48-49; Annex 190: *Anglo-French Award*, *supra* Part III, note 27 at 67.

⁴⁴ Even in cases of a significant difference in lengths of coasts, the approach is of questionable utility: Annex 187: *Libya/Malta*, *supra* Part III, note 25 at 45-46. See also Annex 194: *St. Pierre and Miquelon Award*, *supra* Part III, note 48 at 1162, 1175-1176.

⁴⁵ The method of determining the seaward extent of the offshore areas, as described in Appendix B, below, also relies on geological and geomorphological factors. The distance from the coast is a factor in the overall constraint lines, as discussed in Appendix B, below.

46. It is not required that proportionality be assessed in precise terms, for the appreciation of proportion or disproportion “does not depend upon a mathematical operation...”⁴⁶ Indeed, the application of the concept in circumstances in which it is difficult to discern any truly objective basis for the relevant coasts and areas selected renders “nice calculations of proportionality” meaningless.⁴⁷ This concern was clearly expressed by the Court in *Libya/Malta*, where the relationship of the coasts and the presence of undelimited third-party boundaries made the definition of relevant areas problematic.⁴⁸

These difficulties are particularly evident in the present case where, in the first place, the geographical context is such that the identification of the relevant coasts and the relevant areas is so much at large that virtually any variant could be chosen, leading to widely different results; and in the second place the area to which the Judgment will in fact apply is limited by reason of the existence of claims of third States.

47. In the present case, however, the relevant area is capable of objective and relatively accurate definition, and the relevant coasts are readily linked to that area. This justifies the application of the mathematical calculations that would have been difficult in a case such as *Libya/Malta*.⁴⁹

b) The Application Of Proportionality In This Case

• *The Relevant Area*

48. The relevant area for the calculation of proportionality is, as shown in Part IV, above, the area within which the potential entitlements of the parties overlap. In

⁴⁶ Annex 187: *Libya/Malta*, *supra* Part III, note 25 at 50.

⁴⁷ Annex 190: *Anglo-French Award*, *supra* Part III, note 27 at 38.

⁴⁸ Annex 187: *Libya/Malta*, *supra* Part III, note 25 at 53.

⁴⁹ This does not imply that any resulting adjustment in the line must be effected as a mechanical operation based on the resulting ratios. The concern in the cases has always been the avoidance of significant disproportion, rather than ensuring perfect proportionality, and slight degrees of variation in proportionality need not result in the automatic adjustment of the line. See Annex 190: *Anglo-French Award*, *supra* Part III, note 27 at 67: “In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor.”

the present case, this area is clearly defined by the extension of the provinces' respective "offshore areas" to the outer edge of the continental margin, as provided in the *Accord Acts*, and the identification of the area of overlap. Figure 54 depicts the overlapping area generated by this approach.

- *The Relevant Coasts*

49. Figure 55⁵⁰ also shows those segments of the parties' coastlines that are relevant for purposes of comparison to their respective maritime areas. These coastline configurations, unlike the "general direction" lines shown in Part IV, take account of larger bays and indentations. In the present context, these lines are significant for their length, not their general direction, and a failure to account for some of the local variations could result in an underestimate of the relevant distances, particularly for the south coast of Newfoundland.

50. For Newfoundland, the relevant coastal length is calculated as follows:

- From Point Enragée (near Cape Ray) to Cape Race, allowing for the major indentations as shown, the total distance is 599 km;
- From Cape Race to Cape Spear, the coastal length is 102 km. This part of the coast is included here since it could be seen as having a legitimate contribution to those portions of the overlapping maritime area to the North and East of the Avalon Peninsula;⁵¹
- The total length of Newfoundland's relevant coastline, calculated as described, is approximately 701 km.

⁵⁰ Figure 55: Relevant Coasts.

⁵¹ The northern terminus of this segment of the coast is the coastal point closest to the outer limit of the overlapping area to the northeast.

51. For Nova Scotia, the relevant coasts and lengths are calculated as follows:

- A first segment of coastline runs from Money Point to Scatarie Island (123.6 km). From Scatarie, the coastline runs to Cape Canso and Cape Sambro, and thence to Cape Sable Island, a distance of 559.5 km. Little variation is required in these segments, in that the coast is not as heavily indented as that of Newfoundland;
- A further 63.7 km is allowed for a portion of the coastline running north from Cape Sable, since that segment contributes to a portion of the overlap area lying to the West;⁵²
- The total relevant coastline of Nova Scotia, based on these lines, is approximately 747 km.

- *The Proportionality Of The Result*

52. When the relevant offshore areas, as divided by the boundary line as drawn above, are compared with the coastlines relevant to those areas, the following results are obtained:

- The combined relevant coastlines of the parties total approximately 1,448 km. Of this total, the Nova Scotia coast represents 52%, and the Newfoundland coast represents 48%;
- When the parties' respective offshore areas are considered, of the total area of overlap of 1,283,000 km², Nova Scotia receives 47% of the area, compared with 53% for Newfoundland;

⁵² This segment was determined by the same method as that for Cape Race-Cape Spear, stopping at the point closest to the outer limit of the overlapping area to the Southwest.

- Newfoundland, then, receives a somewhat greater proportion of the offshore in the area of overlap than might be expected from its share of the coastline length.

53. The same relationship can be expressed in terms of ratios, as has been done in some cases. The ratio of Nova Scotia's relevant coastal length to that of Newfoundland's is 1.07 to 1, while the ratio of Nova Scotia's relevant offshore area to that of Newfoundland's is 1 to 1.14. On the basis of the line as provisionally drawn, therefore, Newfoundland receives a slightly greater share of the overlapping offshore area than its share of coastal length would indicate.

