

ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR
AND NOVA SCOTIA

held on the 20th 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:

David A. Colson

Professor Donald M. McRae

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MR. COLSON: Good morning, Mr. Chairman and members of the
Tribunal. Let me begin by stating that it is an honor and
a privilege to appear before this Tribunal on behalf of
Newfoundland and Labrador.

My assignment this morning is to discuss the subject
of delimitation methods as they pertain to this case. It

is striking, I think, that neither party proposes a line based on the equidistance method.

On the one hand, Nova Scotia proposes that the Tribunal should adopt a line that it says exists in the practice of the parties. It calls forward the delimitation method employed by the International Court of Justice in part of the first segment of the boundary the Court established in the 1982 Libya-Tunisia case to support the Nova Scotia position.

Newfoundland and Labrador, on the other hand, proposes that the Tribunal adopt a three-segment line based on the geographical circumstances making use of the bisectors of two angles formed by opposing coastal fronts within the inner concavity and in the outer area, adopting a line perpendicular to the closing line of that concavity drawn from a point that takes into account coastal proportionality.

Newfoundland and Labrador refers to the delimitation method adopted by the Chamber of the Court in the Canada-United States case in support of its position.

I propose to begin this presentation examining the attitudes of the parties toward the equidistance method in order to discover why they each individually find the equidistance method not to be appropriate in this case.

With that in mind, I will review what Nova Scotia says

about the method employed by the Court in the Lybia-Tunisia case, and examine those contentions against what the Court actually did.

I believe that we will see that Nova Scotia's reliance on that case is misplaced. Following that I will examine the method employed by the Chamber in the Gulf of Maine case, because that case dealt with an inner concavity and an outer area just as the Tribunal must now do, noting similarities and differences between the geographical circumstances of that case and those that are present in this case.

Let me now turn to questions of equidistance. There are three points concerning equidistance that appear to be common between the parties.

First, both parties accept that equidistance, per se, is not a principle or rule of law, but instead it is a delimitation method.

Second, both parties accept that it is the practice of courts and tribunals to examine the equidistance or median line as a first step in the analysis of a maritime boundary question. The court or tribunal will ask whether the method itself may lead to an equitable result in the circumstances. If so, the question will also be asked if any geographical features need to be disregarded in the application of the method in order to produce an equitable

result.

Of course, if the equidistance method is determined to be incapable of producing an equitable result in the circumstances, another method must be found that will do so.

The third point about equidistance on which the parties the agree is that equidistance will not produce an equitable result in this case. Thus there is not any reason to dwell on the various characteristics and idiosyncrasies of this method. Suffice it to say that in its strictest form, equidistance will always produce a line, the turning points of which are exactly halfway equidistant from the nearest points on the territorial sea baseline of two countries.

However, since points on that baseline may be found on islands far off the mainland shore, or perhaps on rocks or low tide elevations within the territorial sea, the question also arises -- often arises whether or not the use of such features as a base point in the circumstances of a particular case might distort the equidistance line and lead to an inequitable result.

Moreover, if the geographical circumstances of a given case involve the delimitation within and beyond a coastal concavity, especially, when there is a substantial difference in the lengths of the relevant coasts of the

parties, the equidistance method is notoriously incapable of producing an equitable result in almost all cases.

Thus, if the equidistance method is used here, there are a series of decisions concerning the base points to be employed on the respective coasts to construct the line so that one, that it produces an equitable delimitation.

But there are other more fundamental questions concerning this method in the event of convex or concave coastal configurations. Particularly so since there are significant differences between the lengths of the coasts -- of the relevant coasts of the parties. Here both parties suggest that this Tribunal should adopt a method other than equidistance for the delimitation that it must carry out. Nonetheless, the reasons of this conclusion differ. And it is illuminating to examine why that is so.

PROFESSOR CRAWFORD: Mr. Colson --

MR. COLSON: Yes.

PROFESSOR CRAWFORD: -- I am sorry, maybe you will cover this later on. I hope I am not interrupting you prematurely. You are not suggesting that this Tribunal is bound by the agreement of the parties on the inapplicability of the equidistance method?

MR. COLSON: Certainly not. I don't think that the parties have the power to bind this Tribunal on any particular

point relating to the law or method. That's for this Tribunal to determine. I am simply pointing out the fact that neither party in this case proposes a commonly used method, which certainly I would expect that this Tribunal would want to examine.

CHAIRMAN: We will certainly examine it. I think it's right to say that, of course, the basis for each party refusing it is so different that it doesn't make it too easy to see what the real common ground is. I think that as you -- as was pointed out yesterday, it's the basis of title that was one of the reasons in the Nova Scotia -- from the Nova Scotia side. In your side, it's inequitable. And I gather that it was difficult from the argument to tell at one stage it wasn't going to be used at all the other time, because it was overridden by what I might call equities.

PROFESSOR CRAWFORD: There is also the problem, obviously, that -- and maybe this is a matter for next week, that we know what Nova Scotia's claim line is, but we don't know what their claim line would be if it wasn't their claim line, if you know what I mean.

MR. COLSON: I think I will be -- perhaps if I can look into this question more deeply about what Newfoundland and Labrador says about equidistance and what Nova Scotia says about equidistance, we will perhaps help the Tribunal in

the way that it will go about its own consideration about this matter.

Let me turn then to the Newfoundland and Labrador view regarding equidistance. In the Memorial of Newfoundland and Labrador at paragraphs 174 to 208, we address the equidistance method, and set forth five reasons why equidistance does not produce an equitable result in this case.

Those reasons are the prevalence of distorting incidental features in the delimitation area, a substantial disparity in coastal lengths, and an inequitable cut-off of the coasts of southwest Newfoundland, encroachment on the seaward projections of southeast Newfoundland, and the unique political geography.

Let me briefly recall what was said about each of those reasons. But before I do so, let me present the Tribunal with a new figure. Nova Scotia makes much of its criticism of Newfoundland and Labrador for not presenting a map showing a strict equidistance line in its pleadings. Of course, neither has Nova Scotia done so to date. So for all of our information, and in particular, the information of the Tribunal, here is a map that shows four lines. A strict equidistance line, the equidistance line which gives no effect to St. Paul Island or Sable Island,

the Nova Scotia line, and the Newfoundland and Labrador line.

I would simply like to note that the end of those lines is arbitrarily determined. They do not rest on either the 200 nautical mile limit, nor is it supposed to be a depiction of the outer edge of the continental margin. It's simply arbitrary. I think there is a common ground between the parties that the last segment of this Tribunal's line should simply be extended, and so we have not tried to address the end point, if you will, of these two -- or these four lines.

In answer to one of yesterday's questions, and without prejudice to our position, I might note that the no effect equidistance line is a line always halfway between the nearest point on the mainland coasts and the nearby islands. Thus, areas north of that line will be closer to Newfoundland than to Nova Scotia. And areas south of that line will be closer to Nova Scotia than to Newfoundland. And as you can see, that particular line does not reach the French corridor, but would so if that corridor were extended for a very short distance.

Now why does Newfoundland and Labrador believe the equidistance method will not produce an equitable result in this case? The first reason concerns two distorting incidental features that are present in the case, St. Paul

Island and Sable Island. St. Paul Island to a lesser degree and Sable Island to a much larger extent are features that depart from the general direction of the coasts of the parties.

They lie in positions that are outside the general relationship between the coasts of the parties. They are Nova Scotian features and there are no geographical features on the Newfoundland side that offset or compensate for their relative location.

Nova Scotia would obtain an unwarranted advantage from the location of these features if they were used as Nova Scotian base points in an equidistance delimitation.

As for St. Paul Island, it lies within Cabot Strait more than 14 miles from the Nova Scotia mainland. As figure 68 from the Nova Scotia Counter-Memorial shows, which is on the screen before you, its use as an equidistant base point would start the delimitation in Cabot Strait not at a mid-point that respects the relationship of the mainland coasts of the parties in the area, but at a mid-point that is constructed using an incidental feature more than one-quarter of the way across the strait.

Now in its pleadings, Nova Scotia argues that if St. Paul is used as a base point, its effect on the equidistance or median line is relatively short lived in

the innermost reaches of the concavity. That is the purpose of this figure. That is true, but it is no reason to use a feature as a base point that distorts the line just because the distortion is relatively short lived.

More importantly by far is the potential effect on an equidistance line if Sable Island is used as a base point to construct an equidistance line in the outer area. Figure 14 from the Newfoundland and Labrador Memorial, now shown, shows the enormous area that is solely attributable to Sable Island if it is used as a base point to construct an equidistance line.

The Tribunal can readily see the difference between the two equidistance lines in the outer area on the map. As the figure suggests, the equidistance method treats islands as if they were attached to the mainland.

Notably, Nova Scotia makes no argument concerning Sable Island similar to the one it makes with regard to St. Paul. That is Nova Scotia does not claim that Sable Island's effect on an equidistance line is short lived. Nor could Nova Scotia do so. This feature is far offshore and it would have enormous effects on an equidistance line, wholly disproportionate and leading to an inequitable result.

Nova Scotia's position with regard to the two islands is slippery, because it also says in regard to St. Paul,

it would have no disproportionate effect.

Newfoundland and Labrador can agree that St. Paul's effect on the equidistance line is short lived simply because soon other features on the coasts of both parties come into play in the technical construction of an equidistance line. It disagrees with the assertion, however, that St. Paul would have no disproportionate effect. More to the point is that again, Nova Scotia makes no similar assertion relating to Sable Island. It never says Sable Island would have no disproportionate effect.

Instead Nova Scotia obscures the issue and only says - and I quote from paragraph 43 of the Counter-Memorial, section 315. It says, "Sable Island is less directly relevant in that neither party proposes using a primary method of delimitation relying on equidistance in the outer sector."

This statement can only be understood to be an acknowledgment by Nova Scotia that if equidistance were to be used in the outer area, then Sable Island would not be an appropriate base point.

Obviously it is possible for the Tribunal to mitigate the effect of such features as St. Paul Island and Sable Island by not using them as base points to construct an equidistance line.

You can see the figure that the result of the no effect to Sable Island line in the figures that we have seen. However -- and this is a key point -- there are other characteristics of the relevant geographical circumstances and of the equidistance method other than its use or nonuse of selected base points that commands recourse to another method in this case to produce an equitable result.

One of these is the marked disparity in relevant coastal lengths. Often when there are substantial differences in coastal lengths the equidistance method will not produce an equitable result. Unless one were to adopt the Nova Scotian view that virtually all of its coasts are relevant to this delimitation, it should be self-evident that the most extensive coasts fronting the delimitation area within the inner concavity and beyond are those of Newfoundland and Labrador.

An earlier presentation by Newfoundland and Labrador's Agent has gone into some detail as to exactly why these coasts -- how these coasts should be determined, and how they should be deemed relevant coasts and how their lengths should be measured.

While affirming that presentation, all I want to do is note at this stage is the general view of Newfoundland and Labrador that no matter how one looks at it, there is a

substantial disparity in coastal lengths between the parties in this case.

In turn, therefore, there is no doubt going back to the North Sea Continental Shelf cases that a substantial disparity in relative coastal lengths is a geographical characteristic that makes the use of the equidistance method questionable in these circumstances.

Accordingly, a method that respects and makes use of the disparity in coastal lengths is more likely to produce an equitable result in such cases. Here is the first of several answers to Nova Scotia. Yes, Newfoundland and Labrador seeks a boundary more favorable than the no effect to Sable Island equidistance line, because international law recognizes that a delimitation based on equitable principles will apply a delimitation method that will take into account substantial disparities in coastal length and will not become mired in a debate about the effect or noneffect of incidental features.

Likewise, a delimitation based on equitable principles will concern itself with the general coastal figuration. It will seek a line that does not cut off seaward projections of coast in an inequitable manner. Thus, the third reason given by Newfoundland and Labrador for not applying equidistance in this case is that equidistance cuts off the seaward extension of the coast of southwest

Newfoundland.

The coast we speak of here is the coast east of Cape Ray running toward the Burin Peninsula. This Newfoundland coast faces outward, faces southward, is at the back of an inner concavity. The equidistance line developed from the headlands of the concavity quite simply cut off the seaward extension of this coastal front within the inner concavity leaving it with virtually no influence on the delimitation in the outer area.

This situation was shown at figure 15 of the Newfoundland and Labrador Memorial. Nova Scotia had a great deal of fun criticising this figure but we believe it missed the point.

First, let me make the point clear. There is a coastal concavity. It is formed on one side by the northeast coast of Cape Breton Island. Cabot Strait is shared between the parties. There is a long southwest coast of Newfoundland stretching east from Cape Ray, and then there is the westward facing coast of Newfoundland across Fortune Bay to the Burin Peninsula.

Surely, St. Pierre and Miquelon lay close to the coast to the coast of Newfoundland within the coastal concavity that is so formed.

Figure 15 shown here is intended to demonstrate that the application of equidistance works in this concavity

just like it did in the North Sea cases, where it was accepted that the equidistance method was disadvantageous to the coasts at the back of the concavity.

Certainly the geography isn't identical. So what are Nova Scotia's criticisms? They are basically three. First, Nova Scotia quibbled with our graphics, and I'm not going to go down that road. Second, they refer to the fact that we have ignored the Canada-France Award for the purpose of this figure.

I suppose that is so, but I fail to see what that has to do with our point. As we know, the northwest quadrant of the Canada-France delimitation is an equidistance line, which is the equidistance line shown here between the Newfoundland and French islands. In itself that equidistance line, which extends for 24 miles, cuts off the extension of the southwest coast of Newfoundland. The fact that there is some further maritime area west of the area awarded to France that would be attributable to Newfoundland by an equidistance line between Nova Scotia and Newfoundland does not make that equidistance line equitable.

That equidistance line still hits the Scatarie Island, Burin Peninsula closing line near its mid-point attributing area without reference to coastal configuration or coastal proportionality.

Furthermore, while Nova Scotia does not say so, it remains clear that the Nova Scotia, Newfoundland equidistance line soon crosses the French corridor, which is not shown on these figures. And even Nova Scotia must admit that at that point the southwest coast of Newfoundland has been totally squeezed out of the picture by a Nova Scotia, Newfoundland equidistance line.

This also answers Nova Scotia's third criticism, which is to the effect that the Newfoundland and Labrador line in the innermost part of the inner concavity and the equidistance line in that same area, run at nearly the same bearing. Thus, Nova Scotia finds our criticisms of the equidistance line misplaced. Of course the answer is that it is not so much a question of where the equidistance line starts as where it ends up. That is a longstanding lesson that we have learned from the North Sea Continental Shelf cases.

In summary, the cut-off of the extension of the coast of Southwest Newfoundland is a fundamental and classical reason why equidistance should not be used as a delimitation method within and beyond this coastal concavity.

The fourth objection to equidistance, which also concerns the same cut-off problem, pertains to the fact that the equidistance line encroaches or cuts off the

seaward projection of the southeastern Nova Scotia -- or Newfoundland and Labrador coast, and Newfoundland coast east of the Burin Peninsula.

This is a particularly important matter in this case, and as we addressed yesterday the matter, Nova Scotia calls upon the Tribunal to discard the geographical analysis of the majority in the Canada-France case.

Figure 1 from Newfoundland and Labrador's Memorial is now on the screen. This figure is entitled "The Geographical Setting", and it shows the Canada-France delimitation line.

Nova Scotia asserts its entitlement to area east of the St. Pierre Miquelon corridor. Nova Scotia deems irrelevant that the majority opinion in Canada-France found that the seaward projection of St. Pierre and Miquelon towards the south was unobstructed by any notion of an eastward projection of the coast of Nova Scotia.

This finding by that tribunal was a major defeat for Canada in that case. It was an essential element of that tribunal's reasoning which denied Canada the enclave it sought around the French Islands. Nova Scotia now asks this Tribunal to cast the earlier tribunal's finding out the door.

In Newfoundland and Labrador's submission, however, if the French Islands have an unobstructed projection towards

the south, not encumbered by the eastward projection of Nova Scotian coast as the earlier tribunal categorically stated, so too must the coast of Newfoundland further to the east have an unobstructed projection toward the south, but this is denied by the equidistance line in the outer area. That is the fourth reason why Newfoundland and Labrador chooses not to apply the equidistance method in this case.

Yes, Professor Crawford?

PROFESSOR CRAWFORD: Mr. Colson, the relevant passage in the -- in the Canada-St. Pierre Miquelon Award is paragraph 73, where the tribunal rather briefly discusses and rejects the Canadian argument based on the coasts of Nova Scotia. And there are actually only two sentences of reasoning, apart from the repetition of the formula that the coasts project frontally.

And the crucial sentence is this: "It is questionable whether the area hypothetically corresponding to Nova Scotia would reach the maritime areas towards the south, appertaining to St. Pierre and Miquelon." So the word used is "questionable".

