

PART VI: ACQUIESCENCE AND ESTOPPEL

A. Introduction

1. There was little agreement between the parties as to the relevance of the principles of acquiescence and estoppel in Phase One of the arbitration: Nova Scotia argued that Newfoundland had acquiesced in the boundary and was estopped from denying its existence, while Newfoundland retorted that acquiescence and estoppel were irrelevant to proving the existence of a binding agreement. Newfoundland argued further that:¹

[C]onduct by one of the parties ... could only be relevant in determining where the boundary should be, not whether an agreement has been concluded.

2. The Tribunal did not pronounce on Nova Scotia's arguments regarding acquiescence and estoppel *per se*, though it indicated in its Phase One Award that:²

[T]he conduct of the Parties may be relevant to delimitation in a variety of ways ... Such conduct thus remains relevant for the process of delimitation in the second phase of this arbitration.

...

[T]he point of the remarks made by Québec extends beyond the issue of formal agreement. Minister Allard's argument focused more on considerations such as reliance, good faith, legitimate expectation and subsequent practice than on the question of a legally binding agreement. Even if ... the interprovincial boundary has not been resolved by agreement, this does not at all exclude the relevance of such considerations in the next phase of the arbitration.

¹ Newfoundland Counter-Memorial, para. 251. See also Transcript of Oral Argument, March 15, 2001, p. 455, where the Agent for Newfoundland suggested that it would defeat the objective of separating the arbitration into two phases if the relevant circumstances and "issues of acquiescence in [sic] estoppel" were "brought into phase one of the arbitration relating to agreement."

² Phase One Award, paras. 7.8 – 7.9.

3. In Phase Two, then, there is no doubt about the relevance of the conduct of the parties in determining the location of the line dividing the offshore areas of Nova Scotia and Newfoundland.
4. This Part considers the conduct of the parties as it relates to the principles of acquiescence and estoppel. The question here is not whether, and which aspects of the parties' conduct constitutes a relevant circumstance in the context of the fundamental norm of maritime boundary delimitation; those matters are discussed above, in Part IV. Rather, the issue is whether the conduct of the parties demonstrates - as Nova Scotia submits that it does - acquiescence in or recognition of the existing line by Newfoundland, and the creation of an estoppel regarding that line in favour of Nova Scotia. It has already been demonstrated in Parts IV and V that the application of the fundamental norm of maritime boundary delimitation results, in the end, in the drawing of a line that matches the existing boundary. This Part confirms that the existing line is also indicated by the application of the principles of acquiescence and estoppel.

B. The Principles Of Acquiescence And Estoppel Are Well Settled

5. The principles of acquiescence and estoppel have been discussed in the parties' pleadings in Phase One and need no further elaboration here.³ It is sufficient to recall the definition provided by the Chamber of the International Court of Justice in the *Gulf of Maine* case:⁴

[T]he concepts of acquiescence and estoppel ... both follow from the fundamental principles of good faith and equity ... acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion ...

³ See Nova Scotia Memorial, Part III D, Part IV E; Nova Scotia Counter-Memorial, Part V D; Newfoundland Counter-Memorial, Chapter VI.

⁴ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 305.

6. Overall, the Court and other tribunals have provided ample guidance in their decisions regarding the circumstances that lead to a finding of acquiescence or estoppel. The facts of this case are even more compelling than those found to have given rise to acquiescence and estoppel in previous cases. As demonstrated below, Newfoundland has acquiesced in the existing line, and it must not be permitted, in the words of Lord McNair to “blow hot and cold”⁵ by espousing a claim before this Tribunal that conflicts with its previous conduct.

C. Newfoundland Has Acquiesced In The Line And Is Estopped From Espousing An Alternative Delimitation

7. The elements of Newfoundland’s acquiescence, and the circumstances that create an estoppel in favour of Nova Scotia, are:
- In 1964, Newfoundland, together with Nova Scotia and the other East Coast Provinces, agreed on the location of interprovincial boundaries dividing the offshore areas adjacent to their coasts;⁶
 - Newfoundland said nothing in the face of Nova Scotia’s issuance, from 1965 through 1971, of offshore oil and gas permits along the line;⁷
 - Newfoundland itself issued permits along the boundary during this period;⁸

⁵ Annex 103: A. McNair, “The Legality of the Occupation of the Ruhr”, (1924) 5 Brit.Y.B. Int’l L. 17 at 35.

⁶ Annex 24: *Communiqué* issued by Atlantic Premiers Conference, Halifax, Nova Scotia, September 30, 1964.

