ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR

AND NOVA SCOTIA

held on the 19th day of November, A.D., 2001, at the Wu Conference Centre, Fredericton, New Brunswick, commencing at 9:30 a.m.

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Tribunal:

Hon. Gerard V. LaForest, Chairman

Mr. Leonard Legault, Q.C.

Professor James Richard Crawford

Appearances:

Professor Donald M. McRae

L. Alan Willis, Q.C.

Professor John H. Currie

. . . . . .

CHAIRMAN: Good morning. I understand that we have made arrangement with -- about who speaks first.

PROFESSOR MCRAE: Thank you very much, Mr. Chairman and members of the Tribunal. It is my privilege to -- on behalf of Newfoundland and Labrador to open the case of

Newfoundland and Labrador this morning in the second phase of this arbitration. Just as a preliminary matter, I would just mention that in front of you, you have a book -- a binder for illustrations. Those are the illustrations that will appear on the screen throughout the presentations by counsel for Newfoundland and Labrador.

The illustrations will be put in your binder before each person speaks, so at the moment you have in your binder the illustrations that will be part of my presentation this morning.

I should also say that in the -- making the illustrations appear on the screen, counsel for Newfoundland and Labrador are assisted by Mr. Ron Gélinas, who is the person who is responsible for these illustrations appearing on the screen. That is meant to give him credit and not to absolve myself of responsibility, I should say.

Mr. Chairman, members of the Tribunal, the task of the Tribunal in this phase, as set out in Article 3 of the Terms of Reference, is to determine the line dividing the respective offshore areas of Newfoundland and Labrador and Nova Scotia, and it is to do so, again, in accordance with Article 3, by applying the principles of international law governing maritime boundary delimitation.

In a sense, nothing could be more straightforward.

The body of international law governing maritime boundary delimitation has evolved and developed over the years through international negotiations and convention, through the evolution of customary international law, through state practice, and particular, through the decisions of international courts and tribunals.

There is, therefore, a settled body of law that can be called on to delimit maritime boundaries between states and that is the body of law that has been invoked in legislation implementing the Accords and in the Terms of Reference to settle this matter. And the federal government and the provinces, thus, had recourse to a body of law that was available to effect the delimitation of maritime territory, and, of course, the domestic law of Canada could not have done this.

Now, of course, as we know, this dispute differs from classical maritime boundary disputes between states because we are dealing with a delimitation between two provinces in a process formally established by the Government of Canada. And, of course, the parties recognized the unusual nature of delimitation between provinces through the application of international law because the legislation implementing the Accords added the qualification that the principles of international law governing maritime boundary delimitation were to be

applied with such modification as the circumstances may require.

And the Terms of Reference added the additional clarification that the principles of international law governing maritime boundary delimitation were to be applied as if the parties were states subject to the same rights and obligations as the Government of Canada at all relevant times.

But even though it is a process that derives from legislation implementing the Accords under the provinces' rights of management and revenue sharing that were established under those Accords, what the provinces and the federal government agreed to was that notwithstanding that the issue would be a division of areas between the provinces relating to management rights and revenue sharing, the areas were to be delimited in accordance with the principles of international law governing the delimitation of maritime boundaries.

And in preparing its written pleadings in this case and its oral arguments for this hearing, Newfoundland and Labrador have taken the Terms of Reference and applied them. The line put forward by Newfoundland and Labrador in this case is a line drawn on the basis of the principles of international law governing maritime boundary delimitation.

Now with the excess of rhetoric that we have become used to in these proceedings, the Nova Scotia Counter-Memorial casts the Newfoundland and Labrador approach to a line as an attempt to get it all. Although oblivious to the patent contradiction, it then states in the next sentence that it is an attempt to split the difference.

Now while such extreme statements may be useful in gaining headlines, they must be exposed for what they are. For Nova Scotia, Newfoundland and Labrador's claim is excessive because it is different from the Nova Scotia claim.

In short, Nova Scotia treats its own claim as the norm and then castigates Newfoundland and Labrador because it deviates from it. But the result in this case is not going to depend on which side can win the rhetoric battle of casting the other side's position as extreme. It will be decided on the basis of the principles of international law governing the delimitation of maritime boundaries.

And we have shown in our written pleadings and we will demonstrate in this oral phase the Newfoundland and Labrador line is a line that is based on applying the principles of law, and in our view, the Nova Scotia line is a line based on ignoring the law.

Now the case is unusual in a further way. It has involved a two-part process. In the first phase, the

Tribunal had to determine whether the relations of the two provinces going back into the 1960's disclosed evidence of an agreement between them, delimiting these offshore areas.

The Tribunal ruled that there was not, and thus, in accordance with Article 3.II -- Roman II of Article 3 -- with paragraph 3.II, I should say, sub (2) of Article 3, the Tribunal is now to decide, and I quote, "How, in the absence of any agreement, the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined."

In the light of these clear provisions in the Terms of Reference, Newfoundland and Labrador was, to say the least, surprised to find that Nova Scotia still wants the Tribunal to determine a line in this case as if there were an agreement.

One might have thought that that issue had already been decided in phase one, and one might have thought that in the light of the express terms of paragraph 3.II(2) under which the Tribunal is to decide how, in the absence of any agreement, the line is to be determined, the issue of agreement had been well and truly laid to rest. But now it seems that Nova Scotia wants essentially that this issue be re-litigated.

Mr. Chairman, the legislation implementing the Accords provided for a delimitation of a boundary in accordance with the principles of international law governing the delimitation of maritime boundaries. That is what Newfoundland and Labrador has understood this process to be about, and frankly, that is what it has understood it is entitled to.

But, in our view, from the outset, Nova Scotia seems to have wanted to divert this process. It wanted a different question decided, whether the boundary had been resolved by agreement, and this was done.

But that question having been decided, Nova Scotia still is seeking to avoid having this delimitation determined in accordance with the principles of international maritime boundary law. It wants the case to be defined, not as if it were a dispute between states, as the Terms of Reference call for, but as a dispute between provinces which have limited authority over the offshore area, and with the result that the law of maritime boundary delimitation is to be applied in a fundamentally different, and, indeed, in our view, perverse manner.

In effect, Nova Scotia wants to have the "as if they were states" clause of the Terms of Reference about which they spoke with much force in phase one, read "as if they were provinces". And the point of this is that Nova

Scotia wants to use this redefinition of maritime delimitation law to justify the Tribunal in addressing a variation of the question that was posed in phase one to decide that though there was no agreement on a boundary, nevertheless, there was an agreed boundary.

Newfoundland and Labrador, Mr. Chairman, might therefore be forgiven for asking how many times Nova Scotia has to be brought to the altar before it will do the honourable thing. That is simply have the Tribunal apply the principles of international law governing maritime delimitation in order to determine a line dividing their respective offshore areas.

There is a further aspect to this delimitation that must be noted at the outset. The delimitation is to take place in an area that has already been the subject of maritime delimitation. Now that of itself may not be regarded as extraordinary, but this is not a case just of there being third states in the area that have effected their own delimitation. There has been a maritime boundary established between Canada and France in respect of the area appertaining to the Islands of St. Pierre Miquelon, islands that lie just off the south coast of Newfoundland. And the case involved the consideration of the coasts and of the maritime area that are directly at issue in this dispute.

Moreover, in accordance with the Terms of Reference, since the result is binding on Canada, it is binding on the two parties here which are subject to the same rights and obligations as the Government of Canada at all relevant times.

Thus, Mr. Chairman, the fact of that delimitation, the result reached and the reasoning of the Tribunal will have important implications for this case, and this is a matter on which I will be talking further, and Mr. Willis will also be making some comments.

Now in its written pleadings, Nova Scotia seeks to undo much of what was done in the Canada-France decision, but the desire to undo what has already been decided does not stop with that decision.

In phase one, Nova Scotia seemed very attached to the wrecking ball metaphor. Apparently, it liked it so much that it decided to use a wrecking ball itself. The decision in Canada-France falls under the wrecking ball.

Whatever Nova Scotia does not like from the Gulf of Maine goes the same way. Although it's unlikely that Nova Scotia would wish to undo the result in that case.

But the wrecking ball does not stop swinging. Because fundamentally, Nova Scotia's argument in this case consists of aiming the wrecking ball squarely at the Tribunal's decision in phase one.

There was no agreement, the Tribunal said. But the parties agreed on something, Nova Scotia says. And that something turns out to be nothing other than the line that the Tribunal has said was not agreed to.

Mr. Chairman, in these opening remarks I wish to do three things. First, since Nova Scotia has placed squarely in issue matters that were dealt with in phase one, I shall offer the Tribunal a view of Newfoundland and Labrador on where this phase sits in relation to the phase one Award. What is already resolved, and what is still open for consideration.

Second, I shall outline for the Tribunal the points that are at issue between the parties, which my colleagues will elaborate on in their presentations following me.

And third, I will address the particular situation of the delimitation involving St. Pierre Miquelon, and how an existing delimitation in the area in the decision of the Tribunal of the Court of Arbitration, excuse me, should be viewed by this Tribunal.

Now, before embarking on the first of these points, Mr. Chairman, I would like to outline how the Newfoundland and Labrador case will be developed over the next two days.

Following this opening statement, I shall turn to the geography of the area, and indicate how the geography

should be considered in this case.

Mr. Willis will then address the fundamental contention in the Nova Scotia Memorial, that in this case the basis of title is to be derived from the Accords, and the implementing legislation. And that as a result, this justifies a completely novel application of the principles of international law governing maritime boundary delimitation.

He will then take the Tribunal through the law of maritime boundary delimitation, as it is applicable to this case. And he will show, how in its written pleadings, Nova Scotia has misinterpreted, and misapplied them.

Mr. Willis will also address the contentions of Nova Scotia about the way in which the jurisprudence has been applied by Newfoundland and Labrador.

Following Mr. Willis, Professor Currie will address the law relating to acquiescence and estoppel supplied to the conduct of the parties. He will show why these doctrines are inapplicable to this dispute, both in law and in fact.

Following Professor Currie, Mr. Colson will address the Tribunal on delimitation methods, and look specifically at the Tunisia-Libya and Gulf of Maine cases, to show what was actually done in those cases, and their

relevance to this particular dispute.

Finally, Mr. Chairman, I shall set out Newfoundland and Labrador's position on how the line delimiting the respective offshore areas of Newfoundland and Labrador, and Nova Scotia should be constructed, and show that this line meets the ultimate test of maritime delimitation, in accordance with the relevant principles of international law, that it produces an equitable result.

Mr. Chairman, let me turn to the phase one Award. The question in phase one was whether the respective offshore areas of Newfoundland and Labrador, and Nova Scotia, had been resolved by agreement. You ruled that they had not. That is definitive, and there can be no going back on that in this case. There is no agreed boundary between Newfoundland and Labrador, and Nova Scotia, in respect of their offshore areas.

One might have thought that such a definitive statement by the Tribunal would have put the issue to rest. But the language of the 1964 Agreement, and the existing boundary still peppers the Nova Scotia pleadings.

In reaching its conclusion that there was no agreement on the boundary, the Tribunal said a number of things that are equally important for this case, and with some apologies, but nevertheless, I should like to draw the Tribunal's attention to what it said.

First, Mr. Chairman, there is the question of the applicable law. The Tribunal concluded that in accordance with the Terms of Reference, international law governed this dispute. And this conclusion was reached even though the parties were provinces, and even though the offshore areas were not areas in which the provinces had the sovereign rights of a state, that a state would have over such an area.

In our view, that conclusion applies equally to this phase. Nova Scotia cannot now argue that it is not the principles of international law governing maritime boundary that are to be applied to this dispute.

Nova Scotia cannot claim that because of the rights of the provinces are less than those of states, some kind of sui generis body of delimitation law should be applied.

As Mr. Willis will point out, the novel basis of title arguments that Nova Scotia purports to derive from the Accords, and the implementing legislation simply are contrary to what the Tribunal is required to do under the Terms of Reference in this case.

Moreover, the reasoning of the Tribunal for applying international law to the conduct of provinces in concluding an agreement, is equally applicable here.

In explaining that the Terms of Reference did not require the Tribunal to attribute the provinces an

intention that they could not have had at the time to enter into a treaty, the Tribunal stated that the Terms of Reference, and I quote, and this is from paragraph 3.26, "The Terms of Reference call for the application of international law by analogy to the conduct of provincial governments within Canada claiming the benefit of a resource."

Mr. Chairman, what we understand the Tribunal to have been saying in respect of phase one, is that it did not matter that the parties are provinces. International law can be applied by analogy.

And it did not matter that the instruments the provinces conclude are not treaties, international law can be applied by analogy.

That conclusion is precisely applicable to the situation in phase two. The Tribunal is to apply the principles of international maritime -- international law governing maritime boundary delimitation by analogy to the offshore areas of the provinces as if they were states.

This means that it does not matter that the provinces do not have the rights of statehood. The principles of international maritime boundary law can be applied by analogy. And it means that it does not matter that the authority that the provinces have over their offshore areas are not the sovereign rights of a state, the

principles of international law governing maritime boundary delimitation can be applied by analogy.

There is thus no basis, Mr. Chairman, for a novel, distorted, or eccentric approach to the application of the principles of international maritime boundary law, just because the parties are provinces, or just because they have only rights of management and revenue sharing over the offshore areas.

In inviting you to take such an approach, Nova Scotia is inviting you to depart from what you decided in phase one.

The second aspect of the phase one Award I wish to refer to relates to the role of conduct in these proceedings.

In the phase one Award, it is noted that the consideration of conduct for the purposes of determining whether there was an agreement was without prejudice to the Tribunal's consideration of the possible relevance of that conduct to the delimitation of the boundary, if the boundary had not been resolved by agreement.

The Tribunal went on to acknowledge that the relevance of considerations relating to the conduct was not excluded from the proceedings in phase two.

Now, of course, Newfoundland and Labrador has recognized from the outset that conduct can be relevant

circumstance in maritime delimitation. We argue about the weight that should be given to the conduct; we do not deny it can be a relevant circumstance. But in recycling its conduct arguments from phase one, Nova Scotia has ignored what the Tribunal actually decided in that phase.

The Tribunal decided that the so-called 1964 Agreement did not constitute an agreement evidencing an intent to enter into a final and binding agreement. And this was because it was understood that the provincial claims evidenced in that instrument required federal recognition and approval. Because there was no evidence of any intention that the boundaries described therein were agreed to for any purpose other than the provincial claim to ownership. Because the claims required further action by both federal and provincial governments to give them effect. And because the boundaries were described and illustrated with such a lack of attention to precision and detail, that there could be no intent to enter into a final and binding agreement.

And in respect of the 1972 communiqué, although the situation was potentially different, in fact, nothing changed in the lack of precision, the conditional character, and the linkage to provincial claim.

And after 1972, the situation was even less equivocal. The Tribunal noted the federal provincial negotiations

after 1972. The 1977 MOU, which did not involve Newfoundland and Labrador, and which lapsed when Nova Scotia unilaterally withdrew. The Newfoundland and Labrador White Paper of 1977, as well as the oil and gas permit practice of the provinces.

In paragraph 6.15, the Tribunal concluded, and again I quote, "Although some Newfoundland and Labrador documents, for example, Minister Doody's letter of October 6th, 1972, seemed to have used the 1972 turning points at no stage did Newfoundland and Labrador accept or endorse the 135 degree line. Quite apart from the Doody letter, and its sequel, subsequent indications are that Nova Scotia knew Newfoundland and Labrador disputed that line."

In fact, each of the issues raised by Nova Scotia in support of its argument that there is evidence of Newfoundland acquiescence in, or acceptance of the Nova Scotia line can be met by looking at what the Tribunal has already said.

The Doody letter, which Nova Scotia tries to recast as a rejection of 125 degree Stanfield line, and not the 135 degree line, would, said the Tribunal, "viewed from the perspective of international law, probably be treated as the beginning of a dispute."

The alleged failure by Newfoundland and Labrador formally to protest the 1977 MOU, which ignores the fact

that at that time Newfoundland and Labrador issued a white paper, and regulations with maps that contradicted the MOU line, has to be considered against the Tribunal's own statement about the behaviour of the parties.

At paragraph 7.6 of the Award, the Tribunal said, and again I quote, "More generally, it is a striking feature of the negotiating history that none of the participants invoked earlier agreements as binding or formally protested at departures from them. When Newfoundland and Labrador raised doubts about the location of the southeasterly line, it was not met with criticism but with the suggestion that the matter could be resolved (and yet Nova Scotia took no steps to resolve it). When Newfoundland and Labrador broke away from the East Coast negotiations this was described as a "divorce" but was treated as a fait accompli. Likewise when Nova Scotia withdrew from the 1977 Memorandum of Understanding. Throughout, the negotiations are characterized by measure of informality and imprecision."

The same comments, Mr. Chairman, can be made about Nova Scotia's claims about the failure of Newfoundland and Labrador but to protest the 1984 legislation implementing the 1982 Agreement. And again -- and this is the final -- almost the final quotation from the Award of the Tribunal that I will give you.

I quote from paragraph 5.7 where it is said, "By the time the Accord legislation was passed ,it was clear that Newfoundland and Labrador, and Nova Scotia were in dispute as to the existence and location of a boundary separating their offshore claims, in particular in the Atlantic sector. As will be seen, the beginnings of that dispute go back to 1973, when Newfoundland and Labrador began to question the principle of which a line was purportedly drawn beyond Point 2017. Later the dispute became more general, as Newfoundland and Labrador withdrew from the East Coast Provinces' alliance and sought to establish its particular claims to offshore jurisdiction."

"The dispute continued" -- and I continue the quote -- "The dispute continued even after Newfoundland and Labrador's legal claim was rejected in 1984. The existence of a dispute was known to federal officials as well as to Nova Scotia."

Mr. Chairman, the lack of precision, the conditional character, and the linkage to a provincial claim, the fact that the parties have been in dispute at least since 1973 does not change just because we are now in phase two. What those conclusions tell us is that the parties were working to a goal relating to provincial rights over the offshore. They never achieved the goal of 1964 and 1972. They tell us nothing about the way in which a line should

be drawn in the year 2001 under the mandate granted to this Tribunal.

What provinces tentatively and conditionally thought might be a way to resolve boundaries in 1964 and 1972 is simply of no value in considering how boundaries should be drawn under the law of today.