The problem with that is that the tribunal didn't really discuss -- the tribunal in this case didn't really discuss the hypothesis in question in any detail at all. They simply said it was questionable. And much would

depend on exactly how the line was drawn. If you take -- if you go back to your graph of respective claims comparing to full and no effect equidistance. I mean, it's certainly true that the Nova Scotia claim line cuts right across, and the full effect equidistance using Sable Island, does. But the no effect equidistance is rather different, isn't it? You have it there? Yes. And yet one would have thought, the point is accentuated, because you're not taking the line out to the outer edge of the continental margin.

But if you were to do that notionally, and if you were to assume that the French claim to the outer continental shelf beyond the corridor was upheld in some way, then pretty clearly there is an effect, and I just find it difficult to accept on a moderate assumption as to what was going to happen that the Nova Scotia coast would not reach maritime areas towards the south appertaining to St. Pierre and Miquelon. I quite see the difficulty with some of the lines as were more north. But if you're looking to the outer continental shelf, it does appear that the -- that there's a problem of conflicting projections taken from the main Nova Scotia coast, if you like.

That's -- I'm just really putting that as a hypothesis. I would be interested in your comments.

MR. COLSON: Well, I don't think there's any question that

even Newfoundland and Labrador's claim line, if we were sticking to, should I say a very rigid perspective on the analysis that one could take from paragraph 73, we might have dropped a line of longitude down the side of the corridor in some fashion, which might have been -- we might have been able to argue that it was consistent with the reasoning of the tribunal.

We chose -- we did not believe that was appropriate. Clearly, even our line will intersect an extension of the corridor further to the south. So far as I know, there are no formal claims in that area on behalf of France. We don't know what may be going on in the diplomatic discussions. But the delimitation that was done in that case extended to 200 miles.

And this Tribunal now, I would submit, is free to construct its own delimitation, as if these two provinces are states in international law, and delimit area that is south of the corridor. I don't see any prohibition in the way that, if this was a tribunal between sovereign states, and this matter was before them arguing about the area south of the corridor would be something that would be appropriate, and our analysis of the geography takes a line south of the corridor.

PROFESSOR CRAWFORD: Yes, that's undoubtedly true. And obviously there's no difficulty in now making an award

which is -- applies as between two Canadian Provinces. It will obviously be subject to the ultimate resolution of any dispute between France and Canada, as to outer continental shelf beyond the corridor, to the south of the corridor. That's a matter which we can't effect one way or another, and will be whatever it is.

My point was really this, that if you take into account the outer continental shelf, both for St. Pierre and Miquelon and also for Newfoundland, it ceases to be plausible that the area hypothetically corresponding to Nova Scotia will not reach the areas in question. The further out you go, the less plausible that appears to be. It only -- it was only plausible for the tribunal in St. Pierre and Miquelon, because they were able to say, somehow, that they had no jurisdiction beyond 200 nautical miles.

MR. COLSON: And again, I think my response would be that we -- our own analysis of the geography takes the extension of the coast out beyond 200 miles, and where we would find it appropriate to draw a line as between Nova Scotia and Newfoundland, south of the corridor, that would, in effect, be an acknowledgement of the extension Nova Scotia's coastal front that far out.

CHAIRMAN: I come back to what Professor Crawford said, that the term "questionable" is hardly a strong finding of

fact. I mean, if the word "debatable" were used, it wouldn't mean much -- anything very much different. It's questionable where it's going to reach. Well, have they measured it? Any stand point? I mean, it's just -- it's not a very strong finding of fact. And you have relied upon it at times as if it were, and in your Memorial, as if it were a strong finding of fact, and I find it difficult to attach that strong --

MR. COLSON: I think, Mr. Chairman, when one looks at the words of judgments, I think it's important also to look at the arguments that the parties were making at the time.

And here we had an argument that was going in that case where the issue was between Canada -- Canada's interest in enclaving France to a very, very small area. France arguing for an equidistance line around the islands, which would have given them substantial area out there.

The Court there found that there was a seaward projection, that St. Pierre and Miquelon was entitled to the south. They also gave them the top of the mushroom in the inner concavity. And I think that that analysis, if that tribunal was sitting here today, I think they would find it very hard to be looking at lines that cross the corridor. They -- the way they look at the geographical circumstances of that case.

PROFESSOR CRAWFORD: Well I think that's quite clear. And if they were here they might tell us what they -- what reasoning lay behind their use of the word "questionable". The problem is they're not here. This may be a difficulty. And we have to guess what they meant.

Now obviously, the argument was decisive in the rejection of the Canadian argument for a Channel Islands type enclave. They simply rejected that, and that is not in issue in this case. Except to the extent that the maritime zones appertaining to St. Pierre and Miquelon might be a relevant circumstance.

But the question we are concerned with is a line, which if it does not cut the corridor, at least might be in proximity to it. And the difficulty is in giving much credibility to reasoning which uses the word "questionable", and which doesn't give much by way of reasons for -- in relation to the geographical area well to the south. And in relation to areas beyond 200 nautical miles. That's the problem. It's fine in the -- as it were in the inner area, but it doesn't seem very cogent in the outer area.

I'm simply putting this as a hypothesis, because we -- as you know, this is simply a discussion of trying to understand the basis of an Award which is undoubtedly relevant.

MR. COLSON: I did not have the privilege of participating in that particular arbitration. And it's quite surprising, frankly, when some see some of the maps that were used in the Canadian presentation in that case, to -- I think I can see where the genesis of some of those maps came from.

But, it does, and I frankly have only since participating with this team been privy to the arguments, because they, of course, are confidential.

So all I had to go on was the fact that what the tribunal said. But it seems to me clear, again, that the way that they had to -- they analyzed this geography in the circumstances of the case that was brought before them, that they saw the dominant, and I don't want to get into a primary, secondary coast discussion. But they saw that there was a strong southward orientation of the Canadian coast off the whole southern projection of Newfoundland's coast. And they saw a need to award the French Island a quarter. There had been a precedent in the France-Monaco Agreement for a quarter of this nature. They saw the need to do that. And they had to defeat the Canadian argument that that was inappropriate, and that the coast of Nova Scotia extended eastward, and would not have provided for such a quarter, and the tribunal used the language, in paragraph 73, I understand it says

"questionable", and that leaves some room for interpretation.

We have looked at the geography, and we see that there is reason to have a line that is not a line of longitude that simply drops down the side of the corridor, which would be, I think, rigid adherence to the way that the tribunal looked at the case. We have looked at the geography, we have tried to construct a method that reflects the geography using a perpendicular to a closing line that comes out of the concavity, adjusting it for proportionality, and that line runs at an angle that would intersect the corridor south -- would intersect an extension of the corridor south of the 200 mile limit of the corridor, were that to be an extension ever to come about.

I have given four reasons why Newfoundland and Labrador rejected equidistance. The fifth, we have just been talking about to some extent. Quite frankly, is that the equidistance line takes no account of the French corridor. It cuts through it, it perhaps jumps over it, it goes around it, but it certainly doesn't take account of it.

I might now turn to just note before I finish that all of the reasons for finding that equidistance is not appropriate could be abated if the Tribunal chose to use

the equidistance method, but nonetheless to modify it and adjust its application. However, as will be discussed in the following presentation by the Agent, other methods may be employed which more swiftly and simply lead to a boundary that is equitable and appropriate to the circumstances.

Let me now turn to the Nova Scotian view of equidistance. Having examined the reasons given by Newfoundland and Labrador for not using the equidistance method, it is time to see what Nova Scotia has to say about it.

First, we note that Nova Scotia embarks on no corresponding analysis to determine whether or not equidistance is appropriate in the case. Nova Scotia is quick to critique Newfoundland and Labrador's analysis in this regard, but Nova Scotia offers no direct analysis of its own. It simply assumes that its line, which it believes exists in the practice of the parties, trumps all other possibilities including equidistance. That's the basic Nova Scotia position. Yet, while that may be the basic position, it must be said that Nova Scotia insinuates throughout its pleadings the possibilities of an equidistance line without examining its characteristics. Nova Scotia's approach to equidistance is a subtle effort to lead the Tribunal in that direction.

After all is said and done about conduct, Nova Scotia knows there is not enough conduct -- enough common conduct in this case to meet the standards of international law to influence the choice of delimitation method. Thus, Nova Scotia searches for a method based in geography, and at the end of the day it finds one. In the conclusion to its Counter-Memorial, it discovers that its line, and I quote, "is very similar to that which would be obtained by another method, namely the extension of an inner equidistance line." It's important to focus on this for a moment, just to take in what Nova Scotia really is saying.

Nova Scotia presents its figure 53, which depicts all of the various and sundry basepoints used to construct an equidistance line in the inner area. Nova Scotia in many places refers to its line as a simplified median line in the inner area. So far, so good. There is no doubt that Nova Scotia's line in the inner part of the inner concavity has characteristics that may lead it to be called a simplified equidistance line. After all, we know how that line was constructed out to Point 2017 and it was, in fact, a rudimentary -- a rudimentary method that some might call a 1960's version of simplified equidistance. That was the case up to Point 2017.

But Nova Scotia's figure 53 extends the equidistance line well beyond Point 2017 to 46 degrees north latitude.

Please note carefully, if you will, the last two segments of the equidistance line as shown because I'm going to come back to them several times.

The last segment turns to the south relative to the preceding segment, and the second to the last segment shown on figure 53 is about 13 nautical miles long. This is how Nova Scotia presents equidistance in the inner area. For the outer area, Nova Scotia presents figure 79 of its Counter-Memorial, which is labelled "The existing boundary approximates an extended equidistance line". Of course, we know there is no existing boundary, especially so in the outer area, so what does Nova Scotia mean by this label?

It says "Figure 79 depicts a boundary based on an extension of the equidistance line drawn from the last two opposite points on the inner coasts, Scatarie Island, Nova Scotia, and Colombier Island, Newfoundland."

What about this, the extension of an inner equidistance line for the outer area? After all of Nova Scotia's criticisms of Newfoundland and Labrador, here we have a brand new proposed delimitation method, the extension of an inner equidistance line. You will not find this proposed method in the books. It has never been discussed in the International Law Commission. Beware, this is not simply a proposal to apply the equidistance

line in the outer area. It is something else. So what is it?

This method to the extent that we can understand it -- and we cannot be faulted because it appears from nowhere without explanation -- simply extends a line from the inner concavity into the outer area with no effort to decide whether doing so has any basis and just what line is this. Nova Scotia doesn't tell us. It is not the equidistance line developed from the nearest base points on both coasts. It is surely not the extension of the bearing of the final segment shown on Nova Scotia's 53 because that bearing of that line is more to the south. What it appears to be is an extension of that second to the last segment shown on figure 53 -- second to the last segment of a strict equidistance line in the inner area, one of many such equidistance line segments. The seaward point on this segment is constructed relative to selected isolated base points on Scatarie Island and Colombier Island. Nova Scotia's extended equidistance line appears simply to be the extension of one particular equidistance line segment that just so happens is placed and has a bearing similar to that of the Nova Scotia line. That 13 nautical mile line segment becomes over 450 nautical miles long if Nova Scotia has its way.

Now where did the extended equidistance line come

from? As I said, it's not even discussed in the pleadings, except in the most casual way. There's no citation to academic learning. There's no reference to language from a judgment of a court or tribunal, no state practice is cited. This may be the most novel delimitation method ever to be presented in a case.

Nova Scotia does suggest that its method is similar to that used in the Anglo-French award, but it doesn't explain how, and it cannot. The methodology employed by the tribunal in the Anglo-French case bears no relation whatsoever to what Nova Scotia proposes here.

On the screen is figure 8 from the Newfoundland and Labrador Memorial which shows the United Kingdom-France delimitation. Let us remind ourselves what the tribunal said and did in that case. The question arises for that part of the delimitation that is west of the English Channel in the area that is known as the Western Approaches. But before getting to that area, the area that is seaward of the Channel, in light of some of the questioning yesterday, it might be useful to take note of the fact that in the vicinity of the Channel Islands, the tribunal there awarded to France maritime area that is seaward of the area awarded to the United Kingdom attributable to the Channel Islands. Furthermore, you can see that the median line in the middle of the Channel from

Points D1 to D4 on the map is developed from French base points opposite to the Channel Islands.

Thus, there can be little doubt that this segment of French coast, the French coast forming the Golfe de Saint-Maio, was used both to develop the median line between the Channel Islands and that French coast, but it was also used, that same coast, to develop the median line between the mainland coasts resulting in a band of French maritime area seaward of the Channel Islands. As the tribunal in the Anglo-France case stated at paragraph 202 of its award, "The effect will be to accord to the French Republic a substantial band of continental shelf in mid-channel which is contiguous with its continental shelf to the east and west of the Channel Island region." This precedent clearly demonstrates that there is no rule that prevents the westward facing coast of Newfoundland in the inner concavity from projecting through the French islands and French maritime jurisdiction into the waters of the inner concavity.

Now let me turn to the outer area. The tribunal chose to use the equidistance method in the Western Approaches just as it had in the Channel, except for the enclave, but to give half effect to the British Scilly Islands. The Tribunal found in its award at paragraph 251, "The distance that the Scilly Islands extend the coastline of

the mainland of the United Kingdom westwards into the Atlantic onto the Atlantic continental shelf is slightly more than twice the distance that Ushant extends westward the coastline of the French mainland.

This map shows the point clearly. The separation between the Scilly Islands and the Cornwall Peninsula is about twice the distance as that between the French mainland and Ushant.

In the circumstances, the tribunal found that this fact required abatement, what the tribunal called, paragraph 249, an appropriate abatement of the disproportionate effects of a considerable projection on to the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom.

Thus the tribunal concluded from this fact to give half effect to the Scilly Islands.

Now what this has to do with Nova Scotia's extended equidistance line is not clear. Please examine with me our extended equidistance line revealed map. As I have said, Nova Scotia's extended equidistance line appears to be nothing more than the extension of one short segment of the equidistance line in the inner area, disregarding everything else, including all the other equidistance line segments. But it is described by Nova Scotia with reference to Scatarie and Colombier Islands.

We appreciate that Scatarie Island forms the headland of the inner concavity. But Colombier Island cannot be so viewed. There is Colombier.

Colombier's used by Nova Scotia as the outer most point on the Newfoundland and Labrador side of the inner concavity is a refashioning of nature of the first order.

But consider with me for a moment, because if we re-examine this map, we will discover that this short second to the last segment, the segment in yellow, this second to the last segment is not really controlled by Colombier Island. The effect of Colombier Island is simply to stop this segment of the equidistance line. In fact, given the way that equidistance line segments are constructed, Nova Scotia's extended equidistance line is simply the perpendicular bisector of the line that connects Scatarie Island down here and Ramea Island up here.

In its Memorial, Nova Scotia suggested that its line in the outer area could be defended as a geography baseline, because it discovered that the 135 degree bearing line runs through the mid-point of a line connecting Sable Island and Cape St. Mary's in Newfoundland. Mr. Willis discussed that yesterday. That's figure 51 from the Nova Scotia Memorial. That construction of figure 51 took some imagination and presumably a considerable trial and error exercise to make

the predetermined line fit into a geography based construction.

Nova Scotia has found yet another geography based notion, the extended equidistance line, and manipulated it so that the geometry and the geography conform to its predetermined line. To do so, it had to use Ramea Island as a headland, and disregard every Newfoundland geographic feature east of there.

Nova Scotia's reliance in its Memorial on Sable Island and Cape St. Mary's, and now on Scatarie, and Colombier, and Ramea Island to govern the entire delimitation in the outer area on the basis of the geographical relationship between just two pairs of isolated features alone, whether in application of the mid-point method of the Memorial or now on the new found method of the extended equidistance line, proves the point that equidistance is not appropriate in this case, if for no other reason than its reliance on incidental features without reference to the other geographic features of this case, including the concavity and including coastal proportionality.

It also proves that Nova Scotia is still struggling to find a convincing geography based method that will support its pre-determined line.

Let me now turn to the method employed by Nova Scotia in the first instance to support its position. That

method is to follow a line that it submits is based on the conduct of the parties.

Nova Scotia suggests that its boundary proposal stands foursquare with the method adopted by the International Court of Justice in its 1982 judgment in the Tunisia-Libya case for a part of the first segment of that boundary.

The Tribunal is now thoroughly familiar with the facts pertaining to the provincial cooperative effort in the 1960s and 1970s to achieve federal recognition of provincial offshore rights and to associated authorizations and assertions relating to oil and gas activity by the provinces that was nonetheless at all times conducted in a federal context.

In the first phase, the Tribunal found there was no agreement on a boundary. It also found even if, and I quote from the judgment, "Even if the inter-provincial 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." The Tribunal did indicate, however, that conduct may be relevant in the second phase for the process of delimitation. This is only an affirmation of what international law provides and which Newfoundland and Labrador does not deny. It is open to the parties to

address the issues of conduct as a relevant circumstance, and as an element of the delimitation method to be employed.

