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ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR
AND NOVA SCOTIA

held on the 16th day of March, A.D., 2001, at the Wu
Conference Centre, Fredericton, New Brunswick, commencing
at 9:30 a.m.

P. Lynch Enterprises
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Tribunal:

Hon. Gerard V. LaForest, Chairman

Mr. Leonard Legault, Q.C.

Professor James Richard Crawford

Appearances:

L. Alan Willis, Q.C.

Professor Donald M. McRae

.....
CHAIRMAN: Yes, Mr. Willis.

MR. WILLIS: Mr. Chairman, and Members of the Tribunal.

This morning I will be addressing an issue at the heart of
the Nova Scotia case, and at the heart of phase one of
this arbitration.

The issue is whether the line dividing the offshore

areas of Nova Scotia and Newfoundland and Labrador for the purposes of the two federal-provincial Accords has been resolved by an agreement concluded by the Atlantic Premiers on September 30, 1964.

The main points I will develop in my argument this morning include the following: first, the 1964 initiative was not a legally binding agreement, it was a proposal in an unsuccessful federal-provincial negotiation related to ownership rights.

Second, the proposal was to be implemented through federal and provincial legislation, under what was then the British North America Act 1871, and no such legislation was ever passed.

Third, that even if the constitutional legislation had not been required and intended, some form of legislative authority, or sanction, would have been necessary.

Fourth, the Accords and the legislation are inconsistent with the proposition that a binding agreement had already been concluded.

Fifth, the 1964 Proposal fails to cover the principal area in dispute with the precision and certainty that would be required of a legally binding agreement.

Sixth, and finally, the 1964 Proposal related to claimed rights of ownership, and could not be applied for the purposes of the Accords without the express agreement

of the parties.

First, however, a preliminary point. The parties agree on very little, but they do agree on one crucial point, what would be required in order to answer the question in favour of Nova Scotia is a legally binding agreement. The existence of such an agreement depends upon the intentions of the parties at the material time. The adoption of that test is loud and clear throughout the Nova Scotia pleadings, including the oral argument this week.

The issue is whether the parties intended to conclude, and did conclude, a legally binding agreement in 1964.

This common position is compelled by logic and by language. By the language, because the word "resolved" requires the certainty and disability of a definitive settlement, which implies a legal and not merely a political commitment.

More important, this common position is required by logic. The effect of phase one will be to decide whether the Nova Scotia line becomes the line dividing the offshore for once and for all. And to decide this without any consideration of whether that line is consistent with the legal and equitable principles that govern maritime boundary delimitation.

It is unthinkable that such far reaching and

irreversible legal consequences could flow from a document that was not intended to be legally binding, or that such a document should be retroactively transformed into something radically different from what was intended.

And for the same reason, it is clear that the line could not be resolved by an agreement that was intended to become legally operative, or effective, only upon -- only on the basis of conditions or formalities that were never fulfilled.

The requirement of a legally binding agreement cannot be satisfied by negotiating proposals in an unsuccessful negotiation. And by the same token, it cannot be satisfied by ad referendum agreements that were subject to legislation, or by merely political undertakings of whatever character, or even by legal agreements whose conditions of implementation were never completed.

It's early for a digression, but I would like to comment very briefly on Professor Crawford's question about whether there is some significance in the wording of paragraph one of article 83 of the 1982 Law of the Sea Convention, which refers to agreement whereas the word "an agreement" is used in paragraph four.

I would suggest that in paragraph one the reference is to legally binding agreements, and only to legally binding agreements.

In cases where the existence of a settlement by agreement has come up, international tribunals have looked for a binding and applicable treaty. For example, in Senegal and Guinea Bissau, which I will refer to later on, the issue was the binding character with respect to the parties of a 1960 Treaty on the continental shelf.

In the 1992 Jan Mayen case between Norway and Denmark, one issue was the application of an admittedly valid and binding treaty to the Greenland sector.

The same was true in another West African case, Guinea vs. Guinea Bissau, where the applicability of a treaty of 1886 to the issues in dispute was considered.

The point here is that the analysis has always been in terms of binding treaties, genuine treaties, and nothing less. And I think it would be extremely surprising if an international tribunal took some form of agreement that was not intended to be binding, and was not a treaty for that reason, and said that nevertheless, it had the effect of producing a legally binding maritime boundary under article 3 paragraph 1. And there is certainly no authority to support that proposition.

PROFESSOR CRAWFORD: Mr. Willis, that -- that's no doubt right in general. Of course, there have been cases where boundaries have been held to be determined by unilateral acts. I'm not suggesting that this such a case, but as a

matter of interest. I mean, in -- in the Temple case, or the Eastern Greenland case.

Hypothetically, assuming that you had from both parties unilateral acts or a course of conduct which was such as to commit them -- commit each of the parties to the same boundary, would that amount to the resolution by agreement of the boundary? Or would it simply -- is it simply the notion such as acquiescence estoppel, et cetera, factored into relevant consideration?

MR. WILLIS: I think generally it's the latter, that relevant considerations that can come up on the merits in the maritime boundary cases are very broad conception, and accommodates these various concepts.

But certainly I think both in the case of unilateral declarations, and of agreements properly so-called, the test in every case would be intention. Was this really in the circumstances intended to produce legal -- legal consequences of a binding and definitive character?

With that as a general background, Mr. Chairman, I would like to review the events of 1964. And in so doing I will discuss a series of propositions in the Nova Scotia argument that are all essential to what it must prove, but there are so implausible, in our submission, as to be totally out of touch with common sense and reality.

These include the proposition that inter-related items

in a single negotiating document are totally separate and independent. The proposition that items drawn up in preparation for a federal-provincial conference, with the intervention of the government and parliament of Canada expressly and repeatedly called for, was not concerned with federal-provincial relations, but only with the relations of the provinces inter se. And the proposition that constitutional legislation, federal and provincial, which was called for as the method of implementation, was never really necessary in the first place, but was legally redundant window dressing.

Newfoundland and Labrador have submitted that the 1964 Proposal was just that. It was a joint negotiating proposal, and with the failure of the negotiations it ceased to have even a political relevance.

Nova Scotia, of course, asserts exactly the opposite, notwithstanding the absence of a signed agreement, or of the implementing legislation that was called for in the conclusions of the September 30 meeting.

We are told that Newfoundland's fatal flaw in its treatment of the historical record is to confuse the so-called 1964 Agreement of September 30 with the joint submission of October 14 and 15.

It is clear why Nova Scotia seeks to downgrade the importance of the joint submission, because the submission

clearly sets out a negotiating proposal addressed to the federal government. It is not the description of a "fait accompli".

It seems obvious that the two documents are both part of the story, and they should be read together. Each helps to explain the other.

The submission is the outcome of the September 30 meeting. It is the united presentation referred to in the last point, agreed to at that meeting. It's important because it explains the intentions of the Premiers at greater length, and in greater detail than the summary documents of September 30.

In the concluding passages of the Joint Submission, Premier Stanfield says "We are asking you, Mr. Prime Minister, to assure all of the provinces that the position of the provinces in respect of their ownership of submarine mineral rights will be acknowledged and respected by Canada, and that if necessary, proper legislative measures will be enacted to assure such rights to the provinces. We are asking you to put in motion the steps necessary to define the marine boundaries between the several Atlantic Provinces as set out on the map, and in the description accompanying this submission, subject to review in detail."

The federal authorities, therefore, are requested to

give effect to the boundaries, the tentative boundaries, as Premier Stanfield expressed it, under the BNA Act 1871. The words and the substance are completely inconsistent with the idea that boundaries were already in place on the basis of a binding agreement concluded without federal participation some two weeks earlier.

And Mr. Chairman, members of the Tribunal, the word -- the expression "tentative" speaks for itself. Tentative means tentative. It refers to the status of the proposed boundaries themselves, not just the technical details of implementation.

Premier Stanfield's language goes hand in hand with the introduction to the metes and bounds description. The Notes re Boundaries, which was annexed to the submission, and the September 30 statement.

That document, the Notes re Boundaries, speaks of suggested boundaries. The same tentative language was echoed by Premier Smallwood's intervention at the next federal-provincial conference a year later.

Mr. Crane has mentioned this yesterday, but it bears repetition. At the 1965 conference, the Prime Minister said that the adjustment of provincial boundaries without federal participation would be an arbitrary action and that the provinces do not have the constitutional authority to adjust provincial boundaries unilaterally.

Premier Smallwood did not demur. On the contrary, he replied that the interprovincial boundaries were merely a proposal and that the provinces had not attempted to make them law.

The exchange, once again, speaks for itself. It requires no explanation and it is, of course, totally inconsistent with the central proposition of the Nova Scotia case.

PROFESSOR CRAWFORD: Mr. Willis, it's puzzling in a way -- it may be helpful for you, but it's puzzling, anyway, that everyone seems to have assumed that the appropriate way to give effect to a provincial agreement was under section 3 of the Constitution Act of 1871, which implies that what they were doing was actually changing the boundaries of the province.

In fact, there are two assumptions there. The first is that the word "boundaries" extends to maritime boundaries, which is not obvious. I mean the main purpose of determining the extent of the province is to work out who the people of the province are for the purpose of representation and so on.

Secondly, the continental shelf was only in a certain sense the territory of the state. I mean even if the boundaries of the state were to include the territorial sea, which is usually the case internationally, though not

in the British tradition -- the British tradition is that the territorial sea is appurtenant to the territory, not part of it. No one has ever applied that principle to continental shelf.

So I mean it just strikes me as odd that everyone was simply working on the bland assumption that if you're going to have a continental shelf boundary way out to sea, nonetheless, this was going to be part of the boundaries of the province within the meaning of section 3.

MR. WILLIS: Well, I think the question is not without difficulty, but I think the Premiers were on the right track. And even, perhaps, they had some foresight in assuming that the 1871 route was the proper legislative vehicle because, in a sense, the two references of 1967 and later in 1984 decided that the fundamental flaw with the provincial claim was that the territorial sea and the continental shelf were outside provincial limits.

That being the case, there has to be some constitutional way to fix that problem, and the only obvious vehicle would be the Constitution Act 1871, or the BNA Act 1871, as it then is.

Now what does one do about the problem that in 1871 -- and the language doesn't contemplate the special character of continental shelf rights as being sovereign rights outside state territory, properly so called. And I think

there one might rely on the principle that constitutional enactments are given an especially flexible interpretation to keep up with changing developments. That's Lord Sankey's famous living tree metaphor from the labour conventions case.

PROFESSOR CRAWFORD: But what the provinces really sought in relation to the offshore area, leaving aside territorial sea or internal waters -- I mean obviously, internal waters is something else and it may be that a lot of the explanation of these problems is that the focus of their attention was on internal waters. But looking at the offshore for the moment, they weren't particularly concerned as to whether the offshore -- I mean this is how I read the documents at present, subject to correction -- they didn't seem terribly concerned as to whether the offshore was, as it were, part of the province.

They were concerned to have jurisdiction over -- they were concerned for its resources. None of the other federal state settlements involving the offshore anywhere else in the world has increased the provincial units in relation to the continental shelf. They've simply deemed the provinces to include offshore areas or given them powers or jurisdiction or resources, but the resource itself has always remained extra-territorial.

MR. WILLIS: Extra-territorial, but, nevertheless, an

adjunct of state territory. It's sovereign rights. It's not merely a purely economic interest. There's something more to it than that. I think of the JMRC case that said that although it's not -- the continental shelf is not strictly state territory, it's, nevertheless, an appurtenance of state territory.

PROFESSOR CRAWFORD: Yes, but that doesn't -- that's for the purposes of international law, and we're talking about what they thought they were doing. And it's just odd that they assumed blandly that the offshore areas would be, as it were, part of the province in the same sense as its land and territory. I mean that wasn't the case under international law, and arguably, still isn't.

MR. WILLIS: No. Of course, I don't know that -- I would expect that it be a subject of a fair amount of consideration whether the 1871 Act was appropriate. And that legal analysis would not necessarily appear in the political documents we have here. And my answer would be not that it's free of difficulty, given the special character of continental shelf rights, but it's not an unreasonable proposition to say that the 1871 Act is the best available vehicle for achieving what they wanted to achieve.

CHAIRMAN: They may have -- they may not have fully understood the interrelations -- would surprise me if

Premiers did, you know, between international law and national law, and might have assumed that if Parliament extends it that far, we will get whatever it is Canada can get.

It may be that that kind of thinking, you know, particularly in retrospect when it became clear, at least at the national level, that this was an adjunct of sovereignty. It may be that they -- they simply had not qualified it, but that does not necessarily change what was their intent.

MR. WILLIS: I think that's true, and I think the key point here is their intent. Their intent, whether or not it was correct in law, and I think it's a reasonable argument that it was correct, but their intent was to use that legislation, to use that legislative route.

PROFESSOR CRAWFORD: Sorry. Just to finalize the point. As I read the Accord legislation -- I'm not an expert in the law of Canada -- as I read the Accord legislation, it does not change the boundaries of the province and it does not involve an exercise of power under section 3. Do you agree with that?

MR. WILLIS: That's correct, and I'll come to that later on.

MR. LEGAULT: Mr. Willis, at the same time, of course, I think perhaps that's the explanation for the facts regarding the accords as they were just described by

Professor Crawford. The Accords do not grant what the provinces called proprietary rights, ownership and full jurisdiction. Therefore, it would have been quite inappropriate under any view of the law, under any view of the Constitution, under any view of international law to have altered the boundaries of the provinces in those circumstances. Is that correct?

MR. WILLIS: That's correct. And if, indeed, the Premiers had had the prescience to look forward to what the regime were looking at today, I believe they would not have referred to the 1871 Act as the method of implementation.

I was referring to this exchange at the 1965 federal-provincial conference, and, as I had mentioned, it requires no explanation and is inconsistent with the central tenets of the Nova Scotia argument. Nova Scotia was in attendance at that meeting and said nothing to indicate its disagreement, either in the plenary meeting or thereafter.

The idea that a legally binding agreement was already in force would have come as a complete surprise to any of the Premiers at that meeting as they listened to this exchange in silence without objection or comment.

We had an interesting discussion on Monday about Premier Stanfield's letter to Quebec on October 2, 1964, and it refers not once, but three times, to proposed

boundaries. There is no indication in the text that the boundaries were described as proposed only in relation to the Province of Quebec. There is every indication to the contrary. The word "proposed" in this letter describes the status of the boundaries without any limitation or qualification. The language is plain, the meaning is plain, and it does not support the Nova Scotia theory.

MR. LEGAULT: Mr. Willis, would you mind going back for a moment to Mr. Smallwood's interjection? We heard an explanation from Nova Scotia suggesting that the interjection is explained by the fact that Mr. Smallwood -- or the suggestion, rather, that Mr. Smallwood was simply pointing out that the boundary agreement, if I can call it that for the moment, was not opposable to the federal government. Do you have a view on that suggestion?

MR. WILLIS: I do, and I will be coming to that later on, but in anticipation, I -- my answer, essentially, is that I can't find this anywhere in the text, this distinction about opposability versus validity inter se.

I return to the statement of September 30, 1964. There is no evidence here that the Premiers thought they had concluded a legally binding agreement of any kind whatever. Both the language and the substance of the seven agreed points are inconsistent with the notion that

the Premiers intended to conclude a legally binding agreement on that day without any further steps or formalities.

Most of the points do not deal with matters that would be suitable for inclusion in a legally binding agreement. For example, point 7 provides for an approach -- a political approach to the province of Quebec. Point 1 simply sets out in general terms the legal claims to ownership. Point 2 seeks formal recognition of that ownership from the Government of Canada. Points 3 and 6 provide for two different requests for federal legislation from the Parliament of Canada.

All these are statements of policy or of agreed political initiatives, and all this material is typical of political documents as opposed to genuine legal agreements.

Even the items on the boundary are put in language that would not be used in a legally binding agreement. Point 4, as Professor McRae pointed out, says it is desirable that the boundaries should be agreed upon. Point 6, and we've had a discussion about the curious phraseology of point 5, and point 6 calls upon the Parliament of Canada to define the boundaries under the British North America Act, 1871.

The legally operative step, therefore, was to be that

of Parliament, not an executive action taken at a conference of Premiers. What precedes is the expression of an intergovernmental position forming the political basis of the legislative action that was intended to follow, but never did.

There is no perspective from which an intention to create a legally binding agreement can be read into the September 30 statement.

PROFESSOR CRAWFORD: Mr. Willis, sorry to interrupt again, but part of the problem in dealing with these intergovernmental agreements has been the reluctance -- the historic reluctance of the courts to recognize that there is an area for, as it were, public law agreements within -- for example, within a federation, as compared with contracts.

So if you look at the cases, they tend to use contractual analysis, and since these -- this is obviously not the subject matter of contractual agreements which would be enforceable in the context of a private law relationship, the tendency has been to say that it's political, and you then get people who say, well, of course, it's binding, but it's political; *South Australia v. Commonwealth* and things like that.

Now you're using the analysis political versus legal, but our Terms of Reference in the actual legislation

requires to apply international law. I mean I appreciate your point about that, but assuming for the sake of argument that we're going to look for something which, if it was made by states, would be a treaty, obviously, the distinction between contract and political arrangements which are binding would be inappropriate.

Could you perhaps apply your analysis to agreements like this bearing in mind those distinctions? I mean you might have a situation in which subsequent legislation was, in effect, a mandate to give effect to a political agreement intended to be binding, even though that wasn't a contract and wouldn't otherwise have been enforceable as a contract before the ordinary courts.

MR. WILLIS: These are difficult questions and there is not a lot of case law, although I thought the South Australia did recognize that while many intergovernmental agreements are political and therefore never intended to be enforceable, there can nevertheless be intergovernmental agreements in another category, in a legal category. Whether they are directly enforceable or not is another question. They were intended to produce legal consequences and to bind the parties.

And the academic -- some of the academic literature from Canada, which we produced with our Memorial, I think is useful in identifying some of the traits that would be

used to identify what is intended to be a purely political instrument or a purely political undertaking from those intergovernmental agreements that are indeed intended to produce legal consequences.

PROFESSOR CRAWFORD: Even if they are not contracts?

MR. WILLIS: Even if they are not contracts properly so-called. There is no perspective from which the -- an intention to create a legally binding agreement could be read into the September 30 statement.

Consider the language that I just read in conjunction with the press release which Mr. Crane discussed. It says -- this is at tab 16. It says, "The Premiers considered the matter of provincial boundaries in relation to submarine mineral rights, but they agreed upon the manner of presentation of the provinces' case at the next federal-provincial conference."

I think this confirms the characterization that this -- the circumstances here were those of a political meeting, a political meeting of Premiers, which was preparatory to a further political meeting with the federal government and it sets out a common policy and a common negotiating position and nothing more.

The important letter sent by Quebec Minister Allard on May 12th 1969 in his capacity as acting Chair of the JMRC is also totally inconsistent with the position that a

legally binding agreement was already in force.

If an agreement had already been enforce, the provinces would not have been asked to confirm the map and the turning points by agreement. And then to confirm that agreement by legislation, and then to join in seeking federal legislation confirming the agreement. Not one of these multiple steps was accomplished.

In 1972 there was meeting which confirmed agreement at a political level on the turning points. But that, like the 1964 meeting, was a political understanding. The kind of agreement the Minister and the committee hoped to get would have at a minium been one with the formality of the solemnly executed and signed agreement setting up the JMRC itself on July 16, 1968, which is document 25 in the Newfoundland and Labrador case.

