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ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR

AND NOVA SCOTIA

held on the 13th day of March, A.D., 2001, at the Wu Conference Centre, Fredericton, New Brunswick, commencing at 9:30 a.m.

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Henneberry Reporting Service

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Tribunal:

Hon. Gerard V. LaForest, Chairman

Mr. Leonard Legault, Q.C.

Professor James Richard Crawford

Appearances:

Mtre Jean G. Bertrand, Esq.

Professor Phillip M. Saunders

Mtre Valerie Hughes

. . . . . .

CHAIRMAN: Good morning, Mr. Bertrand.

MR. BERTRAND: Good morning, Mr. Chairman. Good morning, Tribunal members. Before I continue with the argument I started yesterday, I want to point out that we made available to the Registrar this morning a packet of

additional annexes, most of which our friends from Newfoundland have seen late Sunday night. To that initial packet that we had communicated to them, we have added, I believe, four new authorities, one new case -- the Beagle Channel case, and an article, as well. In addition, we have, as well, added under a separate tab an extra page of a publication or an article that was referred to by Newfoundland in their briefs.

I will be -- the reason I'm referring to that is that I will be referring to some of the annexes found in that packet later this morning. Yesterday when we finished at 4:30, I was -- I believe I was referring about the Premiers' meeting of June, 1972 at which the turning points had been agreed upon, and I had drawn the Tribunal's attention to two documents evidencing the Premiers' agreement with the turning points.

The first one was the actual communique issued by the premiers after the meeting. As you will remember, there were no minutes of that meeting taken, and further, evidence of the agreement of the Premiers with respect to the turning points could be found in the minutes of a later meeting the same summer, on August 2nd, 1972, and this is where I stopped last night.

I would like to take you to slide 27 and underscore Newfoundland's position with respect to the 1972 meeting

of the Premiers in June.

Newfoundland notes that the Premiers did not make any concrete decision at their June 17, 18, 1972 meeting, but only created a common philosophy. And you find a reference there on the slide to their briefs material. And secondly, that there is no evidence that one of the maps depicting the boundaries was presented to the Premier of Newfoundland, and this particular issue relates to the use by the Premiers or the knowledge by the Premiers of the map which we have reproduced under figure 9. I will come back to that in a minute, but it doesn't seem to be disputed that in 1972 at their June meeting that the Premiers had the map that the JMRC had prepared showing the turning points with the line and the various turning points being linked with one another by a line and the line stopping at the last turning point, 2017.

The issue is whether they had other maps before them or whether they were knowledgeable about other maps showing a line going out to the continental margin.

Dealing with the first of these two Newfoundland's position, Nova Scotia disagrees with the statement that the Premiers did not agree. We believe that it is clear that the Premiers agreed to the turning points, and moreover, we believe that Premier Moores made it very clear that he had agreed to the turning points and that an

agreement on the issue had been reached at that meeting held in June, 1972.

He made that statement to the House of Assembly on June 19, 1972, and this is a document you will find under Annex 58, which is the verbatim of his statement to the House. Newfoundland has produced -- has filed the actual document speech prepared in advance of that statement, but with respect to the relevant excerpts, it does not appear that this pre-prepared statement is in any way different than what the Premier actually said in the House.

Premier Moores' statement makes it clear that the result of those meetings held in June was a seven-point agreement, and he outlines what the seven points are. Point number two is that the governments of the five eastern provinces have agreed to the delineation and description of the offshore boundaries between each of these five provinces.

Now contrary to Newfoundland's contention, Premier Moores' statement went further than simply reporting on ongoing negotiations between the provinces and the federal government. It is quite clear that an agreement had been reached, but that other matters had been discussed at the same time.

He said, "Mr. Speaker, apart from the agreements themselves, these meetings also provided two very real

benefits." He goes on to describe what they are. "The greatest benefit being the creation of a solid front between the provinces and the second benefit is the joining of the Province of Quebec to these discussions."

Then he goes on to say, "The depth of cooperation and the readiness to discuss this problem with all those present at the meetings would indicate that interprovincial cooperation on a number of other issues might be expected, as well." And this is where he says, "It must be stressed that the meetings did not attempt to make concrete decisions on particular problems."

It is our submission that this statement relates to the level of cooperation between the provinces on other issues that could be expected in the future.

It is our further submission that officials from Newfoundland and Nova Scotia understood very well that the Premiers had just agreed on the turning points at their June 17, 18 meeting, and officials from both provinces said so to Dr. Crosby, the ADM from Natural Resources Canada, just the day after the Premiers had met and had reached that agreement.

We can find evidence of that in Annex 57, which are two memos of Dr. Crosby's notes to file regarding telephone conversations he had on June 20, 1972 with, first, Innis McLeod, Deputy Attorney General of Nova

Scotia, and Stu Peters, Special Advisor to Premier Moores.

In the first memo, which is the conversation with Mr. McLeod of Nova Scotia, we can see at slide 36 that Mr. Crosby's understanding of the conversation was that Mr. McLeod said, "They had agreed on interprovincial offshore boundary lines and in response to my direct question, confirmed that these were the same offshore boundaries that had been presented to the federal government by the then Premier of Nova Scotia, Mr. Stanfield, at the federal provincial conference of October 14, 1964."

In other words, the Premiers' reply simply reconfirmed the same offshore boundaries that had been negotiated amongst our predecessors some years before for the purpose of subdividing their respective so-called areas of provincial jurisdiction in the east coast offshore.

This is an important document because it not only confirms the understanding of the province about what the Premiers had done in June, 1972, but it also confirms that the federal government was very well aware that the provinces purported to agree back in 1964 on their respective boundaries in the offshore -- they say in the so-called areas of provincial jurisdiction.

The second memo to file by Mr. Crosby has to do with his later conversation -- subsequent conversation with Mr. Stu Peters, and it corroborates Mr. McLeod's understanding

of what had occurred the previous day at the Premiers' meeting.

He says of that conversation with Mr. Peters, "In general, he corroborated the information received from Innis McLeod that morning. In summary, the seven points agreement upon were as follows", and again, number two is "The Premiers agreed to mutual interprovincial boundaries in the offshore", and he notes further, after having listed the points agreed upon, that there is nothing startlingly new as concerns points one through four.

Point one has been pretty obvious for some time now, and that's the fact that the provinces didn't agree with the federal proposal or position on offshore mineral resources at the time.

Point two, more importantly, involves jurisdictional offshore boundaries that were agreed upon by provincial governments years ago and presented to the federal government in 1964. And again, here it is clear that even the federal government distinguishes between the agreement in 1964 between the provinces and their use of that agreement in the context of filing a claim or making a claim to the federal government with respect to ownership of the offshore mineral resources.

Dealing with the second statement, or position expressed by Newfoundland, our contention is that the

Premier of Newfoundland in particular, had all the information necessary to make an informed decision at the June, 1972 meeting. That includes maps, coordinates, knowledge of the situation.

And we submit that there is no doubt, the record shows clearly that at June 17, 18 meetings, Premier Moores had before him the minutes of the Joint Mineral Resources Committee Meeting of May 24, 1972. That is the meeting at which the JMRC outlined the eight principles upon which the Ministers should discuss, and give their support, including the fact that the boundaries established in 1964 were properly delineated and described by the use of the turning points developed by the JMRC.

The other document that the Premiers had for that -- for that meeting, as I mentioned earlier, was the map prepared by the Technical Committee showing the turning points. This is clear, it is found in the letter that the Secretary of the JMRC sent to the Premiers in advance of the meeting for June 17 and 18.

Secondly, going into the June 17, 18 meetings, Premier Moores was already fully aware of the status of the 1964 Agreement and its boundaries. And you will recall that he had been reminded of them by his Minister of Mines, Mr. Doody, during a meeting with federal officials, including Federal Minister Donald MacDonald on May 9, 1972. And

this account of the meeting is found in Annex 47, which you will find -- an excerpt of which you will find in the following slides.

This is a memo of Jack Austin, whose name you will see -- or you will have seen in other documents, especially accounts of federal-provincial officials meetings discussing arrangements concerning the offshore mineral resources.

At point number 7, Premier -- it says that Premier Moores raised the question of distribution of the provincial portion of offshore revenues amongst the provinces, and was reminded by Mr. Doody that the five Atlantic Provinces had some years ago agreed on boundary lines and spheres of interest.

What is interesting, obviously, is that from the statement is that Mr. Doody's understanding was very clear about what had happened before. And we have to remember that Premier Moores, at that time, had just come into power, and was apparently not -- had not been fully briefed on the issue of interprovincial boundaries, and their use.

What is also interesting from that statement is that obviously Mr. Doody's understanding was that the use of the interprovincial boundaries was not limited to claiming jurisdiction, ownership over the offshore mineral

resources. It was, in his mind at least, very clear that whatever financial arrangements would be agreed upon in the end would be also -- would also include a distribution among the provinces according to the boundaries agreed upon back in 1964.

Another point that appears clear to Nova Scotia is that going into the same June, 1972 meeting, Premier Moores and his officials were undoubtedly aware of the interprovincial boundaries as drawn on the map reproduced as Figure 9.

At that meeting with federal officials held on May 9, 1972, that we just talked about, the previous item to item 7, item 6, discloses a request by Premier Moores to meet with federal officials to be briefed more fully on the issue of offshore mineral resources and the proposals put forth by the federal government, and so on.

That request was apparently acceded to, such that a federal delegation met with Premier Moores and his staff later in June, actually in early June. The meeting was held on June 6, 1972. In advance of that meeting, Mr. Crosby, the ADM for Natural Resources Canada, prepared some notes for the issues to be covered with Premier Moores and his delegation. I don't know that you can read from the document's heading, maybe on your monitor you can't, it says "Notes related to revenue sharing map for

briefing session with Premier Moores."

But we see at the bottom of that, well throughout this document, basically, are various pools, there is the Gulf of St. Lawrence Pool, there is then the Atlantic Pool, and there is the outer part of the Atlantic Pool on the continental slope. Under each pool are described a square mileage area covered by each province's offshore area.

What is interesting is that those numbers that we find on this memo correspond to the numbers that are shown on the map that is depicted on the -- on Figure 9, and I would ask you, if I may, to turn to the larger book of maps, where you will see a lot more clearly I'm sure, than on the map showing on the screen what I am talking about.

PROFESSOR CRAWFORD: Well there is no -- let me ask this as a question. Is there any indication that that map was before the Premiers at their meeting at which they agreed on the boundaries?

MR. BERTRAND: I think it is clear the meeting on which they agreed on the boundaries occurred in 1964, so that we are consistent. I'm just being cute, I'm sorry.

PROFESSOR CRAWFORD: Well perhaps we had better correct the communique.

MR. BERTRAND: Remembering what questions you asked of me yesterday, I was just --

PROFESSOR CRAWFORD: No, no. It's a fair point. The

governments of the five eastern provinces have agreed to the delineation description of the offshore boundaries between each of their five provinces. You interpret that as meaning having agreed -- having agreed in 1964, right?

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: Good, well we will --

MR. BERTRAND: I have reconfirmed there are earlier agreements.

PROFESSOR CRAWFORD: Well let's take it as a reconfirmation.

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: Was this map before them when they reconfirmed?

MR. BERTRAND: It's unclear. What is clear, though, is that Premier Moores was aware of the map, and the other Premiers were as well, because there had been discussions between Nova Scotia and federal officials over these maps. The point we are trying to make is that Premier Moores had been made aware of this map just in advance of the meeting, and so he was conscious of the fact that this line was being used by the federal government in the context that federal sharing -- revenue sharing proposals. And that when they looked at the map of the JMRC it was easy -- it was easy to see that the same lines were being used.

The boundary established in 1964 is used to various --

for various purposes. It is always the same boundary that is used. That matter has been settled back in 1964, and that's the whole idea of the provinces, let's agree on the boundaries first, and then we can go and negotiate with the federal for whatever result may come in the end.

PROFESSOR CRAWFORD: But of course it's -- the map that was -- that was before the Premiers in 1964 didn't show the same line as the 1972 map shows?

MR. BERTRAND: I agree. Obviously not. That is the map that we discussed with Mr. Drymer.

PROFESSOR CRAWFORD: Of course.

MR. BERTRAND: The 1961 map.

PROFESSOR CRAWFORD: No one seems to have adverted in 1972 to the difference between the two maps.

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: Why would you say that was? Was it simply not regarded as a significant difference, or was there some other reason?

MR. BERTRAND: I don't know that I should offer this -- venture this answer, I believe personally that the Premiers considered the matter resolved, and it was not like important -- they were not paying attention to that anymore. They were asked to agree to turning points, and they did that. But for them it has been solved, so I don't think that anyone really took the time to see

whether the map was exactly the same as the other one or not.

The only point here that we are trying to make is that this was being discussed, and it was in the background. And that's the type of views that the federal was proposing to make of the 1964 boundaries. And that's what the provinces wanted at the time.

So the whole exercise here is just to show that in the notes of Mr. -- if we can go back to the previous slide, in the notes of Mr. Crosby for that meeting, the square mileage area as described, or the numbers that are there, correspond to those of this map, which we have reproduced under Figure 9.

He must have been talking either of this exact map, or a map that showed a similar line. How can he arrive at these square mileage figures unless he used the same boundary? So whether it's the exact map, or a map showing a similar line, obviously we can't tell. But we know that they were aware and conscious of that boundary. And the fact that the boundary was being used to the outer edge of the continental margin.

Further there is another document that corroborates that analysis of the documents and the facts, and that is a document found under Annex 48, which is Dr. Crosby's account of his meeting with Premier Moores and his

delegation.

His account is dated June 14, 1972, so eight days after he actually met. And we find an indication that it might have been that map that he used, irrespective of whether the boundary was there, but that actual map, because the way he names it appears to be quite similar to the title of that map which is "Canada East Coast Offshore". Obviously it's a map that is available in -- in many iterations, but nevertheless we have an indication that this might be the exact map he used.

He said "Utilizing an overall map of the east coast region, that we had constructed for the occasion, I describe Canada's submerged continental margin off the east coast, explaining what it consists of, its aerial distribution."

I understand that to mean how it is apportioned between the various provinces. And this is consistent with his use of the square mileage data covering the various -- the respective offshore areas on the east coast.

That covers the knowledge of Premier Moores in advance of the meeting of June 18, 19, in '72.

What appears to be clear is that that very map that we have reproduced under Figure 9 was discussed, and was used by the Premiers at their subsequent meeting of August 2nd,

1972, where again the turning points were reconfirmed, as we saw earlier.

And documents communicated, or circulated in advance of that subsequent meeting of the premiers provide some evidence in this regard.

First, there is the cover letter forwarding the appropriate documents in advance of that August 2nd meeting. And we see under item 4 that a map showing boundaries between the provinces and the offshore areas was forwarded to the Premiers.

When we look sat the actual agenda we see that under item 6, the financial arrangements were to be discussed. And when we look at the background material that was provided in respect of that item 6, again we find the same square mileage areas.

PROFESSOR CRAWFORD: Sorry, to take you back to an earlier document, and I apologize for that. This is the document which is your Annex 48, which is --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- Dr. Crosby's notes of his meeting. Apart from complaining about the lateness of the lunch, Dr. Crosby refers to the French claim associated with St. Pierre Miquelon. This is on page 2 of his report. Sorry, on page 3 of his report.

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: It's a matter to which you may wish to return, but my understanding is that the French claim to the St. Pierre Miquelon continental shelf had by this stage already was in the public domain and the issue was in dispute between --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- Canada and France. And the French claim cut across the line that was shown on the 1972 map.

MR. BERTRAND: For the purpose of discussion, let's assume that what you say is accurate.

PROFESSOR CRAWFORD: It's a matter of interest anyway. And perhaps we could return to it in due course. You may like to look at it again but the point is this, there doesn't seem to have been any discussion of the implications of the French claim for the interprovincial agreement based on the 1972 map.

MR. BERTRAND: That's our understanding.

PROFESSOR CRAWFORD: It's slightly odd, isn't it? I mean, if the province is saying this is our territory, you have a dispute with France. They don't seem to avert to the apparent inconsistency or to the possible implications of the French claim for that agreement?

MR. BERTRAND: I don't know. Assuming that the claim was -- had been made public by the -- at that time, I think the only explanation was that the purpose of the meeting was

not really that, but to provide some background.

It was a briefing meeting for Premier Moores and his staff about the proposals, the various discussions between federal officials and provincial officials and the background of that in terms of possible revenue sharing programs. If indeed the claim of France had been known at the time, I guess, it was always under reserve of the eventual outcome of that claim.

PROFESSOR CRAWFORD: Thank you.

MR. BERTRAND: Obviously what the provinces were trying to do, and I think even Canada wanted or was concerned about was making sure that whatever discussions were held were within the confine of the Canadian jurisdiction. In other words, the provinces only sought to divide between themselves their offshore areas that Canada would otherwise be entitled to.

So again, on the material that was circulated in advance of the August 2nd meeting, we find indications by the use of offshore areas, square mileage, of the fact that a map either identical or quite similar to the one we depict at Figure 9 was used and discussed by the Premiers at that meeting. And if we add from that Figure 9 the total offshore area, that is the offshore area extending -- that is if we add the offshore area extending to the continental shelf, the edge of the continental shelf to

the area, the additional area of the continental slope, we arrive at numbers that are the ones showing on the document filed as Annex 53.

That is 140,000 miles for Nova Scotia -- Nova Scotia's offshore and actually 419 square miles as opposed to 420 square miles -- thousand square miles for Newfoundland's offshore.

As you will note at the document appearing as Annex 53, there is a mention that the offshore area square miles are approximate round figures only. That may explain the difference between the 419,000 square miles and the 420.

PROFESSOR CRAWFORD: And those figures seem to treat St. Pierre Miquelon as belonging to Newfoundland?

MR. BERTRAND: Yes. And part of it as well to Nova Scotia, if we look at the permanent map, there is no mention of it period.

And so in summary, with respect to the turning points and the Agreement, the work of the JMRC, the Agreement of the Premiers to the turning points, there was indeed, it is our submission, a follow-up to the work of the JMRC, as well as to the request of its Vice-Chairman, Mr. Allard, on May 12th 1969 known as the Allard letter.

In June 1972 the Premiers of the East Coast provinces agreed to the delineation and description of the boundaries using the turing points that have been

developed by the JMRC. And thus, the Premiers' Agreement of 1972 -- and I go immediately your question, Professor Crawford, of yesterday, yes, the 1972 meeting gave birth to an Agreement. It is in itself an Agreement. What is the Agreement all about, well it's about confirming the existence of the 1964 Agreement indirectly because it assumes or presumes that boundaries were agreed upon in 1964, and restates actually that Agreement, that support of the Premiers vis-a-vis that Agreement.

And, no, it was not conditional, that agreement of 1972, nor was it in '64. It was not conditional on the execution of an instrument, a contract duly signed by all provinces or the passing of provincial or federal legislation. And our submission is that neither of these were essential or required for the Premiers to have necessary intent to be bound by their agreement. And this obviously is an issue that will be further addressed by Ms. Hughes later today.

More importantly or for your -- for practical purposes, the advantage of the Premiers' Agreement of June 1972, is that it erases any doubt that may stem from certain documents or that Newfoundland attempts to create by an analysis of the documents that predate that June 1972 meeting about the parties resolved back in 1964 with respect to the established boundaries.

I now turn to a new issue, that is the conduct of the parties after the 1972 meeting. And I will start first briefly by the decision of Newfoundland to leave the common front of the Eastern provinces and initiate discussions with the federal government directly.

As you will have no doubt noticed back in 1972, in June 1972 when Premier Moores addressed the House of Assembly in Newfoundland, he did state that Newfoundland had a special case, had a unit case and that therefore, it was believed that Newfoundland had a stronger case to a claim of ownership of -- to the offshore mineral resources.

It was more or less a presage to what could come later and did in fact come, was that that was an attempt by Newfoundland to get a better deal by negotiating directly with the federal government.

The JMRC itself had envisioned that possibility of individual provinces seeking different degrees of control over their offshore.

You will recall the Allard letter of May 12th 1969, where Mr. Allard had pointed out the necessity in support of his plea to have the Premiers agree to the turning points of the necessity again for the provinces to agree on the boundaries, on the delineation of the boundaries before they could go and negotiate with the federal

government. Once the delineation of the boundaries by the turning points was agreed by the Premiers in June 1972, it appears that this is exactly what Newfoundland eventually did.

But in so doing, Newfoundland did not disavow the boundaries established in the 1964 Agreement. And despite Newfoundland's assertions today that it was clear that it did not agree with the 1964 boundaries and made it clear, the record does not indicate so. Intensive discussions between federal officials and provincial officials were held in the spring of 1973, three different meetings.

During those meetings the issue of offshore mineral resources was discussed at length. Provinces had the opportunity to voice concerns, to state what their position was. Nowhere do we find a formal objection by Newfoundland or even a statement that the matter of the boundaries needed to be resolved.

Newfoundland, during these meetings, even tabled its own proposal which eventually was the document that it based itself to negotiate with the federal government. And that very document does not put into question the boundaries that have been agreed back in 1964.

PROFESSOR CRAWFORD: Mr. Bertrand --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- I don't want to anticipate issues

that may be dealt with by other counsel, so please stop me if you think that this is more appropriately a matter for someone else.

Assuming that Newfoundland was right in its position that it was special because of the terms of union, that is that it came into the union with territory which included maritime territory in circumstances binding on Canada, could they have believed that Newfoundland could simply modify the extent of that territory by a Premiers' Conference Agreement unsupported by any legislation, vis-a-vis another province? Was that a view which Newfoundland could have held in terms of the way in which its territory would be disposed of?

MR. BERTRAND: From a legal standpoint, I will defer to Ms. Hughes. But from a practical standpoint, I think what occurred again was that the provinces decided to agree on their boundaries before they went out and made whatever claim they intended to make.

When Newfoundland realized that what the provinces would eventually end up with was short of their hopes, it said, well I have arguments that the others don't have. And I will press these arguments in the hope of getting a better deal for myself.

Nowhere in doing so do they put into questions the offshore area over which that deal is going to apply,

whatever it ends up being. I think that's our view. And that's our submission from a factual standpoint.

And as we see in the historical record finally in September 1973, Newfoundland advises the other eastern provinces that it's breaking off on its own and will submit its own proposal to the federal government.

Again on this occasion the correspondence exchanged between Newfoundland and the federal officials, and even the eastern provinces make no mention of the need to revisit the boundaries agreed upon in 1964.

To a certain extent, Newfoundland's 1973 proposal even assumed and confirmed the existence of the 1964 Agreement. And we refer you to their -- the definition of the adjacent submarine area found in the proposal. We have highlighted in bold the relevant wording which is subject to any lines of demarcation agreed to by the Province of Newfoundland with respect to the submarine areas within the sphere of interest of other provinces.