Newfoundland and Labrador does not deny that facts pertaining to conduct may be an element of the delimitation method to be employed in some cases. But Newfoundland and Labrador believes that the facts alleged by Nova Scotia in this case do not meet the standards employed in the only case where a court, in this instance, the International Court of Justice, saw fit to take conduct into account in a delimitation method. And that was in the Libya-Tunisia case.

It's important, therefore, to review carefully the facts of that case. The Libya-Tunisia case was brought to the Court by a special agreement that was signed on June 10th 1977. In the months leading up to the signing of the special agreement, specifically from early 1976 onward, there were several serious incidents between Libya and Tunisia involving naval units of both parties trying either to disrupt or to support drilling or seismic operations, and tensions had mounted to a crisis level.

The most famous of these incidents were the Scarabeo IV and JW Bates incidents, which began in mid-1976, about a year before the special agreement was signed.

Scarabeo IV was a drill ship operating under Libyan

authorization. It was owned by an Italian company. Suffice it to say that the Tunisian navy tried to run off the Scarabeo IV. The Italian navy -- the Italian navy showed up to protect Italian lives. The owners of the Scarabeo IV closed up shop. But the Libyan authorities were able to enlist another drill ship, the JW Bates, to resume operations. Then both the Libyan and the Tunisian navy showed up. This is by now early 1976 -- or early 1977.

A very serious dispute had emerged that included military standoffs. Fortunately within months the two countries had signed a special agreement taking the case to court.

Once the case was before the court, Libya suggested that the boundary ought to follow a meridian due north from the land boundary terminus adjusted in the offshore area. Tunisia suggested the boundary ought to run at a bearing of 45 degrees from the coast out to the 50 meter isobath. And thereafter that it ought to follow the orientation of something that was called a sheaf of lines. This marked a departure from prior Tunisian positions, which relied on equidistance seaward of the 50 metre isobath.

The court's depictions, and again these are the Court's depictions from the Court's judgment of these

positions, is now shown on the screen. It is a map of the southern Mediterranean Sea taken from the Court's judgment. We have added to the map a symbol depicting where the Scarabeo IV and JW Bates incidents occurred.

The Court was well aware of these -- this situation. The pleadings of the parties had gone through it in detail. The oral argument went through all of this in some detail. The Court found the positions of both parties as depicted here, the Libyan northern thrust proposal and the Tunisian sheaf of line proposal to be without merit, and it adopted a delimitation method that arose out of the facts of the case.

One aspect of those facts was the geographical circumstances of the case. A second aspect was the historical practice dating back to 1913 of a *modus vivendi* by the colonial powers, France and Italy, for a line that was used for fishery enforcement purposes. The third aspect was the fact that in the near shore part of the delimitation area, south of 33 degrees, 55 minutes north latitude, and west of 12 degrees east longitude, there had been a deliberate effort, a deliberate effort by Tunisia and Libya to avoid overlapping oil concessions for a period of approximately eight years. Using the delimitation methodology based on the facts of this case, the court delimited a two segment boundary.

The next figure is taken from the publication, International Maritime Boundaries. This is report number 8-9 from that series. Professor Charney and Alexander being the editors. We have added to that circle -- or to that figure, this red circle, which depicts those important coordinates that I will come back to several times in the next few minutes, 33 degrees, 55 north, 12 degrees east. It shows the full effect Lybia-Tunisia equidistance line, and the line drawn by the Court.

If one reviews this matter with some care, one will see that for the first three segments -- or for the first three quarters of the first or inner segment, where the three aspects of this case, geography, history and recent conduct coincided, the Court indicated its reliance on all three of those aspects to delimit the boundary.

However, beyond 33 55 north 12 east, where there was no history and no contiguous oil conduct existed, the Court could only have used and did only use coastal geography.

Let me begin by examining the geography of this case, which, no matter what Nova Scotia may say, was a key to the Court's decision.

If we focus for a moment on the equidistance line, we can see it leaves the coast at a direction that is almost due north. The reason for this northerly direction of the

equidistance line is the Libyan base point which falls on the protrusion on the Libyan coast near Ras Ajdir. You can see, however, that the general direction of the coast in the vicinity of the land boundary terminus has a northwest-southeast trend. Thus, I believe most observers would agree that the influence of Ras Ajdir on the equidistance line, making the equidistance line run almost due north is not in keeping with an equitable delimitation.

However, about 12 to 14 miles from the coast, the equidistance line turns back to the northeast. The change in direction is caused first by the large peninsula on the Tunisian coast and then by the Tunisian island of Djerba. Later at 34 degrees north, the equidistance line runs almost due east, influenced by Tunisia's Kerkennah Islands, and still later, the equidistance line adopts a final northeasterly bearing into the central Mediterranean Sea.

You can see for yourself how the line adopted by the Court in the first segment straightens out the equidistance line, and in the second segment, you can see how the Court's line parallels the course of the equidistance line. Of course, the Court's line turns eastward later than the equidistance line would turn, but once turned, it extends northward on almost -- it extends

seaward on almost the same bearing as the equidistance line would do.

Let me now refer for a moment to the historical situation, and then, perhaps, Mr. Chairman, it would be appropriate to take a break.

CHAIRMAN: Appropriate 15 minutes?

MR. COLSON: Let me just go through the history. We'll take a break, and then we can come to the oil concessions after the break. Let me refer to the historical situation.

The Court referred to a *modus vivendi* that developed between the Italian and French colonial powers in regard to fisheries enforcement in the early part of the 20th century. Going back as far as 1904, the authorities in Tunisia had claimed that the boundary should run at 45 degrees off the coast. Italy, as the colonial power in Libya, did not accept this, and in 1913 began to exercise enforcement authority west of that line and proposed a delimitation perpendicular to the general direction of the coast. Later, in 1919, Italy actually established regulations, referring to, and I quote, "The line perpendicular to the coast at the border point which is, in this case, the approximate bearing north northeast from Ras Ajdir." That's the Italian regulations as quoted by the Court. All of this is set forth in the Court's 1982 judgment at paragraphs 93 to 95.

After reviewing the long standing historical respect for the modus vivendi by both colonial powers, the Court concludes -- paragraph 95, "the respect for the tacit modus vivendi, which was never formally contested by either side throughout a long period of time, could warrant its acceptance as a historical justification for the choice of method for the delimitation of the continental shelf."

So without examining the oil concession practice, what do we have? First, we have a geographical situation where anyone can see that a perpendicular to the general direction of the coast straightens out the equidistance line, and more closely respect the geographical relationship of the adjacent coast of the two parties in the nearshore area. Moreover, we learn that the perpendicular was recognized and applied at an early date -- 1913. It had the status of a modus vivendi from 1913 forward, governing the offshore relationship of the colonial powers and their enforcement of sponge fishing regulations.

Admittedly, the Court, in the 1982 judgment, did not go into an elaborate effort to construct a perpendicular having regard to specific coastal directions, but that can hardly deny the fact that for more than 60 years before the case had got to the Court, the perpendicular was a

well-established fact, running, as the Italians said, at the approximate bearing north northeast.

That, Mr. Chairman, I would turn to the oil concession issues which may take some time, so perhaps this would be a good time to take a break.

CHAIRMAN: Thank you very much, Mr. Colson. We will take 15 minutes.

(BRIEF RECESS)

MR. COLSON: Thank you, Mr. Chairman. I was told at the break that I'm not allowed in Newfoundland because I don't know how to say "Ramea" properly. It is really "Ramea", and so I stand corrected. It must have been sort of a Latin flavour of "Ramea" -- you know. Nice sound.

We talked before the break about the geography and the history that was before the Court in its 1982 decision in the Libya-Tunisia case, and now we would like to look at how the oil concessions fit into that picture.

We have placed on the screen a map. This is out of the Court's rendition or the Court's documents of the pleadings of the parties -- the Court's publication of the pleadings of the parties. This is map 3 from the Libyan Memorial with our title on it. It's reproduced in volume 6 of the Court's documents as map 41, and it depicts two key concessions.

We have, as we will do in a number of these figures --

we keep adding and bringing your eye to this particular point, 33 55 north, 12 degrees east, simply because that is the seaward point at which there was any alignment in the concessions.

Now this particular map depicts the two key concessions, one Tunisian and one Libyan. The map itself is in error because it dates the Tunisian concession 1967. That Tunisian permit was actually issued in October of 1966. The coordinates of the concession were known -- were widely known and they formed the purple shaded area on the map. Between the listed points 5 and 41 of that concession, the coordinates formed a well-defined stepped eastern limit that generally approximated a 26-degree line from the land boundary terminus. The northeastern point on this stepped limit fell at 33 degrees, 55 north, 12 degrees east.

Libya followed Tunisia less than two years later by granting a concession in April of 1968. It was Libya's first offshore concession in this area. During the case, Libya argued that its 1955 Petroleum law had itself claimed a due north line from the land boundary terminus and Libyan pleadings opine that Libya had showed restraint and had conformed the western limit of its concession area with the eastern limit of the Tunisian area, notwithstanding the formal Libyan position. The Libyan

concession is shown here in green hash marks. It's referred to as "Libyan Concession 137". It is described in the Libyan pleadings as a "line running south southwest from 33 55 north, 12 degrees east." The Agent of Libya told the Court that it was Libya's intent to conform its concession with that of Tunisia's. Libya did not at any stage provide the Court with the exact coordinates of its concession area, however, with the exception of the reference to 33 55 12.

As the case may be, beginning in April of 1968, therefore, south of 33 55 north and west of 12 degrees east, a deliberate pattern of practice was emerging to avoid difficulties and to have a common line separating the concession activities of both countries, even though this did not reflect the formal boundary position of either country.

In 1972, the situation pertaining to offshore concessions northeast of 33 55 north 12 east began to develop. In 1972, Tunisia issued a concession that included substantial area to the east of an extension of the 26-degree line, and in 1974, Libya issued a concession that followed the 26-degree line northward.

Other overlapping concessions were granted. Thus, after 1974, there was a substantial area of overlap but only north of 33 55 degrees north, 12 degrees east. The

overall picture as of 1974 is shown on another map, this one taken from Libya's oral argument. It is map 121, in volume 6 of the Court's documents. You can see the 1966 Tunisian concession in red and the Libyan concession in yellow.

The next figure is a map from Tunisia's oral argument. This map is quite difficult to read and we have added the strong green colored lines to emphasis the area of overlap. What it shows is that by 1976 Tunisia had crossed over the 26 degree line in the inner area south of 33 degrees north, 12 degrees east, 33 55 north, 12 degrees east.

Thus, Tunisia was beginning to claim a large part of Libya's block 137. That was notwithstanding the fact that at least according to the Libyan Memorial and it goes -- or Libyan Counter-Memorial and it goes unchallenged by Tunisia -- that more than 15 wells had been drilled in Libya's concession 137, and that there was at least one substantial discovery by virtue of one of those wells.

In summary, in the immediate offshore area extending out about 50 miles from the coast, out to 33 55 north, 12 degrees east, there had been a common oil concession practice following a 26 degree line which had held for eight years, from 1968 to 1976. This line was not supported by either country as a boundary position. But

it did conform to a line perpendicular to the general direction of the coast. And it respected 60 years -- 60 plus years of historical practice started by the colonial powers.

In the year the case came to the Court, in the 12 months leading up to the case coming to the court, that corresponding oil concession practice in the near shore area broke down because of new Tunisian claims. And those claims ultimately took the form of Tunisia's sheaf of line claim, which it made before the Court. Seaward of 33 55 north, 12 degrees east the concessions had always overlapped.

Thus as the Court was considering its case, it had before it the facts that had led up to a crisis that had resulted from the departure, frankly, of an established oil and gas practice that had been founded in the historical and geographical relationship between the parties.

So with these facts in view what did the Court do? A close reading of the paragraphs of the Court's judgment pertaining to delimitation method, they are paragraphs 114 to 129, is instructive. And again, these are the paragraphs of the Court's judgment where they are specifically talking about method.

Paragraph 114 begins, "Any examination of methods,

like the examination of applicable rules and principles, must take as a starting point the particular geographical situation and especially the extent and features of the area found to be relevant to the delimitation." That's how the Court starts its analysis of method. It must take as a starting point the particular geographical situation.

After discussing the relevant area, the Court concludes that a two-segment approach is called for. The Court begins its discussion of the first segment at paragraph 117. This is one of the paragraphs that is much quoted by Nova Scotia. The paragraph begins, "The circumstance alluded to in paragraph 113 above, which the Court finds to be highly relevant to the determination of the method of delimitation is a circumstance related to the conduct of the parties."

It is interesting to go back and take note what paragraph 113 was talking about. That's one of those paragraphs where the Court is knocking down the arguments of both sides and saying this doesn't count and that doesn't count. But there is one thing that they haven't talked about and that was the point that they were alluding to in this paragraph when they start "The circumstance alluded" in paragraph 113, which the Court finds to be highly relevant.

The court then takes note of the abutting oil

concessions south of 33 55 and refers to the appearance on the map of a de facto line running at a bearing of about 26 degrees true.

The next paragraph, paragraph 118 includes another oft cited provision. "It is evident that the court must take into account whatever indicia of the line or lines which the parties themselves may have considered equitable or acted upon as such."

The Court continues at paragraph 119. A further relevant circumstance is that the 26 degree line thus adopted was neither arbitrary nor without precedent in the relationships -- in the relations between the two states.

The court then goes on to recall that there had been a modus vivendi between the colonial powers. As the Court said, "A modus vivendi concerning the lateral delimitation of fisheries jurisdiction expressed in de facto respect for a line drawn from the land frontier at approximately 26 degrees to the meridian which was proposed on the basis that it was perpendicular to the coast."

The Court concludes its discussion of method for the first sector at paragraph 121, finding that the 26 degree line therefore reflects all appropriate factors.

Now Nova Scotia would have you believe that the Court's reference to highly relevant in paragraph 117 alluding to oil concessions as compared to a further

relevant circumstance, which referred to the other circumstances in paragraph 119, set up a hierarchy.

Indeed in paragraph 126 of its Counter-Memorial Nova Scotia goes so far as to say the perpendicular in question is a line derived solely from conduct.

The Tribunal will have to judge for itself whether it finds this sort of word parsing convincing. A perpendicular is a perpendicular. That is what Italy proposed as a Maritime boundary in 1913. A perpendicular makes sense geographically as a way to ensure against the distortion of equidistance in the presence of distorting features, in this particular circumstance. And it was followed in the practice of the parties up to a year before they came to the Court, both as a historical *modus vivendi* and later as a *de facto* limit between the respective oil concessions.

Now on the screen is the Court's line on the map of the overlapping concessions as of 1974 from Libya's Memorial. We have placed the Court's line there. It is in white and it also shows that point at 33 55 north, 12 degrees east, which was the seaward limit of the abutting oil concessions.

One thing we can readily see is the Court followed the perpendicular line, the 26 degree line, well north of where the Libyan and Tunisian concessions abutted. More

than 15 miles beyond the point that was the northernmost point of abutting concessions, at 33 55 north, 12 degrees east.

Now that tells us something, does it not? That tells us that from the land boundary terminus northward past the 33 degrees 55 minutes north latitude, to the latitude of the western most point of the Gulf of Gabés which is the northern end of the first sector, well beyond the reach of the area of corresponding conduct, the Court's delimitation method was a perpendicular to the general direction of the coast.

South of 33 degrees 55 minutes north latitude, it may have been a line based on a combination of factors. But certainly north of 33 55 north as the line continued to be a perpendicular to the general direction of the coast, there was no history, no abutting concessions. The line here is a line solely based in geography.

In our view, the question whether geography was more important to the delimitation than conduct for the first 50 miles in the Libya-Tunisia case doesn't really get to the point. What is more telling for the present circumstances is that there was a concordance among the various considerations. Here in the Nova Scotia, Newfoundland and Labrador case, quite simply there is not. What is more important for present circumstances is that

the corresponding historical conduct in Libya-Tunisia reached back more than 60 years. Here it does not.

What is more important is that in Libya-Tunisia the conduct concerning abutting oil concessions was admittedly deliberate, it was recent. It was ongoing. And it had led to significant activity by both sides in close proximity along the abutting sides of the two concessions over an eight year period without protest, and was only abandoned the year before the case came to the court. There is nothing like such recent significant activity in this case.

What is more important is that in the Libya Tunisia case there was reference to a classical delimitation method, the perpendicular to the general direction of the coast. No such recognized methodology conforms to the Nova Scotia line.

Of course the Court turned the 26 degree line, the perpendicular line when it found that it was required to do so by the geographical circumstances at the latitude of the western most point in the Gulf of Gabés because of the eastward facing coastal front of Tunisia.

And make no mistake that it was the perpendicular to the general direction of the coast that is being turned. That perpendicular is now well beyond the area of corresponding conduct. And it was time for the

perpendicular to be turned because of the effect of geographical features other than those referenced to the direction of the coast near the land boundary.

