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Maritime Boundary Delimitation in a Federal Domestic Setting: The *Newfoundland and Labrador* v. *Nova Scotia* Arbitration

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Abstract
The author reviews an award rendered in March 2002 by a three-member arbitral tribunal established by the government of Canada in order to determine a maritime boundary between two Canadian provinces – Nova Scotia, and Newfoundland and Labrador. The tribunal's Terms of Reference required it to treat the provinces as sovereign states and to apply principles of international maritime boundary law in order to determine the boundary dividing their respective offshore entitlements as defined under domestic federal legislation. Given this reference to international law and the underlying interests at issue, the tribunal's award amounts to a classic continental shelf delimitation and makes significant contributions to the jurisprudence on international maritime boundary delimitation.

Key words
arbitration; continental shelf; delimitation; maritime boundary

1. Introduction

In March 2002 an arbitral tribunal established by the government of Canada determined a maritime boundary between two Canadian provinces – Nova Scotia, and Newfoundland and Labrador.[1] In accordance with its Terms of Reference, the distinguished three-member tribunal[2] applied 'principles of international law governing maritime boundary delimitation' to reach its conclusions.[3] Beyond ending a decades-old dispute between two provinces in a federal domestic setting, therefore, the award is in essence a classic continental shelf delimitation applying international law as though the two provinces were sovereign states. It accordingly advances the jurisprudence on international maritime boundary delimitation and, as will be seen below, makes some notable observations with respect to trends in that jurisprudence.

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1. *Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas: Award of the Tribunal in the Second Phase*, March 26, 2002, accessible online at http://www.boundary-dispute.ca (hereinafter 'Award II'). The tribunal had already ruled that the maritime boundary had not been established by agreement: *Award of the Tribunal in the First Phase*, 17 May, 2001, accessible online at http://www.boundary-dispute.ca/phase_1.html (hereinafter 'Award I').
2. The Honourable Gérard V. La Forest (Chairperson), Leonard H. Legault, and James R. Crawford.
3. Award I, *supra* note 1, Appendix A.

The direct application of international law to resolve a dispute between domestic actors as though they were sovereign states is relatively rare.[4] The award is therefore instructive of the potential for application of international maritime boundary law to resolve disputes between members of a federation in a domestic setting. In particular, the tribunal found that the conceptual and legal challenges posed by the fictional treatment of federal units as sovereign states were not at all insurmountable. This was so notwithstanding the absence of any sovereign continental shelf rights for provinces within Canadian constitutional law.

This article begins with an overview of the history of the dispute and of the process that led to the establishment of the tribunal. Next follows a description of the positions of the parties on the principal legal issues dividing them. The decision and reasoning of the tribunal are then analysed. Finally, some reflections on the significance of the tribunal's findings are offered.

2. Background

2.1. Historical overview

The emergence of the institution of the continental shelf in post-war international law led, before long, to domestic tensions between Canada's federal and provincial east coast governments with respect to their respective jurisdiction over Canada's continental shelf. Canada and the provinces were equally adamant that they enjoyed exclusive jurisdiction over that shelf, although Canada was prepared to negotiate some form of co-operative resource exploitation regime with the provinces.

To strengthen their hand in this contest, Nova Scotia proposed, in 1961, that the east coast provinces agree among themselves on interprovincial maritime boundaries. Nova Scotia proposed equidistant boundaries in the 'inner' areas, with full effect given to offshore islands, and a 'south-easterly' boundary between itself and Newfoundland and Labrador in the 'outer' area, which it illustrated, without explanation, as a line proceeding on a bearing of approximately 125 degrees for a distance of 85 nautical miles out into the Atlantic.[5]

In 1964, the east coast provinces endorsed the Nova Scotia proposal as a basis for their claim to full provincial ownership over the relevant offshore areas. Canada promptly rejected the provincial claim and hence the pertinence of the proposed interprovincial boundaries.[6] Undeterred, the provinces commissioned a technical description of the proposed boundaries. When complete in 1969, that description showed a boundary between Nova Scotia and Newfoundland and Labrador joining three turning points, respectively designated, from west to east, turning points 2015, 2016 and 2017.[7] However, the 1969 technical description omitted any reference to a 'south-easterly' line beyond turning point 2017. In 1972, based on the 1969 technical description, the east coast provinces again claimed full provincial ownership of the

4. For an overview of similar experiments in the United States, see J. I. Charney, 'The Delimitation of Lateral Seaward Boundaries between States in a Domestic Context', (1981) 75 AJIL 28.
5. Award II, *supra* note 1, at para. 1.4.
6. *Ibid.*, at para. 1.6.
7. *Ibid.*, Figure 8, reproduced here as Fig. 2.