The use of this language just 15 months after Premier Moores stood up in the House of Assembly and said -- and I will refer you back, this is slide 30, the governments of the five eastern provinces have agreed to the delineation and description of the offshore boundaries between each of these five provinces. The use of that language given what he had said is in our submission clearly indicative that

Newfoundland was conscious of its agreement in the context of the 1964 Agreement. Mr. Legault?

MR. LEGAULT: With reference to that you have just said, what significance do you attach to the use of the word "any"? Any lines of demarcation agreed by the Province of Newfoundland. Might that not have better read "the lines of demarcation"?

MR. BERTRAND: The lines.

MR. LEGAULT: Do the two mean the same thing?

MR. BERTRAND: They may in certain context. Let me get ahead of myself in the argument. I think with the benefit of hindsight, all of the record shows that first Newfoundland was conscious that it had taken part -- actually it was a vital part of the 1964 Agreement. That it was a party to it. And had done so at the time.

Clearly also, it is clear with the benefit of hindsight, that they tried to walk away from that deal at a certain point in time.

Clearly also, that they did not so formally -- that they didn't want to state so vigorously, that they wanted to keep all options open. And that in the end they were looking forward to the legislation coming into being with an arbitration clause providing them with an opportunity to argue just what they are arguing today.

That is that there is no deal and that I,

Newfoundland, can get or can try to get a better result through arbitration than the one I agreed to back in 1964. And this is a clear indication of leaving options open while acknowledging that there may be agreements out there.

MR. LEGAULT: Mr. Bertrand, you did not present this as a clear indication of leaving options open. You presented it rather as a clear indication of a recognition that Newfoundland had agreed to certain boundaries in 1964. I don't want to press the point.

MR. BERTRAND: I think it's --

MR. LEGAULT: Thank you.

MR. BERTRAND: Thank you.

PROFESSOR CRAWFORD: If I can press the point.

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: It would be too much to read into this communication by itself any intention by Newfoundland to go it alone on the question of any boundaries. I mean what clearly Newfoundland thinks it has a special case as to title, which the other provinces don't have because of the times --

MR. BERTRAND: Historical, yes.

PROFESSOR CRAWFORD: -- within which they came into the Federation. But it seems to be making the claim for its special position subject to lines of demarcation. I mean

the word "any" could have been "the". But it's a -- it doesn't mean that the lines -- it doesn't say any lines of demarcation to be agreed to in the future.

MR. BERTRAND: I think that's essentially the point that we are making. It's a recognition that something had happened.

One might argue it's just a style of drafting. But we submit that there is obviously a recognition or an "inconfort" by Newfoundland to simply ignore or deny that something had happened back in 1964. A discomfort, thank you, Mr. Drymer.

CHAIRMAN: I think it's somewhat supporting the word the word, "agreed". That's past tense.

MR. BERTRAND: Yes. Leaving options open. Any, not the lines agreed obviously.

PROFESSOR CRAWFORD: Mr. Bertrand, the extract from the agreement, which is Appendix 1 to Premier Moores' letter, you have only given us a couple of pages. Heaven knows, we don't need more paper, I suppose, but --

MR. BERTRAND: I am sorry, I am not following, Professor Crawford, the extract that we gave you with respect to which document?

PROFESSOR CRAWFORD: The agreement itself, the draft agreement, which is --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- presumably in effect the position paper put by Newfoundland to Canada in communique --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- to the other provinces. But all we have is two pages of it. Did the agreement specify what its proper law was? I mean, was there a clause which said this agreement is governed by the law of X?

MR. BERTRAND: I don't believe it did, but we would have to check and we will come back to you. I don't believe it did.

PROFESSOR CRAWFORD: And did the agreement -- well again, did the agreement specify what was to be done to give effect to it by way of legislation or otherwise? It may be as simple as --

MR. BERTRAND: My recollection is no, but we will check.

PROFESSOR CRAWFORD: Perhaps you could just give us a copy of the whole text?

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: Thanks.

MR. BERTRAND: With the Tribunal's permission, we will endeavour to file a complete copy of the proposed agreement.

I intend to go quickly over the use of the 1964 Agreement made by Nova Scotia in various legislation, various Accords with the federal government, either alone

with the federal government or in concert with other provinces. We have covered that in our Memorial.

The only thing that I would like to draw your attention to, and this is why we circulated that packet of material this morning, has to do with two statements made by Newfoundland in their Counter Memorial.

The first one may be found in paragraphs 177 and 178 of 61. 178 of their Counter Memorial. Before, the one previous. Thank you. Newfoundland there challenges Nova Scotia's record in respect of the 1977 MOU. Basically alleges that Nova Scotia itself was unhappy. Didn't think much of the 1977 MOU, which was eventually superseded and replaced by the 1982 Canada-Nova Scotia Accord.

I think it's important to point out that the reasons that lead to the demise of the 1977 MOU have nothing to do with the boundaries that were used in that agreement to apportion the offshore area as between the provinces.

And whether or not Minister Crosbie thought that the 1977 MOU was a sick joke is quite irrelevant, because it has nothing to do with which or whether it was advisable to use the 1964 boundaries as a means of delimiting each provinces' jurisdiction or share of the revenues over the offshore mineral resources.

Secondly, there is another challenge by Newfoundland, which is found at paragraphs 181 and 182 of their

Memorial, which disputes Nova Scotia's assertion that it has constantly used the description of the boundaries provided by the 1964 Agreement.

And to this end, Newfoundland references the Petroleum Resources Act and the Energy and Mineral Resources Conservation Act, among others, and notes that although there is a mention of offshore in these statutes, no definition is provided, at least no definition anywhere similar to that found in the 1964 Agreement as provided.

And we would simply draw your attention to the fact that these legislations, although enacted in 1980 did not come into force until 1984. They only came into force, as you will see -- you will find the Orders-in-Council under Annex 153, as well as 155, they only came into force on July 26th 1984. At the same time that the 1982 Canada-Nova Scotia Implementation Act came into force.

Now we all know that the 1982 Canada-Nova Scotia Implementation Act was meant to govern the issuance of permits in the offshore area.

Now it is true that prior to that these two pieces of legislation, Petroleum Resources Act and Energy and Mineral Resources Conservation Act had to do with the offshore. And in particular, the Petroleum Resources Act was the act meant under which permits would be issued for exploration, even in the offshore. But it never came into

force. And when it did the offshore area aspect of it was taken away from it, was excepted from it and was meant to be covered by the 1982 Canada-Nova Scotia Accord.

Now you will see in the regulations that except that jurisdiction, that part of the offshore from the application of these statutes. And you will find these under Annex 154 and 156, that the way that the Nova Scotia government went about excluding the offshore area from these two statutes was exactly the way that was used by the five eastern provinces back in 1964 to describe their -- the offshore of Nova Scotia.

And so that if you go to the documents, the regulations, under Annex 154 and 156, you will see that the description of the offshore of Nova Scotia is identical to that found in the Notes re Boundary, the metes and bounds description of the Nova Scotia offshore that have been agreed upon in 1964.

One last comment, there is also a reference by Newfoundland to the Gas Utilities Act. And we submit that this reference is irrelevant, as you will see from a copy of that Act under Annex 157. This legislation has to do about -- has to do with onshore distribution of gas. It contains no reference to the offshore. And so in the same vein, and just as relevant, we submit, Newfoundland could have referred to a lot of other legislation, I mean the

Family Maintenance Act passed the same year, which did not refer to the boundary line, or didn't refer to the offshore.

Leaving that topic, I would like to focus now, if I may, on the use of the documents by Newfoundland. To the use of the documents by Newfoundland to either support their contention, their assertion that they had objected to the line, that they had objected to having been a party to the 1964 Agreement.

The use of documents, as well, in support of their contention that Nova Scotia has admitted that Newfoundland did not agree or was not a party. And finally the use of documents emanating from the federal government that support or corroborate their contention that they have protested the 1964 Agreement.

The first category of documents are the documents containing the alleged objections by Newfoundland.

The first of these is a letter dated October 6, 1972, by Minister Doody of Newfoundland, Minister of Mines, Doody, to Mr. Kirby, Special Assistant to Premier Moores. It's a document you will find under Annex 57. And this is obviously an important document, because in Newfoundland's view, this was the document that really put Nova Scotia on notice that Newfoundland did not agree with the line.

This is 1972, October, soon after the Premiers met in

June, confirmed the 1964 Agreement, agreed to the turning points. Further met in August, discussed the various maps. In October, 1972, Mr. Kirby receives a letter, and Minister Doody tells him, "I would like to take up a matter which I had previously discussed with you informally." We don't have any record of these discussions, other than this.

"This is the matter of the precise determination of the interprovincial boundary between the Nova Scotia and Newfoundland sectors." Now that's important. "In doing so, the Government of Newfoundland is not questioning the general principles which form the basis of the present demarcation."

Now the present demarcation is the one agreed to in 1964. This is a confirmation by Newfoundland of the Agreement that was reached in 1964. The existence of that Agreement, the fact that there was an Agreement in 1964.

MR. LEGAULT: Mr. Bertrand --

MR. BERTRAND: Yes, Mr. Legault?

MR. LEGAULT: The letter to which you're referring had a sketch map attached to it.

MR. BERTRAND: It did.

MR. LEGAULT: Showing another line other than the 135 degrees. I don't know if it was even called 135 degrees at that time. But then the line indicated on say the 1964

map, do you take the difference between the line indicated by Mr. Doody and the line indicated on the 1964 map as being insignificant? It was -- is -- was that a matter that could have been settled? Or was that -- would you view that -- let me rephrase this.

MR. BERTRAND: As fundamental?

MR. LEGAULT: Would you view this as a confirmation of the 1964 line, as you view the letter, for instance?

MR. BERTRAND: I see this as a confirmation of the 1964 line. What we submit it is is a query, is a divergence of view as to how the 1964 line, the Agreement, how this Agreement was transposed onto paper.

MR. LEGAULT: But I'm not referring to the Agreement as such right now, I'm referring specifically to the --

MR. BERTRAND: To the line.

MR. LEGAULT: -- line. The southeasterly line in the 19 -- shown in the 1964 map. You view Mr. Doody's letter as a confirmation of the Agreement; do you view his line as a confirmation of the '64 line?

MR. BERTRAND: Yes, until turning point 2017.

MR. LEGAULT: But beyond --

MR. BERTRAND: Beyond that, we now know it is clear, but at the time we believe that this is a matter more of a technical nature than a disagreement with the line.

MR. LEGAULT: But is it a matter of a technical nature that

leads to confirmation of the line, or to a significantly different line?

MR. BERTRAND: Again, let me go back to what I said yesterday. Once the parties have agreed that it's southeast to international waters, this is a matter for application, and Newfoundland will argue for interpretation. We believe that southeast is clear as 135 azimuth.

But whether the line shown on the map that was provided for the Premiers back in 1964, and that was meant to depict the actual words found in the Notes re Boundaries is accurate is something more of a technical nature than fundamental disagreement over the line.

MR. LEGAULT: Thank you, Mr. Bertrand.

MR. BERTRAND: And just to follow-up on that answer, Mr. Legault, the last sentence of the second paragraph of Mr. Doody's letter is -- makes that point. "The boundaries should be established as accurately as possible."

In our view, the Doody letter simply made a technical inquiry regarding the precise determination of the interprovincial boundary between the Newfoundland and the Nova Scotia sectors.

Nova Scotia was not questioning the general principles which form the basis of the present demarcation. Newfoundland expressed the view that the boundary should

be established as accurately as possible, but in doing so it did acknowledge that there was a boundary, that there had been an Agreement over the boundary.

PROFESSOR CRAWFORD: Mr. Bertrand, the letter refers to the general principles of division to which we have agreed. And -- okay. Now the letter might possibly be regarded as revisionist, or as you say, it might be construed in a more innocent way as simply raising an understandable question about precision.

And the Notes re Boundaries did suggest some general principle of division in respect of the turning points.

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: But I haven't seen anywhere any statement of what the general principle was in relation to the -- what we will call the outer line, the line to the east point 2017. Do we have anywhere any indication of what the basis was for saying southeasterly or southeast from that point? I mean, what general principle was supposed to be more accurately reflected by the adjustment that Mr. Doody was proposing?

MR. BERTRAND: Why it is that they said southeast on what basis, there is no indication in the record of that.

Now Mr. Doody's map, I think it is acknowledged that the 1961 map that was before the Premiers in '64 is not a model of precision. And Mr. Doody's map is not a model of

precision either. He acknowledges so in his letter, and as Mr. Drymer noted yesterday, this map fails to -- to have, or to depict a compass rose. And so we don't even know whether the line that he is proposing --

CHAIRMAN: So he viewed southeast as being some -- somewhere else than the map, the original map showed?

MR. BERTRAND: I'm sorry, I didn't --

CHAIRMAN: He viewed southeast in a different light?

MR. BERTRAND: I think that is the conclusion that we can -- we can deduce from that. I don't know that it's really a challenge to whether southeast means 135, or whether it could mean 130. I think it's more a question of a technical nature is that we meant southeast, and the line which is depicted on the 1961 map doesn't appear to be southeast, it appears to be more east than southeast.

There was a follow-up to that -- eleven days after that letter --

CHAIRMAN: I just come back to this southeast.

MR. BERTRAND: Which letter?

CHAIRMAN: It seems to me that this can be a very indefinite term. It can be understood in different ways by different people. And at some stage they are not agreeing to anything, because it is a significant difference between a little more east, as you mentioned, or a little more the other way. I mean, it is -- some point it is southeast,

and there may be a minimum and maximum, but it's very indefinite.

MR. BERTRAND: It could be viewed as such. What we submit is that it's very precise in the sense that if you look at this description in the context of how the Notes re Boundaries have been drafted, one can say that if the parties wanted to have more precision, the level of precision that they had, for example, with respect to the turning points, then they would have seen fit to be more precise past turning point 2017, instead of simply saying "southeast to international waters".

PROFESSOR CRAWFORD: But the curious thing is that -- I mean if you look at the Notes re Boundaries, they used phrases like southeasterly, southeast, northeast, etc., in a pretty imprecise way. And the lines which are eventually determined don't follow precisely -- precise southeast or northeast lines in general. They are more approximate. There's one -- there's one case where something is described I think as, from recollection, as northeast, it's more or less easterly on the map.

Now it's clear that a lot of time was spent sorting out the turning points in the JMRC proceedings, and they were eventually determined with reasonable levels of precision. I mean, the underlying methodology by which the turning points originally described is odd from an

unfashionable point of view, but okay. One, it's described, one knows what it is. They take points, and they fix points between them, so it's possible to find that out.

But in relation to the outer line, as you -- the line east of 2017, there is no description of the basis for the direction of that line in 1961. The line is described twice in slightly different terms. The line on the map in 1961 is different from where you now say it is, in two respects. One is direction to its length.

And yet no one prior to this point in 1972, seems to have raised any question about the precision of that line, or about its technical foundations.

And in the context of something which is described as a binding agreement, I mean, that just presents a bit of a difficulty. Clearly the parties, I mean including in this letter, are accepting that there is an Agreement of some sort. But why did they not previously raise the technical issue? I mean, there was -- it's not that people were completely ignorant about delimitation questions involving long lines out to sea in 1972. They are well aware that this was problematic. The north sea continental shelf arguments had shown how difficult these issues could be, especially as between adjacent coasts.

MR. BERTRAND: Mmmm.

PROFESSOR CRAWFORD: And yet no one seems to have raised any technical difficulties. I mean, it's just slightly odd.

MR. BERTRAND: Can I refer you to the -- I don't know that we can say that that's what they had in mind, but certainly in 1972 why is it not seen as a problem? Why doesn't the JMRC see that as a problem? Can we refer to the well-established practice of describing open ended lines from a starting point in a general direction?

Clearly, the 1961 map, if we reproduce it on a map and try to define what the azimuth is from turning point 2017, it's not 135. It's more like 125, and I think that's the point of the letter of Mr. Doody. Mind you, I don't think his line from 2017 has anything to do with 135. It's more 140, and maybe more than that.

I don't think that we can necessarily conclude that there is, therefore, a lack of meeting of the minds of agreement of the parties with respect to how the line should be in the outer segment past turning point 2017. But I do take your point that the word "southeasterly" is used other -- in other places in the Notes Re Boundaries.

I don't know that the letters "SE" are used specifically elsewhere in the Notes Re Boundaries, and I would certainly be open to the idea that "southeasterly" has a connotation, in a general direction, of southeast, whether it's due southeast or in the general direction of

southeast; whereas "SE" is, we believe, meant to mean southeast -- due southeast, and I think that's where there is a distinction to be made.

PROFESSOR CRAWFORD: So you say it is a compass direction, with or without a compass rose?

MR. BERTRAND: On our map, at least. So there was that follow up letter of legal advisor, Cabot Martin, to Mr. Kirby eleven days after Doody's letter. What is interesting here is that Newfoundland seemed to be in a hurry then, only eleven days at the official levels; there is no answer. They want to have this information quite quickly, yet after this letter nowhere in the record do we find a follow up on this matter, which, in our submission, is an indication that this was purely a technical point.

Whether the point was addressed to Newfoundland's satisfaction by Mr. Kirby assuring, after having reviewed the matter with Mr. Walker, that irrespective of where the line was drawn on different maps, the agreement was 135 or due southeast or whatever, we don't know.

But it's interesting to note that if it is such an important point and if it is such a point of substance as opposed to a technical point, that there is nothing in the record in terms of follow up by Newfoundland with respect to the principles, with respect to how the line was drawn, and that puts into question the fundamental basis upon

which the boundary was established back in 1964.

CHAIRMAN: It does, however, not get rid of the point raised by Professor Crawford, that if the matter is indefinite, there is a difficulty sometimes in finding a contract.

MR. BERTRAND: Ultimately, yes, but again, our submission is that this is a technical difficulty as opposed to a substantive difficulty.

As Mr. Drymer pointed out yesterday, you may be in a position, ultimately, where you find that there is an agreement and that agreement needs to be interpreted. We say it doesn't; we say it's clear, but you may find that there is a level of ambiguity.

We are saying the ambiguity is not sufficient to find that there was no meeting of the minds, but there is room for interpretation and you should say, then, how it should be interpreted. But the question -- the fundamental question that the Terms of Reference remains the same is -- the issue has been resolved by an agreement and the agreement is XYZ.

PROFESSOR CRAWFORD: Of course, there is, at least in theory, a possibility of a middle -- of a middle position; that is that there was some agreement which laid down the parameters for a line, but the agreement was not precise enough to enable the line to be drawn exactly or to make it clear precisely where it was to be, so something

further was required.

Is it for this Tribunal in this phase of the arbitration to supply all of those deficiencies, and bearing in mind, of course, that there is the further point now that there is a projection belonging to a third State which cuts across the line. So there's the question what is the effect on what is, according to you, a pre-agreed line of a subsequent arbitral award which awards part of the area to a third State?

Now the Tribunal, therefore, might have to do certain things beyond recording the existence of an agreement without which there would be no settled boundary between the parties. Is it your submission that we can do all of those things on the material available in this phase of the arbitration? That is a question you may want to take on notice.

MR. BERTRAND: I will, but I will say this for the time being; that to the extent that what you have in mind is to interpret what the agreement was, I would say that yes, it's part of your mandate in the first phase and it is not something which should be deferred to the second phase.

Obviously, if you come to the conclusion that, for various segments, the agreement lacks the precision necessary to even be considered an agreement, then you probably have to come to the conclusion that there is an

agreement for part of the line, but not all of the line, and we submit that this is not the case, however.

We submit that if there's a difficulty, it's only with respect to the interpretation of the phrase "southeast" or "SE" to international waters. Would it be a good time to break?

PROFESSOR CRAWFORD: Could I just ask one last further question? It may be you were going to come to it. Your interpretation of the Doody letter is that this is raising a technical issue of precision, not as it were -- and not a completely new boundary or repudiation of an existing agreement?

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: When do you say Newfoundland first unequivocally challenged what you say to be the boundary? Which is the document?

MR. BERTRAND: In the 90's. We don't have the document. There is nothing -- it's really indirect. It's once the legislation is in place that they say there is a dispute, and then Nova Scotia takes the view, well, no, there's no dispute. The line is properly set out as it is in the legislation.

PROFESSOR CRAWFORD: It's slightly odd that there isn't -- I mean, what one looks sometimes in vain for the critical date in international disputes. You say that the critical

date is some date in the 1990's, but no document --

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: -- no document evidencing the critical date?

MR. BERTRAND: Correct. Correct. Would this be a good time to pause? Thank you.

(Short recess)

MR. BERTRAND: Thank you, Mr. Chairman, Tribunal members. Before I continue with my presentation, I would like to come back on some answers that I gave -- or that I didn't give.

First, in respect of your question, Professor Crawford, as regards the Newfoundland proposal. I am reminded that a full copy of the proposal is found under Document 62 of the Newfoundland document. And that, no, it does not provide for the governing law.

With respect to the issue of the use of the word "any" as opposed to the "lines", I'm also reminded by my colleagues that at the time and still -- let me get an opportunity to use this, the dividing line between -- in the Northeast sector between Quebec -- or between the two portions of Labrador -- of Newfoundland and Labrador has yet to be resolved similarly the upper limit here between Labrador and the Northwest Territories has yet to be resolved. And so that the use of the word "any" might be

inclusive of the lines agreed upon in 1964, but also inclusive of lines to be resolved in the future with respect to the Labrador and the Northwest Territories.

PROFESSOR CRAWFORD: I'm sorry, just dealing with the area here where Newfoundland abuts Labrador. Well I'm not quite sure the other way Newfoundland Labrador abuts Labrador. On your view, however, the turning point -- the furthest Northeast turning point was agreed in 1964.

MR. BERTRAND: Correct. As between Quebec and the other.

PROFESSOR CRAWFORD: And doesn't that complete the possible delimitation of maritime areas as between Quebec on the one hand and Newfoundland and Labrador on the other?

MR. BERTRAND: No. The whole point is that Quebec, as always, contended that it owns Labrador.

PROFESSOR CRAWFORD: Yes, I understand that. But that's a land claim which would have certain maritime consequences. It's terrestrial in every sense.

MR. BERTRAND: Yes, but it would move the last turning point further up, obviously.

PROFESSOR CRAWFORD: So you think that the word "other" was used in Newfoundland --

MR. BERTRAND: Could be.

PROFESSOR CRAWFORD: -- legislation with a possible view to the success of the Quebec link to Labrador, is that it? It is very open minded of them.

MR. BERTRAND: One thing that I was -- that was brought to my attention in the break as well was the fact that the map that Mr. Minister Doody attached to his May -- his October 6th 1972 letter depicts or shows a line that goes beyond the line that the parties had agreed to in 1964. Although it is slightly at a different orientation, it does go further out. The line depicted on the map in 1961, yes, not in the Agreement. So it's interesting that even in Newfoundland's view, the Agreement of 1964, whatever it was according to them, was intended to delimit the offshore areas well into the continental slope -- continental shelf.