Now how did the Court turn the perpendicular? It could have turned the line so that it paralleled the Tunisian mainland coast, or it could have turned the line so that it paralleled the Tunisian coast as defined by the Kerkennah Islands. However, it chose instead to take the bisector of the angle of those two directions, thus in effect giving Tunisia half credit, if you will, for the Kerkennah Islands in the application of this methods.

The Court's figure demonstrating this method is on the screen as it appeared as figure 9 in our Memorial.

Returning to the first segment --

PROFESSOR CRAWFORD: Mr. Colson --

MR. COLSON: Yes.

PROFESSOR CRAWFORD: Oh sorry. Just on that illustration there --

MR. COLSON: Yes.

PROFESSOR CRAWFORD: -- the Court didn't turn the line so as to create a perpendicular in the closing line of the Gulf, did it?

MR. COLSON: No.

PROFESSOR CRAWFORD: No.

MR. COLSON: It created the line from what it found to be

the western most point of the Gulf of Gabés to Ras Kaboudia. It created a line from the western most point of the Gulf of Gabés out along the outer segment of the Kerkennah Islands. It split that angle, and it moved that bearing over to the latitude of the western most point of the Gulf of Gabés, where the perpendicular had intersected that line.

PROFESSOR CRAWFORD: So the influence of the closing line was simply to determine the point at which the change occurred?

MR. COLSON: Of the closing line?

PROFESSOR CRAWFORD: The significance of the closing line of the Gulf was simply to determine the point at which the change of direction occurred?

MR. COLSON: It -- the closing line on that -- on this map --

PROFESSOR CRAWFORD: Yes.

MR. COLSON: -- perhaps is simply a line of longitude that is -- there is not supposed to be a closing line of the Gulf of Gabés on that map.

PROFESSOR CRAWFORD: Isn't there?

MR. COLSON: No.

PROFESSOR CRAWFORD: The reason --

MR. COLSON: That is -- that's a line of longitude.

PROFESSOR CRAWFORD: I wasn't actually thinking about that

line, I was thinking about another line.

MR. COLSON: The line -- yes. The line that is a line of latitude denotes the western most point of the Gulf of Gabés.

PROFESSOR CRAWFORD: Right.

MR. COLSON: And that's where the Court determined to shift from the perpendicular, from the 26 degree line, to another line that was influenced by the change of direction of the Tunisian coast.

Back to the first segment. The Tribunal will recall that in its Counter-Memorial, Newfoundland and Labrador drew the Tribunal's attention to the 1985 judgment of the Court on Tunisian's application for a revision and interpretation of the 1982 judgment.

Tunisia requested that the judgment be revised concerning the first sector, because a new fact had come into its possession. It also requested the Court to interpret its judgment in the first sector.

The new fact that Tunisia had in its possession was -- were the precise coordinates of Libya's concession 137, which had never been part of the record before the Court. And those coordinants revealed a rather slight overlap between the Libyan and Tunisian concessions, and certainly not perfect alignment.

Rather than following the strict methodology suggested

by the Court in the dispositif to its 1982 judgment, Tunisia requested a revision of that judgment that would ensure that its particular concession would not be in any way affected.

Now to save time, I won't get into all of the various technical points that Tunisia raised. What is important for us, I believe, is to note what the Court did with Tunisia's request for revision and interpretation.

Article 61 of the Court's Statute says, "An application for revision of a judgment may be made only when it is based on the discovery of some fact of such a nature as to be a decisive factor, which fact was when the judgment was given unknown to the Court, and also to the party claiming revision, always providing that such ignorance was not due to negligence."

The Court found unanimously that Tunisia's request for a revision of the judgment was inadmissible. The Court found that Tunisia's request for revision was inadmissible because of Tunisia's own negligence in not uncovering what the Court regarded to be a readily ascertainable fact.

Of more importance to us, the Court dealt with the request for interpretation, however, with reference to the standards that are set out in Article 61 of the Court's Statute, namely, were the abutting concessions without overlap? A decisive factor in its 1982 judgment.

The answer of the Court, in its dispositif, in its 1985 judgment, was that the meaning and scope of that part of the judgment which relates to the first sector of the delimitation are to be understood according to paragraphs 32 to 39 of the present judgment.

Now I'm not going to read you the full text of these eight paragraphs.

Surely the Court noted that it had been obvious all along that there was not perfect alignment simply because Tunisian's eastern limit was a step line and Libya's western limit was a straight line.

Now, Nova Scotia may find some comfort in that the Court upheld its line, even though there was some slight overlap. However, I believe it's important not to lose sight of the broader picture. And here, if I might read a portion of paragraph 35. After noting that Tunisia had considered the entire decision of the Court in the first sector to be based on a perfect alignment of permits and concessions, the Court said "This seems to the Court to be an over-simplification of its reasoning. In the first place, it should be recalled that in the operative clause of its judgment the Court defined the relevant circumstances to be taken into account in achieving an equitable delimitation as including the following: The definition of the area relevant to the delimitation; the

general configuration of the coasts of the parties, in particular the marked change in the direction of the Tunisian coastline between Ras Ajdir and Ras Kaboudia; the existence and position of the Kerkennah Islands; the land frontier between the parties, and their conduct prior to 1974, in the grant of petroleum concessions, resulting in the employment of a line seawards from Ras Ajdir at an angle of approximately 26 degrees east of the Meridian, which line corresponds to the line perpendicular to the coast at the frontier point which had in the past, for over 60 years, been observed as a de facto maritime limit, including the zones -- or the respective zones of sponge fishing, and the element of a reasonable degree of proportionality between continental shelf areas, and the length of the relevant part of the coast. The line resulting from the grant of petroleum concessions was thus, by no means, the sole consideration taken into account by the Court."

Thus, the method for the near shore portion of the first segment of the boundary in the Libya-Tunisia case arises from the coincidence of a number of considerations. Geography, historical practice, and recent conduct. There can be no doubt of the Court's reliance on geography as the sole relevant circumstance in the second segment. There can be no doubt of the Court's reliance on geography

as the sole relevant circumstance for the last or seaward 15 miles of the first segment. There can be no doubt that all of the factors led to the same result in the innermost part of the first segment.

We cannot know what the Court might have done if those circumstances had pointed in a different direction. Yet we see clearly the prevalence of a geography based delimitation method throughout this case, and we see clearly that both the historical conduct and the oil concession conduct, followed a line proposed in 1913 as a perpendicular to the general direction of the coast. A line that is founded in geography.

Nova Scotia's contention that conduct was decisive overstates what the Court said and what the Court did in its 1982 judgment.

In summary, Nova Scotia's sole reliance on the method of the Court in the first segment of the boundary in the Libya-Tunisia case to support its position simply doesn't work. Because Nova Scotia doesn't have the facts. The concordance of geography based on method with more of a geography based method with more than 60 years of practice and history, including eight recent years of oil concession activity. Nova Scotia overstates its case, and it comes up empty.

Now I would like to leave the Libya-Tunisia case and

move to the Gulf of Maine case.

PROFESSOR CRAWFORD: Mr. Colson, just before you do --

MR. COLSON: Yes.

PROFESSOR CRAWFORD: -- have there been any Tunisian --

sorry. Have there been any drilling, or other oil activity on the basis of Tunisian permits, to the east of the oil practice line? You say that there was some overlap, and particularly as time went on.

MR. COLSON: And south of 33 --

PROFESSOR CRAWFORD: Yes.

MR. COLSON: -- 55? I think -- I would be happy to look at that specifically at lunch. I -- there may have been a few -- they were putting out marker buoys, and there wasn't -- people weren't drilling wells, but they were putting out marker buoys, and they were each -- each side was tearing up the other's marker buoys. There may be some of that, but I will get back to you on that specifically.

Most of the -- if you will, the difficulties were north of 33 55. But there was a Tunisian claim in the Libyan area.

I would now like to bring in a map of the Gulf of Maine case. This map shows five lines. And from left to right on the screen, they are labelled "The Revised Canadian Claim", "The Canadian Claim Equidistance", "The

Boundary Determined by the Chamber", "U.S. Claim",
"Revised U.S. Claim".

Now, this case does not need a long introduction to this group in this room. Many of us participated in that case. And the Bay of Fundy and the Gulf of Maine are not far away.

But I do think it would be useful to go carefully through the delimitation method that the Court used in these geographical circumstances. And it might also be instructive for a moment to review with you the genesis of the other lines shown on this map, simply because of the passage of time.

To begin, you can see the Canadian claim, the equidistance line. Canada's line first appeared, I believe it was 1964. In the case Canada argued that because of United State's oil and gas related conduct, the United States had acquiesced in the equidistance line. Alternatively, Canada argued that the same conduct created a de facto limit that should be followed by the Chamber, just like Canada said the Court did in the Libya-Tunisia case.

The next line which appeared was the United State's 1976 claim, which ran through the middle of the northeast channel. You will recall that after the 1969 decision of the Court in the North Sea cases, the Court's references

to natural prolongation in that judgment were taken literally, at least by some, and sea floor depressions and structures around the world were examined to see if they might indicate an advantageous boundary position.

In 1976, of course, the North Sea cases was the only maritime boundary case that had been rendered in the post World War II period up to that point.

The Northeast Channel line left to the United States the entirety of Georges Bank, notwithstanding that the Northeast Channel is not much more than a cartographic feature described by the 100 fathom or 200 metre isobath.

This Northeast Channel line, which was defined based entirely with reference to sea floor topography, was first published on the occasion of the publication of the limits of the United States 200 nautical mile fisheries zone in November of 1976.

Canada followed about a year later with a new line notified to the United States in November of 1977, which is shown here as the revised Canadian claim.

You may recall that the decision, which we spoke of earlier of the Tribunal in the Anglo-French case was issued in June of 1977, as noted there, as we noted earlier, the tribunal there determined to apply the equidistance method in the Western Approaches to the Atlantic, but to do so by giving the Scilly Islands half

effect.

Canada on this basis, as Canada said based on the development of the law, changed its position in the Gulf of Maine from that of a strict equidistance line position to a position to employ the equidistance method, but without reference to the existence of Cape Cod or Nantucket Island. They should not be used as equidistance basepoints at all.

The fourth line which emerged for the first time in the United States Memorial is labelled here as the revised United States claim. It was known in the case as the adjusted perpendicular line.

There were several reasons for the United States claim. You may recall that the Memorials in the Canada-United States case were filed in the same year, but after the 1982 judgment of the Court in Lybia-Tunisia, which came out in February of that year.

In Lybia-Tunisia, the Court had given short shrift to arguments based on sea floor topography or geology. And in light of their pronouncements, the United States Northeast Channel line did not look too good. Plus there was the undeniable fact that Canada had expanded its claim. There was also the fact that the case offered for the first time the opportunity to consider ecological ocean systems and fishery issues as perhaps relevant. And

fundamentally, there was the requirement to project a United States line based in geography. Thus the adjusted perpendicular line emerged, a line said to be perpendicular to the general direction of the coast, but adjusted not to cross fishing banks on the Scotian shelf.

The Chamber adopted a method based solely in the geography of the delimitation method -- delimitation area. It took no account as a relevant circumstance the various arguments put forward by both countries concerning fisheries. The United States had promoted the notion that boundaries should respect the unity of fish stocks, and that boundaries should promote single state fisheries management.

Canada argued that the delimitation line should reflect the economic dependence on fishery resources, and the relative capability to deal in socio-economic terms with the line that might be established. None of these arguments led the Chamber toward an appropriate delimitation method.

Canada did, of course, make a strong argument, however, concerning oil and gas activities that related specifically to delimitation method. An argument for the equidistance line. An argument that sounds a lot like Nova Scotia's argument in this case.

So before I look at the Chamber's method in the

geography, it might be useful to review for a moment the specific argument and what the Chamber said.

In the Gulf of Maine case, Canada argued that the conduct of the respective federal authorities concerned with offshore oil and gas activities either constituted acquiescence by the United States in the equidistance line across Georges Bank, or that the same conduct constituted a modus vivendi or de facto maritime limit.

It's interesting to note that the United States-Canada activity concerning the development of North America's offshore petroleum resources argued by Canada in the Gulf of Maine case occurred in the same context as the conduct concerning offshore petroleum resources, which has been addressed in this case.

Surely, offshore petroleum exploration and exploitation programs were accelerating in both countries during this period. Surely, the provinces, as were the states in the United States, pursuing within their respective constitutional systems, the right to have or share in the benefits of those resources.

In the Gulf of Maine case, Canada showed that it had begun in 1964 to issue permits for hydrocarbon exploration and exploitation on its side of the equidistance line on Georges Bank. Seismic research was carried out pursuant to those permits. Canada argued that the relevant United

States authorities, in this case a Mr. Hoffman, of the Bureau of Land Management of the United States Department of Interior, corresponded with Canadian authorities about the precise location of the equidistance line and the basis on which it was established. Canada noted that it was not until late in 1969 that the United States made clear for the first time that it had an objection to the Canadian activity on Georges Bank.

The Canadian -- the Chamber reacted to Canada's arguments as follows. As for acquiescence and estoppel, the Chamber made several comments about the lack of attention to business by the United States. There are a number of digs at the United States, and some of them are almost amusing, as a old bureaucrat. Paragraph 140 says, "the United States showed a certain imprudence in maintaining silence after Canada had first issued permits." Paragraph 141 says, "the attitude of the United States revealed uncertainties and a fair degree of inconsistency." Paragraph 141 also includes the phrase, "the United States' attitude was unclear and perhaps ambiguous."

Notwithstanding these references, however, the Chamber found that the conditions for invoking acquiescence and estoppel were not present.

Just as Nova Scotia does here, Canada in the Gulf of

Maine case relying on the Lybia-Tunisia case, which by that time, by the time we were arguing this case, we now knew what the Court said in Libya-Tunisia. It was fresh in our minds. Also argued that this same oil and gas related conduct was a relevant circumstance that demonstrated a modus vivendi or a de facto maritime limit.

It's important to recall specifically what the Chamber said. And I apologize for the long quote here, but I think it's important. It comes at paragraph 149 to 151 of the Court's judgment -- Chamber's judgment.

"Independently of the arguments derived from the conduct of the parties for the purpose of establishing the existence of acquiescence or estoppel, Canada has also requested the Chamber to find that the conduct of the parties proved at least the existence of a modus vivendi maritime limit or a de facto maritime limit based on the coincidence between the Canadian equidistance line, the strict equidistance line, and the United States BLM line, which it claimed was respected by the two parties, and by numerous oil companies from 1965 to 1972, at least. Canada bases this conclusion on the reasoning and pronouncements of the Court in the Libya-Tunisia case. The United States not only denies that its petroleum and gas permits respected any particular line, see the analysis of the facts relating to the acquiescence and

estoppel above, but also denies the very existence of the BML line."

"Without going into these differences of detail, the Chamber notes that even supposing that there was a de facto demarcation between the areas for which each of the parties issued permits, Canada from 1964 and the United States from 1965 onwards, this cannot be recognized as a situation comparable to that on which the Court based its conclusion in the Tunisia-Libya case. It is true that the Court relied on the fact of the division between the petroleum concessions issued by the two states concerned. But the it took special account of the conduct of the powers formally responsible for the external affairs of Tunisia, France, and of Tripolitania, Italy, which it found amounted to a modus vivendi, and which the two states continued to respect when, after becoming independent, they began to grant petroleum concessions."

"Moreover, in the Chamber's opinion, the period from 1965 to 1972, at least, which according to Canada is the one in which the modus vivendi was instituted is too brief to have the produced -- to have produced a legal effect of this kind, even supposing that the facts are as claimed."

Now with this perspective, let us examine the delimitation method employed by the Chamber in this case. The maritime boundary determined by the Chamber is shown

in black here. The boundary runs from point A to point B, then to C and then to D. Thus the boundary itself has three segments. The starting point A was fixed. The Chamber was required to begin its delimitation at that point by the special agreement of the parties. Also the special agreement required the final point to be placed in a triangle. And suffice it to say that point B falls within the triangle.

The Chamber used a different delimitation methodology to determine each of the three line segments. Segment A-B is the bisector of the angle between two selected coastal fronts. Segment B-C is a line that is referred to by the Chamber as an adjusted median line between two other selected coastal fronts modified to reflect coastal proportionality, and to give half effect to Canada's Seal Island. And segment C-D is a perpendicular to the hypothetical closing line of the Gulf of Maine.

It is one thing to create a line by applying a method. It is another thing to place that line relative to other lines to create an equitable boundary. And it is the placement of lines derived by geometric methods that the Gulf of Maine case is noted for.

I would now like to examine each of these three segments with some care, since the Chamber made a number of judgments that may be instructive in light of the

circumstances now before the Tribunal.

The Chamber decided that the boundary line running from point A should not be an equidistance line. It gave two reasons for this.

First, the main reason given was that using an equidistance line from point A would embroil the Chamber in the Machias Seal Island dispute and this the Chamber wished to avoid. You will find the Chamber's views on this at paragraph 211 of its judgment.

