

Newfoundland and Labrador–Nova Scotia: The Latest “International” Maritime Boundary

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The delimitation award of the Tribunal in the Second Phase of the Arbitration between Newfoundland and Labrador and Nova Scotia is analyzed in light of the terms of reference establishing the Tribunal and the positions of the Parties throughout the delimitation phase of the Arbitration. The application of the principles of international law governing maritime boundary delimitation and the reasoning of the Tribunal in the creation of this boundary puts the Newfoundland and Labrador–Nova Scotia boundary on a par with international maritime boundary awards.

Keywords basis of title, continental shelf, delimitation, equidistance, international maritime boundary, Newfoundland and Labrador, Nova Scotia, St. Pierre and Miquelon

Introduction

The delimitation *Award of the Tribunal in the Second Phase of the Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act* (hereafter the *Award*) adds to the growing list of maritime boundary adjudications in the world.¹ In compliance with the Terms of Reference,² the Tribunal created a maritime boundary, although between Canadian provinces as opposed to independent states, that nevertheless relies for its construction and justification exclusively on the principles of international law governing maritime boundary delimitation. As such, the *Award* constitutes the newest addition to the jurisprudence of international maritime boundary delimitation, and its findings will soon find their way into the language of international maritime boundary practitioners worldwide.

In keeping with the recent practice of the International Court of Justice,³ the Tribunal first calculated a strict equidistance line, giving full effect to all features, and then adjusted that line to take account of the distorting effect of a small feature lying far offshore, and (to a lesser extent and only where it coincided with a simplified equidistant line) the conduct of the Parties.

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Geographical Setting

The delimitation took place between the coasts of Newfoundland and Labrador's island of Newfoundland and Nova Scotia's Cape Breton Island. The configuration of the coasts and the coastal features that were relevant to the delimitation are identified in Figure 1. On the Nova Scotian side, these features included, in counterclockwise order, Egg Island, Big Ledge (Cape Canso), Sable Island, Guyon Island, Portnova Island, Scatarie Island, Cormorandiere Rocks, Flint Island, Money Point (Cape North), St. Paul Island, and Pointe de l'Est (Magdalen Islands, Quebec). On the Newfoundland and Labrador side, the rel-

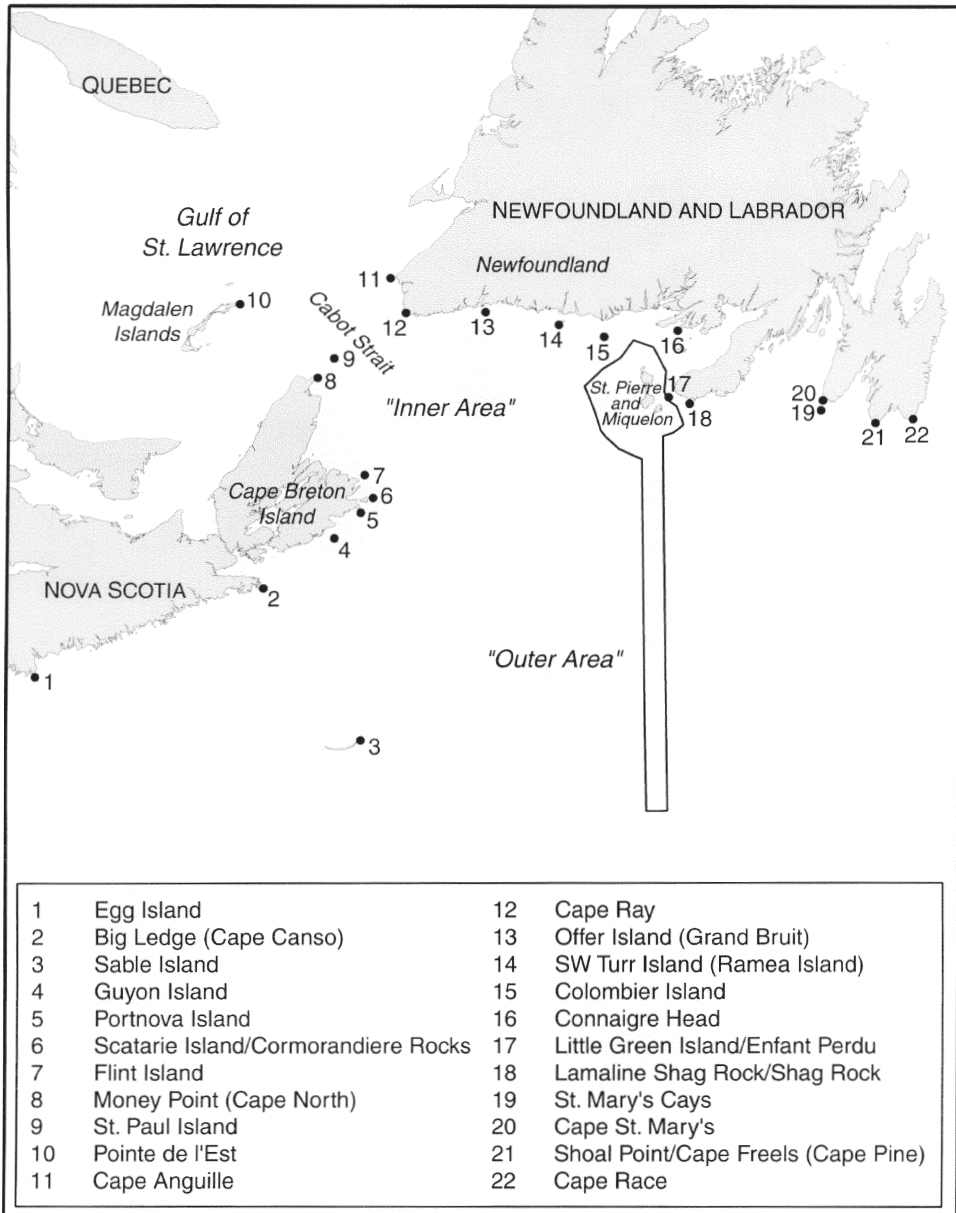


Figure 1. The geographical setting.

evant features included, also in counterclockwise order, Cape Anguille, Cape Ray, Offer Island (Grand Bruit), SW Turr Island (Ramea Islands), Colombier Island, Connaigre Head, Little Green Island, *Enfant Perdu*, Lamaline Shag Rock, Shag Rock, St. Mary's Cays, Cape St. Mary's, Shoal Point, Cape Freels (Cape Pine), and Cape Race.

The Tribunal divided the area into three sectors: the Gulf of St. Lawrence inside the closing line across the Cabot Strait; the "inner area" between the closing line across the Cabot Strait and the closing line from Cormorandiere Rocks to Lamaline Shag Rock; and the "outer area" between the Cormorandiere Rocks—Lamaline Shag Rock closing line and the outer edge of the continental margin, a wide margin that extends far beyond the 200 nautical mile limit in this area. In the central sector of the delimitation area the coasts are generally opposite, and in the northern and southern sectors the coastal relationship becomes one of adjacency, increasing with distance from the coasts.