PROFESSOR CRAWFORD: Mr. Bertrand, there is no indication, is there, in any of the documents as to what the rationale would have been for the line that is shown in the map annexed to the Doody letter?

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: So we don't have any technical basis --

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: -- for inferring one line to the other?

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: Could they both be described as southeasterly?

MR. BERTRAND: Southeasterly, yes, not southeast. And while we are on this issue, I'm not sure that I misspoke but if

I did, let me be clear that our position is that if there is an area of interpretation it is only with respect to the segment of the "line" described as thence SE to international waters. But the point remains that the parties meant to agree on a "line" even for that sector. And so it's not a question of whether there was an agreement or not, it's a question of interpreting, at worse for our case and best for Newfoundland's point of view.

What the "line" was -- and this sector described it thence SE to international waters. And we are saying that this is a matter for Phase 1 and not Phase 2.

PROFESSOR CRAWFORD: But in the situation that now prevails, that question of interpretation also involves the question what are we to do with that "line", having regard to the fact that the line is intersected by territory now definitively attributed to a third -- maritime territory now definitively attributed to a third state?

MR. BERTRAND: If I may?

PROFESSOR CRAWFORD: So there is a question --

MR. BERTRAND: We will reserve on that, if I may, because it may be tied to the -- partly to the answer which we will provide you with respect to the status of the claim of France in 1972, what eventually happened.

One last thing I would like to come back to is the

issue of when the dispute crystallized. I think we have made it clear in our Memorial at page I, VII that the dispute finally crystallized in 1997 when the Federal Minister indicated so to Nova Scotia under his authority pursuant to the legislation.

There had been -- and I refer you on this issue to footnotes 11 and 12. There had been previous correspondence of Newfoundland to the federal government under Annex 4, a letter of Minister Gibbons of Newfoundland to Nova Scotia on August 15, 1995.

And that letter states, "I'm writing now to advise you that the government of Newfoundland and Labrador supports a process of negotiation to resolve the Newfoundland/Nova Scotia offshore boundary. We have begun comprehensive preparations for these negotiations. Once these preparations are complete, I will be in contact with you to arrange a mutually acceptable time to commence negotiations."

Nothing further was done until 1997 when Newfoundland wrote or communicated with the federal government and then the Minister wrote to Nova Scotia saying, under my authority pursuant to the Act I declare that there is a dispute and I will thus commence negotiations or a consultation process.

MR. LEGAULT: Mr. Bertrand, I can't recall the Annex number,

but there was a point at which Newfoundland submitted, I believe it was called a proposal, for the outer segment of the line, a new proposal. Can you refresh my memory on that? What --

MR. BERTRAND: I think it's in the spring of 1998, but we will try and find it.

MR. LEGAULT: When you do if you could just --

MR. BERTRAND: Yes.

MR. LEGAULT: -- bring it to our attention at that time? Thank you.

MR. BERTRAND: Thank you.

PROFESSOR CRAWFORD: The question -- I mean, the Minister couldn't have brought into existence a dispute that did not already exist. I mean, he could have determined that there was a dispute for the purposes of giving effect to provisions of the Federal Act.

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: In any event, your position is we are applying international law and applying international law, even going back to the Doody letter of 1972, it is true that this is described as a -- well he says they are not questioning the general principles which form the basis of the present demarcation.

But then the letter then goes on to qualify that proposition in various ways. I mean, if this had been

correspondence between two states in international law, I would have been inclined to say looking at the map that there is a serious divergence between the two of them and at the very least a serious potential dispute, but quite possibly an actual dispute, certainly a dispute about to occur if this divergence continues.

MR. BERTRAND: On a technicality that is our submission.

PROFESSOR CRAWFORD: Yes, but one person's technicality is another person's resources. The difference between the two lines shown on this map is pretty --

MR. BERTRAND: Well --

PROFESSOR CRAWFORD: -- pretty -- I mean, it is not a minor -- it's not a minor matter when you extend those lines out. It covers a very large amount -- area.

MR. BERTRAND: I will concede that if we were to calculate the square mileage area between these two lines, it would be substantial, but I don't think that it changes the nature of the problem. Again, it's a matter of drawing the line that the parties described in the notes re boundaries.

And furthermore, as you will see in a few minutes, hopefully, Professor Saunders is anxious to come up here -- you will see that we are talking about the summer, early fall of 1972. In 1971 Newfoundland issued the Katy permit right along the 135 line. I mean, how do we reconcile

both? I think it's a reasonable submission to say that this is purely a technical matter of drawing the line that has been agreed to between the parties.

Quickly, if I may, there are other documents that Newfoundland rely as -- upon to state that it did object formally to the '64 Agreement and to having taken part in it. One in particular is the account of the May 3rd 1973 meeting between federal and provincial officials.

And we find these statements by officials of Newfoundland at slide 78. Newfoundland states that it was made clear at that meeting that Newfoundland did not accept the interprovincial boundaries. And we submit that it is not quite what the account tells us.

At that meeting Mr. Kirby asked point blank whether Newfoundland accepted the provincial offshore boundaries. The answer of then Minister Barry who had just replaced Minister Doody, indicated that Newfoundland had not decided on a final position. That's far from saying we don't agree.

A number of documents relating to this seems to be missing from their files. Obviously if they are looking for the contract where everyone has signed off, he was not about to find it.

Furthermore, Cabot Martin, who also attended the meeting, then is reported as having said that in the view

of Newfoundland -- in the view -- in his view, the Premier of Newfoundland had not participated in the Interprovincial Conference at which the boundary lines were accepted. That obviously reveals an ignorance of the facts.

He considered that Newfoundland did not accept the actual lines. He does not deny the 1964 Agreement. And it is obviously only a few months after Minister Doody wrote the letter and said well there is something wrong about the line the way it's drawn.

So he says we did not accept the actual lines, which appeared to have been drawn using strange baselines. Not only did he not -- was he not aware of Mr. Smallwood's participation to the 1964 Agreement, but he was obviously unaware of Premier Moores' agreement with the turning points in 1972, and was unaware of the details of the boundaries agreed to by the provinces and the means used to determine them.

We know from the historical record that this line had not been drawn using baselines. So his statement that strange baselines had been used is obviously very revealing of his lack of knowledge of the matter.

There are also comments of Newfoundland's legal advisor, Mr. Penney, on the implementing legislation of the Canada-Newfoundland Atlantic Accord. It's basically a

memo to Cabinet describing what the Accord legislation purports to do.

And Newfoundland states that Mr. Penney explained that the line between Newfoundland and Labrador and Nova Scotia had not yet been resolved. This is an internal document of Newfoundland. But nevertheless, we submit that this statement is over-reaching. Because when we look at what Mr. Penney actually wrote, we see that it's in the context of signing an agreement with the federal government and getting the federal government to agree to a line.

What was not acceptable to him was the fact that ultimately the federal government would have -- would be empowered to determine what the line would be.

There is another statement of a regulatory affairs specialist, Mr. Laracy, found under -- in the Newfoundland documents number 109. What is interesting here, we have heard the name very recently. This gentleman gave an interview on Sunday morning to CBC Radio as a neutral observer on this file. So obviously he would have some prior knowledge of it in some sort of official capacity.

But Newfoundland states that at a meeting in 1992, just on the eve of the St. Pierre Miquelon decision being issued, there was a meeting where Newfoundland would have clearly stated that they disagreed with the line.

And again, what is said there is somewhat different.

The official says to my knowledge the province has never officially recognized the boundaries which abut our offshore areas as set out in the Nova Scotia Accord Act.

First we have to recognize that this is a statement made by an official who did not attend these various meetings.

But the kind of -- this kind of statement, in our submission is akin to saying, well, I don't really say that we did not say yes, but it does not count, because we did not officially agree to it.

There was an agreement or there was not an agreement. And obviously, these statements are insufficient to support Newfoundland's view that it made clear that it was not a party to that agreement. It didn't consider that this was an agreement that had occurred and that it was not in agreement with the result of that agreement.

They may have been unhappy with the result of that agreement 20 years after, but it doesn't change the fact that there had been an agreement.

In order to let Mr. Saunders be in a position to address the issue of subsequent conduct in respect of the permits, I will directly go to Nova Scotia's alleged admissions made by Mr. Kirby. This is slide 86. This is one of the documents referred to by Newfoundland in support of its position that Nova Scotia knew that all

along and even recognized it in the context of meetings with federal officials.

What we have to understand is that at these meetings what is starting to transpire is that Nova Scotia is going its own way. It has undertaken negotiations separately from the other provinces. And the federal officials are starting to wonder what is going to be the impact of that on their ability, for example, to define what the applicable territory of these agreements will be in the absence of certain parties to the table.

So in response to a concern expressed by Mr. Austin, which I will read to you, he asked Dr. Kirby of -- I am sorry -- page 6 of document 66. He asked Dr. Kirby to secure written confirmation that Newfoundland has withdrawn from the East Coast provinces group and has no further interest in these negotiations and their outcome. Queried whether any problems would arise from the withdrawal of Newfoundland, for example, as regards interprovincial boundaries, and this is where Mr. Kirby indicated his understanding that there had been an agreement on boundaries among the provinces some years ago, but that Newfoundland claimed they had no written evidence of Newfoundland's acceptance of these boundaries.

That's not saying they don't agree. That's not saying they deny having agreed. And that's saying we don't have

an actual piece of paper that will enable us to say that they are bound. This is the proof of their commitment, of their agreement. It's always in the context of trying to agree with two parties, Quebec and Newfoundland, being absent from the negotiations, and the ability of the remaining parties, potential parties to an agreement, to make sure that they have an agreement that will be legally enforceable.

PROFESSOR CRAWFORD: The fact is that Newfoundland wasn't represented at that meeting?

MR. BERTRAND: It was not. Correct. These are meetings that are being held between the remaining provinces and the federal government. The provinces that are still part of the common front.

PROFESSOR CRAWFORD: And Deputy Minister Austin thinks that Newfoundland has withdrawn?

MR. BERTRAND: Correct. Well he probably knows by now because we are '74.

PROFESSOR CRAWFORD: Yes.

MR. BERTRAND: And Newfoundland has filed its proposal in early '73.

PROFESSOR CRAWFORD: But in the context, it's some distance away from a Newfoundland acceptance of the boundaries until 1990's, isn't it?

MR. BERTRAND: I think what we are saying is that they

failed to protest. They say that it was clear to everyone. And what we say is that they failed to protest.

As we -- as I said earlier, I think with the benefit of hindsight, with the benefit of a review of federal documents that we never had access to before this case began, we now see that Newfoundland is trying to take its distance from the deal it struck back in 1964.

That's obviously a different situation than what it did in practice, how it conducted itself in terms of issuing permits. And this is where Professor Saunders will come in and say, well strategically in the course of negotiations, this is what they were trying to do obviously, but in practice they were still using the 1964 Agreement and behaving as though it was binding on themselves.

The same comments may be made in respect of the following document, August 13, 1974 report of Mr. Kirby to his government outlining what had happened during the negotiations with the federal government. And there is a comment in there about the need to have a precise determination or definition of the boundaries between the provinces.

We submit that this is taken out of context because -- and it's given too much importance, because obviously it is considered a purely technical problem. It pertains to

issues relating to the negotiations between the federal government, on the one hand, and the provinces, on the other hand. And again it is a reflection of the parties, remaining parties at the table, and especially the federal government to ensure that whatever they would be agreeing to would be legally enforceable.

It is purely technical, because Mr. Kirby says he is confident that it is something that can be resolved by further negotiations at the officials' level. It certainly does not refer to Newfoundland's recently stated position that it never accepted the 1964 Agreement.

PROFESSOR CRAWFORD: I found that statement by Nova Scotia rather surprising, because leaving Newfoundland to one side, you had the -- what in your view is the 1972 Agreement --

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: -- on turning points. I can't understand how you can say that in the light of the relatively precise determination of turning points, there would be any doubt about which was the adjacent territory within the Gulf of St. Lawrence. I mean, I could see that there could still be doubt out to sea, as between Nova Scotia and Newfoundland, but the paragraph refers to the five eastern provinces. So it's just slightly odd. How could there have been any doubt as between say Prince

Edward Island and Nova Scotia?

MR. BERTRAND: I think it's as a whole and not necessarily with respect to a particular instance. I don't think that the -- Mr. Kirby's comments refers us to any particular instance where there is a problem.

I think it's more again a reflection of a concern by the federal government consistent with the comments made by Mr. Austin in 1974. And consistent with the comments -- comments as well of Mr. Thorgrimsson in 1974 about the likely impact of the withdrawal of Newfoundland. And how can we get to an agreement that will be legally enforceable? I must confess to not having a better answer than that.

PROFESSOR CRAWFORD: There probably isn't a better answer. The fact is that different officials were dealing with this at different times. And there was obviously some awareness both of the existence of earlier discussions and agreements, and also that more might need to be done.

MR. BERTRAND: Yes. Finally on the Nova Scotia front, there is one last document which purports to -- 95, which purports to report a statement made by an official of Nova Scotia by the name of Graham Walker, who during one of these negotiations between the federal level and the provincial officials, would have said -- he commented that there would be only one area of controversy, that between

Nova Scotia and Newfoundland. We have to read the whole context again to understand the scope of his comment.

Mr. McNabb from the federal government is said to have noted that the provinces would have to agree among themselves as to how they would share the revenues. He raised the question of the territory to be covered by the agreement.

It's then that Mr. Walker said -- commented that there would be only one area of controversy, that between Nova Scotia and Newfoundland. And then Mr. McNabb from federal government says well -- remarked that it would be necessary also to consult Quebec and Newfoundland with regard to the interprovincial lines of demarcation. Why? Because they are not sitting at the table again.

And then Innis McLeod, Deputy Minister Justice at this time -- at that time rather, noted that Nova Scotia had on file a telegram from Premier Lesage accepting the interprovincial lines of demarcation agreed to in 1964. Unfortunately, we didn't have anything from Newfoundland, other than the joint communique.

So our submission is that this statement of Mr. Walker was made in a particular context addressing a particular concern that we have just described. It refers to a possibility where in 1976, and is also consistent with similar concerns being voiced regarding Quebec's absence

from the table, as we see.

We submit that it's not indicative of a disagreement between the East Coast Provinces over the issue of the boundaries, and is simply thus a reflection of the absence of certain interlocutors from the table.

Finally, the last category of documents, and I'll go quickly over these, because while addressing previous documents I think all of the points were made. The documents emanating from the federal government, as we've seen several, are accounts of negotiation meetings between federal and provincial officials, where the federal officials voiced concerns about the meaning and possible impact of Newfoundland not being present at these meeting, and having decided to go its own way. And where federal officials raise doubts about whether or not Newfoundland will challenge the boundaries that they agreed to in 1964.

All of these documents, I submit, assume, presume from the federal government that there had been an Agreement in 1964. So, when Newfoundland states that the federal government doesn't appear to have been aware of this Agreement, I think there are -- the record is replete with documents evidencing the federal's knowledge, but unwillingness to consider itself bound by this Agreement.

Other documents refer to the need, that we've seen just a few minutes ago. To the need in the context of

federal-provincial agreements for the federal government and the provinces involved to agree on delimitation lines between the provinces in the offshore areas, to make sure that they have an agreement that will be legally enforceable, absent the participation of certain provinces.

And these, again, are only indicative of the federal government's long held view that it was not bound by the 1964 Agreement further.

Finally, other more recent documents reveal the federal government's attempts once Newfoundland had indicated that there existed a dispute, or that it wanted to negotiate the boundary with Nova Scotia, to resolve it by negotiations between the parties, and I refer specifically to the EP Letters, and then subsequently the letter of the Federal Minister stating that he was exercising his authority under the legislation.

And thus we submit that none of these are really helpful to establish whether Newfoundland disagreed or protested officially, formally, informally to Nova Scotia the boundaries established by the 1964 Agreement, subsequent to 1972.

Finally, and more importantly, Newfoundland's analysis studiously ignores the various documents emanating from the federal government in which the existence of the '64

Agreement is recognized.

According to Newfoundland, the various documents emanating from the federal government are inconsistent with the notion that the 1964 Agreement is binding on Newfoundland, and this is false. It's not incorrect, it's simply false.

And I just remind you, just refer you back to the notes to file of Dr. Crosby, of his conversations with Stu Peters, and Innis MacLeod, after the June 18, 19, 1972 meeting of the Premiers. That confirms the opposite. That confirms that the federal government was fully aware of the Agreement.

And finally, a new document, new to this presentation, the August 4th, 1976 letter of Prime Minister Trudeau confirms the opposite too. We're kind of late in the game in 1976, and Premier Trudeau -- Prime Minister Trudeau writes a letter to the Premiers, offering them a proposal in terms of revenue sharing.

As part of his proposal under Schedule 1, we deal, or he deals with the issue of boundaries. And it says there that the proposal, with regards to limits of the areas to be covered by the arrangement, the international -- the interprovincial lines of demarcation agree upon by the five eastern provinces in 1964 would be accepted as a basis for settlement.

So even though the federal government did not consider itself bound, it was ready -- it was knowledgeable of the Agreement, and was ready to use it in the context of an Agreement to be entered into with the remaining provinces.

PROFESSOR CRAWFORD: In that paragraph is he talking about the boundaries between the provinces inside the, what are called the Mineral Resource Administration Line? Or is he talking about the distribution of revenue beyond those lines? If you look at the preceding paragraph --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- where he says "The federal government is..." --

MR. BERTRAND: Also prepared?

PROFESSOR CRAWFORD: "...prepared to consider relocating the mineral resource administration lines, land of which mineral resource revenues would accrue to the provinces. And this would be a minimal of five kilometers from the shore." Obviously this was a modification of the earlier federal position that those mineral resource administration lines would basically --

MR. BERTRAND: Correct. The provinces had never agreed to these.

PROFESSOR CRAWFORD: No, of course not. But the question was whether the Prime Minister was saying that the 1964 lines would -- would delimit provincial areas inside or

outside those administration lines. I mean the --

MR. BERTRAND: By the proposal that was being made, it -- it would be outside.

PROFESSOR CRAWFORD: Yes.

MR. BERTRAND: At the very nature of the proposal that was being made, it would be outside.

PROFESSOR CRAWFORD: Any suggestion of there being any pooling of revenue had disappeared by this stage?

MR. BERTRAND: Had disappeared by this stage, indeed. There was no notion of an Atlantic pool that would not call upon interprovincial boundaries.

So at that time the federal government was indeed willing to use the interprovincial lines of demarcation agreed upon by the five eastern provinces in 1964.

Unless you have further questions I will -- unless there are further questions I will ask you, Mr. Chairman, to invite Professor Saunders to address you on the issue of subsequent conduct of the parties as regards issuance of permits.

CHAIRMAN: One thing that concerns me here on -- as far as the Tribunal is concerned, is that you were at length in establishing, you know, from your perspective, that there was an Agreement. Now, assuming the Province went along with the notion that there was -- not the Province, the Tribunal went along with the notion, I'm saying this to

you, but it is a more general thing about the tactics.

MR. BERTRAND: Yes.

CHAIRMAN: We will be getting argument, of course, that might be an Agreement, but insofar as it was an Agreement, it was a -- not at the treaty level, or at least the international level. I don't know what the Tribunal will think about the arguments when they have heard them. But we will have one side of an argument on that issue, and I wonder if it is proposed ultimately for your side to say anything about what an Agreement under Canadian Law would be, or -- and certainly I don't expect any concessions of any kind from you. I just want to -- I'm just asking as a matter of --

MR. BERTRAND: We are prepared -- we are prepared to address that, and Ms. Hughes will be here this afternoon, and the question may be put to her. She will be prepared to answer it.

CHAIRMAN: Thank you.

MR. BERTRAND: Thank you. Mr. Chairman, can we take a two minute break so that Professor Saunders can be wired?

(Brief Recess)

CHAIRMAN: Yes, Mr. Saunders.

PROFESSOR SAUNDERS: Thank you very much. Mr. Chairman, it's a great pleasure to be here representing my own province. I guess it's an anomaly today. My colleagues

have asked me to provide, before I begin, a brief answer for the convenience of Mr. Legault, who had asked a question about a map presented in the annexes.

The map referred to was received by Nova Scotia on July 22nd, 1998. It's contained at Annex 7 of the Nova Scotia Memorial. It was marked "without prejudice" as a letter from Newfoundland. It followed on from a meeting of April 9th, 1998 with the representatives of the Government of Nova Scotia and legal counsel, Mr. McRae, on behalf of Newfoundland, where a similar line had been presented in footnote 14 of the Nova Scotia Memorial in part one. That has nothing to do with my presentation.

Mr. Chairman, my colleagues have already provided a quite complete overview of the historical events that surrounded the conclusion and application of the 1964 Agreement, including much of the conduct of the parties subsequent to 1964.

I would like to turn back now to a particular, but, we think, very significant aspect of that subsequent conduct. And that is the activities of the five provinces, particularly Newfoundland and Nova Scotia, in legislating for and actually issuing permits for oil and gas exploration activities on their offshore areas, activities which are dealt with in some detail in Appendix A and Part II of Nova Scotia's Memorial.

I will not be reviewing all of that conduct in detail, although it may seem like it at times, given the material, but I will focus on some of the central aspects, and I particularly want to deal with the arguments introduced by Newfoundland by way of response in their Counter Memorial.

I should also note at the outset that is shown in the slide -- if we can go back to the previous slide -- that the federal government was issuing permits in the offshore throughout the period that I will be reviewing. This map shows federal rights, for example, issued up until 1970.

Second, some of these conflicted with provincial permits; others were issued to match the provincial permits, but the conduct does not directly engage the parties to the Agreement, and I will not be dealing with the federal permits further.

I would note, however, that the very extensive federal permits issued well out on the continental shelf by 1964 certainly would have served to put the Premiers on notice as to the likely extent of Canadian claims to the offshore at that time. And that would be the areas marked in the very pale purple sort of colour on that map.

PROFESSOR CRAWFORD: Mr. Saunders, I understand that notwithstanding the decisions of the Supreme Court in 1967 and subsequently, the provinces continued to issue licenses beyond territorial -- beyond territorial waters

in the narrow sense.

PROFESSOR SAUNDERS: That's correct.

PROFESSOR CRAWFORD: Under their own legislation?

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: Why wasn't -- on what basis was that legislation constitutionally valid?

PROFESSOR SAUNDERS: Well, it varies from province to province, but without getting into the constitutional debate, which I am a little wary of doing, my understanding of the position of the provinces, at the time, and, indeed, to the present date for provinces that have not actually challenged and lost on jurisdiction, is that the decision, for example, in 1967 on the BC offshore was particular to the facts. And that the facts might be different in different places for different provinces. That was certainly the position of Newfoundland in taking the Hibernia Challenge.

PROFESSOR CRAWFORD: Yes, but, of course, Newfoundland lost.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: But did Newfoundland continue to issue licenses after it lost?

PROFESSOR SAUNDERS: Not to our knowledge. By that point, they were already moving into the Accord phase.