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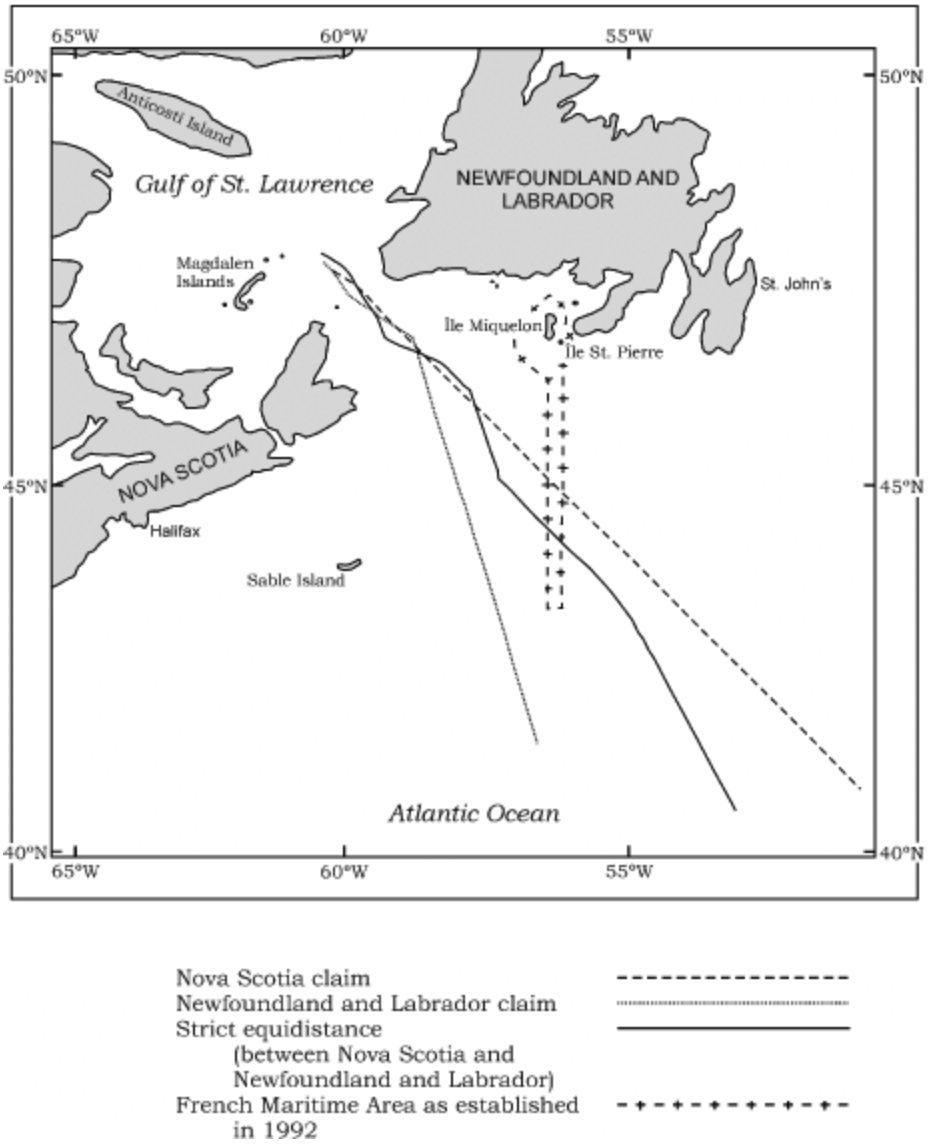

Fig. 1. The claims of the parties.

offshore areas. Canada's rejection of this renewed claim was, if anything, swifter and even more categorical than in 1964.[8]

Following this definitive rupture in negotiations, federal attention shifted increasingly to international maritime boundary disputes with the United States[9] and

8. *Ibid.*, at para. 1.9.
9. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, [1984] ICJ Rep. 246.

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France,[10] while the provincial common front dissolved as each province jockeyed for attention and advantage in the unresolved dispute over offshore ownership. Both Nova Scotia and Newfoundland and Labrador issued hydrocarbon exploration permits, some overlapping and most conflicting with coextensive federal permits.[11] Newfoundland and Labrador also signalled in various ways that it considered the proposed interprovincial boundaries to be defunct due to federal rejection of the 1964 and 1972 claims, a position that went undisputed by Nova Scotia for several years.[12] Eventually, Newfoundland and Labrador tested and lost its own claim to offshore ownership in a 1984 decision of the Supreme Court of Canada.[13]

Following this loss, Canada and Newfoundland and Labrador negotiated a joint management and revenue-sharing accord (the 'Atlantic Accord') with respect to Newfoundland and Labrador's 'offshore area'. While the Atlantic Accord failed to define that area, an arbitration clause addressed the potential for boundary disputes with neighbouring jurisdictions.[14] Shortly thereafter, Canada and Nova Scotia negotiated a similar bilateral arrangement (the Nova Scotia Accord), with the significant difference that Nova Scotia's offshore area *was* defined, in terms similar to the 1964 boundary proposal.[15]

The result, therefore, was an asymmetry in the Atlantic and Nova Scotia Accords' definitions of the provinces' respective offshore areas. As it proved impossible, despite protracted negotiations, to settle the ensuing dispute, the Canadian government invoked the Accords' arbitration clauses and constituted the tribunal on 31 May 2000.

2.2. The mandate of the tribunal

In negotiations leading to the establishment of the tribunal, Nova Scotia took the position that the boundary between the parties had already been resolved by agreement. The Terms of Reference establishing the tribunal therefore directed a two-phase arbitration. In Phase I, the tribunal was to determine whether the parties had indeed resolved their boundary by agreement. If they had not, in Phase II the tribunal was to determine a boundary.

Having found in Phase I that the line dividing the parties' respective offshore areas had not been resolved by agreement, the tribunal proceeded to its Phase II mandate, which was defined in the Terms of Reference as follows:

> 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

10. *Case Concerning Delimitation of Maritime Areas between Canada and the French Republic (St Pierre and Miquelon)*, (1992) 95 ILR 645.
11. Award II, *supra* note 1, at paras. 3.11, 3.13–3.14.
12. Award I, *supra* note 1, at para. 5.24; Award II, *supra* note 1, at paras. 1.10, 1.13, 1.19.
13. *Reference re: Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 SCR 86.
14. *Canada–Newfoundland Atlantic Accord Implementation Act*, SC 1987, c.3, ss.2, 6.
15. *Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c. 28, s.2. The Nova Scotia Accord contained the same dispute resolution mechanism as the Atlantic Accord: *Ibid.*, s.48. Note also that the ambiguous 1964 reference to a 'south-easterly' line was replaced in the Nova Scotia Accord with an explicit reference to a line 'on an azimuth of 135 [degrees] to the outer edge of the continental margin', consistent with the interpretation espoused by Nova Scotia from 1964 onwards: Award II, *supra* note 1, at para. 1.17.