Furthermore, the Tribunal made perfectly clear that even if there had been an agreement in 1964 or 1972, it would not have included any line southeasterly of Point 2017. And again, with permission I would quote -- and this is the final quote that I will give you from your Award. Paragraph 7.10, I quote, "In the Tribunal's view, even if the 1964 Joint Statement or the 1972 Communiqué had amounted to a binding agreement, this would not have resolved the question of that line." And of course the Tribunal is speaking of the 135 degree line.

"As to the 1964 Joint Statement the reason is that neither the Joint Submission nor the notes re boundaries provided any rational for the direction or length of the line. The direction of the line on the map did not coincide with a strict southeast line, and there was nothing in the documents or in the travaux which could resolve the uncertainty. If anything, the indications were that the line would not follow a strict southeast direction --".

And later in the same paragraph the Tribunal said, "Thus, even if the interprovincial boundary up to Point 2017 had been established by agreement, the question of the boundary to the southeast would not have been resolved thereby and a process of delimitation would still have been required in that sector."

Mr. Chairman, even if Nova Scotia could rely on the alleged 1964 Agreement as constituting something close to an agreement the extension beyond Point 2017, the major part of the Nova Scotia claim would not fall into that category.

Mr. Chairman, we will come back to the question of conduct both in relation to acquiescence and estoppel and in respect to determining the equity of the result.

At this stage I would just say that Nova Scotia is perfectly entitled to argue that the conduct of the parties is a relevant circumstance that should be taken into account in delimitation. What is important, however, is that the conduct on which Nova Scotia relies be placed in proper perspective.

And in its arguments in these proceedings Nova Scotia cannot undermine the reasoning and the result of the Award in phase one. That in essence is what the conduct argument put forward in Nova Scotia's written pleadings seeks to do.

Let me turn, Mr. Chairman, to the issues that divide the parties. As I have stated the task of the Tribunal in applying the principles of international law governing maritime boundary delimitation is quite straight forward. And on the face both parties take a similar approach to the essential formulation of those principles drawing on the fundamental norm of maritime boundary delimitation expressed in the Gulf of Maine case, but that is about as far as it goes. From there the articulation of principles, criteria, methods and results differs. In fact, this difference rests largely on what might be expressed as the issue of the basis of title.

Newfoundland and Labrador applying the principles of international law governing maritime delimitation finds the basis of title in the coasts from which the maritime area projects. This is simply an application of what is accepted in maritime delimitation. It is as it were boilerplate. Not for Nova Scotia.

In this case Nova Scotia claims there is eight different phases of title derived from the limited forms of jurisdiction that the provinces have under the Accords and the implementing legislation. And for Nova Scotia this unique basis of title justifies the turning of maritime delimitation law on its head.

Mr. Chairman, nothing could be more fundamental than

this division between the parties. For Nova Scotia the basis of title is pervasive. Indeed the whole of the Nova Scotia case is really founded on this concept. Why does Nova Scotia invert the hierarchy of relevant circumstances so that conduct is the key consideration and that geography is essentially relegated to an insignificant role? Because of the different basis of title in this case.

Why does Nova Scotia reject the coastal framework adopted in Canada-France? Because the basis of title is different in this case. Why does Nova Scotia argue that coasts that do not converge and overlap and nevertheless coasts that must be taken into account for the purposes of this delimitation? Because of its basis of title argument.

And why does Nova Scotia designate a relevant area that extends beyond the nose and tail of the Grand Banks? Because of its basis of title argument.

Consequent upon its arguments relating to the basis of title and its corresponding notion of entitlements, Nova Scotia claims that equal division of overlapping entitlements is an object of delimitation. And although the concept of entitlement seems to apply to a geographic area determined nevertheless by reference to the criterion for determining the outer limit of the continental shelf,

Nova Scotia's notion of entitlement leads it to the posit that the function of delimitation also is to provide for relative shares in the wealth of the offshore.

Nova Scotia wishes to compare the resources of the whole of the area it receives under its Accord with the federal government, with the resources Newfoundland and Labrador receives under its Accord with the federal government. Again, we have a fundamental difference between the parties.

As Mr. Willis will point out, the so-called principle of the equal division of overlapping entitlements is not known to the international law of maritime delimitation. Nova Scotia is taking related terminology from the Gulf of Maine case and applying it out of context.

And as for asserting that the relative wealth or the resources appertaining to them should be a relevant consideration in maritime delimitation, Nova Scotia contravenes some of the most well established law in maritime delimitation. Sharing wealth is not the object of delimitation.

Right from the North Sea cases it was recognized that wealth is transitory and could be changed. And if it were relevant, what should be taken into account in measuring relative wealth? Gross provincial product, average incomes, unemployment rates? Not surprisingly Nova Scotia

is not forthcoming on any such comparisons. And that of course is precisely the reason why the law does not take such issues into account.

Of course there is authority for looking at such considerations where the location of a line could lead to catastrophic repercussions. But as we said in our written pleadings, in the context of this delimitation, such result does not and could not occur.

In short, Nova Scotia's argument about the basis of title is both the foundation for the justification for the Nova Scotia line and the foundation of every criticism of the Newfoundland and Labrador line.

Indeed, Mr. Chairman, what is curious about Nova Scotia's argument is that it is completely hinged on the concept of basis of title. Without the basis of title Nova Scotia proposes, conduct is relegated to its proper status as a relevant circumstance, and Nova Scotia's argument for its line falls to the ground. Without the basis of title argument that Nova Scotia proposes, the whole geographic framework proposed by Nova Scotia falls to the ground. And so do its objections of the Newfoundland and Labrador line.

In short, Nova Scotia so far has made no arguments to support any line should its aberrant view of the basis of title in this case be rejected.

Now although the question of the basis of title is at the heart of the differences between the parties in this case, there are two other areas where the parties are fundamentally at odds, although in each case, the Nova Scotia position still flows from its arguments on the basis of title.

The first relates to the geography of the area. Quite clearly the parties have fundamentally different approaches to the determination of the geographical framework, the relevant coasts and the relevant area.

Newfoundland and Labrador has identified the area that is relevant to this delimitation as essentially the area that was considered by the Court of Arbitration in Canada-France. Accordingly, Newfoundland and Labrador defines the relevant coasts as the coasts that were considered for the purposes of that delimitation and then determines the relevant area by the use of perpendiculars from the outer limits of those coasts.

Nova Scotia defines the relevant coasts and relevant area in much more expansive terms. Not only does Nova Scotia extend the coasts that it regards as relevant from Cape Canso all the way down the Nova Scotia mainland to Cape Sable but it turns and follows the coasts around to Chebogue Point so that a coast that faces Georges Bank is somehow made relevant to delimitation of the offshore

areas between Newfoundland and Labrador and Nova Scotia.

And the same applies to the Newfoundland side. The relevant coasts somehow extending to include the coast from Cape Race to Cape Spear, a coast that faces out into the Atlantic, and by no stretch of the imagination, towards the area that is to be delimited between Newfoundland and Labrador, and Nova Scotia.

In some sense this is in keeping with the macro-geographical perspective that Nova Scotia wishes to assert, whereby Nova Scotia depicts itself as tucked into a concavity of the North American continent. We pointed out in our Counter-Memorial how this can be achieved only by way of cartographical creativity. It has no relationship to the actual geography.

But to give appropriate credit, there is a thread of continuity in the Nova Scotia argument. The depiction of Nova Scotia as tucked into a concavity is linked to the claim that there is a danger of Nova Scotia being squeezed. And that again, is linked to the claim that the wealth of resources appertaining to each province in their offshore area is a factor to be taken into account in delimitation. So the arguments all point towards supporting what is in fact an essentially irrelevant consideration in maritime delimitation.

As I have said, Mr. Chairman, it is difficult to

separate Nova Scotia's view on its geographical framework from its arguments relating to its basis of title. But if they were to be set apart a fundamental issue in this case would be whether the geographical framework for this case is the vast expanded area suggested by Nova Scotia or the more contained area in which the parties make their actual claims.

And this has significance for concepts such as relevant coasts, relevant area and proportionality as a factor in testing the equity of the result. Both Mr. Willis and I will elaborate on these matters later in the Newfoundland and Labrador presentation.

The final issue that divides the parties in this case, is the question of conduct. Again, the parties are fundamentally apart.

In Newfoundland and Labrador's view, Nova Scotia is attaching a weight to conduct as a relevant circumstance that simply finds no justification in the law. Moreover, the conduct of officials, as we will point out in 1964 and 1972 and later, disclose no acquiescence or estoppel. They do not provide evidence of an equitable result applying the principles of international maritime boundary law as they exist today.

And in respect of administrative conduct, the granting of provincial permits in respect of areas over which the

provinces hoped one day to have full rights, a hope that was never fulfilled, again, there the facts demonstrate uncertainty, inconsistency and contradiction. Nothing that amounts to acquiescence and estoppel. Nothing that shows what an equitable result would be.

However, claims about conduct are at the heart of the Nova Scotia case. And in that sense, Nova Scotia's case is essentially a reiteration of what it said in phase one.

Nova Scotia claims that the events surrounding the alleged 1964 Agreement and the 1972 Communique, although determined by the Tribunal not to constitute a legally binding agreement, should rise again to bind the parties as something close to an agreement.

It claims that the practice in issuing permits for oil and gas exploration should be treated as definitive practice by the provinces for the purposes of defining a line. And it isolates certain events over this period as indicative of Newfoundland and Labrador's acceptance of or acquiescence in the line claimed by Nova Scotia.

There is in fact an air of unreality, Mr. Chairman, about Nova Scotia's reliance on conduct as a principal consideration in this delimitation, because even if the evidence did show that there was a time when Newfoundland and Labrador did have a considered view on where the boundary should go, which it does not, the Terms of

Reference call for the application of law. The principles of international law governing the delimitation of maritime boundaries. That is the law of today, not the law as it existed in 1964 or 1972. And as we know, the law of maritime boundary delimitation has evolved. In the views of states as to where their boundaries should go, has evolved and changed as the law has evolved.

Canada, itself, some two years before the conclusion of the agreement that would send the dispute in the Gulf of Maine to the International Court of Justice, modified its claimed line in the Gulf of Maine to take account for developments in the jurisprudence. That was a natural and appropriate thing to do in the light of the evolution of the law.

Everyone understood that as the law evolved, a state's perception of what would be an appropriate boundary would also evolve.

Thus, Mr. Chairman, the parties are divided in terms of the legal relevance that is to be accorded to conduct as a relevant circumstance in maritime boundary delimitation law, what the facts are, and what their implications are for this dispute. And more broadly, over the relevance of alleged conduct that occurred under a particular set of circumstances, the claims of the two provinces to assert offshore ownership against the federal

government to delimitation of the offshore areas of today.

Let me turn, Mr. Chairman, to the question of the relevance of the Canada-France delimitation. As I mentioned earlier, the existence of the islands of St. Pierre and Miquelon, the zone attributed to them by the Court of Arbitration, and the Award of the Court of Arbitration, are factors of particular significance for this dispute.

Nova Scotia asserts that this constitutes tying the hands of the Tribunal. Nova Scotia's preferred approach, at least in most instances, seems to be to pretend that the Award did not happen.

In these circumstances, it is important to consider precisely how the St. Pierre and Miquelon issue factors into this dispute.

Mr. Willis is going to deal with some of these issues in more detail shortly. At this stage, I would just like to make some preliminary comments.

First, the delimitation effected by the Award is binding on Canada, and by virtue of the terms of reference, binding on Newfoundland and Labrador and Nova Scotia. What does this mean? If Newfoundland and Labrador, and Nova Scotia were truly separate states, and had all been parties to the arbitration, then the Award would be a definitive determination of the rights of

Newfoundland and Labrador, and Nova Scotia, in respect of the zone off St. Pierre and Miquelon. And that is precisely the position that the Terms of Reference stipulate.

Second, as a matter of practice, international tribunals respect the decisions of other international tribunals unless there is good reason to depart from them. That is necessary in order to maintain the integrity of the international judicial process, even though there is no formal doctrine of precedent, or any formal judicial hierarchy.

Thus the reasoning and the analysis of the Court of Arbitration are entitled to respect by this Tribunal.

Even if the Canada-France delimitation was a delimitation between St. Pierre and Miquelon and Newfoundland and Labrador, and Nova Scotia was just a third state, the decision of the Court of Arbitration would still be entitled to respect in any delimitation between Newfoundland and Labrador, and Nova Scotia. And again this is because the integrity of the process requires that decisions be more than isolated, unrelated arbitral awards with no consistency between them. And this is particularly so when decisions relate to the same geographical area, as it does in this case.

If one tribunal were to give coasts one weight, and

another tribunal considering the same area were to give the same coasts a different weight, then in the absence of a good reason for the difference, the approach would be nothing more than arbitrary. And this is even more important in a delimitation between two provinces where doubt casts on the result of the international delimitation in the area would have unfortunate political ramifications.

Now this does not make the findings in Canada-France binding ipso facto on this Tribunal. It does not tie the hands of the Tribunal in carrying out its task of applying the principles of international maritime boundary delimitation, laws required by the Terms of Reference. It simply requires the Tribunal to accord respect to the decision of the Court of Arbitration, and depart from its reasoning and analysis only where there is clear and compelling justification for doing so.

And as a final point --

PROFESSOR CRAWFORD: Ask a question at this stage. I suppose conceptually there are two ways of thinking about the relationship between these proceedings and the proceedings in the Canada-France case. Quite obviously the decision of the Tribunal is binding on Canada, and is binding on the parties, and it's binding on this Tribunal, the area in question belongs to St. Pierre and Miquelon.

That's that.

PROFESSOR MCRAE: Right.

PROFESSOR CRAWFORD: There is an unresolved issue beyond the end of the projection, as perhaps we should call it, or in any event, perhaps the parties could agree on what we are going to call it. The baguette, the stalk of the mushroom, there have been various phrases.

PROFESSOR MCRAE: I think we have various phrases. Probably still in our pleadings.

PROFESSOR CRAWFORD: Yes. Well, perhaps some consistency on that would be a good idea. But looking to questions of substance, one view would be to say that what we are doing is really something quite different and intra-Canadian, albeit that we are applying rules of international law applicable to maritime boundary delimitation. We are doing so within Canada's two provinces. And all you do in effect is to get some scissors and cut out the St. Pierre and Miquelon maritime area and delimit the rest without particular regard to that, because it's not part of the picture. It's as it were, it occurred on a different plane, you might say, even if it occurred in the same geographical area.

Obviously, I hear what you say about paying due respect to the decision of the Tribunal of St. Pierre and Miquelon. Clearly it's important that even domestic or

internal tribunals pay respect to relevant decisions in the same field.

But subject to that duty of respect, you might say that there is an area which is Canadian, and our function is looking at the relevant coasts of Canada, ignoring St. Pierre and Miquelon to delimit that area. That's the only way to go.

The other thing would be to in effect to say that because if Nova Scotia, Newfoundland, and St. Pierre and Miquelon, were to be treated as it were three different states, it would be impossible for any line attributable to Nova Scotia to go beyond a projection binding on all of them, which cut out in the way that the projection does cut out, that that has a dispositive effect.

So as it were, it's a question of whether we are treating the decision as on the same plane as the decision we are having to meet, or whether we are treating it in effect as something which occurs in a different plane.

PROFESSOR MCRAE: Professor Crawford, in our view, either of those approaches would lead to the same consequence that you suggest that that is the impossibility of extending beyond the baguette or the French corridor. And without consulting with my colleagues, I am not sure if we can settle yet a fixed name for it.

In either case, one is faced with the south coast of

Newfoundland's projection. And we are faced with the fact that the Court of Arbitration, the point that in fact I was about to make, the Court of Arbitration, saw the projection of that coast extending on either side of the French corridor out to the outer limit of the zone.

So whether one sees that as an internal matter or not, one is still faced with that factor, which we would argue is correct. And that of itself, that projection of itself, prevents that extension from extending beyond.

On the other hand, we do have reservations about looking at this as a provincial matter in which one can simply slice out the zone and pretend this is a delimitation between provinces. But in terms of the end result, our submission would be it wouldn't make any difference. In neither instance could Nova Scotia project beyond the baguette.

And that was the point essentially that I was making, that if one looked at this from the point of view of the Court of Arbitration at the time it resolved the St. Pierre Miquelon boundary, if it had also been asked the question, where does the line between Newfoundland and Labrador, and Nova Scotia go, that Court of Arbitration could not have extended, consistently with its reasoning, could not have extended the boundary to the east of the baguette. That would contradict its reasoning, its own

reasoning in that case.

MR. LEGAULT: Professor McRae, just following up the same plane, if the coast of Nova Scotia, had it project east of the corridor or baguette, how can you hold that the south coast of Newfoundland, that is I guess from the Burin Peninsula to Cape Race is a relevant coast? It cannot by your own argument, converge and overlap with the Nova Scotia coast.

PROFESSOR MCRAE: Mr. Legault, my argument is that it is the south projection of the coast of Newfoundland that prevents the extension of Nova Scotia out beyond that, the area of the baguette. It is not that the baguette itself was imposing a barrier, it is the projection of the south coast of Newfoundland that poses a barrier. And that is why in answer to Professor Crawford, I said it really didn't matter which hypothesis one was proceeding on, one reached the same result.

MR. LEGAULT: How can one coast after this very event of the convergence and overlap of another. You will never have a relevant area. I am really having a bit of trouble following.

PROFESSOR MCRAE: The projection of the south coast of Newfoundland, as I will explain shortly when we look at the relevant coasts, in our view it extends out to Cape Race. The projection that whole of south coast goes

south. And it is the projection of that south coast, the whole of that south coast. And although again we are jumping ahead, the whole of that south coast essentially from Connaigre Head or Lamaline Shag Rock eastward that -- cuts off. And the projection of the south coast from Cape Ray to Connaigre Head, also is part of the projection going south. So it's the whole of that coast that projects south, not isolated parts of it projected south.

CHAIRMAN: One thing that troubles me is that it isn't only the baguette that prevents the coast from projecting, but the very islands of St. Pierre and Miquelon are right in the way. And then you project them further, so that on the one hand, you say we can't go through the baguette, but you seem to be going right through the islands.