PROFESSOR CRAWFORD: Right. But the other provinces treated themselves as in a special position?

PROFESSOR SAUNDERS: By the point of the Hibernia Challenge, Nova Scotia had already moved into an agreement with the Canadian Government.

PROFESSOR CRAWFORD: Yes. And the companies which had provincial licenses paid money to the provinces?

PROFESSOR SAUNDERS: We don't know how much. In some cases there's not much in the way of records as to what was actually paid, and, of course, nothing was produced, so the real money beyond applications was really not developing.

PROFESSOR CRAWFORD: I see.

CHAIRMAN: So far as money was concerned, there was a provision, I think, in the permits that it would be that money and only that would be returned if it wasn't valid or --

PROFESSOR SAUNDERS: Yes. I believe that most -- all of the permits that I've seen, I should say, contained either a caveat in the case of the Nova Scotia permits, or a separate letter in the case of some of the Newfoundland permits, basically absolving the province of liability should they turn out to lose on jurisdiction.

We should note, as well, that the Accords themselves are without prejudice to ultimate constitutional claims, but relevant, as well, to some of the provincial practice that I'll be discussing, the situation in the Gulf of St.

Lawrence is fundamentally different, potentially, from a constitutional standpoint than some of the other positions, but again, we don't have to determine the constitutional question within the boundaries of the Accord Acts themselves.

Now in Nova Scotia's submission, leaving aside the federal permits, the evidence surrounding the issuance of provincial permits supports the view that the provinces, beginning in 1964 and throughout the following years, considered themselves to have concluded a binding agreement for the delimitation of their respective offshore areas. It was an agreement that they were obligated to apply in their own regulation of the offshore and their issuance of permits as well as in their dealings with the federal government, an issue already addressed by Mr. Drymer and Mr. Bertrand.

Additionally, the subsequent conduct of all of the parties provides, in our view, powerful evidence as to the interpretation of the Agreement that occurred in 1964, an interpretation given to it by the parties on two central issues.

First, it shows that the boundaries agreed in 1964 were to be applied regardless of whether or not full ownership and jurisdiction had actually been vested in the provinces at that time.

Second, it shows that the provinces agreed and knew they had agreed on the division of the entire continental shelf accruing to Canada under international law, and that the delimitation of the outer segment was to be on the 135 azimuth line, southeast to the limits of Canadian jurisdiction.

Now I'll be addressing these in more detail later, but Newfoundland, in its Counter Memorial, has two general responses to all of this evidence.

First, much of it simply didn't happen in the manner suggested by Nova Scotia. "We have", in the words of the Newfoundland Counter Memorial, at paragraph 80, "been crystal ball gazing when we should have been looking at the facts." I will deal with that contention further in the course of my submissions.

Second, and more broadly, Newfoundland repeatedly asserts that all of this conduct is irrelevant, although they don't actually say that about their own conduct.

The central relevance of subsequent conduct in law, especially subsequent conduct so directly related to the main subject matter of interested parties, will be dealt with by Ms. Hughes. I had to say that because everybody else has.

PROFESSOR CRAWFORD: We were waiting.

PROFESSOR SAUNDERS: Yes, we booked her a week, I think.

But I would like to touch on its special significance in the context of this dispute as a practical matter. The importance of the permit issued to the boundaries is highlighted by the fact that the original instigation of discussions on interprovincial boundaries arose from a concern with the issuance of offshore permits.

Mr. Drymer has already dealt with the fact that the first provincial initiatives on the offshore were intended to respond to the apparent need for interprovincial boundaries arising from the eminent need for permits.

As indicated in this memo which was referred to in Mr. Drymer's presentation, the participants from the beginning were worried about the permits and they were worried about potentially conflicting offshore rights issuance. They understood that if boundaries were, in the words of the Newfoundland Memorial, "inextricably linked" to anything, it was inextricably linked to the problem of potentially conflicting offshore rights.

So if permits were central or at least extremely important to the need for a boundary from the very beginning, then the subsequent conduct surrounding the actual permit issuance of the parties is also clearly relevant to understanding any agreement on the boundary, contrary to what Newfoundland has suggested.

And, indeed, in a way, this point is effectively

conceded by Newfoundland when it states at paragraph 211 of its Counter Memorial that "The issuance of permits by Newfoundland and Labrador..." -- and I quote -- "...was part of its strategy to assert exclusive jurisdiction over all of the offshore resources adjacent to its coasts."

If this is true, then it is clear that those permits, as with the permits issued by Nova Scotia, were a reflection of that assertion of jurisdiction by the provinces, and the limits of those permits, where relevant, would be expected to reflect the limits of jurisdiction with respect to the provinces.

Now my submissions on this issue will be organized as follows. I would like to deal with the practice of Quebec, New Brunswick and Prince Edward Island a bit more in brief than in the other -- Nova Scotia and Newfoundland, as things seem to be a little more settled on the Gulf at the moment.

I'll deal with Nova Scotia's offshore exploration permits and Newfoundland's offshore exploration permits broken down into parts, and finally, consider the impact and the relevance of these facts as I'm going to present them to the arguments presented by both Nova Scotia and Newfoundland in a broader sense. In particular, the recognition and implementation of the '64 Agreement boundaries by all parties, the fact that this conduct

reveals the impossibility of Newfoundland's theory of the dead proposal, the dismissal of Newfoundland's firm assertion of a preoccupation with the Gulf of St. Lawrence, and finally, and critically, the application of the 135 line in the 1960's and 1970's by Newfoundland and Nova Scotia.

But to begin with the practice of Quebec, New Brunswick and Prince Edward Island, the other parties to the 1964 Agreement. All of these provinces, in brief, have consistently applied the boundary as agreed in 1964 for the purpose of defining their offshore areas, and particularly, for designating the limits of areas in which permits may be issued.

In New Brunswick, by the application of the boundary and legislation; in Prince Edward Island, by the application of the boundary in the permit map under their legislation, and in Quebec through published official maps and through actual use in permit issuance.

To begin with New Brunswick, this is the standard oil and natural gas grid map, part of the regulations under New Brunswick's Oil and Natural Gas Act. This map is figure 11 in the Nova Scotia Memorial.

The map clearly applies the boundary agreed in 1964 -- and this can be checked and we'll defer to your technical expert -- confirming this as the current extent of New

Brunswick's assertion of jurisdiction for oil and gas rights. And again, New Brunswick has not yet had an unsuccessful court challenge.

Next, this map shows very poorly, but it's from the copy we had, the official published map by which Prince Edward Island defines its permit areas under its Oil and Natural Gas Act. It's in the Nova Scotia Memorial at figure 12. This map clearly -- well, somewhat clearly -- applies the 1964 Agreements, and, in fact, on very close examination -- I wish I had brought you a magnifying glass -- it can be seen that the permit actually uses the turning point numbers used by the JMRC in 1972. There's no doubt about the providence of this line.

Newfoundland has suggested at paragraph 242 of its Counter Memorial that Prince Edward Island has now adopted a new statutory definition which Newfoundland says does not correspond to the agreed boundary. This definition, in fact, refers to provincial lands as the land mass of Prince Edward Island, and, as it always did, to the limits of PEI's sovereignty in the offshore, and adds "And to such limits as may be set by federal/provincial agreement."

Newfoundland's interpretation has no real basis. The definition shown here simply allows for the extension of jurisdiction to the limits of the province's sovereignty,

the old formulation, and adds the words "And to such limits as may be agreed by federal/provincial agreement." It's an additional definition. It doesn't eliminate the current one and it does not eliminate the map which is currently in use by Prince Edward Island. All it does is allow for limits under a future agreement, which may be, in fact, less than what could be claimed here. There's no new defined boundary that fails to correspond to the '64 Agreement.

Now to Quebec --

PROFESSOR CRAWFORD: I'm sorry --

PROFESSOR SAUNDERS: Oh, yes.

PROFESSOR CRAWFORD: Just put it down to my ignorance. Why are there no Accords with the other Atlantic provinces?

PROFESSOR SAUNDERS: It's a political question. There have been none negotiated. It may be lack of interest. It may be lack of the stakes that Nova Scotia and Newfoundland had in the issue, but I would be speculating.

PROFESSOR CRAWFORD: And what about with Quebec?

PROFESSOR SAUNDERS: Quebec is a different issue, but we have heard that there are -- there are negotiations, as I believe was mentioned at the beginning of the Premier's presentation, but no other Accords have been negotiated.

But with reference to Quebec's own practice, Quebec has not legislated a permit grid system or boundaries

specifically for offshore permits. But its practice with respect to the boundary has been completely clear and consistent. And in fact, in reading the annexes you may find that it was often the Quebec representatives that were often the best informed on the origin of the boundary.

These first two illustrations show published maps of the government of Quebec from 1968 and 1998 from their Department of Natural Resources or equivalent showing Quebec's own view of the extent of its offshore zones. Allowing for the fact that the first map, the 1968 map was prepared without the detailed turning points prepared by the Joint Mineral Resources Committee. It is clear Quebec regards its offshore limits as though set out in the 1964 Agreement.

This next slide shows a more recent practice and places Quebec's practice squarely in the context of oil and gas permits. This is -- this map is originally at Nova Scotia Memorial, Figure 15.

This is the 1999 map, which shows offshore boundaries -- sorry, offshore permits issued by Quebec with the 1964 Agreement boundaries clearly marked and one large permit block in blue directly abutting the Newfoundland boundary. It is readily apparent where Quebec believes its boundaries lie.

In sum, what does the practice of the other provinces give us? In Nova Scotia's view first, it tells us that the other provinces who were parties to the 1964 Agreement have been scrupulous in recognizing and applying the boundaries.

Second, they have shown this consistent conduct spanning more than 35 years. And third, they have applied the boundaries not because they are required to under federal legislation, but purely as part of an interprovincial arrangement and agreement, completely contrary to the Newfoundland view that the Agreement required federal approval and legislation before it could mean anything.

PROFESSOR CRAWFORD: The evidence that they have done this because they regard themselves as parties to the Agreement, you have shown that the Prince Edward Island map uses the turning points based on the 1972 Agreement. What other evidence is there?

PROFESSOR SAUNDERS: Quebec I believe in the meetings in 1972, '73, was very clear that they had agreed the boundaries and continue to apply them ever since.

New Brunswick, it simply -- in all three cases really, the level of coincidence that would be required to achieve exactly the right turning points in all of these boundaries would be phenomenal. And all of them match

with one exception, Quebec has closed the boundary to the land mass in the Labrador area, but we don't wish to get into that one. But in terms of the offshore boundaries themselves, it is consistent.

Now Newfoundland's response is -- yes, sir.

PROFESSOR CRAWFORD: Sorry, a supplementary question. The concurrent conduct shows that there is an agreement, at least you might say a convention, and does it show that there is a binding agreement, and do you need to show that? Or maybe this is a matter for -- the long list for Ms. Hughes.

PROFESSOR SAUNDERS: Yes. It is our position that subsequent conduct is relevant to both issues, as to understanding the intention of the parties at a previous time, which Ms. Hughes is addressing, I do know that. But it is also in our view extremely relevant to showing -- and once we have established that they were part of an Agreement, of course -- that they interpreted the Agreement in a particular way, although that is going to be more relevant to the conduct of Newfoundland and Nova Scotia where the interpretive problems might arise.

Now Newfoundland's response is a little more basic than yours, Professor Crawford. Newfoundland's response to the practice of the other provinces is simple. First, that the evidence presented by Nova Scotia is fragmentary,

in the words of the Newfoundland Memorial. Well it is -- all historic evidence is fragmentary in the sense that it is never complete.

But Nova Scotia has presented some rather substantial and concrete fragments, we would submit. In the absence of significant evidence to the contrary, we submit that it is more than sufficient to understand the practice and the views of these three provinces.

More bodily, however, Newfoundland simply asserts that this practice is again irrelevant. Why? Because these provinces do not have their own offshore Accords with the federal government and are not parties to the arbitration. And with respect, this misses the point.

This material was introduced as evidence of what the parties believed. And the practice of the other three parties to an Agreement after its conclusion provides a clear indication as to what they thought they had done. What they believed their obligations were.

If all three of these provinces, as with Nova Scotia and Newfoundland, came away from the Agreement and applied it in their practice, it is extremely relevant in confirming what all of the parties thought they had done in 1964. Certainly it is more relevant than the views of a non-party, such as the federal government, on which Newfoundland places such enormous reliance.

Second, and this relates to the question of the Accords, the application of the boundaries by provinces in the absence of a federal/provincial agreement is completely supportive of Nova Scotia's case and we would submit, completely dismissive of Newfoundland's.

Newfoundland says the parties in 1964 knew this was just a proposal. They knew it had no effect once it was rejected by the federal government. How then do we explain the consistent practice of three provinces who still assert their offshore claims and have not had them approved by the federal government? They still reject it. Yet in the absence of the federal approval and in the absence of an arrangement like the Accords, they still respect the obligations they assumed in 1964.

Now if I may, I would like to briefly review the status of the other three provinces and turn to Nova Scotia. The other three provinces, we would argue, it's clear. Scrupulous recognition of the boundaries. It is consistent over 35 years, as I said, and it has been applied as part of an interprovincial agreement with no need for federal approval.

If we could turn now to Nova Scotia. Nova Scotia was heavily involved in permitting offshore activities during the 1960's and 70s, prior to the offshore agreements with the federal government beginning in particularly in '82.

I will review this briefly, but the matter is, of course, covered in more detail in Appendix A and in Part 2, paragraphs 88 and 89 of Nova Scotia's Memorial. But it is necessary here to deal in some detail with particular allegations made by Newfoundland respecting the nature and the significance of Nova Scotia's permit activity.

I would like to begin with this map. As is clearly shown in this map of Nova Scotia's permit grid system, which is Figure 16 of the Nova Scotia Memorial, in the 1960's and into the 1970's, Nova Scotia issued all of its offshore exploration permits, so -- when they were in the area of the boundary, so as to abut and not to cross the agreed boundary line. A line that was clearly marked on a published map, and I will return to that issue. A map that is based on the national -- a standard national topographic grid system.

The precise method of determining permit placement is explained in gruesome detail in Appendix A of the Nova Scotia Memorial, but the main point of relevance is clear. In its permit issuance, Nova Scotia has consistently and openly respected and applied the boundary as agreed in 1964, including the 135 azimuth line running to the outer segments of the shelf.

Now Newfoundland has disputed Nova Scotia's contention that it has applied or that it has openly applied the

boundary in its offshore permit activities. I would like to deal first with the question of whether Nova Scotia applied the boundary and then the separate question of whether it was done openly.

Newfoundland, at paragraph 76 of its Counter Memorial, states categorically, that the map presented as Figure 16 does not contain in their words "the turning points prepared by the Joint Mineral Resources Committee", which it was likely to have done at that point. Nova Scotia's -- Newfoundland's assertion, rather, is simply wrong. The turning points are clearly plotted on the large scale maps which provide the detailed breakdown of the overall map.

If I can turn to the next slide. This shows -- we must tell you, we added the red figure to this, just to highlight it -- Annex -- at Annex 122 of its Memorial, Nova Scotia included the detailed map section shown here, Sheet 11 O. it shows the plotted turning point for the mid-point between St. Paul Island and Cape Ray. This point is also shown in the blow-up provided as Figure A-2 in the Nova Scotia Memorial. All of this information was provided with the Nova Scotia Memorial and thus was available to Newfoundland.

If the Tribunal wishes or if Newfoundland requests other examples of the application of the turning points in the detail sheets, can be provided.

Second, Newfoundland has alleged at paragraph 237 of its Counter Memorial that quote, "Nova Scotia did not limit permits in the outer area by reference to any boundary."

Now this is a critical contention, which is obviously at odds with the map already presented and obviously is critical to the issue of the interpretation of the 135 line. And it is based entirely on Newfoundland's erroneous and selective interpretation of the permits issued by Nova Scotia.

Newfoundland claims that Nova Scotia followed one practice for permits issued inside the Gulf of St. Lawrence and the Cabot Strait area and its approaches, however we define that. And a different practice for permits issued in the outer area as shown here on the screen.

What is the source of this supposed difference? Apparently it is the additional terms and conditions, not the permit area definitions, which were added to some permits that contain the words "bordering upon the common boundary line of Nova Scotia and the Province of Newfoundland." Some permits have that as part of the terms and conditions, some do not. But in none of them is it part of the permit definition.

Newfoundland's allegation on this point is completely

baseless. First of all, the definitive method used for all of the permits on the boundary dating back to 1965 is the same, by definition of permit grid areas with reference to the reservation grid map. And that map clearly incorporates the boundary. By way of illustration, we can look at the details of permit 372.

Permit 372 is a permit issued to Hudson's Bay Company by Nova Scotia in 1971, and it is cited by Newfoundland at paragraph 236 of their Counter Memorial as an example of a permit that is not limited quote, "by reference to any boundary". Next we have the grid numbers which are part of the Hudson's Bay permit and which in fact define where it is operative under this system.

if we look at a reconstruction of the actual grid sections -- and we had to reconstruct this and lay the line over it because of the quality of the map. But if we look at these grid sections, we see that the only sections named in the permit are those that have part of their area on the Nova Scotia side of the boundary line. All of the other permit areas that don't have anything crossing over are excluded. None of the others.

Why on earth would that be so if as Newfoundland now states as fact there was no boundary imposed on this permit. The same analysis could be conducted for the other boundary permits, the relevant grid sections on the

Nova Scotia side are included in the permit area.

Second, Newfoundland's allegation becomes simply incomprehensible when we move on to consider the permits to the south of turning point 2017, the mid point between Flint Island and Grand Bruit.

This is the next illustration. What this figure shows is that the next three permits to the southeast of permit 272, which is shown here in yellow, which is cited by Newfoundland as one of the so called common boundary provision permits. The next three permits to the south, 269, 268 and 267 all contain the same words. Every one of them. The length of the line covering that area is over 106 kilometres. The next permit shown in green here, permit 372, is one that does not have those words included. But all three of the blue permits do.

So the question becomes what is the significance in the transition from permit 267, which is the last of the blue permits, to permit 372, that makes one of them part of a supposed inner area and the other part of a supposed outer area. And the answer is none.

They are well beyond the last identified turning point. They are well beyond the last point that Newfoundland says was ever identified. So we are left with the fact that the Nova Scotia permits were issued so as to conform with the 1964 Agreement line throughout the

affected area and none of Newfoundland's points made in rebuttal survive examination.

Newfoundland has alleged, paragraph 180 of its Counter Memorial that the 1980 version of the Petroleum Resources Act, under which the permits were issued, made no reference to the agreed interprovincial boundaries.

This contention has been fully addressed by Mr. Bertrand, but briefly they simply fail to mention the Act was not proclaimed in force and when it was, regulations applied the boundary. That deals I would submit with the application of the boundary by Nova Scotia. It's clear.

The next issue raised by Newfoundland concerns the open application of the permit system, and Newfoundland's allegation that there is no evidence of such an open system.

Nova Scotia's position is simple. The province operated a precise system of permit issuance based on the National Topographic Grid System with open publication of the existing rights on an official chart and maintenance of the registry of permits.

Newfoundland disputes that. It claims that Nova Scotia's presentation of the map in this light is, if I may quote from paragraph 79 of the Counter Memorial, "characteristic of Nova Scotia's willingness to make unsupported or incorrect assertions and then treat them as

if they were fact."

Well let's see, on what basis does Newfoundland support the sweeping assertion of its own? The first, there is the allegation about the lack of turning points already dealt with.

Second -- and depending when you wish to stop, Mr. Chairman, I have a couple of minutes of this issue and I could stop at any time you wish.

CHAIRMAN: Well if there is any -- unless you want to --

PROFESSOR SAUNDERS: Would you like me to deal with the publication issue first?

PROFESSOR CRAWFORD: I just want to make the comment that I am not sure how relevant it is that it is opened. I mean, it's clearly relevant for certain purposes.

PROFESSOR SAUNDERS: It's relevant in Newfoundland's view in the sense that they couldn't have been expected to object if they didn't.

PROFESSOR CRAWFORD: Yes, but I mean, we are only concerned with this practice to the extent that it is evidence of an agreement.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: We are not concerned with this practice to the extent that it may be relevant in establishing acquiescence or estoppel or anything independently of an agreement. I mean, clearly you have two adjoining

States -- taking the international situation you have two adjoining States by long practice of abutting concessions and things like that, or nearly abutting concessions were to establish a set of expectations in States and companies that would be relevant to the application of the principle of equities, but nothing to do with the present phase of the case. And nothing we said about these or otherwise an agreement, would exclude any material in a hypothetical second phase going to that question. So why does it matter whether it was open?

PROFESSOR SAUNDERS: I would not want to argue with you on this, Professor Crawford, because I would be making Newfoundland's case for them. We are answering -- on this point, we are answering Newfoundland and that they are contending that the permit issuance cannot be used as evidence of their supposed agreement. And one of the points they make is we haven't objected to it, which you might have expected them to do if they had noticed it in these -- you put in a practical sense, if the boundary line were applied out to the 13' -- on the 135, out to the outer limits of the continental shelf, and if, as Newfoundland believes, nobody had ever heard of this line or ever thought of it, it might be expected to come up. And I think that is at the heart of Newfoundland's contention that they couldn't be expected to raise it

simply because they didn't know about it.

But I would agree that our conduct is our conduct and it should be asserted. But at this point, I feel that since they haven't yet had a chance to argue it, I should have dealt with it.

The publication issue, there is not much to it in any event, Mr. Chairman and members of the Tribunal. The basis is really Nova Scotia's supposedly nefarious behaviour yet again in changing the date of publication from '73 or '74 to '71, exposed by the presence of Leonard Pace's name on the chart when he became Minister later. Interesting though that fact is -- it neglects the point that Nova Scotia was claiming that the map showed boundary permits current to 1971. We don't know a publication date. And it showed caution, rather than any attempt at concealment to state it as such.

Furthermore, the permits from 1965 on were all defined by reference to the permit grid system. And that system was based on a constant national chart that never changed. So the permits couldn't have changed either.

Furthermore, Newfoundland simply never identifies a motive for this supposed concealment of this fact. It is in fact more favorable to Nova Scotia to recognize a later date for its continuing practice in respecting and applying the boundary. If Newfoundland is now conceding

that Nova Scotia's application and recognition of the boundary extended at least into the mid-1970s, Nova Scotia is happy to accept the concession.

The third general allegation, which I can deal with in a few seconds, is that the map was never published or at least not until some other date in a different version. We would note that if this were an internal map -- if I could have slide 19 -- there would be no need for the inclusion of the formal title "The Crest", and unfortunately, the clear identification of the Minister, which put Newfoundland onto this. This was obviously intended for public use.

Second, Nova Scotia, in response has provided to the Tribunal the publication list for Nova Scotia's Department of Mines and Energy for 1983. Unfortunately, the latest year -- or the earliest year we could get that showed it. Now admittedly it was available at a cost of $2, but I don't think that's much of a restriction.