And that was discussed yesterday and a question was asked about whether that might be intended to be a legal agreement. And in looking into that question, we noted that in the case of Newfoundland an Order in Council was passed to authorize its conclusion. And we can make that Order in Council available to the Tribunal, if that would be useful.

What is incontestable abut the Allard letter is that point 5 required legislation by each of the five provinces and point six required federal legislation. And none of

this legislation was passed. The sequence of multiple steps set out by Allard to bring the boundaries into force would be inexplicable if those boundaries had already been the subject of a binding legal agreement for almost five years.

And while none of the other provinces did what Allard requested, they did not object the JMRC's characterization of the need for agreement, as well as legislative action at both levels of government. In fact, Nova Scotia accepted it without reservation, as appears in the JMRC minutes at tab 25 of the book before you.

There is another strand to Nova Scotia's attempt to prove the unprovable. In other words, that an agreement was concluded on September 1964, September 30, 1964, and intended to be legally binding without legislative implementation or the signature of an agreement or the adherence of the federal government.

In both its Memorial and its Counter Memorial, and again this week, Nova Scotia seizes on practically every instance of the word agreed or agreement in a record stretching back over three decades and it proclaims triumphantly in each instance that its case has been clinched.

But in each instance the argument contradicts a fundamental tenet of the Nova Scotia case, that what is

required to resolve the line is not just the political consequences but a legally binding agreement. That not all agreements are legally binding in international law, and the same is true of Canadian law, as we have shown in our Memorial. And that the essential issue is therefore one of determining whether a document, whether or not it's called an agreement was intended by the parties to be legally binding.

A broad range of so-called agreements are political but not legal agreements, or else they are agreements that are expressly subject to stipulated requirements before they enter into force, such as ratification or cabinet approval, or the passage of legislation.

And because the word "agreement" can refer either to a legally binding agreement or to a nonbinding or political agreement, and I emphasize this is common ground between the parties, the word itself is entirely neutral. It all depends upon the context, the context in which the words are used, and the surrounding circumstances.

Given the test that Nova Scotia has itself accepted, the use of the word "agreement" or "agreed" simply begs the question. And the question is in each case, are we talking about an agreement that was intended by the parties to be legally binding or are we talking about something that falls short of that standard.

Ms. Hughes proposed four criteria for a binding agreement under international law. The first two were the terms of the agreement or the document in question and the circumstances. These do reflect the test in international law as stated by the International Court of Justice in cases such as Qatar and Bahrian. And they would also be relevant in assessing the legal or political character of an intergovernmental agreement in Canadian law, taking into account the academic literature we filed with our Memorial. But then she added two other tests, the object and purpose of the agreement and the subsequent practice or conduct of the parties.

Now these indeed are recognized principles for the interpretation of treaties, but we have been given no authority that they are relevant to the distinct question as to whether a treaty has come into force. And they seem to us to be circular, patently circular.

The object and purpose of the agreement presupposes that there is an agreement, so in a sense does subsequent conduct because it begs the question subsequent to what.

I will mention as an aside another egregious misinterpretation of the word agreed. I refer to the wording about any lines of demarkation agreed to by the province in the definition of the adjacent submarine area in the 1973 proposal by the Province of Newfoundland and

Labrador, that is at tab 39.

This of course was to be a clause in an agreement of indefinite duration, not just long term, but virtually permanent. It was therefore a prospective definition, just like one that might be put in legislation. It covers any boundaries that might be agreed to at any point in time during the validity of the agreement. It would cover a boundary agreed to 100 years after the conclusion of the agreement and it carries no implication whatsoever. The pre-existing agreed boundaries were already in place.

PROFESSOR CRAWFORD: Mr. Willis, are you saying that the subsequent practice of the parties cannot -- is inadmissible in international law for the purpose of determining whether there is an agreement?

MR. WILLIS: I don't take it to the point that I would say it's inadmissible. I would say that in cases like Qatar and Bahrain and Aegean Sea when the circumstances of the -- the surrounding circumstance were referred to as being relevant to determine whether an agreement was intended to be legally binding, was intended to be a treaty, what the court had in mind was really the contemporaneous circumstances. I would not go to the point of saying that subsequent conduct is necessarily inadmissible.

What I would resist is the proposition that this use of subsequent practice has the sanction of a rule of law

which it does in the context of Article 31 of the Vienna Convention when we are looking at the interpretation of a treaty which is in force.

So it's not a question of inadmissibility, it's a question of perhaps a secondary relevance, secondary to the contemporaneous circumstances, inadequate by itself and certainly something without the support of a positive rule of law, which subsequent practice does have in the context of interpretation.

The meetings of the Premiers in 1964 and then in 1972 obviously reached agreement on a number of interrelated points. But these were agreements on a common negotiating position in order to form what they called a united front, a political front or to make what they also called a united presentation in dealings with the federal government. Agreement on a common position in a multi-lateral negotiation between several parties with a common interest is an every day occurrence.

No one would mistake an agreed negotiating position with a legally binding agreement, that is independent of the final outcome of the negotiations. The distinction is elementary. It seems to us, perhaps, even a truism and yet it provides a complete answer to the Nova Scotia case.

Mr. Chairman, members of the Tribunal, let me go back to basics. We all know what an intergovernmental

agreement looks like in Canadian practice. When they deal with legal and constitutional matters of the importance and the permanence of a maritime boundary, they are drawn up in language that is legally precise and formal. They have a solemnity that is commensurate with the subject matter. Anything less would be reckless and irresponsible. Above all, when the vital interests of an entire province are at stake, not just for a terms of years but for once and for all.

Nova Scotia is arguing that politicians can bargain these interests away at political meetings, not only without legislation, without even a signed agreement that could be tabled in the Legislature. In the real world, that idea would provoke outrage. It would be denounced, and rightly so, as unconstitutional in the broadest sense of the word. There is, we submit, a fundamental disconnect between the Nova Scotia case and political reality in Canada.

I said we all know what a Canadian intergovernmental agreement looks like in practice when it deals with matters of importance and is intended to be legally binding. The two Accords in this case are examples, so too is the agreement setting up the JMRC, which we have referred to, despite the essentially procedural nature of that committee.

We annexed other examples to the Newfoundland and Labrador Memorial. We would have annexed dozens. Though none with the importance of an agreed and permanent boundary.

Mr. Chairman, members of the Tribunal, not one of these agreements would have had the slightest resemblance to the scraps of paper Nova Scotia has tendered in support of its case. The September 30 --

PROFESSOR CRAWFORD: Sorry to interrupt again. One of the worries about this case, if indeed we are to apply international law, the international law of treaties to determine the agreement, if you look at, for example, the Aegean Sea case, that was an unsigned communique at the end of a Prime Minister's meeting on an important question of submission of a dispute, which could have caused a war to the court.

The court interpreted the agreement as not embodying an immediate commitment to accept its jurisdiction, but if clearly left open the question that the agreement might nonetheless have had other legal consequences.

So I mean I can see that if we are applying Canadian law, the threshold may be a lot higher. But if we are applying international law, isn't it a very low threshold indeed?

MR. WILLIS: It's -- but I think a great deal depends even

in international law on the context and the subject matter of the agreement.

I think one has to put both the Aegean Sea case and the Qatar v. Bahrain on jurisdiction in the context. Those were not agreements on territory or sovereignty or boundaries. They were ad hoc referrals of matters to the International Court of Justice. So they were purely jurisdictional agreements. I think there is that contextual subject matter distinction that could be made.

So we are talking in international law quite different on this particular point from domestic law about a minimum threshold. But the threshold, I submit, would depend very much on the context and subject matter. And perhaps the period in question. Modern practice, you know, it would not be necessarily the same as what might have been accepted in the time of Matternich.

Now, Mr. Chairman --

PROFESSOR CRAWFORD: Matternich was a provincial Premier, was he?

MR. WILLIS: I should have perhaps mentioned Talleyrand. The September 30 statement, which Nova Scotia tells us constitutes the agreement that resolves this line for once and for all and for any and all purposes, was not only unsigned, it was not even proofread, as the rather obvious typos in point 1 and point 4 serve to demonstrate. The

word "affect" and the word, "gove" instead of "give".

Now there was a question yesterday -- no, I will pass on to something else, if I may. Ms. Hughes said our Memorial had referred to a settled body of law on intergovernmental agreements in Canada. I stand to be corrected, but I don't think that's exactly how we put it. We did talk about settled practices, and also an abundant academic literature, which we discussed and annexed. And we refer to the existence of some case law.

Nova Scotia has not addressed or refuted any of this material and what it demonstrates.

The Newfoundland and Labrador Memorial pointed out that the Canadian academic literature recognizes the distinction between legally binding and purely political and nonbinding agreements between Canadian governments.

This distinction is also brought out very clearly in the Australian case we cited, *South Australia v. The Commonwealth*, on the railway construction in that country.

It is meaningless to say there is an agreement. The real issue is which of these two categories does the agreement fall into. And hereto, the Canadian academic literature we set out in our Memorial is very clear. There are a number of earmarks of a legally binding agreement. Chief among them, the language used and the degree of formality.

These tests by themselves rule the Nova Scotia documents out of court.

A political and nonbinding agreement will very often be the first step in a process that leads to the conclusion of a legally binding agreement, and where necessary, to legislation.

But the first step in a process is just that. If it is not taken further, it has no legal consequences.

In a very real sense, Nova Scotia is looking to this arbitration as a substitute, both for a proper legal agreement and for the complex legislative process that would have followed such an agreement. Obviously, this is illegitimate.

Ultimately, the Nova Scotia case in phase one is incapable of passing a reality check, because there is no document that even remotely resembles the kind of agreement the Canadian practice would require on a subject of this importance.

There is no precedent in Canada for a legally binding agreement between governments with this type of documentation.

Nova Scotia has been saying throughout that there is a legally binding agreement. We have been waiting to see it. We are still waiting. And in fact, we will wait forever, because it simply doesn't exist.

At this fundamental level, there is a substantial degree of common ground between Canadian law and international law. Nova Scotia says there are no rules of form in international law. Even oral agreements are possible in theory.

But it all depends, as we discussed a moment ago, on the circumstances and on the terms. There is nothing more compelling in determining whether or not an agreement was intended to be legally binding in any given case than the normal practice of the parties, taking into account the subject matter, the period and regional variations in practice.

If the practice is virtually invariable, and would require the use of a document of some formality, disclosing an intention to conclude a legal agreement, and if the instruments at issue plainly fail to reflect that practice, then the evidence is conclusive. It means the parties did not in fact intend to include -- conclude such an agreement.

This is not to transform questions of form into a substantive rule of law. The intention is a question of fact. The parties, internationally or in Canada can use any form they like, so long as their intentions are clear.

But when there are settled practices as to how legal agreements are concluded, and those settled practices have

been completely disregarded, the only possible inference is that the parties did not intend to conclude a legally binding agreement.

Nova Scotia is fond of the statement by Premier Moores on June 19th 1972, which we discussed yesterday, or at least I should have said they are fond of parts of the statement taken out of context. This is the statement in which he announced a seven point agreement among the Premiers, including agreement on the delineation and description of the offshore boundaries, which was a reference to the turning points developed by the JMRC, and the map showing a boundary that stops at point 2017 in the entrance to Cabot Strait.

Now that, of course, is the part of the statement that Nova Scotia likes. The part they don't like at all is where Premier Moores says at the conclusion of his statement, and I quote, "It must be stressed that the meetings did not attempt to make concrete decisions on particular problems. It must be clear that the meeting succeeded only in creating a common philosophy on the question and a procedural method will follow through."

Let me comment on Mr. Legault's question of yesterday afternoon. I would submit what the Premier said here was not in any way an attempt to override or contradict what precedes.

This statement does two things. It underlines the political, as opposed to the legal nature of the agreement reached at the meeting of June 1972. And it also underlines that it was a step, only a step, in a complex and lengthy process and not the final result. Weasel words in a sense, but at least they were clear.

The Premier was talking about work in progress, not a completed agreement that was already in force.

And so with a gesture that is bold even by Nova Scotia's standards, they correct what Premier Moores' -- they correct his statement, just as they correct Premier Smallwood's statement in 1965, and of course, the Katy permit.

They limit what Moores said in 1972 to the matter of co-operation with other provinces, which is the topic of the immediately preceding paragraph.

But the scope of the passage we have on the screen is general in its terms. It is not limited to the immediately preceding paragraph. It refers to the meetings and their deliberations without limitation, every aspect of what was discussed at those meetings. And above all, the seven points of agreement, which were its main focus.

The point does not have to be belaboured, because the text when read as a whole is as clear on this point as it

could be.

PROFESSOR CRAWFORD: I find that slightly odd. I mean weasel words can weasel even in relation to themselves. But earlier on he had said the governments of the five eastern provinces have agreed to the delineation and description of the offshore boundaries. And if you look at the map, and leaving aside the Atlantic area, it's very difficult to describe that. Whatever subsequent process might have been required is not a particular problem. I mean it was a particular problem, and there was something concrete decided, it may be subject to ratification. But decided on that particular problem.

So it seems contradictory to say we decided on these turning points, but we didn't make concrete decisions on particular problems. I mean what would have been a particular problem if the turning points weren't?

MR. WILLIS: Well I think the turning points, themselves, created no problems. But it was part of a larger process. It was the fact that it was part of a package and it was linked to the fundamental objectives of ownership. And the attempt, as we will discuss in other context, to take one point out of these multiple point agreements and make it into a stand alone, self-contained, independent agreement, is one reason why the turning points, themselves, could not be regarded as being cast in

concrete. And in that sense the weasel words apply indeed to the whole agreement, including the turning points.

So we see that the distinction between legally binding agreements, and merely political undertakings, is on the one hand admitted by Nova Scotia, but on the other, studiously ignored in practice.

There is, however, a text book example of this distinction that lies very close to home. And I am referring here to the 1977 Memorandum of Understanding on Offshore Resources at Tab 48. As Mr. Crane has noted, that agreement never entered into force. It was repudiated by Nova Scotia, by the Buchanan administration, which disagreed with the predecessor Regan government and tore up the agreement.

No one challenged the right of Nova Scotia to do what it did. No one said they had reneged on a done deal. No one used Nova Scotia's highly coloured language and said that Nova Scotia had wrongly disavowed an agreement that was legally binding upon it. And that was --

PROFESSOR CRAWFORD: The copy of that agreement we have isn't signed or dated. Is that simply because it's a copy or was there an executed version of that agreement? Certainly the copy in tab 48 isn't signed or dated?

MR. WILLIS: Yes, I am instructed that there is a signed copy.

PROFESSOR CRAWFORD: Okay. Thanks.

MR. WILLIS: It was understood by everyone involved that the distinction between legally binding agreements and political deals was applicable here, and they understood that the MOU was in the latter category. And that it had become a dead letter because of Nova Scotia's veto.

And yet the first thing that would strike any reader on a comparison of the 1964 statement and the 1977 MOU, is that the MOU is far closer in every respect to a legal agreement than is the statement of 1964.

The MOU has a contractual form. It was a signed instrument. It has a formality that is conspicuously absent from any of Nova Scotia's scraps of paper.

Now the MOU of 1977 provided for the preparation of a detailed and comprehensive agreement. This is exactly what Minister Allard assumed to be necessary when he called for the conclusion of an agreement implementing the maritime boundary proposal.

The MOU also called for legislation by all four parties to give effect to the agreement, section 7, and this, again, is exactly the same as the request for legislation under the BNA Act 1871 in 1964. The parallels are too close to be missed.

Then why, one can ask -- why can one be repudiated at will while the other is treated as something that binds

the parties forever, above all, when the supposedly binding agreement is an unsigned political statement and when it deals with a matter as fundamental and as permanent as boundaries? We await some explanation of this apparent double standard.

Would this be a proper time for a break, Mr. Chairman?

CHAIRMAN: Thank you, Mr. Willis. The usual 15 minutes.

(Brief recess)

MR. WILLIS: Mr. Chairman and members of the Tribunal, I was informed that the break does usually come later, and I apologize if I upset the normal schedule. On another --

CHAIRMAN: No problem. I was having the same problem out there, wondering when it was time, so maybe we were just a little bit too early this time.

MR. WILLIS: I'm informed, as well, that there is a signed copy of the 1977 MOU at Annex 67 of the Nova Scotia documents.

MR. FORTIER: That we filed. We signed the copies that we had.

PROFESSOR CRAWFORD: Would you -- if we had to apply international law to that MOU if it was still in force, would it be binding?

MR. WILLIS: It would be binding according to its terms, perhaps, but the most it would commit the parties to would be the conclusion of an agreement, and subject to

legislation, and if those procedural steps had not been accomplished, binding in a sense, but only to what it actually commits to. Again, I'm not even sure that one should go that far because the document itself, when you read its terms, although it's set up in a fairly formal and structured way, makes it clear that this is something that would be very much subject to legislation and is a procedural and political agreement, so perhaps one shouldn't go even as far as to say it would be binding even to conclude that agreement.

PROFESSOR CRAWFORD: The British practice is if they call it a Memorandum of Understanding, it's not binding. That's -- the British regard everyone else as on notice.

MR. WILLIS: Yes.

PROFESSOR CRAWFORD: I don't know if the rest of the world always agrees with that.

MR. WILLIS: Turning now, with your permission, to another topic -- the consistency of the Nova Scotia argument with the terms of the Accords and the legislation.

Nova Scotia has persisted in a further line of argument that, in fact, undercuts its case. It says that the Stanfield lines plus the 135 degree line outside the Gulf have achieved some sort of legal recognition because they were used in the Nova Scotia legislation and the Nova Scotia Accords.

Now what this can have to do with the phase one issue is not clear because Newfoundland was a party to none of those instruments which could not, therefore, possibly reflect an agreement between the parties. But I set that aside for the moment because, in reality, the Accords and the legislation have implications that are impossible to reconcile with the Nova Scotia case.

The caveat at the beginning of the schedule -- the boundary schedule to the 1982 Nova Scotia agreement is a prime example, and it says "Provided..." -- after setting out the boundary issue, it says, "Provided that if there is a dispute as to these boundaries with any neighbouring jurisdiction, the federal government may redraw the boundaries after consultation with all parties concerned."

Nova Scotia's creativity should not be underestimated. It now claims with no supporting material that this caveat was put in only because of the pending Gulf of Maine dispute with the United States. We could ask why the caveat would refer to any neighbouring jurisdiction if only one jurisdiction was intended, but there is a much more decisive answer.

Mr. Chairman, it takes only a glance at what the schedule says about the Canada/US boundary to see that no dispute could possibly have arisen with the United States in connection with the boundaries as described in this

document. A joint Canada/US request for the delimitation of a single maritime boundary had been made to the International Court of Justice only a few months earlier, on November 25, 1981.

This pending single maritime boundary is referred to in the schedule in two places, but without any indication as to what the line might be or what it might turn out to be after the decision of the International Court.

In other words, the schedule does no more than recognize that a single maritime boundary was to be created by the International Court under a process to which both Canada and the United States had agreed by treaty.

There is nothing here that could possibly have given rise to a dispute. Even if there had been, the provisions for consultations with neighbouring jurisdictions is not language that could really relate to the single maritime boundary in the Gulf of Maine at that stage. Because that boundary could no longer be the subject of consultations, it was under the act of consideration of a Chamber of the International Court of Justice.

So Nova Scotia's attempt to rationalize the caveat of the 1982 agreement simply doesn't work. The language in the 1982 agreement with Nova Scotia is incompatible with the theory that the boundaries were already in place on

the basis of an existing and binding legal agreement.

