ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR

AND NOVA SCOTIA

held on the 22nd 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:

L. Yves Fortier, Q.C.

Professor Dawn Russell

Professor Philip M. Saunders

Jean G. Bertrand

.....

CHAIRMAN: Mr. Fortier?

MR. FORTIER: Thank you, Mr. Chairman. Good morning. Mr. Chairman, members of the Tribunal, I have the honour and privilege to lead the oral argument on behalf of the

Province of Nova Scotia this morning.

In a news release which was distributed to the media on the 12th of March, 2001 -- it seems like a long time ago, doesn't it -- the opening day of the hearing in the first phase of this arbitration, the Government of Newfoundland and Labrador clearly stated what this dispute was all about: access to hydrocarbon resources, not just anywhere, but specifically in the Laurentian sub-basin. Their news release stated, and I quote, "The establishment of a boundary line will open highly prospective areas between the two provinces (in particular the Laurentian sub-basin) to exploratory drilling.

A little more than two months later, in the aftermath of the Tribunal's Award in the first phase of this case, in an article focusing primarily on the fate of the Laurentian sub-basin, Newfoundland and Labrador's Minister of Mines and Energy proclaimed his Province's intention in this arbitration. He said, "We want it all." If his words were in any way enigmatic at the time, I submit that they are no longer.

Not since Nova Scotia and Newfoundland began issuing permits along the line that they both considered to be an appropriate offshore boundary, almost 40 years ago, as Newfoundland and Labrador formally articulated a different claim to the maritime area between the two provinces,

until now. And now that such a claim has finally seen the light of day, Mr. Chairman, gentlemen, it must be seen for what it is: a blatant attempt to get all of the sub-basin and much else, as well.

My friend, Mr. McRae, on Sunday -- on Monday morning, suggested that there was an inherent contradiction between getting it all and splitting the difference. In fact, there is no difference. There is no contradiction. Clearly, Newfoundland's aim is to get all of the sub-basin. The method by which Newfoundland and Labrador hopes to attain this goal is a grossly exaggerated claim, a claim with plenty of "wiggle room", so to speak, the animating spirit of which appears to be to induce the Tribunal to "play Solomon", dividing the baby in half in a manner that accords all of the sub-basin to Newfoundland.

But Nova Scotia knows that the Tribunal, as King Solomon, will not accept to play this game. And just as the motivations of the party willing to go along with such a ruse were exposed to long ago, so too are Newfoundland's intentions in this case now clear.

This may not be a "zen delimitation", as Mr. Legault pointed out on Tuesday afternoon, but the Tribunal is more than sufficiently enlightened to resist the temptation held out by Newfoundland.

Like ships passing in the night, that is how

Newfoundland and Labrador in its Counter-Memorial describes the cases put before the Tribunal by the parties -- like ships passing in the night.

Presumably, Newfoundland and Labrador had in mind Henry Longfellow's imagery of "ships that pass in the night", and speak each other in passing; only a signal shown and a distant voice in the darkness. But it might well have heeded the words of Lewis Carroll, with which I'm sure members of the Tribunal are familiar. "But the principal failings occurred in the sailing and the Bellman, perplexed and distressed, said he had hoped, at least, when the wind blew southeast, that the ship would not travel due west."

If it is true that the parties are "as ships that pass in the night", Mr. Chairman, it is principally because of Newfoundland's sailing. Its master and crew have deliberately chosen to steer a course well outside the normal lanes of traffic, and to cry out from a distance, even in the light of day, lest they sail too long within range of Nova Scotia's well-aimed guns.

Perhaps the most telling manifestation of Newfoundland and Labrador's willingness to tack back and forth at will -- to weasel or to wiggle, to use a landlubber's metaphor -- was provided on Monday morning this week when Newfoundland's Agent managed to argue his case regarding

the basis of title with barely any mention of the words offshore area and no mention at all of the phrase "The Accord Acts". That was quite a feat.

But, of course, the parties' positions are not ships in the night -- at least not as Newfoundland and Labrador imagines them to be. Rather, as the Tribunal will have realized, the Memorials and the Counter-Memorials filed by Nova Scotia and Newfoundland and Labrador not only speak each other in passing, but serve to lay bare the critical issues that must be decided in order for the Tribunal -- I quote from the Terms of Reference -- "to determine the line dividing the respective offshore areas of the parties."

As the Agent for Newfoundland and Labrador stated, both in his introduction as well as in his conclusion earlier this week, although the two provinces have adopted vastly different approaches to the delimitation to be effected in this case, in terms of theory, in terms of analysis, in terms of strategy, in terms of presentation, they both focus on the same issues.

What are these issues? The object and the purpose of the arbitration and the Tribunal's mandate; the legal basis and nature of the parties' entitlements; the applicable principles of international law, in particular, the fundamental norm of maritime delimitation and the

process of delimitation; the role of conduct, in particular, among the relevant -- the role of conduct, in particular, among the relevant geographic and other circumstances of this case, and the delimitation proposed by each party, including the relevant coasts and area, and the equitableness of the results.

In my remarks this morning, Mr. Chairman, members of the Tribunal, I will address principally the first two of these issues -- the mandate of the Tribunal and the entitlements that are at issue in this delimitation. My colleagues, Professors Russell and Saunders, and Mr. Bertrand, will address the remainder of the issues that I have just identified during the time available to Nova Scotia today and tomorrow, and I will conclude briefly tomorrow afternoon.

In the course of these submissions, counsel for Nova Scotia will, as always, welcome the opportunity to respond to questions from members of the Tribunal and to clarify any uncertainties regarding our position. We believe that such a dialogue can only serve to reinforce the merits of the maritime delimitation that Nova Scotia has proposed while exposing the principal failings in Newfoundland's sailing.

Needless to say, Nova Scotia relies on the entirety of the submissions made in its written materials, whether or

not they are referred to during the hearing. And, in particular, Mr. Chairman, though it does not intend -- we do not intend to use the time available during the hearing to restate our case regarding acquiescence and estoppel, or to refute the claims made by Newfoundland and Labrador in this regard, Nova Scotia relies on the submissions set out in its phase two Memorial.

The mandate of the Tribunal. Well, the mandate is set out in the Terms of Reference. By now, it is familiar to all involved in this arbitration on both sides of the bar. It is strange -- it is, indeed, very strange, therefore, that Newfoundland and Labrador has chosen to call into question certain aspects of your mandate. It having done so, however, Nova Scotia is required to respond and to reiterate the nature and the scope of the exercise in which the parties and the Tribunals are engaged.

I apologize, Mr. Chairman, member of the Tribunal -- I apologize in advance if this seems a tedious exercise; however, Newfoundland and Labrador's obstinate refusal to recognize the clear mandate of the Tribunal and its attempt instead to cloud the issue obligates Nova Scotia to start with the basics. I pray indulgence of the Tribunal. Please bear with me.

The object and purpose of the arbitration are spelled out in the very title of the Terms of Reference now on

your screen.

Terms of Reference to establish an Arbitration Tribunal for the settlement of a dispute concerning portions of the limits of the respective offshore areas as defined in both Acts. This is supplemented by an identical description of the dispute to be resolved by the Tribunal, in the preamble of the instrument:

Considering, as you will see now on your screen, considering that a dispute has arisen between the two provinces concerning portions of the limits of their respective offshore areas, as defined in the Acts.

And the preamble continues:

Considering that the parties have expressed a common desire to have the dispute referred to an arbitration Tribunal for resolution;

Considering the responsibility of the Federal Minister, etc., to determine the constitution and membership of the Tribunal, and the procedure for settlement of the dispute.

Again, in Article 1, entitled "The Dispute", there is a dispute within -- between the Provinces. And the Federal Minister refers this dispute to arbitration.

And, of course, in Article 3, "The Mandate of the Tribunal", your mandate, Mr. Chairman, Members of the Tribunal. The Tribunal shall determine the line dividing

the respective offshore areas of the parties.

And again, significantly in Article 15, the Federal Minister shall recommend that the Governor in Council amend to the extent necessary, the description of the portions of the limits set out in Schedule 1 of the Canada-Nova Scotia Act, and prescribe the line for the purpose of paragraph (a) of the definition of offshore areas in section 2 of the Canada-Newfoundland Act, the whole in accordance with the outcome of this arbitration, determining as between the parties the line dividing their respective offshore areas.

There is not the slightest ambiguity as regards the nature of the dispute, the object of this delimitation, the scope of the Tribunal's mandate in this arbitration, or the ultimate effect of its decision.

Newfoundland and Labrador has raised a dispute regarding the line dividing the two parties' offshore areas, as defined in their respective Accord Acts - no other dispute is extant.

The thing to be delimited by the Tribunal is the line dividing the parties' offshore areas as defined in their respective Accord Acts, and no other thing.

Your Tribunal has been established for this purpose only, to determine the line dividing the parties' offshore areas, as defined in their respective Accord Acts.

And the Tribunal's determination shall form the basis of recommendations to Cabinet regarding amendments to the definition of the parties' offshore areas.

And what is the definition, Mr. Chairman, Members of the Tribunal? What is the definition of the parties' offshore areas, as set out in the Accord Acts?

Well, in the Canada-Newfoundland Act of 1987, we read...you can see it on your screen...offshore area means those submarine areas lying seaward of the low water mark of the province, and extending, at any location, as far as any prescribed line, or as in this case, where no line is prescribed, as extending to the outer edge of the continental margin, or a distance of 200 miles, whichever is greater.

The mirror definition in the Canada-Nova Scotia Act of 1988, of offshore area, reads, "offshore area means the lands and submarine areas within the limits described in Schedule 1, which itself provides that the inner limit of the offshore area is the low water mark of Nova Scotia, while the outer limit runs to the outer edge of the continental margin."

In his comments on Monday afternoon, my friend Mr. Willis, declaimed that delimitation law is a body of law that is inseparable from its practical applications. I repeat, Mr. Willis stated that delimitation law is a body

of law that is inseparable from its practical applications. Well, Mr. Chairman, Members of the Tribunal, the question of practical applications is precisely the point that we must constantly bear in mind.

In a nutshell, this arbitration concerns the refinement and implementation of a legal regime involving the Federal Government and each of the two parties, as defined in federal and provincial legislation.

And the sole purpose of this arbitration is to complete the legislative picture sketched in the Accord Acts, to determine the boundary between the offshore areas of the two provinces, so that the Acts may be amended, as necessary, and the legal regime of the offshore areas, as established in the legislation, may be implemented fully.

And the practical application of your Tribunal's determination will be to determine a line which will be used to amend legislation, the entire purpose of which is declared in its official title, which I quote again, "An Act to implement an agreement between the Government of Canada and the Government of Newfoundland and Labrador/ Nova Scotia, on offshore petroleum resource management and revenue sharing".

Mr. Chairman, Members of the Tribunal, all of this may appear self-evident, but it is effectively challenged, I would say it is subverted, in Newfoundland and Labrador's

submissions.

Now, there is no dispute, there can be no dispute, regarding the fundamental significance in this, as in any maritime delimitation case, of the origin of the parties' entitlements to the maritime area at issue.

In Newfoundland's words, and I quote, "The basis of title is the primordial consideration in a delimitation..." they say, "...based on principles of international law."

Or, as my friend Mr. Willis put in on Monday, "The basis of title is the point of departure of the international law of maritime delimitation, and it is the benchmark of relevance."

I agree with my friend, Mr. Willis, but I quickly part company with him.

In the opening paragraph of its overview of the arbitration, in the opening paragraph, Newfoundland and Labrador claims that its proposed boundary reflects, and I quote, "The basis of title as defined in the international law of maritime delimitation."

I repeat, Newfoundland and Labrador, in its own Memorial, says that its proposed boundary reflects the basis of title as defined in the international law of maritime delimitation.

Well, Newfoundland and Labrador claims much more in

this passage, and I will come to these other facets of this passage in a few moments, but before proceeding any further, may I identify a problem which I'm sure Members of the Tribunal have already seized.

What Newfoundland is pleased to call "the basis of title", is not, cannot be, defined in the international law of maritime delimitation. Members of the Tribunal know that.

As the Court, the international Court, made absolutely clear in Libya -- in the Libya-Malta case, the law applicable to entitlement and definition on the one hand, and the law applicable to delimitation on the other, are distinct.

I quote from the Libya-Malta decision, that the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are not only distinct, but are also complementary is self-evident.

While the two questions are clearly complementary, the fundamental norm requires the adjudicator, you, to consider the basis in law of the entitlements to be delimited. But as the Court found in Libya-Malta, dealing with an exclusive economic zone, as the basis of title changes, so may the results of the delimitation change as a consequence.

MR. LEGAULT: Mr. Fortier?

MR. FORTIER: Yes, Mr. Legault?

MR. LEGAULT: Just a small question.

I follow your argument perfectly, but I'm simply wondering why you say that the fact that the question of entitlement on the one hand, and of delimitation on the other hand, are not only distinct, but complementary, should mean that there is no definition in international law of the basis, legal basis of title?

MR. FORTIER: I'm coming to that very question presently, Mr. Legault.

MR. LEGAULT: Thank you.

MR. FORTIER: Since the basis of title varies from zone to zone while the fundamental norm of maritime delimitation remains constant, it appears to me -- and this is in part an answer to your question, Mr. Legault -- it seems to me that this is entirely logical. You know, Newfoundland and Labrador does not do so expressly, but it implicitly asks the Tribunal to accept that the characteristics of title to the continental shelf are components of the law of delimitation to be applied in this case, which they are not.

There is no definition of the basis of title, because as I said, it changes with the nature of the zone to be delimited. I think I will demonstrate to you in the

course of my argument that this is evident when one reads, for example, the North Sea cases, the Gulf of Maine, the Jan Mayen case. The basis of title in each one of those cases was different. And the Court said it was different. And the Court said well, we will apply the fundamental norm.

MR. LEGAULT: Mr. Fortier, just another question. I'm very much looking forward to that presentation, indicating that the basis of title varies from situation to situation. Because according to my reading of the jurisprudence, the basis of title is, was and always remains the sovereignty of the coastal state over its land territory and the projection of that sovereignty seaward through the median of its coast for the territorial sea, for the continental shelf, for the exclusive economic zone, and for the contiguous zone. But I gather you are going to be, as you just said, reviewing that for us? I look forward to that with interest.

MR. FORTIER: I notice that in your recital of the various zones, where the basis of title may have or did indeed stem from -- flow from the sovereignty of the coastal state, you left out the very delimitation that you are called upon to make in this case. That is a delimitation of offshore areas.

MR. LEGAULT: I have never heard of one in the

jurisprudence, Mr. Fortier.

MR. FORTIER: No. You are absolutely right, Mr. Legault. You are pioneers. You are pioneers and this is what Nova Scotia submits. But Nova Scotia is confident that in the same way that the international Court or arbitration tribunals seized with a different area to be delimited found it possible to apply the fundamental norm and proceed to a delimitation, we are confident that in this instance you will accept to meet the challenge.

CHAIRMAN: We do have another kind of challenge in the words we used in the first Award. In paragraph 310, after stating that the Tribunal is required to apply the principles of international law and then the next sentence is, this directs the Tribunal to those principles binding upon Canada which governs the delimitation of adjacent areas of continental shelf. We have that problem.

We have also on a factual kind of problem the situation that we all know that in the continental shelf areas, petroleum was the tail that wagged the dog.

MR. FORTIER: A familiar expression.

CHAIRMAN: So we have to get around -- somehow you have to get around those words to me in it and explain why this is -- that law is inapplicable as -- otherwise we are left rather with equitable principles, and we have to, as you say, to make it all up again. And it would have been so

easy for the Act to say just apply equitable principles.

MR. FORTIER: Well, Mr. Chairman, Nova Scotia has no problem with this passage in your phase one Award. First, I would point out that this was not a matter that was argued in the first phase of the arbitration. I think it's important to keep that in mind.

Secondly, Nova Scotia has read this statement, and it agrees with this reading, that the Tribunal is directed to those principles binding upon Canada which govern the delimitation of the physical area of the continental shelf. Not the juridical area of the continental shelf. There is a distinction, which I submit must be applied because you could not have ruled in the phase one Award that this was a matter, although it had not been argued, although you had not heard any submissions, was decided.