Second, the Chamber concluded at paragraph 210 that an equidistance line in the near shore area would be influenced by far too many offshore rocks and small islands. As the Chamber said in that paragraph 210, I quote, "the likely end result would be the adoption of a line, all of whose base points would be located on a handful of isolated rocks some very distant from the coast, or on a few low tide elevations."

The Chamber decided, therefore, not to apply equidistance, but instead, that the first segment should have the bearing of the line that bisects the angle of the United States and Canadian coasts facing this area. The coastal fronts are depicted now on the map. Line 1 is the United States coastal front described as a straight line between the international boundary terminus and Cape Elizabeth. Line 2 is the Canadian coastal front between

the international boundary terminus and Cape Sable.

The Chamber, through its technical expert, determined that the bearing of the line that bisects that angle formed by line 1 and line 2 is approximately 194 degrees. The Chamber, acting through its technical expert, applied that bearing at Point A, thereby achieving the direction of the first segment of the boundary. The Chamber said that the seaward end of the first segment would be automatically established when the Chamber determined the placement of the second segment.

The second segment was the key to the entire delimitation. The Chamber, at paragraph 214, says, "the establishment of this second segment which, though it may be the shortest, will certainly be the central and most decisive segment for the whole delimitation line." Elsewhere, at paragraph 226, the Chamber said, and I quote again, "the Chamber has born constantly in mind the problem of determining the final segment of the delimitation line when applying itself so meticulously to the task of establishing the previous segments."

As for the second segment, the Chamber decided that it should be a median line between the opposite United States and Canadian coasts facing this section of the boundary, adjusted to take account of proportionality between the United States and Canadian coasts that the Chamber found

to be relevant, including portions of Canada's coast in the Bay of Fundy.

There are several points to note here. First, the median line the Chamber called for, in fact, was another angle bisector. The Chamber regarded the opposing Canadian and United States coastal fronts to run from Cape Ann to the elbow of Cape Cod on the United States side, shown here as line 3, and from Brier Island to Cape Sable on the Canadian side, line 4. For practical purposes, what is essentially the same Canadian coastal front was used twice to determine directions for both the first and second segments. The median line or the angle bisector between these opposing coastal fronts runs at a bearing of approximately 150 degrees true. So it was on this basis that the Chamber, again working with its technical expert, established the direction of the second segment of the boundary line. Again, it's one thing to say that a line should have a certain bearing; however, and quite another to say where that line with that bearing should be placed. This is, again, a critical lesson from the Chamber's method.

The Chamber considered whether the line with this bearing should simply be placed midway between the opposing coasts. It concluded, however, at paragraph 218 of its judgment, and I quote, "It is in the Chamber's view

impossible to disregard the circumstance which is of undeniable importance in the present case that there is a difference in length between the respective coastlines of the two neighbouring states which border on the delimitation area." Thus, the Chamber said that the 150-degree true bearing line should be placed between the opposing coast so as to reflect coastal proportionality.

To accomplish this objective, the Chamber determined that the 150-degree true bearing line should intersect a line that it called the location line, which it described as a line running between the nearest points on the opposing United States and Canadian coasts, namely between the northeastern tip of Cape Cod in the United States and Chebogue Point in Canada. You can see this location line on the figure before you.

The Chamber decided that the second segment running at a bearing of 150 degrees true should intersect the location line at a point on the location line that corresponds to coastal proportionality, a proportionality, as the Chamber found, of all relevant coasts -- and we now have depicted that on the screen -- including the United States coastal front between Cape Elizabeth and Cape Ann, which had not been used for the construction of other parts of this method, and coasts -- Canadian coasts that extended some way into the Bay of Fundy.

The ratio between the respective lengths of coasts, as the Chamber found, is 1.38 to 1 in favour of the United States. Thus, the 150-degree bearing line would cross the location line at the point where the location line was divided by a 1.38 to 1 ratio in the United States' favour.

The Chamber was not yet done, however, with the second segment. It decided that Canada's Seal Island, just off the Canadian coast, that southwestern facing coast of Nova Scotia, that little Seal Island, should be given half effect in the application of the proportionality method adopted for this second segment. Now, normally, particularly when we are talking about equidistance, when an island is given half effect in the equidistance method, it means that the island is given less weight than other points on the coastline. In this case, by using a method based on coastal proportionality as applied to the location line, half effect for Seal Island added to the weight of Canada's coast.

Now, frankly, from my United States' vantage point, on first glance, this was counter-intuitive and unfair, but then I tried to look at the issue more closely. Canada had, of course, argued that Cape Cod was a geographic anomaly; that it should be disregarded in the application of the equidistance method. That was Canada's position -- equidistance with no effect for Cape Cod and Nantucket

Island. Of course, the Chamber had decided not to use the equidistance method for many of the same reasons we have mentioned here -- incidental features, disparities in coastal length, the cutoff effect associated with equidistance within and outside of a coastal concavity. So it did not specifically address Canada's specific contention about Cape Cod.

In the method the Chamber employed in the second segment, however, Cape Cod, if you will, was given full effect, both because Line 3 was anchored at the elbow of Cape Cod and because the tip of Cape Cod served as the United States end the location line. Both of these decisions about line placement were to the United States' advantage in the Chamber's methodology, so the half effect for Seal Island becomes more understandable. The method used by the technical expert to give Seal Island half effect was to determine the distance from Seal Island to Canada's coastal front, to divide that distance by one-half, and then to subtract that one-half distance from the length of the location line, thereby making the location line shorter. The 1.38 to 1 ratio was then applied to the shorter location line which resulted in an entire -- in the division of the entire line in a 1.32 to 1 ratio. Thus, the effect of giving Seal Island half effect was to move toward the United States the point where the

150-degree true bearing line would cross the location line.

So with that point on the location line determined, the 150-degree bearing line could be drawn so as to intersect the location line at that point, and it could then be extended until it intersected the 194-degree bearing line drawn from Point A. The intersection of those two lines determined the location of Point B.

The Chamber determined that Point C should be where the seaward reach of the 150-degree bearing line crossed the hypothetical closing line of the Gulf of Maine which runs from Nantucket Island to Cape Sable. Thus, the second segment of this boundary placed within the Gulf of Maine coastal concavity between opposite coasts, but placed closer to Canada than the United States to respect coastal proportionality, served both to stop the angle bisector that constituted the first segment, and also, to establish the point on the Gulf of Maine closing line from which to construct the perpendicular. The third segment of the line from Point C was a line perpendicular to the Gulf of Maine closing line to Point D, which, in that case, falls on the 200-mile limit drawn from the United States coast.

Just to summarize, Segment A-B is a line that has the bearing of the bisector of the angle of the adjacent

coastal fronts, lines 1 and 2. Segment B-C is a line that has a bearing of the bisector of the angle formed by the opposing coastal fronts, lines 3 and 4. It extends from a hypothetical location line at that bearing from a point that reflects the ratio of all the relevant coasts of the parties. Line C-D is a perpendicular to the closing line of the Gulf of Maine drawn from the point where the second segment intersects the closing line.

Now what conclusions might one draw from the Chamber's method in the Gulf of Maine case? There are two that I would like to highlight. First, one important point that the Chamber makes is that it is appropriate to think ahead, to employ methods inshore with a view to how such methods will impact or set up the delimitation methods for the offshore segment. This is particularly important for delimitations which begin within coastal concavities and which have to extend into outer areas.

Nova Scotia takes issue with this practice. It says Newfoundland and Labrador's line in the inner concavity is intended to set up its line in the outer area. Indeed, it says that the methods adopted in the inner sector can only be understood by reference to their impact on the boundary as it runs to sea in the final outer area.

It also criticizes Newfoundland and Labrador to the effect that equidistance is not embraced in the inner

concavity because of the difficulty in shifting methods applicable to the outer area.

Fortunately, we can look to guidance from the Chamber on such matters and disregard Nova Scotia's advocacy. There is no prohibition on having regard to how the methods employed in the inner area might affect the application of methods in the outer area.

A second point made clear by the Chamber's method is there is no prohibition on using the same coastal front more than once in the application of several constructions in a comprehensive methodology to achieve an equitable result. Nor is it required to use exactly the same coasts to measure relative proportions of coastal length as may be used to construct lines or angles.

Certainly the geographical circumstances of the Gulf of Maine case are not identical to the circumstances before the Tribunal. But there are similarities, including the basic fact that the delimitation must begin within an inner concavity and it must emerge from the inner concavity and extend into an outer area.

The other basic similarity is that there are substantial disparities in coastal lengths in both situations. In these circumstances where and how the delimitation line intersects the closing line of the inner concavity becomes perhaps the most crucial ingredient of

the method to be employed.

An equidistance line will simply hit the midpoint of such a closing line and extend seaward as a perpendicular, taking no account of coastal proportionality or other characteristics of the relevant geography. That is why the Chamber paid so much attention to the middle segment. It had to stop the angle bisector constituting the first segment of its boundary and turn the boundary so that it intersected the closing line of the Gulf of Maine at a point that took account of the relationship of coastal lengths of the parties.

Here, of course, the boundary emerges from Cabot Strait, not the United States-Canada international boundary terminus in a corner of the Gulf of Maine. While that is an important difference of fact, it really does not alter the overall applicability of the Chamber's methodology to circumstances of a geographical concavity. The first segment must be stopped. It must be turned by a second segment that hits the closing line at a point that takes into account the geographical circumstances of the case, including coastal proportionality. It must then be extended seaward in a final segment of the boundary.

How this methodology may be applied in the circumstances of this case will be explained in a few moments in the next presentation by the Agent of

Newfoundland and Labrador.

In closing, let me thank the Tribunal for its attention. We have seen that neither party seeks a delimitation method based in the equidistance method, but that the reasons differ.

We have also seen that Nova Scotia's perspective on the method employed in the Libya-Tunisia case is like what the court said of Tunisia's perspective in the revision judgment, an over simplification of its reasoning.

We have reviewed the delimitation method applied by the Chamber of the International Court of Justice in the Canada-United States Gulf of Maine case, because there are useful analogies that may be drawn between the geographical circumstances present in this case, and those that were present in that case.

Thank you very much, Mr. Chairman.

PROFESSOR CRAWFORD: Mr. Colson --

MR. COLSON: Yes.

PROFESSOR CRAWFORD: -- before you sit down. In the subsequent discussions by the Court of maritime delimitation, how has this combination of methods used by the Chamber in Gulf of Maine fared? And in particular, is there anything we can learn from the most recent decision of the Court in Qatar-Bahrain relating to that question?

MR. COLSON: The most recent decision of the Court in

Qatar-Bahrain is -- will probably go down in the books as a case that relates primarily to the selection of base points in the construction of equidistance line or the nonselection of base points, if you will. The methodology employed by that Court was almost exclusively an equidistance methodology. There are a few places where it says that it is applying equidistance but our analysis would show that maybe they were just connecting two lines because it was convenient to connect two lines to get between features where -- that they had to get between.

But the case is primarily a case between -- or about whether certain features should be used in constructing an equidistance line. I think the fact that the Court drew a line between the coast of Qatar and the Hawar Islands which were awarded to Bahrain demonstrates a departure, if you will, from some of the thought process that might have gone into the Anglo-French decision, but the geographical circumstances were of course different.

The UK in the Anglo-French case argued for the kind of line that Bahrain received in the Qatar-Bahrain case where basically there was the -- Bahrain achieved more than an enclave, shall we say, for the Hawar Islands.

But I don't really see much connection between the Gulf of Maine methodology and what the Court did in Qatar-Bahrain.

PROFESSOR CRAWFORD: Would you regard Qatar-Bahrain as in effect reinstating a presumption of -- that the equidistance principle should be applied unless there are very good reasons not to apply it?

MR. COLSON: I think the last two cases, both Qatar-Bahrain and the Yemen-Eriteria case, are related to geographical facts that made departures from an equidistance method different -- difficult for the tribunals to deal with. Certainly I'm sure that some will argue that there is a prevailing mood in the law and practice of courts and tribunals to apply the equidistance method. Certainly -- and when we were arguing the Canada-France -- or Canada-United States case, the whole notion of a presumption in favor of equidistance was a center piece of the argument.

I think now it's widely accepted that it is appropriate. We don't worry about presumptions but if you want to beat equidistance you have to demonstrate that there is good reason not to apply equidistance, and I hope that we have been able to do that for this Tribunal.

So with that, Mr. Chairman, I would once again thank you and ask you to call upon the Agent of Newfoundland and Labrador to address the construction of the Newfoundland and Labrador line and the equity of the result.

CHAIRMAN: Given the time, Mr. McRae, do you think that this -- you would be going just a few more minutes. It is

getting close to 12:30, what --

PROFESSOR MCRAE: Mr. Chairman, I have a presentation that will be about 45 minutes to one hour, so I'm in your hands as to -- as how to proceed.

CHAIRMAN: I think if you -- you know, I hate to break you up -- break up your presentation after 10 minutes to go to lunch.

PROFESSOR MCRAE: I'm quite happy to start after lunch if that is the --

CHAIRMAN: I have no idea of what the -- I was thinking of an hour. We could make it 1:30, would that be cutting your time in the afternoon?

PROFESSOR. MCRAE: 1:30 -- my presentation will complete our presentation, so I have -- what we have really for the first round of Newfoundland and Labrador essentially one hour of argument to complete.

CHAIRMAN: Why don't we make it an even hour then?

MR. FORTIER: Mr. Chairman, I wonder if it doesn't cause any inconvenience to Professor McRae, he and I have discussed it briefly at the end of the day yesterday, if we could adjourn for -- if it was convenient to the Tribunal, obviously, if we could adjourn for an hour and a half, I would be grateful because I have to participate in a telephone conference which may last well into -- for the better part of an hour. Would that be --

CHAIRMAN: Why don't we break till 2:00 o'clock?

MR. FORTIER: Thank you very much.

(Recess - 12:30 p.m. - 2:00 p.m)

PROFESSOR MCRAE: Thank you, Mr. Chairman.

Mr. Chairman, Members of the Tribunal, in this last phase of the presentation of the Newfoundland and Labrador case in this round, I would like to turn to the question of the drawing of the line. You heard yesterday and this morning, from counsel for Newfoundland and Labrador about the geographical framework, about the applicable law of maritime boundary delimitation, and the inapplicable law of acquiescence and estoppel, and about delimitation methods. It is time to draw all of this together. What result does the appropriate method, or methods, produce in the circumstances of this case? And is that result justified in law?

What I would like to do in this presentation is to take the Tribunal through the construction of the line that Newfoundland and Labrador has placed before this Tribunal, explaining the methods used and why they were used, and then show that in accordance with accepted tests of the law of maritime boundary delimitation, the result achieved is equitable.

However, first a preliminary issue. Yesterday a question was asked about the status of the eastern portion

of the Newfoundland coastline that is east of St. Pierre and Miquelon zone. And as I recall it, the thrust of the question was since the Court of Arbitration had held in Canada-France that the maritime projections of the coasts of Nova Scotia do not reach the areas south and east of the French islands, well the question is, can the eastern portion of the Newfoundland coast be considered a relevant coast in respect of the areas west of St. Pierre and Miquelon? And the answer, in our view, is yes, it can. And we provided an answer yesterday, and I would just like to elaborate on that a little.

In our view, the south coast of Newfoundland is a single continuous geographical feature. Nova Scotia's own picture of the relevant coasts adopts this same perspective, and treats the entire coastal facade of southern Newfoundland as a unified geographical feature, running from Cape Ray to Cape Race. This coast line, as an entity, generates a single natural prolongation throughout the area south of Newfoundland, except of course, the areas that are now subject to the French -- to French jurisdiction.

And in our view, it is helpful to look at this issue from a perspective of the situation before the delimitation with France.

At that time, a part of the area could be described as

the common natural prolongation of both Canada and France, which is what gave rise to the need for delimitation in the first place. And under that situation, the natural prolongation of Newfoundland into this area, was obviously not compartmentalized, it was not a matter of one projection from the eastern area, and a completely separate projection from the western area. It was a single maritime projection from a continuous coastline.

The effect of the delimitation, of course, was to define an exclusive French area, and an exclusive Canadian area. But that did not change the conceptual point of departure. The correlation between the coasts and the submerged areas off the coast, under which there was a single projection extending from the south coast of Newfoundland as a unit, into the offshore area. And since the Award it is clear that there is no overlap of the maritime projections of Nova Scotia and Newfoundland to the east of the corridor. And that's because of the combined weight of the Newfoundland and St. Pierre Miquelon projections into the area.

It does not follow, however, that the portion of the south coast of Newfoundland east of the corridor does not contribute to the overlap of maritime projections further west. And this is because, I suggest, the whole of the south coast of Newfoundland should be treated as a single

undivided whole, with a single natural prolongation throughout the area, and not as two separate coastal fronts with two separate maritime projections.