And Mr. Chairman, members of the Tribunal, this is language which Nova Scotia agreed to of its own accord in a negotiation to which Newfoundland and Labrador was not a party, and moreover, was not consulted. And there is no reservation or statement contradicting the obvious implications of this 1982 schedule.

It is equally difficult to understand how the present Accords and the present legislation could be reconciled with the Nova Scotia case. The Accords and the implementing statutes recognize that the boundary is a matter of potential dispute. They also recognize that the boundary may be the subject of arbitration on the basis of the principles of international law respecting maritime boundary delimitation. This makes sense only on the basis that there is no agreed boundary already in place.

The reference to international law demonstrates that the issue contemplated by the legislation was the line itself, not the existence of a prior binding agreement between provinces.

Nova Scotia itself accepted this procedure. It's part of its own offshore Accord. Mr. Chairman, a provincial government that believes its boundaries are the subject of a prior agreement would not, without some form of reservation or clarifying statement, agree that those

boundaries are to be determined once again on the basis of international law.

Nova Scotia takes umbrage at our use of the expression "a provisional line", but clearly, it was intended as provisional by all the parties concerned, including Nova Scotia.

PROFESSOR CRAWFORD: There is evidence from Nova Scotian officials that they were aware that you disputed the boundary before the Accord and the legislation. I mean the parties had positions on it, but there was a disagreement. There can be disagreement about the existence of an agreement.

MR. WILLIS: The 1982 Agreement with Nova Scotia followed very closely after the constitutional negotiations of 1980 -- starting in 1979 and going through 1980. During the course of those negotiations, it was very clear through Newfoundland's own proposal that what was desired was an arbitration, if necessary, on the boundaries.

So I think there must have been a clear awareness at that time. I think the timing of the 1982 Nova Scotia Accord was not entirely unrelated to that constitutional process that was under way at that time.

The lines were intended as provisional by all the parties concerned, including Nova Scotia, which, as I mentioned, signed off on this arbitral procedure without

reservation. The legislation implementing the Nova Scotia Accord itself recognizes the provisional status of the lines.

As an exception to the general proviso that amendments require the consent of both parties, the Nova Scotia implementing legislation provides that the federal government can amend the boundary provisions unilaterally and without consent. What stronger evidence could one seek of the provisional nature of the lines?

And so I conclude this branch of my argument, Mr. Chairman. There was never an intention to conclude a legally binding agreement on September 30, 1964, as Nova Scotia contends.

Nova Scotia asserts that the ownership claim and the boundary proposal were patently separate items of agreement. That's a phrase that appears in the Nova Scotia Counter Memorial.

Patently separate items of agreement, they say, with no interdependence between them. A surprising claim, because the two were always dealt with together and were logically connected. In fact, a cursory reading of the Stanfield submission disposes of this attempt to de-link the two issues. They were treated as a package from the outset.

What dominates the submission throughout is the

question of ownership -- not just the legal claim, but the argument that even if that claim were not accepted, it would be, and I quote, "Just and equitable to vest those rights in the Atlantic provinces by way of a transfer."

Contrary to the Nova Scotia position, the boundary issue was indeed subordinate or ancillary to the underlying claim to ownership, which was always the real prize.

I said a moment ago that it's clear that the documents should be taken as a whole, but this is precisely what Nova Scotia says we must not do. They say that each of the points were patently separate items of agreement and that the boundary provision had a life of its own that survived the failure and desuetude of the rest of the package. They have provided no explanation of why this should be so.

When a list of items is drawn up and presented as a package, a series of related points in a single document, it's reasonable to conclude that it was intended as a package. All the more so, Mr. Chairman, when the list is a presentation of a negotiating position. The idea that in a negotiating context one can treat the items in a single list of proposals as patently separate is commonly ridiculed as "cherry picking".

And the September 30 statement was very clearly the

expression of a negotiating position. The items on the list, from bottom to top, imply not only acceptance by the federal government, but implementation by the federal government.

This is true of the claim to ownership, the territorial status of the Gulf of St. Lawrence and the Cabot Strait, and of the boundary proposal itself.

And the negotiating context is confirmed by the final point, which refers to the united presentation to be made to the Government of Canada two weeks later.

The attempt to de-link the boundary proposal from the ownership claim is critical to the Nova Scotia argument. Obviously, they have to prove that the boundary proposal survived the failure of the ownership claim, because if they were indeed linked, that would not be the case.

It's also critical to the argument that the 1964 proposal was not a proposal at all, but a full-fledged binding and legally conclusive agreement.

It's clear from all the documents that the ownership claim was in fact a negotiating proposal put forward jointly by the provinces to the federal government, and that it came to nothing.

It follows that if the boundary proposal was not an independent agreement, but was directly linked to the ownership claim, then it must have had the same status.

It must have been a negotiating proposal as well. The same status and the same fate. And when the context is considered objectively, the linkage is obvious.

The events took place, as I said, in a negotiating context in preparation for, and at a federal-provincial conference. The documents, as I have just pointed out, deal with both ownership and boundaries in the same text, and in a single list on a single general topic. All the hallmarks of a negotiating package are there.

The contention that the boundary proposal was separate and distinct, a patently separate of agreement from the ownership proposal disregards both the negotiating context and the nature of the documents in which the two items were presented in close association as two sides of a single coin.

Nova Scotia is asking you to accept that two items on a single negotiating list have a completely different status. That one was a negotiating proposal that never saw the light of day, while the other was a self-contained legally binding agreement, whose faith had nothing to do with the rest of the proposal.

The obvious answer is, if the status of the different items on the list was so fundamentally different, why were they dealt with in the same way in the same documents? Why is there nothing in the documents to reflect the

self-serving distinction Nova Scotia has now invented out of old cloth?

PROFESSOR CRAWFORD: Mr. Willis, okay, the -- you said that about the 1964 package, which included what Nova Scotia says is an agreement on boundaries. Now, it might have been the case that the provinces confronted the federal government, and the federal government said no way, and the provinces went away and started concerning themselves with terrestrial development in the way in which I understand that phrase. That didn't happen.

In 1969 you have Allard writing saying "Do you confirm?". He used the "confirm" the boundaries, and the turning points, at least, were in line with the -- with what was envisaged in '64. So I mean, if anything died in '64 it was resurrected.

MR. WILLIS: Yes, I think that's a fair characterization. I mean, a proposal was put forward in 1964, and it was not accepted. The federal government went ahead with its strategy of litigation. And -- but the matter was not dropped. And the proposal was, in a sense, revived in the period from 1969 to '72, but it was again rejected.

So whether one treats the intervening period as a period in which the proposal was off the table, or whether it was still in a very general sense on the table, I don't think makes too much difference. I think there's a

continuity in the -- in the entire sequence.

And one can speak of the JMRC events and the 1972 events as being the revival of the proposal, or as being a reiteration of a proposal that, in the interim, had been dropped. But in either event, I think it's the proper characterization of it, of the boundary item, was because of its negotiating context it was a proposal as well.

PROFESSOR CRAWFORD: Yes, but if you look at the provincial effort over the whole period, from 1959 up to the present, you say okay, the provincial legal case is rejected by the Supreme Court twice. And although it's kept alive for rhetorical purposes, the substance of what happens after that is that the provinces are trying to win through negotiations with the federal government what they failed to get in the courts. And they eventually do. I mean, to a significant extent, through the Accords, they get -- their boundaries are not changed, but they get access to resources, they get involvement in administration and things -- things which the federal government, at various stages of the negotiations, rejected.

Isn't it reasonable to take a long view and to say, well, if as part of that overall process which ended in the Accords, the provinces had reached a clear understanding which they thought would be as such definitive as to the boundaries? And if this Tribunal is

the mechanism by which any such understanding if definitive was to be implemented, isn't it reasonable to say that we have a mandate to do that? I -- I put that as a question, not an expression of view.

MR. WILLIS: Let me try to come to grips with this. I'm not sure I understood it completely.

I think it's fair to say that a certain point, there may have been shifts of emphasis. But I don't think the ownership issue at any point was abandoned by the provinces during the periods we're referring to. It's true the Supreme Court of Canada came down with its decision on the 1967 reference in British Columbia, and it's true that the elements distinguishing the Newfoundland case were much more pronounced and stronger than those distinguishing the legal interests of the other provinces. But I don't think the other provinces had abandoned that goal of ownership. Even through litigation, but perhaps if not litigation, through -- through negotiations, that was the tenure of the Newfoundland and Labrador proposals during the important negotiations on the constitution in the period around 1980.

So that goal of ownership had never been abandoned, even though the hopes were fading to some degree for Newfoundland, perhaps to a greater degree for the other

provinces.

Even on the legal issue, I believe it's fair to say that the other provinces, apart from Newfoundland and Labrador's special case, also had distinguishing elements in their historical background that might have been pressed to distinguish their case from the -- from that of British Columbia.

And I think it is interesting to reflect on the fact that in the United States, the East Coast, the original 13 colonies were litigating their case on the basis of a different historical background before the Supreme Court, trying to distinguish their case from the early cases in the 1940's in California, Texas and Louisiana.

That decision didn't come down until 1975, U.S. v. Maine, so there was this idea in the background that maybe the older colonies could have a better case than the -- than British Columbia might have had.

CHAIRMAN: As a -- to add some specific substance to that, the New Brunswick boundaries are defined as including the appurtenances.

PROFESSOR CRAWFORD: Yes, but I mean it's not so much a question whether in the end the Supreme Court would have upheld any plausible, special case. The fact is the -- that what really happened after Canada -- Canada won the two Supreme Court cases that did go, was that there was an

agreement, the Accords. Well there was a process of agreement which ended in the Accords.

And it seems -- it seems a bit artificial to sort of chop that up into bits and say okay, well proposal one was rejected and therefore we can forget about that, and proposal two was rejected and we can forget about that, if there's a continuous element of adherence, at least to aspects of that proposal over the whole period. And if there is machinery in the eventual political settlement in the Accords, which were of course implemented by legislation, which enables any agreed element of the package to be implemented. Again, that's a question.

CHAIRMAN: On the other hand, I was going to add, that insofar as the decision of the Supreme Court itself, and particularly the second one, it seems to me to be relying on international sovereignty as a basis for the right. And of course, the provinces, however they may have been defined, would find that hard to fight with.

MR. WILLIS: This idea of continuity is something that one can accept to a certain degree, in the events from 1964 and those years, and up to '72, but I think there was quite a break between '72 and the period of the Accords. There I do see a tabularasa being established, both by the intervening court decisions, which put to bed as it were, any lingering hope that Newfoundland and Labrador at

least, might have had ownership of the continental shelf, but also the negotiating break from 1972, where Newfoundland had no longer been part of that process for a decade.

So the continuity, yes, a certain degree of continuity perhaps in the JMRC years, even up to 1972. But not, I would think, from 1972 onward.

The delinking operation between ownership and boundaries is also contrary to what Minister Allard wrote in his letter of May 12, 1969, where he noted that the ownership claim, and the proposed boundaries, went hand in hand. This is tab 22.

Referring to the 1964 meetings, he wrote that the notes garnered from the Atlantic Premiers Conference state that the purpose for delineating the boundaries related expressly to the ownership of minerals in the submarine areas or lands within the provinces, and in their common terrestrial border zones.

Above all, the attempt to delink the ownership and boundary items in a single list flies in the face of logic. The two items are linked because they had to be linked. The boundary proposal could not exist in a vacuum. It had to have an object. In this proposal the object was ownership, nothing short of ownership.

There had to be something to delimit. The ownership

claim was therefore logically prior to, and therefore inseparable from, the proposal on delimitation.

The linkage that Nova Scotia denies, and must deny, is therefore not only apparent from the negotiating context and the manner in which the documents were drawn up, it's an inherent linkage, inherent and therefore inevitable.

Mr. Drymer said that the so-called boundary agreement was there to assist the ownership claim, but not the reverse. Perhaps the important point here is that this recognizes the inherent association between the two.

But the qualification he added does not hold water for the reasons I have just noted. Without the ownership claim the boundaries would have been a pure abstraction, and worse, an exercise in futility.

Now, the Nova Scotia Counter Memorial says that Newfoundland and Labrador has completely misconstrued the issue, that we have erected a strawman. A strawman by applying -- implying that what has to be proved is the existence of a federal-provincial agreement binding under Canadian law.

Not so, says Nova Scotia. All that has to be shown is whether the parties agreed between themselves on the line. And in fact, here Nova Scotia goes even further with the truly breathtaking statement that the agreement that the Tribunal has been asked to find is not an agreement

between units of a federal state, as if the Terms of Reference were intended to dissolve Confederation, and turn reality on its head.

The federal government, obviously, never accepted any part of the 1964 proposal, they refused to have anything to do with it. This wasn't just a deal that fell through, Mr. Chairman, it never got off the ground, because one of the two sides rejected it flat from the very beginning.

It's therefore essential to the Nova Scotia case that the federal government must be taken out of the equation entirely, along with the requirements of the Canadian Constitution.

It's only on this basis that the Nova Scotia theory about a binding agreement can even begin to make sense.

On the contrary, the federal government was always seen as an essential party to the transaction, and it was in fact an essential party.

There cannot, therefore, have been an intention to conclude a legally binding agreement in 1964 without the participation of the federal government.

Let me start with the second point, that the federal government was, in fact, an essential party to the proposed transaction. So far as the claim to ownership is concerned, the fundamental objective was to get recognition of the claimed rights without the uncertainty

of litigation. That recognition could only come from the federal government.

In fact, the Stanfield submission could not have been more explicit on this, it was the central theme. And even if the ownership issue had been settled in favor of the provinces, either by litigation or otherwise, the federal government was still an essential party, so far as the delimitation was concerned.

This is because the method of implementation to be used was the BNA Act 1871, which I will discuss in a little more detail in just a moment.

So the federal government was an essential party to both aspects of the transaction, ownership and boundaries.

Now this is not the only reason why the Nova Scotia attempt to remove the federal government from the picture makes no sense. It also disregards the facts and the documents. From beginning to end, this matter was pursued in the context of federal-provincial relations, that is what the united presentation called for on September 30 was all about. This was the context of the Stanfield submission at the federal-provincial conference two weeks later.

Nova Scotia agrees that what counts is intention. From that point of view, the documents could not be more clear. There was never an intention to proceed without

the federal government, whose participation was viewed as essential, as I said, to both the ownership claim and to the delimitation.

Nova Scotia draws an artificial distinction between the validity of the boundaries as between the provinces and their opposability to the federal government. That distinction, we submit, is misconceived.

It disregards the very nature of boundaries which define areas in which governmental powers can be exercised. Internationally boundaries define areas of territorial sovereignty that must be respected. Domestically, they determine where a province can exercise its constitutional powers, above all its legislative powers, and where it cannot.

If a purported provincial boundary is invalid then it has no legal existence at all. If it is valid then it controls the extent of provincial powers for all purposes of the constitution and is therefore opposable to one and all, including other orders of government in Canada and the public at large.

PROFESSOR CRAWFORD: Mr. Willis, the problem with that -- fine, the proposal made in 1964 was part of a package which was adverse to the federal government and so you would say it was either/or. But if at some point that proposal was transmuted into an all purposes agreement in

the context of an eventual negotiation leading to an Accord, so that the arrangements between the federal and provincial levels would be agreed, what powers they would exercise would be agreed. And if that was put into legislation and if Canada said, look, it's up to an arbitration process to decide the boundaries, we can then implement them but it doesn't bother us, then surely the question of opposability really doesn't arise?

If at some point the provinces said whatever arrangement we make with the -- eventually make with the federal government these will be our boundaries. And assuming the federal government never objected to that or established a procedure which was capable of giving it effect, why do we have a problem of opposability?

MR. WILLIS: I think it was open to the parties, had they done so, to adopt what was provisionally agreed to in an earlier stage of the negotiations and to apply it to a -- the different regime that finally emerged.

What I would submit is that it's far from being the reality, that it's far from being what is supported by the facts on this case.

To characterize the early stages of the negotiations leading to some kind of an internal inter se agreement that a certain approach would be used in subsequent and then uncomtemplated negotiations 20 years down the road, I

think is stretching the record beyond its possible limits.

The idea that something that was on a negotiating table in 1964 could be adopted, could be revived, as it were, 20 years on, is perfectly plausible. The idea that there would be a legal obligation 20 years on to adopt it in a completely different negotiating context, I think goes beyond what either a plausible legal construction would support or the facts can support in this case.

Now Mr. Drymer said that the concept of an interprovincial agreement on boundaries is temporally and conceptually distinct from that of a federal-provincial agreement. Temporally distinct, one can understand in a certain sense. An interprovincial agreement could be seen as the first step, but only the first step, in a complex process that eventually could lead to legally effective boundaries. That first step, however, would have only a political significance, it would have no legal effect in and of itself.

It would have to be formally consented to by the provincial legislatures concerned through legislation and followed by legislation by the Parliament of Canada. And only then would the new boundaries acquire any legal force or effect. This is not only the constitution, it was what was intended by the parties at all material times. And I will come back to that in a few moments.

But the conceptual distinction that Mr. Drymer spoke of is more difficult to grasp. In a federation the questions of territorial jurisdiction are necessarily of interest to the federal government, of direct interest. Think of the implications.

In marine areas that are within provincial limits, Georgia Strait or Conception Bay might be examples, the federal government exercises a very wide range of vital powers, Fisheries, Navigation, Defense, Environmental Protection, Customs and Immigration, Search and Rescue, and of course, International Relations.

As a practical matter, it has to know what jurisdiction to deal with. As a legal matter, the public has to know what -- whose legislation to obey, who gets the royalties or taxes and where to apply for a permit.

The concept of interprovincial boundaries with some form of legal status, but with a limited opposability is not only wrong, it is almost impossible to grasp what it could really mean, if in fact, it could mean anything at all. Despite all this, Mr. Drymer said that the so-called interprovincial agreement was conceptually distinct in the sense that it could have its own independent sphere of operation even in the absence of federal recognition.

Now what could that mean in practice? He said the agreement could be and was applied through the issuance of

permits. But even setting aside our disagreement on the facts, it's obvious that the legal effect of the permits was ultimately and completely dependent on the ownership issue and thus on federal recognition.

Without a resolution of the ownership issue, the permits would remain an empty gesture, worthless bits of paper. Legally they would be precarious, to say the least. And for that reason their practical value would be at most a matter of hedging bets. They could never justify major investments or allow full development.

So even apart from the BNA Act 1871, the legal effect of any interprovincial agreement on boundaries was inseparable from the ownership issue, and with it the role of the federal government.

Mr. Drymer gave another example of how the so-called interprovincial agreement was conceptually distinct from the federal-provincial agreement that was never concluded. He said the Stanfield submission was the very first use of the September 30 agreement.

But, Mr. Chairman, this was plainly a political use of a political understanding for political purposes. It does nothing to validate the artificial concept of interprovincial agreements on boundaries that are legally valid inter se but not opposable to the federal government.

Nova Scotia once again fails to distinguish the political from the legal, a distinction it nevertheless recognized in the plainest terms in its pleadings.

Now how does the Nova Scotia case get off into this conceptual muddle, this web of boundaries that exist but do not exist, boundaries with a kind of half-life. I suggest the confusion is a direct result of the misapplication of international law to a purely federal issue and undiluted international law with no regard whatever to the modifications that the circumstances would require.

The federal government is implicitly treated as if it were a third state, a foreign state, in fact, for which the transactions of the provinces between themselves are simply irrelevant, *res inter alios acta*. And meanwhile back on planet earth, it's not like that at all. The federal and provincial governments are not foreign states, they are interrelated orders of government in a federal system with functions that are intertwined at every step of the way.