> 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.[16]

This unusual invocation of international law to settle a domestic dispute between federal units, and their fictional treatment as sovereign states, flowed from simple necessity. All parties agreed that there was no extant body of domestic Canadian law that could be applied to determine maritime boundaries between provinces. It was accordingly deemed expedient to apply, through a legal fiction, international legal principles of maritime boundary delimitation.

3. The positions of the parties

From this common starting point, the parties took radically different approaches.[17] For Newfoundland and Labrador, the delimitation was essentially about geography. For Nova Scotia, the boundary was essentially determined by the conduct of the parties since 1964.

3.1. Newfoundland and Labrador

Newfoundland and Labrador took the position that the Terms of Reference required the tribunal to conduct a classic continental-shelf delimitation applying customary international law, even though Canada was, at all relevant times, a party to the 1958 Geneva Convention on the Continental Shelf.[18] It argued that the use of 'principles of international law' in the Terms of Reference referred to general international law rather than specific treaty obligations. In any case, it said, the process and result of delimitation under either Article 6 of the 1958 Convention or customary international law would be the same.

For Newfoundland and Labrador, therefore, customary international law's 'fundamental norm' was to be applied to achieve an equitable result.[19] Given that the provinces were to be treated as states, and that the basis of states' title over their continental shelf is coastal sovereignty,[20] coastal geography was the primary factor to be considered in achieving that result. An equitable result would therefore accord to each party the natural seaward projections of its relevant coasts without undue 'cut-off' by those of the other; grant maritime areas in proportion to the relative length of each party's relevant coasts; and avoid distorting effects of incidental features, such as isolated islands.

In terms of method, Newfoundland and Labrador relied on the analysis of the coastal geography undertaken in *St Pierre and Miquelon* due to the similar area to

16. Award I, *supra* note 1, Appendix A, at para. 3.1.
17. The contrasting positions of the parties are illustrated in Award II, Fig. 1, reproduced here as Fig. 1.
18. Geneva Convention on the Continental Shelf, 29 April 1958, 499 UNTS 312 (in force 10 June 1964) (hereinafter 1958 Convention). Note that Canada, only became a party to the United Nations Convention on the Law of the Sea, 10 Dec. 1982, 450 UNTS 11 (in force 16 Nov. 1994) (hereinafter UNCLOS 1982) on 6 November 2003.
19. '[D]elimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result': *Gulf of Maine*, *supra* note 9, at para. 112; see also *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, [1982] ICJ Rep. 18, at para. 70.
20. *Tunisia v. Libya*, *supra* note 19, at para. 61.

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be delimited. That analysis suggested two main sectors to be delimited: (i) an 'inner concavity' bounded to the north-west by a closing line across Cabot Strait (from Money Point off the northernmost point of Cape Breton Island to Cape Ray at the south-west tip of Newfoundland) and to the south-east by a closing line between Scatarie Island (just off the easternmost point of Cape Breton Island) and Lamaline Shag Rock (just east of St Pierre and Miquelon); and (ii) an 'outer area' beyond the Scatarie Island–Lamaline Shag Rock closing line, cradled by the south-east coast of Nova Scotia down to Cape Canso and the south coast of Newfoundland to Cape Race. In addition, a small area to the north-west of the Cabot Strait closing line, in the Gulf of St Lawrence, also had to be delimited.

This view of the relevant geography in turn inspired an adaptation of the method used by the Chamber in *Gulf of Maine*. In the 'inner concavity', this entailed the use of bisectors to the general directions of the parties' coasts. The general direction of the Nova Scotia coast was taken to be a straight line joining Money Point and Scatarie Island. On the Newfoundland side the general direction of the coast was defined by two lines, one essentially running west–east from Cape Ray to Connaigre Head and another essentially north–south from Connaigre Head to Lamaline Shag Rock. The bisector of the Money Point–Scatarie Island and Connaigre Head–Lamaline Shag Rock general directions was then moved 34.6 nautical miles towards Nova Scotia, along the Scatarie Island–Lamaline Shag Rock closing line, to account, proportionately, for the longer Newfoundland and Labrador coasts. In the 'outer area', the *Gulf of Maine* approach suggested the use of a simple perpendicular to the Scatarie Island–Lamaline Shag Rock closing line, to the limit of Canada's continental margin. The delimitation would then be completed, in the Gulf of St Lawrence area, by using a perpendicular to the Cabot Strait closing line.

The line thus achieved was said to be equitable because the ratio of the maritime areas thereby apportioned to the parties (defined by frontal projection of the relevant coasts to a distance of 200 nautical miles) was virtually identical to the ratio of their relevant coastal lengths.[21] The method and result were also argued to be equitable because they avoided the distorting effects of such incidental Nova Scotia features as St Paul Island (in Cabot Strait) and Sable Island (in the outer area) and, further, avoided any undue cut-off of either the southward projection of Newfoundland's coast or the south-east projection of Nova Scotia's coast. With respect to other equitable factors, such as the conduct of the parties, Newfoundland and Labrador argued that this was of no assistance in determining the equity of the result given the tribunal's Phase I finding and given that the conduct of the parties did not disclose a shared view of the equitableness of any particular boundary. Finally, access to resources was also said to be of no assistance in testing the equity of the result because there was as yet no reliable evidence of the location or existence of any potential resources in the relevant area.