PROFESSOR MCRAE: But with respect, Mr. Chairman, the islands, as we would see it, and we feel the Court of Arbitration saw it, and certainly that was the view put forward by Canada in the arbitration, the islands are really an isolated area sitting on what is essentially the natural prolongation of the south coast of Newfoundland. And therefore, projections can go around, just as in the Anglo-French case, and again I am anticipating the arguments of some of my colleagues, but again, as in the Anglo-French case, the idea that coasts could project around a delimitation of another state was clearly

accepted there.

And this is a peculiar situation. This is a peculiar situation of islands tucked up against the coast of another state. And there is a danger, as I will mention when I refer to geography, there is a danger of a Tribunal doubling the inequity of that peculiar placement of the islands. The inequity is already there because of the zone that is as described, and that inequity should not be doubled in another delimitation.

CHAIRMAN: But they are. These islands are situate very close to Newfoundland and not situate anywhere else. And geography is geography, as it were. And it seems to me that when you say, well of the inequity, it may be inequitable to Newfoundland. I mean if you question the Award, but that's where those islands are situate.

PROFESSOR MCRAE: The islands are situated there. And Mr. Chairman, the Court of Arbitration recognized the inequity to the south coast of Newfoundland in the way in which they drew the boundary. They drew the boundary in a way that avoided as far as possible the encroachment of the French zone on the southern projection of the coast of Newfoundland -- of the island of Newfoundland recognizing that unusual characteristic that we are not dealing with two states that were far apart. We're dealing with islands that were up against the coast of another state

that led to that particular delimitation. So that -- that is recognized, I think, in the way the delimitation is structured in that case. And what I'm suggesting here is that having already taken that zone out, then one should not have to pay twice for that location of St. Pierre and Miquelon.

PROFESSOR CRAWFORD: But that -- that's a different point than the point where the -- in the context, if you were to treat the three entities, the parties here, plus St. Pierre and Miquelon, as being delimited as it were on the same plane. It would be a good argument that there's no possibility. You can't even begin to think about a line which cuts across the projection.

PROFESSOR MCRAE: I agree. You could not think of a line that cuts --

PROFESSOR CRAWFORD: Whereas the argument you're making is now an equity argument, which is -- which is different.

PROFESSOR MCRAE: Well the equity argument turns on how one -- one delimits in the light of the existence of the zone. But our argument is it's the south projection of the coast that prevents the -- the cut-off of the zone. And that really relates from the geographical projection. Which again is why I said it really does not matter which way one looks at this. It's an issue, I'm sure, we're going to come back to in the different presentations, Mr.

Chairman.

That, in fact, concludes what I would say by way of preliminary remarks, as the decision of the Court of Arbitration is obviously a significant decision, it has to be given careful consideration, and appropriate weight by the Tribunal.

But that brings me, Mr. Chairman, to the question of geography. And going back to some of the things that perhaps we've been talking about up until now.

Mr. Chairman, members of the Tribunal, what I would like to do is set out for the Tribunal the geographical setting in which this delimitation is to take place, because as we have argued --

CHAIRMAN: I believe this would be a convenient point for a break.

PROFESSOR MCRAE: It is certainly convenient to my presentation. I wasn't sure whether you wished to break now, or to break closer to 11:00.

CHAIRMAN: Well I think it's convenient for your presentation, perhaps we should do that.

(BRIEF RECESS)

PROFESSOR MCRAE: Thank you, Mr. Chairman.

As I mentioned before the break, what I would like to do now is to set out for the Tribunal the geographical setting in which this delimitation is to take place,

because as we have argued, and that geography, of course, is a fundamental consideration in maritime delimitation.

In our view, a proper appreciation of the geography of the area involves an understanding of the geographical position of the coasts of the parties, and of their relationship to each other, and to the area to be delimited. Indeed, in our view, it is the geography of the area, the configuration of the coasts, that determines the method.

The delimitation method has to be one that is appropriate for the geographical circumstances of the case. And will, as we will show, that the predominant circumstance in this case is geography. It's the geography, and the geographical relationship of the coasts of the island of Newfoundland and the coasts of Nova Scotia, that are, in our view, the predominant circumstances in this case.

Now Nova Scotia has argued that geography is of much lesser significance in this case, and as I mentioned earlier, this really derives from their view about the basis of title. And from some sort of what we regard as a rather undisciplined smorgasbord approach to maritime delimitation. That is everything is relevant, you just pick and choose willy-nilly without any regard to a hierarchy of relevant circumstances. And also regardless,

too, of the fact that the principles of maritime delimitation, as developed in the cases, as Mr. Willis will point out, have consistently placed geography at the centre of the delimitation process.

And when it does come to consider geography, again as I mentioned earlier, Nova Scotia inflates the geography, adding coasts and encompassing maritime areas that have nothing to do with the area in which this delimitation is to take place.

So Mr. Chairman, it is important that at the outset of the case, we start with a familiarity of the area, the geography of the area, and a proper appreciation of the geographical configuration and the coastal relationships.

In our view, there are two basic propositions about the geography of the area.

The first proposition is that putting aside a relatively small area to be delimited inside the Gulf of St. Lawrence, the area to be delimited in this case is characterized by two distinct geographic areas. There is the relatively confined area in the proximity of Cabot Strait, that we have characterized as the inner concavity. And there is the more open unconfined outer area, extending from the inner concavity seawards, to the outer limit of the Canadian continental margin.

The inner concavity is bounded by the south coast of

Newfoundland, and the northeast facing coast of Cape Breton Island. The outer coast is not similarly bounded. It is flanked by the coastal wings of the Newfoundland coast from Lamaline Shag Rock to Cape Ray. And the Nova Scotia from Scatarie Island to Cape Canso.

Now the second proposition is that the geography of this area has already been reviewed, considered, and given effect by the Court of Arbitration in Canada-France. And as we have said, although the reasoning does not bind the Tribunal, the Court of Arbitration's decision must be appointed departure for the Tribunal.

CHAIRMAN: There's another factor that concerns me about the -- when I look at this map, I see -- I'm looking as if I were deciding the case there. I see St. Pierre and Miquelon sitting right in the middle of the concavity, as opposed to what is basically a much wider area here that comprises the effect of the Nova Scotia coasts, and the Newfoundland coasts at large, as it were. At what point it stops, I'm not getting into that. But I -- just look at your own picture there, and see the influence that would have on the mind, and therefore, on the geography. That was a piece of the geography within the concavity. We're dealing here with something else again. And that may involve other considerations as to how one looks at it.

PROFESSOR MCRAE: Mr. Chairman, I think we simply would say that the fact that St. Pierre and Miquelon is just inside the inner concavity was certainly noted by the Court of Arbitration. They put it towards, as I recall, one stage said towards the back of the gulf approaches, they saw it inside the concavity there. That nevertheless, did not prevent a general appreciation of the area as a whole, recognizing that it sat inside the concavity. And, of course, given that the Tribunal -- or given that the Court of Arbitration extended the boundary of St. Pierre and Miquelon out into what we define as the -- as the inner area, St. Pierre and Miquelon has significance both for the inner concavity and for the outer area. One can't ignore it. It seems with respect in both areas. Although, when we look at the coasts, we can go back to your question about the impact on the coast when we go along those coasts, as I plan to do.

Does that answer your question?

CHAIRMAN: For the moment.

PROFESSOR MCRAE: The location of St. Pierre and Miquelon arbitration as mentioned, should be a point of departure, and that, of course, includes both the location of the islands, and what the Court said about them. And the Court's appreciation of those coasts, and the coastal relationships, of course, have to be given serious

consideration.

Nova Scotia, for its own reasons, does not wish to give effect to the geographical appreciation that was adopted in Canada-France. In fact, Nova Scotia seems to suggest that the Court of Arbitration either got the facts or the law wrong, or sometimes both. But we would suggest that Nova Scotia has so far, failed to advance any compelling reasons why the approach taken to the geography in that case should be rejected. And I will come back to that in the course of this presentation.

So in this presentation, what I would like to do, is to describe the general geographical setting, outline the coasts that are relevant to this delimitation, explain how the coasts and the coastal relationships were perceived in Canada-France. And point out that nothing has changed since that delimitation.

I'll then look at the arguments made by Nova Scotia for rejecting the geographical framework adopted in Canada-France, and show why those arguments have no force.

And finally, I will review the appropriate geographic framework for this case.

In doing so, I should mention that what I'm trying to do is to set out some building blocks for my colleagues in their later presentations.

Let me turn to the geographical setting. The broad

geographical setting of Newfoundland and Labrador, and Nova Scotia, on the east coast of North America, and their location constituting the eastern confines of the Gulf of St. Lawrence are hardly matters which this Tribunal needs any introduction.

The offshore areas of Newfoundland and Labrador, and Nova Scotia, lie inside the Gulf of St. Lawrence, to the immediate west of Cabot Strait, and outside the Gulf of St. Lawrence, south of Newfoundland, and to the east and southeast of Nova Scotia.

Those are the areas where the parties have set out their claims, and thus, there really is no basis for considering as relevant areas that lie beyond.

Now when looking at this area on a map, visually Cabot Strait does become a sort of a focal point. And so, perhaps this is an appropriate starting point for considering the coastal geography of the area.

The nearest points on the coast of Newfoundland and Nova Scotia across Cabot Strait are, of course, Cape Ray, and on the Newfoundland side, and Money Point on the Nova Scotia side. And those, in a sense, form the entrance points to the Gulf.

Inside the Gulf, beyond the Cape Ray, the Newfoundland coast trends northwards, until it reaches Cape Anguille, and then it turns back to the northeast. On the Nova

Scotia side, the coast inside the Gulf runs from Money Point to Cape St. Lawrence. And then turns in a westerly direction.

Now generally the geography in this area is not complicated. And the only other feature to note within the Gulf are the Iles de la Madeleine, which are part of the Province of Quebec.

But, of course, there is an important factor. Between Cape Ray and Money Point lies the Island of St. Paul. An island belonging to Nova Scotia, lying some fourteen nautical miles off Money Point, one quarter of the distance between Nova Scotia and Newfoundland.

I'll come back to St. Paul Island later in this presentation.

Outside the Gulf, the south coast of Newfoundland stretches from Cape Ray to Cape Race. The general trend from Cape Ray to Cape Race is easterly, with the result of this coast of Newfoundland is south facing. Within that eastward trend, nevertheless, there are a considerable number of extensive bays and indentations. These include Fortune Bay, Placentia Bay, St. Mary's Bay, and Trepassey Bay.

And dividing Fortune Bay from Placentia Bay is the Burin Peninsula, which marks the beginning of a more southerly thrust in the south coast of Newfoundland. And

that southerly thrust is continued by the Avalon Peninsula until Cape Race is reached.

Now at the tip of the Burin Peninsula lie, of course, as the Chairman has mentioned, the Islands of St. Pierre and Miquelon, which are less than ten nautical miles from the Canadian mainland.

Now off the south coast of Newfoundland there are other occasional islands, including Ramea, and the Colombier Islands, Brunette Island and Green Island. All of these islands are relatively close proximity to the coast, and do not interrupt the general geographic trend, or direction of the Newfoundland south coast.

On the Nova Scotia side, starting from Money Point, the coast trends in a general southeasterly direction, until Scatarie Island on the tip of Cape Breton is reached. The length of -- that length of coast is characterized by the indentation formed by St. Anns Bay. And at Scatarie Island, the coast takes an abrupt turn to the southwest, continuing down to Cape Canso, and then receding further to the southwest as the mainland coast of Nova Scotia goes down to Cape Sambro, and ultimately to Cape Sable.

Beyond Cape Canso, however, in our submission, the Newfoundland coast -- the Nova Scotia coast, excuse me, ceases to face onto the area to be delimited.

And to the southeast of Cape Canso lies Sable Island, some 88 nautical miles from the Nova Scotia coast. Now I will return to Sable Island later.

Those, Mr. Chairman, are the coasts and the coastal features that confront us in the delimitation of the offshore areas of Newfoundland and Labrador and Nova Scotia in the present case. Now how are these coasts to be perceived for the purposes of delimitation? What are the relevant coasts and what are the lengths of those coasts and what is their relationship to each other?

So let me turn to the coastal configuration in Canada-France because we have argued, Mr. Chairman, that since this area is essentially the same as that in Canada-France, then prima facie, at least, the perception of the coasts and of their relationship that was adopted in that case should guide the Tribunal in its appreciation of the area. So how, then, were the coasts understood in that case?

The Award of the Court of Arbitration makes clear that it accepted the Canadian view of how the coastal configuration was to be understood for the purposes of that case. Thus, I would like to take the Tribunal through the analysis of coastal projection and length as put forward in that case that formed the foundation of the decision in Canada-France.

The question for the Court was which coasts were to be taken into account and what was the relationship of the coasts of each party to each other and to the area to be delimited. And in Canada-France, the questions of coastal projection, direction and length were answered by a single operation. Clearly, coastal length and projection could not be determined by reference to the sinuosities of the coast; rather, they had to be determined in accordance with coastal fronts.

Now there was no doubt that the south coast of Newfoundland faced onto the area to be delimited in Canada-France. In fact, the parties in this case are in agreement that the south coast of Newfoundland faces on the area to be delimited in this case. But having said that, the parties do not seem to be in agreement on the actual configuration of that coast.

Let me describe, then, how the coasts were identified in Canada-France, which was the basis for the Court of Arbitration's appreciation of the coasts and their relationship. Starting from Cape Ray, the south coast of Newfoundland essentially has a constant eastward direction until it reaches Fortune Bay. The Ramea and Columbia Islands lie off that coast, but they do not interrupt the general eastward direction. Thus, a straight line from Cape Ray to Fortune Bay was chosen in Canada-France to

reflect that unidirectional coast. The end point of that line was taken as Connaigre Head.

Why Connaigre Head? In its Counter-Memorial, Nova Scotia derides the use of Connaigre Head as a coastal direction turning point. The coast, it says, does not turn at Connaigre Head. It goes on to Boxey Point. Well, of course it does. The coasts continues into Fortune Bay.

But lines of direction representing coastal fronts do not enter bays; the coasts within the Bay are represented by a closing line across the Bay. That was done with the Gulf of St. Lawrence in Canada-France by a closing line across Cabot Strait, and it was done in respect of the major indentations on the south coast of Newfoundland. In that way, micro changes of direction are ignored and coastal lengths are not aggravated by including coasts inside such embayments and indentations.

In the case of Fortune Bay, the presence of Brunette Island at the mouth of the Bay also meant that the entrance to the Bay was less than 24 nautical miles. Thus, it was appropriate to ignore the coasts inside the Bay and represent them by a single closing line.

CHAIRMAN: I have -- your reference to the 24 miles has to do with the Treaty 1212 and so on, the territorial sea distances?

PROFESSOR MCRAE: It has to do, Mr. Chairman, with the

closing line across the bays for the purpose of --

CHAIRMAN: No. In Newfoundland, there's a very strong case, I think, that every bay is an inland bay anywhere. I notice your lines don't take that into account, and I wonder about the bay between the Avalon Peninsula and the Burin Peninsula, why it turns in that way.

PROFESSOR MCRAE: Because, Mr. Chairman, first, in response to your first point, these lines are representing coastal fronts and coastal directions rather than representing any issue of legal title over the Bay. So regardless of whether they are inland bays or territorial waters or federal or provincial jurisdiction, they're simply representing the actual coastal geography.

As far as Placentia Bay is concerned, it is more than 24 nautical miles. The lines taken in there were taken to a point that could be reached where they could extend across a 24-mile stretch, and that, in fact, was what was done in the Gulf of Maine in respect to the Bay of Fundy. The chamber of the court went inside the Bay of Fundy to a point that was 24 miles across, and then represented the coastal front and then the coastal length by that line, and this was simply an application of the Bay of Fundy result in Gulf of Maine to Placentia Bay.

Connaigre Head is the point at the entrance to Fortune Bay. As I mentioned, the point is that the closing line

should cross the Bay and not go inside. So from Connaigre Head, a straight line is drawn to Lamaline Shag Rock, which represents the coastal front of Fortune Bay.

But, says Nova Scotia, the line should not run to Lamaline Shag Rock; it should run instead to the northern headland of Fortune Bay, which it identifies as Fortune Head. Again, Nova Scotia is forgetting that lines of general direction representing coastal fronts should be drawn generally and not reflect micro changes in direction.

Lamaline Shag Rock represents the westward extent of the south facing coasts from the Burin Peninsula to Cape Race. The straight line from Connaigre Head to Lamaline Shag Rock is an accurate description of the change in coastal direction that occurs at the Burin Peninsula. It visibly traces a tangent with the southern point of St. Pierre and to the coast of the Burin Peninsula. It would achieve nothing to represent this by a series of short lines that enter Fortune Bay or lines that go around the tip of the Burin Peninsula from Fortune Head to meet up with Lamaline Shag Rock. And it would have made no sense to draw a coastal front that cuts right through St. Pierre Miquelon.

And yet, after all of Nova Scotia's protestations, what it does eventually when it draws its own lines of

direction for purposes of proportionality in Figure 55, and I'll be coming back to that shortly, it draws a line from what seems to be essentially Connaigre Head to Lamaline Shag Road. Once again, I'll mention that later.

Now to the east of the Burin Peninsula, the same considerations applied in the construction of the coastal front lines. The coast within St. Mary's Bay and Trepassey Bay, which are both less than 24 nautical miles wide, can be represented by a straight line, and as I mentioned in the case of Placentia Bay, which is 48 nautical miles across, the lines had to enter the Bay until they reached the point of 24 miles across. Again, this is simply an application of what was done in the Bay of Fundy.

On the Nova Scotia side, the lines of direction are relatively simple. A single line from Money Point or Cape North to Scatarie Island would have ignored the convexity of Cape Breton at Scatarie Island. Thus, lines of direction were drawn to reflect the curvature of St. Anns Bay. Beyond Scatarie Island, a single straight line was drawn to Cape Canso reflecting the coast of Cape Breton and crossing over Chedabucto Bay.

Now Canada had taken the position before the Court of Arbitration in Canada-France that the coasts beyond Cape Canso were not relevant to the delimitation. The Court of

Arbitration noted that the east coast of the mainland of Nova Scotia continued beyond Cape Canso in much the same direction, but when it came to effecting the delimitation, the Court of Arbitration stated that the coast of Nova Scotia beyond that point projected south and it was questionable whether their extension would reach the areas to the south appertaining to St. Pierre Miquelon.

The lines representing the coastal fronts of both Newfoundland and Nova Scotia can then be used to determine coastal lengths.