The distinction is, in any event, a figment of the imagination. It lacks even the slightest support in the historical record. It is obvious it would never have occurred to the Premiers when they decided that constitutional legislation involving the Parliament of

Canada was to be the method of implementation.

The Nova Scotia Counter Memorial refers to Premier Smallwood's crystal clear comments at the 1965 federal-provincial conference, which we have already mentioned, that the boundaries were merely a proposal.

The Nova Scotia Counter Memorial claims with no explanation that the discussion had nothing to do with the effect of the provinces' boundary agreement as between themselves. But the discussion contains no reference, no reference to any such distinction. It deals with the status of the proposed boundaries as boundaries for all purposes of Canadian law, nothing more and nothing less.

There is no hint, no hint of the qualification that Nova Scotia inserts without evidence that Premier Smallwood was talking about the boundary, only as far as federal-provincial relations were concerned.

Even in the very different legal context of the present day Accords, the attempt to write the federal government out of the picture rings false. The Accords obviously are federal-provincial Accords. The implementing legislation is both federal and provincial. The legal framework is that of federal-provincial relations. And this, in fact, is the only constant, the only common denominator between the 1964 proposal and the present day Accords.

So if we look at the matter from the constitutional perspective of 1964, the federal government was expressly recognized as an essential party. Similarly, if we look at it from the perspective of the current Accords, the federal government remains an essential party, though for very different reasons. The line could not be resolved by agreement for the purposes of the federal-provincial Accords if it were not opposable to the federal government.

In short, the lines could not be resolved by an agreement that was not opposable to the federal government because we are dealing with the legal framework of federal legislation and of federal-provincial Accords.

And it is because the federal government was in fact and an intention an essential party, that the 1964 proposal was just that. Without the participation of an essential party, expressly recognized as such, the agreement could not enter into force. And what is critical, it could not have been intended to enter into force.

That disposes of the principal issue, but not of all the issues. The political consensus reached on September 30, 1964 was expressly subject to an agreed method of implementation. That, of course, was the use of Section 3 of the British North America Act 1871, now the

Constitution Act 1871.

Now this was the stipulated condition of the entry into force of those boundaries. And the failure of that condition provides an equally complete answer to the contention that the line has been resolved by agreement.

The 1871 Act, and this goes back to an exchange we had earlier, it's the only method of dealing with provincial limits under the Constitution. And from that point of view, its proposed use was a matter of course.

But there were other considerations. The use of a constitutional mechanism involving both the Provincial Legislatures and the Parliament of Canada was central to the entire scheme. It would have killed two birds with one stone. If Parliament had enacted the legislation, it would not only have entrenched the boundaries, it would also have constituted an authoritative recognition from the federal authorities of provincial rights in the offshore entrenched in the Constitution, and it would have put those rights beyond any possible challenge either from the federal government or from third parties.

It would, therefore, have secured the claim to ownership, which was always the real objective.

And so this requirement was anything but superfluous. And the failure of any of the six legislative bodies in governments to even begin this constitutional process

means that the boundaries never acquired legal force. And that the line has therefore not been resolved by agreement or otherwise.

Nova Scotia's central proposition is that the alleged boundaries were binding and immediately effective in 1964. It was the fourth of Mr. Drymer's main themes, and was reiterated in Mr. Bertrand's conclusions. Immediately effective on the basis of an agreement that was binding on the provinces inter se.

But, Mr. Chairman, the effect and the purpose of the BNA Act 1871, is that interprovincial boundaries could never be altered on the basis of an interprovincial government -- agreement standing by itself. The wording is on the screen. It requires both the agreement of the provinces concerned in the form of the consent of the Legislature, plus legislation of the Parliament of Canada.

The constitutional rule is that these matters cannot be dealt with by the provinces on their own. Their agreement is a condition precedent, but it's not enough. It could be described as a necessary, but not a sufficient condition. And that is one reason why the requested legislation was anything but superfluous window dressing. It was essential, and accepted as such.

Nova Scotia answers first that the use of the BNA Act 1871 is not necessary for the alteration of lines for the

purposes of the Accords. But as I have said, the intentions of 1964 must be assessed in terms of what was on the table at that time. They must be assessed in terms of what was being proposed at that time.

And Nova Scotia also says that domestic law and constitutional entrenchment are irrelevant, because only international law is relevant. But even if that were true, it would get Nova Scotia nowhere at all, because international law requires that the intentions of the parties should be respected. And the intention of the parties, as stated in the documents, was to use the BNA Act 1971 to give legal effect to these lines, to define the lines.

PROFESSOR CRAWFORD: Is that true of the discussions that occurred in the JMRC process? For example, after 1972 was it -- was it always envisaged that the BNA Act, Section 3 would be used? As I say, from a legal point of view, as soon as you understand what the continental shelf is, Section 3 seems inappropriate.

MR. WILLIS: The first point I might make in response is that I am -- I recognize that the use of the Constitution Act 1871 is not something that is beyond debate or beyond controversy. But I think it's a very strong case could be made that it is the appropriate constitutional vehicle, even with respect to the continental shelf.

I believe that the intention -- there is no evidence of a change in intention in terms of the method of implementation between 1964 and 1972.

The Allard letter of -- and I will come to this later, but the Allard letter of 1969 speaks of legislation. It also speaks of legislation, both by the provinces and subsequently by the Parliament of Canada. There is no mention of the BNA Act 1871 in that letter. But the procedure is so identical at every point of the way with what was originally proposed that I have always assumed that he was referring to exactly the same thing. And there is no evidence of a change of approach between Minister Allard's letter and the meetings of 1972.

PROFESSOR CRAWFORD: But you might say even if Section 3 wasn't going to be used, it would still require legislation, and it would still require federal legislation?

MR. WILLIS: Exactly.

PROFESSOR CRAWFORD: Of course, part of the answer to that was that's what he got in the Accord Acts?

MR. WILLIS: That's what he got in a different context.

We come back every step to this question of intent. It defies understanding how one could say that the parties intended the lines to enter into force without constitutional legislation, when they expressly stated the

opposite. Their statements were loud and clear, and they were made over and over again.

We see it in point 6 of the statement of September 30, 1964. We see it in the record of the preparatory meeting of September 23. It takes up one of the lengthiest passages in the united presentation made by Premier Stanfield to the Federal Provincial Conference, tab 16.

Mr. Chairman, this was a situation where the federal government had an adverse interest. If federal implementation had not been considered an essential condition, the parties would never have stipulated a method that depended upon federal co-operation and goodwill. They would not have made themselves hostages to the party on the opposite side of the negotiations.

The absence of the legislation that was intended to be the method for bringing the lines into force is a complete answer to the Nova Scotia case.

This is so whether we look at it from the perspective of Canadian law or even from the perspective of international law, with its emphasis on the intention of the parties.

There is a close analogy here to the situation considered in the North Sea cases. In both instances, the stipulated condition of entry into force has not been met. In the North Sea cases, the court asked why Germany would

not have ratified the 1958 Convention on the continental shelf as the convention provided, if it had -- if Germany had had what it called a real intention to become bound. And similarly in this case, the parties would not have provided for the use of constitutional legislation, if there had been a real intention that the lines would apply without such legislation.

Nova Scotia holds that the legislation under the Constitution Act 1871 was wholly unnecessary. That it was legally redundant. And that it was not essential to the intentions of the parties despite what they said. In short, that it was nothing more than window dressing.

This, of course, is totally inconsistent with the documents. And as I just mentioned, it asks us to accept the improbable notion that even though constitutional legislation is said to be unnecessary in the first place, the parties nevertheless chose to make the whole project hostage to the whims of the federal government. None of this makes sense.

The language of the documents by itself demonstrates that the constitutional legislation was intended to be the legally operative step that would bring the lines into force. Not the icing on the cake, but the cake, itself.

Both the September 23 and the September 30 records ask Parliament to define the boundaries under the 1871

procedure.

It would have been contemptuous to assume that Parliament was an irrelevant rubber stamp. This is not an intention that we could impute to the Premiers. And there is nothing in the Stanfield submission that could support it.

Mr. Drymer suggested, if I understood this point, that the use of the BNA Act 1871 was needed only to give effect to the federal-provincial dimension of the boundaries. That the federal legislation under that act would have constituted in a sense a separate agreement, and was not relevant to the provinces inter se.

This I submit is a false distinction. It is not consistent with the wording of the constitutional legislation, which speaks of any change in the limits of the province without qualification, any action to increase, diminish or otherwise alter those limits.

On its face this deals with boundaries for all purposes, whether as between the provinces, or vis-a-vis the federal government, or vis-a-vis third parties.

The need for legislation came up again when the JMRC revived the whole proposal some years later. In this connection, the Nova Scotia Counter Memorial sets forth an argument that leaves us totally baffled.

They say that the Newfoundland and Labrador argument

is internally inconsistent. They refer to our point that the lines were to be implemented not by ordinary provincial legislation, but through the constitutional procedure of the 1871 Act, which involves federal concurrence and participation.

But, so they claim, the JMRC recommendations, as transmitted by Allard, were entirely concerned with so-called ordinary legislation by the provinces. And the word, "entirely" appears in bold in the passage of the Nova Scotia Counter Memorial I am referring to, which is chapter 3, pages 43 and 44.

From this the following conclusions are drawn by the Nova Scotia Counter Memorial. First, and I quote, "nowhere in the evidence adduced by Newfoundland in support of its theory of conditionality is there mention of constitutional alteration of provincial boundaries, or indeed of the need for any federal participation in the proposed legislative exercise."

Nowhere, Mr. Chairman. Not only the Stanfield submission, but the very document at the heart of the Nova Scotia case refers in the most explicit terms to both the role of the Parliament of Canada and to the use of a legislative procedure that is part of the Constitution of Canada.

Second, since Nova Scotia assumes the JMRC in 1969 was

discussing ordinary legislation, and I quote again, "the conduct of the parties in 1969 is in fact completely at odds with Newfoundland's account of events and discredits totally its theory."

This appears to reflect a fundamental misunderstanding of the Constitution Act 1871 and how it works in practice. It involves legislation by the Parliament of Canada. In other words, federal concurrence and participation of the most authoritative kind.

But, of course, that legislation cannot be enacted without the consent of each of the provincial legislatures, according to the terms of Section 3. Such consent is customarily expressed by a statute passed by the Legislature.

Whether one calls this ordinary legislation or not is immaterial. It's a legal precondition of the exercise of the federal power.

There are many examples on the books. I will mention -- and these examples are included in your authorities. The Ontario-Manitoba Boundary Act 1950 passed by the Legislative Assembly of Ontario, along with complimentary Manitoba legislation. The Manitoba-Saskatchewan Boundary Act 1966. The Saskatchewan-Northwest Territory Act -- Northwest Territories Boundary Act 1966, chapters 88 and 89 of the Statutes of

Saskatchewan 1966. And as I mentioned there are many other examples on the books.

PROFESSOR CRAWFORD: But did any of those examples involve maritime boundaries?

MR. WILLIS: No.

PROFESSOR CRAWFORD: Has section 3 ever been used for maritime boundaries?

MR. WILLIS: No.

PROFESSOR CRAWFORD: Even in relation to internal waters?

MR. WILLIS: No, not to my -- not to my recollection. There is no reason why it couldn't be, but I don't believe it has.

We have some maritime boundaries between provinces, not many. There's a boundary in the Bay of Chaleur and a boundary in the Bay of Fundy, I think both supported by pre-Confederation legislation, and so the use of the 1871 procedure was not called for in those two cases. I'm not really aware of any other maritime boundaries between provinces.

CHAIRMAN: The Bay of Fundy one is in the Constitution of New Brunswick when the -- as being in the middle of the Bay of Fundy, whatever that means, but it is defined in that sense. Are there not rivers that are defined? That is not the same thing, but there probably are. Certainly, there are. Rivers do constitute some of the boundaries,

but I don't really know. That's the only ones I would have heard of.

MR. WILLIS: There's certainly no reason why it couldn't be used for water boundaries. There's a question about the continental shelf, but I think a question that can be answered, but when you get to internal waters or territorial waters, absolutely no legal impediment. When --

PROFESSOR CRAWFORD: You may be -- since we're discussing this, in Australia, of course, when -- because the Tidelands -- the Australian Tidelands decision in 1975 went against the States, they were held to stop at the low water mark. It was then federal/state legislative package, but it didn't give the territorial sea to the States because that would have required referenda in each of the States.

What it did was to deem the States to include the territorial sea for various purposes without actually making the territorial sea part of the States. It, therefore, evaded a constitutional requirement, but this is presumably something that's only done in Australia.

MR. WILLIS: When Minister Allard wrote to the provinces requesting inter alia legislation by each of them to confirm the agreement which they never concluded and then to join with the other four provinces in seeking

legislation by the Government of Canada, he described -- as I mentioned before in response to a question, he described a process that is exactly what is required and done in practice under the 1871 procedure.

Given the earlier understanding that the BNA Act 1871 would be used, there is no doubt he was talking about the same procedure, which is constitutional legislation, and which involves the participation and concurrence of the federal government and which was never tabled or passed.

How any of this totally discredits Newfoundland's theory, therefore, is a mystery. But let us suppose for just a moment that Minister Allard was not referring to constitutional legislation, but to ordinary provincial legislation that would apply of its own force.

How could this possibly advance the Nova Scotia case because no legislation of any kind, constitutional or ordinary, was introduced or passed by a single one of the provinces, despite the eloquence of Minister Allard's plea.

And that brings up a consideration that is even more fundamental. Even if constitutional legislation had not been required, it is plain that under the Canadian Constitution, some form of legislative sanction would have been necessary. This, of course, is based on principles that are inherent in the parliamentary system of

government.

Politicians do not rule by fiat or decree, nor can they rule by unlegislated executive agreements, which would amount to exactly the same thing. The notion that politicians --

PROFESSOR CRAWFORD: Sorry. Is there anything -- maybe you're coming to this, but is there anything that provincial Premiers could have done which would have related if not to the location of their boundaries -- I see the point there, but at least as to the way in which they would treat the areas in question?

For example, could they have agreed on a modus vivendi with respect to the issue of permits without legislation, which would have created, in effect, a concurrence on boundaries perhaps not amounting to a formal agreement?

MR. WILLIS: There are matters which Premiers can agree to as a matter of prerogative and there are -- there's a certain degree of contractual authority vested, you know, in the executive and the Crown. As well, there's a vast area of matters which are governed by legislation in which there is existing legal authority to act at the executive level. But even in those cases, I don't believe those would allow -- extend to anything in the nature of binding agreement, even on a modus vivendi, on issuing or not issuing permits, if that were not consistent with or

authorized by legislation.

That might be a political deal, but I don't think it would have any legal force or effect if it were not authorized by legislation.

PROFESSOR CRAWFORD: Does the Amphritite Principle apply in Canada? That is to say the principle that the executive cannot contract as to the exercise of future governmental powers?

MR. WILLIS: I would think so, in the sense that the Canada Assistance Plan referenced would support that approach.

The notion that politicians can take or give away provincial territory at intergovernmental meetings without legislative authority is not consistent with the Canadian Constitution, but this is what Nova Scotia would have you accept.

The more general notion that binding, executory and irrevocable agreements affecting the vital and enduring interest of a province can be brought into effect by a handshake of politicians without legislative authority, or even a signed agreement, is also an absurdity, but it is also something Nova Scotia would ask you to accept.

These propositions would strike at the roots of the doctrine of legislative supremacy, of parliamentary sovereignty. It is no wonder that Nova Scotia wants nothing whatever to do with Canadian law, or even the

Canadian system of government in this case.

And yet, even international law puts the same questions squarely before us because intention would still be the government criterion, and it is literally inconceivable that the Premiers intended to do something that would fly in the face of Canadian law.

Nova Scotia dismisses these considerations with a contemptuous wave of the hand. It says that Newfoundland grossly exaggerates. It says the issue is whether the line has been resolved by agreement for the purposes of the Accords and for no other purpose, and this will not require any alteration of the provinces' boundaries under the Constitution, which, of course, is true, and which misses the point altogether. Because the issue is what the parties intended to do and did not intend in their dealings with each other in 1964.

They were not dealing with the Accords or with any other form of administrative arrangement. They were dealing with ownership and they said so emphatically.

Again, the intention of the parties in 1964 has to be assessed in terms of what was on the table at that time, not in terms of what emerged almost two decades later on.

And the Nova Scotia argument misses an even more basic point, which is that even if constitutional legislation had not been required under the BNA Act 1871, even if the

matter had not reached that level, some form of legislative authority or sanction would have been required under principles of our Constitution that are more general and more fundamental.

There is, of course, a certain air of unreality about this discussion of legislative supremacy or parliamentary sovereignty because the Premiers never even dreamed of bringing these lines into effect without legislation. Their stated intention was exactly the opposite.

There is one other point of a constitutional character which we described in our Memorial as simple, but conclusive. It is impossible to see how an interprovincial agreement on the delimitation of the continental shelf could resolve anything at all.

The two Supreme Court references have established that ownership and jurisdiction over the continental shelf is federal. They have established in particular that exclusive legislative jurisdiction, and, therefore, exclusive executive authority, as well, lies with the federal government under the peace, order and good government power. Any provincial attempt to divide up what does not belong to them would have been ultra vires and of no effect whatsoever -- nemo dat qui non habet.

The Premiers did not know this to be the case in 1964 and the purpose of the whole initiative was to foreclose

this outcome. But they ultimately failed, and it follows that even if the parties had intended to consummate a legally binding agreement on September 30, 1964 and even if they had passed unilateral legislation to approve that agreement, all of this would have been null and void ab initio on the basis of the most elementary constitutional principles.

I turn next, Mr. Chairman, to issues that would arise only if Nova --

PROFESSOR CRAWFORD: Mr. Willis --

MR. WILLIS: -- Scotia is right that a legally binding and applicable agreement was indeed concluded in 1964.

PROFESSOR CRAWFORD: Mr. Willis, before you do that, does it follow in what you said that the provincial Accord legislation is invalid?

MR. WILLIS: The provincial Accord legislation is valid.

PROFESSOR CRAWFORD: Why?

MR. WILLIS: It's valid because it's based on recognized principles of interdelegation. There are -- there is -- there are areas which are within provincial limits and the jurisdictional questions are set aside as to where those limits might be by the terms of those Accords, so I think that no question could arise about the constitutional validity of the Accords or the implementing legislation of the provinces.

PROFESSOR CRAWFORD: Is there -- in Australia there is a special provision of -- the equivalent of section 91 -- section 51, which allows federal/state legislative cooperative schemes, although there are some limits on it. Is there an equivalent in Canada?

MR. WILLIS: Well, we had -- we have a pretty clearly established line of jurisprudence that while you can't exchange legislative powers -- that was a case involving Nova Scotia in the early 1950's -- administrative interdelegation is allowed. And the courts have placed very few limits on such administrative interdelegations, as long as you don't cross that line of attempting to transfer actual legislative powers.

CHAIRMAN: Could you draw my attention to a few cases on that in the courts?

MR. WILLIS: Well, I think the PEI Potato Marketing case of the 50's, maybe.

CHAIRMAN: Yes, but PEI there was delegating its own legislative power to an entity. The only case I know of is a quite recent one that delegates administrative powers regarding fisheries -- not owned fisheries -- from the federal to the provincial. In other words, the provinces do not own those.