If you meant to say that the Tribunal would consider the physical continental shelf of the two provinces, we have no problem with that at all. Of course, that is a fact. And as I will be saying in the course of my argument, facts are facts. But the fact of the physical continental shelf has to to be considered in the light of the legislation and your Terms of Reference. And the continental -- in respect of the continental shelf, there are offshore areas which have to be delimited, and the purpose of the delimitation is to define the area where

each one of the provinces will participate in the royalty scheme.

It is not -- your decision is not going to confer sovereignty over the continental shelf in favor of the provinces. That is not what your mandate is.

PROFESSOR CRAWFORD: Mr. Fortier, I get the impression -- of course one had the converse impression with Newfoundland that you are international for the purposes of agreements and domestic for the purposes of resources. But the point is that Canada as a state in international law has an entitlement to continental shelf resources, that is to oil and gas.

We are not concerned with sedentary species. Canada has an entitlement to oil and gas throughout the area to be delimited by reason of the continental shelf. And we have a mandate under legislation of Canada which tells us to draw a line between the two provinces for the purposes of revenue sharing of that resource by reference to principles of international law.

I just wonder what other principles of international law there might be, than the principles of international law relating to delimitation of the continental shelf? Obviously there is an element of fiction in treating Nova Scotia and Newfoundland as states, but there is no particular difficulty in treating them as policies which

have claimed an entitlement.

I'm afraid I'm slightly baffled as to why this matters? Because if we are clearly enough pointed by legislation and by the Terms of Reference to a set of rules, and the rules are relevant to the delimitation of the resource, which as you rightly say, is in issue, why does it matter?

MR. FORTIER: Well I see by the three questions which members of the Tribunal have asked, that they are still understandably influenced by the oral submission of my friends acting on behalf of Newfoundland and Labrador. I'm only in the first half-hour of my presentation and I'm confident that in the course of the next little while, the light will be made. That is my responsibility. It's a challenge which I accept.

PROFESSOR CRAWFORD: Persuasion by contact, Mr. Fortier.

MR. FORTIER: Exactly. So these are all very pertinent questions, extremely pertinent questions. I -- if at the end of my presentation either one of you is still pregnant with the questions that you have posed, I trust that you will remind me that I have failed in my responsibility to try and bring you around to the point of you -- of Nova -- the validity of Nova Scotia's argument.

All of these questions stem from the all important definition of the basis of title of the parties in this

case. And yes, Newfoundland and Labrador asks you, the Tribunal, to accept that the characteristics of title to the continental shelf are components of the law of delimitation to be applied in this case. That is what they are asking you to do and that is what your questions seem to indicate. Having heard only one of the two parties, this is what your questions seem to indicate you are called upon to do.

And I will try to convince you that this is not your mandate and indeed to do so would, I submit very respectfully, leave the Tribunal open to challenge in the Canadian courts. That it had exceeded its jurisdiction. That is -- that's as far as I go in developing my argument, Mr. Chairman, members of the Tribunal.

The characteristics of title to whatever zone is being delimited are, as Mr. Legault implied in his question -- the characteristic of title to whatever zone is being delimited are taken into account in delimitation law. They are the primordial consideration in a delimitation based on international law. But I submit, they are not part of that law. In Libya-Malta the Court emphasized the need to take account of the legal basis of that which is to be delimited and of entitlement to it.

The Court declared, Mr. Chairman, members of the Tribunal, and I quote, "The legal basis of that which is

to be delimited and of entitlement to it cannot be other than pertinent to the delimitation." And here that which is to be delimited is, to quote the Terms of Reference which must guide you -- that which is to be delimited is the offshore areas as defined in the Accord Acts, nothing more and nothing else.

And the legal basis, Mr. Chairman, gentlemen -- the legal basis of the offshore area, that which is to be delimited and of entitlement of those areas, is found in these Acts. So Newfoundland never finds the answer to the question, never, what is the basis of title to that which is to be delimited in this case.

Well, I submit that the answer lies elsewhere than among the principles of law governing maritime boundary delimitation.

But because Newfoundland narrows the scope of its search, and because it refuses to see the facts as they are, its purported analysis is more of a wild goose chase.

No wonder -- no wonder that Newfoundland and Labrador reacts with such disbelief to Nova Scotia's position regarding the basis of title, a position which it then attempts to ridicule.

Newfoundland and Labrador accuses Nova Scotia of foisting upon the Tribunal an unprecedented conception of the basis of title, with some success, I gather, up to

now. And of following a radically different approach than Newfoundland. I am sorry, than Nova Scotia. And it scoffs that Nova Scotia, and I quote from their Counter-Memorial, "holds that the basis of title in this case is merely a negotiated entitlement implemented in Canadian law." This is their principal charge, that Nova Scotia holds that the basis of title in this case is merely a negotiated entitlement implemented in Canadian law.

Well, Mr. Chairman, members of the Tribunal, I appear before you today, on behalf of the Province of Nova Scotia, and I plead in effect guilty. Guilty as charged on all counts. And the first witness -- the first witness I would call in my defence is Mr. Currie, counsel for Newfoundland and Labrador, who on Monday acknowledged on two occasions that the entitlements at issue in this case involve rights enjoyed by virtue of a negotiated process. Specifically, and I quote from Mr. Currie's presentation, "a negotiated process between it and the federal government, since enshrined in legislation."

To attempt to indict Nova Scotia, as Newfoundland and Labrador has done, to charge that Nova Scotia holds that the basis of title in this case is a negotiated entitlement implemented in Canadian law is to state our defence as eloquently as we could hope to do ourselves.

Can there exist any genuine doubt, Mr. Chairman,

members of the Tribunal, can there exist any genuine doubt regarding the origin and basis of the parties' entitlements in this case? No great imagination, no fiction, Dr. Crawford, no metaphorical transfer to the circumstances of this case of concepts and terms appropriate to other cases is required to solve any uncertainty. All that is required, all that is called for is good faith consideration of the facts.

From this perspective, Mr. Currie's candid, if belated admission, that the nature of the parties' offshore area rights derive from a negotiating process enshrined in Canadian law is very refreshing indeed.

If the history of the dispute were not dispositive regarding the nature of the entitlements at stake, the Terms of Reference are themselves conclusive. And I remind you again of what they say. The dispute in this arbitration, the dispute that you have to resolve, concerns the boundary of the parties' offshore areas, as the term is defined in the Accord Acts. And we saw earlier that the Accord Acts, which define the parties' offshore areas, merely implement in law, agreements, the Offshore Accords negotiated by the parties and the federal government.

It is those Accords --

PROFESSOR CRAWFORD: Mr. Fortier, when you say, merely --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- that -- I mean, up to now I am entirely in agreement, what you are saying is that the rights of the provinces have derived from the legislation.

MR. FORTIER: That's right.

PROFESSOR CRAWFORD: The Accords, themselves, of course, though were a necessary political stage to having the legislation, were not self-implementing in Canadian law --

MR. FORTIER: No, that is correct.

PROFESSOR CRAWFORD: -- that legal effect. The legal effect derives from the legislation.

MR. FORTIER: That's right.

PROFESSOR CRAWFORD: So I mean if what you are saying is the rights derived from the legislation, then we can all go home and agree. But I mean the question is where does that take us?

MR. FORTIER: Well I am coming to it. But the genesis of those rights must begin with the Accord agreements. That's where a political -- negotiated, political agreement intervene. And then those rights were implemented in the Accord Acts. And if those Accords -- I am sorry, it is those Accords, as implemented in the Acts, which follow, it is those Accords, which establish and specify the nature of the zones defined as offshore areas, and which are the source of the legal entitlements of the

two provinces within those zones.

For example, the Canada-Newfoundland Atlantic Accord states that the object and purpose of the Accord, and this is key, the object and the purpose of the Accord is joint management of the offshore oil and gas resources off Newfoundland and Labrador, and the sharing of revenues from the exploitation of those resources, while the area covered by the Accord is defined as that area -- that area below the low water mark out to the edge of the continental margin coming within Canada's jurisdiction. And as we know, the Canada-Nova Scotia Accord contains similar provisions.

Now the Accords, and the legislation which follow, are the results of negotiation between the two provinces and the federal government. And that, Dr. Crawford, goes to conduct. That was -- there was a negotiation. There was an agreement. The agreement was implemented. And that is very relevant to conduct. And this will lead me to say to you presently, that amongst other consequences that flow from this stream of important documents, the Accord, the Accord Acts, is that conduct is highly relevant. Not only geography, as Newfoundland and Labrador would have it.

Need I remind you, Mr. Chairman, members of the Tribunal, that the mandate of the Tribunal and the sole purpose for which it has been established is to determine

the line dividing the parties' respective offshore area, zones of entitlement, as defined in the Acts, and originated in the negotiated Accords. And I would submit that this reinforces the answer that I gave earlier that we are not dealing, Mr. Chairman, with continental shelf. We are dealing with offshore areas. And your role is to delimit these offshore areas. For what purposes? So that the sharing of revenues can be apportioned as between the two provinces.

So, yes, as Newfoundland and Labrador has finally acknowledged, and as I hope I am convincing you, yes, the basis of title in this delimitation -- the basis of title is a negotiated entitlement implemented in Canadian law. That's where it starts. And that's where the maritime delimitation exercise has to begin with an identification of, and a definition of the basis of title. And we see that it is a negotiated entitlement implemented in Canadian law.

PROFESSOR CRAWFORD: Mr. Fortier, if you look at section 6, subsection 4 of the -- I think this is the Newfoundland Act, but I think the Nova Scotia Act says -- is in exactly the same terms -- it says, where the procedure for the settlement of a dispute pursuant to this section involves arbitration, which this one does --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- and the reference to the dispute is a dispute over the extent of the offshore areas, the arbitrator shall apply the principles of international law governing maritime boundary delimitation with such modifications as the circumstances require.

Now there are no principles of international law governing offshore areas under the Canadian Act.

MR. FORTIER: I am with you so far.

PROFESSOR CRAWFORD: No other state has any interest in how Canada decides to allocate offshore areas. And Canada might have decided to allocate the offshore areas for the purpose of revenue sharing by any criterion, or whatever, without any breach of international law. But doesn't -- don't these -- that doesn't this provision direct us to, as it were, an analogous area of international law for the purpose of drawing a line?

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: Admittedly, it is for a Canadian purpose. But I mean I just don't see any difficulty in our -- in our accepting that mandate. The principles of international law have in real life been concerned, at least so far as the continental shelf is concerned with oil and gas, which is this resource. I mean they are not as it were two different resources. It's the same resource.

So, although I agree with you entirely that the basis of title of the provinces, that is to say, their entitlement in law to the share of a resource and to joint management and so on, derives from the legislation, I just don't see what the connection is between that proposition and any proposition that's relevant to what we have to decide. Now I am just telling you my problem. I haven't made up my mind, I can assure you. I would just like you to try to make that link.

MR. FORTIER: I hope that by the time I am finished with my presentation, Dr. Crawford, that the link will be evident, because if I -- if I do not succeed in convincing you that there is a link, then I have failed, you know, in my -- in my mandate. And I am sure that you will not fail in your mandate.

PROFESSOR CRAWFORD: Yes, but the -- I mean, I can see that you might -- you might say that we -- the Tribunal should say that there are no principles of international law governing the delimitation of offshore areas, therefore, all of the weight is in the modifications. I mean --

MR. FORTIER: Oh, no. Oh, no, I don't say that.

PROFESSOR CRAWFORD: Okay. Fine.

MR. FORTIER: We don't say that.

PROFESSOR CRAWFORD: Okay. That's a help. You might say that the principles of international law don't take -- or

don't take sufficient account of the conduct of the parties. Whereas, in the context of legislation, which implements a negotiated Accord, the conduct of the parties is by implication more important. And therefore, one of the modifications we should introduce into Section 4 is greater weight on the conduct of the parties. Is that your argument?

MR. FORTIER: That's part of my argument, Dr. Crawford.

PROFESSOR CRAWFORD: Okay.

MR. FORTIER: Yes, that's very much part of my argument. And some of the other points that you have raised in your observations and your question, I will be coming to later on this morning.

But before examining another ground on which Newfoundland and Labrador attempted to reject this simple truth, that the supposed -- the supposed inability of international law to take cognizance of the parties' true entitlement, may I address briefly the nature of those entitlements.

Specifically, I have already alluded to it, I would like to be a little more focused, the actual substance and extent of the parties rights to the offshore areas defined in the Accord Acts, that are the object of the delimitation.

Now, again, Mr. Chairman, members of the Tribunal, one

is figuratively forced to ask rhetorically, "Can there exist any genuine doubt as to the substantive nature of the rights that are at issue in this arbitration? The rights of the parties?"

Devoid of sophistry, an analysis of the facts yields a few simple, mundane and entirely uncontroversial results.

Just as the origin of the parties' entitlements within the offshore areas are specified in the negotiated Accords as implemented by means of the Accord Acts, so too are the substantive rights that comprise those entitlements, that are spelled out in these instruments.

As we saw, by virtue of the Accords, and the implementing Acts, the two provinces are entitled to participate with the Government of Canada, in the administration and benefits relating to hydrocarbon resources located within the defined offshore areas.

These rights, limited -- albeit limited rights, comprise the full extent, the entire ambit, of the provinces' offshore area entitlement. And when you come to the exercise of delimitation, I submit - Nova Scotia submits that the nature of those rights has to be present in your mind.

As pointed out earlier, the offshore areas within which the parties enjoy their entitlement extend from the low water mark of the provinces to the outer edge of the

continental margin, covering an area that, as I -- as we will see in a moment, is relatively easy to map and measure.

The outer edge of the continental margin is defined in the Canadian Oceans Act, in terms that effectively incorporate the provisions of Article 76 of the 1982 Law of the Sea Convention, regarding the maximum extent of states' continental shelf jurisdictions at international law.

And the result, as Newfoundland and Labrador itself recognized in its Memorial, although it seems to wish that it did not, because in its Counter-Memorial it entirely ignored the matter, the result is that the seaward limit of each parties' offshore area extends beyond 200 nautical miles from the coast, on the basis of the definition set out in Article 76 of the 1982 Convention. Those are the words of Newfoundland and Labrador in its Memorial.

So, Mr. Chairman, Members of the Tribunal, I remind you respectfully that Newfoundland and Labrador presents two faces in this arbitration. It claims to recognize the role of Article 76 in defining the seaward limits of the area to be delimited, and it also claims to recognize the primordial significance of the legal basis of title.

However, it fails altogether to give effect to Article 76, the Article 76 definition in the process of

constructing its proposed delimitation, just as it refuses to acknowledge the indisputable basis of title to the offshore areas that are the subject matter of this arbitration.

In reaction -- its reaction to Nova Scotia's demonstration of the application of Article 76 to the circumstances of this case is disingenuous to the point of incredibility, and appears more reflex than reflective.

Newfoundland announces that it is, and I quote, "Virtually impossible to grasp the basis on which Nova Scotia has established the area of overlapping area entitlements." Says it's virtually impossible to grasp the basis on which Nova Scotia has established the area of overlapping offshore area entitlements.

In its written submissions it declares that no explanation has been provided by Nova Scotia in this regard, and this week, it yet again resorted to mockery as though that were sufficient to outweigh the evidence adduced by Nova Scotia.

And yet -- and yet, Mr. Chairman, Members of the Tribunal, the basis of Nova Scotia's construction, as you will have noticed by reading our written pleadings, the basis of Nova Scotia's construction is clearly and meticulously explained in its Memorial. It is based squarely on the Article 76 definition of the outer edge of

the continental margin.

The Tribunal will have seen Appendix B to Nova Scotia's Memorial, in which the construction of the Provinces' offshore area entitlements is carried out by reference to the provisions of Article 76.

This evidence, which was prepared by Mr. Galo Carrera, a member of the UN Commission on the Limits of the Continental Shelf, and Nova Scotia's technical adviser in this arbitration, was adduced by Nova Scotia many months ago.

This evidence, Mr. Chairman, members of the Tribunal, has not been contradicted by Newfoundland, which chose not to submit any proof of its own in this regard, and it stands unchallenged to this date.