⁷ Nova Scotia Memorial, Part II H, Part IV E; Nova Scotia Counter-Memorial, Part V D.

⁸ Nova Scotia Memorial, Part II H.

- Newfoundland was silent regarding the use of the line by New Brunswick, Prince Edward Island and Québec in their oil and gas legislation and in their permit issuance;⁹
- Newfoundland endorsed the precise demarcation of the turning points of the 1964 boundary by the JMRC and its *Technical Committee*;¹⁰
- The Premier of Newfoundland, together with the Premiers of the other East Coast Provinces, agreed in June 1972 to the delineation and description of the boundary prepared by the JMRC *Technical Committee*;¹¹
- The Premier of Newfoundland announced the Premiers' June 1972 agreement in the Newfoundland House of Assembly;¹²
- On August 2, 1972, at the East Coast Premiers' meeting, Newfoundland did not object the clear depiction of the boundary

⁹ Nova Scotia Memorial, Part IV E.

¹⁰ **Annex 36:** "Minutes of Meeting of Joint Mineral Resources Committee Held at the Board Room, Provincial Building, Halifax, Nova Scotia, July 16, 1968" (16 July 1968); Schedule "A"; Memorandum of Agreement (16 July 1968); **Annex 37:** Letter from J.C. Smith, Chairman, Sub-Committee on Delineation and Description of Provincial Boundaries of Participating Provinces in Submarine Areas to H.B. Robertson, Director of Surveys, Department of Lands and Forests, Province of Nova Scotia (30 August 1968); Memorandum from J.C. Smith to W. Roberts (30 August 1968); **Annex 40:** Memorandum from F.J. Lukins, Chief Engineer, Department of Mines, Agriculture and Resources, Government of Newfoundland to F. Gover, Deputy Minister of Mines, Government of Newfoundland (7 January 1969).

¹¹ **Annex 54:** "Communiqué Issued Following Meeting of the Premiers of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, and the Vice-Premier of Québec" (18 June 1972).

¹² **Annex 58:** Newfoundland, 36th General Assembly, "Statement by Premier Moores" in *Verbatim Report*, 1st Session, Vol. 1, No. 33 (19 June 1972) at 2491.

on a map presented to the Premiers, and confirmed its agreement on the location of the boundary;¹³

- Newfoundland did not object to the use of the agreed line in the *1977 Memorandum of Understanding* between the federal government and the Provinces of Nova Scotia, New Brunswick and Prince Edward Island;¹⁴
- Newfoundland applied the line in its *1977 Petroleum Regulations*;¹⁵
- Newfoundland was silent in the face of reliance on the agreed line by Nova Scotia and the federal government in the 1982 *Canada-Nova Scotia Agreement*;¹⁶
- Newfoundland did not object to the incorporation of the agreed line into the 1984 federal and provincial legislation implementing the 1982 Agreement (following the 1984 Supreme Court of Canada decision recognizing federal jurisdiction over the mineral resources of the continental shelf off Newfoundland), in the 1986

¹³ Part II, above, and Figure 9.

¹⁴ Annex 67: "Federal-Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces" (1 February 1977).

¹⁵ See Figure 39 and Annex 109: *The Newfoundland and Labrador Petroleum Regulations 1977*, Nfld. Reg. 139/78.

¹⁶ Annex 68: *Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing* (2 March 1982).

Canada-Nova Scotia Accord or in the federal and provincial legislation implementing that Accord.¹⁷

8. These facts are, by now, well known to the Tribunal. They were considered in Phase One of this arbitration and have been reviewed in this Memorial. While they did not lead to a finding that the line dividing the offshore areas off Newfoundland and Nova Scotia had been resolved by a legally binding agreement, they do support a finding that Newfoundland acquiesced in the line that has been espoused by Nova Scotia throughout this arbitration. This conclusion is inescapable, especially when the circumstances of this case are compared to those in other cases where the International Court of Justice has determined there was acquiescence by one of the parties. These decisions, in which the parallels to the case before the Tribunal are plainly obvious, are reviewed briefly below.

D. The Case Law Confirms That The Conditions Necessary for Establishing Acquiescence and Estoppel Have Been Met In This Case

9. In the Anglo-Norwegian *Fisheries Case*,¹⁸ the Court considered the absence of protest by the United Kingdom regarding Norway's use of straight baselines. Although the United Kingdom claimed that the Norwegian system of delimitation was unknown to it, the Court concluded that the United Kingdom "could not have been ignorant"¹⁹ of the Norwegian practice or its significance. The Court referred to the "notoriety of the facts ... Great Britain's position in the North Sea, her own

¹⁷ **Annex 70:** *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C., 1984, c. 29; **Annex 182:** *Hibernia Reference*, *supra* Part II, note 59; **Annex 2:** *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3.