21. Nova Scotia: 30.6% of the relevant coasts, 30.4% of the relevant area. Newfoundland and Labrador: 69.4% of the relevant coasts, 69.6% of the relevant area.

3.2. Nova Scotia

Nova Scotia agreed that customary international law governed the dispute because neither the areas nor the resource entitlements granted to the provinces under the Accords were coterminous with those of the continental shelf, and as a result Article 6 of the 1958 Convention could not apply.[22] Nova Scotia nevertheless also agreed that the same result would flow even if Article 6 of the 1958 Convention were applied.

From that similar point of departure, however, the Nova Scotia approach differed radically. For Nova Scotia, the basis of title in the unique circumstances of this case, involving as it did two provinces in a domestic setting, could not be the parties' inherent sovereignty over their coasts. Rather, the basis of any provincial 'title' was the Accords, that is, negotiated agreements between each of the provinces and Canada. And the Accords did not purport to attribute title or sovereign rights to offshore areas per se. This distinct basis of title was therefore a special circumstance requiring a *sui generis* approach to the application of customary maritime boundary law. Effectively this meant that the importance of geography, in particular the seaward projection of the parties' coasts, was significantly attenuated. In its place, given that the basis of title was a negotiated entitlement, the parties' conduct was the dominant, if not decisive, relevant circumstance.

Nova Scotia therefore argued that, even if it did not amount to a legally binding agreement, the conduct of the parties had consistently affirmed the boundary first proposed by Nova Scotia in 1961. It also confirmed, in Nova Scotia's view, an interpretation of the 'south-easterly' line from turning point 2017 as a line running on a constant bearing of 135 degrees to the outer edge of the continental margin. For Nova Scotia, Newfoundland and Labrador had endorsed such a boundary in 1964 and 1972; had apparently respected it in its hydrocarbon permitting practice; had failed to protest Nova Scotia's permitting practice similarly respecting the boundary; and had failed to protest the inclusion of the boundary in the Nova Scotia Accord.

To confirm the equity of that boundary, Nova Scotia undertook a maritime area–coastal length proportionality analysis of its own. First, it defined its relevant coasts considerably more expansively than had Newfoundland and Labrador: from Chebogue Point (near Yarmouth) in the Gulf of Maine all the way anticlockwise to Enragée Point (near Chéticamp) in the Gulf of St Lawrence. Next, drawing inspiration from the 'area of overlapping entitlements' concept applied in *Jan Mayen*,[23] it defined relevant areas in terms of radial, rather than frontal, projections of the relevant coasts, to the outer edge of the continental margin as defined in UNCLOS 1982. It argued that the resulting ratios of relevant coastal lengths and areas apportioned to the parties were proportional.[24] Finally, Nova Scotia claimed that the result was equitable because it shared access to potentially significant hydrocarbon

22. The maritime areas covered by the Accords began at the low-water mark rather than at the outer edge of the territorial sea, and extended to the outer edge of the continental margin as defined by UNCLOS 1982, *supra* note 18, at Art. 76: see *Oceans Act*, SC 1996, c.31, s.17.
23. *Jan Mayen*, [1994] ICJ Rep. 38.
24. Nova Scotia: 52% of the relevant coasts, 47% of the relevant area. Newfoundland and Labrador: 48% of the relevant coasts, 53% of the relevant area.

resources in the Laurentian Sub-Basin,[25] and approximated a strict equidistance line.

4. The decision of the tribunal

4.1. The applicable law

The tribunal rejected Nova Scotia's contention that the parties' basis of title was essentially different from that of sovereign states, or that the negotiated source of their rights affected the delimitation process. It considered that any differences between the rights of the parties under the Accords and of states under international law were overcome by the Terms of Reference. The injunction to approach the problem 'as if the parties were states' was specifically intended, in the tribunal's view, to overcome the reality that the provinces enjoyed no sovereign rights to the continental shelf adjacent to their coasts. The further instruction to treat the parties as states 'subject to the same rights and obligations as the Government of Canada at all relevant times' also required the tribunal to attribute to the parties the same basis of title as enjoyed by Canada in international law. The tribunal therefore saw 'no difficulty or obstacle of any kind'[26] in doing so. In any case, noted the tribunal, the purpose of the negotiated entitlements under the Accords – exploitation of hydrocarbon resources – was also a key purpose of the continental shelf, and the parties themselves had always approached their negotiations over the area as though they were dealing with continental-shelf entitlements.[27]

This in turn led the tribunal to refute Nova Scotia's position that the 1958 Convention did not apply due to the *sui generis* nature of parties' entitlements under the Accords. It also dismissed Nova Scotia's argument that the 1958 Convention could not apply due to an incompatible definition of the areas to be delimited under the Accords. It reasoned, first, that no part of the delimitation required that a line be traced through the territorial sea adjacent to either province; and, second, that the definitions of the seaward extent of the continental shelf in the 1958 Convention and UNCLOS 1982 are 'essentially compatible'.[28] Finally, the tribunal rejected Newfoundland and Labrador's argument that use of the term 'principles' in the Terms of Reference ousted treaty-based rules of delimitation. In the tribunal's view, this interpretation was contradicted by the words 'rights and obligations [of] the Government of Canada', which clearly included its rights and obligations as a party to the 1958 Convention.[29]

However, the tribunal downplayed the significance of its conclusion that the applicable law was Article 6 of the 1958 Convention, observing that both state practice and the jurisprudence on continental-shelf delimitation bear witness to a virtual convergence of delimitation methods, whether under the 1958 Convention,

25. Award II, *supra* note 1, at 63, Fig. 4.
26. *Ibid.*, at para. 2.15.
27. *Ibid.*, at paras. 2.14–2.18.
28. *Ibid.*, at para. 2.22, citing the practice of parties to the 1958 Convention (including Canada) which had claimed continental shelves beyond 200 nautical miles before 1982.
29. *Ibid.*, at paras. 2.19–2.25.