And without entering into a detailed discourse, because I am not qualified to do so, without entering into a detailed discourse regarding the rules and methods prescribed by Article 76, they are explained in our Appendix B to our Memorial, I would ask, however, the Tribunal to recall a few salient features of its provisions.

As explained in our Appendix B, Article 76 defines the juridical continental shelf as extending to the outer edge of the continental margin. It also establishes a methodology for defining the outer limits of a coastal

state's entitlement.

Where, as in this case, the potential claim extends to the so-called "broad shelf", that is where the outer edge of the margin is beyond the 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, Article 76, as you know better than I do, provides two formulae for the determination of the potential limits of a state's claim.

And it stipulates two constraints, or limits, on the potential claim.

And applying this process and methodology to the definition of the outer limits of the entitlements of Newfoundland and Labrador on the one hand, and Nova Scotia on the other, under the -- their respective Accord Acts, results in each province possessing the entitlement to exercise its offshore area rights within the limits illustrated on the slides which are now shown on the screen.

The outer limits of Newfoundland's offshore area entitlements are presently shown on your screen, and the outer limits of Nova Scotia's offshore area entitlements follow.

As with the entirety of Appendix B to Nova Scotia's Phase Two Memorial, I repeat, these illustrations are based on the technical guidelines issued by the UN

Commission on the Limits of the Continental Shelf, of which, as mentioned, Mr. Carrera is a member.

The construction, Mr. Chairman, members of the Tribunal, the construction of the relevant area of the delimitation, which involves identifying the relevant coasts, and the area of overlapping entitlement of the parties, will be addressed, I'm pleased to say, in greater detail by my colleague, Professor Saunders. The point that I wish to make here this morning is simply to note that the extent of the offshore areas that are at issue in this arbitration are clearly specified in the negotiated Accords, and the implementing Acts from which the provinces' entitlements arise.

Now, bearing in mind, Mr. Chairman, members of the Tribunal, bearing in mind what the basis and nature of the parties' entitlements are, it is possible, I submit, to understand what they are not.

As demonstrated in Nova Scotia's written submissions, the legal regime, or institution of the offshore area is not the same as the legal regime, or institution, of the continental shelf, of the EEZ, or indeed any juridical zone considered, let alone delimited, in the existing caselaw.

There is -- there is no real --

PROFESSOR CRAWFORD: Mr. Fortier?

MR. FORTIER: Yes, Dr. Crawford.

PROFESSOR CRAWFORD: In which case, why is the author of Appendix B an expert?

MR. FORTIER: Why is he --

PROFESSOR CRAWFORD: The author of Appendix B is a member of the Commission --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- on the Continental Shelf. And his expertise, presumably, derives from understandings of the rules about the outer edge of the continental shelf. Are you saying that, as it were, he -- he's sort of an accidental expert, like the accidental tourist? He happens to be able to give evidence about something which is specifically Canadian --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- by reason of -- I see.

MR. FORTIER: But it's very simple. The physical -- the physical area which has to be delimited, as we see from a definition -- as we see from the definition of the offshore areas in the Accord Acts, and by reference to the Ocean Act, is the physical continental shelf. And Mr. Carrera is an expert.

There is -- there is -- up to a point, there is no real disagreement between the parties in this regard. The legislation, as we have seen, is crystal clear regarding

the limited rights relating to oil and gas resources accorded to the provinces within the offshore areas.

What Newfoundland and Labrador advocates, the essence of its position, is that regardless of the situation in fact -- regardless of the situation in fact, the juridical offshore area must be fictitiously assimilated to the juridical continental shelf in order for principles of international law to be applicable. This was implicit in Mr. Legault's question earlier this morning.

Well, with the greatest of respect for my friends, counsel for Newfoundland and Labrador, this is simply untrue for several reasons. But before considering why, and you want to be helped and I want to help you -- before considering why international law does not require any assistance from Newfoundland and Labrador in order to play the governing role prescribed for it here, let us remain with the facts, as you said in your phase one Award.

First, just as there is no denying that, in fact, the bases of the provinces' entitlements with respect to the offshore areas are the negotiated Accords implemented in legislation, by which the federal government has conferred certain rights to the parties, there is no denying that, in law, a state's continental shelf entitlement is inherent, ab initio, ipso jure, automatic, arising simply by virtue of the state's sovereignty over a strip of

coast.

I invite you to look at the figure in your book and reproduced on the screen. The distinction between the origin of continental shelf entitlements and offshore area entitlements of the sort at issue in this case is obvious. In fact, Mr. Chairman, members of the Tribunal, the essential condition for the enjoyment of continental shelf rights -- sovereignty -- is entirely lacking here. And as Newfoundland and Labrador itself took pains to point out at virtually every conceivable opportunity during the first round of this arbitration, Nova Scotia and Newfoundland and Labrador are not sovereign states, but provinces within the Canadian confederation.

I'm mindful of the words in Article 3 of the Terms of Reference, and I will be addressing them shortly, but the fact is that the two provinces are not sovereign states, but provinces within the Canadian confederation.

Secondly, just as there is no denying that the substance and the scope of the offshore area rights which the parties do, in fact, enjoy are limited to a defined sharing with the Government of Canada, in the management and revenues relating to hydrocarbon resources, there can be no denying that the nature of true continental shelf rights are far broader, ab initio, and, as an appurtenance, or manifestation of sovereignty, exclusive

in nature.

The fundamental distinction between the substantive nature of continental shelf rights and the rights enjoyed by the parties in this case is clear. The constricted shared nature of the parties' so-called "title" to the maritime zone to be delimited is inimical -- I would say indeed, antithetical -- I have difficulty with that word; French is my native tongue -- so the constricted shared nature of the parties' so-called title to the maritime zone to be delimited in this arbitration is antithetical to the concept and substance of sovereignty-based title to the continental shelf.

And thirdly, the geographic scope of the parties' offshore area entitlements is not the same as for a continental shelf. The continental shelf is defined as beginning beyond the territorial sea; the offshore areas begin at the low-water mark of the provinces.

And perhaps in tacit acknowledgement of this fact, yet unable to admit the obvious, Newfoundland approaches from another tack. It states in its Counter-Memorial that the Offshore Accords, and I quote, "would be incomprehensible except as an internal division of the continental shelf rights that international law accords to Canada."

Newfoundland and Labrador state that the Offshore Accords would be incomprehensible except as an internal

division of the continental shelf rights that international law accords to Canada.

This would, one is entitled to assume, come as a surprise and a shock to the signatories of the Accords: the Prime Minister of Canada, whose predecessors had fought since 1964 -- before 1964 -- precisely to ensure that Canada's continental shelf remained Canada's without any sort of internal division, and, indeed, the premiers of Nova Scotia and Newfoundland who entered into the Accords only after the Supreme Court of Canada had ruled twice in favour of the federal government on the matter.

PROFESSOR CRAWFORD: Mr. Fortier, what does that do in relation to the delimitation to the northeast of Cabot Strait, because the Canadian position, as I understand it, is that the Gulf of St. Lawrence is internal waters, so that the offshore area within the Gulf of St. Lawrence appertaining to the parties is not continental shelf.

MR. FORTIER: Precisely. Mm-hmm.

PROFESSOR CRAWFORD: And, of course, the Accord legislation doesn't refer only to the rules of international law relating to the delimitation of continental shelf; it refers to the rules of international law governing maritime boundary delimitation --

MR. FORTIER: Correct.

PROFESSOR CRAWFORD: -- with such modifications as the

circumstances require.

MR. FORTIER: I will call -- I will call you as my second witness, Dr. Crawford, after Mr. Currie.

PROFESSOR CRAWFORD: Thank you very much. There may be a slight conflict there, but I will do my best. But I'm interested -- and this may be a point you don't want to take up now, but I would be interested in some consideration of what principles we ought to apply in relation -- in the event that we decide that we have to delimit within --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- let us say, northeastward of the closing line across Cabot Strait.

MR. FORTIER: It's a -- it's a very fair -- it's very fair. Of course.

PROFESSOR CRAWFORD: We've already -- we've already, of course, decided that there is no legally binding agreement, although that's without prejudice to arguments relating to conduct.

MR. FORTIER: Absolutely. Mm-hmm.

PROFESSOR CRAWFORD: So there is a serious question where we get the rules from for delimitation within the Strait. Obviously, it's not our business to pronounce on the status of the Gulf of St. Lawrence, but I think we can all accept that it's not continental shelf.

MR. FORTIER: My friend and colleague, Professor Saunders, will be dealing with that issue when he rises tomorrow, Dr. Crawford. So I was -- I was addressing the Newfoundland statement that it would be incomprehensible -- the offshore Accords would be incomprehensible except as an internal division of the continental shelf rights that international law accords to Canada, and it -- it's worth -- it's very important to look again to the Accord Acts which are not silent on this point. They're crystal clear. Lest the implementation of the Accords be construed as the Government or Parliament of Canada having qualified in any way the internal indivisibility of Canada's sovereign shelf rights, such as Newfoundland and Labrador is now trying to do -- the Acts declare, at section 3 in both Acts: "The provisions of this Act shall not be construed as providing a basis for any claim by or on behalf of any province in respect of any entitlement to or legislative jurisdiction over the offshore area or any living or non-living resources in the offshore area." So we see that the essence of continental shelf rights are explicitly denied to the provinces. Surely, they are not to be granted to them by this Tribunal.

The notion that the effect -- no, for Newfoundland, I would say the intent of the Acts is to divvy up Canada's continental shelf rights as among the provinces could be

risible if it were not so seriously misguided.

And Newfoundland and Labrador would do well to heed its own advice. In its Counter-Memorial, as you will recall, it pretentiously intoned, "It is surprising and regrettable that Nova Scotia contradicts the position of Canada. In a domestic arbitration under Canadian legislation, it is clear that the Tribunal and the parties should avoid espousing positions in important matters that directly contradict the policies of the national government."

Well, I submit that such pious advice applies equally to constitutional as to international controversies, and to Newfoundland and Labrador as well as to Nova Scotia.

Now this is not the forum within which to accord, or even to assume, to the benefit of the provinces a constitutional status and rights that they do not, in fact, possess and which the Government of Canada has expressly chosen to withhold.

It occurred to me as I was -- as I was preparing my argument for this morning that the phrase "offshore area", as it is frequently used, is a misnomer. No title to area of any sort is conveyed to the parties by means of these instruments; nor is any jurisdiction over any area or resources conveyed by the Accords. There is, in the end, no such thing as Nova Scotia's offshore area or

Newfoundland's offshore area. The words refer only to the geographic area, the spatial zone within which the parties are entitled to exercise the very limited rights -- the important, but limited rights -- conferred on them by the Accords and the Act. And this is the full extent of their so-called title.

PROFESSOR CRAWFORD: Mr. Fortier, I hate to appear tedious, but let's assume, for the sake of argument, and in my case, I think as at present advised, it's probably true, that I agree with every word of what you just said. Why does it make any difference?

MR. FORTIER: This was just a -- this was just an observation that I thought I owed -- I owed to you to deliver at this point in my oral argument, Dr. Crawford.

PROFESSOR CRAWFORD: Can I say, it's a splendid observation.

MR. FORTIER: It's an observation which I think may -- should influence you as you embark on the implementation of and the discharge of your duties under your mandate. What, precisely, are we referring to? What did the legislator refer to here when he used the words "offshore area"? And --

CHAIRMAN: You mean offshore areas off Nova Scotia with two "f"'s?

MR. FORTIER: Yes. That's right. And I noticed that. The -- you know, I -- finally in closing on this point,

and maybe this is the real answer to Dr. Crawford's question. For Newfoundland and Labrador to suggest otherwise in the specific light of your Tribunal's clear statement in its phase one Award that, quote, "The federal accord legislation does not purport to attribute offshore areas to the provinces" is wishful thinking, if not wilful blindness.

It is all the more unforgivable in the light of what my first witness, Mr. Currie, on Monday of this week, correctly called the unmistakable import of the Supreme Court's ruling in the Hibernia reference, that the federal government enjoys exclusive rights and jurisdiction over the continental shelf. And indeed, it contradicts Newfoundland and Labrador's own repeated argument in phase one of this arbitration.

Mr. Chairman, if this is convenient for you and your colleagues -- I don't know whether you plan to have a break this morning but I'm coming to principles of international law and this may be a natural break in the continental shelf of my argument?

CHAIRMAN: It seems natural enough to me. 15 minutes, is it?

MR. FORTIER: Yes. Very good. Thank you.

(Recess)

CHAIRMAN: Mr. Fortier.

MR. FORTIER: Merci, Monsieur le President. As -- Mr. Chairman, members of the Tribunal, as noted, the essence of Newfoundland and -- Newfoundland and Labrador's plea is that the offshore areas, as defined in the Terms of Reference and underlying legislation, is a matter of which the international law of maritime delimitation could scarcely take cognizance. This assertion, as we all know by now, is absolutely central to Newfoundland's case. It's the keystone of its construction of its proposed line. It's a line which we submit can only be understood if the true factual circumstances of the arbitration are ignored.

So it is no surprise that the assertion reappears throughout Newfoundland's written and oral submissions in various guises.

Slide 31 will list the various guises which Newfoundland's submission on this central issue take. In Newfoundland's view, the legal framework established by Nova Scotia is in direct conflict with the Terms of Reference. According to Newfoundland, it would not be possible to apply the international law of maritime delimitation.

It goes so far as to insist that the Terms of Reference require that the parties must be treated as entities with inherent continental shelf rights under

international law. They say the exercise becomes a logical impossibility. The proposition that the object of this delimitation is not the continental shelf, Newfoundland states, would imply that the delimitation could not be effected on the basis of international law of maritime delimitation.

The legal basis of the offshore areas and the parties' entitlements to them must be assumed to be identical. They say there could be no law. There would be no law that could be applied. It accuses Nova Scotia of stripping all decided cases of their meaning and relevance.

They say that -- they state that to say that the basis of title is simply a negotiated arrangement, is to refer the matter to the subjective intentions of the parties, to remove the conception of title from the delimitation exercise altogether. We are warned that reducing the basis of title to the meaningless category of a negotiated arrangement would diminish or eliminate the significance of the judicial and arbitral precedents and even of state practice, and so on and so on.

It leads to an impasse, say Newfoundland and Labrador. In fact, it would lead to a non liquet in the present proceedings. It's the tail wagging the dog. I could go on. These arguments and others which are in your --

repeated in your books that were circulated this morning, are such that would drive Hamlet's mother herself, Queen Gertrude of Denmark, to declaim counsel doth protest too much, me thinks.

One wonders what liquet Newfoundland has been drinking or has had poured into its ear.

Aside from missing the mark entirely, such protestations invoke an unmistakable sense of deja vu, but with a twist.

There are two factors to consider, Mr. Chairman, members of the Tribunal, in order to respond and to refute Newfoundland and Labrador's arguments. One, the requirements of the Terms of Reference and two, the applicability per se of principles of international law.

Firs the Terms of Reference. Yogi Berra called it deja vu all over again. Did not Newfoundland and Labrador argue strenuously throughout the first phase of this arbitration, amongst other things, that under no circumstances could the parties be deemed to be, to use its own language, entities with inherent rights under international law.

Counsel for Newfoundland and Labrador repeatedly stressed that by requiring the application of principles of international law to determine the issues before the Tribunal, the Terms of Reference did not require, in fact,

prohibited any modification of the basic facts of this case. Such basic facts included the self-evident proposition, that in their negotiations regarding interprovincial boundaries, the premiers of Nova Scotia and Newfoundland were in fact acting not as heads of states but as provincial leaders within a domestic context, and were thus amongst other consequences, beholden to their own legislatures and to the federal parliament.

Indeed, in its written response to the Tribunal's question regarding the meaning and effect of the phrase with such modifications as circumstances require, Newfoundland argued that regard for both Canadian and international law requires an actual intent by the parties to conclude a legally binding agreement, having regard to the actual circumstances in which they were acting, the principal such circumstance being the actual legal and constitutional framework within which the parties were acting.

And Nova Scotia for its part opined and we continue to believe that the Terms of Reference and in particular the requirement that the provinces be treated as if they were states at all relevant times themselves specify the only modification that is required.