In addition to the relevant coastal features, three important political-geographic features were present in the area of delimitation. First, the United States–Canada boundary in the Gulf of Maine, in Nova Scotia's view, formed the western limit of the area to be considered by the Tribunal.⁴ Nova Scotia put forward a macrogeographic argument whereby it found itself in a coastal concavity, squeezed between the United States and Newfoundland.⁵ In this purported concavity, Nova Scotia's offshore area was cut off in the south and west by the Gulf of Maine delimitation and would be cut off again in the north and east depending on the result of the present delimitation.⁶

Second, there was the presence of a third province in the Gulf of St. Lawrence, namely Quebec in the form of Magdalen Islands. Third-province interests had to be considered, especially in regard to the northern terminus point of the boundary, the location of which could be effected by the presence of third-province territory and claims and, conversely, the location of which could prejudice, if not in law, at least in practical terms, third-province interests.⁷

Third, and most importantly, the presence of a French zone formed by the Canada–France boundaries around St. Pierre and Miquelon was located in the midst of the delimitation area.⁸ The presence of the French zone was an issue for the Tribunal in two respects. First, an international maritime boundary arbitration had already occurred between Canada and France in substantially the same area that was now being considered by the Tribunal. In the decision, the *ad hoc* Court of Arbitration formulated its perspective on relevant coasts, relevant areas, and the extent to which specific coasts influenced the delimitation. Newfoundland and Labrador argued that the ruling and reasoning of the Court of Arbitration should be respected by the Tribunal unless there was a compelling reason to do otherwise.⁹ Second, there was the geopolitical fact of a long French corridor cutting through the area out to 200 nautical miles and perhaps, in the French view, beyond 200 nautical miles to the edge of the wide continental margin.¹⁰ Whether or not this corridor should have any effect on the delimitation was a question on the Tribunal's mind as early as the end of the first phase.¹¹

Two-Phase Arbitration

Article 3.2 of the Terms of Reference establishing the Tribunal provided for a two-phase arbitration in the following terms:

3.2 The Tribunal shall, in accordance with Article 3.1 above, determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia in two phases.

- (i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement.
- (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined.

First Phase: No Agreement

During the First Phase of the arbitration, Nova Scotia argued that a boundary between Newfoundland and Nova Scotia had already been agreed.¹² Nova Scotia's argument was based primarily on the conduct of the parties during the 1960s and 1970s, conduct that was undertaken by and among the provinces of eastern Canada in the context of an unsuccessful, multiprovince effort to wrest rights to the offshore from the Canadian federal government. The backbone of Nova Scotia's argument in the First Phase was a series of meetings and correspondence between 1964 and 1972 during which proposed interprovincial mineral rights boundaries, primarily in the Gulf of St. Lawrence, were discussed. The proposed interprovincial boundaries developed during this period consisted of a set of turning points midway between prominent coastal features, including nearshore islands lying between opposite coasts.¹³ The three turning points between Newfoundland and Nova Scotia that were identified in those discussions, points 2015, 2016, and 2017, figured prominently in the arguments of the First Phase and in the Second Phase delimitation award. These points were described as lying midway between Pointe de l'Est (Quebec) and Cape Anguille (Newfoundland) (2015), St. Paul Island (Nova Scotia) and Cape Ray (Newfoundland) (2016) and Flint Island (Nova Scotia) and Grand Bruit (Newfoundland) (2017). Beyond point 2017, the boundary was described as extending "southeasterly to International waters," or alternatively "S.E. to International waters."¹⁴ Based on this vague reference, Nova Scotia argued that the agreed boundary continued from point 2017 to the edge of the continental margin on an azimuth of 135°. Points 2015, 2016, 2017, and the 135° line are depicted in Figure 2. In the First Phase, Newfoundland and Labrador argued that the conduct of the Parties, including conduct related to the proposed interprovincial boundary, did not rise to the level of a binding agreement.

The Tribunal sided with Newfoundland and Labrador and ruled in the First Phase of the arbitration that "the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia had not been resolved by agreement."¹⁵ In the Tribunal's view, the conduct of the parties did not "disclose the existence of agreement resolving the offshore boundaries of Newfoundland and Labrador and Nova Scotia, within the meaning of the Terms of Reference."¹⁶ However, the Tribunal differentiated between the portion of the boundary formed by points 2015, 2016, and 2017 and the portion of the boundary seaward of 2017. On this issue, the Tribunal wrote, "even if the interprovincial boundary up to Point 2017 had been established by agreement, the question of the boundary to the southeast would not have been resolved thereby."¹⁷ Finally, although the Tribunal ruled that the conduct of the parties did not create a binding agreement that could resolve the dispute in the First Phase, it made clear that conduct could be relevant in the Second Phase of the arbitration.¹⁸

Second Phase: Positions of the Parties

The Second Phase submissions of the Parties are illustrated at Figure 2.

Nova Scotia. In the Second Phase, Nova Scotia submitted that the boundary should run from point 2015 to 2016 to 2017 and "thence southeasterly in a straight line and on an azimuth of 135° 00' 00" to the outer edge of the continental margin."¹⁹ This was the same line that had been found not to have been resolved by agreement in Phase One—a line entirely based on the conduct of the Parties that had been found to be insufficient to resolve the boundary question in the First Phase. The entire Nova Scotia case in the delimitation phase hung from the thin thread that the Tribunal had left uncut when it stated that "conduct thus remains relevant for the process of delimitation in the Second Phase of this arbitration."²⁰ Beyond point 2017, the Nova Scotia submission was without any support from the coastal geography, although some late and faint-hearted attempts were made to justify it on geographical grounds.²¹ This outer portion of the Nova Scotia line was justified primarily on the basis of oil conduct, conduct that Nova Scotia unsuccessfully equated with the oil practice of the parties in the *Case Concerning the Continental Shelf* (Tunisia/Libyan Arab Jamahiriya).²² Perhaps importantly, although it is not mentioned in the Award, the Nova Scotia line cut across, or jumped over, the French corridor.

Nova Scotia developed a basis of title argument that disregarded the mandate of the Tribunal to apply the principles of international law as if the provinces were sovereign states. (See the discussion below regarding Article 3.1 of the Terms of Reference.) They ignored the legal fiction established by the Terms of Reference at their peril. Nova Scotia argued that, in reality, the limited rights of the provinces to offshore resources, which in no way resembled the rights of a sovereign state to the continental shelf, were negotiated entitlements granted by the Canadian federal government through the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act²³ and the Canada-Newfoundland Atlantic Accord Implementation Act²⁴ (hereafter the Accord Acts). Therefore, the basis of title could be found only in the domestic legislative acts that established those limited rights and had nothing to do with the fictional sovereignty of the provinces over their land territory, the coasts of which automatically would have generated continental shelf were they truly sovereign states. This formulation of the basis of title ran counter to the Terms of Reference establishing the Tribunal and was ultimately rejected by the Tribunal, but it allowed Nova Scotia to invert the hierarchy of circumstances relevant to the delimitation, putting conduct (especially conduct related to or carried out under the Accord Acts) at the top and coastal geography at the bottom.