That's a very recent case and it's sort of a one-liner in the Supreme Court of Canada. There's a very detailed

argument in the Ontario Court of Appeal, but I really know of no other. And if you -- I'm rather curious when you say that it's well established. It may be well established by reason of that, but if there are some others, I wouldn't mind knowing what they are.

MR. WILLIS: I was thinking more generally of the interdelegation cases --

CHAIRMAN: Interdelegation, but this presupposes -- the interdelegation cases have presupposed a legislative power in both governments. Sometimes they have established a body to which they can delegate some things, but the difficulty in this case may be to find delegation of what the province has to delegate.

MR. WILLIS: In both cases, however, there are, admittedly, areas of -- that are covered by the geographical scope of the Accords that are within admitted provincial jurisdiction, such as Conception Bay.

PROFESSOR CRAWFORD: But none of these areas would relate to the boundary that we're asked to draw, which is --

MR. WILLIS: No, that's --

PROFESSOR CRAWFORD: -- which is way outside the 12-mile line drawn from any conceivable boundary of internal waters.

MR. WILLIS: That is correct.

PROFESSOR CRAWFORD: So the legal character of what we're

doing, if you analyze it at a certain level, is that we're -- we are making a decision, almost a hypothetical decision, because, of course, international law did not apply to the relations between the provinces, and it still doesn't. We're making a hypothetical decision which will enable the Minister, in accordance with valid federal legislation, to determine the scope of operation of -- you say an interdelegated legislative scheme, or not to put it too bluntly, which will enable the Minister to allow the provinces to assist Canada in doing something that Canada could have done anyway.

MR. WILLIS: No, that --

PROFESSOR CRAWFORD: That's not a boundary scheme.

MR. WILLIS: That is correct, but as to whether the boundary was resolved by an agreement in 1964, all that, I suggest, has to be assessed in the context of 1964 and what was under discussion at that time.

Now I'm turning now, Mr. Chairman, to issues that arise only if Nova Scotia is right in its basic proposition that there is a legally binding agreement, an applicable agreement, concluded in 1964.

The first of these issues concerns the course of the line in the outer area, in particular whether there was an agreement on the line extending from turning point 2017 at a bearing of 135 degrees to the outer limit of the

continental margin.

And the second question is how, on accepted legal principles, an agreement dealing with ownership rights could be applied for the distinct and different purposes of the Accords, the present day Accords, without the express agreement of the parties?

These issues would arise only if Nova Scotia were to succeed on the principle issues. But they're important in their own right because Nova Scotia would have to prevail on both these issues in order to get the disposition it seeks in phase one.

First, Mr. Chairman, the blank on the map outside the Gulf of St. Lawrence. Let me begin with the basic facts. The 135 degree line is not to be found in the description or the map accompanying the 1964 submission.

It is demonstrably inconsistent with both those documents. Points two and three that introduce the metes and bounds description in the Notes re Boundaries are based upon the use of coastal features to control the course of the line.

Now by definition, a line projected indefinitely seaward on an arbitrary bearing, and a constant bearing, has nothing to do with such an approach.

As to the 1964 map --

PROFESSOR CRAWFORD: Mr. Willis, I was -- I was struck as

one would have to be, by the method adopted. I know Nova Scotia has made the point that it's not our business to critique the method. If it was agreed it was agreed, and that's that. And it may be that it produced lines which are -- which are broadly acceptable, even if it's not the method that would be adopted by modern cartographers in trying to draw equidistance lines, or any other sort of lines.

What's the providence, though, of that sort of method of drawing -- treating islands as if they are peninsulas, and drawing lines from prominent land marks, and picking equidistance points? Where did that come from? Or is this just something invented by the Premiers in 1961?

MR. WILLIS: I could not -- I couldn't really usefully speculate on where that methodology came from. It's methodology that makes a certain degree of sense in the opposite coast, and complex figuration of the Gulf. It certainly has no applicability or relevance to the outer area. That's really all I could say in answer to that question.

As to the 1964 map, it shows a line extending to an arbitrary point at sea which is not referred to in the description, to an arbitrary and inexplicable at -- an arbitrary angle and an inexplicable angle which reflects no principle of delimitation, and which is not 135

degrees. The map therefore provides no support to the Nova Scotia contention that the 135 degree line was part and parcel of the 1964 proposal.

Nova Scotia has attempted to explain this away, as a slight though very definite turn toward the east, or a mere deflection, but a shift of a full 10 degrees far exceeds a deviation that could be brushed aside in these terms, not with compass roses in plain view on the map.

Finally, when the lines were plotted with precision by the JMRC, the map they produced as showing the boundaries of mineral rights depicts no boundary whatsoever in the outer area. It shows a line that goes no further than turning point 2017, with absolutely no indication of an intended further projection seaward. It was this map that was before the premiers in 1972. Nova Scotia denies this, but the facts speak for themselves.

The very first documentary reference to a 135 degree line is in an internal communication, a federal communication in 1983, from Mr. W. V. Blaickie, the Federal Surveyor General, presumably in connection with the legislative implementation of the first Canada-Nova Scotia Agreement. He wrote that the boundaries in 1964 Submission were subject to a certain amount of interpretation, and that the outer portion of the boundary, and here I quote, "was assumed to be a line

having an azimuth of 135 degrees".

It was in this way that by far the most extensive portion of the Nova Scotia line first saw the light of day. Not only the most extensive portion of the line, by far the most important, as well, according to statements of the Premier of Nova Scotia.

The most critical portion of the line stems from a document to which Newfoundland and Labrador was never a party, and on which it was never even copied.

Mr. Blaickie was right when he wrote that the 1964 description was open to interpretation. What the 1964 description provides is an indication in the vaguest possible terms of the general direction of the line, from the mid point between Flint Island and Grand Bruit, and thence southeasterly to international waters. That was enough at the time, because Premier Stanfield said that further work would be needed to define the tentative boundaries, as he expressed it.

The JMRC completed this task in the Gulf of St. Lawrence. So far as the outer area is concerned, the outer continental shelf, which is the crucial area, the work was never even begun. The map produced by the JMRC as a depiction of the proposed boundaries is extended no further seaward than point 2017, just at the entrance to Cabot Strait.

The most important area of all, Mr. Chairman, was left as a blank on the map.

That map, according to its title, shows the proposed boundaries as such, not merely the turning points. This is no accident, it is confirmed not only by the title, but by the minutes of the JMRC of January 17, 1969, which you can see on the screen. The map shows the boundaries as determined by his committee.

The turning points are meaningless by themselves. They are the elements out of which a boundary is constructed. What the map shows is a proposed boundary, and one that fails to cover anything beyond this famous turning point 2017.

Nova Scotia protests that Newfoundland's position is contrary to the principle of effectiveness in the international law of treaties, that we are saying that the 1964 language on thence southeasterly has no meaning. We are not saying that at all.

We are saying that these terms, this language, lacks the precision that would be required in a legally binding and legally operative agreement. That this precision is one further indication that no such agreement was intended by the parties.

An indication of a general direction could have been the starting point in the process of future work that

Premier Stanfield called for. The language is far from meaningless when the 1964 initiative is seen in its proper light, as a step in a process, but not the final culmination of that process.

CHAIRMAN: Mr. Willis, I wonder, it has nothing to do precisely with what you are saying now, but I understand there is another area of disagreement between the provinces. Am I correct in that? As to where the -- where there is another possible dispute between the provinces? Are you aware of that?

MR. WILLIS: I believe there is.

CHAIRMAN: And I would like to know essentially where it is at some stage.

MR. WILLIS: Is that the area -- are you referring to the area of the northeast part of the Gulf?

CHAIRMAN: I don't know what area, I just -- that's what I'm trying to determine.

MR. WILLIS: Right. I believe there is one area that the agent for Newfoundland and Labrador is intending to address later in the day, and I believe that is the area where there is some question.

CHAIRMAN: That's just fine.

MR. WILLIS: I think it's better to leave it until then, if I may. Thank you.

PROFESSOR CRAWFORD: Mr. Willis, it's true that Mr. Blaickie

seems to have drawn this line on the map, in 1983. But the Katy Permit, of course, had a 135 degree line as well, and that was in the seventies?

MR. WILLIS: Well the -- not the Katy Permit, I think, our facts and submissions were --

PROFESSOR CRAWFORD: Sorry, the Mobil one?

MR. WILLIS: Yes. Approximates that line, and of course, one of the points that was made -- a number of points were made on that --

PROFESSOR CRAWFORD: Yes.

MR. WILLIS: -- yesterday by Mr. Crane. And we don't know what the background to that is. We know that it came after the Nova Scotia permit.

PROFESSOR CRAWFORD: Yes.

MR. WILLIS: And I don't think whatever the explanation that too much significance can be attached to a -- one event of that -- of that character.

PROFESSOR CRAWFORD: No, it's just you said it was the first time it saw the light of day, well I suppose --

MR. WILLIS: Exactly.

PROFESSOR CRAWFORD: There's different sorts of lights.

(Brief Interruption)

MR. WILLIS: Back to the principle of effectiveness. And the only other observation I wanted to add is one of a legal character, that this argument from Nova Scotia about

the principle of effectiveness shares much in common with a number of the Nova Scotian arguments based on the international law of treaties. They are all based on the principles of treaty interpretation, plain meaning, object and purpose and subsequent practice.

They assume exactly what has to be proved, that a so-called treaty is in force. All this puts the cart before the horse. The principles of treaty interpretation provide no assistance on the prior question of whether there is a treaty to interpret in the first place.

If the issue were the interpretation of a binding treaty, the effectiveness principle might be relevant to an argument that the language is too imprecise to be given a legal meaning.

It's no answer at all when the issue is quite different, and the issue here is whether the language lacks the precision that would be found in and would be required by a legally binding and operative agreement.

There are two critical ambiguities in the phrase "thence southeasterly to international waters." First, the meaning of southeasterly, and second the meaning of international waters.

As a matter of ordinary language, the word "southeasterly" is an indication of a general direction, not a single, precise bearing. It potentially covers

anything between south and east, and this is how the weather service would use it in describing the direction of winds, or how a sailor or a fisherman might use it. Due southeast is one meaning the terms can have, but it is certainly not the only meaning.

The first definition in the Webster's citation at Annex 19 of the Nova Scotia annexes describes southeasterly as the general direction between south and east.

The use of the abbreviation SE appears at the end of the metes and bounds description, where the proposed boundary of Newfoundland is being described in terms that parallel the Nova Scotia description, but in a form that is abbreviated in several places.

It is obvious that here SE has to stand for southeasterly, because otherwise it would be in potential conflict with the parallel clause on the proposed Nova Scotia line in the very same document, which is not a possibility.

So SE in this context has to mean southeasterly, and nothing more precise than that. And of course, in the 1982 Nova Scotia Agreement, which led to the first appearance of the 19' -- of the 135 degree line, the expression used is simply "southeasterly".

It is above all the usage in the 1964 description that

shows the expression -- how the expression southeasterly cannot without further qualification be equated with the notion of due southeast. Throughout that description, identical or similar terms, such as northeasterly, southeasterly, easterly, and southwesterly and so on are used in a very approximate fashion, a very loose fashion that demonstrably does not correspond to the cardinal compass points or to points exactly between them.

For example -- and I put up some illustrations on the screen. These are examples taken from the metes and bounds description in respect of the area within the Gulf of St. Lawrence. Due south -- due northeast, as you note --

MR. LEGAULT: Are those slides from the '64 map or the '72 map?

MR. WILLIS: That's from the original document of 1964 --

MR. LEGAULT: Thank you.

MR. WILLIS: -- or perhaps before that, 1961, the metes and bounds. And due northeast, as you can see, is 45 degrees, and where the expression northeasterly appears in a number of places in the metes and bounds description describing the boundary of Nova Scotia within the Gulf of St. Lawrence, the range -- the range of deviation is between 11 degrees and 58 degrees. A very considerable range.

Similarly, the expression southwesterly in the same

document, the metes and bounds, southwest, due southwest being 225 degrees and again several instances where you see a range of variation not quite as dramatic as in the case of the northeasterly, but nevertheless, ranging from 213 degrees to 243. So it not only is a matter of general linguistic usage but in the very context of this document, these expressions have a very imprecise sense and can be used with a wide range of meanings.

PROFESSOR CRAWFORD: Mr. Willis, the map -- the Stanfield map, did that have any other lines which were not joining two points, apart from the southeasterly line, which is obviously the --

MR. WILLIS: I'm going to -- there is a reference to the Bay of Fundy area, I believe in the document, which would not be a line between two points.

PROFESSOR CRAWFORD: So that would be like the so-called southeasterly line out into the Atlantic. The point is where you say southeasterly joining two points. There is no particular stress on the word southeasterly because the two points will determine the exact area?

MR. WILLIS: That's true.

PROFESSOR CRAWFORD: Whereas if you have a single point in a line, it makes a big difference --

MR. WILLIS: Yes.

PROFESSOR CRAWFORD: -- as it did, for example, in the Libia

Chad case where the crucial point was southeasterly of a particular point identified on the map and the boundary was to go southeasterly from there. That of course gave rise to a dispute and a war, what southeasterly meant in the context of that case.

That was a land boundary, but I was just wondering what the position was with the other boundary on the Stanfield map that was not joining two points? Perhaps you can --

MR. WILLIS: It does not give a bearing.

PROFESSOR CRAWFORD: It doesn't give a bearing?

MR. WILLIS: It doesn't give a bearing, as I recall.

PROFESSOR CRAWFORD: Well perhaps you could come back to that after the break anyway?

MR. WILLIS: Mmmm. I would like to check the document and I believe it's different in the sense that it doesn't give -
- the language is not exactly parallel and in that context, of course, the Gulf of Maine issue was present as well.

PROFESSOR CRAWFORD: The point is that the stress on the southeasterly is much, much heavier where there is no connecting point?

MR. WILLIS: Right. Now the use of an approximate expression like southeasterly or northwesterly or similar expressions is without consequence where the line joins

point A to point B because one knows what it's going to be. But the point here is that the expression is demonstrably approximate and not precise.

So as a conclusion, it is -- I believe that the description itself confirms the view that the expression southeasterly can refer to any of an infinity of possible bearings between due south and due east. And the expression southeasterly therefore cannot be equated with a bearing of precisely 135 degrees.

The other important ambiguity in these documents is the reference to international waters as the terminal point of the line. Now Nova Scotia attempts to brush this aside as a nontechnical usage but this does not hold up. Let us not forget that the officials that drew up the documents formulated a very precisely described claim to the Gulf of St. Lawrence, the Strait of Belle Isle, the Cabot Strait and the Bay of Fundy as territorial waters or inland waters.

They had a very clear and correct conception of the distinction between territorial and international waters. It is therefore reasonable to assume that they understood that international waters means the high seas, including the waters above the continental shelf, and begin at the outer limit of the territorial sea.

The ambiguity is compounded by the fact that the

Premiers put forward a territorial waters claim to Cabot Strait, but without defining the geographical limits of that strait, which could be interpreted as extending out to the area of the final turning point.

It was only in 1970 through the fishing zones 1, 2 and 3 order under what was then the Territorial Sea and Fishing Zones Act, that the closing line across Cabot Strait, as we now know it, was established. In 1964 it did not exist and was clearly not something the parties were aware of when they said the Cabot Strait should be considered internal waters. And in any event, a closing line would not assist in defining the strait as an area. it defines the access of the strait, but not the entire extent.

Nova Scotia's response on this issue fails to address the real point, which is that the expression international waters is so ambiguous and imprecise as to cast further doubt on the notion that the Premiers had any conception that they were actually delimiting the continental shelf beyond the Cabot Strait.

Now this might be a good point to respond to a question that was put forward yesterday about the Canadian claim to the Gulf of St. Lawrence, which is a long story but I will try to make it short.

There are no straight baselines and no specific

legislative declaration relating to the Gulf of St. Lawrence. However, the federal government on quite a number of occasions has stated an internal waters claim to the whole of the gulf, starting with a declaration by Prime Minister St. Laurent in 1949, at the time of the -- and on the occasion of the Confederation of Newfoundland and Labrador with Canada.

Although there are no straight baselines, the Oceans Act as passed about 1996, recognizes that historic waters not enclosed by baselines are included within the internal waters of Canada and in principle that language would cover the Gulf. And should that matter arise in litigation, a certificate can be filed by the Minister of Foreign Affairs, which resolves the issue conclusively.

PROFESSOR CRAWFORD: Perhaps not an international arbitration but -- and perhaps this isn't an international arbitration, assuming that a particular area was recognized as being internal waters after federation, would have had the effect of extending the territory of the provinces? In the Australian situation -- I'm sorry to keep harping on it but it's the only thing I know -- the Australian situation is that the internal waters of the States are part of the State geographically but they were fixed in 1901 and they can't be extended other than by the constitutional process. So that any internal

waters that accrue to Australia as a result of subsequent developments in international law are federal internal waters and not State.

MR. WILLIS: Yes. That's the same in -- that would be the same in Canada definitely. If we drew a new baseline enclosing an area of the bay, it would not add to the territory of the province and that's part of the reasoning of the references that the limits of the provinces are affixed.

PROFESSOR CRAWFORD: So the effect would be that if Canada -
- with a Canadian claim to the Gulf of St Lawrence's internal waters came to be generally recognized, that would be federal internal waters and not state -- and not provincial?

MR. WILLIS: Yes. The act of -- the act of adding anything to the internal waters of Canada would not change the limits of the provinces.

CHAIRMAN: That would be a quick plea to the Constitutional Act of 1871.

MR. WILLIS: That's right. Now throughout its response on the 135 degree line, Nova Scotia systematically confuses delimitation with the claim to ownership.

Nova Scotia argues, for example, that because the Premiers claimed and intended to claim the entire area of the Banks of Nova Scotia and Newfoundland in 1964, they

must have intended to delimit those areas at the same time.

But this doesn't follow. It's a non sequitur. No doubt the Premiers intended to delimit the continental shelf with precision and binding legal effect in the fullness of time. It does not follow that they intended to do so then and there. And there is every indication that they did not.

This systematic confusion of the claim to ownership with the existence of an agreed delimitation is not only a non sequitur, it's also glaringly inconsistent with the main branch of the Nova Scotia argument.

On the more fundamental question of whether there was an agreement in the first place, Nova Scotia insists that the boundary and ownership proposals in 1964 were patently separate items of agreement with no interdependence at all.

When it comes to the blank on the map outside the Gulf of St. Lawrence, everything is turned inside out and a full fledged boundaries are said to be of the very essence of jurisdiction.

Now the irony is that they have got it backwards in both cases. A delimitation without ownership would indeed be an exercise in futility, but the converse does not hold true. A claim to ownership prior to a legally operative

delimitation makes perfect legal sense and is in fact the normal sequence of events.

It's even implied in the ab initio and ipso facto doctrine of the North Sea cases where the continental shelf is automatically as it were, an appurtenance of the coastal state. And this is true even in the case of land boundaries where there can be vast undelimited frontier zones with no question of terra noveus.

So it's obvious that a collective claim to a continental shelf area can be made first and the delimitation can come after.

Nova Scotia takes issue with our statement that the principal concern of the parties in 1964 and in subsequent years was the Gulf of St. Lawrence. But the historical facts are clear, not only the delimitation, but the claim to territorial waters status were both concerned primarily with the gulf and the Cabot Strait. This was the natural focus of attention in a multi-lateral context where the majority of the jurisdictions concerned had no interests outside the gulf.