As the Tribunal remarked, according to Nova Scotia it

is not necessary to modify the principles of international law, other than so as to ensure their applicabilities -- applicability to the parties in this case, and this is already achieved in the Terms of reference.

Your Tribunal analyzed the requirements in Article 3 of the Terms of Reference, that the dispute be resolved by applying principles of international law with such modifications as the circumstances require, as if the parties were states. And its conclusions, your conclusions clearly pertinent to this phase of the arbitration, were not antithetical to the positions articulated by the parties.

You found, Mr. Chairman, members of the Tribunal, that the language of the Terms of Reference is no doubt intended to give the Tribunal some flexibility in applying rules of international law as it were retrospectively to transactions which took place within Canada by reference to Canadian law and politics.

You held that the phrase, with such modifications as the circumstances require, clearly applies to the principles of international law governing maritime boundary delimitation and not to the facts of the dispute dixit this Tribunal. Not to the facts of the dispute.

And you determined that the Terms of Reference call for the application of international law by analogy to the

conduct of provincial government within Canada claiming the benefit of a resource.

All of this -- all of this is undeniably relevant to the manner in which the issues before your Tribunal in the present phase of the arbitration are to be resolved.

The Terms of reference provide the flexibility required for the Tribunal to apply rules of international law to matters that arise within Canada, by reference to Canadian law and politics, such as the delimitation of offshore areas created and defined by agreement and implemented in law. The applicable principles of international law may be modified as the circumstances require, but not the facts of the dispute, such as the origin of the -- and the substantive nature of the legal regime at issue.

International law is to be applied by analogy as it were to provincial governments within Canada claiming the benefit of a resource. As Mr. Currie, on behalf of Newfoundland and Labrador, declared on Monday afternoon, the facts are the facts. Nova Scotia agrees.

In this -- Mr. Chairman, gentlemen, in this as in any delimitation case, the status, origin and content of the zones to be delimited are matters of fact. Fact derived from the law. They may not be modified or assumed away as Newfoundland and Labrador argues the Tribunal should do,

anymore than any other fact may be altered or written out of existence.

To do so would be no mere legal fiction. It would divorce the arbitration and the delimitation that will result from the factual circumstances in which the dispute has arisen and in which the line dividing the parties' offshore area will be given effect, in law and in fact.

As mentioned, Newfoundland and Labrador also argues that it is not possible for international law to apply or to take cognizance of the entirely domestic subject matter of this arbitration, namely the offshore area as defined in the Accords, in the Acts and identified in the Terms of Reference.

Now such a claim is as baseless now as it was in the first phase of the arbitration, for the reasons which I have already discussed with you.

The Terms of Reference -- your Terms of Reference effectively resolve any conflict by providing the flexibility required to apply rules of international law to domestic actors and subject matters.

But, Mr. Chairman, members of the Tribunal, there is a more insidious fallacy woven through Newfoundland and Labrador's claim.

In essence, as you will have noted, Newfoundland and Labrador maintains that if the Tribunal were to

acknowledge the fact that the offshore areas to be delimited are fundamentally different from a continental shelf, much as the inter-provincial boundary agreements at issue in phase one are different from true treaties, the Tribunal would be frustrated in the execution of its mandate.

Why? Because the law, says Newfoundland and Labrador, can only take cognizance of, or be applied to a maritime zone, the basis of title to which derives from coastal geography.

For Newfoundland and Labrador, the juridical term, offshore area, must be construed so as to mean the juridical continental shelf. And the Tribunal has no choice but to treat the parties as entities with inherent continental shelf rights under international law.

How do they reconcile that statement with the fact that in the Gulf, as Dr. Crawford pointed out earlier this morning, the area to be delimited by the application of international law is not the continental shelf. And yet, the legislator has said, international law must apply.

The alternative, Newfoundland and Labrador warns, is that the delimitation can no longer be guided by a body of settled precedent.

Thankfully, as far as Nova Scotia is concerned, no such dire fate is in store for the parties or members of

the Tribunal.

Newfoundland's ominous prediction fails to account for the generally -- excuse me, Newfoundland's ominous prediction fails to account for the generality and universality of the fundamental norm of Maritime delimitation. It also underestimates, indeed, it denies the adaptability of the applicable principles of international law, as demonstrated by the very body of precedent to which Newfoundland refers.

Mr. Chairman, members of the Tribunal, very briefly, in 19' -- let me review with you what these -- what three important precedents, in our submission, stand for, which is particularly relevant to this arbitration.

In 1969, the North Sea cases, the ICJ was asked to identify for the first time the principles and rules of customary international law applicable to the delimitation of continental shelf boundaries. There had been no previous cases. There was no body of precedent dealing with continental shelf delimitation.

The Court, itself, determined that Article 6.2 of the 1958 Convention, which embodies the equidistance special circumstances rule, was not directly applicable, and had not crystallized into a rule of customary international law. And although the UN Seabed Committee had begun to prepare the way for the third UN Conference on the Law of

the Sea, it was too early to predict the outcome for purposes of delimitation theory and even to identify a majority trend of governmental opinion, much less accord any juridical weight to a particular trend.

In short, the international Court was asked to perform a pioneering role. And it met the challenge in a decision which recognized the need for a linkage between general principles of international law and the specific type of boundary in dispute. Relying, as we know, on equitable principles taking account of all relevant circumstances.

In 1984, in the Gulf of Maine case, a Chamber of the Court was asked also to perform a pioneering role. This time in respect of the first ever delimitation of a single maritime boundary dividing both the continental shelf and the fisheries zones of the parties.

As we -- many of us in this room know by agreement of Canada and the United States, the boundary to be drawn was to be applicable to all aspects of their maritime jurisdiction, even though the basis of title to the continental shelf was different from that of the fishing zones.

And the Chamber considered it necessary to observe that both parties had simply taken it for granted that it would be possible, both legally and materially, to draw a single maritime boundary for two different jurisdictions,

and that they had not put forward any argument in support of this assumption.

Nonetheless, did the Chamber throw up its hands and declare that in the absence of precedent, as well as in the absence of -- in the absence of any guidance from the parties, it would not be able to perform the tasks that the parties had set for it? No, it did not throw up its hands. Rather it noted there is certainly no rule of international law to the contrary, and emphasized in terms particularly apposite to the present case that, and I quote from paragraph 81 of the Gulf of Maine decision, "in a matter of this kind, international law can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective. It cannot also be expected to specify the equitable criteria to be applied or the practical, often technical method to be used for attaining that objective."

Having regard to the need to delimit a single boundary, appropriate both for the shelf and the water column, the Chamber excluded from consideration criteria which were typically and exclusively bound up with the particular characteristics of one alone of the two types of zone that it had been asked to delimit in conjunction. It did not shy away from the challenge.

It reasoned that although certain criteria had been

found in previous adjudications to be equitable, and thus applicable for the delimitation of the continental shelf, this did not imply, and I quote, "that they must automatically possess the same properties in relation to the simultaneous delimitation of the continental shelf and the superjacent fishery zone.

In other words, Mr. Chairman, members of the Tribunal, the absence of precedent relating to the delimitation of a single maritime boundary in the Gulf of Maine case, was not a barrier to the application of international law, but merely a factor which required the Chamber to consider afresh the nature of the fundamental norm, and to determine this -- its application in a new factual context.

Yet again, in 1993, in the Jan Mayen case, the ICJ was asked to perform a task it had not hitherto performed, for which there were no judicial or arbitral precedents.

As you know, as we know, the Court was mandated by the parties to delimit both the continental shelf and the fishery zones of Denmark and Norway. But unlike in the Gulf of Maine case, there was no agreement between the parties that the Court should draw a single maritime boundary applicable to both jurisdictions. The shelf and the fishery zones were to be treated separately.

As the Court remarked, no decision of an

international Tribunal has been rendered that concerned only the delimitation of a fishery zone. There existed no judicial or arbitral precedent dealing solely with delimitation of an EEZ boundary. And despite the novel circumstances in which it found itself, the Court was nonetheless able to apply the fundamental norm of maritime delimitation, which in the final analysis comprises, as a Chamber in the Gulf of Maine case stated, what international law prescribes in every maritime delimitation.

In the present case, Mr. Chairman, members of the Tribunal, Nova Scotia has no doubt that this Tribunal is up to the task that has been set for them in the Terms of Reference, the determination of the line dividing the parties' offshore areas, as defined in the Accord Acts, by applying principles of international law.

Nova Scotia is confident that notwithstanding the novel circumstances of the present delimitation, the Tribunal will determine that its path is not barred, as Newfoundland suggests is the case. And we are confident that the Tribunal will recognize that it is fully able to apply -- to apply to the facts of this case, the fundamental norm of maritime delimitation to the division of the parties' offshore areas.

And to the extent, Mr. Chairman -- to the extent that

the offshore areas differ from the types of zones delimited by other Tribunals in other cases, yes, the Tribunal -- your Tribunal is being asked to perform a pioneering task. And to do so, as the international Court has done, as I have tried to demonstrate, with boldness and with imagination. Because fundamentally your role is no different than that of any international adjudicative body in a maritime delimitation case. It is no different.

Your task, the task of any adjudicator in a maritime delimitation case, invariably entails as an initial, an essential step, the determination of the particular origin and nature of the parties' title to the juridical area to be delimited. The norm, the fundamental norm is then applied with regard to this and other relevant facts and circumstances particular to the case.

But the fundamental norm requires you to start with the legal basis of title. This is what is required here.

But not for Newfoundland. Newfoundland and Labrador argues, yet again, that this -- that unless this arbitration is conducted as what it calls "a proper shelf delimitation", then -- it goes on to say, "the proper hierarchy of relevant circumstances would be open to change from previous continental shelf delimitations."

Indeed, Newfoundland and Labrador claims that the legal framework proposed by Nova Scotia, applying

principles of international law to the admittedly domestic facts of this case, results, and I quote, "in the proper hierarchy of relevant circumstances being inverted".

An established, proper hierarchy of relevant circumstances? Where does this hierarchy come from? This time counsel can only plead on behalf of Nova Scotia, not guilt, but puzzlement in the face of Newfoundland and Labrador's charge.

We are unaware, Mr. Chairman, of any established hierarchy of relevant circumstances in maritime delimitation law, a hierarchy that, in the words of the Chamber in the Gulf of Maine case, international law prescribed in every maritime delimitation.

Such a notion runs counter to the basic norm of maritime delimitation, including the principle that each delimitation is unique, monolithic. Quoting Professor Weil, "Basing themselves on the sui generis nature of each particular situation...", "...the sui generis nature of each particular situation, and the novelty of the subject matter, the courts have always stressed the rudimentary character of maritime delimitation which is limited to providing a few relatively abstract guidelines without any detailed rules."

But, be that as it may, if the question is, Mr. Chairman, Members of the Tribunal, if the question is, is

it possible for the relevant circumstances identified in other cases to be open to change in this case? The answer, emphatically, is yes. That is the entire point, that is the very essence of the fundamental norm.

If Newfoundland and Labrador were correct, the norm could never have been applied to the Gulf of Maine, or the Jan Mayen cases, or to St. Pierre et Miquelon, for that matter, which were not pure shelf cases.

But the norm, what international law prescribes in every maritime delimitation, is sufficiently robust and flexible to encompass, indeed, it has been formulated expressly so as to encompass the circumstances of this, or any, maritime boundary case.

And just as the circumstances of this case differ from those of a pure shelf case, in particular as regards the basis and the nature of title, so too the weight, the weight, Mr. Chairman, and members of the Tribunal, the weight attached to each such circumstance, its contribution to an overall equitable result. This point will be developed by Professor Saunders, when he addresses the Tribunal.

But an excellent example, a superb example of this was suggested by my friend, Mr. Willis, himself on Monday, when he argued that the geographic considerations of the case, which as you will have noted, Newfoundland and

Labrador draws entirely from the Canada-France arbitration, they -- Mr. Willis argued that the geographic circumstances of -- considerations of the case should not be discarded merely because other considerations, notably conduct, may be relevant.

Of course, this is not what Nova Scotia has argued. Geographic considerations obviously should not be ignored in this case. And we do not ignore geographic considerations. But the point, the point is precisely that the weight accorded to geography, or to conduct, or to any relevant circumstance, varies from case to case, as is demonstrated by the body of precedents.

Mr. Willis argued that geography should invariably have pride of place, because of its linkage to the basis of title. But in fact, as we have seen, as I have tried to demonstrate, the basis of title in this case, is not linked to geography in the same way that it is in other cases. We're not saying that geography is -- is not relevant. But we submit that it is less relevant to the basis of title than conduct, and it may well be that its pride of place must be ceded.

Contrary to Newfoundland and Labrador's increasingly shrill protestations, it is not Nova Scotia's conception of the basis of title that is unprecedented, Mr. Chairman. It is the very nature of this arbitration itself.

As I have observed, the basis of title is a fact. It is only the application of international law to such a fact in the context of an adjudicated delimitation that is, almost certainly, unprecedented.

But, Mr. Chairman, members of the Tribunal, you did as much in the first phase of the arbitration. You had no difficulty rejecting Newfoundland's argument that there is something fallacious in applying international law as a criteria of decision to the questions before it.

And we are certain that the Tribunal will find that it is fully capable of doing the same with Newfoundland's repeated plea in this phase.

You have already found that the Terms of Reference clearly require this for both phases of the arbitration.

Before leaving the question of the basis of title, Mr. Chairman, it behooves all of us in this room to recall, once again, the specific issues that the Tribunal has been asked to determine.

It goes without saying that if the parties were states, yes, they would possess, by virtue of their coastal geography, continental shelf entitlements.

The Tribunal will have noticed, however, that Newfoundland and Labrador goes one step further. It asserts that because the Terms of Reference require the delimitation in this case to be effected as if the parties

were states, they also require the Tribunal to delimit the continental shelf entitlements that the parties would enjoy if in fact they were states.

But that is not what the Terms of Reference dictate. That is not what your mandate is. It is not what the Terms of Reference say. It's not what they mean. It's not what the drafters intended, as my friend the Agent for Newfoundland and Labrador is well aware.

The specific language of the Terms of Reference regarding the application of international law to the present parties has already been discussed.

To paraphrase the Tribunal in its Award in phase one, which, to heed Mr. McRae's admonition on Monday this week, neither party should attempt to relitigate, the Terms of Reference call for the application of international law, by analogy, to the conduct of provincial governments within Canada, and to facts which arise within Canada by reference to Canadian law and politics.

The principles of international law governing maritime boundary delimitation may be modified as the circumstances require, but not the facts of the dispute, as you said.

More significantly, as we saw earlier, the language of the Terms of Reference are unambiguous as regards the subject matter of the delimitation. You have to determine the line dividing the respective offshore areas of the

parties.

And the stated purpose for which the Tribunal has been established is similarly explicit, as we saw earlier this morning.

Even if, Mr. Chairman, even if the parties were states, even though -- even if Nova Scotia and Newfoundland and Labrador were states, actually possessing sovereign entitlements, ab initio, de jure, to the continental shelf, the Tribunal would have no mandate to effect the sort of delimitation which is proposed by Newfoundland and Labrador.

Even if, I will go further, even if the Terms of Reference required the Tribunal to treat the parties as if they possessed such entitlements, which they manifestly do not, the fact remains that you have not been asked to delimit the continental shelf zones of the parties.

And if you were to follow the path proposed by Newfoundland and Labrador, which Nova Scotia is confident you will not, your ruling would be, as I said earlier, ultra petita, and it would leave it open to challenge before Canadian courts on the grounds that the Tribunal had exceeded its jurisdiction.

The purposes for which your Tribunal has been constituted, and the matter which you must determine, is the delimitation of the parties' offshore areas

specifically defined, point à la ligne, full stop.

I end with the following brief remarks, Mr. Chairman, members of the Tribunal.

The different and differing delimitations proposed by the parties is explained in large measure by the vastly different approaches that they have adopted, and the different objectives that they appear to have in mind in this arbitration.

The fundamental norm of maritime delimitation, about which we will hear more from Professor Russell after I leave the podium, entails the application of equitable criteria, in order to achieve an equitable result, taking into account all the relevant circumstances. The equitableness of the result is the predominant concern.

And in the final analysis, this is the only true rule, or principle of maritime boundary delimitation. What international law prescribes in all cases of adjudicated boundaries.