Mr. Chairman, in approaching this case, Newfoundland and Labrador saw no need to go beyond the determination of relevant coasts, coastal projection that formed the basis of the decision in Canada-France. The area to be delimited is substantially the same. Nova Scotia's claim cuts right through the middle of this area. The approach to coastal projection and length was formulated by the Government of Canada and it was essentially adopted by the Court of Arbitration. What reason could there be for deviating from it?

There is, of course, one difference respecting the south coast of Newfoundland from that which was adopted by the Court of Arbitration in Canada-France. Because the coast to the immediate east of St. Pierre Miquelon had already been used as the basis for the delimitation for

the east facing coast of St. Pierre Miquelon, they were not to be used again for the delimitation for remaining coasts of the islands.

And such a consideration has no application here where the delimitation is between Newfoundland and Labrador and Nova Scotia, and that leads me back to the question of the Chair before the break where you asked how those coasts could project past the land mass of the Island of St. Pierre Miquelon. And here I think we distinguished quite clearly between that question and the question of whether a line can go through a maritime zone.

In response to your question, "Can the islands have a projection past a land mass?", in our view, the decision of the Court in the Anglo-French case in respect of the Channel Islands lying off the coast of France was that the mainland coast could project, as a matter of coastal projection, around islands that are on the Continental Shelf in front of it, and then could have objection out beyond those islands. So as a matter of coastal projection, in our view, the Anglo-French case provides a response to that.

PROFESSOR CRAWFORD: Yes, but you talk about a smorgasbord, and really with cases on maritime delimitation one is reminded of a smorgasbord with a small number of dishes on it. The question is whether you can pick and choose as

between St. Pierre Miquelon and the Channel Islands case. Are they consistent in their handling of small immediately proximate offshore islands?

PROFESSOR MCRAE: Professor Crawford, I don't see that they are inconsistent. They were talking about a south facing coast which projects -- in the St. Pierre Miquelon arbitration they're talking about a south facing -- south coast of Newfoundland that projected out into that area. That is not inconsistent with the question of whether coasts behind islands off can project out.

PROFESSOR CRAWFORD: Obviously I will have to go back and look at it more carefully, but are you saying that the Anglo-French case was dealing with the equivalent of the line between Connaigre Head and Lamaline Shag Rock and saying that that could project in such a way as to enclave islands, or was it simply the more general French coast which had been affected, Anglo-French coast?

PROFESSOR MCRAE: They were talking about generally the French coast, but that included the coast right behind the zone. They did not distinguish between the coast immediately behind the islands and the coasts on either side. They were talking about the French coast more -- more generally in that case, and I cannot recall a specific reference to those coasts.

PROFESSOR CRAWFORD: I mean obviously, it's difficult when

you're dealing with counter-factuals, but let's assume that Newfoundland stopped at Connaigre Head and that Nova Scotia then began so that we're only dealing with the coast to the east. It would be very difficult to say that that part of the coastline represented by the line Lamaline Shag Rock to Connaigre Head could attract Continental Shelf to the west of St. Pierre Miquelon. I mean it -- that line seems to be completely cut off. I can well understand, of course, how the line Connaigre Head to Cape Ray or some version of it would attract Continental Shelf areas, but where you have a line in close proximity with an immediate offshore island like that, surely the two coastlines basically cancel each other out and that's the end of it, unless you're saying that what we're doing is, in effect, working with a map to which someone has taken a pair of scissors and cut out the whole of the area because we're operating on the provincial plan, not on the international plan. There you could see if you did that -- well, St. Pierre Miquelon has already been taken into account and we still have provincial coasts which are to be deemed to be facing each other without reference to any international issue.

PROFESSOR MCRAE: Professor Crawford, I think in your example we'd be dealing with certainly a different geographical context, as I understood it from Connaigre

Head on to Cape Race, was Nova Scotia, and I assume they're talking about Nova Scotia also having Cape Breton, so we're talking -- we really are talking about three stakes surrounding what is left of Newfoundland in your hypothetical, but I would say there are a number of different exercises here. I think there are a series of exercises that we are involved in here. One is determining what coasts face into the area. And I think even in that example you would say that coast faces into the area.

The next question is what coasts might be relevant for the purpose of construction of a line. And then again, you might take a different view of which coasts are appropriate for construction of the line. And then again, when one gets to the exercise of determining proportionality, one might have to look at whether which coasts within that general area ought to be taken into account. There might be separate questions that are involved in that depending on your -- on your hypothetical.

In our view, we don't get into that in this area, because the geographic frame is, in our view, quite clear. And at the moment, we are talking about whether those coasts could project into the area. Then comes the question of drawing the line. We don't have a problem

with drawing the line, obviously, to the west of St. Pierre and Miquelon, and our line does not raise any questions about cutting through.

So, therefore, from our point of view, it's not really a live issue in terms of where the line should go. But I do think it depends upon the particular context of your hypothetical and where the states are to really respond to it.

Now as I mentioned, the fact that those coasts were not seen as relevant for the St. Pierre Miquelon arbitration had to do not with their lack of projection, but with the specific fact that they had already been the subject of delimitation in between St. Pierre and Miquelon and Canada in the earlier agreement I think of 1972.

But looking at it more broadly, the relationship of St. Pierre and Miquelon to Newfoundland is, as I mentioned earlier, the islands of St. Pierre and Miquelon sit on the continental shelf that is a projection from the south coast of Newfoundland. And their presence and their zone does not alter the fact that the natural prolongation comes from the coast of Newfoundland, nor does it alter the fact of the geographical relationship of those coasts of Newfoundland to those of Nova Scotia. And as I mentioned before, to argue otherwise doubles the inequity of having the island there.

Mr. Chairman, let me turn to Nova Scotia's rejection of the Canada-France geographical framework. As I mentioned earlier, much of Nova Scotia's rejection of that frame of reference in Canada-France really has nothing to do with geography at all. Reliance on Canada-France is, according to Nova Scotia misplaced because the basis of title to the area to be delimited in this case differs from that in Canada-France. Because the resources at issue are difference, because of other alleged other delimitations in the region, and inevitably because of that continual refrain, the conduct of the parties.

But, of course, none of this justifies refusing to look at the geography in the same way as it was looked in Canada-France. The geography doesn't change because of any of these considerations.

Now Nova Scotia does get close to making a geographical argument for rejecting the Canada-France perception of geography when it argues that the key factor is not coasts, but coastal relationships. The Court of Arbitration, Nova Scotia points out, did not have to consider the geographical relationship of the coasts of Newfoundland to the coasts of Nova Scotia. Well that's partially, but only partially true. But at the same time it's completely irrelevant.

And I say it's only partially true, because of course,

the Court of Arbitration did consider the relationship of the coasts of both Newfoundland and Nova Scotia to the area to be delimited. And that's essentially the same thing as considering the relationship to each other. And the area to be delimited in Canada-France is essentially the same area as that in which Nova Scotia now claims its lines should run. But it's also irrelevant, because the coasts did not move after the Canada-France case. They are still the same coasts, whether or not the Court of Arbitration considered their relationship to each other, or just considered their relationship to the area of delimitation that is now the subject of this case.

Nova Scotia also suggests that the Nova Scotia coasts were constrained in Canada-France, because Canada wished to keep the focus of attention around the islands themselves and provide an enclave of maritime territory only.

But in making this point, Nova Scotia overlooks two things. First, a focus on Canada's contentions about the geography in Canada-France is important because the Court of Arbitration essentially adopted the Canadian characterization of the coasts. And second, the Court of Arbitration did not enclave St. Pierre and Miquelon. It extended the French zone southwards to the 200 nautical mile limit. But even at that most southerly point, the

Court of Arbitration did not consider that the coast of Nova Scotia projected into that area.

And, of course, Nova Scotia wants to go beyond that area, well to the east of the area where the Court of Arbitration considered that there was no projection of the Nova Scotia coasts. It's no wonder that the rhetoric in the Nova Scotia pleadings escalates when discussing the Canada-France Award.

Now Nova Scotia also seeks to rely on the somewhat confusing argument that since the Canada-France case dealt with the delimitation of a 200 nautical mile zone, then the area of delimitation cannot be the same as in the present case, where the boundary is to extend out to the edge of the continental margin. But that has nothing to do with the coasts that face onto the area of delimitation. The fact that the area extends further seawards does not alter the coasts from which that maritime territory project, nor does it alter the relationship of the coasts of the two parties. Even though Nova Scotia states that it does in a footnote, as if it were axiomatic.

And finally, Nova Scotia objects to reliance on the geographical analysis of the Canada-France award because the Court of Arbitration suggests that the coasts project frontally, with the consequence that the south coast of

Newfoundland would be cut off if its southward projection both east and west of the French corridor were to be encroached upon.

Now, Mr. Willis will deal later with Nova Scotia's contentions about frontal and radial projections. Suffice to say that the fact that coasts face onto a maritime area does not change simply by an arbitrary selection of coasts in and beyond the area of delimitation. That's an important lesson that France learned in the Canada-France case.

Mr. Chairman, Nova Scotia protests the relevant coasts as identified by Newfoundland and Labrador. But what does it offer in exchange? In fact, it is quite generous. It offers two apparently alternative views of the coast configuration. However, both have a common theme. Both aggrandize the coasts. Both extend the coasts well beyond any conceivable notion of the area to be delimited. And both give the impression of points having been chosen at random, as if coastal points were selected by throwing a dart at a map. So that Boxey Point, Mistaken Point, Point au Gaul, Point Enragee, suddenly seem to have some significance of maritime delimitation, as if they had been wrongly overlooked in Canada-France.

But why is it necessary to offer two different perceptions of the coast? In describing the general

configuration of the region, Nova Scotia adopts one set of lines to represent coastal fronts. In determining the coasts to be measured for the purpose of establishing proportionality, Nova Scotia adopts another set of lines to represent coastal fronts.

For the purpose of identifying the coastal configuration of the region, the coastal direction line runs from Point Enragee to Boxey Point. But when it comes to measuring that coast, the line used runs from Point Enragee to what appears to be close to Connaigre Head, a point I mentioned earlier that came -- Newfoundland and Labrador came in for heavy criticism by Nova Scotia. And you will note that also it goes from there to Lamaline Shag Rock. I am sorry, you don't notice it on that.

For the purposes of identifying the coastal configuration in the region, the mainland coast of Nova Scotia is represented by a straight line from Cape Canso to Cape Sable. But when it comes to identifying the coast for the purposes of proportionality, the earliest straight line takes a detour via Cable Sable -- via by Cape Sambro. And so it goes on.

But more fundamental that the erratic selection of points on the coast, is the extent of the coast that Nova Scotia has identified. Coasts that had no relevance when the Court of Arbitration delimited the area in which Nova

Scotia is now making a claim have been included as relevant to this delimitation. The whole of the southeast facing coast, mainland Nova Scotia coast down to Cape Sable apparently converges and overlaps with the south coast of Newfoundland.

But it does not stop there. Cape Sable does not go far enough. The line turns and goes along the southwest facing coast of Nova Scotia. The coast that faces onto the Gulf of Maine and Georges Bank has suddenly become relevant to a delimitation between Newfoundland and Labrador, and Nova Scotia.

Mr. Chairman, if this is correct, then the Gulf of Maine case ought to be reopened. There must have been a serious error in that case, because the Chamber failed to take into account the fact that the south facing coast of Newfoundland faces onto the Gulf of Maine.

Indeed, if Nova Scotia is correct that the coast from Cape Sable to Chebogue Point is relevant to delimitation between Newfoundland and Labrador, and Nova Scotia, then perhaps the coast between Cape Race and Cape Spear, a coast that Nova Scotia also considers to be relevant to this delimitation should have been taken into account in the delimitation of the Gulf of Maine.

And, of course, none of this makes geographic or any other sense.

It cannot be justified on the basis of principles of international law governing Maritime boundary delimitation. It is a consequence of Nova Scotia's attempt to avoid the application of the principles of international law of maritime boundary delimitation, by turning this case into a sui generis delimitation, unique to the Accords and to the legislation implementing them.

However, as Mr. Willis will point out, that interpretation of the Accords, and of the Terms of Reference, simply cannot stand.

In short, Nova Scotia has failed to provide any reason for deviating from the coastal direction, length or projection that was adopted by the Court of Arbitration in Canada-France.

Indeed, Nova Scotia's whole case rests on its curious notion of the basis of title. For without that notion, the whole conception of relevant coasts, coastal direction and relevant area all fall to the ground. In the absence of its basis of title conception, Nova Scotia has no theory of the coasts or the area relevant to this delimitation.

Thus, Mr. Chairman, at the end of the day in review of Newfoundland and Labrador, the correct approach is clear. Since there is no reason for deviating from the geographical framework identified in Canada-France, the

Tribunal should follow the framework adopted there.

Mr. Chairman, let me state briefly the proper geographical framework within which this case must be considered.

First, it must focus on the geography of the specific area to be delimited, not on some macrogeographical conception of Nova Scotia's place on the eastern seaboard of the North American continent. For that reason, Nova Scotia's portrayal of itself as being squeezed into a concavity of the east coast of North American simply has to be rejected.

Equally its claims based on the basis of title to encompass coasts that do not converge or overlap in the area to be delimited have to be rejected as well.

Second, there are three -- essentially three geographic areas involved in this delimitation. There is the area inside the Gulf, there is the area immediately outside the Gulf, what has been characterized as the inner concavity. And there is the area beyond, which we refer to as the outer area.

The area inside the Gulf is relatively small and differences between the parties is relatively minor. In fact, the major difference in this area is the same as one of the issues in the inner concavity, that is the weight to be given to St. Paul Island.

Within the inner concavity, with the exception of the weight to be given to St. Paul Island, again, the parties in fact when it comes down to it, do not differ substantially in the determination of coasts and coastal length. Each party sees the coastal relationship as one of oppositeness, although the parties differ on whether the particular coasts that are to be -- are to be viewed as recessive or protruding. In fact as Newfoundland and Labrador pointed out in its Memorial, apart from the question of St. Paul Island the differences resulting from the application of any method to the geography in this area would have little impact on the lines drawn regardless of the methods used. And I will come back to that later at the end of Newfoundland's submissions.

There are two exceptions to this. The first, as I have mentioned, is the impact of St. Paul Island. The second exception related to the transition between the inner concavity and the outer area. As was recognized in the Gulf of Maine case, an appreciation of the proper coastal relationship where a boundary exits a concavity is critical to the proper construction of the line in the outer area.

In this regard, Nova Scotia's argument that the relationship of oppositeness in the coast of Newfoundland and Nova Scotia extends out to the parallel of 46 degrees

north cannot be sustained. It is based on a theory on oppositeness and adjacency put forward by Canada in the Gulf of Maine case, but not relied on by the Chamber nor adopted by any court or tribunal.

As applied by Nova Scotia, it consists of projecting a coastal relationship that is one of oppositeness within the inner concavity into an area where the coasts are clearly adjacent. And it does this by the false reasoning that since an equidistance line can be drawn between coasts then the coastal relationship is one of oppositeness. And as we pointed out in our Counter-Memorial, by such reasoning all coasts are opposite and thus Nova Scotia's contention loses any rationale.

This apart, in the outer area, the parties appear to be agreed that the coastal relationship is one of adjacency. What divides the parties here is Nova Scotia's attempt to draw in many more coasts, particularly on the Nova Scotia side. What also divides the parties, although Nova Scotia makes at least a pretence of not relying on this issue, is the weight that ought to be accorded to Sable Island.

Mr. Chairman, from this description of the area where the delimitation is to take place comes the relevant area. It is the area just described, bounded in some way that will provide a reasonably objective way of containing the

area. Newfoundland and Labrador has suggested the use of perpendiculars applied to the outer limit of the relevant coasts of Newfoundland and Nova Scotia. And thus the relevant area is defined.

Nova Scotia objects to the use of perpendiculars, arguing that the choice of the point from which the perpendicular is drawn will have a significant influence on the relevant area the further out the perpendicular extends. The point is obvious, but it applies to any line of direction. Where two lines start with different directions, that difference is accentuated the longer the line is.

And Nova Scotia's criticism is surprising given the result of applying the same logic to its own line defining the outer limit of the relevant area. By use of an arbitrary line instead of a perpendicular, Nova Scotia attributes a substantial area to Newfoundland and Labrador allegedly as a result of the delimitation.

In his presentation following me Mr. Willis will elaborate on the appropriateness of the use of perpendiculars.

Mr. Chairman, my final subject this morning in this geographical presentation concerns the two islands mentioned earlier, St. Paul Island and Sable Island. As we have pointed out in our written pleadings, incidental

features have the capacity to distort any boundary, and these two features, given their location and their particular characteristics would be a source of distortion if given any weight in delimitation.

Now in our phase two Memorial we pointed out that St. Paul Island protruding 14 nautical miles from the promontory at Money Point was an inhabited island who significance was essentially as a hazard to navigation.

Nova Scotia responds to this allegation that St. Paul Island was little more than a barren wilderness by arguing it has two fresh water lakes, is largely forested and once sustained a population.

But the information provided by Nova Scotia itself paints not quite such a rosy picture. The habitation in the distant past consisted of establishment to build and maintain lighthouses and rescue those wrecked on its shores. The island is covered in small spruce and the two lakes referred to by Nova Scotia are high up and seemingly serve as reservoirs simply for the streams on the island.

Moreover, the colorful history of the island thoughtfully provided by Nova Scotia in its annex 114, indicates that the link between the island and Nova Scotia was so strong that for a considerable period of time it did not seem to belong to Quebec -- it did not seem clear whether it belonged to Quebec, New Brunswick, P.E.I. or

Nova Scotia. Its only real links apparently were with the ships that foundered on its rocks.

And of course that makes the essential point, an island far from the coast is a hazard to navigation in a way that a coast -- an island located closer to the coast would not be. And it is islands located close to the coast that should be treated as if they are part of the coast. Islands that lie a distance and do not conform to the general coastal configuration should not be treated as part of the coast.

And of course this applies even more strongly in the case of Sable Island which lies some 88 nautical miles from the Nova Scotia coast. Curiously, Nova Scotia provides little to support the contention that Sable Island is not a distorting feature. Apart from a tis not to Newfoundland and Labrador's contention Sable Island is little more than an exposed reef, Nova Scotia is largely concerned to contradict Newfoundland and Labrador's contention that the nominal interest that Nova Scotia has over Sable Island, which does not amount to ownership, would deprive Nova Scotia, if it were really a state, of the use of Sable Island as a base point.