Primarily for the purpose of testing the equity of the Nova Scotia submission with a proportionality test, Nova Scotia developed a definition of relevant coasts and relevant area. This definition of coasts and area was based on Nova Scotia's perception of the legal basis of title to the offshore areas to be delimited (see Figure 2). Nova Scotia's relevant area was created using Nova Scotia's basis of title argument and the concept of areas of overlapping entitlement. In order to find the relevant area, Nova Scotia asked, "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?"²⁵ Under this scenario, Nova Scotia, by virtue of the location of the "sediment thickness/distance from the foot of the slope" line, could claim areas beyond the Flemish Cap over 750 nautical miles from its coasts. Newfoundland and Labrador, by virtue of the location of the line 100 nautical miles beyond the 2500 meter isobath could claim

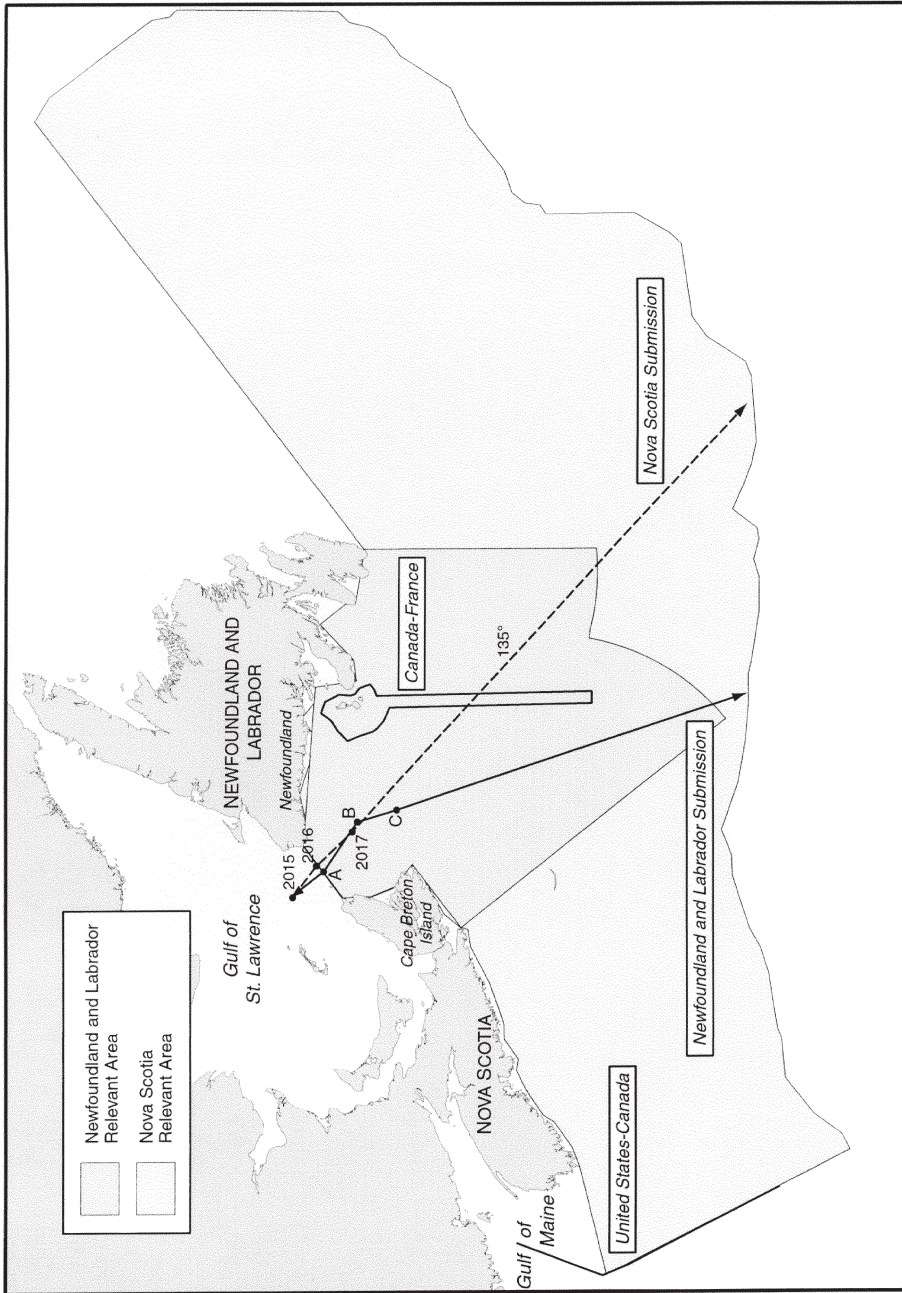


Figure 2. The parties' submissions and relevant areas.

area approximately 550 nautical miles from its coast up to the Gulf of Maine delimitation.²⁶ The end result was a 1,200,000 km² area stretching from the coasts of the Provinces out to the wide continental margin, bound in the southwest by the Gulf of Maine delimitation and in the northeast by a "line of sight" (sighting from Sable Island northeast past Cape Race) running northeast from Cape Race. Not surprisingly, the proportionality test conducted using Nova Scotia's relevant coasts and relevant area bore out Nova Scotia's contention that its line produced an equitable result. Nova Scotia also tested the equity of its line in terms of the distribution of potential hydrocarbon resources in the Laurentian Subbasin and on a regional scale. The Tribunal rejected Nova Scotia's resource distribution arguments.²⁷

Newfoundland and Labrador. In the Second Phase, Newfoundland and Labrador discounted conduct as a relevant circumstance and argued for a line that was based exclusively on the coastal geography of the Parties. The Newfoundland and Labrador submission was modeled on the Gulf of Maine delimitation and was constructed using concepts of proportionality, generalized coastal directions, angle bisectors, and perpendiculars to closing lines.²⁸ This approach gave no effect to Sable Island, took account of the longer Newfoundland coastline, generally reflected the coastal configuration in the area and eliminated the potential cutoff of Newfoundland's southwest coast.