And although the process, yes, the process, by which a boundary is thus drawn involves a degree of subjectivity to the extent that it is necessary to it identify and choose among a range of factors and considerations, according to which a Tribunal determines what is equitable in the circumstances, overall, the process remains firmly rooted in law.

And the primary means by which this is assured is the requirement that a delimitation be effected having regard, above all, to the origin and nature of the juridical zone in question, and of the parties' entitlements to that zone.

It also involves an assessment of the various circumstances relevant to the delimitation, dispensing with what the Chamber in the Gulf of Maine case called preconceived assertions in favour of solutions that are demonstrably equitable.

Now Newfoundland and Labrador eschews such an approach. It proposes a boundary that effectively relies upon just such preconceptions of key elements of the delimitation process.

The delimitation that it has proposed is at least as remarkable for what it expressly excludes as for what is included amongst the range of factors and circumstances to be taken into account by the Tribunal.

Its approach overall is to narrow the focus of your Tribunal to such an extent that one wonders -- one wonders why an adjudication is at all necessary. For example, Newfoundland and Labrador has predetermined that the only manner in which the Tribunal can fulfil its mandate is to modify the facts of the dispute so as to turn the delimitation of the line dividing the respective offshore

areas of the parties into a delimitation of continental shelf entitlements that the parties do not, in fact or in law, possess.

It draws its criteria for the delimitation almost entirely from other cases with little, if any, reasoned consideration of what might be appropriate on the facts of this case. It virtually ignores the true juridical origin and nature of the parties' entitlements. It proposes instead the delimitation of an area that may have been relevant in the context of the Canada-France delimitation, but is not relevant to the extent to which my friends submit in the present case.

It precludes from consideration the extensive conduct of the parties with respect to the boundary, denies the significance of the permits that they issued in the area, dismisses the relevance of the very resources -- the only resources which comprise the interest of the parties in the areas to be delimited.

And despite my friend, Mr. McRae's gracious permission to Nova Scotia to argue that factors other than geographies -- other than geography are also considerations in the delimitation, in the final analysis, Newfoundland's own scheme admits of only one factor -- geography. And yet, it nonetheless attempts to distort the facts of nature.

Far from producing a solution that is both equitable and grounded in law, the end result is a delimitation disconnected from the factual and legal circumstances particular to these case and to the parties.

As I and my colleagues will demonstrate later today and tomorrow, a proper delimitation, one that produces an equitable result having regard to all of the relevant legal and factual circumstances, is the delimitation proposed by Nova Scotia. Mr. Legault?

MR. LEGAULT: Mr. Fortier, questions put by the Tribunal, of course, are only intended to seek the assistance that you have offered and indeed have already provided in the Tribunal's attempt to master the pioneering venture that you have described for us.

I have another question that might assist me, at any rate, in doing so. You have cited with approval and indicated your full agreement with the proposition from the Libya-Malta case, that the questions of entitlement and of definition of continental shelf on the one hand, and of delimitation of continental shelf on the other, are not only distinct, but are also complementary, is self-evident. It seems to me -- I wonder, at any rate, if the effect of what you have described as your position on the legal basis of title on the one hand and the definition of the offshore areas in question on the other hand, don't,

in fact, enhance the distinctness referred to in the Libya-Malta case -- yes, Libya-Malta case -- perhaps even to the point of water tightness, while, on the other hand, eliminating the complementarity altogether. Is that impression mistaken?

Because, on the one hand, you say continental shelf is totally irrelevant to this case so far as the legal basis of title is concerned; on the other hand, continental shelf and the definition of the continental shelf in Article 76 of the 1982 Law of the Sea Convention is critical to this case. It is the definition that determines the entitlements. Is there a contradiction here or a difficulty, or am I creating one in my own mind?

MR. FORTIER: Thank you, Mr. Legault. I don't think there is a contradiction. And what I offer by way of a reply and a comment to your important observation is that Nova Scotia is not arguing that the fact that both provinces, you know, have coasts which abut on the relevant area, which physically happens to be the continental shelf, is irrelevant. What we are submitting is that the -- the Accords, the enabling legislation, the implementing legislation, the Terms of Reference, give you one mandate and one mandate alone, and that is to define the line which delimits the offshore areas.

As I said earlier this morning, and as I repeated, the

offshore area incorporate the description of the physical shelf of Article 76, and the offshore -- obviously, the provinces would not have any offshore areas if they -- if they did not -- if their coasts did not abut on the area to be delimited, but that the area to be delimited is the continental shelf is, if I may use the expression, a physical fact -- a physical fact. But the basis of title is not the continental -- the juridical continental shelf. The basis of title is the legislated -- the negotiated entitlements which were negotiated. That's the key.

MR. LEGAULT: Thank you very much, sir.

MR. FORTIER: Thank you, Mr. Legault.

Mr. Chairman, I thank you for having you and your -- I thank you and your colleagues for having listened to me attentively this morning, and I would now ask you to call on Professor Russell to come to the podium. Thank you, Mr. Chairman.

PROFESSOR RUSSELL: Mr. Chairman, members of the Tribunal, my colleague, Yves Fortier, has focused your attention on the Terms of Reference. He has stated Nova Scotia's position on the fundamental norm of international law applicable to maritime boundary delimitation, and he has explored the basis and nature of the parties' entitlement to the offshore areas.

I will be focusing primarily on three aspects of the

applicable law. First of all, on the essential characteristics of the fundamental norm which recognize that each delimitation is unique. Secondly, on the critical importance of the legal basis of title in the application of the fundamental norm, and thirdly, on the proper role of previous judicial and arbitral decisions dealing with maritime boundary delimitation, a matter which Newfoundland has misconceived.

As the phase two Memorials of Nova Scotia and Newfoundland and Labrador illustrate, the parties are in agreement on a few significant issues with respect to the law that governs the arbitration.

For example, both of us have argued, although for different reasons which I'll address in a few moments, that the 1958 Geneva Convention on the Continental Shelf is not directly applicable to the present case. They also agree that under Canadian, as well as under international law, the seaward limits of their offshore areas are to be defined by the criteria and the methods provided in Article 76 of the 1982 Convention on the Law of the Sea.

Both parties have also acknowledged that the objective of this delimitation is to achieve an equitable result and both have asserted that recognition of and respect for the nature and origin of the parties' legal entitlements is of central importance to the delimitation process.

There are, however, critical features of the applicable law which are either misstated or simply ignored by Newfoundland and Labrador, and as we will demonstrate, these errors are of such fundamental importance to the structure of Newfoundland's case that they can lead only to the complete rejection of both the general approach to the delimitation espoused by Newfoundland and of its proposed line.

As we have seen and as we will show, the entire thrust of Newfoundland's case is to limit the range of circumstances, both legal and factual, to be taken into account by the Tribunal in effecting the delimitation. This is the opposite of what the law requires, and in light of the approach that Newfoundland has taken to the law, it is important to consider the essential characteristics of the fundamental norm governing maritime boundary delimitation as developed in decisions of the International Court of Justice and other tribunals.

I want to begin, however, with a few brief comments on the relevance to this case of conventional -- the conventional sources of law on maritime boundary delimitation, the 1958 Geneva Convention on the Continental Shelf and the 1982 United Nations Convention on the Law of the Sea. One point on which the parties are agreed is that the 1958 Continental Shelf Convention does

not apply to the present dispute. And this is so despite the fact that Canada is party to that convention and despite the fact that Article 3.1 of the Terms of Reference transposes to the parties Canada's international legal rights and obligations. However, we differ in our reasons for concluding that the continental shelf is -- the Convention is not directly applicable, and I think it's important to restate Nova Scotia's position on this, and also to give our opinion on Newfoundland's position on the same point.

In our view, the delimitation provisions of the Continental Shelf Convention are not directly applicable because, as Mr. Fortier has explained, the continental shelf regime which the Continental Shelf Convention applies to is inherently different from the offshore area regime of management and revenue joint -- shared management and revenue.

The entitlement of the parties to the offshore areas, as Mr. Fortier has shown, arises exclusively by virtue of the Accords and the implementing legislation. The Accord Acts don't address the same rights, not all of the same resources, or the same uses envisaged in the Continental Shelf Convention, nor do they apply to the same area of the seabed. So Article 6 is not directly applicable to the present case.

However, Article 6 and the cases dealing with its application do have some relevance. They certainly constitute an important part of the historical evolution of the law and of the fundamental norm applicable to all cases of maritime boundary delimitation.

Now as to Newfoundland's analysis as to why the continental shelf convention does not apply, we disagree with Newfoundland's analysis on this point. And we regard it as unsupportable on a proper reading of Article 31 of the Terms of Reference.

The phrase, the principles of international law governing maritime boundary delimitation combined with the phrase, as if the parties were subject to the same rights and obligations as the government of Canada at all times would, in our opinion, include Article 6 of the 1958 Convention on the continental shelf.

Now Canada is not a party to the Law of the Sea Convention, the 1982 convention on the Law of the Sea, however, it is generally agreed that many of the convention's provisions, including Articles 74 and 83, dealing with the delimitation of the exclusive economic zone and the continental shelf respectively, reflect customary international law to a substantial degree.

This was noted by the Gulf of -- by the Chamber in the Gulf of Maine case in 1984, which also commented on the

significance of the parallel or virtually identical wording of Articles 74 and 83. And again, we would note that that parallel wording of the provisions governing delimitation of the exclusive economic zone and of the continental shelf, highlights or underlines the applicability of the fundamental norm to different maritime zones.

However, as Mr. David Colson noted in a talk that he delivered to the American Society of International Law in 1987, any student of the case law of international boundary delimitation, knows that the answer to a boundary dispute is not going to be found in the text of the 1958 or the 1982 convention.

Interestingly enough, however, he went on to say, I'm not sure I can tell you where the answer will be found. But the language of the 1982 convention is only going to frame the debate, not resolve it.

Interesting I say that he said, I'm not sure I can tell where it can be found -- where the answer can be found, because I think implicit in that is a recognition that the fundamental norm identified, developed in the jurisprudence, like the norm as reflected in the convention, only provides a framework.

Now from the outset Newfoundland misconceives of key tenets of the international law governing maritime

boundary delimitation. My colleague, Yves Fortier, has already shown how Newfoundland has confused the law applicable to entitlement to and definition of the continental shelf on the onehand, with the law applicable to the delimitation of maritime boundaries generally on the other. And it does so despite the fact that the Court made it absolutely clear in Libya- Malta that the two are distinct, though complementary. And though the cases demonstrate that the fundamental norm is applicable not only to the delimitation of the continental shelf, but also to the delimitation of fishery zones, exclusive economic zones and single maritime boundaries, indeed to all maritime delimitations.

This confusion, however, pervades Newfoundland's treatment of the applicable law and its critique of Nova Scotia's legal framework. According to Newfoundland, the legal framework adopted by Nova Scotia, requiring as it does the application of the fundamental norm to the division of the offshore areas, as opposed to the continental shelf, creates a framework in which the relevant circumstances can be selected at will and assigned whatever priority and weight happened to suit the needs of the argument. That from paragraph 72 of Newfoundland's Counter-Memorial.

Newfoundland further contends that the legal framework

proposed by Nova Scotia has the following consequences. That the proper hierarchy of relevant circumstances will be inverted, that from paragraph 11 of Newfoundland's Counter-Memorial.

Now on Monday --

PROFESSOR CRAWFORD: Ms. Russell --

PROFESSOR RUSSELL: Yes.

PROFESSOR CRAWFORD: -- someone whom your side has already quoted said "what I say to you three times is true", and we have heard this on a number of occasions. Is the emphasis that you are placing on the distinction between the offshore area and the continental shelf -- does that carry with it any implication that if we regard the two areas as so analogous, if we were to regard them as so analogous that the rules of that continental shelf delimitation would apply, that Newfoundland's analysis of those rules would be accurate? Or that Newfoundland's line would follow? I mean, I --

PROFESSOR RUSSELL: No, it -- Newfoundland -- no.

PROFESSOR CRAWFORD: I'm starting to be worried about all this pervasive stuff.

PROFESSOR RUSSELL: Yes. The --

PROFESSOR CRAWFORD: Because you might be pervasively wrong.

PROFESSOR RUSSELL: Newfoundland's -- the law, the norm is essentially the same, the types of criteria, circumstances

and methods are very similar. The Tribunal would, of course, draw on the same norm, the same tools. But Newfoundland has, I would say -- we would say, misstated even the law of continental shelf delimitation. And I will proceed to show how that is so.

Now on Monday, Mr. McRae said that Newfoundland -- that Nova Scotia wanted to -- the law to be applied in a perverse manner. And that we had applied the wrecking ball to the Canada-France case and to the Gulf of Maine case. And in our respectful view it is Newfoundland that has applied the wrecking ball, and it has applied it to the fundamental norm. It has torn down the modern structure and taken us back to 1969, with an argument premised on the North Sea cases which ignores the developments and the evolution that have taken place in the law since that time, particularly in the downplaying of the importance of natural prolongation and of non encroachment, which my colleague, Professor Saunders, will address in greater detail later.

Newfoundland would reduce the law of maritime boundary delimitation to a fundamental norm in which relevant circumstances means only geographical circumstances. And in which equitable criteria would be reduced to a closed list of two, non encroachment, no cutting off and proportionality.

Now no doubt many commentators who have been critical of the international Court's approach to maritime boundary delimitation would applaud such a clarification or simplification of the law. However, as we will demonstrate, the jurisprudence does not support it. And as Mr. Willis himself pointed out in his article from precedent to precedent, the triumph of pragmatism in the law of maritime boundaries, which is found in our annex 192, the law as stated in the decisions of the World Court may lack precision. And as he says, may suffer from an access of equitable discretion. But as he also notes, it is rooted in a pragmatic recognition that the undisciplined vagaries of geography cannot be ordered readily by the law, much less reduced to a formula that can be applied universally.

PROFESSOR CRAWFORD: Miss Russell, the Registrar will provide you with a text of a speech given by the President of the International Court, Judge Guillaume on the 31st of October of this year. It was actually a lecture. I attended it. But it was in the Sixth Committee on maritime boundary delimitation. And he says on page 8 of that speech, "Whether it be for the territorial sea, the continental shelf or the fishing zone -- sorry, I will just take the quote back a line. "The law on maritime delimitations was completely reunified." He is referring

to the decision in Qatar-Bahrain -- "Whether it be for the territorial sea, the continental shelf or the fishing zone, it is an equitable result that must be achieved. Such result may be achieved by first identifying the equidistance line, then correcting that line to take into account special circumstances or relevant factors, which are both essentially geographical in nature." And he then goes on to say that that rule is also applied to adjacent as well as opposites coasts.

I simply draw that to your attention since we have -- you have quoted from counsel on the other side. I -- and it is a view as to what is going on now as a result of Qatar-Bahrain. And I would be grateful if in the course, not necessarily in your immediate presentation, but in talking about the applicable law, whether you would address this on the issues discussed by the President.

PROFESSOR RUSSELL: Okay.

PROFESSOR CRAWFORD: In other words, has there been a move in the law of maritime delimitation? Of course, I entirely understand the argument that we are delimiting a sui generis zone, but nonetheless, what he is saying is the law has been completely reunified. And this is the first time I have seen the suggestion that it's even been reunified to the level of there being no distinction in principle between territorial sea and the continental

shelf delimitation. So if that's true what would --

PROFESSOR RUSSELL: Just on -- yes. Just on an immediate comment, I note that for example in the Gulf of Maine case, I think it's at paragraph 160, the Chamber commented in terms of methods, you know, on that fact that the methods that had been used and which were appropriate to the areas closer to shore like the territorial sea, you know, might be very different and probably are very different than the methods that should be adopted for the delimitation much farther from shore, it said, where the purpose of the delimitation is to, as it said, share the mineral wealth of the seas.

PROFESSOR CRAWFORD: Yes. But the point about this statement is that it identifies a sort of unease about the law of maritime delimitation, which many had in the early 80s. And by implication at the time of the Gulf of Maine case. And then says that since then there has been a development in the direction of greater certainty.

Now Mr. Willis at least in his academic capacity may rejoice in uncertainty --

PROFESSOR RUSSELL: Yes. That's right.