But even here, Nova Scotia's response seems at best lukewarm and at worst simply does not address Newfoundland and Labrador's point. It reverts to the basis of title

argument that this is not a continental shelf delimitation. It says that the federal government owns the whole offshore anyway and thus Newfoundland and Labrador has no better rights to the offshore than Nova Scotia, missing the point that it's the ownership of the land by the federal authority that makes the case of Sable Island different.

And it argues that Nova Scotia's role in respect of the island is greater than Newfoundland and Labrador claims. But all of that is beside the point. Newfoundland and Labrador was not querying whether Nova Scotia had rights over the offshore area emanating from Sable Island. Clearly it does.

Newfoundland and Labrador was querying whether the weight that could be accorded in delimitation to an island where the state whose territory was being delimited did not have ownership over the island. And to that question Nova Scotia provides no answer.

Sable Island is essentially a narrow, elongated reef like sandy island that runs east west and presents, as we said in our Memorial, only an attenuated salient towards the delimitation area. It cannot support human habitation, and is occupied only by scientific and other federally approved individuals.

Mr. Chairman, neither St. Paul Island nor Sable Island

are either geographically or otherwise sufficiently linked to the mainland coast to be treated as part of that coast for the purposes of delimitation. A ready comparison with the treatment of Seal Island in the drawing of the line in the second -- in the Gulf of Maine case makes that apparent.

Seal Island, which as the Chamber pointed out in Gulf of Maine, was inhabited year round extended the coast of Nova Scotia in relation to the opposite coast of Massachusetts only a fraction of the one-quarter that St. Paul extends the Nova Scotia coast towards Newfoundland. Yet it was given weight -- it was given reduced weight in the delimitation.

Mr. Chairman, that concludes my presentation this morning. I thank you and the Members of the Tribunal for your attention. I would now like to ask you to call on Mr. Willis to address the legal issues related to maritime delimitation.

MR. WILLIS: Mr. Chairman and Members of the Tribunal, it is a privilege to appear once again before you on behalf of the Province of Newfoundland and Labrador.

My first topis this morning concerns the interpretation of the Terms of Reference, the mandate to apply the principles of international law, the international law of maritime boundary delimitation to

this interprovincial dispute. This will consist very largely in a discussion of the Nova Scotia thesis that the case is not to be treated as a true continental shelf delimitation, and that the basis of title is not to be found in the coastal geography, all of which has profound and practical implications in terms of the relevant circumstances and the equitable principles to be applied.

My second and principal subject will be the applicable law, the substance of the law -- the international law of maritime delimitation, including the fundamental norm, relevant and irrelevant circumstances and equitable principles or criteria.

And finally I will wrap up this review of the applicable law with the response to Nova Scotia's broad and pervasive criticism of the use of precedent by Newfoundland and Labrador in this case, the charge that we have applied the results but overlooked the reasoning of the decided cases. And specifically that we have misapplied on the one hand analogies from Gulf of Maine and on the other findings of fact from the Canada-France maritime boundary Award.

I begin then with the Terms of Reference which define the subject matter of this arbitration. The nature of the Nova Scotia argument has placed them at the very centre of the debate.

The legislation respecting both Accords is expressed in identical terms on this point. The statutes refer to the, and I quote, "The principles of international law governing maritime boundary delimitation."

The rationale for applying international law is obvious. There is simply no body of domestic law that deals in a substantive way with the delimitation of the vast offshore areas covered by the continental shelf, and the exclusive economic zone. There is, on the other hand, a very substantial body of international law on this subject.

So the legislative choice of international law as the governing law was not only logical, it was practically inevitable. The alternative was a legal vacuum.

And as well, the subject matter lends itself quite readily to the application of international law. We are dealing, in a domestic and federal context, with a subject matter that is international in its nature and in its origin. The delimitation will cover the geographical area of the continental shelf, an offshore area in which rights and jurisdiction are defined by international law, and intensively regulated by international law.

The Terms of Reference are in any event, perfectly clear. They call for the application of the principles of international law. Notwithstanding this unequivocal

mandate, Nova Scotia has done its utmost to distance this case from the recognized principles of international law. It sees an enormous chasm between the subject matter of the Accords and the subject matter addressed by the international law of maritime boundary delimitation.

It says the two are fundamentally at odds. That we are dealing here with a purely negotiated entitlement that has no connection with the inherent rights that sovereign states enjoy with respect to the continental shelf.

If this were really true, it would call into question the feasibility of applying the international law of maritime delimitation in the first place. The selection of international law as the governing law must apply an assumption that the subject matter is sufficiently similar to that dealt with by international law, to permit those principles to be applied in a coherent fashion.

Now, Nova Scotia's avowed purpose in this branch of its argument is to remove geography from centre stage. Nova Scotia is quite as emphatic about this in its Counter-Memorial as it was in its Memorial. We're told, for example, at page 412, paragraph 27, that in the circumstances of this case, and I quote, "It is evident that geography is not the dominant relevant circumstance."

This objective of relegating the coastal geography to a secondary status contradicts the very notion of applying

the international law of maritime boundary delimitation. The entire conceptual basis of this branch of international law is to be found in the idea that Maritime rights flow from sovereignty over the land. Over the adjacent coastal territories.

This is captured in the celebrated maxim from the North Sea cases, that the land dominates the sea. The central role of geography has been reflected, and reiterated in practically every subsequent case. In Libya-Malta, the Court said that continental shelf rights are derived from territorial sovereignty, through the maritime front, or coastal opening, of the adjacent state.

In Guinea versus Guinea Bissau, the Tribunal said that everything depends on the maritime facades of the adjacent states, and in French, in the French original, "La façon donc elle se présente."

Canada-France put it as clearly as any of the decided cases. It said, and I quote, "Geographical features are at the heart of the delimitation process." And quoting Gulf of Maine, it added that "equitable criteria", and I quote again, "are essentially to be determined in relation to what may properly be called the geographical features of the area."

Tunisia-Libya finally, is a case much cited by Nova Scotia. And as Mr. Colson will show, it does not

represent an exception to the rule that delimitation turns on the coastal geography.

That case put the nature of delimitation very neatly. The basis of title, the Court said, is the geographic correlation between coast and submerged areas off the coast. And for that reason, the Court added, the coast of each of the parties therefore constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them, extend in a seaward direction, as well as in relation to neighbouring states situated in either an adjacent or an opposite position. That's at paragraphs 73 and 74.

In a word, the entire conceptual basis of the international law of maritime delimitation revolves around the coastal geography, and it does so because the basis of title is territorial sovereignty over adjacent coastal areas. Take this out of the equation, and the coherence, and the rationale of the law simply disappears.

Nova Scotia is right on one point, and one point only. The basis of title is the point of departure of the international law of maritime delimitation, and it is the benchmark of relevance. But the basis of title as recognized by international law, is and always has been, geography. The coastal geography. Take that away, and the legal cogency of the entire system disappears. And

not only the legal cogency. What Nova Scotia has failed to appreciate, Mr. Chairman, is that the international law of maritime boundaries is not a set of disembodied abstractions. It's a body of law that is inseparable from its practical applications.

What Nova Scotia would cast aside, along with the recognized basis of title, is the wealth of geographical criteria, and the repertory of practical, geographically based methods that give real content, and real substance to the international law of maritime delimitation.

The idea of proportionate and disproportionate affects, for example, or cut-off. If geography no longer dominated the process as the basis of title, all this would be lost. The principles would be impoverished beyond recognition.

Having dismantled the existing structure of international maritime boundary law, Nova Scotia attempts to put Humpty-Dumpty back together again, by postulating a new and unprecedented so-called basis of title.

It says the basis of title in this case is fundamentally at odds with the inherent ab initio rights over the continental shelf, as established by international law, because we are dealing here with negotiated entitlements, implemented in Canadian law.

But the new Nova Scotia interpretation of

international law has, in reality, no foundation at all. Saying that geography is the basis of title is a meaningful statement. It leads to practical ways in which the geography can be interpreted. Coastal fronts, maritime projections, proportionality, and the rest. It also leads to specific methods that can be applied.

But saying the basis of title is two separate negotiated entitlements under Canadian law, in practical terms, leads no where at all. It's a statement that's empty of practical or useful implications for delimitation. It's a pretext for a completely arbitrary approach to the relevant circumstances, where the relevancy and the weight of those circumstances can be juggled at will. And where the recognized principles of international law can be treated as secondary or irrelevant.

There is, Mr. Chairman, and members of the Tribunal, no reason to follow Nova Scotia down this path into the realm of the arbitrary. There is no difficulty in applying the international law of continental shelf delimitation to this case, and applying it with all its rich content of geographically based criteria and methods.

When the legislation mandates the application of public international law to a dispute between two provinces, it implies that the parties are to be treated

as if they were, for that limited purpose, sovereign states. And as if their offshore rights in the area of the continental shelf were, in fact, the inherent continental shelf rights that appertain to such sovereign states.

The assumption that the parties are, for the limited purposes of this arbitration, sovereign states with the offshore rights of such states is a perfectly workable and modest legal fiction, which is a necessary implication of the legislation. And for that reason, it was perfectly appropriate to make the assumption explicit in the Terms of Reference, with the phrase, "As if the parties were states, subject to the same rights and obligations as the Government of Canada at all relevant times." Those words, in our submission, provide a complete refutation to the Nova Scotia contention that this case is not to be treated as a true continental shelf delimitation.

The issue about the Terms of Reference is not difficult, but it is nevertheless, fundamental. It is only through a highly unorthodox approach to the basis of title, and thus to the international law of delimitation, that Nova Scotia can hope to put conduct on a higher pedestal than geography. And thus to turn phase two into a cosmetic make-over of phase one.

Subsidiarily, it is only through a highly unorthodox

approach that it can propose a delimitation based on the equal division of an enormous area of continental shelf extending from Georges Bank to the northern tip of the Grand Banks of Newfoundland. In other words, in effect, an apportionment of the continental shelf, and not a delimitation.

All this, we submit, would transform the principles of international law relating to maritime boundary delimitation beyond recognition.

I turn next, Mr. Chairman, to the main body of my presentation, a review of the substantive content of the applicable law. The principles of international law that are referred to in the legislation, and in the Terms of Reference.

Because we are dealing with the seabed and subsoil beyond the territorial sea, it is the law of the continental shelf that is directly applicable. But in fact, the cases dealing with the exclusive economic zone, and single maritime boundaries, turn on essentially the same geographical principles, and are therefore instructive, as well.

The debate between the parties with respect to the applicable law can be dealt with in terms of three broad categories. First, the distinction between delimitation as such, and the apportionment of an undivided whole.

Relevant and irrelevant circumstances, and equitable principles or criteria.

PROFESSOR CRAWFORD: Mr. Willis, I'm sorry, I don't want to derange the order of your presentation, but Canada is bound by the 1958 Continental Shelf Convention. So, in the context in which we have to treat the parties as having the same rights and obligations as Canada, why don't we simply start with the Continental Shelf Convention?

MR. WILLIS: With article 6?

PROFESSOR CRAWFORD: Yes.

MR. WILLIS: Let me preface that. We'll answer the question. I'll preface the remark that, as we said in our Memorial, very little turns on this issue. I believe the trend of the jurisprudence has been defined a very substantial identity, if not a complete identity between the limitation based on article 6 and delimitation based on customary international law.

But looking at the legislation as really the -- the primary source of the mandate given to the Tribunal, and certainly the source that inspires the Terms of Reference, that refers to principles of international law, without qualification. We interpret principles of international law as referring prima facie to general international law, and not to the lex speciales, if you like, of a particular

convention, whose application, let's take the case of the Government of Canada, whose application depends, in each instance, on whether there's been a voluntary act of ratification by the other party. So if you were to look at the legislation by itself, I think the natural interpretation would be principles of international law is general international law, and not treaties that depend on ratification.

MR. LEGAULT: Even in the light of the Terms of Reference, that's a subject of the same rights and obligations as Canada? Canada is a party ipso facto, Newfoundland is a party, Nova Scotia is a party.

MR. WILLIS: But again, the -- the -- our point of departure is the natural meaning of the expression "principles of international law". Is article 6 in itself, a principle of international law? Or is it not a lex speciales provision of a particular treaty?

MR. LEGAULT: Does Article 6 constitute rights and obligations under international law?

MR. WILLIS: It does constitute rights and obligations for adhering parties.

MR. LEGAULT: Thank you.

CHAIRMAN: I must say too, and I can't find the area particularly, that in the first phase this Tribunal said that prima facie that treaty applies. And somehow or

other, we have to weasel our way out of that. And you would have to talk us out of it.

MR. WILLIS: Well I don't attach, Mr. Chairman, -- it's good to be clear. But I don't attach a decisive importance to this, because we do see both article 6 and customary international law as pointing in exactly the same direction, and for exactly the same reasons. But again, our short answer to this question is, what is the natural meaning of the expression "principles of international law", as used in the -- in the legislation.

PROFESSOR CRAWFORD: The term "principles of international law" is used pretty loosely in international law. And it wouldn't have been odd, certainly in 1958, and possibly not even now, to describe article 6 as a statement of principle. After all, article 6, as we have seen, doesn't lead to any very specific conclusion. It's a -- it posits a modus operandi that's been subject to extensive interpretation. And you're probably right in saying that it doesn't make much difference, but there's the problem of where we start from.

MR. WILLIS: Yes. But it certainly applies --

CHAIRMAN: Excuse me. We may have to try it on first. In other words, it's one thing, and you do, I think you do it both ways, you say there is no application. It's one thing to say that. It's another thing to say that here,

special circumstances take over. And you give a number of reasons later. But they are two different questions.

The paragraph I was referring to is article 3.11, and we say that, as a matter of international law, the governing provision prima facie, at least, is the GCCS article 6. So that we have already stated that. But as I say, they are two separate questions.

MR. WILLIS: Yes.

CHAIRMAN: You may argue that in the end you go into special circumstance to bring all the other considerations.

MR. WILLIS: The --

CHAIRMAN: I believe that they are close.

MR. WILLIS: The -- one implication, if we say article 6 applies, one implication is that we ought to at least look at the equidistance line in this case. That was done in Jan Mayen, not only because article 6 applied, but the Court also mentioned because it was an opposite state situation. But as far as Newfoundland and Labrador is concerned, we have taken that approach. We have looked at a provisional equidistance line, and we have no difficulty with that mode of analysis.

Before Mr. Chairman, addressing the fundamental norm, there's something even more basic. We need to begin with a clear idea of what delimitation consists of, of what it is, and what it is not. Contrary to some of the most

central features of the Nova Scotia argument, it is not a global apportionment of the entire continental shelf.

Nova Scotia, in its Memorial, appealed to considerations relating to the total division of the continental shelf between the parties. It also proposed a grossly inflated conception of the relevant area, that in practical terms would imply much the same approach.

Reflecting this objective of global apportionment, it argues and I quote, "The area that is the object of the delimitation in this case comprises an integral undivided whole. Canada's jurisdiction over the continental shelf."

All this directly contradicts the very concept of delimitation, as articulated in the leading decision, the North Sea cases of 1969.

In that case, it was held that a delimitation is not, and again I quote, "It is not an apportionment of something that previously consisted of an integral, still less and undivided whole." This was a central point, because the approach taken by Germany, which envisaged the establishment of what that state termed just and equitable shares, dividing out the North Sea between the parties. Between the coastal states.

This, of course, was rejected. As the Anglo-French Award pointed out a few -- some years later, this rejection of the idea of a global apportionment was

closely linked to the conceptual framework of ab initio and ipso facto rights to the continental shelf.

We are aware that Nova Scotia takes the view that this conceptual framework is inapplicable in this case. But that would take this exercise, I submit, completely out of the context of the international law of maritime boundaries, which the legislation directs us to apply.

Since the law has rejected the idea of a global apportionment, the implication is that delimitation should not focus on the division of the entire continental shelf. It should focus on a restricted area of potentially competing claims known as the relevant area.

The North Sea cases referred to this as a marginal, or fringe area. The designation of a relevant area is implicit in the fundamental norm as set out in Gulf of Maine, which refers to the geographical and other relevant circumstances of, quote, "The area". In the light of how the Chamber approached the delimitation, and of all the prior jurisprudence, this clearly refers to something quite different from the global apportionment of the total continental shelf between the two parties.

The parties agree on very little in this case, but they do agree on at least one point. The fundamental norm as set out in the Gulf of Maine decision.

The first paragraph of the norm deals primarily with

the process of delimitation. The second paragraph refers to the application of equitable criteria, and the use of practical methods capable of ensuring with regard to the geographic configuration of the area, and other relevant circumstances, an equitable result.

Even here in the context of an extremely abstract, and deliberately general formulation, it is the geographic circumstances of the area that are singled out for attention.

Other relevant circumstances of an undefined character can also be considered in determining what is an equitable result. Which is always the ultimate objective.

Finally, the norm refers to equitable criteria and practical methods, but fails to provide any definition of what those are.

Now the fundamental norm puts the spotlight on geography, and suggests that the geographical configuration is the principle concern. It also refers to other relevant circumstances. These other relevant circumstances form an undefined residual category. As the Libya-Malta case pointed out, not everything is relevant.

The Litmus Test is whether any given factor is sufficiently linked in legal terms, to the institution of the continental shelf. As Libya-Malta expressed it, the only relevant circumstances are those that are pertinent

to the institution of the continental shelf, as it has developed in the law, and to the application of equitable principles to its delimitation.

Newfoundland and Labrador has no quarrel with the notion that depending on the facts, non-geographical factors may sometimes be relevant. Most often, however, they are relevant not as the principle determinant of the boundary, but either as supporting considerations, or as tests of the equity of the line.

For example, the so-called catastrophic repercussions test of economic relevance as set out in Gulf of Maine.

The approach in the Nova Scotia presentation is, of course, completely different. It not only allows a role for nongeographcial circumstances, it allows them to overshadow everything else. It puts the geography in the back seat. This is not merely atypical. It is in fact a radical departure from the pattern revealed throughout the jurisprudence in case after case.

And this reversal of the accepted hierarchy of relevant circumstances, which is a reflection of the basis of title, is what drives the Nova Scotian argument to the extreme position that the basis of title in this case is something unknown to international law, unknown to the international law of maritime boundary delimitation and mandating a comprehensive upheaval in the manner in which

that body of law has been applied.