One final point is that Newfoundland does concede that the version of the map was published in 1974 and that federal officials saw it then. I would note that they jump from that simple fact to the conclusion that because federal officials did see it in 1974, they must not have seen it before. There is not a single word in the memo -- slide 20 and 21 -- not a single word in the memo provided

at Newfoundland's supplemental document 16 that even remotely suggests that.

In sum, Nova Scotia's practice is clear. It was open. And nothing raised by Newfoundland in the Counter Memorial comes even close to rebutting it. And that's a point at if you wish, Mr. Chairman, I would be happy to --

CHAIRMAN: Thank you, Mr. Saunders. We will resume then say at five after 2:00.

PROFESSOR SAUNDERS: Thank you.

(Recess - 12:35 p.m. - 1:45 p.m.)

CHAIRMAN: Yes.

PROFESSOR SAUNDERS: Thank you, Mr. Chairman.

If you recall, before lunch I was in the midst of a conclusion to the discussion of Nova Scotia's permit granting practice. And the remaining issue, of course, is the significance of that practice, which with your permission, I would like to address at the end of this submission.

But there's one small point in this respect which I would like to deal with now, as it is integrally tied to Newfoundland's treatment of the permit map, and rises in that context.

Newfoundland of course claims that this map was of no significance, and thus the Nova Scotia permits were of no significance. Why? Well, in large part because, and I

quote, "It was treated with derision by federal officials." This is in the memo from Mr. Hopper that I referred to before the break, portions of which are now on the screen, and as found at Newfoundland's supplemental document number 16.

And because of that, Newfoundland's contention, Newfoundland had no reason to give it anymore attention than the federal government did. Now, apart from the simple factual error in that Mr. Hopper never referred to the map in his memo, but rather to the publication of which it was but one page, there is a more important flaw in Newfoundland's argument. And it relates back to something Mr. Fortier said at the outset about Newfoundland's tendency to focus rather entirely on the federal attitudes, rather than on the interprovincial agreement.

In 1974, Newfoundland was still maintaining, and would ultimately take to court, its own assertion of provincial jurisdiction. It issued its own permits in the 1970's, as it says to assert jurisdiction, and it passed regulations asserting jurisdiction, further in 1977. Were all of these acts meaningless court challenges initiated, permits issued to private parties despite the full knowledge that the federal government had ultimate control. Or was it that only Newfoundland's claims were worthy of respect and

serious treatment?

We have to ask why one federal official's supposed derision of Nova Scotia's claim invalidated any significance which might be attached to a jurisdictional claim between the provinces, when that same claim was currently being made by Newfoundland?

Newfoundland, in sum, had every reason to take Nova Scotia's permits and its claims seriously, because it was making its own claims and issuing its own permits at the same time.

In sum, then -- can I have the next slide? What are we left with on the conduct of Nova Scotia respecting its permits? First, all Nova Scotia exploration permits in the area of the boundary were issued so as to abut and not cross the agreed line from 1965 onwards. Second, the boundary used was clearly the 1964 boundary, and it included the 135 line. Third, the boundary was applied in a clear and open manner, whether it mattered or not. And finally, Newfoundland, to Nova Scotia's knowledge, never objected to our practice.

And indeed it would have been strange if they had, for Newfoundland was busily applying the agreed boundary itself, in its own permit issuance, which I shall now move on to discuss.

With respect to Newfoundland's practice of issuing

permits in the offshore area during the relevant periods, if I could have the next slide? I'll address this under the following headings: A brief background and introduction to Newfoundland permits, which I know more about now than I wanted to in the beginning. The interim permits issued in 1965 through '67, interim permits issued in '67 and '71, and the so called exploration permits of '73 to '75, addressed in Newfoundland's Counter Memorial.

Now, by way of introduction, we set out in the Memorial for Nova Scotia at Appendix "A" some of Newfoundland's conduct in issuing permits, particularly in the 1960's and early seventies, and the manner in which it was characterized really by an ad hoc unsystematic approach.

No regulations were in place until 1977, so the permits from 1965 onward were issued as interim permits under the Petroleum and Natural Gas Act, often with little or no public knowledge, and no regularized system for granting the permits. And critically, no standard grid map.

Even the Newfoundland Government, when it tried to sort out the existing rights in the offshore in 1972, had some difficulty in establishing just what rights had been granted, and to whom. And it's laid out at Nova Scotia's Memorial in Appendix "A".

Now this situation subsisted essentially up until the regulations were introduced under the Petroleum and Natural Gas Act in 1977. And that has implications, of course, for what other provinces might have known, or been expected to know about Newfoundland's permit activities, if the Government of Newfoundland did not, at times, know what was going on in its offshore itself, it's not surprising the same might have been true for others.

But it is possible, based on the records now made available, to determine at least a large part of what has happened, or happened during that period. Leaving aside the limited permits issued in some bays and near shore areas prior to 1964, to which I submit are not really important to this case, I will begin with the rights issued in the period between 1965 and 1967, a process beginning almost immediately after the conclusion of the 1964 Agreement.

Now, in the Nova Scotia Memorial at Appendix "A", paragraph 16, it was stated that Newfoundland began in January of '65 to issue permits in the offshore areas, as shown in this federal summary map prepared later in 1965. The areas bounded in red were the Newfoundland permit areas as marked by the federal government on the original. It shows permits up to 300 miles from shore, approximately 30 million acres of permits during that period.

However, based on information in the Newfoundland Counter Memorial, paragraphs 213 to 214, and on additional discovery material we've received, it's clear that this statement is in part incorrect. It appears that the approvals granted in 1965 were mostly approvals in principle, contrary to what the federal government believed at the time, contrary to what appeared in the industry press. But -- and indeed even later Newfoundland permit plans, at least one of the permits is shown as dating to February, 1965, we were in error based on those sources. But, it is also clear that these in principle approvals were later ratified in 1967, and in some the main point made by Nova Scotia, that these areas reflected the scope of Newfoundland's interest, and known intentions in 1965 and onwards is unchanged.

The most significant of these blocks involved rights eventually issued to a number of companies; Shaheen Natural Resources, which is shown as number two; Alberta Export Refining, shown as number one on the federal map; and Pan American Petroleum, shown as number three. The significance of these areas is clear. Apart from the fact that they appear to not violate the boundary where important, there might be one small bulge in the north, but it's difficult to tell, the initial approvals in principle, and the later full approvals, raised serious

doubts about one of Newfoundland's central arguments about the events of 1964.

According to Newfoundland in its Memorial at paragraph 210, the parties in 1964 and afterwards were primarily concerned with the Gulf of St. Lawrence. They say the focus of attention in 1964, and in subsequent years, so far as the limitation issue is concerned, was not the outer area. The parties were concerned primarily with the Gulf of St. Lawrence.

Elsewhere Newfoundland does not limit the supposed main interest in the Gulf to the delimitation issue, but stated broadly as the virtually exclusive pre-occupation of the parties with the Gulf and adjacent waters.

Well, at the very least, the issuance of permits over huge areas of the outer sector was a peculiar way of showing a virtually exclusive pre-occupation with the Gulf of St. Lawrence, and the adjacent waters, which might be defined as encompassing the Grand Banks.

This was as early as 1965 with the approvals in principle.

Now, 1966 and 1967 to '71 is the next period I would like to address. This is a critical period of activity, in our view, during which the provinces were still asserting the right to issue offshore permits, even in the absence of matching federal permits, and well before the

federal government had indicated any real willingness to come to a settlement.

That is, it's a period of largely interprovincial activity, without reference to the federal approval or sanction that is so central to Newfoundland's case.

And the overall actions of Newfoundland in this period are summarized in the Nova Scotia Memorial at Appendix "A", at paragraphs 19 to 36. The most relevant permits and the ones I would like to focus on, are those along the boundary with Quebec, and particularly with Nova Scotia. And these are the permits shown in this diagram, disputed diagram, I'll deal with the dispute afterwards. Diagram showing the permits issued to Mobil Oil in September, 1967, here in the -- what I can only describe as tangerine coloured section, I'm not quite sure what that colour is. And to Katy Industries here in the Gulf of St. Lawrence, and here in the south in a larger block, running a couple of hundred miles out, or a few hundred miles out.

I would like to begin, if I may, with the Mobil Oil permit of 1967. September, '67.

The Mobil permit, as shown in this figure, which is drawn from the original permit plan, originals at Annex 80 of the Nova Scotia Memorial, is clear. The method of construction is specified in the permit, and clearly defined. We have a defined point "A" in the southwest

corner, and leaving aside the eastern side of the permit for now. Defined point "A" which was set as coordinates at the 45th parallel, and longitude established.

Second, the permit establishes a northern reference point here at point "D", and specifies "A" be adjoined to "D", and that determines the permit boundary line. Or the side -- that side of the permit.

In joining those lines it gives the permit limit, but the permit only goes as far north as the 46th parallel, stops here at point "B". That's the limit of the Mobil permit, clearly specified.

The outcome is a line that is in full accord with the 1964 Agreement boundary, which is shown in green overlapping the line, the red line, running from the mid point of the Cabot Strait, through the point 2017, and out along the 135 line.

The explanation for this permit boundary from Newfoundland to date? None. Yes this 135 line, according to Newfoundland in its Memorial at paragraph 217, and its Counter Memorial at paragraph 40, was not to be invented for another 17 years, when surveyor General Blaickie supposedly developed it as an innovation for the Nova Scotia implementing legislation in '84.

This explanation here is clear, the permit was drawn with respect to the boundary, and to apply it. And the

boundary in this segment was the 135 line.

It becomes even clearer if we consider the following illustration, showing the Newfoundland Mobil permit issued in September of '67, compared to some Nova Scotia Mobil permits issued in February, '67, and some of these permits are contained at Annex 76 of the Nova Scotia Memorial. And it's clear, the Mobil permits on the Nova Scotia side, the Mobil permits on the Newfoundland side, match. The western limit of Newfoundland's permit is on the boundary line. The northern limit is also on the boundary line, matching the Mobil permit on the other side.

Are we to believe that this is a coincidence? Or that communication with Mobil was so poor that no one ever mentioned the match with the permits on the other side, and thus with the boundary? All of this flies in the face of Newfoundland's claim that they had no reason to know of Nova Scotia's permits, or of the Nova Scotia Permit Map.

And if this is explained as some kind of secret, how are we to explain the published map shown on this diagram produced in 1979 by Petro Canada, a Federal Crown Corporation at the time, which was provided to the Tribunal as Annex 150. This clearly shows, not so well in the diagram, but it shows the two permits issued by the two provinces. It shows them with reference to the boundary line, a boundary line that nobody knew about in

1979, according to Newfoundland, and it shows them on opposite sides of it.

If Petro Canada knew in 1979, surely Newfoundland knew when they issued the permit in 1967. If nothing else were available, this permit would make it clear that in 1967 Newfoundland knew of the line, including the 135 azimuth segment and applied it in its permit issuance.

Now there is more available. I would like to turn to the permit areas issued to Katy Industries in May 1971 contained at Nova Scotia's Annex 80. And this is where Nova Scotia and Newfoundland most seriously dispute the meaning of the evidence. So I apologize, it requires some detailed treatment, because this is directly in dispute.

The simplest part, however, of the Katy permit is shown here. This is the Katy permit areas in the Gulf of St. Lawrence. They obviously abut the line, the 64 line, and they were drafted so as to accord with it.

Newfoundland's explanation, well none directly related to this permit. But more generally at paragraph 34 of the Counter Memorial, Newfoundland states that the provisional use of a median line in the absence of an agreement is a perfectly normal practice. And that is certainly true.

However, here we do not have any old median line. We have a line joining particular points in a particular shape of line, and they are the points that were contained

in the agreement. That is what the Katy permit matches. Not a general median line, but a series of points that tie it back to the particular line agreed by the parties in 1964.

Newfoundland's attempt to dismiss it as the provisional use of median line is simply unsustainable on the facts. Or at least yet another in a series of remarkable coincidences like the Mobil permit.

Because the use in 1971 of a line drawn from the 1964 Agreement, whether in the Gulf or beyond is fundamentally inconsistent with Newfoundland's repeatedly stated theory that the boundary was only ever a proposal and that it died with rejection by the federal government. Are we now to accept that it only died a partial death in the area outside the Gulf, but not inside? Because Newfoundland has not contended that there was an agreement in the Gulf, they simply assert there was no agreement.

To turn now to the Katy permit issued on the Grand Banks to the south of St. Pierre in May of 1971. The two sides are in complete disagreement on this permit and it requires a more detailed consideration. It's quite critical. It's a large permit area. Well out along the boundary line that we are concerned with and into the outer area at a time when Newfoundland says this line had not been dealt with at all. Long before the supposed

mention of the 135 line and long after 1964 Agreement was dead and gone.

I need to outline the Nova Scotia position on this permit and consider the Newfoundland response and demonstrate why that response is simply wrong from a technical standpoint.

The Nova Scotia position is straightforward. I will outline it now, if I may, and come back to it in detail in a few minutes. Our position is that the Katy western line down this side here was drawn as a flawed, but clear attempt to apply the outer segment of the boundary agreed in 1964. This permit, unlike the Mobil permit, provided no coordinates, just a drawing of the permit on a plan. There are no instructions on the permit plan showing how that was to be done.

So Nova Scotia contends, and we will return to this, that the critical western limit of the permit was most likely drawn as a straight line extension of the inner segment of the agreed 1964 boundary. A segment, which is very close to, though not perfectly aligned with the 135 line.

Further, Nova Scotia, submits that that extension was drawn as a straight line on an inappropriate chart, which we will demonstrate. One that is not amenable to the drawing of constant azimuth lines as straight lines.

And finally, when that line is properly transferred to a Mercator chart on which the azimuth can be properly shown, the result is a line that while still in error is substantially in conformity with the agreed line. And with your forbearance, I will show I hope why this is so.

The Newfoundland response, however, takes several parts. It begins with a misstatement of what Nova Scotia is arguing. They state that Nova Scotia asserts it is the 135 line. In fact our position is that it is a flawed attempt and that it comes very close to the 135 line, which I will explain.

But more important, Newfoundland simply asserts the following. First that Nova Scotia has presumed or imagined the intention of the drafter of the Katy permit. And second, critically, that it is a trivial task to transfer the permit line to a Mercator chart, and that Nova Scotia has done it incorrectly.

The result, in Newfoundland's view, is the version of the permit on the Mercator chart that is markedly different from that proposed by Nova Scotia. Here we have both side by side. Newfoundland and Labrador's version on the left. Nova Scotia on the right. You can see the variance. Why the discrepancy is the question.

In explaining that, and I shudder to do this, I need to deal first with the transference and the issue of

transference of a line from the permit plan to a Mercator projection. And with apologies in advance to Mr. Gray for my attempt at cartography 101.

As just noted, Newfoundland says flat out that it is a trivial task to transfer the permit line from one chart to another. Here from a Conic projection to a Mercator projection. It may be. But it's not so trivial that it can't be done wrong, as is demonstrated by Newfoundland in their Counter Memorial.

The key points in Nova Scotia's view are the following. First, the Katy permit is drawn on a map of an unidentified Conic projection, but a projection which is inappropriate for representing a straight line defined as a constant azimuth, such as the 135 line.

Second, it's our contention that the Mercator projection chart is the appropriate chart for showing such a line.

And third, to properly transfer a line drawn from -- drawn as an azimuth on one chart to another, you must know and follow the method by which the original line was drawn.

These facts, which are simply ignored by Newfoundland, can be graphically demonstrated as follows. It's my least dramatic slide, I am afraid. This diagram, if you will bear with me for a moment here, this diagram shows a Conic

projection chart in the abstract, a similar projection to that used in the Katy permit. The longitude lines, as we will see, converge, come closer together as they go to the north, which accounts for the tilted appearance of the chart. It's as simple as that. That's the Conic projection.

If we want, or if we try to draw a 135 line, or any azimuth on this chart, and we do it by simply drawing a straight line on the paper, this is the result. Now it's apparent we started at 135. I used to think that that should be a 135 line the whole way down. I don't any more. And here is why.

At various points along this line -- we can have the next slide -- we can see the affect of the Conic projection. The changing angle of the longitude lines, because it is the angle between the longitude and the line drawn on the chart that gives us the azimuth. That is the compass heading. And as this line runs across the various meridians, the azimuth changes because the angle of the longitude line is changing as it goes north.

So what begins as a 135 line here quite confidently becomes a 136 in 48 minutes, a 137 at 42 and finally a 138 in 36. It's unavoidable if it's done that way.

So what began as an attempt to draw a 135 line becomes something else. And that is why you do not draw a

constant azimuth line as a straight line on a Conic projection chart.

That's why Katy, in our view, was done on the wrong type of chart, if for the sake of argument, if it was drawn as a straight line azimuth projection or extension.

Now what happens with the same exercise for a Mercator chart? In the blank, but on this diagram we see that a Mercator projection, a key distinction, is that the lines of longitude are not parallel. You do not change angle as they go north or south. They are constant.

So if we do the same exercise starting at a 135 heading here and then check the coordinates as we go down, we have -- or the headings, we have 135, 135 and so on throughout the line. The angle never changes, because the longitude line hasn't changed its angle.

On this chart, a straight line with a starting azimuth of 135 has that azimuth at the end and it has it as a constant throughout, which is why you want a Mercator chart to draw this type of line. And it can be reflected -- the same line could be reflected on a Conic chart, but not by drawing it as a constant straight line.

Which is all very nice, but what does it tell us, apart from the fact that I have been spending more time than is good for me around the cartographers? I know that it looks like an abstract exercise and it is to a point.

But the problem is the following. If a line is drawn on a Conic chart with the intention of following an azimuth line, that line, as it was intended, can only be reflected on the Mercator chart by reproducing the starting azimuth. And not by using the latitude and longitude coordinates. Again, we can demonstrate this simply and graphically.

If we can return -- yes, we have the Conic chart again, a 135 azimuth at the beginning, if we were to pick coordinates along this line, which would be the next slide, we have a number of coordinates, which often define the line and do on that chart, simple latitude and longitude coordinates.

Now in Newfoundland's contention, how does that line get transferred to a Mercator projection? According to Newfoundland, and they are explicit, it's obvious it must be done by reference to what they call the grid. That is, you simply pick off the latitude and longitude points from several coordinates along the way, place them on the Mercator chart and join the dots.

And what is the result if we do that? Let's turn to the Mercator chart. We take this line on the next line and we draw it, you can test it as a -- test the Newfoundland method, if we draw a 135 line, this is what we know the drafter attempted on the other chart and intended. This is what we have, is a 135 line that's

constant throughout. But if we transfer the coordinates from the same original line, what's the result? The result is a line that because the coordinates did not reflect the line on the other chart, diverges to the south, and at the bottom or the south here, is almost 34 kilometres apart from the other line.

Now Newfoundland, in paragraph 81 of its Counter Memorial, says the following, "The essence of the Nova Scotia argument is that two things that are different are in fact the same." Well in a sense that is true. We have one original line on another chart, but it transfers into this chart as two lines, depending upon the method that you use. And that is the fundamental technical flaw that underlies Newfoundland's argument on the Katy permit.

Newfoundland assumes, wrongly, that there is only one method for transferring a line, one result to be obtained from the original line.

There are in fact two methods. Use the coordinates or use the azimuth. And they give very different results.

So the question at the heart of this treatment of this critical permit is how do you determine which one to use, because you could use either. And obviously, we would submit, the answer is use the one that best reflects what the drafter was trying to do. If you asked for a 135 line on chart A, that should be what you get on chart B. If

the line was drawn as an azimuth, you must use the azimuth. If it was drawn by reference to coordinates, use the coordinates, as with the Mobil permit.

And that brings us to the final issue that ties this permit together. It is our alleged invention of the intention of the Katy drafter. Newfoundland claims that in trying to determine what the method was on the Katy permit, so we can determine the method to use in transferring the line, it is perfectly evident in Newfoundland's view that the permit was drawn using what Newfoundland calls the permit grid. They are explicit on this. And some of the more exciting passages of the Newfoundland Counter Memorial, Nova Scotia is accused of transparent revisionism at one point, and elsewhere of a desperate attempt to explain away what is simple, straightforward and obvious.

So if I may continue in that attempt, this is all because we simply made up out of whole cloth the method used by the drafter of the Katy permit. And that's central to the argument how did Nova Scotia invent or imagine the intention of the drafter, by looking at the physical fact of the chart itself and the line drawn upon it?

The permit, remember, concludes no coordinates, no basis for drawing the western limit of the permit. Both

sides, Newfoundland and Nova Scotia -- both sides have had to deduce the original method from evidence before us -- both of us. So let's compare the alternative theories and see how simple, straightforward and obvious Newfoundland's answer really is.

For Nova Scotia, the evidence on which we base our deduction is the following: This is the Katy permit and we have transposed onto it points 2016 and 2017, the last two identified turning points on the boundary line.

And here is what happens if the line between 2016 and 2017 is extended in a straight line as if drawn with a straight edge on the chart. The result, clearly, is the western boundary of the Katy permit.

This is not imagination. It is not crystal ball gazing. It's a fact. Now what it's done with that fact, Newfoundland may contend that it's simply another incredible coincidence, like the boundary of the Mobil permit or the Katy permit in the Gulf, but Nova Scotia has offered a theory as to how the permit was drawn, which is supported by the fact of the line on the chart, as an azimuth based on this inner segment extended as a straight line.

Now what does Newfoundland suggest to justify their deduction that the line was, in fact, based on a series of coordinates? Effectively, nothing. First, Newfoundland

refers to these latitude and longitude lines on this chart, the entire chart, as a permit grid -- in fact, as the Newfoundland permit grid, but -- and by the way, we have suspiciously removed this, as well, while we were transferring it to the Mercator chart. We didn't remove the Newfoundland permit grid for the simple fact that Newfoundland didn't have one in 1971.

It isn't a permit grid which provides a system whereby permit limits are specified and tied to grid numbers. That's what a permit grid is. These are simply the latitude and longitude lines on this chart. There's no permit grid at all, and there's not the slightest indication in the permit that it was drawn according to a permit grid, because there would have been grid reference numbers and there are not.

At the very least, if the permit was, nonetheless, defined by coordinates on this boundary, there would be a series of coordinates provided in the permit, and there are not.

The Katy permit, the western boundary, has none of this, no grid reference, no coordinates. It's a line on the chart drawn by an unspecified method.

So we have two options for how this permit was drawn, each requiring a different method of plotting on a Mercator chart to accurately reflect the original intent

and the instructions of the drafter.

Nova Scotia has offered a factual basis short of astounding coincidence that shows that the line was drawn as an azimuth defined by joining the last two turning points.

Newfoundland offers nothing beyond an unsubstantiated assertion that the original map was a permit grid when it was not.