PROFESSOR CRAWFORD: -- in uncertainty, but it just seems to me that there is at least a case that the President looking at it from within, as it were, has analyzed a trend in the decision such as Jan Mayen and Qatar-Bahrain,

which we need to think about. Thank you.

PROFESSOR RUSSELL: Okay. Now despite the statement that -- from Mr. Willis in his article at page 5, that the law couldn't be reduced to a formula that can be applied universally, we heard Mr. Willis speak earlier this week in formulaic and mathematical terms about the proportionality equation and about the fact that the body of law is inseparable from its practical applications. That was precisely what the Chamber in the Gulf of Maine was warning against when it stressed that each case is in the final analysis different from all others. It is monotypic.

Now although it has been criticized for its open-ended nature, the fundamental norm that delimitation be effected by the application of equitable principles taking into account all of the relevant circumstances, in order to achieve an equitable result, is not devoid of legal structure. This jurisprudence has been consistent in emphasizing that equity must be seen as operating within a framework of legal principles.

According to the International Court of Justice, the requirement that equitable principles be applied in a delimitation is itself a rule of law, and a delimitation effected by a Tribunal in accordance with the principles of international law is to be distinguished from an award

ex aequo bono. Although Tribunals do enjoy a measure of discretion virtually at every stage of the delimitation process, that discretion is constrained and guided throughout by legal principles.

As the Court noted in the Tunisia-Libya case at page 60, the task of the Court is to apply equitable principles as part of international law and to balance up the various considerations which it regards as relevant in order to produce an equitable result.

The Court went on to say, that while it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise in discretion or conciliation, nor is it an operation of distributive justice.

There are two particular characteristics of the norm that provide a legal framework to equitable principles. First, the choice of equitable principles or criteria that will govern a particular decision are made within a process that requires explicit consideration of, and connection to the relevant circumstances of a given case.

A tribunal cannot proceed to the decision it views as just in the broad sense. It must do so through the application of principles and practical methods which are derived from relevant circumstances on the facts of the case.

Second, both the relevant circumstances that influence the choice of equitable principles and the principles themselves must reflect the legal basis of title to the zone being delimited.

The Court in the Libya-Malta case stressed that the legal nature of the zone in question was a significant constraint on the potentially unlimited range of equitable considerations. At page 40 of its decision, the Court said, "For a court, although there is assuredly no closed lists of considerations, it is evident that only those that are pertinent to the institution of the continental shelf, as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of the continental shelf could, itself, be fundamentally changed by the introduction of considerations strange to its nature." The same, of course, can be said with the offshore area.

The implications of this approach in the present arbitration are clear. Tying the election of equitable principles to the substantive legal basis of title to the zone in question is an important element in ensuring that the delimitation is made within a clear legal framework, and not as a matter of pure discretion.

Again, as Mr. Willis pointed out in his article, in

the first place, discretion exercised by the courts has at once been confined and guided by the basis of title.

Now it is true that in all previous cases, the basis of title has been or has been found to be related to coastal geography. But that is not part of the norm. It was a reflection in these cases of the impact of the basis of title on the application of the norm.

Now contrary to what Newfoundland argues in its Counter-Memorial at paragraph 11, there is no established hierarchy of relevant circumstances in delimitation law. Such a notion is contrary to the basic norm of maritime boundary delimitation, which recognizes that each delimitation is unique. As Professor Weil says in his book at page 11 -- his book, that is, Maritime Boundary Law Reflections at page 11, what is involved is not a hierarchy of relevant circumstances, but rather a ballet of concepts, or if it fits better with the smorgasbord of cases and the ice-cream curry, a buffet of concepts.

CHAIRMAN: May I just intersperse a housekeeping element. I have no idea how long you plan to continue, but it is getting very close to 12:30, and if you are going to speak for some length, perhaps you might come to a convenient break pretty soon.

PROFESSOR RUSSELL: Mr. Chairman, I will finish just with a quote from the North Sea cases, which makes this point,

and then I will take up again after lunch, if that's convenient. That will only take a couple -- even just a minute.

So the factual circumstances which may be relevant to a delimitation are theoretically unlimited. As the court said in the North Sea case in 1969, "In fact there is no legal limit to the considerations which the states may take into account for the purpose of making sure that they apply equitable procedures. And more often than in not, it is the balancing up of all such considerations that will produce this result rather than the reliance on one to the exclusion of all others. The problem of relative weight" the Court said "to be accorded to different considerations naturally varies with the circumstances of the case."

So the North Sea case said theoretically at least there is no limitation of the factual circumstances. In practice, the legal basis of title may constitute such a limitation. I will continue after lunch with a description of some of the circumstances that have been considered in previous cases.

PROFESSOR CRAWFORD: But, of course, that passage was the one which provoked the one you read earlier about the distinction between what states could take into account and what tribunals could take into account.

PROFESSOR RUSSELL: That's right. That's right. And that's why the legal basis of title is so important --

PROFESSOR CRAWFORD: Yes.

PROFESSOR RUSSELL: -- in giving weight to the circumstances of the particular case, and from on the basis of the circumstances then, on deciding what criteria are appropriate to apply. And from that then based on the criteria, what practical methods are appropriate for the implementation of those criteria. And that's precisely our point.

Thank you very much.

CHAIRMAN: Thank you.

PROFESSOR RUSSELL: Oh, I am sorry. Will we reconvene at 1:30 or --

CHAIRMAN: That in part is -- 1:30 is convenient?

PROFESSOR RUSSELL: Yes. Yes, thank you.

CHAIRMAN: Yes.

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

PROFESSOR RUSSELL: Mr. Chairman, members of the Tribunal, before we adjourned for lunch, I was just making the point that there is no hierarchy of relevant circumstances. And that as the Court said in the North Sea case, the factual circumstances which may be relevant to a delimitation are theoretically unlimited.

And in answer to a question to Professor Crawford, I

made the point that, yes, in Libya-Malta, that they had pointed out that the basis of title forms a significant constraint on the potentially unlimited range of circumstances.

It is possible to identify the types of relevant circumstances considered in the previous cases. Now my colleague, Professor Saunders, is going to do a general introduction to the law of relevant circumstances. So I am really just introducing them very briefly.

But the relevant circumstances, which have been considered in previous cases have included geographic factors. And geographic factors have, as Mr. Willis has noted, they have played a prominent role in all of the cases, commencing with North Sea. The relationship between the coasts of the parties, questions of adjacency and oppositeness, distance between the coasts, the configuration of a coast, changes in direction and so on.

The courts have also considered circumstances related to the conduct of the parties. We have heard some already about the circumstances of conduct in Tunisia-Libya, and we will hear more about that from Professor Saunders and Mr. Bertrand, as well.

The location and division of relevant resources has also been mentioned in the cases as a relevant circumstance beginning in North Sea where they talked

about circumstance -- resources that were known or readily ascertainable.

However, in the Gulf of Maine case, in noting that the third sector of the boundary line was perhaps the most important, because of the presence of Georges Banks, the Court also -- the Chamber also noted in that case that that was a place where there were not only valuable fish resources, but also valuable potential hydrocarbon resources, as well.

Economic dependence on resources in the disputed zone has been frowned on in some cases, such as in Tunisia-Libya, where they said they couldn't consider such circumstances because national fortunes can change and tilt the balance one way or the other.

On the other hand, in Jan Mayen, they did mention that in the Gulf of Maine case, the Chamber had said that economic dependence on resources was at least an auxiliary factor and that the Court had to consider the impact of the delimitation on the economic well-being of the populations of both parties in relation to the fish resources, for example, or hydrocarbons.

As well -- and I should make it, there is a distinction to be drawn between economic dependence on resources in the disputed zone and relative wealth and poverty. Contrary to what the counsel for Newfoundland

have said, Nova Scotia is not arguing that relative wealth and poverty should be a relevant circumstance in this case.

Third party interests and the impact of other delimitations in the regions has played an important role in a number of the cases. In Tunisia-Libya, the Court, for example, said that it was a potentially relevant circumstance, the existing or potential delimitations between each of the parties and other states in the area.

And certainly at page 36 of the judgment, map number 1, for example, in that case, showed the delimitation between Tunisia and Italy. So certainly it was probably on their minds.

In Libya-Malta, the interests of Italy were very much on the minds of the Court. And in Guinea/Guinea-Bissau, the Court said that in order for the delimitation between the two Guineas to be suitable for equitable integration into the existing delimitations of West Africa, the West African region, as well as into future delimitations, they said it was necessary to consider how all of the delimitations fit in with the general configuration of the West African coast.

PROFESSOR CRAWFORD: Dr. Russell, the West African case is certainly relevant. Of course, the difference here is that we actually have a delimitation. I mean it's not a

case of speculation. We know -- we know what it is.

Are you going to argue about what the impact of that is, or is that going to be a matter for someone else on your team?

PROFESSOR RUSSELL: Professor Saunders is actually going to deal with the law on the relevant circumstances.

PROFESSOR CRAWFORD: I see. Professor Saunders is the Dr. Hughes of this round?

PROFESSOR RUSSELL: That's exactly. This is it. Considerations of geology, and geomorphology, and historic rights have also been circumstances that have been looked at in the cases, but not -- not really attached weight in the various cases.

Like the range of circumstances that's open for consideration, the potential range of applicable -- equitable principles is also unrestricted. Although, it is, as well, possible to identify the equitable criteria used in previous cases.

They include the familiar maxim that the land dominates the sea, flowing from the sovereignty of the coastal state over the land territory. Equal division of overlapping areas of entitlement, first mentioned in North Sea. Described in the Gulf of Maine case by the Chamber as being a criteria that was intrinsically equitable. Avoidance of cut-off and nonencroachment of areas close to

the coasts of the party. Mentioned again in North Sea and also in Anglo-French. Conduct as an indicator of what the parties, themselves, have considered how they have viewed the geographical equities of the situation through their own eyes. And most -- most particularly in the Tunisia-Libya case. And proportionality -- a reasonable degree of proportionality of relevant coastal lengths to maritime areas. That's been a factor in all of the cases.

MR. LEGAULT: Miss Russell, a very brief question. I don't want to interrupt you for long. I understand the differences between the approaches of the two parties as regards both equitable principles and relevant circumstances. I think it has been made very clear. Could you refresh my memory as to whether the parties agree, however, on the basic formulation of the fundamental norm?

PROFESSOR RUSSELL: Yes.

MR. LEGAULT: Not its application, just its formulation.

PROFESSOR RUSSELL: Yes, we do agree on the formulation. Yes. Although, then in the statements of law, you know, sort of summarizing it, I would say -- I will show that there is inaccuracies. And I will point those out.

MR. LEGAULT: Thank you very much.

PROFESSOR RUSSELL: The essential point though is that the list of criterion is neither closed nor of automatic

application.

The mere fact that a particular principle was utilized or rejected in a previous case, for example, dealing with the continental shelf, as the Gulf of Maine Chamber said, does not permit the presumption that the same should occur when new facts are under consideration.

It doesn't preclude them, but doesn't also entitle those criterion to automatic application. And as the Chamber in the Gulf of Maine noted, there is a fundamental distinction to be drawn between a mandatory legal rule or norm and the considerations that might be used in the application of that norm. This point is reflected in the Gulf of Maine case where the Chamber stated that "The law requires the application of equitable criteria, namely criteria derived from equity which, whether they be designated principles or criteria, the latter term being preferred by the Chamber for reasons of clarity, are not in themselves principles and rules of international law."

So the particular principles that are identified and applied in the cases are not rules of law, but are considerations whose application depends entirely on their appropriateness to a particular fact situation.

Newfoundland incorrectly equates equitable principles and relevant circumstances with mandatory rules of law. After acknowledging that those principles are based on

equity in light of the circumstances, Newfoundland goes on to argue specifically they, the principles of international law, include -- and then it mentions natural prolongation, non-encroachment, no cut-off, the abatement of disproportionate effects created by incidental coastal features or irregular coastal configurations, and a reasonable degree of proportionality. Then, at paragraph 69, it proceeds, "These are among the fundamental principles recognized by the jurisprudence. Provided they are respected, there is no method of delimitation that is sacrosanct."

There are several serious errors manifested in this statement of the law. First and foremost, Newfoundland's formulation confuses and effectively merges the discreet concepts of principles of law which govern the process of maritime delimitation and equitable principles, which are one of the factors to be applied as part of that process. And that's why the Gulf of Maine stated its preference for the term "equitable criteria", for reasons of clarity. It's that clarity that Newfoundland sacrifices when it anoints as principles and rules of international law, indeed, as fundamental principles, the concepts of non-encroachment, avoidance of cut-off, and proportionality.

Now all criteria are to be selected with reference to their appropriateness to the circumstances of a given

case. This point was stressed by the Chamber in the Gulf of Maine case in respect of two of the equitable principles or criteria that Newfoundland would now imbue with mandatory status -- non-encroachment and no cutting off.

The Court cautioned that the error lies precisely in searching general international law for, as it were, a set of rules which are not there. This observation applies particularly to certain principles advanced by the parties as constituting well-established rules of law, and then it refers to a couple and then says, "One could add to these ideas the ideas of non-encroachment upon the coasts of another state or of no cutting off of the seaward projections of the coasts of another state which may, in given circumstances, constitute equitable criteria provided, however, that no attempt is made to raise them to the status of established rules endorsed by international law."

The same position was reflected by the full Court in its decision in Libya-Malta regarding the criterion of proportionality. Far from constituting a principle of international law, one of the fundamental principles recognized in the jurisprudence, as pleaded by Newfoundland and Labrador, the Court stated that "Proportionality is one possibly relevant factor amongst

several other factors to be taken into account. It is nowhere mentioned", the Court said, "amongst the principles and rules of international law applicable to the delimitation."

In sum, the critical error identified by the Chamber in the Gulf of Maine case, as by the Court in the Libya-Malta case, is precisely the error that Newfoundland makes in its statement in regarding what it considers the principles of international law relating to maritime -- to the delimitation of maritime boundaries. It cloaks the concepts of natural prolongation, no cut-off and proportionality with a mantle of universality reserved only for true principles of law.

Earlier this week, Mr. Willis accused Nova Scotia of draining the law of its substantive content. I would suggest that he's just talking about a content that's not there. He's committing the error that the Chamber cautioned against, the area of searching general international law for a set of rules which is not there.

A further error in Newfoundland's statement of what it refers to as the principles of law flows directly from its theme of limiting the considerations which are to be taken into account in this delimitation. Newfoundland and Labrador declares that the essential requirement of a delimitation effected according to the principles of

international law is a result that is equitable in terms of a particular geographical configuration of the relevant area.

In other words, of the potentially vast range of circumstances pertinent to any given case -- circumstances by reference to which the criteria and methods of delimitation are to be selected and the overall equity of the result is to be measured. Only one is relevant, in Newfoundland's estimation, and that's geography. And we're not saying that geography isn't relevant; we're just saying that it is not the only relevant circumstance.

But this refrain recurs throughout Newfoundland's phase two Memorial. For example, they say, "The present dispute can and should be resolved exclusively on the basis of the coastal geography of the delimitation area." And again, "the geography is overwhelmingly the most important factor and is most often -- is most often the only relevant factor."

Now contrary to Newfoundland's interpretation, the essential requirement of the law of maritime boundary delimitation, as stated by the Court in the Libya-Malta case, for example, is that delimitation must be effected by the application of equitable principles in all of the relevant circumstances in order to achieve an equitable result.

Again, in the Gulf of Maine case, in its formulation of the fundamental norm of maritime delimitation, which Newfoundland quotes, but, apparently, declines to apply where its own interests are at stake, the Chamber stated unequivocally that "Delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result."

Ultimately, the choice of relevant circumstances, as with the selection of equitable criteria, must be made in relation to the facts of the case. There is no single set of circumstances that can be identified as an essential requirement.

The same argument applies to practical methods. The parties agree that there's no practical method that must be applied, and so this really isn't a matter of contention between us.

In sum, there are no predetermined equitable criterion or set of criterion, nor any single practical method or group of methods that constitute rules of international law. Every delimitation is unique. That's the essence of the fundamental norm, as the Chamber said in the Gulf of Maine case.