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UNCLOS 1982, or customary international law. The tribunal noted that, under Article 6 of the 1958 Convention, 'special circumstances' have readily been identified in terms similar to the 'relevant circumstances' of Article 83 of UNCLOS 1982, usually with a view to achieving an equitable result.[30] The tribunal also noted that decisions since *Libya* v. *Malta*[31] have tended, whether applying Article 83 or customary international law, to begin with an equidistance line subject to adjustment in light of relevant circumstances.[32] The result, according to the tribunal, was 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.[33]

Thus the process of delimitation was to be, at least in its initial stages, dominated by considerations of coastal geography.

4.2. The process of delimitation

Having established that the starting point for the delimitation should be an equidistance line, the tribunal considered criteria that would justify departures from that line.

4.2.1. The conduct of the parties

Having rejected Nova Scotia's argument on the distinct basis of title in this case and, hence, of the primacy of conduct in determining the boundary, the tribunal nevertheless noted that evidence of the parties' conduct has always been admissible in maritime boundary disputes.[34] However, the tribunal held that for conduct (short of agreement) to give rise to a boundary, it would have to be 'unequivocal . . . as between the two parties concerned, relating to the area and supporting the boundary . . . which is in dispute'.[35] Further, it noted that in cases where conduct has been determinative, such as *Tunisia* v. *Libya*,[36] the relevant conduct was real (e.g. actual exploration and exploitation as opposed to the mere issuance of 'paper' permits), mutually concordant, and uncontested over a significant period of time.

30. *Ibid.*, at paras. 2.26–2.27.
31. *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, [1985] ICJ Rep. 13, at para. 33.
32. In support of this proposition, the tribunal cited (in addition to *Libya v. Malta, ibid.*), *Jan Mayen, supra* note 23, at paras. 46, 56; *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, (2001) 40 ILM 847, at paras. 230–231; and *Eritrea–Yemen Arbitration (Second Stage: Maritime Delimitation)*, (2001) 40 ILM 983, at para. 83. See Award II, *supra* note 1, at paras. 2.27–2.28.
33. Award II, *supra* note 1, at para. 2.28. At another point, the tribunal referred to the 'basic unity' of maritime delimitation law regardless of the source of law applied: *Ibid.*, at para. 5.2.
34. *North Sea Continental Shelf Cases*, [1969] ICJ Rep. 3, at paras. 27–33; *Tunisia v. Libya, supra* note 19, at paras. 87–96; *Libya v. Malta, supra* note 31, at paras. 24–25, *Gulf of Maine, supra* note 9, at paras. 126–54; *Guinea–Guinea-Bissau Maritime Delimitation*, (1985) 77 ILR 636, at paras. 61–66, 105; *St Pierre and Miquelon, supra* note 10, at paras. 89–92; *Jan Mayen, supra* note 23, at paras. 33–39, 82–86; and *Eritrea v. Yemen, supra* note 32, at paras. 76–82.
35. Award II, *supra* note 1, at para. 3.5, relying on *Jan Mayen, supra* note 23, at paras. 32, 34–37, 86; *Tunisia v. Libya, supra* note 19, at paras. 90, 92; *Libya v. Malta, supra* note 31, at para. 25; and *Gulf of Maine, supra* note 9, at paras. 146, 151.
36. *Supra* note 19.

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Applying these standards to the facts of this case, the tribunal held that Newfoundland and Labrador had not engaged in sufficiently clear, sustained, and consistent conduct to justify the conclusion that it had adopted the Nova Scotia line for purposes beyond the 1964 and 1972 provincial claims. Nevertheless, between turning points 2015 and 2017, the tribunal observed that Newfoundland and Labrador had never protested the method by which the line had been established. However, the tribunal held that Nova Scotia was on notice from 1972 that Newfoundland and Labrador disputed a 135-degree line from turning point 2017. Further, the hydrocarbon-permitting practice of the parties was neither concordant, real ('little more than a paper trail'),[37] nor sufficiently sustained to have established such a boundary by practice. Accordingly the tribunal could not conclude that the parties regarded a 135-degree line from turning point 2017 to be equitable.[38]

4.2.2. Access to resources

The tribunal took the view that access to resources could only be a relevant factor in two circumstances. The first, clearly inapplicable in this case, was where the delimitation would have catastrophic economic effects for one or more of the parties.[39] The second was where the existence and location of the resources was known or readily ascertainable.[40] As the tribunal preferred not to apply this criterion restrictively where officials of both parties had acknowledged the potential resources of the Laurentian Sub-Basin, it essentially assumed the existence of such resources. However, the tribunal noted that its proposed delimitation in fact provided access to the Sub-Basin to both parties. In the absence of specific information as to the location of resources within the Sub-Basin, the tribunal could not justify any adjustment to the line on this basis.[41]