The Newfoundland and Labrador line started at point A, the midpoint on the Cabot Strait closing line between Money Point and Cape Ray giving no effect to St. Paul Island. To the northwest of point A, the line followed the perpendicular to the Cabot Strait closing line until reaching the area of a third party. To the southeast of point A the line followed the azimuth of the angle bisector formed by the southwest coast of Newfoundland between Cape Ray and Connaigre Head on the one hand and the east coast of Cape Breton Island from Money Point to Scatarie Island on the other hand until it reached point B. The location of point B could only be found, as in the Gulf of Maine delimitation, after the position and direction of segment B–C was found. This was achieved in two steps. First, point C was positioned at the midpoint of the Scatarie Island–Lamaline Shag Rock closing line. The location of point C was then adjusted along that closing line to reflect the longer Newfoundland coast within the inner area. This adjustment shifted the location of point C in Newfoundland and Labrador's favor approximately 35 nautical miles toward Nova Scotia. Second, the azimuth of segment B–C was found by determining the azimuth of the angle bisector formed by the Newfoundland coast between Connaigre Head and Lamaline Shag Rock on the one hand and the Cape Breton Island coast between Money Point and Scatarie Island on the other. When that azimuth, or more accurately the back azimuth, was applied from the adjusted position of point C, the position of point B could be found. Seaward of point C the Newfoundland and Labrador line was the perpendicular to the Scatarie Island–Lamaline Shag Rock closing line. Unlike Nova Scotia's line, the Newfoundland and Labrador line did not cross the French corridor.

Newfoundland and Labrador argued that its basis of title to the maritime area adjacent to its coasts was found in the coasts themselves. This position was in conformity with the accepted principle in international law that sovereignty over land territory is what generates, through the coast as an intermediary, title to maritime area.²⁹ Newfoundland and Labrador's position on the legal basis of title informed the entire construction of its boundary argument, not least the contention that coastal geography must be the dominant relevant circumstance in the delimitation.

Like Nova Scotia, Newfoundland and Labrador developed a set of relevant coasts and

a relevant area in order to test the equity of their line using proportionality. These were based on a loose interpretation of the coasts and area used by the Tribunal in the *Canada-France Arbitration*.³⁰ As with Nova Scotia's, Newfoundland and Labrador's proportionality test supported the contention that its proposed line produced an equitable result.³¹

The Terms of Reference and the Applicable Law

Having read and heard the Parties' Second Phase arguments in their Memorials, Counter-Memorials and finally in six days of oral argument, the Tribunal was left to rule on the boundary. Article 3.1 of the Terms of Reference establishing the Tribunal set forth the mandate of the Tribunal in the following terms:

3.1 *Applying the principles of international law governing maritime boundary delimitation* with such modification as the circumstances require, the Tribunal shall determine the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia, *as if the parties were states subject to the same rights and obligations as the Government of Canada* at all relevant times. (emphasis added)

Article 3.1 clearly created a provinces-as-states fiction within which the delimitation would be effected. The parties dealt in starkly divergent ways with the implications of Article 3.1 on their cases and especially as it effected their interpretations of the legal basis of title to the area to be delimited.

In the delimitation phase, Nova Scotia argued that the language of Article 3.1 was not applicable to the delimitation exercise because the provincial rights in the offshore areas to be delimited were established under domestic Canadian law. These provincial rights as defined in the Accord Acts were negotiated entitlements, they were not rights to the continental shelf in the international legal sense and could not be delimited as if they were despite the Terms of Reference. In this situation it would be impossible, Nova Scotia reasoned, to apply the principles of international law to the delimitation.

In contrast, Newfoundland and Labrador argued for the adoption of the legal fiction set out in the Terms of Reference: that the two provinces were to be treated, by analogy, as if they were sovereign states and that the offshore areas should be considered to be essentially identical in legal status and geographical extent to the continental shelf that would appertain to the provinces if in fact they were states.³²

At paragraph 2.15 of the Award, the Tribunal resolved the question, in Newfoundland and Labrador's favor, by clearly stating its interpretation of the legal framework imposed on the Tribunal and Parties by Article 3.1 of the Terms of Reference in the following terms:

- First, the Tribunal is to determine the line dividing the respective offshore areas of the two provinces. These areas are and will remain areas encompassing not exclusive sovereign rights over seabed resources, but limited, shared, negotiated rights in respect of certain of those resources only.
- Second, for the purpose of making this determination, the Tribunal is to apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require. The provinces, however, are not subjects of international law. The principles governing maritime delimitation apply to the territorial sea, the continental shelf and the economic zone, and not to a

purely domestic arrangement between provinces and the Federal Government on joint management and revenue sharing relative to offshore hydrocarbon resources, a regime unknown to international law. Evidently something more is required for the Tribunal to carry out its mandate.

- Third, for this reason, the Tribunal is required to effect its determination as if the Parties were states, with all the attributes of states, including territorial sovereignty and exclusive sovereign rights in respect of the resources of the continental shelf adjacent to their coasts.
- Fourth, to add emphasis and even greater precision to the foregoing point, the Tribunal is also required to make its determination as if the provinces were subject to the same rights and obligations as the Government of Canada. Canada's rights in respect of the continental shelf arise not from domestic law but from its legal basis of title under international law. The offshore rights of Nova Scotia and Newfoundland and Labrador under the Accord Acts must therefore be treated for the purposes of delimitation of those areas as arising, like Canada's, from the same basis of title in international law.³³

The Tribunal then dealt with the question of what the applicable international law was in this case. It first looked at the treaty law binding on Canada. Canada had ratified the 1958 Geneva Convention on the Continental Shelf³⁴ (hereafter the 1958 Geneva Convention) without any reservations, but had not yet ratified the 1982 United Nations Convention on the Law of the Sea³⁵ (hereafter the 1982 Law of the Sea Convention). The Tribunal therefore noted that "Canada is subject to the rights and obligations [the 1958 Geneva Convention] incorporates, including those under Article 6. So too, under the Terms of Reference, are Nova Scotia and Newfoundland and Labrador."³⁶ Article 6, being the delimitation article in the 1958 Geneva Convention with its reference to the equidistance/special circumstances principle for the delimitation of continental shelf between opposite or adjacent states, was specifically named. The Tribunal then elaborated on the developments in the international law of maritime delimitation pointing to the growing unity in the law with regard to the equidistance/special circumstances principle subsequent to the 1958 Geneva Convention and concluded that "the applicability of the 1958 Geneva Convention in the present proceedings reinforces the case for commencing with an equidistance line, but in any event that is now the starting point in most cases, whether the governing law is the 1958 Geneva Convention, the 1982 Law of the Sea Convention or customary international law."³⁷

Having resolved the questions related to the interpretation of Article 3.1 of the Terms of Reference, the Tribunal proceeded to delimit the boundary.

The Line

In keeping with its interpretation of Article 3.1, the Tribunal started the delimitation exercise by constructing a strict equidistance line giving full effect to all valid basepoints, including all islands. The Tribunal then considered whether any circumstances existed that would merit an adjustment to the strict equidistance line, and found only two: the conduct of the Parties vis-à-vis turning points 2015, 2016, and 2017; and the presence of Sable Island. The full-effect equidistance line and the boundary awarded by the Tribunal are shown at Figure 3.