And it is, furthermore, and the jurisprudence is clear

about this, that although equitable considerations influence all stages of a delimitation, it is ultimately the equitable nature of the result that must be the dominant concern. This point is fundamental, and it was confirmed by the Court in Tunisia-Libya as follows: "The result of the application of equitable principles must be equitable. It is the result which is predominant. The principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result."

PROFESSOR CRAWFORD: The problem we have, Dr. Russell, with that is that if it's true, it's a bit like trying to cut -- cut a steel bar with a piece of rubber. I mean it -- it just doesn't have any purchase. If that's true, then you can't -- there's no criteria. Okay, equity -- what is equity in the eye of the beholder? In the courts, surely there has been some sort of common law method. Mr. Willis said with some relish that it was a common law method which has developed criteria for working out what is equity and for eliminating certain consequences. It may be that this is a matter for your co-counsel.

PROFESSOR RUSSELL: Well, I can tell you that, first of all, we have got a team that has a number of civil lawyers, as well, so that may influence our approach, but

international law is not common law, and we -- common lawyers who have training in international law must always keep that in mind. It's difficult for us to be working in a system where there's no binding precedent, and we see that --

PROFESSOR CRAWFORD: It's not a question of the cases being binding. It's a question of whether, from the cases, emerges any guidance for the Tribunal in what is -- in what is equitable in certain kinds of situations. A situation where you have is that -- I say this under advisement, and subject to further persuasion as a result of additional contact with Mr. Fortier, but up to now it seems to me the situation is that there's an inner area which -- where the two parties are more or less opposite, and then there's an outer area in which they're more or less adjacent. This is not the first time in international jurisprudence in which courts have faced that situation, is it?

PROFESSOR RUSSELL: No, it -- no, it isn't.

PROFESSOR CRAWFORD: And so I mean speaking for myself, can I say that I accept entirely that the general goal is an equitable result? It probably doesn't make any difference whether you're applying 1958 or 1982 or customary international law. So we know that much, but we don't know very much.

PROFESSOR RUSSELL: I would say -- I would say your concern is that you've got too much discretion and is it just ex aequo et bono, and I would say no, it isn't. The legal basis of title forms a constraint. It influences the weight attached to the circumstances in the case, and then flowing from that, the selection of criteria. And then once you've, you know, selected the criteria, then what methods are appropriate to the criteria that you've selected? That's the process, and I think that it isn't just an unlimited discretion. It is constrained.

That was the point of the statement by the Court in the Libya-Malta. That's the process that was taken in Gulf of Maine and subsequent cases. So I think that the cases do provide you with guidance. The legal basis of title in this case is unique; the whole case is unique where we are applying international law to a creature of domestic law. But the -- the law does provide you with guidance.

The foregoing review of the central characteristics of the fundamental norm indicates that judges and arbitrators do enjoy broad, though not unlimited, discretion in maritime boundary decision making. However, as I've said, one critical factor that's emphasized repeatedly in the jurisprudence and that serves at every stage of the delimitation to direct and to constrain the discretion

inherent in the Tribunal's task is the legal basis of a state's claim to entitlement to a particular maritime zone.

The importance of that title cannot be overstated. The significance of the title was, as Mr. Fortier noted, recognized in the Gulf of Maine case in which the Chamber held that the fact that the object of the delimitation in that case was not just the continental shelf, but a zone that would encompass both the seabed and the water column was a special aspect of the case which must be taken into consideration, even before proceeding to examine the possible influence of other circumstances on the choice of applicable criteria.

The Court noted the profound difference between the task that had been assigned to it and the task of the Court in earlier cases, or of other tribunals, in delimiting the continental shelf.

And it stated that, for example, that the nature of its task, that the combined basis of title affected the choice of circumstances and relevant criteria. That it could not consider any criterion that related only to one of the two different realities that had to be delimited in conjunction.

The passage from the Gulf of Maine really notes the intrinsic connection between the nature and origin of the

title claimed, and the choice of the dominant equitable criteria to be applied in a delimitation. And the cases have repeatedly demonstrated that.

In the North Sea case, the Court's reasoning did proceed from its finding regarding the juridical character of the continental shelf as an extension seaward of land territory, over which a state may exercise sovereign rights by virtue of its sovereignty over the land. And that in turn justified the central requirement in shelf cases, first of all. Then it drew from that the maxim land dominates the sea, and then that in turn justified the central requirement in shelf cases to examine closely the geography of the coastline.

In Libya-Malta, when the Court examined the continental shelf case, it had to consider a change in the juridical status of the continental shelf, arising from the proceedings of UNCLOS III, and the entitlement to an Exclusive Economic Zone extending to 200 miles. And it noted -- it noted the influence of that change on its reasoning.

The Court said it follows that for juridical and practical reasons, the distance criteria must apply to the continental shelf, as well as to the Exclusive Economic Zone. And that distance criterion, which Libya tried to -- to get the Court to ignore, played a role, influenced

the Court's adoption of a provisional median line in that case.

The legal basis of entitlement is also critical to one of the most difficult and controversial aspects of maritime delimitation. And that's the definition of the area relevant to the delimitation.

The Court in Tunisia-Libya, applying the finding in the North Sea case, that the geographic correlation between coast and submerged areas off the coast is the basis of the coastal state's title, then proceeded to say that the coast of each of the parties', therefore, constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring states situated either in an adjacent or opposite position.

So the legal nature and status of the zone will determine the possible seaward limits of a state's claim. The area of potential legal entitlement.

And as will be shown by Professor Saunders, it is this, the area of overlap between competing legal entitlements of the two states that forms the area of direct relevance to a delimitation. And this, in turn, influences the application of the proportionality criteria.

Now, although the parties agree on the importance of title as one of the primary considerations with respect to the case, they disagree on the circumstances and the equitable criteria. And that's -- the reason lies in the fact that while Newfoundland asserts that the legal basis of title is the primordial consideration in a delimitation based on principles of international law, it fails to consider the basis of title to the zone to be delimited here. It simply assumes as the keystone of the proposed delimitation, that the offshore areas have the same characteristics as the continental shelf. And that the origin and the nature of the parties' entitlements are the same as the continental shelf.

The outgrowth and impact of this fallacious assumption are obvious in every aspect of Newfoundland's approach. Its reliance on geography is justified on this basis. You can see, for example, in its -- in its Memorial at paragraph 87, and there are many paragraphs that -- that would demonstrate this, that delimitation must be based on coastal geography. It goes on, "Since the coast is the source of title, it is the primary consideration that is pertinent to the institution of the continental shelf, as it has developed within the law."

Now, I should say, and I have said this already in answer to one question, that even if this were a

continental shelf delimitation, Newfoundland's contention that the case should be decided only on the basis of geography is contrary to the fundamental norm, and to the jurisprudence. Nevertheless, it bears reiterating that the entitlements of the parties in this delimitation are not derived from any ab initio entitlement, or inherent title, based on coastal geography, or sovereignty over the coast. The parties' entitlements derived from specific legislation which implements negotiated, joint management and revenue sharing agreements. And this is a factual context or framework that cries out for a consideration of a far broader range of relevant circumstances and criteria, than merely the geographical.

PROFESSOR CRAWFORD: I -- there seems to be an equivocation there. I can understand that if you were saying, well this is not a continental shelf delimitation, this is a delimitation of something else. And therefore, continental shelf cases are irrelevant.

But is that what you're saying? Or are you saying --

PROFESSOR RUSSELL: No, I'm not -- no, I'm not saying that.

PROFESSOR CRAWFORD: Then why are you -- why are you saying it is so different? I mean, why the emphasis upon the difference, if it doesn't make a difference? If I can put it that way?

PROFESSOR RUSSELL: Because the criteria -- the legal basis

of title affects the weight and the selection of the circumstances that are really considered relevant, they have to be -- bear some relationship to the -- the basis of title to the zone being delimited.

And it affects the weighting of those circumstances, and that in turn, affects the selection of the criteria. That's what -- that's our point.

So that, for example, in a negotiated entitlement, conduct should have more weight than it would in an entitlement that arises only by virtue of sovereignty over the land. Or that, in a zone, single maritime zone where you can't consider factors related to fish, or to the aquatic fauna, because you are dealing with a zone that encompasses both the seabed and the water, and you can't consider geological, or geomorphological factors, or hydrocarbon resources only because they relate to the shelf, when you're delimiting a zone, a basis of title that involves only one type of resource, or rights related to one type of resource, then the factors related to that resource have to be given some weight. And Newfoundland is saying no, conduct doesn't need to be given weight, it's only geography.

PROFESSOR CRAWFORD: Well -- yes. To some -- maybe Newfoundland was saying that in the sense that there was certainly an argument that in Tunisia-Libya, the aspect of

conduct was -- was correlative with other factors, and wasn't considered as vital in isolation.

PROFESSOR RUSSELL: Yes.

PROFESSOR CRAWFORD: But are you saying that, as it were, let's take conduct. I mean, obviously, this case has got nothing to do with the incidence of fisheries resources, and both parties agree that that's irrelevant.

But that's a fairly simple point.

Let's take the case of conduct. And you might take the view that international law says that conduct is never relevant, as such. And certainly, Professor Weil has taken that point in literature. That's a rather extreme position.

I think most would take the view that the conduct of the states concerned as in other areas of international law, including land boundaries, is relevant, provided it's unequivocal, and related to the point in issue, and not vitiated in any way.

Now, if that's true, and why should that rule be any different for an offshore area? I mean, as it were, is it when one enters into the field of Canadian politics that everything becomes soft and mushy, and so one can have equivocal and less relevant conduct, which nonetheless makes a difference?

Is that the nature of the beast?

PROFESSOR RUSSELL: No. And I think -- I think conduct, as a common lawyer, you would certainly know this, all the members of the Tribunal would, you know, that many of the equitable principles in domestic law have a lot to do with conduct.

And -- and --

PROFESSOR CRAWFORD: The point I'm making is, if the requirement is that the conduct in question should be unequivocal, there's no --

PROFESSOR RUSSELL: Is that the re -- are you saying if that's a requirement?

PROFESSOR CRAWFORD: I'm taking that as an example. It seems to me that -- that we would say, in relation to land boundaries, or indeed any other area of international law, that if -- if the conduct of a party is relied on as making a difference, it ought -- it ought to be unequivocal.

PROFESSOR RUSSELL: I guess --

PROFESSOR CRAWFORD: And it seems to me that you apply exactly the same rule to the delimitation of an offshore area, or -- Newfoundland's, well at least a principle strand of Newfoundland's attack on your conduct argument is that the conduct was not unequivocal.

PROFESSOR RUSSELL: Yes.

PROFESSOR CRAWFORD: I take it that Professor Saunders will

deal with that?

PROFESSOR RUSSELL: Professor Saunders will deal with the details, but let me just say right now that even in the Tunisia-Libya case, where a significant weight was attached to the conduct, there were protests and equivocation with respect to that conduct.

So, that's a starting point. And I would suggest that there is no -- that the notion that the conduct must be unequivocal is -- is not correct. And what is required from an equitable point of view, from the law of maritime boundary delimitation, is that the conduct be capable of being seen as a genuine expression by the parties of how they saw the equities through their own eyes. That's what you have to find.

It doesn't have to be a binding agreement, that's phase one. This is not a replay of phase one. And it's not -- I -- also, doesn't have to meet the test of the acquiescence and estoppel. And you won't -- we will not be arguing that in our oral argument. And that's a false sort of merger of those two arguments.

The standard for conduct as a relevant circumstance in maritime boundary delimitation is neither the standard for acquiescence or estoppel. Nor is it the standard for a binding agreement.

CHAIRMAN. The conduct beyond point 217 -- 2017 --

PROFESSOR RUSSELL: Yes.

CHAIRMAN: -- is really quite limited as compared to the parts before. And it's largely in the permit areas, where the conduct is relevant. I don't know if that's all, but that's really where the heart of it is.

PROFESSOR RUSSELL: Mm-hm. And you'll hear -- you'll hear quite a bit more about that from Mr. Bertrand.

CHAIRMAN: I just want to --

PROFESSOR RUSSELL: Yes. But that -- that's the type of -- that's what you will be hearing us talk about. That's right.

Okay. Now, I want to go on and talk about the last aspect of applicable law that falls under my domain, that is the proper treatment of previous decisions.

One rarely finds more than a passing acknowledgement in the decisions of the International Court of justice, or arbitral tribunals, of the proper role of previous decisions. And that's probably because the role of prior decisions is generally well understood.

However, numerous statements that counsel for Newfoundland made in their oral argument, and which are made in their Counter-Memorial as well, underline the need for some consideration of the proper role of previous international Court of justice and arbitral decisions in relation to the delimitation of maritime boundaries.

Just to focus, to remind you of the type of statement that I'm talking about, at paragraphs 58 and 59 of their Counter-Memorial, Newfoundland says "In Canada-France, the Court of Arbitration based its determination of coastal land on the Newfoundland coasts from Cape Race to Cape Ray and the Nova Scotia coasts from Cape North to Scatarie Island and onto Cape Canso.

In describing the general configuration of the region, Nova Scotia ignores this approach. And then goes on. It doesn't explain why it rejects the Court of Arbitration's description of the geography because it has no principled reason for doing so.

These type of statements really are examples of the third basic misconception which is at the heart of Newfoundland's treatment of the applicable law. And that is its misconception of the role of previous decisions of courts and tribunals in other delimitations and in particularly in the Gulf of Maine case and the St. Pierre and Miquelon award.

Certainly the Court will know that neither the findings of fact nor the legal principles accepted by the International Court of Justice or arbitral tribunals are binding on other states or in other disputes. And that the value of the previous decisions in international law is really as persuasive evidence as to the state of

international law.

Judicial decisions are not strictly speaking a formal source of international law, but in some instances they are regarded as authoritative evidence of the state of the law. Article 38.1 of the Statute of the Court, which is generally regarded by learned publicists as a correct statement of the sources of international law, refers to judicial decisions as a subsidiary means for the determination of law. And the practical significance of the label "subsidiary means" is not to be exaggerated because, of course, a coherent body of jurisprudence will obviously have important consequences for the law.

But Article 38.1 of the Statute starts with a proviso, subject to the provisions of Article 59 -- and Article 59 provides that the decision of the Court has no binding force except as between the parties and in respect of that particular dispute.

The debate in the committee of jurists responsible for the Statute indicates that -- clearly that Article 59 was not intended merely to express the principle of res judicata, but also to rule out a system of binding precedent. And strictly speaking, the Court doesn't observe a doctrine of finding precedent but it does strive to maintain judicial consistencies and indeed we would all, I think, agree that that is of value.

Now much of the customary international law of maritime boundary delimitation is derived from the jurisprudence of the International Court of Justice and other international tribunals. And because of the nature of state practice concerning boundary delimitation, the fact that each negotiated arrangement is both unique to its own facts and to circumstances which are known only to the parties, the statements of the Court and other tribunals regarding the nature and application of the principles governing maritime delimitation, though they aren't binding precedent, are certainly instructive and persuasive.

They can be used for example, in two ways, where such decisions yield the statements of principles or rules of law in sufficiently general terms to be readily applicable to new fact situations. They can be applied in that way. And a perfect example of that is the fundamental norm of maritime boundary delimitation as articulated by the Chamber in the Gulf of Maine case.

And secondly, the manner in which a tribunal has applied the law in the circumstances of a particular case may serve as a useful example or analogy in other factual situations in other cases displaying sufficient similarity. And the cases also provide guidance on the process by which the principles are applied.

However, Newfoundland misconceives the role of previous decisions. It applies the results but ignores the reasoning in previous decisions. Throughout its phase two Memorial and oral argument, it has displayed a patently self serving willingness to embrace certain of the conclusions reached in previous decisions and to adopt and apply such conclusions in the present case without, however, bothering to consider or certainly without adequately explaining the reasons why they were found to be appropriate in the first place.

PROFESSOR CRAWFORD: Of course, the decision in the St. Pierre and Miquelon case is binding on Canada and therefore binding on the parties and on the Tribunal

PROFESSOR RUSSELL: Yes. There is a zone there that belongs to France and --

PROFESSOR CRAWFORD: But how far does that go in terms of whether Article 59 or any other principle -- to what extent should the Tribunal --

PROFESSOR RUSSELL: In my -- in our view --

PROFESSOR CRAWFORD: -- respect the reasoning which led to the conclusion which is binding on the parties? It is a different situation where the parties would be free to reject the conclusion. And therefore a fortiori are free to reject the reasons. In this case the parties have to accept the conclusion. Does that carry through in any way

to the reasoning?