The result is clear. The Katy line was drawn on the basis of the azimuth suggested by Nova Scotia, based on the inner segment, not perfectly on the 135, as an attempt to replicate the outer boundary segment, and the correct method for transferring this line to the Mercator chart is the azimuth line and it results not in 135, but extremely close at around 136 to 136.25, the starting azimuth at 2017. And what does it result in? It results in a line that, for all intents and purposes, matches the 135 line, certainly close enough that there is no other line in the vicinity that could reasonably be suggested as a basis for it.

In sum, with respect to the permits to this point, Newfoundland, as we've said, accuses Nova Scotia of crystal ball gazing with respect to the permits. Crystal balls are used to tell the future, not the past, and if anyone had access to a crystal ball on Newfoundland's

theory, it must have been the drafters of the Katy permit, and certainly those who provided the Mobil permit because, somehow, out of thousands of possible lines, they managed to predict a line that Newfoundland says had never been discussed, had not been thought of in 1967 and 1971, and which, indeed, would not be invented for another 17 years.

That deals, I would submit, with Newfoundland's practice in the 1965 to 1971 period. Newfoundland applied the boundary, despite their denials, and they obviously considered that the boundary ran well out along the 135 line.

Now I would like to turn finally to the question of the permits issued by Newfoundland in 1973 to 1975. These are detailed in the Newfoundland Counter Memorial, shown primarily in figures 13 and 14 of their Counter Memorial. Start with figure -- yes, thank you.

These permits, at least as they are depicted by Newfoundland, present a very dramatic visual impact. In the area off Cape Breton, here to the north and above, we have a permit, particularly number 6, which diverges consistently or significantly from the line. The departure in the south is, in fact, far less significant in this area, but here it's quite significant.

But when we delve only a little deeper, it becomes apparent that the visuals, even for that northern permit,

are, at best, deceptive. For the substance of the actual permits and the manner in which they are granted is simply not fully revealed in the Newfoundland Counter Memorial, and particularly not in these diagrams.

I would like to begin, if I may, with the specifics of permit granted to Texaco in the northern section shown here as number 6, and if we could move to the detail -- thank you. This is drawn from figure 14 of the Newfoundland Counter Memorial.

This is rightly identified by Newfoundland as being a permit of particular interest. It certainly is. It's a permit that extensively overlaps the Nova Scotia boundary, apparently. I would like to deal with it first and then deal with some general issues respecting the rest of the permits.

But on this Texaco permit, as it's drawn by Newfoundland, it's striking in the extent to which it intrudes into what would on any conceivable measure be Nova Scotia's offshore area. In fact, it does even more than intrude on the offshore.

On this point, I should note that I think it's fair to say, and there are people on the panel who could probably correct me, but that in almost every maritime boundary case in the last 40 years, there has come a point in the proceedings where one side accuses the other of

refashioning geography. I think it's mandatory, in fact. So let me fill that role here.

There's something missing from this map and it's not just the compass rose. The impossibility of Newfoundland's interpretation of this permit is shown by the fact that to make it even appear feasible, they had to remove St. Paul Island, Nova Scotia from the map. If we could have it back, the return of St. Paul Island here.

St. Paul Island is a significant geographical feature. It's been known as the "Graveyard of the Gulf" because of shipwrecks. I believe it was first charted by Jacques Cartier in the late 16th century. Everybody knows about it. Unless Newfoundland say that they have simply generalized the map, I would note that a number of much smaller features make it onto the map on the other side of the line.

So unless we are to accept that Newfoundland, very quietly, was making territorial claims on Nova Scotia in 1976, how do we explain this conflict? Why did Newfoundland issue a permit covering what is clearly the land mass of Nova Scotia?

And the answer, of course, is that they did not. In addition to leaving out St. Paul Island, which would be enough on its own, Newfoundland has not mentioned and has not reflected in this dramatic illustration, which is

before the Tribunal, a critical limiting clause in the schedule by which the permit is defined.

After listing the various coordinates, which do, indeed, define that area shown on the map, the permit goes on to impose the following important limitation. This is at supplemental document 50 of Newfoundland. It says, "The area subject to this Interim Permit bounded as follows", lists the coordinates, and then at the end says, "Excluding throughout those areas outside the jurisdiction of the Legislature of the Province of Newfoundland."

It's apparent from those words that the effect of the permit was explicitly limited to something less than the complete area shown by those coordinates; otherwise, there's no purpose to the words. Yet it is that complete area that Newfoundland has dramatically and inaccurately shown as the real extent of this permit.

So now that we've got St. Paul Island back in Nova Scotia, that deals with the most significant of the supposed intrusions, but we still have to ask why Newfoundland did not simply use the boundary as they had done in their previous exploration permits and why there are other apparent overlaps in the other permits. And the answer is found in the nature of these permits and the manner in which they are granted by Newfoundland.

Newfoundland, in its Counter Memorial, at paragraph

224 -- if I could have the next sign -- describes the permits as follows: Class B Interim Permits, which entitled holders to quote "prospect and explore for petroleum." Production rights were not granted. Like the drawing of the Texaco permit, this description gives us part of the picture.

To begin with, it is true that production rights were not granted, but the permits, in fact, went farther. The permittee gets no production rights or any interest in petroleum found or existing in the area, no interest at all, not even a preferential or any right to further permits arising out of the work.

Earlier permits, which is the Mobil permit from '67, and even the Katy permit of 1971, as it was originally issued before it was reclassified, did not contain this limitation. It's this limitation, this lack of any real rights to particular lands, that explains another anomaly in these permits. And that is the extent to which they overlap with each other in space and time.

The same companies -- or sorry, different companies were granted permits covering the same areas at the same times, in one case actually involving permits issued to different companies for the same place on the same day, and the overlap is shown in red -- the extent of overlaps in space and time for different permit -- or permit grants

to different companies.

Why? They demonstrate the extent to which the permits granted gave the permittee absolutely nothing by way of exclusive rights to those lands. They're explicitly not exclusive.

Furthermore -- we can go back to the other slide -- the permits on the boundary were not actually permits to prospect and explore, as Newfoundland has it. In fact, they were permits to explore by particular methods only, they were limited. They were limited to geophysical surveys in some cases, which would include magnetic surveys, for example, and in others, more specifically, again, by seismic survey only.

In neither case was drilling allowed. There was no drilling at all, with one exception, the oil permit of 1973, supplemental document 45, but it's all on the Newfoundland side of the boundary, interestingly.

Now so what? What's the significance of that limitation in the Newfoundland permits? A full answer requires us to look at the statutory basis, the real statutory basis for seismic permits in Newfoundland, a basis that has not been fully explained by the Counter Memorial.

Newfoundland has suggested that the permits were issued under the authority of section 8 of the Petroleum

and Natural Gas Act of 1965, as it was amended in 1966. In fact, that section did not require permits -- if I could have the next sign -- did not require permits for anything other than drilling operations, including drilling for exploratory purposes.

It says, "No person shall drill or operate or undertake to drill or operate any well." It was, in fact, only in 1974 that an amendment was introduced requiring permits for pre-drilling seismic and geophysical surveys, and this was a document provided by Nova Scotia as Annex 152.

Newfoundland's section 8 from 1974 extended the effect of the Act to any operation relating to the exploration for or the exploitation of petroleum, any operation. In Nova Scotia in the same period the Nova Scotia Petroleum Natural Gas Act of the period did not require permits for seismic or similar operations. It was consistent with the previous Newfoundland practice. Why? Well because seismic and similar surveys were generally seen as lower order activities that were in most jurisdictions unregulated and would not entitle the operator to any claim over a specified area of lands. And on this point we do have Newfoundland and Labrador's own views, as expressed in the White Paper on Draft Petroleum Regulations published in 1977 and contained in

Newfoundland's Document number 75.

If I may quote as it is on the screen, "In most countries, companies carry on these seismic surveys prior even to making an application for the right to drill or produce. A number of companies may conduct separate seismic surveys over the same area. It's not considered to entitle a company to any special rights in the area in question." This will also be the position of this government."

Now this attitude to seismic and similar surveys was also significant to the manner in which the permits were actually issued. The White Paper also referred to this question, and made it clear that the purpose of the permits and how they are treated in the application process, quite apart from the other class B permits that extended to drilling operations.

What they said was this, "this amendment -- the 1974 amendment -- "was aimed at regulating predrilling, seismic survey and obtaining the information generated there from. In terms of the information, the company must first present a general program description to the Department of Mines and Energy. After review, an interim permit is issued subject to the usual conditions."

Two points worthy of mention. First, the amendment was aimed clearly at regulating predrilling seismic for

which no rights attached. And for the purpose of obtaining information on geological structures.

Second and more important, the operator was required only to present a general program description and after review a permit is issued. Given that seismic operations would be conducted across geologically defined areas, it is hardly surprising that the general program descriptions filed by the companies would cross the boundary. And of course, any work in Nova Scotia's area would not require a permit.

Furthermore, it is apparent that the level of review was minimal, given that no rights were attached and that you could even have multiple permits to the same area.

So Newfoundland in these permits simply incorporated the general program descriptions provided by the companies in these nonexclusive permits to conduct operations, not to hold certain areas. No significance was attached to the areas because no rights to those areas were involved.

Now this is shown -- you can look at one of the permit forms. This is a permit application filed by Texaco in 1970' -- pardon?

MR. LEGAULT: Professor Saunders, you are putting out to us that these interim permits granted no rights whatever. Would they still have significance as indicating a claim of jurisdiction? For instance, look at the Newfoundland

Texaco permit. Presumably that is a claim of jurisdiction otherwise there would be no necessity to add the concluding clause, excluding throughout those areas outside the jurisdiction of the Legislature of the Province of Newfoundland?

PROFESSOR SAUNDERS: Yes. Sorry.

MR. LEGAULT: So the permit would have at least that significance. It does indicate a claim to jurisdiction?

PROFESSOR SAUNDERS: That is the interesting part, Mr. Legault, because the extent of the permit area and the extent of the operations may not be the same thing at all. The companies -- and we will show a map in a moment that shows how the companies define the operations on the permits they submitted.

And Newfoundland probably did it correctly in that one, but then again, as they asserted carefully themselves these permits didn't mean anything anywhere else. If somebody had sailed a seismic ship past Halifax Harbour conducting the survey at this time, Energy and Mines officials would have done nothing but wave presumably. It is not a matter for them to be concerned with.

Newfoundland internally might have thought of it that way if they had indicated greater concern with the actual definition of the lands involved, but they didn't.

MR. LEGAULT: But specifically the Newfoundland Texaco

permit, if we were take -- if we were to take that permit at its face value is a claim of jurisdiction?

PROFESSOR SAUNDERS: Well it is the opposite in a sense in that what they say is your -- our permit only covers you within our jurisdiction. And they don't specify where that jurisdiction runs.

MR. LEGAULT: Yes. But excluding there are areas within the permit --

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: -- that they specifically exclude as being outside their jurisdiction. Those areas are not included within the permit as I read this. They are excluded from the permit?

PROFESSOR SAUNDERS: That's right.

MR. LEGAULT: The permit does not extend to them. Specifically they are not claiming jurisdiction over that area, but presumably they are claiming jurisdiction over everything else, is that correct?

PROFESSOR SAUNDERS: They are not extending their claim to authorize the operation beyond their jurisdiction in that permit. However, there is two -- there is a distinction to be drawn between what the permit is and what the program description that's submitted by the company is. So when they define the entire program description of the company and say we are only covering the part that is

within our jurisdiction, yes, there is an implicit claim of jurisdiction, as there would be for a permit.

However, just because they include the total geophysical area in some other permit can't constitute a claim, in the same way that an exploratory permit that actually attempts to give rights to the land might do, or at least it's at a very much lower order, as recognized in the Newfoundland White Paper.

MR. LEGAULT: Thank you very much, Professor Saunders.

PROFESSOR CRAWFORD: Sorry, I may be stupid after lunch. I'm trying to understand why this is relevant? I can see that it may be relevant in a hypothetical second phase, but the fact that they issued permits which are subject to an unspecified qualification relating to the jurisdiction of Newfoundland doesn't really help us, does it? I mean, the purpose of the inquiry is to see if there was practice of Newfoundland which could be regarded as shedding light either on the existence or the interpretation of the Agreement.

PROFESSOR SAUNDERS: That's right.

PROFESSOR CRAWFORD: If it's an unspecified qualification it does neither. It's consistent with either view. I mean, it either may or may not reflect the view of the Agreement. It just doesn't help us. Is that unfair or --

PROFESSOR SAUNDERS: No, actually that saves me a line or

two later on, I believe. They are -- again, we are responding here to what Newfoundland has said.

CHAIRMAN: It's a rebuttal before the main bout?

PROFESSOR SAUNDERS: Yes, basically. I have this fondest for St. Paul Island. I felt compelled, I'm sorry. Yes, I would tend to agree that the nature of these particular permits and the unspecified nature -- not just of the one that had that restriction but of the others we will see makes them virtually useless to defining the areas of limits, because they weren't defined in that way as an exploratory permit in proper might be.

PROFESSOR CRAWFORD: Well I'm relieved you didn't refer that matter to Ms. Hughes.

PROFESSOR SAUNDERS: I'm sure she will take a second crack at it if need be, Professor Crawford.

As you say, no significance was attached to the areas, no rights were involved. And if we look at the permit application form that was involved for these types of permits it confirms what Professor Crawford has suggested.

This is the overall form for the Texaco permit that I referred to. It is identified on its face as something different from other exploratory permits. It is to conduct exploratory operations other than drilling. it is not granting a permit area.

And the next. This is the operational data required

under this permit application. You will note in the geographical area, there is a list of -- you are to list the latitudes and longitudes of the work area. They list them. They list one latitude and two longitudes. My geometry is not great, but I think that is only sufficient to form a line, not a box. And Newfoundland eventually when they granted the permit turned it into a box.

If we can turn to the next slide. This is the quality of the map that was submitted with the permit. They are general geophysical operations looking at geological structures. They have nothing to do with permit areas or the boundaries.

Now we can leave, again, the visually dramatic but substantively a bit lighter seismic permits and turn to summing up.

If we can turn -- yes, we have it here. If we can dispense with the seismic permits, I think we have, we can return to the overall picture presented by the granting of real exploration permits in the 1960's and 70's by the parties to the 1964 -- to the 1964 Agreement.

A picture that is clear, and in Nova Scotia's view, entirely consistent with the 1964 Agreement boundaries and with nothing else.

Sorry, we have jumped ahead a bit here in the order. I believe we are at what would be slide 63 or so.

I realize I have gone on in quite a bit more detail than I promised on these issues, but these are points on which the parties have truly joined issue in a very direct way. And that is justified by their central importance in understanding what the parties to this Agreement believed about its status and about its interpretation.

Before I close, I would like to make a few general points about the significance of all of this conduct, leaving for Ms. Hughes the legal significance.

First, I would like to reiterate what I said at the outset, and that is the relevance, the high degree of relevance of this conduct to the dispute before us. I refer you again to paragraph 211 of the Newfoundland Memorial, where it is stated that, "Newfoundland issued its permits to assert exclusive jurisdiction over the offshore resources." And indeed that view is consistent with an application of the Boundary Agreement. Surely the permits must be relevant to the limits of that jurisdiction.

Second -- you can go back to the summary slide. Thanks. The 1964 Agreement Boundary, contrary to what Newfoundland has said, survived federal rejection according to this conduct. The parties, all of the parties, continued to view themselves apparently as bound by the Agreement, completely contrary to Newfoundland's

fundamental position that this was only a proposal that died with rejection in 1964.

My colleague likes the Hardy Boys, I have always liked Mark Twain. If I can paraphrase him, the rumors of the Agreement's death seem to have been greatly exaggerated.

The boundary, third, was applied despite the failure to gain full ownership and jurisdiction. Again, fundamentally contrary to Newfoundland's notion that that was a necessary condition for conclusion of the Agreement.

Next, the supposed preoccupation with the Gulf. It's simply not evident in the permit behavior of Nova Scotia and Newfoundland. It was clear from 1965 that the real action by that point was in the offshore areas, not the Gulf.

Finally, in dividing the line in the offshore area to which they were seeking jurisdiction, it is clear it was the 135 line that both parties understood as dividing their jurisdictions. This was applied in their permit issuance despite minor variations, and they were minor, and the practice preceded the alleged 1984 invention of that line by many, many years.

We cannot explain in any rational way the use or near use of the line in the 1960's and 70's by both Nova Scotia and Newfoundland. it's simply not a coincidence again. As with the issues of the dead proposal or the condition

of full ownership, the facts on this central issue are consistently and completely contrary to Newfoundland's theories of this case.

If there are no further questions, or perhaps there are, I would invite the Chairman to ask the much heralded and by this point, perhaps nervous Ms. Hughes, to take the rest.

CHAIRMAN: Yes, Ms. Hughes.

MS. HUGHES: Thank you, Mr. Chairman. Mr. Chairman and distinguished members of the Tribunal, over the past day and a half my co-counsel have set out the facts and reviewed the evidence filed by both parties to the arbitration, and my task is to discuss the applicable law. And it seems everything else.

So what I propose to do is deal with three broad themes, and relate them to the facts of this case, and hopefully cover the various issues that have been left to me to cover.

Those three themes, (1), The Applicable Law, and specifically what is meant by International Law governing Maritime Boundary Delimitation; (2), The Law on International Agreements, particularly the conclusion of them, and intent to be bound; and (3), The Interpretation of International Agreements.

A brief word first about burden of proof.

Newfoundland has suggested that the burden of proof lies on Nova Scotia throughout. But in fact, this is not so.

The burden of proof as a matter of law rests with the party that asserts a particular fact. The burden of proof for Nova Scotia, we maintain that the line has been resolved by Agreement, and it was for Nova Scotia to prove its assertion, and in our submission, we have met that burden.

Newfoundland must meet the burden of proving its assertions. In paragraph four of Newfoundland's Memorial, Newfoundland asserts that it will establish that there was no Agreement on the line dividing the offshore areas between Newfoundland and Nova Scotia. Newfoundland alleges that the provinces merely agreed on a negotiating position in order to assist their claims to jurisdiction vis-a-vis Canada.

Newfoundland has failed to meet its own standard, it has failed to meet its burden of proof in this arbitration.

But in any event, the important point is this: the Tribunal has a clear mandate, it must determine, regardless of the burden of proof, whether the line dividing the offshore areas between Newfoundland and Nova Scotia has been resolved by Agreement.

Turning to the applicable law, which is international

law. As explained yesterday by Mr. Fortier, the applicable law is international law governing maritime boundary delimitation with such modification as the circumstances require.

The parties to this arbitration are deemed to be States, and it is international law that governs the relations between States. Domestic law, by definition, does not.

The words of Sir Gerald Fitzmaurice taken from an article cited by Newfoundland in its Counter Memorial are instructive. Sir Gerald wrote, "National Law is not and cannot be a rival to international law in the international law field, or it would cease to be national and become international, which ex-hypothesi, it is not. National law, by definition, cannot govern the action of, or relations with, other States.

The Terms of Reference are abundantly clear. The Tribunal must decide the question before it applying the principles of international law governing maritime boundary, delimitation, with such modification as the circumstances require, as if the parties were States at all relevant times.

It must be borne in mind, the Terms of Reference were determined following more than a year of consultations and negotiations. Its terms are quite deliberate, and they

did not come out of the blue.

The Terms of Reference are derived from the legislation, federal and provincial, and that legislation implements the Accords. And that legislation refers specifically to the fact that the applicable law shall be international law governing maritime boundary delimitation.

Now, I was going to move now to the -- what is meant by international law governing maritime boundary delimitation, but I'm going to deal with the Chairman's question, because somebody said I would.

The Chairman -- now the Chairman, and this is without prejudice of course, to the Nova Scotia position that international law, and not Canadian law, applies. But, the Chairman's question is, what is Nova Scotia's response to Newfoundland's argument that Canadian law applies?

Well, Newfoundland argues that there was a settled body of Canadian law on the elements required for the formation of an interprovincial agreement. The fact is they have not supported that claim.

The cases that they cite simply do not support the fact that there was a settled body of Canadian law on the subject. They cite a south Australia v. Australia case from 1962, which wasn't decided on that point, but even if it had been, I don't see how that could form part of the

settled body of Canadian law, with all respect for Australian law, of course.

And then they cited the reference re the Canada Assistance Plan. That was decided in 1991, and crystal balls aside, that could not have formed part of the settled body of Canadian law in 1964.

PROFESSOR CRAWFORD: Excuse -- the problem is not so much what -- what was the general Canadian law on the making of inter-governmental agreements at large, because obviously there are lots and lots of different sorts of inter-governmental agreements. They may cover matters which are forward in the general scope of executive power in Canada. Let's -- we're leaving aside obviously the issues as to what is the applicable law.

The question is what was the -- what was the Canadian law on the giving effect to agreements relating to the -- to the boundaries or jurisdictions of the provinces? And the difficulty that I have is not, okay, then there will be questions about that referring to the provisions of the British North America Act, and so on. But if -- if it was the case that the parties assumed that something more would have to be done by way of legislation, provincial or federal or both, and they proceeded throughout on the assumption that, okay, we've reached an agreement at some level, but it still has to be formalized, and isn't that

as it were analogous to the international situation where plenipotentiaries have negotiated a treaty which they assume is going to be subject to ratification? It doesn't matter how much they've reached agreement on the terms of the treaty. It doesn't matter how precise they are about the terms of the treaty, it's still subject to ratification.

And -- and isn't that as it were, one of the modifications that the circumstances require? We have to treat these provinces in a situation in which under Canadian law they -- the executive simply cannot reach a certain agreement, as if they were negotiating subject to ratification?

MS. HUGHES: I think, Professor Crawford, it's the position of Nova Scotia that whatever the Canadian requirements were, they -- they're irrelevant.

What the Terms of Reference require is that we apply international law. And so what does international law require for the formation of the Agreement? And what the international law requires, I propose to get to. But to answer you directly, there are a number of things, but you do have to have an intent to be bound. And that can be determined, according to international law, by the circumstances of the formation of the Agreement, the terms, contemporaneous at the time, the terms of the

documents that made the Agreement, and then the conduct subsequent confirming that intent to be bound. And these will establish that there was an intent to be bound, and I submit that what you have heard already is clear evidence of an intent to be bound. And that's what is important, because it is that which determines whether or not there was an Agreement. They intended to be bound.

PROFESSOR CRAWFORD: But let's assume that I'm operating in fact. I mean, international doesn't ignore national law, it simply doesn't treat it as a normative system within the international law system, it treats it as we say, as a question of fact, but it treats it as existing. I mean, it knows that it's there.

If within the legal system in which the provinces actually in fact existed and have their being, it was the case that they couldn't -- that the first ministers or the premiers could not change the boundaries of the provinces, then they could not have had an intent to be bound. That in fact, the -- that's the difficulty, they simply couldn't have had it, because they had no power to have it, anymore than, you know, the head submission have the power to enter into the treaties without -- without instructions. I mean, you know, they may talk to each other, they may even reach agreement, but at some level they can't have had the intention to be bound, because

they knew under the -- in the way in which they're operating they didn't have the power.