After constructing a full-effect equidistance line, the Tribunal examined that line against the conduct of the Parties in the vicinity of the Cabot Strait. Here the Tribunal

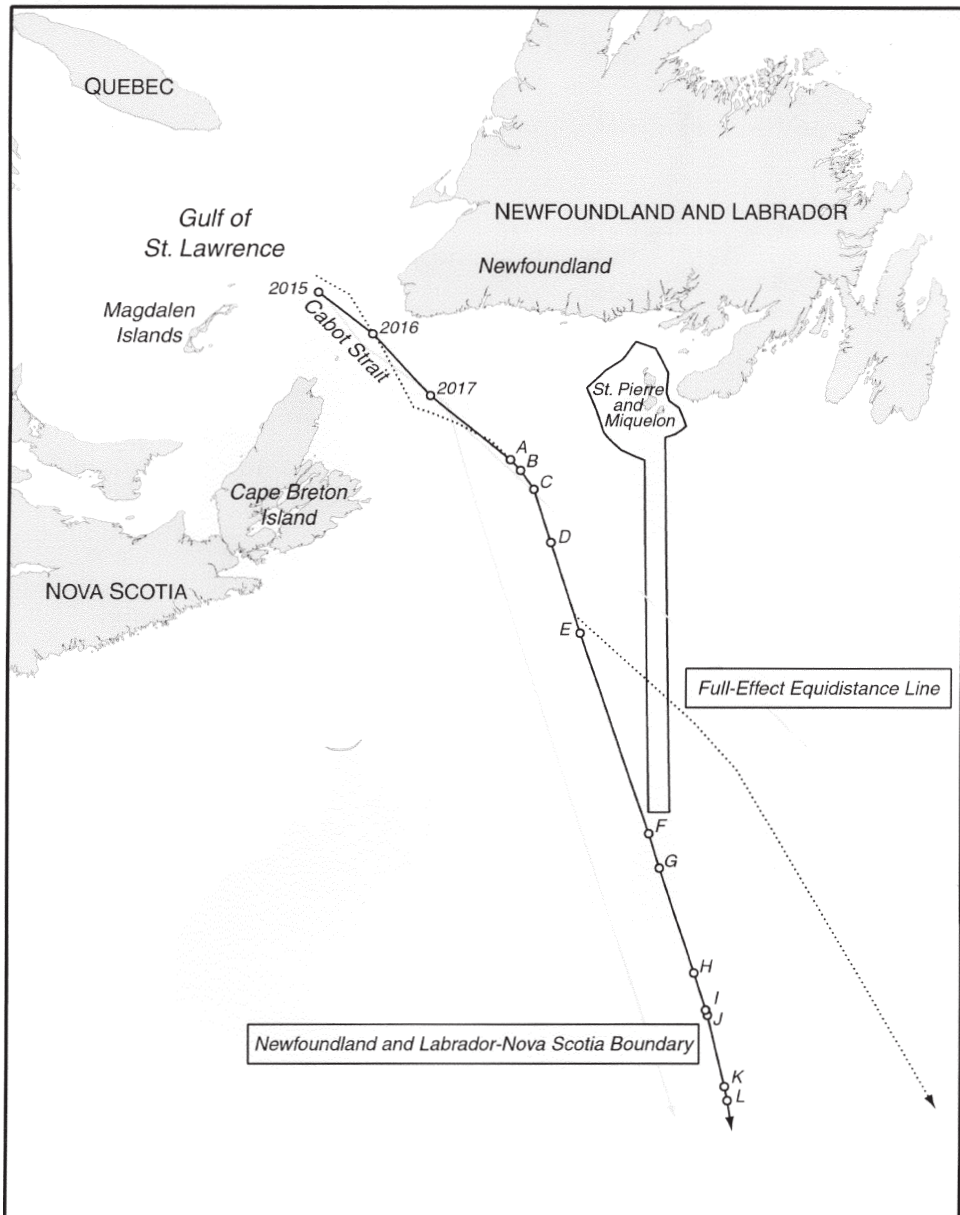


Figure 3. The award line.

found that using points 2015, 2016, and 2017 in place of strict equidistant turning points to construct a line would be “both equitable and appropriate” because the line closely resembled a strict equidistance line and because “Newfoundland never raised any objection to or difficulty with that line up to turning point 2017.”³⁸ The Tribunal simplified the strict equidistance line in the rest of the inner area by creating a single segment between point 2017 and the intersection of the strict equidistance line with the Cormorandiere Rocks–Lamaline Shag Rock closing line.³⁹

To account for the effect of Sable Island, the Tribunal adjusted the line in the outer area to give no effect to this feature. First, in order to have “regard to [Sable Island’s] remote location and to the very substantial disproportionate effect this small, unpopulated island would have on the delimitation,” the Tribunal adjusted the line to give Sable Island only half effect.⁴⁰ The Tribunal then further adjusted the line, this time giving no effect to Sable Island in order to mitigate the cut off of Newfoundland’s southwest coast and to “accommodate in a reasonable way the disparity in the lengths of the Parties’ coasts (as determined by the Tribunal) in both the inner and outer areas.”⁴¹

In the delimitation process, the Tribunal rejected some parts of both Parties’ arguments and adopted others. Although the Tribunal rejected outright Nova Scotia’s concept of the basis of title, and rejected Nova Scotia’s argument that conduct beyond point 2017 had created a *de facto* boundary, it did incorporate into the delineated boundary the inshore portion of the line submitted by Nova Scotia between point 2015 and 2017. As for the arguments of Newfoundland and Labrador, the Tribunal did not perceive the geography in quite the same terms and rejected the Gulf of Maine–based theory behind the construction of the Newfoundland and Labrador submission.⁴² The Tribunal did, however, adopt two notions from Newfoundland and Labrador’s argument, first that as a function of the coastal geography and in order to avoid cut-off of the Newfoundland southwest coast, the boundary must turn to the south starting somewhere near the closing line of the inner area, and second that Sable Island should be given no effect in the delimitation.

Conclusions

In establishing the boundary, the Tribunal, as mandated in the Terms of Reference, applied the principles of international law governing maritime boundary delimitation as if the Parties were sovereign states. The Tribunal did so despite the reality that the Parties were in fact Canadian provinces. In so doing, the Tribunal rejected Nova Scotia’s argument that the provincial entitlements to offshore areas as defined in the *Accord Acts* could not be regarded as continental shelf for the limited purpose of delimitation, even by analogy, and adopted, wholesale, the provinces-as-states fiction created by the Terms of Reference.

The Award: (i) explicitly recognized and applied the step-by-step equidistance/special circumstances methodology used by the International Court of Justice and other boundary tribunals to delimit equitable international maritime boundaries elsewhere in the world; (ii) implicitly recognized and respected the ruling of the previous *ad hoc* Court of Arbitration that established the maritime boundary between Canada and the French islands of St. Pierre and Miquelon; (iii) confirmed the role of coasts as the basis of title to the continental shelf and the predominance of coastal geography in the hierarchy of relevant circumstances; (iv) rejected comparative wealth and resource distribution arguments; (v) reconfirmed the subjective nature and limited usefulness of nice proportionality models as *ex post facto* tests of equity; and (vi) gave no significance to oil practice that was not clear, substantial, and unequivocal.