It is not surprising that the outer area was at most a footnote in the vaguest possible terms to a document that was overwhelmingly dominated by the Gulf of St. Lawrence. The general claim to ownership did, as we understand it, extend to the continental shelf outside the gulf through

the reference to the Banks of Nova Scotia and Newfoundland. But that was not the focus of attention where the proposed interprovincial boundaries were concerned.

This preoccupation with the Gulf, for example, is why Premier Smallwood spoke in 1965 of these interprovincial boundaries in the gulf when the matter came up at the federal-provincial conference of that year.

It is why the record of the September 23 meeting of officials in 1964 stated that the meeting considered that it was desirable that the boundaries should be agreed upon by the provincial authorities and the necessary steps should be taken to give effect to that agreement.

In this respect, a plan was prepared by the Nova Scotia Department of Mines setting forth graphically and by metes and bounds the suggested boundary lines covering the Bay of Fundy, Northumberland Strait, the Gulf of St. Lawrence, including the Bay of Chaleur, and the Strait of Belle Isle and Cabot Strait. Not a single illusion, Mr. Chairman and members of the Tribunal, to the outer area. And yet this was the meeting that prepared the ground for a meeting only one week later at the level of the Premiers.

Now point five in the September 23 document refers to the claim to the outer banks in terms of the forgoing

principles, but that appears to refer to the general principles, the claim to ownership, the desirability of delimitation, certainly not to the plan showing the delimitation or to the metes and bounds.

The record speaks for itself and explains -- it explains what is in any event self-evident, that the proposed boundaries within the gulf had been worked out in considerable detail, whereas in the outer area, the consensus was limited to a vague conception of the general direction the line might eventually take. Leading, as we have seen, to this blank on the map when the proposed boundaries were given their most definitive expression some years later by the JMRC.

Dr. Crosby and Mr. Thorgrimsson, the Director and Assistant Director of the Resource Management Branch in the federal department of Energy Mines and Resources set out their understanding of the extent of the 1964 lines as referred to in the 1977 MOU.

In briefing material for the Minister on the 1977 MOU, they said that the interprovincial lines of demarkation are absent in two places because they do not extend far enough off the mouth of the Bay of Fundy and southeasterly from Cabot Strait.

The document is important and not because it has a legal status, but because it reflects the understanding of

the experts who are dealing intensively and probably on a daily basis with the file at that time. And this moreover, was in the context of a document to which the federal government was a party, the 1977 MOU. And if these experts understood that the 1964 proposed boundary stopped outside the Cabot Strait, that speaks volumes about the Nova Scotia 135 line.

PROFESSOR CRAWFORD: The document doesn't say it stops. it says it doesn't extend far enough. And I mean, if you look at the Stanfield map that is certainly true, it doesn't extend far enough. I mean, there is some -- obviously there is some tension between --

MR. WILLIS: Yes.

PROFESSOR CRAWFORD: -- saying absent and saying do not extend far enough, but the answer says do not extend far enough.

MR. WILLIS: Yes. It's -- I think the two documents -- I mean, the concept of stopping at 2017 and not extending far enough southeasterly from Cabot Strait really depends on what you think of as Cabot Strait. And there is no real conflict in that respect.

PROFESSOR CRAWFORD: But it says the lines as originally drawn by the five East Coast Provinces. And the question is whether that is a reference to the Stanfield map or to the turning points map.

MR. WILLIS: Well that would be a reference, I believe, to the turning point map because the terms of the MOU I think referred back to the interprovincial lines of demarcation as drawn in 1964.

The turning point map might have been used to clarify the exactitude and extent of the 1964 lines but the primary reference of this expression would be to the 1964 grid.

PROFESSOR CRAWFORD: Yes, which means originally goes back to '64. And the '64 line extended beyond 2017, so --

MR. WILLIS: Well I think -- but it depends if he was referring in this respect -- I would have taken he was referring to the metes and bounds description, which while not as precise as the JMRC turning points, was a good deal more precise than the map.

PROFESSOR CRAWFORD: The authors of this document seem to have no doubt that the lines were originally drawn by the five East Coast provinces.

MR. WILLIS: Drawn, yes.

CHAIRMAN: Just a matter of housekeeping, Mr. Willis, do you propose to go on very long or -- it's time for the break.

MR. WILLIS: I'm entirely in your hands. I have about I would say five minutes on this issue of the 135 degree line.

CHAIRMAN: I would prefer if you took the five minutes after

lunch. As a question too, I was wondering about the time, if we would extend it 15 minutes. When would that put us to?

PROFESSOR MCRAE: 10 to 2:00.

CHAIRMAN: 10 to 2:00 rather than -- if that doesn't interfere with your time so that you can complete say at 4:30?

MR. WILLIS: That's no problem.

CHAIRMAN: All right. Thank you very much.

MR. WILLIS: Thank you, Mr. Chairman.

(Recess - 12:30 p.m. - 1:50 p.m.)

CHAIRMAN: Yes, Mr. Willis.

MR. WILLIS: Thank you, Mr. Chairman, and members of the Tribunal.

Before going back to where we left off just before the lunch break, I might comment on a question concerning the language of the metes and bounds, the 1961 to '64 document with respect to the Bay of Fundy area. And it is a little different from the language respecting the Newfoundland and Nova Scotia areas. It says "Thence generally southwest to international waters."

So there's two differences, one is the use of southwest, not southwesterly, and the other is the word "generally", which seems to anticipate or contemplate the multiple jogs in the line, in the equidistance line as it

precedes outward from the Bay of Fundy to the Georges Bank area, and the Gulf of Maine.

PROFESSOR CRAWFORD: And the degree that that line is drawn on the Stanfield map, the Bay of Fundy line? I should say, I don't want to appear to be duplicitous, our technical expert calculates that it's two degrees off the relevant -- I mean, it's not exactly southwest, it's 223 rather than 225, or something like that. So that it's very nearly, but not quite. At least that was our calculation, but you might look at it. And -- but they used the words "international waters" as well in relation to that description.

MR. WILLIS: There are some parallels and some differences. Now, returning to the 1977 MOU, and we had on the screen before the language of the Q's and A's from the federal side that responded to the question of why the lines of demarcation were absent in two places, and we had a discussion about that.

But there is another point I wanted to raise in relation to the 1977 MOU, and the events that surrounded that development. Nova Scotia asks, in their written pleadings, why Newfoundland and Labrador did not protest the 1977 MOU? And our response essentially is, there was nothing to protest.

It wasn't even *res inter alios acta* in the treaty

language that Nova Scotia prefers. It was nothing more than a political prelude to a proposed agreement that never saw the light of day, because it was unilaterally vetoed by Nova Scotia. It applied to the whole continental shelf, but it described no boundary whatsoever in the outer area, certainly not the 135 degree line that was developed by Mr. Blaickie in 1983.

Now, in discussing the Q's and A's which we had up on the screens this morning, Nova Scotia said in their Counter Memorial that the MOU trumps, the MOU trumps the considered views of the federal experts.

But how could a document that never entered into legal force trump anything at all? And how could a document that specifically addresses the delimitation of the outer area be trumped by one that makes no specific reference to that issue at all?

The clearly incomplete nature of the boundary points up the importance of the legal steps that were to follow, as outlined in 1969 in the Allard letter.

Because it would have been in the course of developing a full-fledged legal agreement, and drafting the legislation, that the course of the line would have been pinned down with a modicum of precision. And without that precision, the line would not and could not have been legislated into existence.

And certainly it's not -- it's not the function of phase one of this arbitration to pin down, or to specify something that was left up in the air in 1964, and again in 1969 and 1972.

It may well have been that the boundary dispute with France deterred the parties from delineating and depicting a boundary through the disputed zone. If so, that was a prudent course. But there's no reason to speculate, because the historical reality is clear. Yes, the parties in 1964 no doubt envisaged an eventual delimitation of the outer area, and indicated to a degree, the general direction the line was to follow to international waters, wherever that might be.

But this falls short of a delimitation defined with sufficient exactitude to become legally binding and effective there and then.

The 135 degree line was developed when, and only when, it was considered necessary to define something precise for the purpose of implementing the first Nova Scotia Agreement of 1982 in legislation.

But that was a process that is not binding upon Newfoundland, in which Newfoundland and Labrador was not involved, that does not constitute an agreement in any sense of the word, and where the interests of Newfoundland and Labrador were fully protected by the caveat in the

schedule to the 1982 Canada-Nova Scotia Agreement, which we've discussed this morning.

The final topic I will deal with today, Mr. Chairman, is the Nova Scotia position that the purported 1964 Agreement applies for all purposes, and is not limited to its stated subject matter of ownership, and of true provincial limits as determined under the BNA Act 1871.

On its face this is a hard argument to make, because all the normal rules of interpretation would lead to the opposite conclusion, which is that an agreement concluded for a stated purpose, and with a stated field of application, is limited to what it was originally intended to cover, until the parties expressly agree otherwise.

In other words, that agreements cannot be rewritten by one of the parties to apply to new and different fact situations without the agreement of the other party.

And in this case, it could not apply to a type of regime that was not referred to, and not in contemplation in 1964, and that it in fact emerged as a political settlement after the objective of the 1964 initiative had been defeated in court.

This is not an academic point. The proposal on boundaries was made in order to facilitate the achievement of the main goal, which was constitutionally recognized ownership. There is essentially no disagreement between

the parties on that.

The concessions inherent in a boundary settlement would have been part of the price to be paid for a much greater prize. But once the goal of constitutionally recognized ownership was gone, the quid pro quo was gone. To apply the boundaries without the quid pro quo would be unfaithful to the original intention.

Nova Scotia argues that a delimitation for the purposes of ownership can automatically be applied to a completely different regime of administrative co-operation and revenue sharing on the principle that the greater includes the lesser. The argument in our submission does not hold water.

Nova Scotia has no right to assume that something the parties might have been prepared to accept as part of a package aimed at unqualified, exclusive and entrenched rights of ownership is something they might also have been prepared to accept for a far more limited objective. Maybe so, and maybe not. We have no right to make assumptions that go beyond what the parties said, or to reformulate their intentions some 35 years down the road.

The proposition that an agreement concluded for one purpose cannot be applied for another purpose without a further agreement is elementary. I will give an example from the field of international law. I'm referring here

to the arbitration between Senegal and Guinea Bissau, upheld by the International Court of Justice on judicial review.

One of the issues was whether an agreement of 1960 dealing with the territorial sea, the contiguous zone, and the continental shelf, could be considered applicable to the exclusive economic zone without the agreement of the parties.

And the decision by a distinguished panel of international jurists was that it did not apply to the new institution of the EEZ, which was obviously not perhaps the most pragmatic outcome since it left the parties without a complete settlement. But it was dictated by elementary principles of consensualism, which applied to treaties and to contracts, and of course, to intergovernmental agreements in federal states.

The Nova Scotia refrain is that the so-called 1964 Agreement was concluded for all purposes. But consider, Mr. Chairman, and members of the Tribunal, where they get this. It is not from the 1964 records at all. It is from the 1969 letter from Minister Allard. And what is significant is that apart from Nova Scotia, the provinces did not report back to him as he requested, that they accepted this characterization.

Newfoundland and Labrador in particular, did not so

report. And it is of interest that the only province apart from Nova Scotia that reacted to this point was Prince Edward Island, which was obviously puzzled by the reference to all purposes, and replied that it was meaningless.

Mr. Allard also referred in his letter to the effect of such approval. And Mr. Chairman, it is notorious that such approval never came.

Now Nova Scotia also falls back on events that transpired not in 1964, when the agreement is said to have been concluded with immediate binding effect, but eight years later in 1972.

But its reading of the 1972 documents is just plain wrong. The last two points of the telegram sent after the June meeting in 1972 opened the door to a regional administrative authority, and to financial arrangements of matters of possible further study.

However, and this is key, they did so in the context of a resounding re-affirmation of the claim to ownership, without which the political united front, which the document referred to, would have been a complete non-starter.

What Nova Scotia has failed to recognize throughout this part of this argument is something so obvious it should hardly have to be mentioned. Administrative

arrangements and ownership, as well as constitutional jurisdiction, are not mutually exclusive.

Administrative arrangements were never seen as a substitute for ownership in 1972, they were seen as complimentary, and rightly so.

The need for administrative and financial arrangements in a context of provincial ownership, would have been overwhelmingly obvious to all concerned, given the extensive federal responsibilities for ocean management, even in areas within provincial limits.

So the Nova Scotia contention that references to administrative arrangements in 1972 imply a backing away from the original claim to ownership is simply wrong. And it also begs the obvious question, if an agreement had been concluded in 1964 with immediate binding effect, how could the negotiations of 1972 have changed the original scope of the existing agreement? The Nova Scotia arguments beg the questions, but fail to provide even a hint of an answer.

Nova Scotia quotes the words of Premier Regan of that province at the August 23, 1972 meeting. Premier Regan said that the ownership question should be set aside for the moment. These are important qualifying words.

But, of course, the real question about this passage is what could it possibly have to do with Newfoundland and

Labrador? Premier Regan, presumably, was speaking for Nova Scotia, not Newfoundland and Labrador. How his unilateral remarks at the August meeting could have the slightest bearing on the position of Newfoundland and Labrador, or on an agreement allegedly concluded eight years earlier, and not referred to by the Premier, is once again a complete mystery.

The same applies with even greater force to what Nova Scotia said in its Counter Memorial about a letter from Premier Smallwood in 1970. The letter, of course, had nothing to do with boundaries. It makes no reference to them.

Quite incredibly they construe, or rather they misconstrue, a reference to the urgency of establishing administrative arrangements as a signal that Premier Smallwood was, and I quote here, "evidently prepared to set aside matters of ownership or full jurisdiction."

But the 1964 approach was expressly predicated on ownership and nothing less.

These are among the most spectacular nonsequiturs of the Nova Scotia pleadings. Nova Scotia was consistent and persistent in its pursuit of the goal of ownership.

Since Premier Smallwood linked his observations to the original approach of 1964, it is crystal clear that he was thinking about administrative arrangements as something

that would be complimentary to ownership, but in no way as a substitute for ownership, such as eventually emerged in the two accords.

Mr. Chairman, that concludes my presentation. The principle conclusions I am respectfully asking you to consider are as follows: that the proposal of 1964 was made in a federal-provincial negotiating context, and could not have been intended to constitute a legally binding agreement. That the proposal was in any event conditional upon the enactment of constitution legislation, which was never enacted. That the course of the line in the most extensive and important area of the dispute was never defined with the precision that would be required of a legally binding agreement. And that the proposal applied to ownership rights, which is not what the present accords establish.

I thank the Tribunal for its courteous attention.

CHAIRMAN: Thank you, Mr. Willis.

MR. WILLIS: Thank you.

PROFESSOR MCRAE: Mr. Chairman, Members of the Tribunal, I wish this afternoon to speak to the Tribunal on the question of subsequent practice. And on the conclusion of that presentation, I would like to make some closing remarks on behalf of Newfoundland and Labrador.

Before doing so, I would like to refer to two other

matters.

This morning, the Chairman asked the question about another dispute, I think --- or referenced another dispute on which he wanted some clarification.

It appears there may be some misunderstanding about references to another dispute.

In his presentation yesterday, Mr. Crane, on the transcript at page 507, referred to some references to differences of view involving Newfoundland and involving Quebec. And he referred to the tab 27 of the oral pleadings. And he made another reference again later on to 530. Those references are to references into early documents about a lack of clarification in the area in the northeast Gulf, and this having to be resolved.

Like many of the references in these documents, and there is both -- that kind of reference appears in that tab 27, and again in supplementary document 13, page 8, like many of these references in these oral documents, they are somewhat opaque, and we really have no information about what they meant at the time beyond those specific references. They certainly don't have anything to do with the present day.

The second clarification I would like to provide relates to a question I believe that Mr. Crane was asked by Professor Crawford yesterday about whether a draft of a

formal agreement was prepared as contemplated by the 1977 MOU. We have looked at the record on this point, and it would appear that there were continuing federal-provincial discussions regarding an agreement, and a potential draft legislation, but no formal agreement as contemplated by the MOU, was ever completed.

And the document 77 does make some reference to those further discussions, but again there is no record that we are aware of, of any further documentary conclusions on that.

Mr. Chairman, Members of the Tribunal, I would like to address the relevance of certain elements of the historical record which follow the September 30, 1964, the date on which Nova Scotia contends the parties concluded a binding agreement.

In fact, much of the post-1964 record has already been dealt with by Mr. Willis in demonstrating that no binding agreement was concluded between the parties, whether in 1964, 1972 or any other time. But Nova Scotia has argued that other parts of the post-1964 record are significant in these proceedings, and not because of anything that Newfoundland and Labrador actually did or said, but because of what it allegedly did not do or did not say. And it is to this aspect of Nova Scotia's argument that I now turn.

Nova Scotia has made much of what it calls, throughout its pleadings, the "subsequent conduct" of the parties. However, Nova Scotia's "subsequent conduct" arguments are essentially irrelevant to the task which it has set for itself, that is, to establish that the parties concluded, on September 30th, 1964, a legally binding agreement.

And its subsequent conduct arguments rest on two very tenuous props.

The first is what can only be described as a somewhat mystifying mistreatment or misapprehension of relating to the legal relevance of subsequent conduct relating to the establishing of the existence of a binding agreement.

And secondly, Nova Scotia refers only to selected parts of the parties' subsequent conduct, or as I say, rather the lack of conduct, and then we would suggest takes it out of context.

But there is a note that we also should point out. Nova Scotia advances its subsequent conduct argument on the assumption that only international law applies in phase one. It has not attempted to show that Canadian law attaches any significance to the subsequent conduct of the parties in establishing the existence of a legal agreement. And so this aspect of Nova Scotia's argument is relevant only if international law applies in determining the parties' intent.

Now Nova Scotia makes two broad legal arguments about international law and subsequent conduct.

And the first of these, and the only one raised by Nova Scotia in its oral pleadings earlier this week, is that well-established rules of treaty interpretation provide that the subsequent conduct of parties to an agreement is a reliable guide to the meaning of their agreement.

And the second, argued in Nova Scotia's Memorial and Counter Memorial, but not raised in the oral pleadings, is that conduct, or again, more precisely, absence of conduct gives rise to acquiescence or estoppel precluding a party from denying a fact implied by its conduct, whether the implied fact is true or not.

But neither of those propositions really has anything to do with ascertaining the existence of a binding agreement. Both are, we would submit, completely irrelevant to phase one. Indeed by its silence, it seems that not even Nova Scotia is convinced any longer of the relevance of the second of these two arguments, that relating to acquiescence and estoppel, and so I will deal only with the first.

The basic flaw with Nova Scotia's attempt to invoke subsequent conduct as a means of treaty interpretation is that it assumes that the very fact it has to prove --

assumes the very fact that it has to prove the existence of a binding agreement. To state the obvious, rules of treaty interpretation can only be relevant if there is a treaty to interpret. Article 31 of the Vienna Convention, on which Nova Scotia relies heavily, has absolutely nothing to do with ascertaining the existence of a binding agreement. It is solely about understanding agreements already in existence.

So the suggestion by Nova Scotia that a rule of treaty interpretation can be used to establish the existence, as opposed to the meaning of a treaty, is as absurd as suggesting that the "golden rule" of domestic statutory interpretation is a rule about the existence, as opposed to the meaning of statutes.

Nova Scotia supports its reliance on rules of treaty interpretation by calling in aid a passage from McNair's Law of Treaties. And I quote McNair as saying, and I quote, "the relevant conduct of the contracting parties after conclusion of the treaty..has a high probative value as to the intent of the parties at the time of its conclusion." And that's found in the Memorial, part 3, paragraph 15.