MR. LEGAULT: Mr. McRae, thank you for elaborating on your response to the question I put to you yesterday. But I'm afraid you left me more confused than I was before I put the question to you, and after I put the question to you.

This is not a Zen delimitation. We're not looking for the sound of one coast converging. There would have to be two coasts to converge. The definition of the relevant area, according to Newfoundland, is that area where the seaward projections of the coasts of the parties converge, and overlap. You said yesterday that the convergence of Nova Scotia east of the corridor, was blocked, which still left you with a Zen delimitation, only one coast converging with itself, I guess.

Today, you are telling us that that coast converges, not with the Nova Scotia coast east of the French corridor, but west of the French corridor? Is that what you are saying?

PROFESSOR MCRAE: That is correct. The as I mentioned, the -- there is a single projection, and not an eastern projection and a western projection of the coast of Newfoundland.

Now, the projections, as the Court of Arbitration has

decided, the projection of Nova -- of Nova Scotia does not project into the area of the St. Pierre Miquelon, and projection, and -- and projection of the south coast of Newfoundland. On the other hand, that south coast of Newfoundland projection still continues, combined with the rest of the coast of Newfoundland. There's a projection of the south coast of Newfoundland, both east and west, because we say it's a continuous -- projection. And it is -- it is there that it meets the projection of Nova Scotia, but it meets that projection west of the boundary of St. Pierre and Miquelon.

MR. LEGAULT: Is that -- does that fit with your theory of coastal front projection? Perpendicular projection? Aren't you having to cut an angle of some kind to get west? Doesn't that south coast east of St. Pierre and Miquelon, in order to converge with the Nova Scotia coast west of that line, west of that corridor, have to, so to speak, project at an angle?

PROFESSOR MCRAE: I think with respect, Mr. Legault, what you're doing is -- is compartmentalizing the projections. We're saying that there is a single projection from the south coast of Newfoundland. And that projection goes southwards, as we have indicated, from the coastal front. And therefore, it's a projection of the south coast of Newfoundland. And therefore, one cannot simply cut off

certain coasts of the south coast of Newfoundland, and say they're irrelevant to that total projection of the south coast. It's not a case of wrapping -- wrapping the south coast across, it's the -- or wrapping the eastern part of the south coast across. That in our view, is compartmentalizing. The coasts are all part of the south coast of Newfoundland, the south coast of Newfoundland does project into this area, and therefore, the coasts are relevant.

PROFESSOR CRAWFORD: But I mean -- obviously we perhaps don't have to be too, I think the word used was "nice" in one of the cases, in calculating these distances if we're doing it for the purpose of checking their overall equity of the result.

But nonetheless, aren't you trying to have it both ways? You told us earlier that we had to respect the reasoning in St. Pierre Miquelon, which operates on the basis of -- of -- I might describe it as full frontage, if the phrase is not too vivid. And it's a full frontal projection.

And we've heard this morning from Mr. Colson, and I accept that in the Channel Islands case, the French coast behind the Channel Islands projected through them, as it were, and you could see how the closing line across Fortune Bay might do that. But, surely your theory, on

the one hand, you're saying you -- the corridor blocks Nova Scotia, and you have to accept the reasoning in the St. Pierre and Miquelon case based upon full frontal projection. On the other hand you're saying that the whole of this coast, no matter which way it looks, has to be taken into account. Aren't those two positions inconsistent?

PROFESSOR MCRAE: We do not see it as inconsistent, Professor Crawford, because the building block that we work from is that in identifying the relevant area, you identify the coasts that project into that area. That is the south coast of Newfoundland.

Then the question is where does the projection of Nova Scotia meet? And then you have to take into account the existence of the St. Pierre Miquelon zone, and the reasoning of the Court of Arbitration. Then when one defines the length of coasts, having defined the relevant area, the coasts in that area are relevant to that delimitation for purposes of proportionality, whatever purpose. Those are a step by step process in identifying the relevant area, and then determining where the projections converging overlap. And in this case, we do have this important relevant circumstance, this fact, of the Court of Arbitration decision.

PROFESSOR CRAWFORD: There's no doubt that it's an important

fact. But in any event, given that we are delimiting out to the outer edge of the continental margin, if you take this sort of generalized projection theory, what's the basis for stopping at Cape Canso? Because surely, at least in relation to the outer continental shelf, close to the south of that is projecting into the relevant area.

PROFESSOR MCRAE: Well, perhaps I can answer that by the next response I was going to have to a question that was raised yesterday, I think answers in part that question. And if I may, with the -- at the risk of confusing Mr. Legault even further, let me attempt the answer to that question. Because I think yesterday, and it's a similar question. The question was raised about the -- whether the frontal projection of the coastal front off the south coast of Newfoundland from Point Enragée might not overlap with the frontal projection from Nova Scotia coast beyond Cape Canso. And I think the question was how far out do you go in that overlap.

And I -- the answer was given by Mr. Willis, at the time, and that was to be relevant to bring a coastal area within the relevant coasts, the overlap generated by the coasts has to be substantial. And it has to, therefore, begin within reasonable proximity with the coasts. And an overlap at the fringes, at some considerable distances, distance from the coast won't suffice.

Mr. Willis is, of course, always correct, but I would like to add some additional comments to that -- to that response.

PROFESSOR CRAWFORD: And you are more correct?

PROFESSOR MCRAE: These are elaborations that Mr. Willis advises me will assist in understanding his original response. I take my guidance from Mr. Willis, rather than claiming to be more correct than him.

In a broad shelf situation, the frontal projections of any two coasts that are not absolutely parallel, or not facing away from each other, will at some stage, ultimately overlap. So if one keeps on going out far enough, any coasts that are not parallel, and not facing, will eventually overlap. But in our view that is just too a -- too indiscriminating a conception for determining any relevant area. Because it would lose its utility as a basis for identifying relevant and irrelevant coasts. You can't go on forever.

And so therefore to be qualified, as we have suggested, that is the coasts have to end at some point, a point that will reasonably define the area in which the delimitation should take place.

But I think we have to bear in mind, again, as we said yesterday, that we are not talking about absolutes here. They are not to be understood as geometrical formulas

based on precise perpendicular lines that can be all determined with mathematical precision or rigidity. I think the courts have made clear that the application of equitable criteria is just not to be understood in that way.

For example, dealing with the effect of disparities in coastal lengths, and Professor Crawford referred to it, the courts have warned against nice calculations of proportionality and have said that the determination should only be in broad terms and that a rigorous definition is not essential, and indeed, not appropriate.

So the assessment of areas within which maritime projections take place has to be approached, in our view, in somewhat broad brush terms. Decisions have to be made as to where the coasts will end and they have to be made in a way that will reasonably identify an area as a relevant area for the purpose of delimitation.

MR. LEGAULT: Professor McRae, I hope you will forgive me if I follow up again on one of the questions I asked yesterday. On your reason -- your reasoning about the approach one should take to the south coast of Newfoundland and avoiding compartmentalization and thinking of it as a whole, integral, undivided coast projecting out to sea. In that case, in looking at the coast of Nova Scotia, say from Scatarie Island beyond Cape

Canso -- I don't know how far beyond Cape Canso, but say some distance from Cape Canso -- out to that distance, perhaps, where at some point you have an overlap with the seaward projection of Newfoundland. Would not that same reasoning suggest that you don't compartmentalize that part of the coast which contributes to a convergence only further out to sea, but view it as being part of the overall convergence of the Nova Scotia coastal front?

PROFESSOR MCRAE: Well, I think there are a couple of answers to that, Mr. Legault, and one is one can really go on forever if one continues those lines out for such a period of time. The coasts will expand under that -- under that theory, and you will lose the value of defining an area which is relatively close to the coast where the delimitation is to take place, so --

MR. LEGAULT: Mr. McRae, the furthest coast from the area where the delimitation is to take place is the southeast coast of Newfoundland, not any part of the coast of Nova Scotia that Newfoundland has identified as being relevant, so has the Newfoundland coast gone too far east because it's getting further and further away from the area where the delimitation is to take place?

PROFESSOR MCRAE: Well, again, we get back to the question of what a reasonable perception of the frontage of a coast into the area, and coastal fronts based on a -- a coastal

front rather than a radial perspective has to look at the general broad direction that the coast is facing on -- facing in. And the south coast of Newfoundland faces straight down into this area, and as the Court of Arbitration pointed out, the further one goes down the Nova Scotia coast, the further it faces away from the delimitation area and the further it faces towards the south, southeast. So one is losing the relevance as the coastal front faces away, but you don't stop the relevance of a coastal front that directly faces onto that -- onto that area.

MR. LEGAULT: Sorry. I just want to ask -- I think you're coming close to saying that the south coast of Newfoundland is relevant because it faces south, but the south coast of Nova Scotia west of Cape Canso is irrelevant because it faces south.

PROFESSOR MCRAE: It depends on location of the coast. A south facing coast that is south of the delimitation area is not the same as a south facing coast that is facing onto the delimitation area. So the fact that it is south facing, you have to take into account its location in relation to the area to be delimited, and a south coast -- a south facing coast on southwest Nova Scotia, southwest facing coast is simply going away from the area. There's a matter of degree and a matter of judgment in these

cases.

MR. LEGAULT: Thank you.

PROFESSOR CRAWFORD: We ought to say that there was a time before St. Pierre and Miquelon, the age of innocence, where we had an undivided area, but that's not true anymore. The area is divided in two ways. First of all, we have the delimitation, and secondly, we have the analysis which you've affirmed of the areas consisting of an inner concavity and an outer area.

If you take the inner concavity and have some form of closing line, on the face of it, it looks entirely reasonable because the area of Cabot Strait is obviously subject to different considerations than the open Atlantic. Surely, there's a question whether -- and again, you've affirmed the approach in the Gulf of Maine case which is subject to perhaps overrefinement, nonetheless, took some sort of ratio of coasts within the Gulf of -- the general Gulf of Maine area as a ratio of the closing line. Is there some room for doing that here?

And I'm -- I'm wondering whether there's not some analogy with the Gulf of Fonseca because although the Court didn't engage in maritime delimitation outside of the Gulf, it is widely thought that it was leading up to a situation where each of the states within the Gulf of Fonseca, including a state at the back of the Gulf could,

as it were, claim a proportion of the closing line at the Gulf of Fonseca.

Now if that's right and if there's a closing line here, shouldn't there be some sort of proportion, including St. Pierre Miquelon -- although, the area it gets is clear, but St. Pierre Miquelon, Nova Scotia, Newfoundland, but it wouldn't be the length of coast. Now that, of course, may be for a slightly different purpose, but I wonder if you would comment on that scenario?

PROFESSOR MCRAE: It's difficult to comment. It's sort of a hypothetical that would disregard what St. Pierre Miquelon has already -- has already got because certainly when I move on to explaining how we construct our line, we do certainly rely on the inner concavity and the method from the -- from the Gulf of Maine.

If one was starting out delimiting St. Pierre Miquelon and Nova Scotia and Newfoundland again as if there were three states, I think that the reasoning of the Court of Arbitration would still have to play a prominent role; that coasts ought to be able to project out to the outer limit, and so some method, if one is starting from the beginning, putting aside the actual delimitation and the Court of Arbitration, three states in this coastal configuration would probably start with the same North Sea kind of objective, that is that coasts ought to be able to

project out and not be cut off.

Mr. Chairman, if I can turn to developing our argument in relation to the appropriate line, as we have made clear in these proceedings, the exercise of delimitation requires a complex interaction of geography and other relevant circumstances, equitable principles and criteria and geometrical methods, all of which lead to the determination of the line. And in this case, the nature of the area is such that the ultimate boundary line dividing the offshore areas of the parties has to be constructed segment by segment in response to the particular geography of each area.

A fundamental element of this particular case is that we are not dealing with an area with single or uniform geographical characteristics. The geography changes, the areas change, and thus, the considerations relevant to delimitation, the appropriate methods and the line itself must change.

And, of course, what is striking about the area to be delimited beyond the Cabot Strait is, as we have pointed out, that it is characterized by the fact that it really is two distinct geographical areas, the inner concavity and an outer area. And the inner concavity is not a completely enclosed concavity; rather, it's a concavity in the nature of the concavity formed by the Gulf of Maine.

It was clearly recognized as such by the Court of Arbitration in Canada-France. And it lies between the opposite facing coasts of Newfoundland and Cape Breton.

And yesterday, the question was raised about the nature of the area. Could it really be considered a concavity? And Mr. Willis said in response that the issue is purely one of geography. If the coasts form a geographical concavity, they do so regardless of the political geography of the area, whether it's one state or two states or three states in the area, and whether the Islands of St. Pierre Miquelon existed or not, there would still be a geographic concavity in this area.

And so to assist in understanding this, we have shown the configuration of the Gulf of Maine and the configuration of the inner concavity. They are, in our view, very similar. In fact, one might say almost identical. The Chamber considered that the Gulf of Maine was a geographical concavity, and its delimitation method was based, as Mr. Colson pointed out this morning, very much on that factor. And it is the similarity of this area with the Gulf of Maine that justifies treating it as a two-area delimitation for the area outside the Gulf, as we have done.

Now at the Burin Peninsula on the Newfoundland side, and Scatarie Island on the Nova Scotia side, the concavity

opens out into the outer area, and this area is not characterized by opposite coasts, but by the open waters of the Atlantic. The coasts at this point are the coastal wings of Newfoundland -- of the Newfoundland south coast from the Burin Peninsula to Cape Race, and the Nova Scotia coast from Cape -- from Scatarie Island to Cape Canso. And the relationship of these coasts is one of adjacency.

And that, Mr. Chairman, is why, in our view, the line proposed by Nova Scotia is so fundamentally misconceived. How can a line of constant direction, as the Nova Scotia line is, be justified in an area of such obvious geographical change? How can a line drawn in response to opposite coasts close to Cabot Strait be appropriate for an area 200 miles from the coasts where the coastal relationship is one of adjacency?

Those questions call for answers, but Nova Scotia does not attempt to answer them. It can provide no geographical rationale for its line because, of course, there is none. It is a line drawn despite the geography. It results from this, as we have put it, ill-conceived notion on the basis of title and the idea that conduct that has been held not to amount to an agreement on a line should, nevertheless, be treated as if it did constitute an agreement.

And I think the lack of a geographical rationale for

Nova Scotia's line becomes even more evident in the light of Mr. Colson's presentation this morning. He pointed out why equidistance is an inappropriate method in the circumstances of this case, particularly in the outer area, and noted the distorting effect of Sable Island on any such line.

But he also pointed out that in its Counter-Memorial, Nova Scotia seeks to justify its line as an application of a simplified form of equidistance, and Mr. Willis pointed out in the Nova Scotia Memorial Nova Scotia had seemed to do the same thing, although with a different rationale. In fact, in the light of these two approaches, we're looking forward to seeing in Nova Scotia's oral presentation later this week which is the real position.

But, of course, as Mr. Willis and Mr. Colson have shown, neither of these pseudo-equidistant rationales can be substantiated. And, of course, there is an air of unreality about all of this because if Nova Scotia is relying on the principle or method of equidistance to support its line, it is really attempting the impossible because it's invoking equidistance in support of a claim to a line that would grant Nova Scotia much more than a full effect equidistance line would. And to reiterate a phrase from our written pleadings that attracted the attention of Nova Scotia, this defies all logic.

Mr. Chairman, a unidirectional line in an area of geographical change is prima facie questionable. And if it is not drawn in accordance with the equidistance method it cannot be justified on the basis of equidistance.

Now, Mr. Chairman, in our Memorial we set out why a provisional equidistance line was not appropriate in the circumstances of this case. Again, Mr. Colson went through it this morning. We referred to the cut off that it would produce. We mentioned the fact that it ignores differences in coastal length. We showed that it improperly gives weight to incidental features. And we showed that it produces a result that is really not proportionate.

All of these arguments equally apply to the Nova Scotia line. And if it is to be justified on the basis of equidistance, then it is as I have suggested, an equidistance result on stilts.

Let me turn, Mr. Chairman, to the construction of the Newfoundland and Labrador line. We have said that an appropriate method must take account of certain criteria that the jurisprudence of maritime delimitation has treated as fundamental. And let me list these quite quickly.

First, the delimitation must be based on actual coastal relationships. And of course, that is recognizing

that it is the coast that is the source of title to maritime territory.

And second, the delimitation should avoid relying on any distorting incidental features that exist in the area.

And third, the delimitation has to take into account any disparity in coastal lengths.

And fourth, the delimitation must avoid encroachment or cut-off.

Now against the background of these principles, what are the key considerations in respect of a delimitation area characterized by the existence of two quite different areas, a constrained inner concavity and an unconstrained open outer area.

Now obviously a method has to be adopted in each of these areas that is appropriate for that particular area. But there was a further point that emerges from Mr. Colson's discussion of the Gulf of Maine case this morning. That is it is not just methods within each area that is significant, it is the transition from one area to the other that is critical in ensuring that an appropriate line is being drawn.