4.2.3. Geographical considerations

The tribunal therefore considered geographical considerations to be paramount in effecting the delimitation. It also accepted Newfoundland and Labrador's submission that there were three distinct geographic areas to be delimited: (i) an 'inner area' essentially corresponding to the area identified by Newfoundland and Labrador as the 'inner concavity'; (ii) an 'outer area' beyond the Scatarie Island–Lamaline Shag Rock closing line; and (iii) an area in the Gulf of St Lawrence, landward of the Cabot Strait closing line. However, the tribunal rejected Newfoundland and Labrador's treatment of the inner area as an 'inner concavity' because the Cabot Strait closing line could not readily be assimilated to the coast of either province, as it had been to the coast of Canada in *St Pierre and Miquelon*. The true distinction between the inner and outer areas, in the tribunal's view, was that in the former, the parties' coasts were essentially opposite, whereas in the latter they were 'rather comparable

37. Award II, *supra* note 1, at para. 3.14.
38. *Ibid.*, at paras. 3.10–3.18.
39. *Gulf of Maine*, *supra* note 9, at para. 237.
40. *North Sea Continental Shelf Cases*, *supra* note 34; *Jan Mayen*, *supra* note 23, at para. 76.
41. Award II, *supra* note 1, at paras. 3.21–3.23.

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to adjacent coasts'.[42] This finding, and the lack of alignment between the Scatarie Island–Lamaline Shag Rock closing line and the general direction of the parties' coasts in the outer area, also prompted the tribunal to reject the utility of the *Gulf of Maine* methodology.

The tribunal also rejected each party's characterization of the relevant coasts and area. Relevant coasts were simply those that contributed to the area of potential convergence and overlap. This meant extension of Newfoundland and Labrador's overly restrictive view of Nova Scotia's relevant coasts to include the coast from Cape Canso down to Egg Island, just east of Halifax. Conversely, Nova Scotia's characterization of the relevant coasts and area was found to be so extremely expansive as to provide no assistance at all in the delimitation process, and *Jan Mayen*'s 'area of potential overlapping entitlements' was rejected given the different geographical circumstances of that case. Indeed, the tribunal rejected the need to identify the relevant area at all, given that (i) it did not propose to conduct a coastal length/maritime area proportionality test; (ii) there was no potential for interference with other (third party) delimitations; and (iii) the provisional equidistance line adequately defined the area in which the delimitation was to take place.[43]

Finally, with respect to offshore islands, the tribunal found no need to adjust its method to account for the French islands of St Pierre and Miquelon or the maritime entitlements they generate. With respect to Nova Scotia's St Paul Island, lying 13 nautical miles north-east of Money Point, the tribunal indicated that it would have been inclined to give half effect to such an uninhabited island. However, the tribunal noted that Newfoundland and Labrador had, in connection with the 1964 and 1972 proposals, expressly accepted the use of St Paul Island as a basepoint. Such conduct justified according full weight to the island, following the example of the *Anglo-French Channel Islands* arbitration.[44] By contrast, the tribunal noted that there was no such conduct or acquiescence by Newfoundland and Labrador with respect to the uninhabited Sable Island, lying approximately 88 nautical miles from the Nova Scotia mainland. Thus, the tribunal felt that the major equidistance effects that would be generated by such an isolated island had to be treated as a special or relevant circumstance in the delimitation process.

4.2.4. The delimitation

In the inner area, the tribunal held that it would be both convenient and equitable to simplify the strict equidistance line by adopting and connecting turning points 2016 and 2017. Turning point 2017 was then connected to the equidistance line where it intersected the Scatarie Island–Lamaline Shag Rock closing line. The tribunal noted that the resulting line did not differ significantly from either the strict equidistance

42. *Ibid.*, at para. 4.6, quoting *Qatar v. Bahrain*, *supra* note 32, at para. 170.
43. *Ibid.*, at paras. 4.23–4.24.
44. *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, (1977) 18 RIAA 3, at paras. 140–141.

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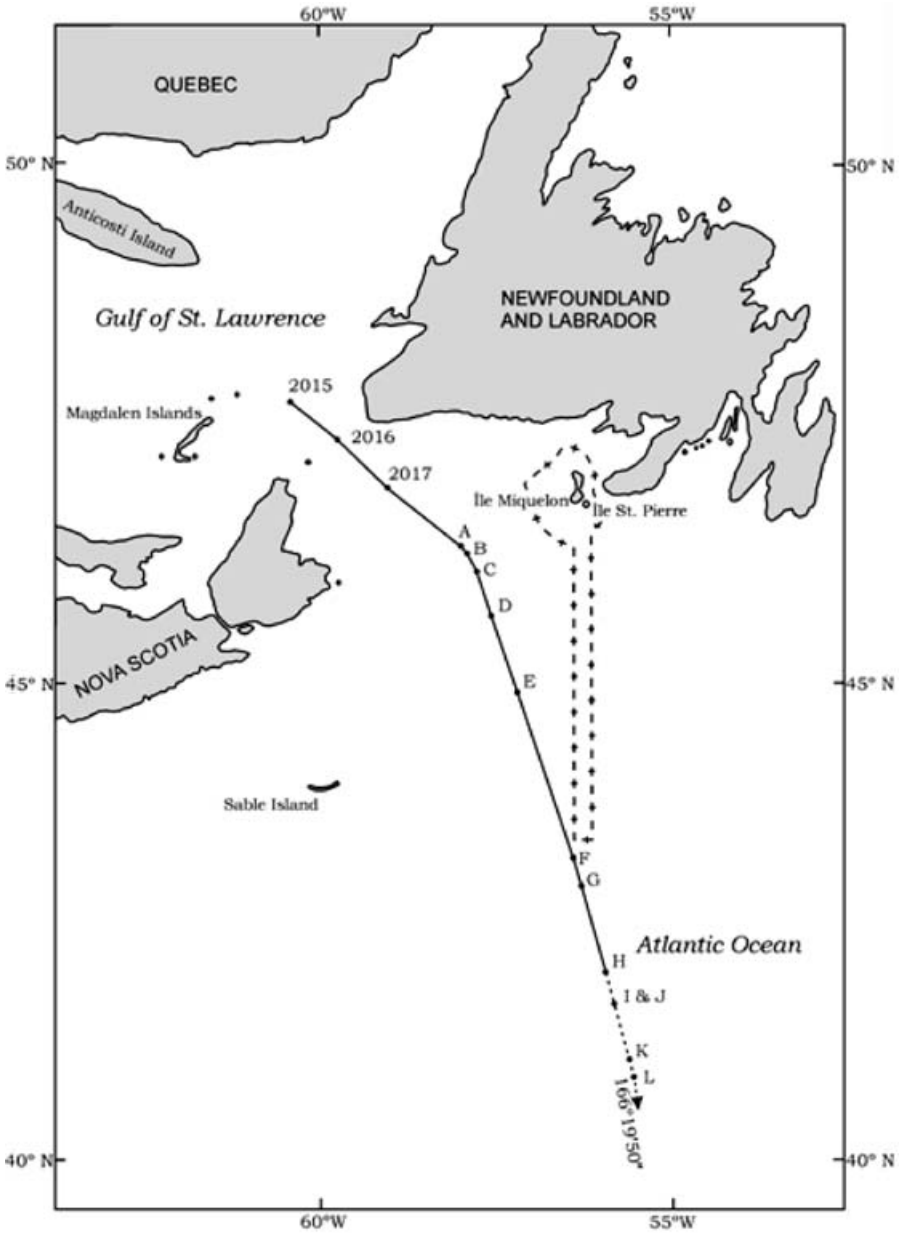