¹⁸ **Annex 204:** *Fisheries Case (United Kingdom v. Norway)* [1951] I.C.J. Rep. 116 (hereinafter *Anglo-Norwegian Fisheries Case*).

¹⁹ **Annex 204:** *Anglo-Norwegian Fisheries Case*, *supra* note 18 at 139.

interest in the question, and her prolonged abstention”,²⁰ and determined that the circumstances “warrant[ed] Norway’s enforcement of her system against the United Kingdom.”²¹ In this case, Nova Scotia’s use of the line was certainly well known – indeed, even oil and gas companies knew of the line and sought permits in conformity with it.²² And Newfoundland does not deny today “her own interest” in the area.

10. In the *Case Concerning the Arbitral Award Made by the King of Spain on December 23, 1906*,²³ in which Nicaragua challenged the validity of an award regarding the determination of a boundary between Nicaragua and Honduras, the Court found that Nicaragua had “by express declaration and by conduct,”²⁴ including the Foreign Minister’s report on the award to the National Legislative Assembly of Nicaragua,²⁵ recognized the award as valid. Having failed to raise any questions about the award for almost five and one-half years, Nicaragua was not permitted “to go back upon that recognition”²⁶ and to challenge the award. These facts bring to mind Newfoundland’s “express declarations and conduct”, especially Premier Moores’ statement to the Newfoundland House of Assembly on September 19, 1972, when he confirmed the Premiers’ agreement the day before, on the description and delineation of the line.
11. The Court determined that the necessary conditions for a finding of acquiescence were present as well in the *Case Concerning the Temple of Preah Vihear*,²⁷ between Cambodia and Thailand. The Court found that, given Thailand’s failure to object to the depiction on a map of a boundary line described verbally,

²⁰ Annex 204: Anglo-Norwegian *Fisheries Case*, *supra* note 18 at 139.

²¹ Annex 204: Anglo-Norwegian *Fisheries Case*, *supra* note 18 at 139.

²² See Part IV, above.

²³ Annex 205: (*Honduras v. Nicaragua*), [1960] I.C.J. Rep. 192 (hereinafter *King of Spain*).

²⁴ Annex 205: *King of Spain*, *supra* note 23 at 213.

²⁵ Annex 205: *King of Spain*, *supra* note 23 at 211.

²⁶ Annex 205: *King of Spain*, *supra* note 23 at 213.

²⁷ Annex 206: (*Cambodia v. Thailand*) (Merits), [1962] I.C.J. Rep. 6 (hereinafter *Temple of Preah Vihear*).

Thailand had acquiesced in the depicted boundary, even though the map did not reflect the agreed verbal description.²⁸ In the present case, Newfoundland, too, failed to object to the line depicted on several maps over the years.

12. In the *Case Concerning the Land, Island and Maritime Frontier Dispute*²⁹ between El Salvador and Honduras, the Court found tacit consent on the part of Honduras to El Salvador's sovereignty over a contested island because Honduras failed to protest public acts demonstrating El Salvador's claim to sovereignty.³⁰ The Court also determined that a protest by Honduras made in 1991 was too late to affect the "presumption of acquiescence"³¹ created by Honduras' long silence. Here, Nova Scotia's oil and gas permit practice was, by any definition, a public act demonstrating its claim to the area on its side of the line. Certainly the oil and gas companies and the federal government had no doubt about Nova Scotia's exercise of rights on its side of the line. Further, any purported "protest" by Newfoundland could not have displaced its prior acquiescence.
13. In the *Case Concerning the Territorial Dispute*³² between Libya and Chad, the parties disputed whether a 1955 treaty had established a boundary between them. The Court found that the boundary had been established by the treaty, noting *inter alia* that the Libyan Prime Minister had expressly accepted that the frontiers had been established and that implementation (meaning more precise demarcation) would follow.³³ Similarly, the East Coast Premiers, including Premier Smallwood, agreed on boundaries to be legislated, and accepted that "before actual legislation is prepared the description by metes and bounds should be reviewed and revised ... if necessary."³⁴ The JMRC *Technical Committee* took

²⁸ Annex 206: *Temple of Preah Vihear*, *supra* note 27 at 23.