From this, Nova Scotia claims, and I quote, "The principle that subsequent conduct provides evidence of high probative value as to the intention of the parties as

an earlier time, extends equally to the parties' intentions to assume binding legal obligations." And that is in part 3, at the next page of their Memorial, part 3, paragraph 16.

What Nova Scotia fails to mention, of course, is that the words immediately preceding the quotation from McNair indicates that he was only addressing the situation, and I quote, "when there is a doubt as to the meaning of a provision or an expression contained in a treaty." Not when there was a doubt as to the very existence of the treaty itself.

So, if read in actual context, it's obvious that McNair's reference to subsequent conduct being probative of the parties' "intent" was a reference to the intended meaning of the parties' agreement, not to its intended existence.

Now interpreting a treaty is obviously a fundamentally different process from establishing its existence. And there is no logical reason why, as Nova Scotia suggests, a rule relating to the one should "extend equally" to the other. Of course, Nova Scotia cites no authority or support for this leap of logic, and we would suggest that the reliance on principles of treaty interpretation to establish the existence of an agreement is nothing more than an attempt to plant in the mind a suggestion that if

the process is really only one about interpreting a binding agreement, then, a fortiori, agreement must exist.

The irony, of course, is that Nova Scotia's theories on the legal significance of subsequent conduct are really quite unnecessary. The legal significance of subsequent conduct to the existence of a binding agreement is, in fact, clear, simple and overwhelmingly intuitive.

It was demonstrated with clarity by the International Court of Justice in considering the existence of a binding agreement in the Aegean Sea case. There, the Court held that the determinative evidence of the existence of an intent to be bound is, if anywhere, in the terms of the alleged agreement itself and in the circumstances surrounding its drawing up.

By contrast, the Court accorded only limited significance to the subsequent conduct of the parties. It considered the latter merely to confirm the former. That, of course, is simply a matter of common sense. The actual intentions of the parties are obviously best ascertained on the basis of what they said and what they did at the time, and on the circumstances then prevailing.

So circumspection is in order when relying on the conduct of the parties, even if only for the limited purpose of confirming their prior intent.

Now while the parties' subsequent conduct may provide

some inferential confirmation of their contemporaneous intent, subsequent conduct cannot be a substitute for contemporaneous proof. Still less can it, as Nova Scotia appears to believe possible, overcome contemporaneous evidence which shows an absence of intent. The Court, for example, was clearly dismissive of the significance of the parties' subsequent conduct in Qatar Bahrain, particularly when compared with the clear terms of a contemporaneous written record of their agreement.

And I come back to the Aegean Sea case for a moment because the treatment of the parties' subsequent conduct there offers some parallels with the present case. In the Aegean Sea, the Court emphasized the fact that subsequent to the alleged agreement in that case, Greece failed for several years to invoke it as binding. The Court simply considered this as confirmation of what was already clear from the terms of the alleged agreement itself, that it had not been intended to be binding.

In that sense, the parties' subsequent conduct had some limited evidential relevance, but only because it circumstantially confirmed the thrust of the primary contemporary evidence. That, of course, is the exact situation in this case.

As shown this morning by Mr. Willis, the terms of what Nova Scotia calls the 1964 Agreement, although all the

while lamenting their inability to find it, the terms of the supposed agreement are themselves inconsistent with any binding commitment. And Nova Scotia failed thereafter even to suggest that such a bilaterally binding and self-executing agreement had been concluded between the parties on September 30th, 1964.

And, in fact, as we pointed out in our Memorial, Newfoundland and Labrador had to wait for the Nova Scotia Memorial before knowing the basis of its claim that there was an agreement. And as I pointed out yesterday, we clearly got it wrong in anticipating its claim in our Memorial, we did not understand what it was that Nova Scotia claimed was the 1964 Agreement.

Nova Scotia's failure for many years to invoke the alleged 1964 Agreement simply confirms that there was no intent to be bound. The authorities are also clear that the confirmatory effect of subsequent conduct is critically dependent on its sustained, insistent and unambiguous nature.

What might be significant is a pattern of subsequent conduct, not isolated statements and incidents from an incomplete record. Proof by subsequent conduct depends for its weight on consistency with the primary evidence, but it also depends for its persuasiveness on being part of a clear pattern that leads ineluctably to one and only

one possible explanation. If it is sporadic, it is not persuasive. If it could lead equally to two or more conclusions, it's logical -- it is logically probative of neither or none of them.

Now to the extent that subsequent conduct in this case is relevant, therefore, a full and frank examination of that conduct in its overall context is in order. As Mr. Willis has already shown, the subsequent conduct of the parties in context, in fact, merely confirms, resoundingly, we would suggest, the already clear contemporaneous evidence: there was no binding intent.

Thus, Mr. Chairman, the role played by subsequent practice in this case is completely misapprehended by Nova Scotia. Nova Scotia implies that subsequent practice is rife with complex and weighty implications. It is not. Nova Scotia would have you conclude that the evidence cannot be interpreted in any way other than their way. It can. Nova Scotia says that the parties' subsequent conduct requires the imposition on Newfoundland and Labrador of a boundary regardless of whether it ever truly agreed to it, and, of course, its subsequent conduct requires no such thing.

The subsequent conduct issue is simply a matter of considering the evidence of the relevant behaviour of the parties after 1964, such as it is, in its context and with

the caution required by its indirect and therefore limited probative value.

It is simply a matter of determining whether it unambiguously confirms the contemporaneous evidence.

Other than the evidence surrounding the 1972 meetings, which has already been dealt with by Mr. Willis, Nova Scotia relies on two broad categories of subsequent conduct, which I will now refer to: Permitting and subsequent dealings in 1977, '82 and '86 between Nova Scotia and the federal government.

Neither assists Nova Scotia in establishing that a binding agreement was concluded on September 30th, 1964. If the subsequent conduct confirms anything, it is exactly the contrary.

What is most striking about the historical record following September 30th, 1964 is the general absence of conduct consistent with the hypothesis that the parties had just concluded a legally binding maritime boundary agreement. Just as there is no contemporaneous evidence of the formalities that would normally have accompanied such an agreement, there is also no evidence thereafter of the sort of acts that would normally follow upon the conclusion of such an agreement.

Where, for example, is the legislation, whether provincial, federal or constitutional, confirming the

conclusion of the agreement? There is, of course, none. Just as there is no signed agreement.

So it's not surprising that in 1974, the Special Advisor to the President of Nova Scotia -- the Premier of Nova Scotia, Michael Kirby, plainly admitted that Nova Scotia -- I've got the international law image too much in my mind, I expect -- the Premier of Nova Scotia, Michael Kirby, plainly admitted that Nova Scotia had no evidence that Newfoundland and Labrador had agreed to a maritime boundary. And that was not a temporary situation -- the paucity of evidence of such an agreement continues to this day.

The general silence of the record here seems expressly -- especially striking in light of the profound significance of such an agreement and the significance it would have had for the relations of the parties.

In fact, not a single statement was made by the parties to the effect that whatever the outcome of the offshore ownership issue, the line dividing whatever offshore rights they might acquire in the future had already been resolved by agreement. Not only did no one bother to write down or record the alleged fact that a binding agreement of profound constitutional and territorial significance had been concluded; no one ventured to speak of it in such terms thereafter.

Apparently, the 1964 Agreement was an agreement that everyone knew, but no one spoke of.

The absence of conduct consistent with a prior binding agreement seems striking, and yet, when viewed in context, it is not. In fact, it is perfectly consistent with the primary evidence, that is the available documentary evidence at the time of the alleged agreement.

Thus, what is consistent throughout is the absence of any clear evidence of an intent to form a legally binding agreement on September 30th, 1964, or, for that matter, at a later date.

Now let me turn to the question of permits. First, there is the inescapable fact that Newfoundland and Labrador's permitting practice did not respect any supposed agreement on boundaries. Notwithstanding Nova Scotia's attempt to brush this fact aside, Newfoundland and Labrador did, as we have shown, repeatedly issue permits. And those permits substantially crossed what Nova Scotia characterizes as an agreed boundary, and Nova Scotia never uttered a single word of protest in response to any of these apparent incursions into its jurisdiction.

Nova Scotia's permitting practice in no way demanded a response by Newfoundland and Labrador. Nova Scotia's argument is that essentially Newfoundland and Labrador ought to have protested Nova Scotia's alleged respect of

the 135 degree line. Why respect by one province of an arbitrary boundary ought to provoke protest by another is not clarified by Nova Scotia, but in any event, Nova Scotia's argument wholly misses the only important point.

A failure by Newfoundland and Labrador to protest Nova Scotia's permitting practice, whether respecting a 135 degree line or not, is just as probative of the absence of any binding agreement as it is of its supposed existence. For it would be a perfectly logical explanation of such absence of protest that there was no binding agreement, and, therefore, no basis for protest. If no legal rights were in existence, none were being abridged in such a fashion as to demand a response.

And, of course, again, one must always remember the object of both provinces was ownership in its relations with the federal government.

And nor would we suggest that anything can be drawn from any apparent respect of a median line by Newfoundland and Labrador in the issuance of a permit in the northeast area of the Gulf to Cathedral Corporation in 1971 -- something that was referred to by Professor Saunders the other day.

There is nothing unusual in the practice of states about the de facto use of a median line where there is no agreement on boundaries, particularly in an opposite coast

situation like that inside the Gulf. It is simply the default practice adopted by states for purely practical day-to-day purposes.

Now on Tuesday, Professor Saunders attempted to dismiss that argument by suggesting that the provinces did not follow any median line, but rather a median line that conformed precisely to the turning points determined by the JMRC.

But how does this prove that there was a binding agreement? All it suggests is that the provinces may have very practically adopted the technical work of the JMRC in determining where the median line was for purposes of their de facto practice. Nothing here leads irresistibly to the conclusion that the specific course of the median line they chose to respect, for practical and political purposes, was legally mandated by agreement.

In other words, the conclusion Nova Scotia seeks to draw from its apparent respect of a 135-degree line -- even assuming such a line was a term of the 1964 Statement -- simply does not follow.

But, in any event, Nova Scotia's permitting argument is completely irrelevant to this case for the same reasons the Chamber dismissed virtually identical arguments put forward in the Gulf of Maine case where the practice was much more consistent and much more compelling than here.

Evidentiary inferences drawn from subsequent conduct require sustained and consistent conduct over time that is unambiguous and irresistibly conducive to one and only one conclusion that has not been, and cannot be, shown in this case.

In the absence of these requirements, and they are all manifestly absent in this case, one simply cannot draw legal conclusions from such practice. Moreover, the legal and political realities of the time show that permit issuance by the provinces in the 1960s and 1970s, was, to a large extent, an exercise in fiction.

The provinces had no jurisdiction of their own over the offshore but were dealing for political reasons in something they did not yet have. And remarkably, it is this politically motivated fictional practice that Nova Scotia now urges the Tribunal to draw legally binding conclusions from with retroactive effect for Newfoundland and Labrador.

Let me turn to the subsequent relations between the federal government and Nova Scotia. It's curious that Nova Scotia discovers the provincial relations with the federal government may have a role to play in these proceedings after all, but only, mind you, when it comes to events from the late 1970s onward -- almost a decade and a half after the time it contends a binding agreement

was concluded.

I'm now referring to that part of Nova Scotia's written argument that relies upon Newfoundland and Labrador's alleged failure to protest various arrangements between Nova Scotia and the federal government -- the 1977 MOU, the 1982 Canada-Nova Scotia Agreement and the 1986 Canada-Nova Scotia Accord.

What is rather perplexing about Nova Scotia's argument is that it has been made at all, particularly in an arbitration concerned with the law relating to agreements. It is -- because it's an elementary rule of agreements, whether under international or domestic Canadian law, that they only create rights or obligations for the parties to them. *Res inter alios acta*.

And of course, Newfoundland and Labrador is not and never was a party to any of the arrangements referred to by Nova Scotia. Not only was Newfoundland and Labrador not a party to them, it was not even a party to any of the negotiations leading to them. Further still, while invoking these arrangements against Newfoundland and Labrador in this case, Nova Scotia has chosen not to place the record of any evidence on the nature of the prior negotiations.

What is the nature of the obligations allegedly created for Newfoundland and Labrador?

Two possibilities are implied by Nova Scotia's argument. The first is that the simple conclusion of these arrangements between other parties imposed on Newfoundland and Labrador a positive obligation to protest such conclusion, failing which it became bound by some of their terms. The other possibility appears to be that the conclusion of these subsequent arrangements between other parties somehow proves the conclusion of a prior binding agreement between Nova Scotia and Newfoundland and Labrador. And of course, neither of those alternatives makes any sense.

The result of either would be to wipe out two of the most fundamental principles of treaty law, the rule that to become party -- to become bound by an agreement a party must express its consent to be bound, and its somewhat corollary, that failure to express a -- to express consent does not cause that party to become bound by the treaty.

But in any event, Nova Scotia's reliance on these arrangements between other parties is also completely misguided on the facts.

First, with respect to the 1977 Memorandum of Understanding. The simple fact, as explained by Mr. Crane and Mr. Willis -- Mr. Crane yesterday and Mr. Willis today, the MOU did not create binding obligations even for the parties assigned it, let alone for Newfoundland and

Labrador.

And now, almost 20 years later, Nova Scotia argues that Newfoundland and Labrador, a non-party to the MOU, ought to have taken it more seriously than Nova Scotia itself did. Newfoundland and Labrador ought somehow to have foreseen that if it ignored the MOU as legally irrelevant it would somehow acquire a legal life of its own and prove the existence of a different type of agreement, this time legally binding, allegedly concluded at a different time, between different parties, and containing different terms.

And even beyond this, the terms of the 1977 MOU itself come nowhere near to suggesting what Nova Scotia suggests. The MOU does not refer to a binding boundary agreement between Newfoundland and Labrador and Nova Scotia concluded on September 30th, 1964. It refers to the interprovincial lines of demarcation agreed upon in 1964 by Nova Scotia, New Brunswick and Prince Edward Island, and it says nothing about the nature of that agreement, whether binding or otherwise. In short, there was simply nothing in the 1977 MOU to protest, either in respect of its nature or its contents.

And a similar non-effect is Nova Scotia's reliance on Newfoundland and Labrador's alleged failure to protest the terms of either the 1982 Canada-Nova Scotia Agreement, the

1986 Canada-Nova Scotia Accord or any of the federal or Nova Scotia legislation implementing those agreements.

The Agreement and the Accord and their implementing legislation did not claim to contain any reference to the very boundary between Nova Scotia and Newfoundland in the agreement concluded by the five provinces on September 30th 1964, if I can quote from Mr. Fortier on Monday.

And even the description of the offshore regions or offshore areas included in the Agreement and the Accord and the relevant implementing legislation differs from the description of the proposed boundaries which Nova Scotia claims was agreed to in September 30th, 1964. And in particular, I refer to the fact the 1964 reference to "international waters" became in the 1982 Agreement and the '86 Accord "to the outer edge of the continental margin."

And of course, there is, in fact, no mention in either the '82 Agreement or the 1986 Accord or any of their implementing legislation of a 1964 Agreement or of a binding 1964 Agreement.

The significance of this is that once again, there simply was nothing of relevance to protest. There was no mention of the purported boundaries of Newfoundland and Labrador. And more significantly, there was no mention of the existence of a prior binding 1964 Agreement. So why

would Newfoundland and Labrador protest? The Agreement and the Accord were clearly different agreements between different parties for different purposes and of no legal relevance to Newfoundland and Labrador.

So the whole Nova Scotia argument here unravels into an allegation that Newfoundland and Labrador was, for some reason, required to protest agreements between other parties which did not mention the supposed existence of a binding 1964 Agreement.

And above all this, of course -- in fact both the '82 Agreement and the '86 Accord expressly contemplated that there would be disputes with other jurisdictions and other provinces as to the description of offshore regions and offshore areas.

And the 1982 Agreement expressly provided that in such a case it will be open to the federal government to readjust the description of the boundaries of the regions and areas. And the 1986 Accord, as we know, expressly provided that disputes could be resolved by arbitration.

Again, this points to the inherent implausibility of the Nova Scotia argument when compared to the overwhelming evidence indicating that there was no binding agreement in 1964. Had there been such a binding agreement, there is simply no way as Mr. Willis pointed out, that Nova Scotia would ever have agreed to the dispute resolution

provisions in '82 and '86.

Far more plausible is the obvious alternative explanation, and that alternative explanation that is consistent with all of the -- and that alternative explanation is consistent with all of the evidence of what the parties actually did and said in 1964.

And that explanation is that no binding agreement was ever concluded. This would explain why there is no reference to such a binding agreement in '82 and '86. It would explain why the descriptions of the relevant offshore areas in the '82 and '86 instruments differed from what was said in '64, or, for that matter, from what was in the JMRC description. And above all it would show that Nova Scotia had not thrown away its legal rights by agreeing in 1982 and 1986 to dispute settlement mechanisms over which it had no control. It threw away nothing because there was nothing to throw away.

Mr. Chairman, members of the Tribunal, let me conclude my submissions on subsequent conduct by summarizing in the following way. First, the subsequent conduct of the parties can at best play the role of confirming what must be established by Nova Scotia on the basis of the contemporaneous record of events in 1964. It cannot be a substitute for such contemporaneous evidence, nor can it overcome the thrust of such contemporaneous evidence.

Whether an intent to form a binding agreement in 1964 existed depends critically on the contemporaneous evidence and only secondarily on subsequent events.

Second, all Newfoundland and Labrador must demonstrate in order to prevail in this phase of the proceedings is that the contemporaneous and subsequent record is ambiguous. If it is, that is, if the evidence would permit plausible alternative explanations other than the one urged by Nova Scotia, Nova Scotia's case on agreement must fail.

Nova Scotia has to show that there is only -- there is one and only one possible explanation for the evidence, and if it fails to do so, then it fails to show the existence of an agreement.

Third, the permitting practice on which Nova Scotia places emphasis is simply irrelevant. It's irrelevant because at best it was sporadic and confused. It is irrelevant because it is inconclusive. It is consistent with the nonexistence rather than the existence of a binding agreement. And it is irrelevant because it was, all of it, a purely fictional politically inspired exercise, based on rights the provinces did not, in fact, have at the time.

Fourth, the alleged failure by Newfoundland and Labrador to protest the 1977 MOU, the 1982 Agreement and

the 1986 Accord is also completely irrelevant. It is irrelevant because these are arrangements to which Newfoundland and Labrador was not a party. It is irrelevant because none of these arrangements referred to the -- to a binding agreement concluded in 1964. It is irrelevant because nothing significant in these arrangements -- there was nothing significant in these arrangements that required a response from Newfoundland and Labrador. And of course, the 1986 dealt with any concerns Newfoundland and Labrador might have by means of an arbitration process.

Fifth, and finally, placing Nova Scotia's case at its very highest, both the contemporary record and the subsequent conduct of the parties is inconclusive. That's the best one could say about their case. Even when placed in the most favourable light for Nova Scotia, the record could support any number of interpretations, all of which are far more plausible than the one Nova Scotia proposes. On this basis alone, Nova Scotia fails. But in fact, we would suggest the record does more than that. Rather than showing the existence of a binding 1964 Agreement, the record shows precisely the opposite. There was no intent to form such an agreement, no intent could possibly have been formed, and that subsequent events are quite consistent with that impossibility of having

contemporaneous intent.