Fig. 2. The tribunal's delimitation.

line or the line endorsed by the parties themselves in 1964 and 1972 in the inner area.[45]

In the outer area, the tribunal recalled that no conduct of the parties justified departure from the provisional equidistance line. Thus the equity of that line was to

45. Award II, *supra* note 1, at para. 5.7.

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be tested strictly in the light of geographical considerations. With respect to Sable Island, the tribunal began by giving it half effect, noting its potential distorting effect. However, the tribunal found that even such an adjusted equidistance line generated considerable 'cut-off' of the southward projection of the Newfoundland coast. Combining this with Newfoundland and Labrador's considerably longer relevant coasts, the tribunal concluded that it would be equitable to give 'no effect whatever' to Sable Island.[46]

Turning finally to the area within the Gulf of St Lawrence, the tribunal observed that a strict equidistance line would differ only slightly from a line joining turning points 2015 and 2016. Again in the light of the conduct of the parties, the tribunal deemed it expedient to adopt such a line.[47]

In terms of confirming the equity of the resulting overall delimitation,[48] the tribunal held that a coastal length–maritime area proportionality test is not appropriate where the delimitation method has already taken account of the parties' respective coastal lengths.[49] The tribunal stressed that proportionality is not itself a principle of delimitation or a basis of title. In any event, the tribunal found that such a test was too readily manipulated to be helpful in assessing the equity of the result. It accordingly declined to test its result in this fashion.[50]

5. Discussion

5.1. Lessons on bridging the domestic/international law divide

It can thus be seen that the delimitation in this case readily joins, and arguably advances, the case law developed by the International Court of Justice and international arbitral tribunals in inter-state maritime boundary disputes. That it does so despite the sub-national status of the parties is primarily attributable to a successfully crafted dispute resolution clause invoking international law in a domestic context. In a reversal of the more common situation, the case is instructive as to the potential for calling upon international law to address a lacuna in domestic law – in this case, the absence of any domestic law governing the delimitation of interprovincial maritime boundaries.

Of course, the domestic application of rules designed to govern inter-state relations may give rise to conceptual and logical difficulties. Such difficulties are illustrated in Nova Scotia's argument that the parties' domestic law entitlements were essentially different from a state's sovereign rights at international law. At a fundamental level, of course, Nova Scotia was right. Indeed, in the first phase of the proceedings, when the issue was whether the parties had agreed on a boundary, Newfoundland and Labrador had raised essentially the same concern. How could the parties' behaviour be retroactively judged by the rather permissive formal requirements of international treaty law, when they had no reason to believe that

46. *Ibid.*, at para. 5.15.
47. *Ibid.*, at para. 5.16.
48. *Ibid.*, Fig. 8, reproduced here as Fig. 2.
49. *Gulf of Maine, supra* note 9; *Libya v. Malta, supra* note 31; and *Jan Mayen, supra* note 23.
50. Award II, *supra* note 1, at para. 5.17.

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their conduct could have legal effects except in accordance with domestic Canadian law? Or, transposing the problem to the delimitation phase of the proceedings, how could one apply maritime boundary law while ignoring perhaps the most relevant circumstance of all – that the parties to the dispute were not states?

The answer to both questions lies in the unambiguous direction to the tribunal, in the Terms of Reference, that it do so notwithstanding any logical difficulties. As rightly observed by the tribunal, the purpose of invoking international law was to resolve a difficulty – the absence of domestic delimitation law – not to create one.[51] Conceding that the exercise was artificial, or could only be carried out by giving full effect to the non-sovereign status of the parties, would have entirely defeated that purpose. Taken to its logical conclusion, the fact that the parties were not states would have precluded, as a matter of principle, the application of international law to them at all. At its most basic this would simply have returned the parties to their original situation and resulted in a *non liquet*.