MS. HUGHES: But what they did, I think Professor Crawford, was that they set it up so that everything was in place for their Agreement to be made bound -- binding. They -- their intent to be bound was very much evident, because they said here, here's our Agreement, and according to Section 3, what you have to do is change the boundary lines, the provincial areas by Section 3 of the Constitution, the BNA Act. This is what you do with it. We've done everything we can do, here it is, you finish what you have to do.

But as far as we're concerned, we have an agreed boundary, this is it, and as Mr. Drymer explained, they were under the impression, probably from reading Section 3, that if you give your boundaries, you've agreed on them, you give them to the federal government, and they constitutionalize them. That would be the proof that they intended an agreement, and it was everything that was needed to make it so.

PROFESSOR CRAWFORD: Under Section 3, could a request from a Premier, unsupported by provincial legislation, permit or require the -- Canada to -- to change the boundaries of the province? Or -- or would Canada say, we're prepared to act on your request, but only if it's put into

legislation?

MS. HUGHES: What would have been important at the time is what the provinces understood. And what they understood was that they would submit to the federal government an agreed boundary. That's what they did.

And they had the heads of government, all the authority they required under international law, which applies, to have their Agreement made binding.

PROFESSOR CRAWFORD: I think that's the -- that's the point of difficulty. You say international law applies, but it applies as were only after the event, and hypothetically. It didn't apply at the time. I mean I -- it seems clear that it -- if the provinces enter into an Agreement in 1964 they -- they wouldn't -- they wouldn't have contemplated, it wouldn't have occurred to them ever entering into an Agreement under international law. They might have been entering into an Agreement, they may have assumed the Agreement was binding, but they weren't -- they weren't acting as international actors.

Now we may have to judge them as if they were. Under the Terms of Reference I fully accept that. But we, at the same time we have to try to work out what they thought they were doing.

And if the position was that under their legal -- under the legal system in which they were in truth

operating at the time, they could not have made a binding agreement. Surely that's relevant to the question of what their intent was.

MS. HUGHES: It's our submission, of course, well you've -- you've said it. There was in fact -- there is a deeming provision, and it is the international law that must apply. But even putting that aside, which we don't think you should, but put it aside for the purposes of your question, there wasn't any requirement under Canadian law that they didn't meet. What they did was everything that Canadian law, at the time, required.

Newfoundland says otherwise, but it hasn't given the proof. It hasn't made its case, and we have nothing -- nothing on the record that proves that anything further was required.

PROFESSOR CRAWFORD: Has there been any practice under Section 3 of changing provincial boundaries?

MS. HUGHES: I would have to take that under advisement. I don't know the answer to that.

CHAIRMAN: I can give notice of the fact that there have been many statutes under Section 3. In fact, I drafted a couple myself. So that has happened. But I think at some stage, if one carried your proposition to its end, it would mean that if this actually changed the boundaries of a province, you could do by this statute what you must do

under the constitution in a particular way. That's rather what concerns me about this aspect.

You have got a statute that tells you how you're going to change boundaries. You cannot change them by the Premiers alone, nor can you change it by a federal statute not intent on changing boundaries, but letting someone do it by way of decision. There's a real problem here.

MS. HUGHES: Well, this is in fact what the legislation requires. The legislation, federal and provincial, that implements the Accords requires the application of international law in resolving this issue.

The Terms of Reference have been determined by the Minister. The Minister has indicated what this Tribunal must do. And it is our respectful submission that it is not for this Tribunal to inquire as to what the Minister has done in deciding what their Terms of Reference are.

CHAIRMAN: I think we have a duty to look at whether he had the power, if it came to that. Because we must be bound by the Act, and so must the Minister.

PROFESSOR CRAWFORD: But perhaps the answer, and this is obviously a difficult problem, because it's -- despite Sir Gerald Fitzmaurice, I don't think he was talking about hypothetical states looked at retrospectively.

The -- the point is that our decision doesn't actually change any boundary. All it does is to provide the

condition precedent for ministerial action determining a line which will be applicable to a resource allocation issue operating under a federal act. So one might say in response to the concern which the Chairman has expressed about this being as it were, an indirect way of getting around a constitutional requirement as to how boundaries are changed, the answer may be well, that issue doesn't arise, because as the separation of powers, all of this is done pursuant to legislation, federal and provincial.

And as to the constitution, no boundary is affected because we are dealing with areas which are assumed to be within the federal sphere, and we are simply doing something on a hypothesis which will, in accordance with legislation, allow the federal minister to exercise certain powers. That may be the answer.

MS. HUGHES: And certainly one that I would adopt. Thank you.

So if I may now turn to international law governing maritime boundary delimitations. Now Newfoundland seeks, albeit inconsistently to have this Tribunal confine itself to but a part of the international law governing maritime boundary delimitation.

Newfoundland argues that principles of international law governing maritime boundary delimitation is restricted to, and I am quoting from paragraph 100 of their Counter

Memorial. "A body of law that includes relevant circumstances, equitable principles, natural prolongation, nonencroachment and proportionality, and a range of methods leading to an equitable result."

Now Newfoundland, of course, wants the Tribunal to confine itself to this definition, because Newfoundland wants you to believe is a legal vacuum, to throw up your hands and make up your own minds as to the rules on the applicable law for this phase, perhaps the only phase of the arbitration.

So in other words, if all you have to rely upon is nonencroachment and proportionality and equidistance, it would be hardpressed to apply those so-called principles to decide whether or not the line has been resolved by agreement.

Now Newfoundland offers its solution. No problem, ignore the Terms of Reference and apply Canadian law. But the problem, of course, is that you can't ignore the Terms of Reference and apply Canadian law. But the problem, of course, is that you can't ignore the Terms of Reference, and you can't ignore their underlining legislation.

But there is another problem. Newfoundland's definition of international law governing maritime boundary delimitation is in marked contrast to the position of the International Court of Justice, and as

well, of other international tribunals.

Now this borne out by a number of the cases. But let's look, for example, at the Gulf of Maine case. Now there, in considering what law it should apply to decide the delimitation before it, the Chamber of the Court said that equitable criteria are not in themselves principles and rules of international law. And it drew what it called an essential distinction between the principles and rules of international law and the methodology and criteria used to ensure a result in accordance with those rules and principles. The Chamber said, "It seems above all essential to stress the distinction to be drawn between what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure in concreto that a particular situation is dealt with in accordance with the principles and rules in question."

So what is the law that a court or tribunal must apply in a delimitation case? What is meant by international law governing maritime boundary delimitation?

The Gulf of Maine Chamber explained that in its reasoning on the matter, and I am quoting, "it must obviously begin by reference to Article 38, paragraph 1 of the Statute of the International Court of Justice", which

of course sets out the sources of international law.

And the Chamber proceeded to review those sources, conventions, international custom, decisions of the court. And at the end of its review, the Chamber formulated, as Mr. Fortier pointed out yesterday, what the Chamber called the fundamental norm of maritime boundary delimitation. "No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result."

Now that is as true today as it was when the Chamber of the Court formulated the fundamental norm in 1984.

Article 83 of the Law of the Sea Convention provides that the delimitation of the continental shelf between States shall be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

PROFESSOR CRAWFORD: Ms. Hughes, there is a difference at least in language, you actually interpolated the word, "an agreement" in the quotation from the Gulf of Maine case. It says, "by means of agreement."

MS. HUGHES: I beg your pardon.

PROFESSOR CRAWFORD: And, of course, in Article 83, paragraph 1 it says, "effected by agreement." Then Article 83, paragraph 4, says, "where there is an agreement in force."

Is there any difference between the agreement referred to in paragraph 1 and the agreement in force referred to in paragraph 4? Because you see, you might take the view that the agreement, which is part of the basic principle does not -- is not the same thing as a treaty. It is agreement in a more general sense. Any conduct, concurrent conduct of the parties from which it may be established that they are ad idem as to the location of the boundary.

Whereas, agreement in force, clearly requires a treaty in the Vienna Convention since. Is there a difference between the two? And if so, is it within the scope of the first phase of the arbitration that we find agreement in what might be described as the general sense of paragraph 1, if there is a difference?

MS. HUGHES: The theory -- the position of Nova Scotia is that what is fundamental in deciding a maritime boundary delimitation is that you must start with the agreement of the parties. And I don't believe that you have to have a specific formulated agreement according to all the elements, such as one under the Vienna Convention, which

is written. But what is -- what is required here is an agreement. That's what gets pride of place in maritime boundary delimitation. And I think that the agreement here would be very much one that is spoken of in the general international law on maritime boundary delimitation.

PROFESSOR CRAWFORD: Is there any authority on that? I mean you might take the view, okay, there is a special point that under the Vienna Convention it has to be in writing. And as to both to the 1964 and 1972 these are communiques referring to an agreement already reached, which agreement seems not to be in writing. So leaving that -- that's sort of Statute of Frauds problem, leaving that to one side.

I mean it's a tenable view of the facts here that what there was was agreement, but not an agreement.

MS. HUGHES: I am going through my mental file of the cases and trying to remember what in fact in each one of them there was. But I think what we have seen is that -- what the International Court has applied in terms of agreement are all kinds of different instruments that none of -- not necessarily would be an agreement under the Vienna Convention. But they would qualify as an agreement, such as a unilateral declaration such as some of the cases that have looked at whether or not a State has bound itself

internationally.

PROFESSOR CRAWFORD: Yes. I wasn't -- I mean obviously the main case there in recent times is Qatar v. Bahrain, where the court said that Bahrain was bound by what was very much like a communique, or I think in that case the communique may have been at least been signed. But I mean there was a communique by the Minister of Justice, who apparently did not have under the relevant constitution the power to bind the State. The courts have --

MS. HUGHES: Suggested that one --

PROFESSOR CRAWFORD: -- put that to one side. But the point of that agreement, of course, was a compromis. It was an agreement to refer the matter to the court. It wasn't an agreement on maritime delimitation.

Is there any practice whereby agreements, or what amounts to agreement, within the meaning of paragraph 1 on maritime delimitation have been achieved by relatively informal means as distinct from something that would qualify as a treaty in the Vienna Convention since?

MS. HUGHES: I am thinking back over the cases, Professor Crawford, and I am -- perhaps I could come back to it.

PROFESSOR CRAWFORD: Well I think we are exploring these issues for both sides. And obviously there is more time to go and you both have the second round. But I think there is a very serious question in this case whether --

and there is the further question, which is the meaning of the word, "agreement" in the Terms of Reference, as descriptive of the first phase.

Because even if we took the view that the agreement referred to in paragraph 1 was a general agreement of the sort you mentioned, it doesn't follow that the description -- that the distinction between the first and second phase of this arbitration is the same.

MS. HUGHES: Well I can come back to the question, but it would seem to me that what the general law is on the subject is looking for an agreement between the parties and that that is what the court should apply first. And then you examine what it is that a lot of people allege is an agreement. And certainly on one side you often have the court trying to decide between one side and the other is indeed is there an agreement? Have we agreed to something? Or was there just a -- does this treaty actually apply? I am thinking of Lybia/Chad.

All of these cases where you have a question about whether in fact there was an agreement and then the Tribunal decides there was one, I think that at least my recollection of the cases is, the idea is did the parties agree on something? I don't recall that they have gone through a formal examination of do you pass the test of a formal agreement in every case, like you are suggesting

that we might have to do to meet Article 83? But as I say, I can certainly have a look and get back to the Tribunal on this one.

I was now proposing to move to the law on international agreements. You can move -- I am sorry, would this be an appropriate time to break, Mr. Chairman?

CHAIRMAN: Yes. I guess if it's short.

MS. HUGHES: How short is short, Mr. Chairman?

CHAIRMAN: Just you try it?

PROFESSOR CRAWFORD: 10 minutes.

MS. HUGHES: Fine with me.

(Recess)

CHAIRMAN: Ms. Hughes, if we have cut down on your time by staying a little longer, we will add a little bit. I can't give very much at the end but we will add a little bit in order to make that up.

MS. HUGHES: Thank you, Mr. Chairman. I think we can -- I'm going to try to make it by 4:30, I think we can do that, so I don't think you will have to stay beyond the time.

I mentioned just before the break that I was going to now look at the law on international agreements. And to demonstrate that the law supports Nova Scotia's position that the line dividing their respective offshore areas has been resolved by Agreement.

Starting first with the procedural conditions. There

are three procedural conditions that must be met in order to conclude an international agreement. This is from the Nova Scotia Memorial, part 3. The agreement must by 1) concluded between States, 2) governed by international law and 3) concluded by representatives authorized to bind the parties. In our submission the 1964 Agreement meets all three criteria.

Now the first two conditions of course are met by virtue of the terms of reference. And as for the third criterion, there is no question about the capacity of their representatives who entered into the Agreement on behalf of the parties.

The 1964 Agreement was concluded by Premiers, the heads of government, and they are equivalent to heads of state for the purposes of this arbitration. And under international law heads of government do not require any special authority to bind their states.

To quote Professor Brownlie on the next slide -- well he is not there. Well never mind, I will quote him anyway. "Heads of State, heads of Government and Foreign Ministers" -- everybody knows Professor Brownlie -- "Heads of State, head of Government and Foreign Ministers are not required to furnish evidence of their authority."

My accent isn't as good as his but -- so the same principle was enunciated in the Nuclear Test case, where

acts of the President of France were considered as acts of the French State.

"There can be no doubt in view of his functions" -- said the court -- "that his public communications or statements, oral or written, as Head of State are in international relations acts of the French State." So this principle is clearly applicable to the heads of government that signed -- that agreed in 1964 to the 1964 Agreement.

PROFESSOR CRAWFORD: There is no doubt, Ms. Hughes, that they had the capacity to represent the State for general purposes. The question is whether they had the capacity to bind the State to a Boundary Agreement. And Article 46 of the Vienna Convention says that a condition for the validity of a Boundary Agreement is that it is not unconstitutional in those circumstances in which the unconstitutionality is patent to the parties acting in good faith.

Now if it was the case that the heads of State knew that neither of them could by executive agreement or by communique change the boundaries of the State, wouldn't that be an Article 46 case?

MS. HUGHES: Well I think what we -- what you have is an example of the heads of State, the Premiers in this case all gave each other every indication that they had

authority to bind. And that there was no question in anyone's mind that something that would be notorious and well known that Article 46 would apply to that would suggest that there was any difficulty.

There was a press communique immediately after the Agreement was concluded. There was an official communication with Quebec. Each of these Premiers made a very public statement about what they were doing. There was absolutely no indication, one that would fall under Article 46, that would give anyone any indication to doubt the authority to bind the head -- the government, so I don't think that there is a situation where Article 46 would apply.

I think that what we have is very obvious acceptance on the part of all and an obvious indication by each Premier that he had the authority to do what he was doing. And they made it public immediately thereafter without any concern. So in our submission, the three procedural conditions for the existence of an international agreement have been met.

So what about the form of an international agreement? Nova Scotia demonstrated in its Memorial international law requires no particular form for binding agreements. An international agreement doesn't have to be in writing. An oral agreement, can of course, be binding. It doesn't

have to be signed and even a unilateral declaration can constitute an international agreement. There is a fairly well settled principle enunciated in numerous cases like the Legal Status of Eastern Greenland, Nuclear Tests, the GNC, Qatar Bahrain to name a few. And the Tribunal will, of course, be familiar with the following words of the court from the Nuclear Test case. "With regard to the question of form it should be observed that this is not a domain in which international law imposes any special or strict requirements."

Now Canada seems to favor the exchange of notes format for concluding international agreements, but its practice includes all manner of forms, including very formal agreements, agreed minutes, declarations, joint statements and process verbal.

International agreements are thus evidenced in a variety of ways. And in this case, the 1964 Agreement is not expressed in a formal single written agreement signed by all the parties. Rather, it finds expression in several contemporaneous documents, in circumstances of its conclusion and in the subsequent conduct of the parties.

Professor Crawford?

PROFESSOR CRAWFORD: Is there any case in history of a joint communique establishing a boundary? There is certainly cases where conduct of States -- I mean, the Temple case

is an example where the conduct of States has been held to be relevant to the question whether there is a boundary but that -- by way of acquiesence or possibly estoppel. But I think how far we go, it doesn't seem that we are in the realm of general acquiesence or estoppel in this facts. So the question is is there any practice by which joint communique has established boundaries? I mean, that they could conceivably do so may be right. There isn't any specific requirement of form.

But you have to relate what's being done to the form that's being used. One form may be appropriate for relatively routine transactions. If you are doing something like entering into permanent boundary agreements you would expect something more by way of form.

MS. HUGHES: Well I think that what they were doing at the time was everything that they thought was appropriate. They were trying to, first of all, as Mr. Drymer told you, they were agreeing amongst themselves. And their purpose, of course -- and this I think is relevant in determining whether or not -- what kind of agreement they were doing. They wanted to establish an agreement so that they could start issuing oil and gas permits. This is quite a bit different than establishing a boundary on all kinds of territorial rights.

I think you have to look at the context. And in this

context I believe that everyone that was a party to that agreement considered that they had sufficient agreement to carry forward and ask, their intent evident in their request to make it constitutional.

So moving to the intention to be bound. The fundamental requirement for the conclusion of a binding agreement at international law is not a matter of form then but the intention of the parties to be bound. So Lord McNair put the rule this way. "If an agreement is intended by the parties to be binding to effect their future relations then the question of the form it takes is irrelevant to the question of its existence. What matters is the intention of the parties. And that intention may be embodied in a treaty or convention or protocol or even a declaration contained in the minutes of a conference."

Newfoundland has also -- I view that intent to be bound as fundamental, so here the parties are agreed, intent is the key. The parties disagree, however, as to how to determine the parties' intentions.

And more precisely, Newfoundland denies that the methods offered by Nova Scotia, including examination of the plain words of the Agreement, its context, its object and purpose and the subsequent conduct of the parties can assist in determining the parties' intent. And in this we submit Newfoundland is just plain wrong.

Newfoundland doesn't appear to sanction any method for determining the parties' consent to be bound other than the formal methods that are described in Article 11 of the Vienna Convention on the Law of Treaties, signature ratification or accession. But we know that Newfoundland's view cannot be correct because that would imply that international agreements must be expressed in a written form. And we know that that is -- that proposition is at odds with the law.

MR. LEGAULT: Intend to be bound is naturally tied to capacity to be bound and you have dealt with that at least in part by referring to the Premiers being considered heads of State, although heads of Government might be more appropriate. But does the question of capacity to be bound arise in another context? We have had some references already to St. Pierre and Miquelon. What would be -- assuming that the 135th -- 135 degree azimuth line is an agreed boundary, what is the effect, if any, on that boundary of the delimitation of the continental shelf as between Canada and France?

Or another question that flows from that is was it possible -- would it have been possible in 1964 for Nova Scotia and Newfoundland to have agreed on a line of 135 degrees extending to the outer edge of the continental margin without reference of any kind, without making any

manner of provision for the eventual delimitation of the continental shelf boundary between Canada and France?

MS. HUGHES: I don't know that in 1964 the Premiers would have considered that St. Pierre and Miquelon would have entitled France to anything near the 135 degree line, but let -- let's assume that they might have. And let's assume that international law might have recognized at that time. What the Premiers agreed was a boundary that they were submitting -- that they agreed amongst themselves for oil and gas purposes, and they were putting it forward for whatever the nature of the rights might be.

It was indicated in the Joint Submission that they were looking for whatever the nature of the rights might be of Canada. And so they had as much authority, at the time, in their view, whatever Canada -- whatever Canadian Government authority was in the area, they too had the same authority.

MR. LEGAULT: But that answers the second question, but not the first. What is the effect -- if we look at the chart on the left hand screen, what is the effect, if any, that arises from the 135 degree azimuth line cutting through all that -- trying to judge that angle, it may be 40 miles of French continental -- of French continental shelf? Is that area of French continental shelf to be treated as Canadian continental shelf that has been divided between

Nova Scotia and Newfoundland?

MS. HUGHES: What it -- what it -- as a practical matter, as I understand it, I'm informed that it's about a 50 percent loss on each side.

MR. LEGAULT: It's about?

MS. HUGHES: A 50 percent loss of area on each side. 50/50.

MR. LEGAULT: Yes.

MS. HUGHES: That's the -- I'm going to have to -- I'm going to have to clarify that, but apparently the loss for each -- Nova Scotia and Newfoundland is about the same.

MR. LEGAULT: But was that part of an agreement in 1964, that they would accept eventual losses as long as they were equal?

MS. HUGHES: Well I think what they had said was whatever the nature of the rights might be. And so there was a -- a recognition --

MR. LEGAULT: We are not talking about the nature of the rights here, Miss Hughes, we are talking about the extent of the rights.

MS. HUGHES: I'm just going to get the reference for you, Mr. Legault.

PROFESSOR CRAWFORD: Let's put the question another --

MS. HUGHES: It's the nature -- I'm sorry. The nature and extent of the rights. I have misquoted the Joint

Submission, but he is just going to give it to me so I can quote it. That must be Miss Hughes over there.

"That the proprietary rights and submarine minerals as between Canada and the Provinces, whatever the extent and nature of those rights may be." And so in answer to your question, Mr. Legault, I think what they had in mind is whatever Canada could have, they, amongst themselves, had agreed. And so the St. Pierre and Miquelon boundary will take away from that, but that was envisioned. Whatever Canada's rights, the nature and extent may be.

PROFESSOR CRAWFORD: Excuse me, Miss Hughes, that's in the Joint Submission?

MS. HUGHES: Yes.

PROFESSOR CRAWFORD: Of 19' --

MS. HUGHES: The October 14th, 15th, 1964 Joint Submission.

PROFESSOR CRAWFORD: Right. And you interpret that to mean that they agree that the hypothetical 135 degree line is to stay in place, irrespective of what happens to St. Pierre and Miquelon?

MS. HUGHES: I don't know that they were thinking, as I said, about the St. Pierre and Miquelon boundary in that area at the time. But if you want to look as a practical matter what the impact is, that's what I think it would be. If they were looking at the time at the continental shelf extent, nature and extent of whatever the area was,

I think that's what they had in mind.

PROFESSOR CRAWFORD: The problem is that if you are right, this is the -- the award we give at the end of this phase is the end of the arbitration, and we have to come up with a boundary which finally determines the boundary between the two provinces. And therefore determines it to the southeast of the projection.

So we have -- we have to have a basis on which we can do that. Let's assume for the sake of argument, Nova Scotia and Newfoundland are independent States, and that they reach a boundary agreement. And that a third state, in the position of St. Pierre and Miquelon, is subsequently awarded, as against them both, because they are both bound by this award, a projection that cuts across like that, what is the consequence of that subsequent award to their pre-existing agreement as a matter of international law?