54. In sum, the comparison of the relevant coastlines to the relevant offshore areas reveals a slight disproportion in favour of Newfoundland. Assuming that the dominant impact of the conduct of the parties as an equitable consideration in support of the current line will be accepted, however, Nova Scotia has not argued for any adjustment to the line to correct this disproportion.⁵³

- *Comparison Of The Total Offshore Areas*

55. It was demonstrated in Part IV, above, that the equitableness of the result in this case can be fully appreciated only by considering the entirety of the offshore area falling to each province, if only as a secondary factor. Figure 56⁵⁴ shows the

⁵³ If the relevance of that conduct were not to be accepted, Nova Scotia reserves the right to seek such a correction, whether by application of a different method or by *ex post facto* adjustment.

⁵⁴ Figure 56: Total Offshore Areas as Divided by the Existing Boundary.

total offshore area of each province under the proposed delimitation,⁵⁵ as well as their total coastlines.⁵⁶

56. In brief, Newfoundland, with approximately 69% of the combined total of the two parties' coastlines, receives 71% of the total offshore area. Nova Scotia, with 31% of the total combined coastline, receives 29% of the offshore area. Again, and at a different scale of consideration, it appears that the line as established and respected in the conduct of the parties delivers a fully proportional result.
57. The overall proportionality of the delimitation affected as proposed here is clearly illustrated in Figure 57.⁵⁷

iv. Consideration Of Possible Cut-Off And Macrogeography

58. The macrogeography of the region, and its impact on the equitableness of the line as provisionally drawn, can be very briefly stated. The line, running as it does to the Southeast, is generally in a similar orientation to the Single Maritime Boundary with the United States in the Gulf of Maine. This relationship, which is one of nearly parallel lines, avoids any cut-off or "squeeze" of the Nova Scotia offshore area which could otherwise result from the general concavity of the Nova Scotia coast, and particularly from any boundary with Newfoundland that is oriented in a more southerly direction.
59. The impact of the other major delimitation in the region, with France, is equitably distributed between the parties, as shown earlier. There is a risk that a future

⁵⁵ The total areas differ slightly from those shown in Figure 3 in Phase One. For the purposes of Phase Two, phase, the estimates from the Canadian Government have been updated and the result based on actual calculation of the zones based on the best available data for the island of Newfoundland. For Labrador, where the areas involved are less directly relevant, the previous federal estimates are used. In the Gulf of St. Lawrence, the 1964 lines are used for convenience -- no material impact is likely from any shift in these lines.

⁵⁶ Where applicable, the coastlines shown are based on those used in the calculation of the relevant coasts, above. For other areas, long generalized lines are used, as small variations will be of little effect at this scale of comparison.

⁵⁷ Figure 57: Graphic Comparisons: Relevant Coastal Lengths in Relation to Offshore Area Entitlements and Total Coastal Lengths in Relation to Total Offshore Area Entitlements.

delimitation of the broad shelf claims of Canada and France may adversely affect Nova Scotia, but it is impossible to estimate that effect.

60. The general geographically-disadvantaged situation of Nova Scotia, as discussed in Part IV, above, is not addressed by the proposed delimitation line (although of course any shift of the line in a more southerly direction would exacerbate that effect). The line does, however, represent what Nova Scotia and Newfoundland long ago agreed in good faith as a reasonable compromise in the circumstances. Nova Scotia has always accepted the line on that basis, and remains prepared to do so, without modification to accommodate its geographic position, on that basis.

v. Resource Division And Access

61. It would be impossible for this delimitation to correct the huge imbalance between the resources available to Newfoundland and Nova Scotia within their respective offshore areas. Nova Scotia accepts that the geographic situations of the parties, and the agreed method by which those areas extend seaward under the *Accord* legislation, result in much of this imbalance. Indeed, even within the area of overlapping entitlements, Nova Scotia does not demand an **equal** division of resources, but an **equitable** division.
62. If the delimitation cannot create equality, however, it must at least not result in an increase in the current imbalance, which would lead to inequity. Any division of the potential resources in the immediate area of the boundary as provisionally drawn must therefore be considered in the context of the overall division of resources as between the parties' offshore areas.
63. As divided by the line defined above, it is evident that the vast majority of the hydrocarbon resources within the total East Coast offshore fall within Newfoundland's offshore area. On any view of the resource division effected by the current line, Newfoundland will continue to receive the lion's share of benefits from Canada's East Coast offshore.

E. Conclusion – The Balancing Up

64. In many instances of maritime delimitation, a court or tribunal is confronted with a range of relevant considerations which reflect conflicting tendencies. In such a case, when the equitable considerations point in different directions, the adjudicator is called upon to “balance up” the competing factors and effect the delimitation in a manner which best reflects an equitable result overall.
65. Here, the Tribunal’s task is more straightforward. All of the relevant circumstances, and all of the equitable criteria, point in one direction and lead to a single conclusion. The boundary defined above, which is identical to the boundary currently defined in legislation, is completely in accord with what the parties, as demonstrated by their extensive prior conduct, “have considered equitable or acted upon as such”.⁵⁸ It is, moreover, consistent with an equal division of the overlapping entitlements of the parties. Finally, that line delivers a result that is clearly equitable, when the auxiliary criteria of proportionality, resource division and the geographic situation of the parties are considered.
66. In sum, the *de facto* line established by the conduct of the parties, and consistently respected by them for many years, was not only regarded by the parties as a fair and reasonable division of the offshore, it was, and remains, a fully equitable delimitation in all the circumstances of this case.

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⁵⁸ Annex 189: *Tunisia/Libya*, *supra* Part III, note 25 at 84.