And this has two aspects. First, the transition point from a concavity into an open area must reflect the geography of the transition area. And that may differ from the geography of the concavity proper and from that

of the outer area.

And second, since the transition is the starting point for the line in the outer area, it has to be located at a place that will ensure that the line in the outer area is an appropriate one.

Now Mr. Colson's -- Mr. Colson pointed out that Nova Scotia suggests that this is not an appropriate consideration, but again, as both Mr. Willis and Mr. Colson mentioned, this is clearly incorrect. Taking account of the turning point at the mouth of a concavity in order to avoid inequity outside is simply a logical consequence of the delimitation in an area where a concavity leads to an open sea area. And that was the point fully recognized in Gulf of Maine.

PROFESSOR CRAWFORD: Yes. That is undoubtedly true and it is obviously a problem. But of course it is a problem which starting with the equidistance line tends to avoid. I mean, if you are going to have a method which doesn't use equidistance, then clearly you have got the problem of how you arrange those transitions. And it tends to give - or it could in certain circumstances tend to give excessive weight to the features in the transition area, which bear no relationship to the features outside.

PROFESSOR MCRAE: That may be depending on the coastal configuration, Professor Crawford. It purely depends upon

your coastal configuration. Because entirely the opposite can occur, the equidistance line depending on the coastal configuration may well give undue weight to features either at the mouth or inside the concavity, depending what your base points are. So it doesn't appear to me that in principle equidistance necessarily solves this problem any better than -- and it may well solve it worse.

PROFESSOR CRAWFORD: Well, yes. An equidistance line can be corrected in various ways. The problem is if you are adopting these systems -- that's where -- what the Tribunal did -- I thought Mr. Colson did it, if I may say so with great respect to him, superbly this morning in arguing against the U.S. position on the treatment of Seal Island. But it is basically like making a sort of -- a curry and then chucking some ice-cream in it.

I mean, it may be a bad analogy but I mean, once you have adopted a certain method then to give half effects to an island using -- when you would normally do that in a completely different way, it looks extraordinary hybrid.

Now I fully accept that there may well be occasions, and this may be one of them, where the situation is such that you don't use equidistance, even any form of modified equidistance. But it does seem to me that the risk in these nonequidistance methods is that they are putting extraordinary weight on quite short transitional sectors.

It wasn't so obvious because, of course, the way Mr. Colson presented the construction of the Gulf of Maine line, the transitional sector would look quite long until it was actually drawn. But in fact it's a very short sector and it is drawn by reference to rather short coasts.

PROFESSOR MCRAE: But it is drawn in terms of one aspect of it, and that is its direction. But in fact, there -- it was a form of median line that was used. So in fact, the part that you have this problem with was really a part that was based on a form of equidistance and it was the modification of equidistance by the use of Seal Island that caused the problem.

The location is a different question. And of course, that has to do with the coastal lengths in the concavity. And one may argue about how you measure those. But in principle, the problem that it is addressing, that is that you may have the boundary located at any particular point in the concavity and the method used in Gulf of Maine was an effective method of responding to the fact that even though the boundary is located in one corner of the concavity, nevertheless, the longer coasts in the cavity would be given weight in the exiting of that line from the cavity.

So again, the problem that you raise could be a

problem depending on geographic characteristics but we would have to see whether a median or equidistance method is a better way or the worse way of solving that.

Starting then with the inner concavity at Cabot Strait. The first question is where will the lines start? And as we have pointed out there is no justification for extending the coast of Nova Scotia out to St. Paul Island one-quarter of the way across the Strait. And to be perfectly clear --

PROFESSOR CRAWFORD: Sorry to keep interrupting. This really isn't a concavity, is it? It is actually two opposite coasts. If you are taking the Gulf of Maine situation, then -- and of course as the Court of Arbitration said, you have got to take the closing line as representing Quebec. I mean, why can't Quebec jump over St. Paul Island, for example? Do you rely on the agreement of -- or the nonagreement of 1964 to exclude the Gulf states from any part of this delimitation?

PROFESSOR MCRAE: Because we would argue it's blocked by the projections of Nova Scotia and Newfoundland, and it is quite possible that Nova Scotia would agree with us on that point. When you are dealing with an opposite coast situation, that doesn't allow everyone to project out as far as they can. Opposite coast situations create a different dynamic from an adjacent coast situation where

the -- all of the coasts front onto the open sea area.

And the suggestion that it is not a real concavity but opposite coasts, with respect, denies the actual configuration. This is in a sense the Gulf of Maine reversed and what you have in Cabot Strait is rather like the Bay of Fundy. It is slightly longer than the Bay of Fundy and it opens out into a wider area, but it --

CHAIRMAN: But in the Gulf of Maine, there was a -- you know, right here we have got a line drawn across water. Now I grant you that political matters may not be taken into account, but the fact of the matter is that in St. Pierre and Miquelon you were dealing with a country all of Canada that claims the whole of that water as inland waters. Now you can get some understanding, but here we have to look at these two countries as being independent states.

And that being the case, I don't see how either could claim the water within. So, you know, I just don't -- I find it difficult -- if you have been on a ferry between Newfoundland and Nova Scotia, it is a good long distance across there.

PROFESSOR MCRAE: And it probably took quite a long time before you came to St. Paul Island, I'm sure on that.

PROFESSOR CRAWFORD: I haven't had that pleasure.

Considering the weather in Fredericton, I'm not sure I

want it. But if you are looking at this in an international context in which say Quebec was at the back -- and I mean, that is why the Gulf of Fonseca situation had occurred to me. If by chance there were three independent states, Nova Scotia, Newfoundland and Quebec, Quebec would say well, you know, whatever you agree with Nova Scotia about this area, we claim part of it. We want a projection out to the outer edge of the continental margin just like or even a fortiori from St. Pierre and Miquelon, or at least as far as we can get.

Now one answer you would give to that is well, you have never made that claim before. I'm not suggesting, for the moment, that there is an estoppel against Quebec, but there has been a course of conduct in which the states in the St. Lawrence have agreed on a form of division, which doesn't give them any exit.

And I just wonder whether there isn't in effect an implicit Newfoundland reliance on that? And the fact that Nova Scotia relies on it as well may affect what we can do. It may be a matter for ironic comment and nothing more. But it is significant.

PROFESSOR MCRAE: I think in looking at this as if that is an open sea area in which a continental shelf delimitation has to occur is -- has to be taken into account in the light of the Terms of Reference. The same rights and

obligations as the Government of Canada at all relevant times. That is the context we are looking at. Therefore, the Gulf of St. Lawrence is really a water of intern -- an area of internal waters. And that really is the status we have to accord to that area for the purposes of this delimitation.

PROFESSOR CRAWFORD: Well I mean, we don't have to pronounce on the Gulf of St. Lawrence as such. But accepting that is true, isn't the closing line across the Cabot Strait performing the same functions as the closing line across the Gulf of Fonseca, and creating a sort of -- a line in which there is a notional interest of the Gulf states for the purposes of our -- of further delimitation? If the exclusive economic zone begins to be measured from that closing line, it actually reinforces their claim, doesn't it? Unless you can say that their conduct in the previous discussions is such that there is no question of their having a claim.

And if you say that, isn't there an implicit reliance on that conduct? Not for the purposes of establishing an agreement on the precise delimitation, but for the purposes of excluding them from the picture. Now I well accept that you would say that the Terms of Reference exclude them from the picture anyway. But there is a difference between the two situations and we would need to

register that difference in some form even if it made no actual difference in the result.

PROFESSOR MCRAE: But the purpose here is deciding whether the geographical configuration can be treated as if they were coasts. And the Court of Arbitration treated it as if it was a coast. And in our view that parallel is appropriate for exactly the same reason, inside for our purposes we are talking about internal waters of a state. And therefore, alternatively one could try -- and as the Court of Arbitration did -- or you could do as the Court of Arbitration said they would not do, and that is look at all the coasts inside and treat them as relevant. And that I would suggest is what is being done when one starts to bring in Quebec. Alternatively treat this as internal waters and therefore it is a coast. It is a coast that neither can claim. It is a coast of Canada for the purpose of this arbitration.

CHAIRMAN: The internal waters within the Gulf, I would think that by our Terms of Reference, if we follow your submission, we have to treat that under the law of the continental shelf.

PROFESSOR MCRAE: That is correct for the purposes of delimiting a line between Newfoundland and Labrador and Nova Scotia. But not for the purpose of considering some hypothetical question about the right of Quebec. That is

the point at which that area for the purpose -- for those purposes, that area is simply internal waters. For the purpose of delimitation, essentially what the Terms of Reference are saying, it does not matter that they are internal waters, international law relating to delimitation to the drawing of a line can be applied by analogy.

I draw the distinction of the way in which one looks at that for the purpose of this case.

PROFESSOR CRAWFORD: The point goes a bit further because an international court confronted with an agreement between two states to delimit an area in which it is possible that other states have an interest, might find itself -- and even if that objection wasn't taken by the two states, might find itself in the position where it couldn't fully delimit. Now I'm not suggesting we are in that case. But at least it would be of significance to the court to know that there was no subsisting claim and that the other states had behaved in such a way that there was no reasonable expectation of a claim.

So by analogy one might say that notwithstanding that there is no -- as we have held -- no binding agreement on delimitation, there is nonetheless a set of expectations which have been established, and in this respect, not disrupted, though clearly there is no doubt whatever tha

there is a disagreement between these two parties as to the outer -- as to the line beyond the closing line.

That leads me to my next question. When did you tell Nova Scotia that you didn't agree that St. Paul Island would be counted in delimitation?

PROFESSOR MCRAE: I'm not sure if there is a historical record on it but certainly the Memorial made that clear. You mean in these proceedings or historically in the --

PROFESSOR CRAWFORD: You did it in the Memorial. I accept that. No, but the point is there was a time, I think quite clearly when you said we don't accept the line seaward of point 2017. It's perfectly clear in the record. I don't see on the record any objection on your part to the use of St. Paul Island until the pleadings in this case. But I may be wrong.

PROFESSOR MCRAE: I will check that. My recollection is that the record in phase one did not have any information on that. And I don't recall us putting any information on that in phase two. But I certainly will check that -- that question. I'm not -- I'm not sure, perhaps I can also move on, and if we have any further thoughts on the question of Quebec, we can come back and respond at a later stage.

If we start with the -- which is where I started before -- I can get back to where I started before. We

were talking about where does the line start, and which started this line of discussion. The mid-point is the only appropriate place, in our view. The mid-point between Cape Ray and Money Point, and the significance of St. Paul Island, as I mentioned earlier on, is one where it's inappropriate as a base point.

But from that mid-point of the line between Cape Ray and Money Point, the line has to reflect the opposite relation of the south coast of Newfoundland and the northeast facing coast of Nova Scotia. And as we indicated in our Memorial, in this sector a variety of methods will achieve the same result, roughly equidistance, a perpendicular to the closing line, or a bisector of the angle formed by the notional extension of the coasts of Newfoundland and Cape Breton.

We indicated the last of these, because it avoids the distorting impact of individual features. But we do recognize, and did recognize in the Memorial that provided that the distorting effect of St. Paul Island is avoided, there is little difference in result from the application of several alternative methods in this area. Qualified by the next segment.

And, of course, this next segment is much more crucial, because this is the segment that defines the transition from the inner concavity into the outer area.

And in the Gulf of Maine case, it was the opposite facing coast of southwest Nova Scotia and Massachusetts, as was pointed out this morning, that governed the line as it left the Gulf. Not the coasts that lay further back in the concavity, although, they were taken out -- taken into account in terms of their length.

So it is the opposite coasts of Cape Breton at Scatarie Island, and Newfoundland at the Burin Peninsula that govern the line at this stage.

Now although the coastal front on the Nova Scotia side remains relatively constant from Money Point to Scatarie Island, on the Newfoundland side, of course, the geography does change. And the ending of the concavity corresponds to a change in direction within the concavity, as the south coast of Newfoundland from Cape Ray to Connaigre Head changes to a more southward thrust from the Burin Peninsula to Cape Race. So there is a definite change in direction from Connaigre Head to Lamaline Shag Rock.

Now yesterday concerns were raised about the use of coasts behind St. Pierre and Miquelon with a construction of a line on the other side of the islands, and this morning Mr. Colson referred to what was done in the Anglo-French case.

Now because of the coastal direction change, the direction of the boundary line should change. And we have

represented this by a line that bisects the angle formed by the general direction of the coast -- coastal fronts from Connaigre Head to Lamaline Shag Rock on the Newfoundland side, and from Money Point to Scatarie Island on the Nova Scotia side. And that provides the direction of the line. But what about its location?

Again, the methodology applied in the Gulf of Maine case to deal with the concavity in open area transition provides guidance. The line must exit the concavity at a point that takes into account the relative lengths of the coast of the parties inside the concavity. And this is affected by locating the second segment at a point on the closing line that reflects the difference between the coastal lengths inside the concavity. In this case, the coastal ratio is 2.4, two to one. Accordingly, the second segment is located on the closing line at a point that reflects that coastal ratio.

So the second segment of the line runs from the intersection of the first and the second segment lines to the intersection of the second segment with the closing line from Scatarie Island to Lamaline Shag Rock.

PROFESSOR CRAWFORD: Mr. McRae, why are you ignoring St.

Pierre and Miquelon doing this?

PROFESSOR MCRAE: We are talking about the direction from the Burin Peninsula to Money Point. And therefore, it's

simply a straight line direction that is taken into account. We are looking at the geographical concavity, if you like for these purposes, St. Pierre and Miquelon is simply irrelevant, because we are talking about the geographical concavity formed by the Burin Peninsula and Scatarie as the entrance points to that concavity.

That brings us, Mr. Chairman, to the third segment of the Newfoundland and Labrador line, the line that runs into the outer area. And in the outer area, as we have pointed out, the coasts are the coastal wings. On the Newfoundland side from Lamaline Shag Rock to Cape Race, and on the Nova Scotia side from Scatarie Island to Cape Canso. And the relationship of these coasts, as I have said, is one of adjacency.

And the starting point of the line is the intersection of the second segment with the closing line. We have suggested that the line in this outer area should be a perpendicular running from the closing line to the outer limit of the Canadian continental margin.

Now a perpendicular has several advantages as we have pointed out. It doesn't veer towards the coast of one party or the other. It doesn't respond to coastal irregularities or other distorting features. And so it is more appropriate for an open sea area where minor coastal variations or deviations at the -- near the coast can have

a substantial impact on the areas resulting to the parties as the line moves seaward.

In the Gulf of Maine case, of course, which was pointed out this morning provides the useful model.

PROFESSOR CRAWFORD: I am sorry, but let me push the Seal Island and St. Pierre analogy. This system would be identical if St. Pierre and Miquelon did not exist, and that case had never been decided. The line would be in precisely the same place, is that correct?

PROFESSOR MCRAE: In terms of that line, I think that probably on the basis of the construction of that line, yes, it would be in the same place.

PROFESSOR CRAWFORD: Because on the way you -- in the way you have explained it, and the way you have explained it in your pleadings, neither the coast of St. Pierre and Miquelon, nor the areas attributed to it, played any part in any of the calculations.

PROFESSOR MCRAE: That's right.

PROFESSOR CRAWFORD: But it would be very odd, wouldn't it, if it was equitable to have that line whether or not St. Pierre and Miquelon existed. I mean, St. Pierre and Miquelon, being as it were from your point of view on the wrong side of the line, you would expect that any equitable construction which took account of all of the geographical realities would produce a line more

favourable to you, given that St. Pierre and Miquelon is there, than it would otherwise do. So a method which produces the same line irrespective of St. Pierre and Miquelon seems somewhat suspect.

PROFESSOR MCRAE: If -- Professor Crawford, if you are suggesting that we should move the line closer to Nova Scotia to compensate for the area from St. Pierre and Miquelon, that would be something that would obviously have to be looked at. But we don't -- we don't see that as a problem. And, of course, you can adjust and adjust for that sort of inequity.

What we are saying is that the inequity is there because the area is taken out, and we should not suffer any further inequity, because we already recognize that area comes out of our zone.

PROFESSOR CRAWFORD: But the point is, let's take someone who is convinced by your arguments that this essential method of delimitation is appropriate rather than any form of modified or unmodified equidistance. The person would still be puzzled that they were adopting a system of equidistance that took no account of a major -- of a major factor, a real factor in the equation, the existence of those islands and of maritime areas pertaining to them, or at least, the existence of the islands. And what they might do would be then to say, well our function now, as

it were, is to delimit this area, as between on the one part, Nova Scotia, and on the other part, Newfoundland and Labrador, and St. Pierre and Miquelon, because they are on the other side of the line.

Now the division between St. Pierre and Miquelon and Newfoundland and Labrador has already been achieved. So we don't have to worry about that internal thing. But nonetheless they are there, and their coasts cannot be ignored. So we have to have a method which takes them into account. And the problem with this method is that it doesn't.