The Newfoundland and Labrador position in this case is that the delimitation can and should be decided on the basis of the coastal geography. This does not represent an a priori position that nongeographical factors can never be given a proper role. But we do think that geography should invariably have pride of place because of its linkage to the basis of title.

Our position simply reflects our view that as a factual matter the nongeographical circumstances relied upon in this case are either irrelevant or fail to prove what Nova Scotia alleges.

The arguments about the allocation of resources fall into the first category of matters that are legally irrelevant. The arguments based on conduct fall into the second category by failing, as a factual matter, to demonstrate what Nova Scotia is intending to -- is attempting to prove.

Conduct has been given such unprecedented prominence in the Nova Scotia argument that its phase two case is very largely a rehash of phase one. The facts are the same. The divergences and the interpretation of those facts are also the same.

Nova Scotia would make conduct virtually on its own, the sole determinant of the boundary under arbitration.

This makes a mockery of the very division of this case into two phases on which Nova Scotia insisted with such perseverance, and ultimately with success.

It is above all on the facts that we part company from Nova Scotia, so far as the conduct of the parties is concerned.

Other counsel will show that the Nova Scotia case relies essentially on a single precedent, Tunisia-Libya, that fails on every possible count to sustain the conclusions that Nova Scotia draws from it. The facts are fundamentally different in terms of historical depth and continuity, the negotiating context and otherwise. Nor was conduct in that case a self-sufficient basis of delimitation divorced from the geographical circumstances. As in fact, the Court made very clear in its decision on the application for revision brought some years later by Tunisia.

Conduct, is at best, what Gulf of Maine referred to as an auxiliary criterion. It is not an alternative to geography. Instead, where the facts are convincing, as they are not in this case, it is an indication of what the parties themselves have seen as the equitable solution to an essentially geographical problem.

Continental shelf rights in law do not depend on state conduct. They attach to coastal states automatically,

independently of their conduct. In a word, ipso facto and ab initio. That alone suggests that there would be little, if any, justification for the use of conduct as an independent basis of delimitation in a situation that falls short of the requirements of acquiescence and estoppel.

In addition to conduct, Nova Scotia invokes a purported relevant circumstance. It dubs access to resources. This is a thinly disguised attempt to cross over the line to an arbitrary ex aequo et bono process based on legally irrelevant circumstances.

It is also a thinly disguised attempt to do indirectly what cannot be done directly, that is, to obtain a global apportionment of the resources of the continental shelf both within, and above all, outside the delimitation area.

Finally, it appeals to the legally inadmissible factor of relative wealth and poverty, as related to oil and gas resources.

Mr. Chairman, the state of the law on this issue was summed up neatly in a passage by Professor Weil, which we quoted in our Counter-Memorial. And I quote, "the existence, importance and location of natural resources cannot be regarded as relevant for the purposes of delimitation. In short, resources are there they are and the boundary is where it is."

PROFESSOR CRAWFORD: Now, Mr. Willis, is that consistent with the Court's treatment of the resource issue in the Jan Mayen case?

MR. WILLIS: Well I will be coming to that. And indeed that -- in a few minutes, perhaps. North Sea has -- excuse me, Nova Scotia has built its argument on access to resources. On a passage from the North Sea dispositif, which referred to the location of natural resources, and I quote, "so far as known or readily ascertainable."

Now this statement has to be put in the context of what the Court referred to as the marginal or fringe area in the vicinity of the boundary.

One has to bear in mind, as well, that under its terms of reference, it was providing guidelines for a negotiating process that was to follow the decision. Clearly, the Court was not intending to contradict on the level of resource entitlements its basic premise that delimitation is not concerned with the global apportionment or with the sharing out of an undivided whole. Bearing in mind this linkage to the marginal or fringe area and not to the entire continental shelf, there can indeed be adjustments along the course of the line to take into account such matters as the presence of oil wells, or the unity of deposits in this boundary area. And that was seen in the ultimate line that emerged from

the North Sea negotiating process after the decision.

But this patently is not what Nova Scotia is aiming at with its inflated relevant area covering Hibernia to Georges Bank and its appeal to the aggregate estimated resources under the jurisdiction of each party. This is global apportionment on the level of resources. It has nothing to do what the Court had in mind in 1969.

The quoted passage speaks of taking account of resources so far as known or readily ascertainable. This by itself is sufficient to defeat the Nova Scotia argument on this point. Nova Scotia can point to no resources in the boundary area that meet this requirement.

The situation stands in contrast to the sole instance in all the decided cases in which resource issues gave rise to a concrete alteration in the course of the boundary. This, of course, is the adjustment in one sector, one of three sectors of the Jan Mayen line to take account of the distribution of capelin fishery resources, and to allow each side continued access to those resources. And that led to an adjustment.

It was used in this case, in the terminology of the Gulf of Maine, as an auxiliary criterion that led to a moderate adjustment to a geographically based line. And, of course, it dealt with resources that were known or readily ascertainable. As is typical in fisheries

disputes as opposed to continental shelf disputes.

Now, Nova Scotia, in its Counter-Memorial, has attempted to make the Laurentian subbasin, the centre piece of this dispute, the real bone of contention. The Laurentian subbasin has been depicted, for the first time in these proceedings in figure 76 of the Nova Scotia Counter-Memorial, in what it describes as an approximate area, in an approximate location. The 135 degree line very neatly transects this depicted area on the map, while the Nova Scotia and Labrador line only cuts across its western extremity.

I make no comment on the accuracy of the depiction in figure 76, or on the significance in geological terms of the Laurentian subbasin.

But we do emphatically deny that this arbitration is somehow focused on this structure, so as to make the apportionment of its potential resources the real issue.

The Nova Scotia Counter-Memorial itself puts the matter in its true context. It says the distribution of resources within the Laurentian subbasin is unknown. And I quote, "due to the fact that the current state of exploration does not permit detailed, precise location of resources within that structure." If that is true, it also follows, we submit, that the resources of the structure as a whole are equally in the realm of

speculation.

By Nova Scotia's own admission, the subbasin cannot meet the criterion of the North Sea cases that natural resources may be relevant, but only so far as they are known or readily ascertainable.

Nova Scotia makes the audacious suggestion that Newfoundland and Labrador somehow shares its perception that the Laurentian subbasin is central to this dispute. I refer to paragraph 235 of its Counter-Memorial, it used the words, given the importance assigned by Newfoundland to the role of the Laurentian subbasin in this dispute, et cetera. Now this came as news to us.

The footnote reference to the Memorial of Newfoundland and Labrador in the first phase quickly cleared up the confusion. In fact the passage cited refers to a statement by Premier Hamm of Nova Scotia about the Laurentian subbasin as the area most critical to the present arbitration. And it was part of an argument pointing out that the outer area in its totality, the area outside of the Gulf of St. Lawrence as a whole, is the key to this delimitation, and not the areas of the Gulf of St. Lawrence and Cabot Strait that were the focus of the 1964 negotiations. So that's the context in which Newfoundland and Labrador referred to the Laurentian subbasin in the initial Memorial in phase one.

So the Nova Scotia argument about access to resources runs afoul of a whole series of objections. It is not related to the resources of the relevant area. It is a disguised attempt at a global apportionment of the resources of the entire continental shelf. And it does not deal with resources so far as known or readily ascertainable, as required to give even a possible legal relevance to this factor.

PROFESSOR CRAWFORD: Mr. Willis, can you explain to me why it's not part of the relevant area, or I can't understand your second and third points? I mean even your line cuts what is portrayed as the Laurentian subbasin?

MR. WILLIS: No, I am not saying the Laurentian subbasis is not part of the relevant area.

PROFESSOR CRAWFORD: Oh, I am sorry.

MR. WILLIS: I am saying that the Nova Scotia arguments in a more general sense, and I am summing up some of the --

PROFESSOR CRAWFORD: Oh, okay. Sorry.

MR. WILLIS: -- the general picture about this branch of the case. My submission is that the Nova Scotia arguments in the general sense are aimed at an apportionment of the resources of the entire east coast continental shelf. And that is true by virtue of their appeal to alleged statistics and figures relating to Newfoundland's entitlement and Nova Scotia's entitlements in the

aggregate.

PROFESSOR CRAWFORD: If you --

MR. WILLIS: Sorry.

PROFESSOR CRAWFORD: -- if you read the Gulf of Maine case, notwithstanding some of the protestations of the judges, it's impossible to think that they were not influenced by the fisheries resources, which people knew were at stake. And it's clear that there were some level of division of those resources. Even if they weren't candid enough to admit it. At least one might say that in the Jan Mayen case, the Court did at least say what it was doing. Whether it was a legitimate thing to do or not might be debatable, but they were clear about it.

I wonder how far the known or readily ascertainable formula from the 1969 decision excludes reference to a geological feature in the context to oil and gas. And there are quite a lot of these, especially in outer continental shelf areas, where detailed work may not have been done, or if it has been done, the results are not publicly accessible. But everyone has a feeling that there may be something there, as it were. There are serious negotiations relating to that resource. And it would in fact be a strong influence on states in negotiating continental shelf boundaries whether the line in question gave them part of that resource. Are

arbitrators excluded from any of that information, or from any of the -- from taking those factors into account at all?

MR. WILLIS: Well I think there is a fine line between delimitation and apportionment. And that when the Court referred to resources so far as known or readily ascertainable, that should be taken at face value. And in the context of the North Sea, the Court, I believe, was faced with the situation where exploration had reached a relatively advanced stage compared to where we are here. And that was reflected, as I mentioned, in the ultimate course of the negotiated line, which was negotiated on the basis of the principles set down by the Court where there were micro adjustments along the course of the line to take into account delineated, fully delineated oil deposits and perhaps even active oil wells.

I would not be prepared to say that there is any judicial mandate for going much further than that. I would put Jan Mayen very much in the context of a fairly modest adjustment, even a micro adjustment to a line based on known resources, fully known resources in that case, a line based primarily on terms of -- in terms of geographical principles.

And I think this whole line of cases really does go back to the special nature of the mandate the North Sea

cases had, which was to take into account -- which was to give a mandate -- guidelines for a negotiating process. So they knew that there were oil -- delineated oil fields out there and it was only sensible that those should be taken into account by the parties when actually tracing the course of the line.

CHAIRMAN: Mr. Willis, just a matter for housekeeping. I'm going to call a break at 12:30 or whenever -- or soon there if -- it depends how your presentation -- I don't want to stop you in full flight. I thought I would warn you.

MR. WILLIS: I would think in about -- what about five minutes, would that be an appropriate --

CHAIRMAN: Mmmm.

MR. WILLIS: I can just finish this topic on the relevant circumstances.

On this general topic of access to resources, there is a final and equally decisive objection. The Nova Scotia resources argument is an appeal to relative wealth and poverty as a basis of delimitation. This factor has been unequivocally rejected on more than one occasion by the International Court of Justice as a relevant circumstance, whether it relates to aggregate GDP or merely to the resources of the Continental Shelf.

It was Tunisia that pleaded relative wealth and

poverty against Libya. The response of the Court is so unqualified that it is worth quoting once again. These are, the Court said, and I quote, "Virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource."

And a few years later the international accord reiterated the same position in Libya-Malta, which we also referred to in our Counter-Memorial at paragraph 177.

So the Nova Scotia arguments about the distribution of resources fail on every possible count. They are inadmissible in a delimitation based on legal principles. And they have no factual basis.

On the one hand Nova Scotia has conceded the uncertainties of the exploratory work at this stage in a passage I referred to a few moments ago. And there is, as most Canadians would recognize, something that cuts against the grain of reality and of justice in the idea that Hibernia and other recent discoveries should justify a boundary adjustment against Newfoundland and Labrador as a form of compensation for Nova Scotia. The law, the facts and common sense are at one on this particular

issue. The Nova Scotia access to resources argument is utterly without merit.

Mr. Chairman, this would be a convenient break point if you like for lunch.

CHAIRMAN: Thank you very much, Mr. Willis. We will resume at 1:30. I gather it is around 12:30 now.

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

MR. WILLIS: Thank you, Mr. Chairman. Before the break I had completed my review of the issues pertaining to relevant circumstances as that concept is dealt with in the international law of maritime boundaries. And I had concluded that topic.

The next issue I would like -- or set of issues I would like to address is equitable principles or equitable criteria as these have been developed in the jurisprudence on international maritime boundaries.

The specific criteria, in other words, developed in order to determine exactly how the coastal geography should be translated in concrete situations into an equitable delimitation. This brings into play all the more concrete geographically based principles such as a reasonable degree of proportionality, the notion of the maritime projections or natural prolongations of the coasts, nonencroachment and cut-off. These concepts can conveniently be labelled equitable principles or equitable

criteria, by whatever name, however, they make up much of the real substance of the international law of maritime boundary delimitation.

Newfoundland and Labrador has been castigated for confusing principles of law with equitable principles and equitable criteria. In fact, very little turns on whether we describe the various delimitation concepts as principles or criteria. Both formulations are amply supported in the case law.

The Chamber in Gulf of Maine preferred the expression criteria. This reflected its general concern about reading too many preconceived rules into international law without regard to the unique circumstances of each case. And nobody would take issue with that.

It would, on the other hand, be wrong to use the Gulf of Maine approach as a justification for draining the international law of maritime delimitation of its substantive content as that is developed in the jurisprudence.

This is a body of law that is largely constituted by its practical applications. The fundamental norm is a starting point. By its own terms, however, it has to be fleshed out and complimented by the equitable criteria or principles and the practical methods that have been defined in the case law and in state practice. Without

them the law of maritime delimitation would be an empty shell.

Many, indeed most of the equitable principles recognized by the jurisprudence, can be traced back to the point of origin to the North Sea cases. There are two broad areas I would like to discuss in this connection. The first is the concept of proportionality and disproportion. And the second is how the maritime projections or submarine extensions of the coasts have been conceived and defined in the international law of maritime delimitation.

Proportionality in its broadest sense has a number of dimensions. It stands for the significance of differences in coastal links as a relevant circumstance in drawing a line. It also stands for the use of an ex post facto test as the final step in the delimitation process involving a comparison of ratios between coastal links and the areas divided by the proposed line.

In its very broadest sense, proportionality also has a third and perhaps more fundamental aspect. This is the concept of proportionate and disproportionate effects in relation to geographical features. As we pointed out in our phase two Memorial, this idea of proportionate and disproportionate effects sums up in a nutshell what the law of maritime delimitation is all about.

An equitable delimitation is essentially one that gives proportionate effects to the coastal geography. The dipositif in the North Sea cases introduced the idea of proportionality referring -- and I quote -- "to the element of a reasonable degree of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal state and the length of its coast measured in the general direction of its coast line."

This focuses on coastal links and supports both the notion of a disparity in coastal lengths as a factor influencing the choice of a method, as well as the use of a proportionality test in which coastal and area ratios are compared.

There are abundant examples in the jurisprudence of both these aspects of coastal length proportionality. The two international delimitations involving Canada both put comparisons of coastal lengths at the heart of the analysis and of the method applied.

These two cases also show that a relevant disparity in coastal lengths can be very marked as it was in Canada-France with a 15 to 1 ratio or it can be far less pronounced as it was in Gulf of Maine with a ratio of only 1.38 to 1.

Jan Mayen, the Denmark/Norway case and Libya-Malta provide additional examples of delimitations where a disparity in coastal lengths played a role in the construction of the line.

Coastal frontage, especially when measured in terms of the general direction of the coasts, is closely related to the source of title and to the capacity to generate continental shelf rights. Its importance is therefore self evident. At the same time the courts have refused to apply proportionality mechanically as a formula for the direct division of the shelf based on what the Anglo-French Court of Arbitration termed "nice calculations" of proportionality. And this in a sense is a logical corollary of the proposition that delimitation is not the apportionment of a previously undivided whole.

As I mentioned a moment ago, the case law has identified a broader concept of proportionality as a matter of evaluating the proportionate or disproportionate effects of geographical features. This was highlighted in the Anglo-French award which referred to the distortions produced by individual geographical features or configurations upon the course of a boundary and added -- and I quote -- "The concept of proportionality merely expresses the criterion or factor by which it may be determined whether such a distortion results in an

inequitable delimitation of the continental shelf as between the coastal states concerned."

Now the point about distortion in this passage of the Anglo-French award, was related to the application of the equidistance method taking account of the nature of the claims in that case.

The potential for distortion and disproportion is not, however, limited to the assessment of an equidistance line. Any method that utilizes a geographical feature in the construction or the justification of a line calls for an assessment to determine if it gives a proportionate or a disproportionate effect to that feature.

Other counsel have and will be addressing the geography and the Nova Scotia line in some detail. It is no secret, however, that St. Paul Island and Sable Island call for particular attention in this context of disproportionate or distorting effects. The Nova Scotia line gives full weight to St. Paul Island. It does not appear that Sable Island actually played any role in the construction of the 135-degree line. Nova Scotia has, however, chosen to make Sable Island a pivotal point in its justification of the 135-degree line, and we see Figure 51 from the Nova Scotia Memorial. We were told that the line is appropriate because it is situated midway between Sable Island and Cape St. Mary's, an arbitrarily

selected headland along the south coast of Newfoundland.

I do not wish to anticipate the arguments of other counsel, but I will simply observe that the effect of these islands is not offset or compensated by any similar features on the Newfoundland side. There is in this sense an inherent imbalance in the configuration. Nova Scotia implies that the effect of St. Paul Island is somehow comparable to the islands off Newfoundland within the inner concavity, such as Ramea Island and Colombier Island. This proposition simply does not stand up to scrutiny. An ordinary ruler will suffice to show how untenable the argument really is. Ramea and Colombier lie well under ten per cent of the distance across to the corresponding base points or features of land on the Nova Scotia side. In other words, they have a proportionately insignificant effect and they do not depart appreciably from the general direction of the Newfoundland coast.

St. Paul Island, on the other hand, lies fully one-fourth of the way across Cabot Strait. Nova Scotia is fond of the term "windfall". St. Paul Island fits the bill to a tee. It provides a boost to Nova Scotia that is equivalent to a 14 nautical mile shift in the headlands of the Strait in Nova Scotia's favour. The disproportion is both measurable and it is self-evident, but it pales in comparison to the effect that Sable Island would have if

the argument that Nova Scotia has developed were to be accepted. It is striking that the Nova Scotia line in the outer area runs well to the north and east of an equidistant line, giving full weight to Sable Island. It needs no demonstration that an isolated sandy island -- and I'm quoting the words of the Court of Arbitration in Canada-France -- an isolated sandy island fully 88 nautical miles from the mainland of Nova Scotia would be a source of distortion if it were to be used in the construction of the line.