²⁹ Annex 207: (*El Salvador/Honduras*), [1992] I.C.J. Rep. 351 (hereinafter *El Salvador/Honduras*).

³⁰ Annex 207: *El Salvador/Honduras*, *supra* note 29 at 572-574.

³¹ Annex 207: *El Salvador/Honduras*, *supra* note 29 at 577.

³² Annex 208: (*Libyan Arab Jamahiriya/Chad*), [1994] I.C.J. Rep. 6 (hereinafter *Libya/Chad*).

³³ Annex 208: *Libya/Chad*, *supra* note 32 at 28.

³⁴ Annex 31: "Submission on Submarine Mineral Rights by the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland", at 18.

up the demarcation task a few years later. In *Libya/Chad*, Judge Ajibola referred in his Separate Opinion to “the silence or acquiescence of Libya from the date of signing the 1955 Treaty ... without any protest whatsoever...”,³⁵ and considered that such conduct militated against Libya’s claim that the 1955 treaty did not establish the boundary. The same principle applies here, *vis-à-vis* Newfoundland.

14. The Court has declined to find acquiescence and estoppel in other cases. For example, in the *North Sea Continental Shelf Cases*³⁶ and in the *Gulf of Maine* case,³⁷ the Court declined to find acquiescence and estoppel on the part of the Federal Republic of Germany or the United States, respectively. The case before this Tribunal, however, does not suffer from the deficiencies identified in those cases.
15. In the *North Sea Continental Shelf Cases*, the Court did not consider that certain public statements made by Germany were indicative of the Federal Republic’s acceptance of Article 6 of the *Geneva Convention on the Continental Shelf*, because they did not amount to “a very definite, very consistent course of conduct.”³⁸ The Court also found that any such inference would have been negated by the positive acts taken by Germany, by means of an *aide-mémoire* and otherwise, to protest boundary agreements between other States that might affect areas the claimed for itself.³⁹
16. The conduct of Newfoundland in this case stands in marked contrast to that of the Federal Republic of Germany. The “very definite, very consistent course of conduct,” by which Newfoundland not only recognized, but, in fact, participated actively in determining the line dividing the offshore areas, has already been demonstrated.

³⁵ Annex 208: *Libya/Chad*, *supra* note 32 at 81, Separate Opinion of Judge Ajibola.

³⁶ Annex 188: *North Sea Cases*, *supra* Part III, note 25.

³⁷ Annex 174: *Gulf of Maine*, *supra* Part I, note 3.

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

³⁹ Annex 188: *North Sea Cases*, *supra* Part III, note 25 at 18-19.

17. Moreover, Newfoundland did not lodge any formal protest, as it would have been expected to do, and as Germany did, regarding the use of the line by other provinces or by the federal government:

- It did not protest the use of the line by the other East Coast provinces in their oil and gas permit regimes;
- It did not object to the depiction of the line on the map presented to the Premiers at the August 1972 meeting;
- It did not seek to preserve its rights when the federal government and three other provinces used the line in the *1977 MOU*;
- It was silent when the federal government and Nova Scotia relied upon the boundary in the 1982 *Canada-Nova Scotia Agreement*;
- It did not complain about the implementation of the boundary in the 1984 federal and provincial legislation implementing the 1982 Agreement;
- It did not object to the reliance on the line by the federal government and by Nova Scotia in the 1986 *Canada-Nova Scotia Accord*;
- It was silent in the face of federal and provincial legislation implementing the 1986 Agreement.

18. It is only in the context of this dispute that Newfoundland has declared its objection. Newfoundland is too late, however. The ‘presumption of

acquiescence” was established long ago and Newfoundland cannot be permitted “to go back upon that recognition.”

19. And what of Minister Doody’s inquiry in October 1972?⁴⁰ This was no protest; in fact, Minister Doody wrote that “the Government of Newfoundland is not questioning the general principles which form the basis of the present demarcation”. Rather, he suggested that a “more accurate reflection of the general principles to which we have agreed” was desirable. Bearing in mind the possible gaps in the historical record, we must assume that Minister Doody either received a satisfactory answer, or simply changed his mind, for he was never heard to call the line into question again.
20. In the *Gulf of Maine* case, the Chamber “[did] not feel able to draw the conclusion that the United States acquiesced”⁴¹ in delimitation by a median line, nor did it consider that the conditions had been met for an estoppel.⁴² The Chamber explained that there was “nothing to show that [the median line] had been adopted at government level”⁴³ and considered that Canada could not rely on the contents of a letter from a middle-ranking official of the Department of the Interior as though it were an “official declaration” of the United States’ position on the boundary.⁴⁴ The official was merely “acting within the limits of his technical responsibilities” regarding a “technical matter”.⁴⁵ Finally, the Chamber found that the “brief silence” of the United States regarding Canada’s exploration permits in the disputed area did not warrant a finding of estoppel.⁴⁶
21. The relevant facts in the *Gulf of Maine* case bear no resemblance to the facts before this Tribunal. Indeed, they could not be more different. Here, the

⁴⁰ Newfoundland Document # 57.