PROFESSOR MCRAE: The argument though that I think that we are putting forward here is that the -- St. Pierre and Miquelon is a fact. Regardless of what one likes, one can't do anything about their existence, as they exist, and that has an affect on the island, on -- if in fact -- if in fact, the islands were part of the south coast of Newfoundland, then they would be the base points from which we would do our measurements. They are not. So we use the coastal relationships that exist as they are. We recognize that you still have to superimpose because of the facts of those islands, a zone that is superimposed on the area. But that doesn't stop the development of a method on the basis of the actual geography. And while the argument that there is inequity, it does not seem --

that results from that, yes, the inequity that results from those islands being there. That is a reality. But that doesn't mean one has to adjust in the method of delimitation. One might want to take into account that the equity of the result may be, but adjust in the method of the delimitation how you determine the way in which a line should be drawn, where you are dealing with, as we argue, a coastal concavity and a line exiting from that concavity.

As I mentioned the use of a perpendicular is something that was used again in the Gulf of Maine. Nova Scotia rejects the model -- that model, because they say that the area was a rectangle, and that the perpendicular to the closing line was also perpendicular to the coast at the back of the concavity.

But the outer area in this case is characterized by the existence of coastal wings. And if one ignores the concavity -- the back of the concavity and looks at the coasts that are in fact in this area that have a relationship to this outer area, the perpendicular in fact reflects the geography of those coastal wings, because a bisector of the angle formed by the coasts of the wings, be that Burin Peninsula to Cape Race, and Scatarie to Cape Canso, is almost identical to the perpendicular proposed by Newfoundland and Labrador.

So whether one does it as a perpendicular or as a bisector of the angle of the outer wings of the coast, the result is essentially the same.

It remains to consider the segment inside the Gulf of St. Lawrence. As we have said, in this area, the geography is really not complex. And as a result, as in the area just outside the Gulf, as long as the distorting impact of St. Paul Island is avoided, and perhaps this -- similar results would be achieved by the application of different methods. And perhaps I can just make it clear that when we talk about avoiding the impact of distorting island, this is not a claim by Newfoundland and Labrador to sovereignty over St. Paul Island.

Again, a perpendicular provides an appropriate line avoiding any distortion from minor geographical features. And as in the outer area, there is no need to determine the end point of the line. It simply continues to the limit of the jurisdiction of the provinces under their offshore accords, and leaves open the question of how delimitation might occur if offshore accords are negotiated with other provinces in the future.

Constructed in this way, Mr. Chairman, the Newfoundland and Labrador line, in our submission, reflects the actual geography of each of the separate components of the area to be delimited.

So let me turn now to the final phase of the delimitation process, the testing of the equity of the result. How should this be done? Well there are various tests that have been used and developed in the jurisprudence, and some have more or less weight, depending on the circumstances. And the classic test derived from the North Sea case, and developed subsequently, is that there should be a reasonable degree of proportionality between the areas allocated as a result of the delimitation and the lengths of coasts of the parties.

Other tests can look to see whether an adjustment to the line is warranted in the presence of particular factors, geographic or otherwise. And they might include adjustment in the light of catastrophic repercussions, or avoiding inequitable cut-off. In this case, Nova Scotia has placed so much weight on the conduct of the parties, that we will look to see whether there is anything in the conduct of the parties that would result in inequity, if the Newfoundland and Labrador line were adopted.

However, before looking at these tests, there is an additional test of the equity of the result that appears to have been manufactured entirely by Nova Scotia for the purposes of this case. It is the so-called Laurentian Sub-basin issue.

In its phase two Counter-Memorial, Nova Scotia spoke of the Laurentian sub-basin as if it was the issue in this case, in the hope, no doubt, of convincing the Tribunal that a result that did not grant a significant share in the Laurentian sub-basin would be inequitable.

Nova Scotia's whole approach to the Laurentian sub-basin issue is proof of the adage that if you talk about something enough, people will start to think that it is real. In its phase two Counter-Memorial, Nova Scotia produced a figure that is intended to show the Laurentian sub-basin. But apart from the artistic impression it gives, no information is provided on its precise description, estimates of potential value, or other information that could show why it is relevant to this dispute.

Mr. Chairman, a test of equity cannot be created because one party has arbitrarily chosen the feature that its claim crosses, and designated that feature as the issue in the case. The Scotia sub-basin hullabaloo is entirely of Nova Scotia's own making. As Mr. Willis pointed out, the lack of knowledge of the resources of the sub-basin prevent it from being considered as a relevant circumstance relating to resources in the area that are known or readily ascertainable, and they equally fail as a test of the equity of the result.

Let me turn to the classic test of proportionality. The application of such a test involves defining an area in which the coast and the sea area is to be measured. We have done this in our Memorial by testing the line proposed by Newfoundland and Labrador against the area we identified as the relevant area. This was done by taking the outer limits of the coast of the two parties, and using perpendiculars from the points on the coast to define the maritime area. Those perpendiculars run out 200 nautical miles. Yesterday, Mr. Willis provided a justification for the use of perpendiculars and I need to add nothing to that.

Now as we have demonstrated, the result shows that with roughly 60 percent of the coasts in the area, Newfoundland and Labrador received roughly 60 percent of the area. And Nova Scotia with roughly 30 percent of the coasts in the area received roughly 30 percent of the area.

Now Nova Scotia objects to this approach. It argues that since this is a continental shelf delimitation, the test should be applied to the whole area out to the continental margin. But, as Mr. Willis pointed out yesterday, such an approach is ill-conceived. First, we do not know where the limit is. But, secondly, and more fundamentally, extending to the -- the area out to the

limits of the continental margin does not provide a basis for checking the equity of the result. Where one state has a long shelf, and the other a short shelf, then the use of the outer limits of the margin to test the equity of the result will always show disproportion. So in those circumstances, the test cannot measure anything.

Another approach to testing the equity of the result would be to determine whether the line cuts off, or encroaches unduly on the maritime projection of another state. Or of either state. Inevitably, where a line divides an area between two states that are adjacent, then unless the two states are in a straight line, there will be some degree of cut-off.

Now Nova Scotia, as we know, wishes to place all of the consequences of cut-off on Newfoundland and Labrador. They want to avoid any encroachment on their maritime area. And figure 42 of the Nova Scotia Memorial illustrated this. As we pointed out, this cuts off the Newfoundland south coast completely, but frees the southeast-facing Nova Scotia coast from any encroachment at all.

MR. LEGAULT: Professor McRae, does it perhaps do one other thing in that figure? Does it perhaps indicate area the -
- a larger area of overlapping convergence? Including west of Cape Canso? When you -- it seems to me, almost a

perfect illustration of this, and of course, that's not coincidental, because cut-off, of course, arises from overlapping and convergence.

PROFESSOR MCRAE: I'm sure, Mr. Legault, Nova Scotia will be delighted to hear that, because as I recall, they used that illustration initially to show that they did project out for the whole of the coast. But I think that, again, the answer that I gave before illustrates this. The further out you go, yes, coasts do converge and overlap, but it is not significant enough to take into account in the determination of the relevant area for the purpose of delimitation. And when one is defining the relevant area, one is defining coasts that reasonably approximate to the area that the delimitation is to take place.

MR. LEGAULT: What I'm really getting at is there is, I would think, an intimate inter-relationship between convergence on the one hand, and cut-off on the other.

PROFESSOR MCRAE: We will show in a second what the cut-off would be from the Newfoundland and Labrador line, and with respect the cut-off would not have the impact out to the area that you are -- that you are suggesting.

MR. LEGAULT: I was not really suggesting anything of that kind, Mr. McRae.

PROFESSOR MCRAE: Thank you.

PROFESSOR CRAWFORD: Might I take you back to the previous

graphic, please? And you work out those proportions, and remember right at the beginning I asked you whether we took a pair of scissors and cut out the -- the St. Pierre Miquelon area, or not? The -- for the purpose of calculation, you've done exactly that. But since your method would produce the same line even if St. Pierre Miquelon was part of Newfoundland, I gather for about 60 years it was. In the 17th century.

PROFESSOR MCRAE: On and off.

PROFESSOR CRAWFORD: Well, let's take one of the on periods.

The way you have constructed that line would be the same whether or not St. Pierre and Miquelon was part of Newfoundland. Indeed, it would be the same whether or not it existed. But let's take it as part of Newfoundland. Surely in working out proportionality, you have to count the maritime area of St. Pierre and Miquelon.

PROFESSOR MCRAE: I would suggest we do not have to take it into account, because it's not an area appertaining to the coastal -- the coastal state. And the fact that we ignored St. Pierre Miquelon in the construction of the line, that may be different now if -- if -- if you perhaps are providing an answer to your earlier question, as to whether -- that is whether everything would be identical if in fact, St. Pierre Miquelon was part of Newfoundland. And I indicated further -- I indicated earlier that a base

point would be further out, and one would have to look at the impact of that using a different base point on St. Pierre Miquelon, what impact that would have in the line, what that impact would have on the coast, and whether you would end up with identically the same -- with an identical line. And so I think that that would simply depend upon how that was constructed in those -- in those circumstances.

But again, we are not talking about mathematics of any superior kind here. We are talking about rough calculations of equivalence in -- in these tests of proportionality.

PROFESSOR CRAWFORD: It would helpful if you could let us have the figure as it would be if -- if the maritime's zones of St. Pierre and Miquelon were taken into account. Just as a matter of information, at least.

PROFESSOR MCRAE: We -- we will provide that information, Professor Crawford.

Mr. Chairman, the Nova Scotia line cuts off the south coast of Newfoundland. And the Newfoundland and Labrador line reduces that cut-off. In fact, it shares the cut-off between the two parties. It effects a degree of cut-off of both of the parties, but it does not cut one off unduly in comparison with the other. As I mentioned, cut-off is inevitable in these circumstances. It is a question of

balancing it between the two parties, and not putting it all on one or the other. So in our view, there is no inequitable cut-off from the Newfoundland and Labrador line.

Next, Mr. Chairman, in testing the equity of the result, we come to the issue of conduct. And frankly, we think that there is little to say on this, and there certainly is nothing that can be said that has not been said before, many times.

But I think we can say it quite simply for these purposes. In its Award, the Tribunal distinguished between the conduct that was alleged to have constituted an agreement in respect of the area inside the Gulf, and out to Point 2017, and the situation with respect to the area beyond. In respect of the line beyond the Tribunal was clear. The events of 1964 and 1972, and the associated relations of the parties could not constitute an agreement, even if there had been an agreement in respect of the rest of the area.

This suggests that the only conduct arising out of the political relations of the parties from 1964 on that could be conceivably relevant to testing the equity of the result is conduct in respect of the area inside Point 2017. But if that is so, since the line proposed in that area differs little from the line that was proposed in

1964 and '72, in effect, no inequity can result.

And in respect of the area outside Point 2017, the only potential conduct in that area is permitting practice. But as Professor Currie has made clear yesterday, the only permitting conduct of Newfoundland and Labrador that Nova Scotia ultimately can invoke consists of one rather doubtful permit. Nothing that would constitute inequity if the Newfoundland and Labrador line were to be adopted. And in respect of the Nova Scotia permits that expired years ago, in our view, no inequity can exist there.

Finally, Mr. Chairman, there is the issue of catastrophic repercussions, which could justify a deviation from a line to take account of resources in the area. But as we have said in our written pleadings, where resource extraction is potential rather than actual, no question of catastrophic repercussions from the drawing of a line could arise. Again, there is no basis here for questioning the equity of the result achieved by the Newfoundland and Labrador line.

Mr. Chairman, the line put forward by Newfoundland and Labrador in this case is a line in accordance with the applicable principles of international law governing maritime boundary delimitation. It's a line that is based on, and responds to the particular geography of the area

to be delimited. It produces a result that is proportionate according to accepted tests of proportionality, and there are no other factors that make the result achieved by the line to be inequitable. Therefore, in our view, it is a line that should be adopted by the Tribunal in delimiting the respective offshore areas of the parties.

Mr. Chairman, members of the Tribunal, it is now time to draw the first round presentation of Newfoundland and Labrador to a close. And in doing so, I will not take the time of the Tribunal to -- by retracing our arguments of these two days. I will simply make a brief comment.

You have before you stark differences on the approach to this case. On the one hand, Newfoundland and Labrador has set out the principles of international law governing the delimitation of maritime boundaries, and applied them, to divide the offshore areas of the parties as if they were states. This has led to an appreciation of the geography of the area. An analysis of the other relevant factors. And a determination in the light of the jurisprudence of methods of delimitation that will apply to the particular geographic circumstances of this case. The line has then been tested to see, to determine whether it produces an equitable result.

On the other hand, you have the approach of Nova

Scotia, which redefines the principles of international maritime boundary law to fit a delimitation between provinces with limited rights of management and revenue sharing.

The law is being applied to provinces as if they were not states. This leads to an inversion of the relevant circumstances and the determination of a line based essentially on conduct supported by factors which the international law of maritime boundary delimitation has determined to be irrelevant.

In my opening statement, I indicated that there were three fundamental differences between the parties, the basis of title, geography and conduct. But although we identified three areas of disagreement, as we saw it, they really all revolve around one, the basis of title. For if the Tribunal rejects Nova Scotia's arguments relating to the unique basis of title deriving from the Accords and the implementing legislation, the whole edifice of the Nova Scotia case collapses.

There are no principles of international maritime -- there are no principles of international law governing the delimitation of maritime boundaries that support the line proposed by Nova Scotia. The geographic frame of reference and the primacy of conduct is a relevant consideration elevating no agreement into an agreement can

find no basis in law absent Nova Scotia's view on the basis of title.

Thus Mr. Chairman, as we move now to the presentation of the Nova Scotia case, we invite you to keep in mind that in spite of the wealth of detail about conduct that you will hear, in spite of the querying over particular points on the coast used by Newfoundland and Labrador, or over what we call principles are really criteria, the Nova Scotia case all hinges on its conception on the basis of title, and without it, Nova Scotia has no line.

Mr. Chairman, in concluding, I simply wish to affirm -- reaffirm all of the arguments made in our written pleadings, even though we have not referred to them specifically in this oral phase, and to reaffirm the submission in our Memorial that the Tribunal delimit the line dividing the respective offshore areas of the parties in the manner put forward by Newfoundland and Labrador.

Professor Crawford?

PROFESSOR CRAWFORD: There may be areas of outer continental shelf that are attributable to Canada by reason of Sable Island, although it may be that because of the configuration here, that's not the case, but in any event, your position is that we're working up to 200 miles, but the line is continuing, and at least there are certainly areas within 200 miles of Sable Island that Canada claims

that we are delimiting.

PROFESSOR MCRAE: We have no -- no problem with the use of Sable Island as a base point for the outer determination of either the 200 -- of the 200-mile zone. That's not a question in issue. It's only a question of the weight that ought to be accorded to Sable Island in delimitation, which, in our view, is a quite separate question.

PROFESSOR CRAWFORD: Yes, but I mean -- well, I can see that it's separate in relation to areas within 200 miles of the mainland, but is it separate -- if you go further out, is it -- is there some problem in saying, well, we're delimiting areas which are attributable as least as EEZ? Let's take that as an illustration. As EEZ, they are attributable to Canada in right of Sable Island, but we give Sable Island zero weight in delimiting that area as between the two parties.

PROFESSOR MCRAE: Again, Professor Crawford, in our view, the answer is no, it is not -- it is not significant. What the task of the Tribunal here is to delimit the respective offshore areas of the -- of the parties under their Accords. Those Accords grant the provinces rights out to the limits of the Canadian continental margin. How Canada got to that continental margin is simply irrelevant to this arbitration, and therefore, whether it is part of an extension, which I think probably, in fact, we might

argue -- whether one could even argue that the continental shelf is a projection of an island like that, in any event, of the coast, but in our view, it really doesn't matter because the only question is the use of Sable Island as a point in delimitation. And again, I don't think it matters whether one is talking about within 200 or out to the extent of the continental margin. There is a difference between entitlement of the state and the use of points -- islands in delimitation.

And in this sense, that entitlement is simply the Canadian continental margin, as mentioned in the Accords.

Mr. Chairman, members of the Tribunal, if there are no further questions, thank you for your courtesy and attention you have given me and my colleagues in the presentation of the Newfoundland and Labrador case.

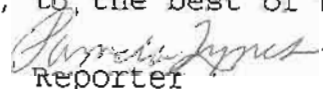
CHAIRMAN: I was wondering, Mr. Fortier, what you would think of the opening time on Thursday?

MR. FORTIER: 9:30. If that's convenient to the Tribunal, it's convenient to us, Mr. Chairman.

CHAIRMAN: Yes. That's fine. Thank you.

(Adjourned)

Certified to be a true transcript of the proceedings of this Arbitration, as recorded by me, to the best of my ability.


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