Notes

1. *Award of the Tribunal in the Second Phase, Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-New-*

foundland Atlantic Accord Implementation Act, Ottawa (26 March 2002) (hereafter *Second Phase Award*). See www.boundary-dispute.ca visited 4 April 2002.

The members of the Tribunal were Gérard V. La Forest (Chair), Leonard H. Legault, and James R. Crawford.

2. See www.boundary-dispute.ca/terms.html (visited 1 April 2002) for the full text of the Terms of Reference to Establish an Arbitration Tribunal for the Settlement of a Dispute Concerning Portions of the Limits of the Respective Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act (hereafter Terms of Reference).

Canadian provinces enjoy no inherent rights to areas beyond their coastlines and internal waters. Therefore, the line to be delimited by the Tribunal would only divide, at the provincial level, the limited rights of joint management of and sharing of revenue derived from hydrocarbon resources, which rights had been negotiated with the Canadian federal government.

3. See, for example, *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, (2001), 40 *I.L.M.* 847.

4. Nova Scotia Memorial, Second Phase, at p. IV-61 (para. 131) and at Figure 42.

5. Nova Scotia Memorial, Second Phase, Figure 49 opposite p. IV-71 and Nova Scotia Counter-Memorial, Second Phase, at p. IV-13-14 (para. 28).

In order to achieve this perspective on the geographic position of Nova Scotia, the Nova Scotia cartographic team first panned out to a coverage that extended from the tip of Florida to northern Labrador and then projected this geography on a Lambert Conformal Conic with standard parallels at 15° and 25° South latitude. This “conformal” projection works well for South America, but has an extremely distorting effect on features in the northern hemisphere, an effect desired and achieved by Nova Scotia, and depicted at their Figure 49, titled “The General Concavity of the East Coast of North America.” In its Counter Memorial, Newfoundland and Labrador illustrated the distortions produced by Nova Scotia’s creative cartography and showed that Nova Scotia is in fact a prominent feature on the eastern seaboard of North America. Newfoundland and Labrador Counter Memorial, Second Phase, Figure 2 following p. 18.

6. Nova Scotia Counter Memorial, Second Phase, at p. IV-13-14 (para. 28).

7. The result of this arbitration could not be considered binding on any but the Parties and the Tribunal emphasized this by writing, “that its decision on the matter [the northern terminus point], as indeed the whole of its decision, is binding only on the Parties to this case and cannot prejudice the rights of any other parties that may be concerned.” See *Second Phase Award*, at p. 92 (para. 5.16).

Further on the issue of the northern terminus point and the boundary within the Gulf of St. Lawrence, it should be noted that Quebec was involved in interprovincial boundary discussions with the other eastern Canadian provinces. As a result, a notional Newfoundland–Nova Scotia–Quebec tripoint, point 2015, had been identified. Regardless of whether this tripoint, or any other sections of the provisional interprovincial boundaries, was binding on the provinces, the tripoint 2015 did appear to represent the farthest southeastern extent of Quebec’s interests in the Gulf of St. Lawrence. The Tribunal, however, was curious about how the presence of Quebec could affect their decision.

In an attempt to explore the universe of possible considerations regarding the treatment of third-province interests and in a quest for clarification of the role a Cabot Strait closing line should have in the delimitation, one member of the Tribunal drew an analogy between El Salvador, Honduras and Nicaragua in the Gulf of Fonseca and Nova Scotia, Quebec and Newfoundland and Labrador in the Gulf of St. Lawrence. He suggested that Quebec could, under this analogy, be given a proportionate section of the Cabot Strait closing line from which to make claims to areas outside the Gulf. Transcript of Oral Argument in the Second Phase of the Arbitration between Newfoundland and Labrador and Nova Scotia, (20 November 2001), at pp. 287–88, 300–01 (hereafter *Second Phase Transcript*). This hypothetical did not appear in the Award.

8. The French zone was formed in two steps. In 1972, Canada and France negotiated a territorial sea boundary between the opposite coasts of Newfoundland and the French islands of

St. Pierre and Miquelon. Agreement between the Government of Canada and the Government of the French Republic Concerning Their Mutual Fishing Relations Off the Atlantic Coast of Canada (27 March 1972), in 862 *U.N.T.S.* 209 (1973). In 1992, the remaining limits of the French zone were created by the decision of an *ad hoc* Court of Arbitration. The Court created an equidistant boundary to the northwest of the French islands, a 24 nautical mile zone to the west, a 12 nautical mile zone to the southeast, and a 10.5 nautical mile wide corridor to the south out to 200 nautical miles from the coast of the French islands. *Case Concerning the Delimitation of Maritime Areas between Canada and the French Republic (St. Pierre and Miquelon)*, (1992), 95 *I.L.R.* 645 (hereafter *St. Pierre and Miquelon*).

9. Second Phase Transcript, (19 November 2001), at pp. 32–33.

An important feature of the decision in *St. Pierre and Miquelon* was that it was “questionable whether the area hypothetically corresponding to Nova Scotia, would reach the maritime areas towards the south appertaining to Saint Pierre and Miquelon.” *St. Pierre and Miquelon*, (1992), 95 *I.L.R.* 645 at para. 73. Newfoundland and Labrador argued that this perspective (and the perspective that Newfoundland should enjoy an unobstructed projection to the south) should be upheld by the Tribunal.

10. Regarding the possibility of a French zone beyond 200 nautical miles, the Tribunal stated that it would “proceed on the basis that the maritime areas pertaining to France are those within the limits defined by the Court of Arbitration.” *Second Phase Award*, at p. 78 (para. 4.27).

11. The Tribunal first indicated its concern about the Canada–France delimitation at the conclusion of oral argument in Phase One when it posed a question related to the presence of the French zone. The Tribunal asked, “[i]n the event that the Tribunal were to hold that there is a binding agreement between the parties as to the line extending out into the Atlantic [135° line], what would be the effect on that agreement of the award of the Tribunal in the *St. Pierre and Miquelon* case?” Transcript of Oral Argument, First Phase, Arbitration between Newfoundland and Labrador and Nova Scotia, (16 March 2001), at pp. 713–714. The question was asked because the “line extending out into the Atlantic” would run into, cross through, jump over or in some way encounter the French corridor. In response, Newfoundland and Labrador submitted that if this were the case, the *St. Pierre and Miquelon* delimitation would have an impact on the hypothetical agreed line between Newfoundland and Labrador and Nova Scotia that would “require either a renegotiation of the line, or a determination of the impact on the line of the *St. Pierre and Miquelon* Award in light of the principles of international law governing maritime boundary delimitation.” Response of Newfoundland and Labrador to Questions Posed by the Tribunal, Arbitration between Newfoundland and Labrador and Nova Scotia Concerning the Delimitation of Their Offshore Areas, First Phase, (23 March 2001), at p. 2. Alternatively, Nova Scotia answered the question by suggesting that the French corridor would interrupt the Newfoundland and Labrador–Nova Scotia boundary “where it meets the western edge of the French line [sic] ... and resume its Southeast course at the point of intersection at the eastern edge of the French zone.” L. Yves Fortier to Heather M. Hobart, 23 March 2001. This would create a gap, an unproblematic one in Nova Scotia’s view, in the Newfoundland and Labrador–Nova Scotia boundary.