Just like St. Paul Island, but to an infinitely greater degree, it would have an effect tantamount to adding approximately 160 kilometres of land to the Nova Scotia land mass, and thereby shifting the mainland 160 kilometres out to sea. The point is illustrated on the screen in the illustration which is drawn from our pleadings.

Now, plainly, this would distort the general direction of the coast, and it would do so beyond recognition. It's interesting to compare the distances involved here to those in the case of the Scilly Islands off Cornwall in the Anglo-French case. Those Islands lay on the landward side about 21 nautical miles off the Cornwall coast. In that sense, less than one-fourth the degree of distortion was involved. That explains why it might have been

appropriate to give some effect to those islands, admittedly, in an equidistance scenario, and only half effect, and why it would not be appropriate to give any effect to Sable Island in the present case.

Our arguments about Sable Island are essentially geographical. While on the subject of Sable Island, however, I will respond to a secondary debate in the pleadings about the significance of its constitutional status. In our Memorial we noted that by the Constitution Act, 1867, both ownership and legislative jurisdiction in relation to the Island are federal, and that, in effect, Nova Scotia has a purely nominal title. We also said that if we were to transpose this unusual status to a framework of sovereign states as the Terms of Reference require, it is obvious that the normal incidents of sovereignty would be conspicuously lacking.

Nova Scotia answered in the Counter-Memorial that its Accord gives an important role to the Island, and there were references to provincial spending on the Island, as well. This cannot change the constitutional status of the Island, and they have nothing to do with Newfoundland and Labrador.

The only legal point I would make in this connection is that a consideration of the constitutional status of the Island, as an element of the relevant circumstances,

in conjunction with the geography, is supported by precedent. In the Anglo-French award, the Court referred to both the population and the autonomous constitutional status of the Channel Islands as part of the balancing up of all the circumstances. Here, the facts are almost the opposite. The province lacks constitutional authority or ownership; the Islands are essentially uninhabited, and they have no economic significance of their own. And by parity of reasoning with the Anglo-French award, these background elements should add to the force of the geographical considerations, suggesting that the Island should not influence the course of the delimitation line.

Mr. Chairman, I return to the geography.

PROFESSOR CRAWFORD: Mr. Willis, just before you do, I was trying to think of analogies of the situation of Sable Island in a properly international demarcation situation, and I suppose there might be some form of military base or lease in which the third -- a third state actually occupied part of the territory of the state. I wondered whether in any of those cases involving lighthouses or so on there was any analogy of taking into account or not taking into account an island which was, in fact, not used by the coastal state as such, but was still part of its territory.

MR. WILLIS: Unfortunately, I'm not aware of any analogies

where the use of such a military base as a base point came into consideration, and of course, the difference between Sable Island and some of the analogies one might think of is that those arrangements, even if they are 99-year leases, are time limited in almost every instance, whereas the constitutional status of Sable Island and of the Anglo-French Islands are both permanent.

CHAIRMAN: One thing that concerns me about this argument about ownership and so on is that ultimately we must treat Newfoundland under our Terms of Reference as a sovereign state, and that is certainly part of its territory, and who owns it, you know, seems to me very much a secondary matter.

MR. WILLIS: Yes, I can see that. And at the same time, one, it's not merely legal ownership that's at issue, but it's also the special status of the Island with respect to legislative jurisdiction. That means all the effective power and, of course, executive authority goes along with legislative jurisdiction, normally, so that means all the effective governmental power over the Island is taken away from Nova Scotia under the constitution and transferred to another government. And that's what we say that -- that's why we say that the normal incidence of sovereignty would really not be there if we pursue this concept of sovereign states.

CHAIRMAN: Oh well yes, but we are bound to.

MR. WILLIS: And it's only in the sense of an equitable consideration that we invoke the constitutional status of the Island. The point is essentially a geographical one, but as in Anglo-French, the courts have shown themselves willing to take into account as supporting or background considerations that go into the weight of the various circumstances in the balancing up factors such as economic importance, population and constitutional status. And constitutional status in the Anglo-French case argued in favour of giving some considerable weight to the Channel Islands and apparently, a good deal of autonomy from the -- it was not actually part of the United Kingdom, as I recall. And here, we believe these factors argue in precisely the opposite direction.

I return, then, to the geographical configuration and the considerations that emerge from that configuration. Many factors can produce distortion and disproportion, and yet, throughout the course of the jurisprudence, it's above all small islands -- small offshore islands that have called for consideration in this context. They are the classic instance of circumstances creative of inequity. Those are the words used by the Anglo-French tribunal. They are the paradigm case of special circumstances in the expression used in the Canadian

Memorial in the Canada-France case. The case law abounds with examples -- St. Pierre Miquelon, the Channel Islands, the Scilly Islands, Seal Island in the Gulf of Maine, the Kerkennahs, Malta, Jan Mayen.

The continuity of this judicial trend is pointed up in the most recent cases, Qatar and Bahrain, and in particular, in the arbitral decision in Eritrea vs. Yemen, where significant mid-sea islands were given no effect in constructing the median line between opposite mainland coastlines. These recent cases reconfirm the following principles, all of which were also evident in the earlier jurisprudence. That the effect to be given to islands and similar features depends not only on their size, but on their position in relation to the mainland; that a critical concern is whether these islands are integrated into the mainland coastal configuration or whether they diverge from that configuration as a result of their offshore position; and it may be appropriate to give no effect to an island that would otherwise constitute a source of distortion or disproportion.

It is, as our Memorial also pointed out, often appropriate to give full effect to islands if they are large, or, as shown in the recent cases, if they are closely aligned with the coast or if they are offsetting islands on both sides of the configuration. Those

situations are not comparable to the potential effect of the islands we have identified as possible sources of inequity in the present case.

The issue here is the effect of small offshore islands that would distort the general direction of the controlling coastlines. The words of Sir Derek Bowett that we quoted in our Memorial are opposite. "State practice", he wrote, "affords many examples of the use of an azimuth or a rhumb line which, subject to leaving islands on the right side of the line, i.e. in the area subject to the same sovereignty, will otherwise ignore islands."

Now this certainly fits the Sable Island scenario. And I would add only one point. State practice, as well as the recent cases, suggest that small offshore islands that are not integrated into the general direction of the mainland coast, should generally be entitled to a full territorial sea. In other words, 12 nautical miles off the coast. But should not otherwise be permitted to exercise a distorting influence on the course of the delimitation.

An example from the Canadian Memorial in Canada-France, based on the Italian delimitations, particularly the Italian delimitation vis-a-vis Yugoslavia, as it then was, shows how this can work in practice. One starts in

effect with a mainland to mainland boundary line. If there is a small mid-sea island located within 12 nautical miles of the principal line of delimitation, but on the right side of the line, as Professor Bowett said, it produces a curve, a curve in the boundary based on the arc of the 12 mile -- the 12 mile arc of the circle.

If, on the other hand, the island is situated more than 12 miles from the boundary, it should on this approach, have no effect at all.

Before leaving this general topic of proportionate and disproportionate effects, I would like to make a few points about a closely related topic. And that is the use of so-called coastal fronts. In other words, lines representing the general direction of the coast.

The topic is closely related for two reasons. On the one hand, proportionality involves the measurement and comparison of coastal lengths. To do this in a meaningful way, the coast must be measured according to their general direction. Otherwise, in a situation like the present one, where the coasts are convoluted and complex, the overall lengths would be grossly inflated, and if one coast were more deeply indented than the other, a fair comparison would not be possible. So that is one respect in which the use of coastal fronts is necessary is assessing proportionality.

The other aspect is that, as the North Sea cases suggested, the use of coastal fronts as part of the method of delimitation may help to avoid the distortions caused by small islands, or peninsulas, or concavities, or other incidental features. In other words, instead of a strict equidistance line, where incidental features might distort the course of the line, one can use coastal fronts from which bisectors, or in the case of a straight coast line, a perpendicular can be drawn.

Newfoundland and Labrador, in this case, has, of course, used coastal fronts for both these purposes. Given our general approach, we have used the coastal fronts with some modifications that were originally developed by Canada, in Canada-France.

Now that's a sore point with Nova Scotia, which has devoted a good deal of time and energy to discrediting those very lines. Professor McRae has dealt with all those points, and I will not return to them here.

Next, Mr. Chairman, I would like to turn to the concept of the maritime projections or submarine extensions of the coast, as conceived in the international law of maritime delimitation.

This is a question that has implications that cut across a number of different aspects of the law of delimitation. It is a precondition of identifying the

relevant coasts and the relevant area in a delimitation. A precondition which provides the geographical framework of the exercise, and the basis for the analysis of proportionality.

It is also closely bound up with the practical application of the equitable criterion of non-encroachment, which in its broadest sense simply holds that a boundary should not encroach on areas that are within the natural prolongation, or the most natural prolongation of another state.

Newfoundland and Labrador has followed the analysis in the Canada-France case, and has identified relevant coasts, and a relevant area, that are situated in the general area of the Gulf Approaches.

Nova Scotia has adopted erratically different approach. Its approach is based on an idiosyncratic interpretation of the legislative definitions of the offshore areas, coupled with a rejection of the frontal projection concept, as applied in Canada-France.

The result is a definition of relevant coasts that includes the entire Nova Scotia seaboard as far as the Gulf of Maine, and in fact, includes coasts within the Gulf of Maine that face directly away from the boundary area, while at the same time adding only a very short segment up to Cape Spear, to the relevant Newfoundland

coast.

This adds up in the Nova Scotia pleadings, to a scenario in which the relevant Nova Scotia coast are overall, slightly longer than the total relevant Newfoundland coasts. That is a dramatically different picture from what emerges from the Canada-France analysis of the coastal geography.

And at the same time, Nova Scotia has proposed a grotesquely inflated relevant area that extends from the northern limits of the Grand Banks, fully 700 nautical miles from the Nova Scotia coast, all the way to the Hague line in the Gulf of Maine to the United States border. And not only is this enormous canvas proposed as a relevant area, it is described as an area of overlapping entitlements that, according to Nova Scotia, should in principle, be equally divided.

I will not add much to what we said in our Counter-Memorial about the Nova Scotia argument that delimitation should be based on an equal division of overlapping entitlements. This appears to be inspired by a passage in Gulf of Maine, but one that is distorted beyond recognition.

The Chamber in that case spoke of the objective of an equal division of areas of overlap or convergence. But, and the qualification is vitally important, subject to the

proviso that this equitable criterion is to be applied having regard to the special circumstances of the case.

Even more fundamentally, it is clear from passages I will refer to in a moment, that the Chamber had in mind a relatively limited area which it referred to as the delimitation area. Something very close in general concept to the marginal, or fringe area, referred to in the North Sea cases.

Nothing was further from the Chamber's intention than the equal division of practically an entire continental shelf. It is clear from passages of the decision I will refer to in a moment, that the Chamber had in mind a far more limited delimitation area.

This misreading of Gulf of Maine is combined with a misreading of the legislative definitions of the offshore areas.

Under the Nova Scotia interpretation, as we understand it, each statute would apply to the entire Canadian continental shelf, creating an enormous area of overlapping entitlements, which is now to be divided up. This disregards the implied context of geographical adjacency, without which the legislative definitions would make no sense, and it also disregards the context and the intention of the Accords.

But at the end of the day, Mr. Chairman, it makes no

difference. The international law of maritime delimitation is simply not concerned with the global division of aggregate entitlements or overlapping entitlements. It has a more selective focus. It is concerned with a relatively limited area, which is referred to as the relevant area, or the delimitation area, and with the coasts facing that area.

The relevant coasts and relevant area identified by Nova Scotia are not consistent with the decided cases. The identification of relevant coasts and relevant areas may be more of an art than a science. But it is certainly not an arbitrary exercise.

The first and most important point is that the aim of the courts in defining a relevant area, has been to narrow the geographical focus, to limit it to the general area of the boundary, and the adjoining coasts.

In other words, the objective has been exactly the reverse of what Nova Scotia has attempted to do with its all encompassing and inflated relevant area.

In Gulf of Maine, the Chamber explained that it could not accept arguments based on socioeconomic factors for taking account of coasts outside the Gulf of Maine proper. Its words are significant. It said, and this is at paragraph 41, "It is ultimately only the concept of the delimitation area which is a legal concept." And it also

said, "The involvement of coasts other than those directly surrounding the Gulf does not and may not have the effect of extending the delimitation area to maritime areas which in fact have nothing to do with it."

The same general objective of limiting the geographical focus is found in Tunisia-Libya. It said, at paragraph 75, "It is clear from the map that there comes a point on the coast of each of the parties beyond which the coast in question no longer has a relationship with the coast of the other party that is relevant to delimitation." In that case the Court did give an indication of what it had in mind, without providing a mathematically precise or preset formula. It noted that any part of the coast whose submarine extension cannot overlap with the extension of the coast of the other party, because of its geographical situation, is not relevant to the delimitation.

A coast that does not have this relationship to the delimitation area, either because of its distance, or because of the general direction in which it faces, is not a relevant coast. This is illustrated in practice by the coast east of Ras Tajoura, which you see on the screen, that were excluded from consideration in Libya-Tunisia, as well as the coast north of Ras Kaboudia. And also by the coasts outside the Gulf of Maine, that were similarly

excluded from consideration in that case.

And that raises a further question. What does it mean to say that the submarine extension or maritime projection of a coast, can or cannot overlap with that of another state? Now the Newfoundland and Labrador arguments are based on a framework of frontal projections, as reflected in the case law, and expressly endorsed in the Canada-France arbitration.

This framework is contested in the Nova Scotia Counter-Memorial, which advocates an alternative conception based on radial projections. Though I must add that even a radial conception fails to justify the inflated Nova Scotia version of the relevant area in this case.

When we say that coasts project frontally, and that areas in front of the given coasts are within the maritime projection, or natural prolongation of that coast, we are not talking in absolutes. We are not saying, for example, that there can be no lateral projection in situations where there is no competing claim. The object in this analysis is to evaluate the relative weight of competing claims to a single maritime area.

It is for this reason, among others, that the competing notion of a radial projection has, in practice, a very limited utility, because that notion provides no

benchmark, other than distance, for evaluating the relative weight of two competing claims in a given maritime area.

A theory of radial projection means that a projection in any direction has exactly as much force as a projection in any other direction. As this analysis implies, radial projection is a concept that leads straight back and inexorably to equidistance. If coasts project equally in every direction around the 360 degree circumference, then by a process of elimination, distance becomes the only possible basis on which one claim can possibly be said to be stronger than another, and once distance becomes the only criterion, equidistance becomes the only solution, which, of course, is an outcome consistently rejected by the jurisprudence from the beginning to the present day.

The theory of a radial projection as a basis of delimitation was advanced by Canada in Gulf of Maine as an argument supporting equidistance, but it was not accepted by the Chamber. In fact, it was part of the chain of reasoning which I have just outlined that the Chamber characterized, and I quote, "as just one more still unconvincing endeavour to instill the idea that equidistance, rather than distance, is a concept endorsed by customary international law."

When we come to Canada's next maritime boundary case,

the Canada-France Arbitration, there can be no mistaking the prominence and decisive influence of the frontal projection concept. As set out in paragraph 59 of the Award, Canada's position was, and I quote, "Coasts project frontally in the direction in which they face. Canada pointed out that the judgment of 1969 in the North Sea continental shelf cases was clearly based on a directional concept of natural prolongation. The court spoke of natural prolongation in terms of the areas directly in front of the coast, and in a practical sense, this was the operative principle of the whole decision." Clearly, the Award itself accepted this position, as appears in the adoption of the 200 mile corridor, and the curtailment of the French zone on either side in order to avoid any cutoff of the frontal projections of Newfoundland toward the south. Indeed, as the dissenting opinion of Professor Weil noted, the concept of a frontal projection was the guiding principle of the corridor or baguette, and he said in his dissent, and I quote, "The court has thus endorsed the frontal projection thesis contended by Canada."

A framework of overlapping entitlements based on radial projections does not correspond to what the courts have said from North Sea onward, and it does not, above all, correspond to what they have done in practice. It would have led to an identification of relevant coasts in

several cases that is not only entirely different from what was done, but that would verge on the absurd. Consider the Gulf of Maine where the Chamber limited the relevant coasts to those within the Gulf. A truly radial projection would have included the relevant -- as relevant coasts what you see on the map, something fundamentally at odds with the actual determination of the Chamber.

It is true, as Nova Scotia has pointed out, that the Canadian coasts inside the Gulf do not face directly toward Georges Bank, but all this proves is that the notion of a frontal projection is not an all or nothing proposition. The fact that the US coasts at the back of the Gulf not only face toward Georges Bank, but are longer than the Canadian coasts involved, was, of course, a determining factor in the reasoning of the Court.

We may consider, as well, what a systematic radial projection approach would have produced in Libya-Tunisia, a far less discriminating inclusion of relevant coasts that bears -- that fails to bear the slightest resemblance to the coast which the courts actually considered relevant.

And yet, there is a further reason why the Nova Scotia challenged the idea of a frontal projection approach is untenable in this case. In a broad shelf setting, based on Article 76, the radial theory ceases to have any basis

at all. The basis of the radial projection argument was the shift in the basis of title from the notion of the continental shelf as the physical platform in front of the coastline to the idea that title is based on a fixed distance of 200 nautical miles from the coast.

Once we shift back to a broad shelf framework on which Nova Scotia insists at every point, even the starting point of the radial projection argument disappears. And disappears completely. One of the options for the rule on the absolute outer limit under Article 76 is, of course, 350 nautical miles from the coast, but that is not the basis of title. It's simply a maximum that can never be exceeded. The basis to title to a broad shelf, as set out in paragraph 4 of Article 76, is a formula primarily based on a distance from the foot of the continental slope. In other words, a line tracking a seabed geological feature. There is no trace here of a basis of title reflecting a radial projection from the coast. We are back to what the court referred to in the North Sea cases as a species of platform, one that extends outward from the coast in a frontal projection.