Mr. Chairman, that concludes my submissions in respect of subsequent practice. I'm quite willing to either take a break at the present time or to proceed with final -- closing submissions.

CHAIRMAN: We will take the break. The usual?

PROFESSOR MCRAE: I'm in your hands.

CHAIRMAN: Perhaps 20 minutes.

PROFESSOR MCRAE: Twenty minutes?

CHAIRMAN: I guess there are a few things we have to talk to each other about.

PROFESSOR MCRAE: Certainly.

CHAIRMAN: Thank you.

(Recess)

CHAIRMAN: Sorry, for the delay. We were on Tribunal business. Do go ahead.

PROFESSOR MCRAE: Thank you, Mr. Chairman. Mr. Chairman, members of the Tribunal, it is my task now and my pleasure now to bring the oral argument of Newfoundland and Labrador to a close for this the first round.

I would like to do this by highlighting the key elements in the Newfoundland and Labrador position.

Let me take you back to the framework for assessing the Nova Scotia claim that I set out in my opening statement. You will recall that I said that Nova Scotia

claims that the provinces entered into an agreement on September 30th 1964. They claim that the agreement described the boundaries, that it was an agreement for all purposes. That the boundary in the outer area was defined by an azimuth of 135 degrees and that it went to the outer edge of the continental margin.

And as I said then, in order to make this claim, Nova Scotia has to rely on four key assumptions. That there was a legally binding agreement. That the issue of boundaries was distinct from the issue of ownership. That the federal government was essentially irrelevant to the process and that the law that governed the conclusion of an agreement by the provinces in 1964 was the international law of treaties.

And throughout these pleadings, we have shown that with one exception, neither the elements of the alleged 1964 Agreement, nor the assumptions on which it was based, can be sustained. And that one exception, of course, is that we do not deny that the Premiers did agree on the lines that it was desirable to agree formally on as boundaries at some stage in the future. That stage in the future, however, would only come about if the federal government agreed to grant ownership of the offshore to the provinces. And, of course, it never did.

By the end of 1972, the united front of the Atlantic

provinces had come to an end. And so too had any idea of a future agreement on the boundaries that had been contemplated in 1964.

But apart from the identification of the boundary lines, the other elements of the 1964 Agreement simply did not exist in 1964. Nova Scotia has to find them elsewhere. Thus there is a major temporal problem with the notion of the 1964 Agreement.

The idea of a boundary being for all purposes is borrowed from the 1969 Allard letter. The notion of 135 degree line is taken from the draft legislation in 1984 for the Canada-Nova Scotia Agreement. Now Nova Scotia, of course, tries to locate it earlier in a federal map, and thus tries to show that the Premiers saw that map in 1972, and it was before them in a meeting of provincial Premiers.

But the reality is that the description of the boundary on an azimuth of 135 degrees does not really appear in the record until 1984.

Now the concept of extending to the outer edge of the continental margin equally did not emerge until much later. Again in the 1980s, and specifically, in the 1982 Agreement.

The outer edge of the continental margin is a quite different concept from that represented by the term

"international waters" that was referred to in the metes and bounds description of the September 1964 joint statement of the Premiers.

Thus to create the 1964 Agreement, Nova Scotia has to abandon 1964 and go searching into the future to find the elements, which it brings then back in the form of a 1964 Agreement.

Furthermore, the assumptions that underpin the Nova Scotia case of a 1964 Agreement also cannot be supported. The key assumption, of course, is that the parties had the intent necessary to create a legally binding agreement.

Yesterday, I pointed out that a careful analysis of the key document on which Nova Scotia relies, that is, the joint statements of the Premiers, resulting in the September 30th 1964 meeting, does not show a present intent to enter into a legally binding agreement.

It shows an intent to enter into an agreement at some stage in the future provided that certain conditions are met. These include the granting of offshore jurisdiction by the federal government and the enactment of the necessary federal and provincial legislation. And, of course, the very fact that there was an intent to agree in the future means that there was an intent not to enter into an agreement at that time.

If there was no intent to enter into an agreement on

September 30th 1964, then Nova Scotia has to search elsewhere for that intent. It looks to the Allard letter. But what did the Allard letter show? As Mr. Willis pointed out this morning, it shows that again, there was a desire to enter into an agreement on boundaries. Allard sets out the conditions that the provinces had to fulfil.

They were first that the provinces confirm the accompanying map and turning points by agreement. Second that they confirm that agreement by legislation. And third that they seek to join in seeking federal legislation confirming that agreement. And, of course, none of this happened.

Each of the three items or actions set out in the Allard letter remained unfulfilled. The failure of the provinces to take the steps necessary to fulfil those conditions is clear evidence of a lack of intent to enter into a legally binding agreement.

Thus Nova Scotia has to search elsewhere for its intent. It tries to find it in the statement of Premier Moores -- the House of Assembly in June 1972.

But as Mr. Willis pointed out, Premier Moores' statement does no more than restate what we already know. The provinces agreed on a position for negotiations with the federal government on offshore ownership, which include boundaries be incorporated into an agreement

should the negotiations be successful. Again, Nova Scotia has to look elsewhere for intent.

Thus we come to an area where much has been said, and much has been speculated, that of the issuance of permits. And here, as I mentioned earlier this afternoon, Mr. Chairman, a dose of reality is needed.

We are talking about permits issued by provinces in respective areas over which they had no jurisdiction. They are quintessentially paper permits. No company needed a permit from a province. A federal permit granted rights. A provincial permit gave peace of mind. "Hedging bets", as Mr. Willis put it this morning.

But even if the permits were to be treated were to be treated as things of substance, the claim by Nova Scotia of conduct evidencing an agreement, or even evidencing a line does not stand up.

Much attention, of course, has been paid to the Katy permit and Nova Scotia's theory of the incompetent drafter.

But I would invite the Tribunal to look at all of the evidence of the permits issued by Newfoundland and Labrador and see if it can determine the alleged pattern of following the 135 degree line.

Katy in 1971, Amoco in 1974, Texaco in 1974, Hudson's Bay in 1974, Pacific Petroleum in 1975. How can it be

said that the conduct of Newfoundland and Labrador in the issuing of permits followed a 135 degree line or the Stanfield line north of turning point 2017? Thus Figure 28 of the Nova Scotia Counter Memorial, which seeks to show the application by Newfoundland and Labrador of the provisions of the alleged 1964 agreement, simply does not provide a true picture of the actual permitting practice of Newfoundland and Labrador.

The result, Mr. Chairman, is that Nova Scotia has failed to show any intent to enter into a legally binding agreement in 1964, or through the subsequent practice of the provinces in 1972, or through the permitting practice of Newfoundland and Labrador.

The key -- the second key assumption that is absolutely essential to Nova Scotia's case is that agreement on interprovincial boundaries was entirely divorced from the objective of securing provincial ownership over the offshore. Without this assumption, there is no answer there is no answer to the plain fact that ownership was never obtained. And that this logically prior condition of an agreement on boundaries -- prior condition to an agreement on boundaries was therefore never fulfilled.

Never mind that there would be no point in the exercise. But, of course, there were no separate tracks,

one on boundaries and the other on ownership and jurisdiction. Not surprisingly, both were always treated as a package. Mr. Willis made this clear in his presentation. And that is because, as he pointed out, they were necessarily and logically connected. If not linked to ownership, boundaries were meaningless.

The key document that Nova Scotia has placed at the heart of its case, the September 30th 1964 Joint Statement, itself addresses both issues. Not only are both issues brought together in the same document, in the same language, denoting a -- denoting a whole negotiating position. The issues are dealt with together in the same document and in the same language denoting a whole negotiating position. Mr. Willis, again, dealt with this this morning.

It's also clear from a reading of the documents that ownership was the primary objective. And that that agreement on boundaries was a desirable, but ancillary means of facilitating that objective. And, of course, the boundaries would only be necessary if ownership of the offshore was obtained.

But this is directly contrary to the Nova Scotia assumption, which is that agreed boundaries were in the forefront, and provincial ownership in the offshore was disassociated and in the background.

Ownership for Nova Scotia was not the objective. It was in a sense a side issue.

Now this artificial severance of two issues that were in fact dealt with together as a package, flies in the face of reality and logic. It's not only contrary to the terms of the September 30th 1964 Joint Statement, but also to the Allard letter, which clearly and rationally linked the need for an agreement on boundaries to the true objective ownership and jurisdiction over the offshore. One ownership, the other fixing boundaries would have been a pointless -- without the one, I am sorry, is logical because without the one ownership, the other fixing boundaries would have been a pointless exercise.

So Nova Scotia's assumption that a binding agreement on boundaries was disassociated from the fate of the claim to ownership had a life on its own so-to-speak simply holds no water. Delimitation without something to delimit is a nonsequitur. It is an assumption that is not only unsustainable, it really is not comprehensible. And again, Mr. Willis made this clear today.

Next, Nova Scotia, assumes that the obviously important role of the federal government in this entire exercise can be ignored. It pretends that the federal government was not a player in the events that shape the parties' actions and intentions in 1964 and after. And,

of course, Nova Scotia must make this assumption because the reality is the federal government was a very big player indeed.

The only reason it could do so is that it was the essential party to the transaction proposed by the provinces. The very words they used in making that proposal show that they knew this to be the case. They were acutely aware that absent a judicial settlement in their favor, the federal government's concurrence was essential to their claim to ownership -- ownership and jurisdiction. And they also knew they could not adjust their boundaries without federal implementation.

With all this knowledge, they plainly appreciated that the federal government was not only a player, it was a key player. Knowing what they knew, they could not possibly have believed or concluding without the key player, a binding agreement on boundaries in the offshore.

Such an intent could not have occurred to them because they knew better.

And the fact that they knew better is most convincingly illustrated by the terms they themselves used, whether in the September 30th 1964 joint statement, or in the Allard letter. Both are clearly couched in language recognizing expressly the need to approach and secure the cooperation of the federal government, the key

player that Nova Scotia now assumes is irrelevant to the transaction.

The evidence knows that the provinces knew what they were doing, and knew of the need to involve the federal government. As a result, Nova Scotia's assumption is completely absurd.

The final key assumption underpinning the Nova Scotia claim is that the only law to be applied in determining the intent of the parties in 1964 is the International Law of Treaties. Nova Scotia also takes for granted that the application of that law means that the parties' intention must be ascertained as though provincial officials were in 1964 in fact acting as diplomats, and heads of state. In other words, they assume not only that international law is to be applied in determining the parties' intentions in 1964, but the parties' intention were themselves formed as though they were then subject to international law.

And this again is a crucial assumption to the Nova Scotia case, because it knows that it cannot succeed -- if it cannot -- that it cannot succeed in showing an agreement if the legal framework within which the legal officials actually operated is applied.

If assessed under Canadian law, the issue of agreement in this case would indeed take little time to dispose of. Nova Scotia has in fact not even made an alternative to

its primary position, an alternative argument putting forward a defensible case under Canadian law.

Nova Scotia's refusal to discuss Canadian law must be taken by this Tribunal as an acceptance by Nova Scotia that it cannot make the case that there is a binding agreement between the provinces under Canadian law.

And Nova Scotia's assumption about the application of international law and the law of treaties is again untenable. It's untenable because it's inconsistent with the Terms of Reference in the enabling legislation, which do not require the Tribunal to apply international law generally, or international treaty law specifically, as the way Nova Scotia describes to this proceeding.

The Terms of Reference require the application of principles of international law governing maritime boundary delimitation. And there is no principle of international law governing maritime boundary delimitation which determines whether a binding agreement has been concluded, least of all whether a binding agreement between two provinces has been concluded.

International maritime boundary law provides that agreements should be concluded in order to resolve delimitation disputes. But it defers to the law of treaties on the question of whether they have been concluded.

Nova Scotia's argument about the application of international law is also untenable because it mistakenly believes that there is an irreconcilable opposition between international law and domestic law. In fact, international law frequently requires a reference to domestic law as a matter of fact. That is the case here.

The application of the international law of treaties to the question of whether there is an agreement requires an assessment of the parties' intent. That intent must be a real intent, and thus can be determined only in the light of the actual knowledge and assumptions of those whose intent is being sought. It is for this reason that international law would require that intent is measured in the light of the Canadian constitutional and legal framework in which the parties were operating.

For that framework form their expectations and their understanding of the legal significance of what they were doing.

And that, of course, reveals the most critical flaw in Nova Scotia's assumptions about the application of international law. Suggesting that this reveals the most critical flaw in Nova Scotia's assumptions about the application of international law, Nova Scotia says that the Tribunal must apply a fiction. And for Nova Scotia, this means that the Tribunal must attribute to the parties

a fictional intent. That is an intent that they could not in fact have had.

But that is not what the application of international law would require. Intent in international law, just as in Canadian law, is a matter of fact, not fiction. Intent in international law as in Canadian law, as I say, is a matter of fact.

International law thus requires that the actual circumstances be considered in measuring the parties' intent.

International law thus requires that the actual circumstances be considered in measuring the parties' intent, and of course, the actual circumstances most critical in assessing the intent of the relevant officials, is the fact that they were provincial officials, not diplomats, not heads of state. They could not have formed the intent that heads of state might have formed, because they knew as a matter of fact the limitations imposed upon them by Canadian law. They knew what it meant to enter into an agreement, they knew what it meant for provinces to enter into an agreement on a matter of this kind.

Thus the Canadian legal context cannot be ignored in ascertaining the parties' intent, therefore even if applying principles of international treaty law.

There is thus no difference in this case between the application of international law, and the application of domestic law. And thus the last of the assumptions most critical to Nova Scotia's case is also indefenceable.

Finally, Mr. Chairman, Nova Scotia has made it clear that the heart of this dispute is the Laurentian sub-basin. As a result, it has taken great pains to defend its claim to a line on 135 degree azimuth to the outer edge of the continental margin. Indeed, for most of its oral presentation the figure it first showed is Figure 29 of its Counter Memorial, was permanently displayed on the screen to your left. It should be burned indelibly in your memory by now.

The prominent feature of Figure 29 is the line running on 135 degree azimuth from turning point 2017 to the outer edge of the continental margin featured on the map in the graphic equivalent of bold text.

In Figure 29 of the Counter Memorial this illustration was headed "The 1964 Agreement has been consistently applied and respected by Nova Scotia and Newfoundland." Well, has it?

The Stanfield map annexed to the joint statement of September 30, 1964, and presented as part of the joint proposal to the federal government on October 14th 1964, certainly did not depict such a line.

However obscure the reasons for the abrupt end of the Stanfield line somewhere off St. Pierre banks, it certainly was not on azimuth of 135 degrees, and it certainly did not extend to the outer edge of the continental margin.

The JMRC map doesn't merely depict a different line extending from turning point 2017, it depicts no such line at all, suggesting that whatever may have been the character of the JMRC's work and the map it produced, it certainly was not applying the 1964 Agreement line as delineated by Nova Scotia. And as the map and as the text makes clear, the JMRC Technical Committee was drawing boundaries, and not just dealing with turning points.

And if one goes further and considers the permitting practice of the parties, as Nova Scotia insists we must do, it also becomes clear that Newfoundland and Labrador never respected anything remotely resembling the lines drawn by Nova Scotia in its Figure 129, that is the 135 degree line. And Newfoundland and Labrador's practice apparently did not perturb Nova Scotia, which did not demand respect of the line.

The map accompanying the 1972 Doody letter depicted a line departing radically from even the Stanfield map, which as noted itself, did not respect the allegedly agreed lines drawn by Nova Scotia in Figure 29. This too

did not draw any outraged response from Nova Scotia, demanding that an agreed boundary be respected. In fact, they never bothered to respond.

And of course, the 1977 petroleum regulations promulgated by Newfoundland and Labrador were based on a line that obviously went to the west of the 135 degree azimuth.

Thus, Mr. Chairman, at the end of the day the burden on Nova Scotia to prove that the line dividing their respective offshore areas between Newfoundland and Labrador, and Nova Scotia, simply has not been discharged. No intent to enter into a legally binding agreement has been established either in 1964 or subsequently.

The common front of the provinces on offshore ownership and boundaries might well have led to an agreement on boundaries if ownership had been achieved, but the federal government rejected all proposals, and thus it came to nothing.

Nova Scotia is now trying to resuscitate that common front in terms of a binding agreement on boundaries, but it just has not established the elements it has sought to show as part of a so-called 1964 Agreement, and its argument ultimately rests on assumptions that cannot be sustained.

Accordingly, Mr. Chairman, and members of the

Tribunal, Newfoundland and Labrador respectfully requests that the Tribunal determine that the line dividing their respective offshore areas of Newfoundland and Labrador, and Nova Scotia, determine that it has not been resolved by agreement.

Thank you, Mr. Chairman.

PROFESSOR CRAWFORD: Professor McRae, before -- the Chairman wants to make some general comments, I just have one question. Is it the Newfoundland position that there are no turning points in the Gulf of St. Lawrence?

PROFESSOR MCRAE: Do you mean no agreed turning points or no turning points, Professor Crawford?

PROFESSOR CRAWFORD: I mean no agreed or established turning points.

PROFESSOR MCRAE: There are no -- the turning points are part of the -- would have been part of the agreement on boundaries if the agreement had ever been concluded. Everyone was aware of what the terms would be if they ever got to the point of finally entering into this agreement that they talked about in which they did all the work in drawing the lines and establishing the turning points, but in the absence of agreement on the boundaries, then those issues remain undetermined.

PROFESSOR CRAWFORD: And they are undetermined in the sort of tabularasa sense? There is -- there is simply nothing

there?

PROFESSOR MCRAE: That is correct.

MR. LEGAULT: Professor McRae, I have no question for you.

I simply want to apologize for having momentarily disrupted your presentation while I was consulting my colleagues. Please do forgive me.

PROFESSOR MCRAE: That is no problem, Mr. Legault. I was able to collect my thoughts at that time.

CHAIRMAN: There are -- before -- are you -- have you completed your --

PROFESSOR MCRAE: I have completed my presentation.

CHAIRMAN: Yes. Before we conclude today, I would like to mention that the Tribunal would like representation from the parties on two questions. I will give them out here, but I will get Ms. Hobart to give you a written copy. The first is in the event that the Tribunal were to hold that there is a binding agreement between the parties as to the line extending out into the Atlantic, what would be the effect on that agreement of the award of the Tribunal in St. Pierre Miquelon case? The second question is precisely which modifications, in the view of the parties, are required by the circumstances to the principles of international law governing maritime boundary delimitation having regard to the requirement that the parties are to be treated as if they were states subject to the same

rights and obligations as the Government of Canada at all relevant times?

I would like to thank the parties for a very interesting week and on behalf of the Tribunal, and I gather most of us, at least, will meet presently, but I'm not sure yet whether I shall be able to. I appreciate your invitation, in any case. But in any event, we should now adjourn until 9:00 o'clock Monday morning.

Yes, Mr. Fortier?

MR. FORTIER: Mr. Chairman, I wonder if I may react to the two questions which you have addressed to the parties? The timetable and the procedure which has been decided upon by the Tribunal calls on Nova Scotia to begin and end its second round of oral pleadings on Monday. On Tuesday, Newfoundland will begin and end its oral pleadings.


If Nova Scotia were to address the two questions which you have posed to the parties on Monday morning, this would allow the Province of Newfoundland an opportunity of reacting to the Nova Scotia reply. On the other hand, when and if Newfoundland addresses these two questions, according to the timetable and the procedure which is presently in place, Nova Scotia would be put in a very unfair position of not being able to react to the Newfoundland answer. So there -- I pose the problem since it is essential that the two states be treated

equally.

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.


Reporter