The Tribunal revisited the question of the French zone on the first day of Phase Two oral argument. Having decided that no binding agreement existed between the Parties, the Tribunal had to figure out how *St. Pierre and Miquelon* and the French zone fit into the delimitation task at hand. One member of the Tribunal asked “whether we [the Tribunal] are treating the [Canada–France] decision as on the same plane as the decision we are having to meet, or whether we are treating it in effect as something which occurs in a different plane.” Second Phase Transcript, (19 November 2001), at p. 35. Throughout the rest of Phase Two oral argument, members of the Tribunal continued to question the Parties on the issues of *St. Pierre and Miquelon* and the French zone. See for example Second Phase Transcript, (19 November 2001), at pp. 37, 38, 59, 160; *ibid.* (20 November 2001), at pp. 209–216, 281, 307–311, 319–320; *ibid.* (22 November 2001), at pp. 454–455; and *ibid.* (23 November 2001), at p. 665.

Newfoundland and Labrador argued that whether the Canada–France decision existed on the same or another plane, the result would be the same because the projection of the south coast

of Newfoundland formed a barrier to the delimitation that would not allow the Newfoundland and Labrador–Nova Scotia boundary to encounter the French corridor in any event. *Ibid.* (19 November 2001), at pp. 35–36. This argument, rather than one that put the corridor itself forward as a barrier, allowed Newfoundland and Labrador to use the coasts of Newfoundland to the north and east of the French zone in the construction and testing of their line. Nova Scotia took the view that the Canada–France delimitation, and the French corridor created thereby, took place on a different plane than this delimitation. *Ibid.* (28 November 2001), at p. 993. Nova Scotia argued that the French zone in no way impeded a delimitation such as the one suggested in its submission, but that the Newfoundland coasts behind the French islands could have no influence on the delimitation because they could not project through the land mass of St. Pierre and Miquelon. *Nova Scotia Counter Memorial, Second Phase*, at p. III-59-60 (para. 176–177).

The question of whether or not the French zone acted as a barrier to the delimitation is not dealt with explicitly in the *Award*. By constructing a line that does not encounter the French zone and by justifying the construction on grounds not directly related to the Canada–France delimitation, the Tribunal avoided the question of the zone as a barrier, although only narrowly. (The distance between the French zone and the *Award* line is only 3.5 nautical miles at its nearest.) Nor did the Tribunal deal explicitly with the question of whether coasts behind Saint Pierre and Miquelon can influence the delimitation. However, in creating its version of the relevant coasts, the Tribunal did include the Newfoundland coasts behind the French islands. *Second Phase Award*, at p. 75 (note 143). Additionally, the question of the use of coasts behind St. Pierre and Miquelon was implicitly answered by the Tribunal’s selection and use in the construction of its strict equidistant line of basepoints on Newfoundland and Labrador features behind the French islands, specifically Little Green Island and *Enfant Perdu*. *Second Phase Award, Technical Report*, at p. 101.

12. For a more detailed analysis of the arguments and the award in the First Phase, see V. Hughes, “The Nova Scotia–Newfoundland Dispute over the Limits of Their Respective Offshore Areas,” 38 *Canadian Yearbook of International Law* 189 (2000).

13. The method for drawing these interprovincial boundaries was first proposed by Nova Scotia in a 1961 document entitled “Notes re: Boundaries of Mineral Rights as between Maritime Provincial Boundaries” (hereafter “Notes re: Boundaries”). In this document the method is described as follows:

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

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

“Notes re: Boundaries” was later attached as Schedule A of the Joint Statement developed at the Atlantic Provinces Premiers’ Conference in Halifax, 30 September 1964. Two weeks later “Notes re: Boundaries” was annexed to the Atlantic Premiers’ Joint Submission to the federal government asserting provincial entitlement to offshore mineral rights. “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). A map was also attached at Schedule B of the Joint Statement that showed the general configuration of the interprovincial boundaries, including a short line on an azimuth of approximately 125° (not 135°) from what would later be designated point 2017. During 1969 the Joint Mineral Resources Committee (JMRC), Technical Committee on Delineation and Description of the Boundaries of the Participating Provinces in Submarine Areas refined the 1964 boundaries, identifying the coordinates of the turning points implied by “Notes re: Boundaries,” including points 2015, 2016, and 2017. The JMRC indicated no boundary south or east of point 2017.

14. *Award of the Tribunal in the First Phase, Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of their Offshore Areas as Defined in the Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada–Newfoundland Atlantic Accord Implementation Act*, Ottawa (17 May 2001) (para. 4.22) www.boundary-dispute.ca visited 1 April 2002 (hereafter *First Phase Award*).

15. *First Phase Award*, (final paragraph, unnumbered).
16. *First Phase Award*, (para. 7.1).
17. *First Phase Award*, (para. 7.10).
18. *First Phase Award*, (paras. 6.8 and 7.8).
19. Nova Scotia Counter-Memorial, Second Phase, at p. V-7 (para. 18).
20. *First Phase Award*, (para. 7.8).

21. The first Nova Scotia attempt to justify the extension of its line beyond point 2017 on geographical grounds consisted of an extension of the 1964 methodology to the outer area. In order to do this, Nova Scotia selected two prominent coastal points, one on Sable Island (Nova Scotia) and the other on Cape St. Mary's (Newfoundland and Labrador), found the midpoint between them and demonstrated that the 135° line runs within 200 meters of the midpoint. See Nova Scotia Memorial, Second Phase, at p. V-12-13 (para. 27-28) and at Figure 51. The choice of Sable Island was questionable because it does not comply with the oppositeness ("lying between the Provinces") requirement in paragraph 2 of the 1964 methodology. The choice of Cape St. Mary's, which was certainly not the nearest Newfoundland basepoint, was clearly contrived.