This result was simply and cleanly avoided in the Terms of Reference by clearly imposing on the tribunal the fiction that the parties were states. To bolster the practical effects of that fiction, the parties were to be considered vested with the same international legal rights and obligations as Canada. The result was a straightforward jurisdictional device permitting the tribunal to avoid justifying an *in limine* decision to treat the provinces as states. That decision had, in effect, already been made for the tribunal by the domestic legislator. Thus, federal or other states wishing to apply international principles of maritime boundary delimitation in a domestic context will want to take note of the critical importance of a strongly worded stipulation that the relevant parties are to be treated, for purposes of the exercise, as states with full rights and obligations at international law.

Less useful, however, was the clause permitting 'such modifications as the circumstances require'. In the end the tribunal found (and indeed the parties conceded) that, once the parties were treated as states, no further modifications were required.[52] This, of course, merely underlines the crucial and all-encompassing importance of deeming the parties to be states.

Finally, the reasoning of the tribunal on the applicable law shows the need for clear language if the intent is to direct the decision-maker to a particular body of international law. In this case, the general reference to 'principles of international law' was found to include all sources of law to which Canada was subject. Canada having ratified the 1958 Convention, its delimitation provisions were accordingly applicable. Had it been intended to have the tribunal apply customary international law, as argued by both parties, this would have had to be clearly and unambiguously stated. As it was, the expression 'principles' was found capable of referring to both customary and conventional international law.

51. *Ibid.*, at para. 2.18.
52. *Ibid.*, at para. 2.35.

5.2. The consolidation of provisional equidistance as ubiquitous method

Undoubtedly the most significant substantive contributions of the tribunal's award are its twin endorsements of the convergence of maritime delimitation law under the 1958 Convention, UNCLOS 1982, and customary international law; and of provisional equidistance, subject to equitable adjustments, as a generally applicable method of delimitation.

Given the relatively small number of inter-state judicial or arbitral delimitations since the adoption of UNCLOS 1982,[53] the tribunal took a surprisingly strong, albeit defensible, view of both developments. In particular, the tribunal's insistence that '*precisely* the same' result would have obtained in this case regardless of the source of law applied suggests that it viewed the process of convergence to be complete.[54] This can fairly be considered a novel element in maritime boundary jurisprudence, which has hitherto cautiously suggested an *ongoing process* of convergence in much more circumspect terms.[55] Even the recent decision in *Cameroon* v. *Nigeria* only goes so far as to describe the equitable principles-relevant circumstances method as 'very similar' to the equidistance-special circumstances method.[56] Accordingly, the tribunal's conclusions on these points are highly significant in charting progress towards a monolithic method in maritime boundary law.

However, the tribunal's approach to adjustment of the provisional equidistance line in this case raises questions as to whether the march towards methodological convergence necessarily yields any greater predictability in outcomes. In a 2001 speech to the Sixth Committee of the United Nations General Assembly,[57] Judge Guillaume, then President of the International Court of Justice, suggested that the law's evolution towards a general equidistance–equitable adjustment method was a desirable antidote to the apparent arbitrariness of result in some of the Court's early delimitations.[58] Considering the huge impact of the tribunal's rather casual denial of any effect for Sable Island in this case, however, it is arguable that provisional equidistance only provides a provisional escape from such apparent arbitrariness.

In particular, the tribunal made no effort to quantify the relationship between the need, on the one hand, to reduce cut-off effects 'in some limited measure'[59] or

53. *Libya v. Malta*, *supra* note 31; *Jan Mayen*, *supra* note 23; *Qatar v. Bahrain*, *supra* note 32; *Eritrea v. Yemen*, *supra* note 32; *St Pierre and Miquelon*, *supra* note 10; *Guinea v. Guinea-Bissau*, *supra* note 34. Of these cases, *St Pierre and Miquelon* did not explicitly consider a provisional equidistance line. Since the award of the tribunal, the International Court of Justice has rendered another decision in which it adopts a provisional equidistance-special circumstances approach in drawing a single maritime boundary pursuant to UNCLOS 1982: *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, Judgement of 10 Oct. 2002, accessible online at http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF, at paras. 288–89.

54. Award II, *supra* note 1, at para. 5.2 (emphasis added).

55. See, e.g., the quotations from *Jan Mayen*, *supra* note 23, and *Qatar v. Bahrain*, *supra* note 32, relied upon by the tribunal: Award II, *supra* note 1, at para. 2.27.

56. *Cameroon v. Nigeria*, *supra* note 53, at para. 288.

57. '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 Oct. 2001, accessible online at http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_6thCommittee_2001.htm.

58. E.g., *North Sea Continental Shelf Cases*, *supra* note 34; *Tunisia v. Libya*, *supra* note 19; and *Gulf of Maine*, *supra* note 9.

59. Award II, *supra* note 1, at para. 5.15.

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account for disparate coastal lengths, and on the other, to attribute no effect to Sable Island. Rather, the latter was simply said to 'accommodate in a reasonable way' the former.[60] Similarly, it is difficult to appreciate, based merely on cryptic references to 'administrative convenience' or what is 'equitable and appropriate',[61] why the parties' conduct, falling short of agreement, resulted not only in adjustment but substitution of the equidistance line in the inner and Gulf areas.

In spite of the apparent objectivity of the initial method used, therefore, such results and the somewhat opaque equitable considerations from which they spring may illustrate that the convergence of method attested to by the award of the tribunal does not necessarily lead to transparency or predictability.

60. *Ibid.*
61. *Ibid.*, at para. 5.7.

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