Again, you can take that question on -- on notice. It's really a reply stage question, but I think -- I think it's a question I'd like to hear both parties on, because if -- if you are right, this is the only award we make, and we have to make the award to the outer edge of the continental shelf.

MS. HUGHES: Right.

PROFESSOR CRAWFORD: And we can't do it without answering

that question.

MS. HUGHES: And you will have an answer.

PROFESSOR CRAWFORD: Thank you. Can I just come back to the question of intent to be bound, rather than -- we really have been addressing it as a separate question almost of capacity. When -- when the Premiers in this -- working in this sort of general terrain wanted to make agreements, and you had to do it, and if you look at Newfoundland Annex 25, this is the Agreement of -- what's the date? 16 July, 1968, on the establishment of the JMRC. It's a memorandum of agreement. You know, it's got the parties, it's got clauses, it's witnessed and it's signed by the Premiers.

And there is nothing like that on the boundary. I mean, it seems a bit curious that they would enter into such a formal agreement on the JMRC, and then satisfy themselves with a binding agreement on the boundary in a couple of communiques.

That question is not intended to express a concluded view, I'm simply asking your opinion?

MS. HUGHES: Well I think that what Mr. Drymer reviewed yesterday was the long history of the development of that Agreement. It was -- it didn't just happen one Friday evening at the bar. I mean, they were making these discussions -- having these discussions for years. They

had the notes re boundaries. They had a map that you have seen. It was a very definite agreement in their mind. And they came once a year together to make important decisions. And this was one of them in 1964.

Now the fact that they made this Agreement this way, I don't think takes away from the fact that they have made another Agreement in a different way. They had been discussing this issue for -- the '64 boundary issue for years.

It was made in a way that was perfectly acceptable at the time. And they made a very public announcement about it, conveyed it officially to Quebec, conveyed it officially to the federal government, and applied it ever after.

CHAIRMAN: The -- I have little doubt that they expected to respect this as opposed to being legally binding. But it was in a context where governments of these provinces make agreements on any number of subject, any number. And I think that that colors the -- that colors the fact that there is no agreement on something as important as a boundary.

But the -- they did have other kinds of agreements in these meetings as you know. Some of which their expectations must have been that the next election might find some other person in their place who might do

something else.

MS. HUGHES: Not with Joey Smallwood, surely. But -- I think what we -- I have to come back to, Mr. Chairman, is the law that applies. And the law that applied didn't require any particular form. And so what they did was perfectly acceptable and perfectly legitimate.

CHAIRMAN: I don't think that it -- I'm not going so far as to say that it demands a particular form. What I am suggesting is it is more serious the argument, the more persuasive it is that the parties were agreeing to be legally bound. And I'm not saying that you wouldn't in this case, I'm merely saying that the more serious the agreement, the more you need to have the persuasive evidence. And I know that over the days here that the attempt has been made.

But I think that the fact that it isn't in a -- an agreement is one that is difficult. But I don't think it's superable.

MS. HUGHES: Thank you. I think, as you said, it's not insuperable. I don't think that the international law has ever said that the more serious agreements have to be done in a certain way, different from others.

There are agreements that -- that are quite serious that are done in -- in different ways. And so I -- as you say it's not insuperable, so I will adopt your comment.

Professor Crawford?

PROFESSOR CRAWFORD: Well in support of that proposition there, I was tracking examples of things which probably should have been done and ratified treaties, which have been done in executive agreements. So -- or whatever. I mean, the date an agreement was -- was binding on signature. So you have an example of a peace treaty. But I mean, it was signed, and I mean, one of the -- one of the slight worries, if you take the view that -- that the purpose of this phase of the arbitration is for us to determine the existence of an agreement which apply international law either was or was deemed to be legally binding.

There is a difficulty that this thing wasn't even signed. I mean, it was a communique.

The declaration contained in the minutes of a conference to quote Lord McNair -- I mean, he would probably have expected at least the minutes of the conference would be signed, and characteristically they are. In many languages they are referred to as protocols. And they are somewhat formal documents.

But what we have here is two communiques of '64, and '72, which were not signed by anyone. And I mean, it's just -- it is just the problem -- you have gone a long way it seems in establishing Agreement, whether the whole way

or not is a question, but certainly a long way. An Agreement? That's the question.

MS. HUGHES: Professor Crawford, I think that the point here is that form of the Agreement is not as important as the context of the Agreement, and it is the context that we have been talking about for a day and a half. And it is the context and the subsequent conduct that confirms the agreement. And that, at international law, is much, much more important than the form.

And indeed, Lord McNair might have preferred that we had -- have someone sign the '64 Agreement, but Lord McNair would suggest that that was not necessary. Or indeed he has.

And so does Nova Scotia. Let me try and move along so we can finish in time. I'm going to look -- I'm just going to review briefly what the -- what I have just been referring to, the circumstances of the signature and the context so that we can determine what in fact the intent -- so I can confirm for you that the intent was there, and that is what is important.

The terms of the 1964 Agreement -- now consider first the documents evidencing the 1964 Agreement and the circumstances of its conclusion. The contemporary written evidence of the '64 Agreement referred to yesterday by Mr. Drymer is overwhelming, both in terms of its extent and

its consistency.

The slide people are not going to know where I am. I'm looking at 16. I apologize, but I have skipped a few pages.

The communique issued by the Premiers following their meeting on September 30th, recording that the Premiers unanimously agreed that the boundaries described by metes and bounds be the boundaries of the provinces. The Matters Discussed Memorandum recording the Premiers' Agreement on boundaries, the correspondence from the Premier of Quebec, confirming his government's Agreement to the boundaries, and the Joint Submission presented to the federal government. Now in all of these -- in all of this you have very significant evidence that there was an Agreement, and the terms of the Agreement -- it's a straightforward analysis. The parties had agreed the boundaries. There was a clear intention. The Notes Re Boundaries and the map was attached at the Joint Submission.

So turning to the circumstances of the conclusion, the Tribunal has already mentioned that sometimes when a government adopts -- when governments adopt a particular agreement, they make statements to say they are not going to be bound, and that's happened. The Universal Declaration of Human Rights, is an example. They make

very clear statements to say what they are not doing. Well, in this case, there were clear statements to say what they were doing, and they made, as I have mentioned, a very public announcement, a communique.

They officially conveyed the Agreement to the Government of Quebec and sought agreements back from Quebec, and then at this meeting of all the Premiers and the Prime Minister of Canada a few weeks later, they made very clear what their Agreement was for all to know. And as I have said, a sure sign of their commitment was their request that they be sanctioned in the Constitution.

Now Newfoundland says that this evidence -- the terms of the documents evidencing the Agreement and the circumstances of its conclusion is consistent with its own theory that the parties agreed on a proposal and nothing more. But I think that my colleagues have demonstrated that the record does not support that position, and indeed, neither does the law.

The object and purpose of the '64 Agreement is relevant in ascertaining the intention to be bound. Mr. Drymer referred yesterday to one very practical reason for agreeing on maritime boundaries in 1964. As he mentioned, the oil companies were keen to start exploring the continental shelf off the Atlantic Coast. The economic benefits of such development were obvious, and the East

Coast provinces believed the mineral resources of the seabed belonged to them. After all, it wasn't for some years that the Supreme Court was going to tell them otherwise.

So one object of the Agreement, of course, was to secure among the provinces a mutual recognition of their rights to grant permits to oil and gas companies in their respective zones, and they were looking for stability in the offshore oil and gas regime with a view to securing economic benefits. If they didn't have an agreement that was binding amongst them, that goal would have been frustrated.

Turning to the subsequent conduct of the parties, the conduct of the East Coast provinces subsequent to the conclusion of the '64 Agreement has been reviewed in detail by Mr. Bertrand and Mr. Saunders, and so I, of course, don't propose to go back into the details, but I would say only this in terms of how that subsequent conduct relates to the intention to be bound.

From the moment the Agreement was concluded in 1964, Nova Scotia took its commitment seriously. From the word go, Nova Scotia operated as if it were bound and has never wavered in that conviction to this day. Newfoundland's conduct too demonstrates that it was in for the long haul, and it believed it to be. The '64 Agreement was

manifestly not just a temporary convenient alliance to be abandoned at will. Newfoundland's conduct over a number of years, including its active and leading role in the JMRC, its permit issuance in conformity with the agreed boundary, and its absence of protest of the use of the line in the Canada/Nova Scotia Accord and the implementing to legislation, we would submit, is cogent evidence of Newfoundland's very definite intention to be bound by the 1964 Agreement.

And the conduct of the other parties, we shouldn't forget, that also proves there was intent among the five East Coast provinces to commit to a binding boundary agreement. Mr. Saunders referred to the East Coast provinces' activities, and these were decidedly not temporary in nature. They developed official maps depicting the boundaries, they issued permits and they relied on the boundaries in federal/provincial negotiations and in legislation. And Newfoundland asks the Tribunal to ignore all of this conduct of the other provinces. It says, well, you know, it's not relevant.

The irony is that Newfoundland considers significant the views and the conduct of the federal government, which is not even a party to the 1964 Agreement, but it wants you to dismiss the conduct of the actual parties.

Newfoundland's approach is out of step with the

approach taken by other international courts and tribunals when assessing the weight to be accorded to the conduct of those not party to a particular dispute. And I will just refer to one example, the Court of Arbitration in the Beagle Channel arbitration, in considering the probative value to be attached to maps prepared by States that were not parties to the arbitration, said the following, "While maps coming from sources other than those of the parties are not on that account to be regarded as necessarily more correct or more objective, they have an independent status which can give them great value. They are significant, relative to a given territorial settlement, where they reveal the existence of a general understanding as to what that settlement is."

So the subsequent conduct of all the parties, as Sir Gerald Fitzmaurice said, is good evidence of their attitude, state of mind or intentions at an earlier date, namely on September 30, 1964.

Now on the subject of subsequent conduct, I just want to address briefly one of Newfoundland's suggestions. It said that the inclusion of a dispute resolution clause in the Canada/Nova Scotia Accord implementing legislation amounts to an admission on the part of Nova Scotia to the effect that the boundary between Newfoundland and Nova Scotia had not been settled. This is a rather

extraordinary proposition. The parties' willingness to include a dispute settlement clause and an arrangement somehow undermines the arrangement -- somehow undermines the Agreement.

Maybe that's not what Newfoundland really meant to say, but I think what Newfoundland did was it misunderstood the dispute resolution provision in the legislation.

The Canada/Nova Scotia Accord Act provides in Section 48.2 that "where a dispute between the province and any other province that is a party to an agreement arises in relation to the description of any portion of the limits set out in Schedule 1" -- and Schedule 1, of course, explained by Mr. Fortier yesterday, sets out the 1964 Agreement boundary between Nova Scotia and Newfoundland. "The dispute resolution provision provides a mechanism to be invoked only if there is a dispute as to the description of any portion of the 1964 Agreement line."

So rather than casting doubt on the existence of the boundary, the provision, in fact, confirms it.

And one final point on Intent to Be Bound, I think. In considering the intention of the parties in concluding the 1964 Agreement, one must not lose sight of the cardinal principle of law on international agreements, namely that agreements are binding upon the parties to

them and must be performed by them in good faith, and this is, of course, the principle referred to as pacta sunt servanda.

The fundamental principle of good faith and the conclusion and performance of agreements and the corresponding centrality of the intention of the parties to be bound constitute the measure by which the parties' conduct is to be judged in this arbitration.

So this concludes my remarks, my prepared remarks on Intent to Be Bound, which may be summarized as follows: The parties' intent to be bound is the fundamental requirement for the conclusion of a binding agreement at international law. Intention to be bound may be expressed in a variety of ways, none of which is mandatory. To ascertain whether parties intended to enter into a binding agreement, one must consider the terms of the agreement, the circumstances of its conclusion, the object and purpose of the agreement and the subsequent conduct of the parties.

Over the past two days, my colleagues have demonstrated that the various propositions on which Newfoundland's case relies have no basis in fact. Newfoundland's contentions that the boundaries were merely a proposal conditional on federal acceptance, that they were valid only in the context of a provincial ownership

over mineral rights of the offshore, that they did not extend to the limit of the continental shelf, and that the outer segment is imprecise, or even non-existent, cannot be reconciled with the facts contained in the historical record or with the conduct of the parties over a period of some 40 years.

And in our submission, application of the principles of international law governing the interpretation of agreements result in the same conclusion, namely that Newfoundland's theories about the 1964 Agreement have no basis, this time in law. And in deducing these conclusions, Nova Scotia has relied, of course, on the principles and rules of treaty interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties, which is now on the screen.

So I think at this point it's not necessary to review in detail the arguments set out in Nova Scotia's pleadings regarding the legal interpretation. I just would make a few brief points to summarize that.

If you could move to the next slide? The plain words of the documents and the subsequent conduct of the parties reveal not a proposal on jurisdiction, but a binding agreement on boundaries. Not a proposition to take effect only upon constitutional implementation, but an agreement effective from the moment it was concluded. Not a regime

applicable only in the context of full provincial ownership of the mineral rights of the offshore, but a boundary agreement for all purposes. Not a delimitation that was focused on the Gulf of St. Lawrence, but a complete boundary extending to the outer limit of the continental shelf. Not an imprecise directional line ending at some arbitrary point in the Cabot Strait area, but an accurate directional line extending southeast on an azimuth of 135 degrees to the outer limits of the continental margin.

I think that at this point I'm going to conclude, unless there are further questions, so that -- Professor Crawford?

PROFESSOR CRAWFORD: I feel under an obligation.

MS. HUGHES: Indeed. Why not?

PROFESSOR CRAWFORD: Well, you have been built up so much.

MS. HUGHES: Well, I'm sure someone will say, Ms. Hughes will answer that again, so I think I will have another shot, but in any event, go ahead.

PROFESSOR CRAWFORD: No, I have no further questions.

MS. HUGHES: Oh, thank you. Very good. So if I could, Mr. Chairman, ask you to call on Mr. Bertrand to conclude for Nova Scotia?

CHAIRMAN: Thank you, Miss Hughes.

MS. HUGHES: Thank you.

MR. BERTRAND: Mr. Chairman, with your permission and indulgence, I will keep you only probably another 10 minutes or so, only, so that we will finish well ahead of time of our 4:30 deadline. I would hate to turn into a pumpkin actually.

A lot was said during the last two days, and I don't intend to repeat what was argued extensively by my colleagues. I mean only to summarize very, very briefly our position and maybe emphasize certain key features of our submission.

As you have heard Mr. Fortier say at the outset, this case is of vital importance for Nova Scotia, and as you have been able to see by a quick glance at the map that has been there ever since we started to argue, the relative size of these provinces' offshores area make it easy to understand that Nova Scotia has a special interest to make sure that Newfoundland is not allowed to walk away from the bargain to renege its word, presumably to claim more offshore at the expense of Nova Scotia.

The mandate of the Tribunal is clear and flows from the Terms of Reference. It is to apply the rules of international law as though Nova Scotia and Newfoundland and Labrador were States subject to the same rights and obligations as the Government of Canada at all relevant times.

With all due respect, the Tribunal has no choice. The Terms of Reference are clear, they are valid, and unless they are challenged and until they are challenged and struck down, you have to presume that they are valid. This is where you hold your mandate.

At the same time, we ask you to bear in mind that we are not here to amend the Constitution because this is not a real boundary dispute, but rather a dispute about a line delimiting areas pertaining to valid, legal administrative arrangements about oil and gas, not about territory, not about other aspects, but only with respect to oil and gas.

So this is not a case about the supremacy of Parliament. There is no need for a constitutional amendment. As you have pointed out, the very legislation from which the Terms of Reference flow provide for the way that this line is going to be implemented after your decision is made.

The best example of that is the fact that the Nova Scotia line is currently legislated in the federal legislation implementing the Canada/Nova Scotia Accord. No constitutional amendment was necessary for it to become law. This is not a typical boundary case either, even though some of you have particular expertise and experience in dealing with these cases and you might be eager to pull out your pen and start drawing where the

line should be. We are not there. And if we have our druthers, obviously, we will not get there.

This is a case about the existence of a valid agreement, an agreement regarding the delimitation of rights to oil and gas between provinces.

And this is thus why you are being asked to determine, as a first step, whether there exists an Agreement, and whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and Nova Scotia has been resolved by Agreement.

Irrespective of any burden of proof, we submit that you are asked to make up your own mind about whether or not such an agreement was entered into.

God knows we would like to show you that signed paper with Mr. Smallwood's signature at the bottom. We don't have it. Mind you, at one point in time in this file we thought we might have it when we suddenly discovered that Newfoundland had a map with the missing "compass rose", we wonder whether they might have in their drawers a copy of a signed Agreement of the 1964 Boundaries. But we are still waiting.

Mr. Drymer initially indicated that our submission was that the Premiers when they met intended to conclude, and did conclude, a binding agreement. An agreement to delimit their boundaries in its entire -- in their

entirety, out to the limits of the continental shelf, subject to Canadian jurisdiction at international law. This is obviously a contentious issue here.

But they intended also to describe their boundary accurately and completely. And that that Agreement was meant to have immediate effect, was not conditional upon anything else.

That they considered their agreed boundaries applicable to all forms of rights relating to mineral resources of the continental shelf. But only to rights relating to the mineral resources of the shelf just as it is now in the Accords.

What we have seen, we submit, is that indeed -- and unfortunately the writing is too small for you to see, but below Figure 29 is a time line summarizing the key events of this case.

On September 30, 1964, the Premiers did meet, and they unanimously agreed the marine boundaries of the provinces of the East Coast. They intended to be bound, they intended, Mr. Chairman, as you said, to be -- to respect their word, and as Miss Hughes has eloquently, I submit, explained, this is all they needed to have in terms of intent.

If you apply the rules of international law to this mindset, you will conclude, we submit, that they had the

necessary intent to bind themselves, and that therefore from that day, they had agreed on their respective boundaries.

The file is replete with various examples of a confirmation of that Agreement of behavior consistent with the existence of such an Agreement. And the first major instance of that is the creation of the JMRC in 1968, '69.. The work of the JMRC, and finally in 1972, the approval by the Premiers of the East Coast Provinces of the turning points as they had been described originally in the 1964 Agreement.

Mr. Moores, then Premier of Newfoundland, shortly thereafter, was proud before the House of Assembly in Newfoundland to inform his constituents about this Agreement, and about the prosperous future that was awaiting the East Coast Provinces as a result of exploration of oil and gas being capable of -- of occurring.

Further confirmation of the existence, and the scope of the Agreement, is found in the behavior of the parties with respect to permit issuance. And I will spare you a recital of an account of the various permits issued along the line, all the way to the outer segment of the line.

But as Miss Hughes just -- I'm sorry, before I turn to Miss Hughes, we refer you to Figure 4, initially the

1961 -- or '64 Agreement, and then we saw that what the Premiers had done basically was to develop turning points without giving them coordinates obviously. But essentially, from the last turning point, the line goes southeast to international waters.

And so this is the proper depiction of the line, the boundary between Newfoundland and Nova Scotia agreed upon at the 1964 meeting of the Premiers.

The JMRC then developed the turning points using a computer and submitted its report to the Premiers in 1972 for approval. Again, the work of the JMRC being limited to developing the turning points, the appropriate depiction of the 1964 boundaries must include an outer segment running SE, southeast from turning point 2017 to international waters.

Now this may be -- this may be something for interpretation, but we submit that it nevertheless establishes the existence of an Agreement.

Newfoundland may dispute what the Agreement means, how the lines should be drawn from descriptions and words to a map, and we can discuss that, but we submit that the historical record is replete with examples -- or not examples, instances where either through its conduct or through documents, Newfoundland has admitted the existence of the 1964 Agreement.

As Professor Saunders said very eloquently, the Agreement either exists or it doesn't exist. Everyone except Newfoundland has the understanding that it existed, not only for the Gulf of St. Lawrence, but it existed also for the outer limit past 2017.

As Miss Hughes has finally concluded, I forgot one -- one Figure, I'm sorry.

This Figure 28 summarizes the issue of permits. This Figure 28 comprises all of the permits issued by all of the Eastern Provinces. And it is clear that everyone, including Newfoundland, understood where the boundary was in this area. The only exception is the Katy Permit, and Mr. Saunder's explanations in this regard, even for a lawyer that I am, were clear.

And finally, Ms. Hughes just covered the slide and basically ties in with the earlier slide. The 1964 Agreement is not a proposal, it's a binding agreement. It is not an Agreement that was conditional on the participation of the federal government. It is a binding agreement as between the provinces. And the provinces had agreed that they needed that boundary before doing anything else. How they use that boundary after is a separate topic.

It is an agreement that was effective from the moment it was concluded. And as Mr. Saunders explained to you,

soon after it was entered into these -- they were agreed, these boundaries were used by Newfoundland to start issuing permits for offshore exploration of gas and oil. The Mobil example is very telling in this regard.

It is as I just said not an Agreement that was conditional upon the acceptance by Canada of a claim of ownership to mineral right -- to mineral resources, but rather an Agreement in itself, which was later used in support of a claim of ownership over these resources.

Again, the Premiers intended to cover the whole ground. They intended to provide for a description of the boundaries in all of this area. Whether they did it clearly, whether the words they used leave something for interpretation maybe is one thing, but it does not put into question the existence of the Agreement. It may be that you have some interpretation to do. We submit that you don't. We submit that they clearly indicated where they wanted the line to run from turning point 2017. I'm sure we will hear something else from our Newfoundland friends in the next few days. But this is something we submit that you have to come to grips with in this first phase. And this is -- you have the power to do it, but more importantly, you have the duty to rule on it.

Finally, before we depart for a couple of days and return here in a different capacity and hear our friends,

we would like to ask you to bear in mind a few thoughts when our friends across the room are going to stand up and start arguing. Maybe you want to ask them how did they operate their oil and gas regime in the offshore in practice during this period if there was no Agreement? Upon what criteria did they decide the limits of where and how these permits would be issued?

Newfoundland avoids referring to the line as a criteria but in fact what did they do? How is it that these permits abut the line? Why is it that permits don't go over the line except for the few examples of seismic exploration? Seismic?

PROFESSOR SAUNDERS: Seismic survey.

MR. BERTRAND: Seismic surveys. Thank you, Professor Saunders. Why is it that there are not more permits that overlap the line? Why is it that they haven't issued a permit that would encompass Sable Island? We would be interested to hear the answers that's for sure.

And lastly, we would like to thank you for your patience over the past two days. And for obviously the hard work that had been done prior to coming here. We are very appreciative of both your patience, your attention and the questions you have been asking us, which have allowed us to really have a frank exchange of views over these issues. Thank you.

CHAIRMAN: Thank you, Mr. Bertrand.

MR. BERTRAND: And it's 4:27.

CHAIRMAN: 4:27. Well you have earned some brownie points.

MR. BERTRAND: Thank you, Mr. Chairman.

(Adjourned)

Certified to be a true transcript of the proceedings of this hearing as recorded by me, to the best of my ability.

Pamela Lyons

Reporter