⁴¹ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 307.

⁴² Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 310.

⁴³ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 307.

⁴⁴ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 307-308.

⁴⁵ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 307-308.

⁴⁶ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 308.

boundary was expressly declared by the Premier of Newfoundland to reflect Newfoundland's position on inter-provincial boundaries in 1964. Even if one were to ignore Newfoundland's practice of issuing permits on the boundary during the subsequent years, leaving aside any doubt about the official position of Newfoundland would have been dispelled by Premier Moores' declaration in the Newfoundland House of Assembly, in June 1972, to the effect that the Premiers had agreed on the delineation and description of the boundary as prepared by the *Technical Committee* and endorsed by the JMRC. Indeed, the Tribunal has already recognized that Premier Moores "evidently supported" the agreement announced in 1972.⁴⁷ The "official position" of Newfoundland was never in doubt until it decided to raise the dispute that is now before the Tribunal.

22. The facts surrounding the oil and gas permit practice in the *Gulf of Maine* case may also be distinguished. Contrary to the brief silence (five years) attributed to the United States, Nova Scotia began issuing permits in 1965, and no protest regarding those permits has been lodged to this day by Newfoundland (or by any of the companies that were granted permits). This was not due to "a certain imprudence in maintaining silence",⁴⁸ as the Court found on the part of the United States in the *Gulf of Maine* case, for Newfoundland itself was issuing permits along the agreed line.
23. Finally, it is submitted that detrimental reliance, generally considered an element of estoppel, is met in this case. Following the agreement on the boundary in 1964, Nova Scotia began to issue permits to interested oil and gas companies on its side of the existing line. These permits created long-term, legal rights directly related to the mineral resources intended to be divided by the interprovincial boundary established in 1964. The implications of this permit activity were well known to Newfoundland, and the permitting practice was a highly public activity.

⁴⁷ Phase One Award, para. 5.18.

⁴⁸ Annex 174: *Gulf of Maine*, *supra* Part I, note 3 at 308.

The permits appeared on published maps and their issuance was reported in industry journals.⁴⁹ The permit rights were in considerable demand by leading corporations, and they created legitimate expectations on the part of oil and gas companies. Had Newfoundland any reservations about these potentially lucrative rights being accorded by Nova Scotia, it would have had to lodge some protest, or even issue similar rights of its own over the same area to preserve its position. Newfoundland did nothing about the Nova Scotia permits - nothing, that is, except to follow suit and issue "matching" exploration permits on its side of the line. Newfoundland's own conduct in its permit practice has never waived, thereby giving Nova Scotia every security that the division of the offshore was not in doubt.

24. Similarly, Nova Scotia relied upon Newfoundland's recognition of the line in negotiating with the federal government over management rights in the offshore. Nova Scotia never sought to secure rights over any area beyond its side of the line. Nova Scotia kept its side of the bargain, and never expected Newfoundland to renege on the province's deal.

E. Conclusion

25. The facts of this case are undeniably more compelling than those considered in previous cases where acquiescence and estoppel have contributed to the Court's reasoning. Acquiescence and estoppel form a solid legal basis, in addition to that achieved through the application of the fundamental norm of maritime boundary delimitation, for determining the line dividing the offshore areas of the parties.
26. Accordingly, the Tribunal should sanction Newfoundland's silence, as well as its positive conduct, to determine that the line dividing the offshore areas off Newfoundland and Nova Scotia is the existing line. Doing so would ensure that the ultimate goal in maritime boundary delimitation is met in this case: an

⁴⁹ See Part IV, above.

equitable result in the circumstances. The words of Professor Hersch Lauterpacht are particularly apt:⁵⁰

The far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability ... it is a precept of fair dealing inasmuch as it prevents States from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects States from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States.

27. Newfoundland must not be allowed to play "fast and loose" with the rights of other provinces arising from its own conduct.

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⁵⁰ Annex 107: H. Lauterpacht, "Sovereignty Over Submarine Areas", (1950) 27 Brit. Y.B. Int'l L. 376 at 395-396.