The only other attempt was made in the Nova Scotia Counter-Memorial and reemphasized during oral arguments. This time Nova Scotia showed that the 135° line coincided with what it called "an extension of the equidistance line drawn from the last two opposite points on the inner coasts (Scatarie Island, Nova Scotia and Colombier Island, Newfoundland)." See Nova Scotia Counter-Memorial, Second Phase, at p. IV-25, para. 56 and at Figure 79. The use of Colombier Island as opposed to Lamaline Shag Rock or another feature off the Burin Peninsula as the last opposite point was questionable and could only be supported by the argument that the coasts behind St. Pierre and Miquelon could not be used in this delimitation. Nova Scotia referred to this "extension of the equidistance line" technique as a "well-known method" and equated it to the technique used to create the final section (segment M-N) of the boundary in the *Anglo-French Award*. *Ibid.* However, the two cases are in no way similar. The Nova Scotia extension was apparently based on the theory that a line constructed in a zone of oppositeness could justifiably be extended into a zone of adjacency. In addition, the Nova Scotia extension gave no effect to the coast of Newfoundland between approximately Connaigre Head and Cape Race, a significant and potentially influential piece of the Newfoundland coast. In contrast, the final section of the boundary in the *Anglo-French Award* was constructed in a zone of adjacency between the final points of adjacent French and British territory (the island of Ushant and the Scilly Isles respectively). It was based on the concept that a boundary giving half effect to the Scilly Isles (small islands located farther offshore the British mainland than Ushant was located from the French mainland) would "be an appropriate and practical method of abating the disproportion and inequity which otherwise results from giving full effect to the Scilly Isles." *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, (1978) 15 *Command Papers Miscellaneous Series Cmnd. 7438*, at para. 251.

22. Nova Scotia Memorial, Second Phase, at p. IV-50-51 (para. 107-108) and Second Phase Award, at p. 59 (para. 3.18). *Case Concerning the Continental Shelf (Tunisia/Libya)*, [1982] *I.C.J. Reports* 554.

23. *Statutes of Canada, 1988*, c. 28.

24. *Statutes of Canada, 1987*, c. 3.

25. Nova Scotia Memorial, Second Phase, at p. IV-10 (para. 20).

26. Nova Scotia Memorial, Second Phase, Appendix B: Potential Offshore Entitlements of Nova Scotia and Newfoundland.

27. *Second Phase Award*, at p. 61 (para. 3.21) and at p. 62 (para. 3.23).

28. With some small exceptions, Newfoundland and Labrador saw the delimitation area as a mirror image of the Gulf of Maine, with a clear break between an inner area, or concavity, and outer area of open sea. The exceptions included the fact that the back of the concavity was formed not by coast but by a closing line across the Cabot Strait, the existence of St. Pierre and Miquelon in the concavity, and the fact that the Scatarie Island-Lamaline Shag Rock closing line was not precisely parallel with the coast at the back of the inner area. The Tribunal noted some

of these differences in the *Second Phase Award*. Nonetheless, Newfoundland and Labrador felt justified in borrowing the method used by the Chamber of the International Court in the Gulf of Maine delimitation to construct a line that responded to a generalized conception of the coasts of the Parties. See *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States of America)*, [1984] *I.C.J. Reports* 246.

29. As the International Court of Justice declared in the *Case Concerning the Continental Shelf (Libya /Malta)*, [1985] *I.C.J. Reports* 13 at pp. 40–41 (para. 49):

The capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect. . . . The juridical link between the State's territorial sovereignty and its rights to certain adjacent maritime expanses is established by means of its coast.

30. Unlike the Court of Arbitration in the *Canada-France Arbitration*, Newfoundland and Labrador used the coasts behind the islands of St. Pierre and Miquelon to measure coastal lengths and used perpendiculars to the general direction of the coast at Cape Canso and Cape Race to find the lateral limits of the relevant area.

31. All of the proportionality games played by both Parties amounted to very little in the end. Of the Parties' versions of relevant coasts and relevant areas, the Tribunal wrote, "[t]here is about both of these versions the unmistakable odour of the pre-cooked." See *Second Phase Award*, p. 74 (para. 4.20). About the Parties' proportionality tests the Tribunal wrote, "[t]he fact that each Party, despite the great difference in their approaches, was able more or less convincingly to satisfy the proportionality test down to almost the last decimal point only confirms that the test may be more contrived than constructive in some instances." See *Second Phase Award*, at p. 93 (para. 5.18). Newfoundland and Labrador's test resulted in a coastal ratio of 69.4(NL): 30.6(NS) and an area ratio of 69.6(NL): 30.4(NS). Newfoundland and Labrador Memorial, Second Phase, at p. 95–96 (para. 259–260). Nova Scotia's test resulted in a coastal ratio of 52(NS):48(NL) and an area ratio of 47(NS):53(NL). Nova Scotia Memorial, Second Phase, at p. V-22 (para. 52). In the final analysis, the Tribunal performed proportionality calculations using the Parties' relevant coasts and areas vis-à-vis the *Award* line to demonstrate that the boundary did not create a significantly disproportionate result in any event. *Second Phase Award*, at p. 94 (para. 5.19).

32. Newfoundland and Labrador pointed out that this was not a novel arrangement. The United States Coastal Energy Impact Program (CEIP) had been required to determine the maritime boundaries between coastal States of the United States for the limited purpose of revenue sharing. Newfoundland and Labrador wrote, "[w]here such boundaries had not been established by interstate compact or judicial decision, statutory authority resided in the administrator of the program to determine the boundaries in accordance with international law." Newfoundland and Labrador Counter-Memorial, Second Phase, at p. 54 (note 140). See also J. Charney, "The Delimitation of Lateral Seaward Boundaries between States in a Domestic Context" (1981) 75 *American Journal of International Law* 28.

33. *Second Phase Award*, at pp. 34–35 (para. 2.15).

34. 499 *U.N.T.S.* 311.

35. Reprinted in (1982), 21 *I.L.M.* 1261.

36. *Second Phase Award*, at p. 40 (para. 2.24)

37. *Second Phase Award*, at p. 43 (para. 2.28). This increasing unity of the law of international maritime boundary delimitation was the subject of a recent speech by no less an authority than Judge Gilbert Guillaume, President of the International Court of Justice. See *Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations*, (31 October 2001).

38. *Second Phase Award*, at p. 88-89 (para. 5.7–5.8), and at p. 92 (para. 5.16).

39. *Second Phase Award*, at p. 88 (para. 5.7).

40. *Second Phase Award*, at p. 90 (para. 5.13). Although the Tribunal did not mention the presence of the French corridor as a factor at this stage of the deliberation, it should be noted that the line giving half effect to Sable Island did cut through the corridor.

41. *Second Phase Award*, at p. 91 (para. 5.15).

42. The Tribunal cited three distinctions between the geography in the Gulf of Maine and the geography in the present delimitation area: (i) the inner area was not closed at the back by the Cabot Strait closing line and did not represent a concavity, but rather an open area in which the coasts are opposite; (ii) the presence of third-state territory, namely St. Pierre and Miquelon; and (iii) the general direction of the coast and the Cormorandiere Rocks–Lamaline Shag Rocks closing line are not parallel to each other. *Second Phase Award*, at pp. 66–68 (para. 4.5).