On this general approach, the inclusion of the Nova Scotia coasts beyond Cape Canso and all the way down to the United States border cannot be justified. This very extensive block of Nova Scotia coastline does not

plausibly generate a maritime projection that overlaps with the maritime projections of Newfoundland and Labrador. This is true in the light of the maritime projection of these Nova Scotia coasts toward the south, which was noted by the Court of Arbitration, and by virtue of their ever-increasing distance from the boundary area.

MR. LEGAULT: Mr. Willis, if you draw a perpendicular from Point Enragée south, don't you get an area of overlap with part of that coloured projection you see on the map of Nova Scotia?

MR. WILLIS: At the -- if it's a strict perpendicular, at the extremity of the outer area, you may get a degree of overlap. That would only be, I believe, on the margins. Essentially, the area of overlap is not one that is generated by the Nova Scotia coast southwest of Cape Canso. It would only be very far out to sea, based on the broad shelf definitions that have been proposed in this case.

MR. LEGAULT: Does it being far out to sea make it irrelevant?

MR. WILLIS: I think -- I think an overlap would have to be significant to be relevant. We are dealing in -- not in absolutes, but we are trying to identify those coasts which have a significant bearing on the delimitation.

PROFESSOR CRAWFORD: Well, no, there is a distinction

between identifying the relevant area and then working out what -- what the implications are within that area. Surely, if any area -- if any area of coast is capable of generating a shelf claim, it ought to be included. And therefore stopping as far northwest as Cape Canso doesn't seem -- well, there may be a case against it, or a case -- for taking some other part of the Nova Scotia coast into effect.

MR. WILLIS: You know, one might have said that beyond Ras Tajoura -- one remembers the map of the Libyan coast that was on the screen awhile ago, a perpendicular generated from that might, in theory, at some point on the outer edges of the map have generated an overlap with the Tunisian coast. One might say the same about the points north of Ras Tajoura, but the courts have tried to identify, you know, relevant coasts in terms of those which generate a substantial overlap with those of the other party, and very marginal areas at the edge, I don't think, should have a bearing on it.

MR. LEGAULT: Well with fringe or marginal areas?

MR. WILLIS: Well, that's in terms of where the boundary runs. It's really not -- the marginal or fringe area, I don't see as being the margins of the relevant area.

MR. LEGAULT: No, but if the relevant area is, in some sense, the area within which the delimitation is to take

place, correct?

MR. WILLIS: Yes.

MR. LEGAULT: Well, then it seems to me -- I'm only asking the question here that there is at least a question that arises whether areas of overlap that don't necessarily constitute overlap right across the board, but some measure of overlap, may be relevant.

MR. WILLIS: Well, the question is some measure. I would suggest that it has to be a significant measure --

MR. LEGAULT: Thank you.

MR. WILLIS: -- and that there is an element of judgment there, and there is an element of judgment that runs through the application of all these concepts.

Now I was pointing out that the change in direction at Cape Canso may not be abrupt, and nor was there an abrupt change in direction at Ras Tajoura in the Tunisia-Libya case, which we looked at a moment ago. What is clear is that where a long coastline recedes away from the limitation area, and where its maritime projections are less and less capable of overlapping with those of the other state, some point must be identified where those coasts are no longer deemed relevant. The relevant coasts, in other words, cannot go on ad infinitum. To paraphrase Tunisia-Libya, there comes a point where the coasts of one state no longer have a relationship with the

coasts of the other that is relevant to the delimitation exercise. Canso Strait dividing mainland Nova Scotia from Cape Breton Island is obviously the major natural break in the coastal geography, and it was accordingly treated as such in Canada-France, much as the changes in direction between the -- at the entrances of the Gulf of Maine were treated as the major natural break the geography in the Gulf of Maine scenario.

On a side issue, I'll note that in its Counter-Memorial, Nova Scotia has attempted to explain away the use of Cape Canso as a limit to the relevant coasts in the Canada-France case by drawing a 200-mile arc from St. Pierre and Miquelon. Nova Scotia has failed to read the Award carefully, which adopted, as logic compels, not a 200 but a 400 nautical mile limit as the maximum separation of coasts whose maritime projections could be said to overlap.

I refer to a discussion of the Cabot Strait closing line, which was said to represent Canadian coasts inside the Gulf, which are in direct opposition to the coast of St. Pierre and Miquelon, and which are less that 400 nautical miles away. That's in paragraph 29.

PROFESSOR CRAWFORD: But of course, we are asked to delimit out to the outer edge of the continental margin. Does that make a difference?

MR. WILLIS: No. On this particular point, I am not really relying on a 400 mile principle. I am just pointing out that the Nova Scotia argument in its Counter-Memorial, that in Canada-France, Cape Canso was selected as a limit, because it's 200 miles, roughly 200 miles from -- it's not tenable. That was the only thing.

PROFESSOR CRAWFORD: Yes. Yes, I understand that. But I am actually making a more a general point. You are eliminating any effect of coastline to the southwest of Cape Canso. But, of course, you have also taken the position that our concern is out to 200 miles.

On the assumption that our mandate is to delimit the whole of the Canadian continental shelf, as between the two parties, that is out to the outer edge of the continental shelf, does that make a difference to relevant coastline? All of the previous cases weren't concerned with outer continental shelf at all.

MR. WILLIS: Yes. Well, Nova Scotia has made the point that is the geographical focus on the shelf becomes a little broader than it is with the 200 mile limit, that perhaps further coast to the east and west are engaged.

We don't really see the logic of that point. If you adopt a consistent frontal projection approach, the result should be essentially the same in both scenarios. And, as well, we -- I will be coming to this later on in my

argument, but we would urge some caution about approaching this case. Admittedly, there is a broad shelf at issue here. But we urge some caution about assuming that that broad shelf is being delimited with the exactitude that the pleadings of Nova Scotia suggest. So we don't know exactly. We know there is a broad shelf, but we don't know exactly how broad.

PROFESSOR CRAWFORD: Yes. Of course, we may not have to decide for the purposes of drawing the line exactly how far it goes. But it would appear that we have to decide at least the direction of the line beyond 200 miles out to wherever it is --

MR. WILLIS: Yes.

PROFESSOR CRAWFORD: -- that the line stops. Out to the outer edge of the margin. And, of course, it will be a matter for other processes to determine where that is. But it's not going to affect the direction of the line.

MR. WILLIS: Well that's -- we would agree with that statement that beyond 200 miles the -- there is a delimitation issue and it can be solved by determining the direction of the line.

But in terms of a very close analysis of how the broader shelf might affect the exact extent of the relevant coast, we believe -- we would urge some caution on that, because we don't know how exactly how broad the

shelf is going to be.

Ultimately, Mr. Chairman, the Nova Scotia approach to the relevant coast is very elastic and expensive approach. It can be seen as a self-defeating exercise.

Nova Scotia believes it can include the Nova Scotia coast right down to and into the Gulf of Maine, over 500 nautical miles from Newfoundland. If that were valid, there would be nothing to limit the Newfoundland coast to those facing south.

Nova Scotia has effectively conceded the point by including the segment of coast running north to Cape Spear. But what stops the line at Cape Spear? And if we can turn this corner, why not turn the corner into the Gulf. Nova Scotia in this matter of relevant coasts and relevant areas is attempting to play a game without rules. A game in which any coast and any area could be included as relevant contrary to the dominant trends of the jurisprudence from North Sea on. It is ultimately a game that they could never win.

PROFESSOR CRAWFORD: If we go back to the graphic, Tunisia-Libya, of course, it may well have been reasonable to stop at Ras Tajoura, because of the general context of the area to be delimited, given that you were dealing with an area necessarily confined by Malta and Italy, as well. It is by no means clear how anything could possibly be relevant

east of Ras Tajoura.

But here, leaving aside St. Pierre and Miquelon, you have got a completely open -- open sea. There is nothing opposite at all.

MR. WILLIS: I would suggest though that east of Ras Tajoura, there was a less of a problem of confinement in the area. It was more open. Of course, there is nothing terribly open in the Mediterranean. There is always other coasts in play, that's true. But it was less tightly constricted east of Ras Tajoura than it was west of Ras Tajoura.

To conclude this topic, Mr. Chairman, and members of the Tribunal, we submit that the framework of relevant coasts we have developed and proposed is valid. Not only because it was adopted in Canada-France as the appropriate analysis of the geography of this region, but because it represents an accurate and reasonable reflection of the principles of the jurisprudence relating to the international law of maritime boundary delimitation.

Finally, Mr. Chairman, I come to my last topic. The rule of precedent. In other words, the practical application of the jurisprudence, which is the living substance of the international law of maritime boundary delimitation.

This is our response to the pervasive criticism in

the Nova Scotia pleadings that Newfoundland and Labrador has misused the precedents; that we have used the results of the cases without the reasoning. That we have used false analogies from the Gulf of Maine, and that we have blindly and wrongly adopted findings of fact from the Canada-France Award.

I will begin with the general objection Nova Scotia has made to the use of the jurisprudence by Newfoundland and Labrador. They say we have ignored the reasoning in the previous decisions, while applying the results of those decisions. They call it colloquially cherry picking and over-conceptualization.

Now this, of course, is a sweeping generalization. But what underlies it appears to be an assumption that almost any factual distinction is sufficient to demonstrate that no useful analogies or examples can be found. Taken to its logical limits, this would mean that analogies and examples could never be found in the precedents, because as pointed out in Gulf of Maine, every case is unique.

How exactly are we said to have misused the precedents? The details are found in a list of bullets at paragraph 39 on page II-18 of its Counter-Memorial. Nova Scotia charges first that we have failed to take into account that geography was a dominant consideration in

other cases. But we have also failed to mention that jurisdictional zones in those other cases were, in their words, entirely distinct from what is at issue here.

Now this, of course, simply brings us back to the fundamental difference between the parties on the terms of reference and the very nature of this arbitration. It illustrates, as nothing else, the underlying Nova Scotia objective of placing as much distance as possible between this case and the entire body of jurisprudence on the international law of maritime delimitation.

The next bullets refer to the proportionality test proposed in the Newfoundland and Labrador Memorial. It is said that we have used a 200 mile limit only because this is what was done in the Canada-France case. This is simply inaccurate.

We did on the other hand refer to the indeterminant extent of the continental shelf areas beyond 200 miles that are at issue in this case.

Nova Scotia has proposed with breathtaking confidence a definition of the exact limits to be determined under the very complex formula of Article 76, which involves difficult questions of scientific fact, as well as a process for decision that has not yet been initiated.

As we have emphasized, important policy decisions will have to be taken by the Government of Canada after

ratification of the 1982 Convention in formulating the Canadian claim, and submitting it to the UN authorities. An exact delineation of the continental margin is premature and inappropriate at this stage.

MR. LEGAULT: Mr. Willis, as I recall the Memorial and Counter-Memorial of Newfoundland and Labrador, you didn't stop there. You went on to say that there was no reason to believe that inclusion for purposes of the proportionality test of the area beyond 200 miles to the continental margin, the edge of the continental margin, would make any substantial difference. What is the basis for saying that? How did Newfoundland reach that conclusion?

MR. WILLIS: We believe that even where there is a broad shelf claim, it's appropriate to test proportionality on the basis of a fixed distance. And that is for the reason that where you have a broad shelf, and this could be illustrated -- well I will be coming to this in a moment. I will just -- this is a -- if you like, a preview of an argument I am coming to, but the undulations and bulges of a broad shelf can distort and skew the results of a proportionality test based on the outer limits of a broad margin. And I will be coming to that in a little more detail in just a moment.

We believe the exemplary prudence shown on this issue

by the Canada-France Court of Arbitration, at paragraph 75 to 82 of its Award should be the model in this case.

PROFESSOR CRAWFORD: The Canada-France arbitration wasn't saying what you have just said, and I can understand that you shouldn't test proportionality beyond 200 miles because where the outer edge of the continental shelf is going to be bears no relationship whatever to anything that occurs within 200 miles, I can see that. It's a geomorphological thing. But basically they didn't have jurisdiction beyond 200 nautical miles --

MR. WILLIS: Yes.

PROFESSOR CRAWFORD: -- which is different. I mean what you are saying is, that okay, we have got jurisdiction to determine where the line would be beyond 200 nautical miles out -- out to wherever the outer edge is, but we shouldn't test proportionality beyond 200 nautical miles, because doing so is effectively meaningless. That's quite a different point.

MR. WILLIS: But in its discussion, it was a jurisdictional point. And clearly the answer to the jurisdictional question is different here from what it was in Canada-France.

PROFESSOR CRAWFORD: Right.

MR. WILLIS: But in its consideration of how they should interpret the comprimis in that case, and whether they

should interpret it as giving jurisdiction beyond 200 miles, they set forth a number of factors that led it to a cautious and prudent approach. And that's why they declined jurisdiction. And they said there are third parties involved with this issue beyond 200 miles. There is the international community, none of whom are before this Court, and these were considerations why they interpreted the jurisdictional mandate in the comprimis as not extending to the area beyond 200 miles.

PROFESSOR CRAWFORD: Well I have to say, as a personal matter, when I first read that I didn't understand it. And now that I have read it again, I find it incomprehensible.

But just as a matter of fact, I understand it's the case that there is still a dispute between France and Canada over whether France has any continental -- any broad continental shelf rights beyond the baguette. Is that right?

MR. WILLIS: I'm quite frankly, Professor Crawford, not familiar with the current state of play on that issue.

PROFESSOR CRAWFORD: Obviously not something we can effect one way or the other because it's a matter between the two states, but it would be something to know as a matter of fact whether the determination of nonjurisdiction closed the matter or whether there was a continued -- or whether

there is a continued dispute between them. If there is a continued dispute then the statement that it was beyond jurisdiction, as it were, becomes even more uncomprehensible than it previously was.

MR. WILLIS: In any event in its analysis of its jurisdictional mandate, the court did point out that the broad -- the issue of the broad shelf in this region involved not only the parties but the international community and specifically the Commission on the Limits of the Continental Shelf under the 1982 convention.

In the present case, it involves another absent third party we well, the Government of Canada. This does not, of course mean that the Award to be given in this case should or can be limited to 200 nautical miles. It should not, but it should also avoid an exact determination of the outer limit, by indicating in the final direction or azimuth of the line and providing in general terms for its extension to the outer limit of the shelf wherever that may eventually be fixed.

There are, in short, sound policy and legal reasons for suggesting a proportionality test based on the 200-mile limit, as we have done. This is not an unthinking adherence to precedent as Nova Scotia has alleged. But there is another compelling reason for using a fixed distance for this purpose, which can only be the 200-mile

limit. The extreme irregularity of the outer limit of a broad shelf its undulations and bulges could profoundly distort the application of a proportionality test.

Take, for example, the fictional scenario on the screen. State A has a very broad shelf which tapers into a much narrower margin off State B. Obviously State A would be arbitrarily penalized in any proportionality test based on the outer limit. And such a proportionality test will produce a skewed result by suggesting the existence of a disproportion that has nothing whatever to do with the appropriateness or equity of the method of delimitation being tested. A disproportion, in other words, that does not exist.

This situation is not in fact too far removed from the present case where the shelf reaches by far its greatest extent off Newfoundland and Labrador and not off Nova Scotia.

MR. LEGAULT: So the reason for not taking the proportionality test beyond 200-miles is not that it doesn't make a difference but rather that it does make a difference?

MR. WILLIS: Well it could make a difference to the number. But would that difference in the numbers truly reflect a disproportion in the application of the equidistance method? I think it could produce misleading results.

PROFESSOR CRAWFORD: And let's assume that in that configuration there is an arbitration between State A and State B. And let's assume that their only dispute is beyond 200 nautical miles. And let's also assume for sake of argument to avoid St. Pierre and Miquelon type problems, that the outreach of the continental shelf is determined as between those two states in the continental shelf commission, so there is no question of there being any problem vis-a-vis any third party. You are saying that in that situation State B has no argument at all that it can make for any adjustment of the line beyond 200 nautical miles by reason of the fact that this will exclude it from an outer continental shelf? It simply in effect has to take the direction of the line within 200 nautical miles as it finds it and that's the end of the matter?

MR. WILLIS: Well I'm -- I'm not sure that my proposition is quite that broad. What I am trying to emphasize is the pit falls of using the proportionality method with a variable outer limit. I'm not sure that -- you know, we are talking here about proportionality test. The courts have said that proportionality tests are not necessarily for application in every case. There are cases where there are too many variables.

We are not talking again about the basic method of

delimitation or even the relevant circumstance. We are talking about the strictly mathematical aspect of proportionality as an ex post facto test. And in that situation, I do submit that the use of a fixed distance from the coasts would generally produce more reliable results even where there is a broad shelf.

CHAIRMAN: Why is that so? Couldn't you be just as disproportional because you are using the wrong distance because it's simply too short? In other words isn't there a chance of disproportion whichever you choose?

MR. WILLIS: Well these matters, Mr. Chairman, are never entirely reliable. But I guess what I do want to suggest for your consideration is that the addition of -- in this proportionality equation of all that extra sea area to State A's side of the ledger may produce untoward results.

CHAIRMAN: It invites caution but either way can be disproportionate?

MR. WILLIS: Yes. Well put. Thank you.

Now still on this topic of the alleged misuse of precedent, and still on the topic of proportionality in that respect, Nova Scotia has another grip about the Newfoundland and Labrador proportionality test. And this is the use of perpendiculars to delineate the area. We mentioned, without making it a central point, that perpendiculars were used as the outer limits of the

proportionality area in the Yemen/Eritrea arbitration.

Nova Scotia claims this is wrong because that case dealt with opposite coasts and because shorter distances were involved. These, we submit, are distinctions without differences. So long as the approximate nature of a proportionality test is borne in mind, the use of a perpendicular limit reflects the idea of a maritime projection into the areas in front of a coast, which is another bone of contention. And the use of a perpendicular line to delineate a proportionality area does not require the existence of opposite coasts.

In fact Nova Scotia has not suggested a single reason why it should. Obviously the proportion -- the potential for distortion is greater with any straight line that is projected over great distances. But the rationale of a perpendicular, which is what we have used to delineate the two ends of our proportionality model, the rationale of a perpendicular to the coastline is precisely that such a line is tailored to minimize the potential for distortion, by avoiding any tendency to swing in one direction or the other.

Nova Scotia has taken us to task for using analogies drawn from Gulf of Maine, specifically, the use of a perpendicular to the closing line and the shift in the position of that line to reflect the significant disparity