PROFESSOR RUSSELL: I would say no. It doesn't -- that the reasoning itself is not binding on the parties to this case, whereas Newfoundland and Nova Scotia the result is definitely binding --

PROFESSOR CRAWFORD: But as emanations of Canada by -- and Canada is bound by the judgment?

PROFESSOR RUSSELL: Canada is bound by the result of the delimitation in that case, that's right.

PROFESSOR CRAWFORD: Yes. And so are the parties. But you are saying that this only extends to the mushroom and that's all?

PROFESSOR RUSSELL: That's right. And that that is another delimitation, you know, really between third parties in a sense that should be taken into consideration in this delimitation as the Gulf of Maine, you know, boundary is there and it has to be taken into account and so on.

Examples of Newfoundland's approach include the following. First of all, Newfoundland's entire focus on the geographic features to the exclusion of other circumstances is supported by the fact that geography was a dominant consideration in other cases. It doesn't mention nor doesn't emphasis that those cases involved jurisdictional zones which are entirely distinct from the offshore areas. It doesn't make any attempt to analyze

the nature of the offshore area in comparison to the continental shelf. And I don't think I need to say more about that. We -- you have heard a lot from us on that point.

Secondly, the outer limits of the relevant area examined in Newfoundland's oral argument and phase two Memorial, are restricted to 200 nautical miles. We thought at first that it was for no other reason that the -- then that the same was done in the St. Pierre Miquelon Award. However, earlier this week when pushed on the point, Mr. Willis came up with another reason which seemed to be in essence that we can't be certain where the outer edge of the margin is. He said it's complex and we must test proportionality on the basis of a fixed distance. He said it's complex. It's uncertain. And it would prevent the Tribunal from applying the proportionality equation.

Now we agree that proportionality is relevant, but his reasoning at that point was contrary to the jurisprudence. In the Gulf of Maine case the Court noted on one hand that proportionality is intimately related to the governing principle of equity. But that it also noted, on the other hand, that proportionality could not be determinative. That the Court said it's difficult indeed to see what room would be left for any other consideration for it would at

once be the principle of entitlement and also the method of putting the principle into operation.

Mr. Willis' contention that we must limit the relevant area to 200 nautical miles though the offshore area extends far beyond that, so that we can apply the proportionality equation is untenable. It is contrary to the case law. It reduces proportionality to a mechanical formula. And as Mr. Willis himself has recognized in his article, the case law has always said that the technique of proportionality must remain subordinate to equity. And yet he seemed to be trying to make the goal subordinate to the means. And that can't be --

PROFESSOR CRAWFORD: Dr. Russell, I hear what you are saying about the need to apply the proportionality test as a secondary test, not as a primary test and as a -- in a way which has some flexibility. And there is certainly plenty of statements to that effect in the jurisprudence. But in addition to that argument, Newfoundland had -- Newfoundland and Labrador had a specific argument for saying that one should not consider proportionality beyond 200 nautical miles, which related to the, as it were, accidental character of the outer continental shelf. And I imagine -- although this wasn't said in so many words -- to the difficulty of changing the direction of the line. I mean, it's not really argued I think by anyone that

there is a case for changing the direction of the line at 200 nautical miles.

Are you going to handle that for us?

PROFESSOR RUSSELL: I'm going to do it, just -- only with the notion that this notion -- and Professor Saunders will be dealing in more detail with the geography in the relevant area. But I do just want to deal briefly, and I think Mr. Fortier has mentioned it as well, the contention that the Tribunal shall limit the relevant area to 200 miles because the delimitation of the outer edge of the margin is complex, it's difficult and it requires scientific expertise, as Mr. Fortier pointed out, we have provided scientific evidence, the evidence provided based on the best available scientific evidence produced in accordance with the methods and criteria provided in Article 76. In accordance with the guidelines produced by the commission on the limits of the continental shelf, and done by a member of that commission.

Newfoundland had -- you know, between August 17th and the present, could have queried us about that. They haven't done so. The evidence is uncontroverted. The Tribunal will certainly want to ask questions about it, not of me, but of others.

But, you know, as to the difficulty also of determining the outer edge of the margin, I think it's

difficult for the Court to carry out its mandate, which is to delimit a line that goes to the outer edge of the margin while ignoring a large part of what it is delimiting. To do so just seems really contrary to the notion that you will be able to assess the equitable result.

And as far as determining the outer edge of the margin, it's also true that in 1977, when it produced its petroleum regulations, Newfoundland seemed able to include a map that showed an approximation of the outer edge of the continental margin, which is not so different than what we have shown you in appendix B. And I would -- and you will hear more of that from -- as I said, from my colleagues.

But the point is that this notion that we should limit to 200 miles based on St. Pierre and Miquelon and then supplemented with other reasons, fails to acknowledge that the 200 mile limit was an appropriate limit in the St. Pierre and Miquelon arbitration only because the dispute itself was limited to the parties' 200 nautical mile zones.

There is no consideration of whether the different coastal relationships of the current parties combined with the fact that their potential offshore entitlements cover a maritime area extending far seaward of that delimited in

the earlier case, might engage further Nova Scotia coasts that legitimately relate to the wider disputed areas.

As well, Newfoundland has justified its use of a perpendicular to a closing line with reference to a particular method employed in the Gulf of Maine. And although I'm not going to deal at length with practical methods, I would note that in terms of applying methods used in other cases, while Mr. Colson gave us a very good presentation, a detailed explanation of some of the facts that the Chamber used to support the application of the methods it used, he omitted some very important aspects of the Chamber's reasoning in that case.

For example, in his lengthy and detailed explanation of the methods used by the Chamber in the Gulf of Maine case, he never once mentioned the equitable criterion that was applied by the Chamber in the case as the basis from which it chose the methods appropriate to the application of the criterion.

The criterion having been equal division of overlapping areas. And one would have thought that that important aspect of the Court's -- the Chamber's reasoning would have been mentioned. However, it wasn't for obvious reasons. Newfoundland wants to adopt the methods without adopting the criteria. That to me appears to be a weakness in the reasoning.

Mr. Colson also didn't talk about the importance placed by the Chamber on the geographical configuration, the rectilinear configuration of the coasts of the Gulf of Maine. It had said that it was an almost essential requirement for the use of a perpendicular that the coasts of the parties lie along a rectilinear coast for at least some distance. It innovated because the closing line to the Gulf paralled the direction of the real coast of Maine at the inside of the Gulf, it was able to innovate on the notion of a perpendicular to the general direction of the coast. And it supported that on the basis of claims as well that had made -- been made by each of the parties.

At one point the United States had made a suggestion for a line drawn perpendicular to the general direction of the coast. And Canada had at one point made a claim for an equidistance line which in one statement it had said would approximate the direction of a perpendicular to the closing line of the Gulf. Those are important aspects of the reasoning that can't be ignored in trying to adopt the methods.

Now, Newfoundland's approach is based on what the International Court of Justice has called an overconceptualization of the rules, principles and methods used by the Court and by other tribunals in previous cases. A practice which the Court cautioned against in

the Tunisia-Libya decision.

Clearly, it said each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances. Therefore, no attempt should be made to here to overconceptualize the application of principles and rules relating to the continental shelf.

MR. LEGAULT: Miss Russell, if I may, I am not 100 percent sure of my reliability of my memory here, but I believe it was in the Libya-Malta case where the Court stated that a number of equitable principles developed through the jurisprudence had really reached a status of, I think the term was general application. I would -- that statement, if my memory proves to be correct, and I am prepared to be corrected on that point, would that change the import in some measure of the statement you are just quoting?

PROFESSOR RUSSELL: That the reason -- that each continental shelf delimitation should be considered and judged on its own merits? That that's -- or just to --

MR. LEGAULT: The question of over-conceptualizing -- and in other words, suggesting that no equitable principle is necessarily ever of general application. That everything depends on the particular circumstances of the case, which seems to be what is being said here.

PROFESSOR RUSSELL: I don't think that's what they are

saying. I think they are saying, though, don't -- that the fact that a criterion was applied in one case doesn't mean that it has to be applied in another case. Or, you know, because there are some cases, for example, nonencroachment is appropriate where there is some -- a line is going to go, as the Court has said directly in front of someone's coasts, or close to the coasts, in a way that could threaten security interests and so on. But -- or equal division might be appropriate in -- particularly, between opposite coasts and so on. So I think they -- I don't think that that's what they are talking about. But they are saying that you can't treat them as principles of law that are mandatory for application.

MR. LEGAULT: Nonencroachment and the avoidance of cut-off were precisely among the principles that the Court identified in this paragraph, which I do not recall precisely its location. But it did make the point that these principles achieved certain status of general application. I was only wondering whether you had any comments on that. I think you explained your views there.

PROFESSOR RUSSELL: As I say, they -- yes, I think if they have general application, but they are not mandatory in any -- you know, they are a set of tools that you can look to, as it is appropriate in the circumstances.

MR. LEGAULT: Thank you.

PROFESSOR RUSSELL: For example, in Tunisia-Libya, the Court said that where the area relevant for the delimitation constitutes a single continental shelf as a natural prolongation of the land territory of both parties, which is what we agree is the case here, no criterion for delimitation of the shelf areas can be derived from the principle of natural prolongation as such. You know, we have -- I think you can find a lot in the jurisprudence that is helpful.

But the most pervasive, inappropriate, and misleading use of the caselaw by Newfoundland consists of its reliance on the St. Pierre and Miquelon Award.

There is no doubt that the award of the Court of Arbitration is of great interest in this case, as are the other decisions that compromise the -- that comprise the international jurisprudence on maritime delimitation.

But Newfoundland, however, attributes to the St. Pierre and Miquelon award, an importance far beyond its role in the development and definition of the international law of delimitation, and it treats certain factual determinations made in that case, as if they were directly applicable in the present arbitration, which they are not.

Indeed, its adherence to certain elements of the St.

Pierre and Miquelon Award is so rote as to suggest that Newfoundland regards many of the issues to be decided by the Tribunal in this delimitation as res judicata.

Examples -- did you have a question?

PROFESSOR CRAWFORD: Well I will eventually.

PROFESSOR RUSSELL: Okay.

CHAIRMAN: He always eventually has one.

PROFESSOR RUSSELL: Okay. Every professor does. Examples of this include Newfoundland's assertion that the line dividing the parties' respective offshore areas must run -- must run to the south and west of the line determined in the St. Pierre and Miquelon Award and its willingness, apparently, to save the Tribunal of the trouble of examining the so-called coastal fronts, on which so much of its proposed delimitation hinges, on the ground that a series of coastal fronts has already been determined and approved in Canada-France, based apparently on the lines proposed by Canada for the purpose of measuring the lengths of the relevant coasts.

PROFESSOR CRAWFORD: Well I will try now.

PROFESSOR RUSSELL: Okay.

PROFESSOR CRAWFORD: I don't want to keep you in suspense. To be fair, Newfoundland and Labrador did not argue that we are bound by the reasoning of the Court -- of the Court of Arbitration. What they said, and I think it's probably

true, is that if this -- if this Tribunal was to award a line which cut through the corridor, we would be contradicting elements in that Award. I think -- I think it's true. I think we would be contradicting it. In particular, the sentences in paragraph 73 that we discussed I think it may have been with Mr. Willis.

But I think -- so Newfoundland says there are inconsistencies. And it also says this is the only judicial examination of this particular area that has been carried out. And that's obviously true. And that we should at least pay regard to what is said and be careful not to contradict it unless necessary. That seems a reasonable position.

Can you tell us what is wrong with the reasoning in the St. Pierre and Miquelon award? Obviously, one might do that at the level of concept or at the level of fact. But if you were to attack it, I would like to know the grounds on which you were attacking it? You are attacking it, as it were, on the ground that Newfoundland pays too much regard to it. But that's really a secondary -- a secondary criticism. One might even say a tertiary criticism.

PROFESSOR RUSSELL: I think there is internal inconsistencies in the Award, itself, and the reasoning of the Award. And Mr. Gotlib and Professor Weil, I think did

a very good job of describing some of those inconsistencies in their dissenting judgment.

One, for example, is the inconsistency in the reasoning behind the delimitation at the western side of St. Pierre and Miquelon. The fact that that was really based -- could only have been based on a radial projection of St. Pierre and Miquelon's coast. Whereas, the corridor to the south seemed to be based on a hard sort of approach to frontal projection. The two are inconsistent and it's absolutely clear that the western section could only have been based on a radial projection. And that it's that type of internal inconsistency, I think which has caused that case not to have been taken up in this -- or referred to in the subsequent jurisprudence.

You know, one would have thought, for example, that it would have been referred to in Jan Mayen. And it wasn't. I think there is a good reason for that.

PROFESSOR CRAWFORD: It is certainly the case that the Channel Islands arbitration has been referred to by the Court in later jurisprudence.

PROFESSOR RUSSELL: That's right.

PROFESSOR CRAWFORD: And some of us would say that there is some difficulty in reconciling aspects of St. Pierre and Miquelon with the Channel Islands arbitration --

PROFESSOR RUSSELL: Yes.

PROFESSOR CRAWFORD: -- leaving aside the whole question of enclaving.

PROFESSOR RUSSELL: That's right. I would agree with that. And I think that it's very significant that it has not been taken up in the subsequent jurisprudence, particularly, as I say, in the Jan Mayen case. And I think that's because of the difficulties with the reasoning, the internal reasoning in the case, itself.

PROFESSOR CRAWFORD: Of course, Jan Mayen involved a totally different geographical situation. I mean there was no level of comparison. But one might have thought that it could have -- that it might have been mentioned in Qatar/Bahrain, and it wasn't mentioned there either.

PROFESSOR RUSSELL: That's right.

PROFESSOR CRAWFORD: I don't know whether it was mentioned in argument in Qatar/Bahrain, for example.

PROFESSOR RUSSELL: No. And I wouldn't -- I wouldn't know that either. With respect to paragraph 73, as you noted, I believe it was Mr. McRae, who was questioned by Justice La Forest on the use of the term, questionable, in that -- in paragraph 73. And what the Court was positing in that paragraph was the hypothesis of a delimitation exclusively between St. Pierre and Miquelon and Nova Scotia, as if the southern coast of Newfoundland didn't exist. And it basically was saying that if that ever occurred, then

an -- a corrected equidistance would probably be resorted to. And in that event, it's questionable.

You know, but the Court in that case did not make a finding that Cape Breton's coasts don't or couldn't project into the area east of the corridor in an internal division of the Canadian-Atlantic offshore areas between Nova Scotia and Newfoundland, which is really what is involved in this case.

Now the error in law of Newfoundland is not only that it treats -- even though it hasn't taken the position in law that findings of facts in the St. Pierre and Miquelon case are binding here, its approach smacks of that. And we know that such decisions aren't binding, but also the very essence of the law of maritime delimitation is the concept of an equitable result in the circumstances of the particular case. And this -- the geographic circumstances are different when you are looking at the coast of Newfoundland in relation to the coasts of Nova Scotia. Whereas, in the St. Pierre and Miquelon, they were looking at the combined coasts of Newfoundland and Nova Scotia, as the coast of Canada facing the coast of St. Pierre and Miquelon. That's quite a different analysis than when you are dealing with the two coasts separately.

Newfoundland really merely lifts the reasoning of St. Pierre and Miquelon Award, which is based on the

geographic and other circumstances in that case, and it applies it to the present delimitation, in which the factual context and thus the relevant circumstances are entirely different.

It doesn't address, for example, the significant differences between the two cases, the mere listing of which should be sufficient to defeat Newfoundland's attempt to assimilate the two.

First of all, the fundamentally different nature and origin of the legal zones in question, as well as their extent. And that is the offshore area extending to the outer edge of the margin as opposed to a 200 mile zone.

The different resources at issue, oil and gas exclusively here, as compared to primarily fisheries, although hydrocarbons there, as well. The impact of other delimitations in the region. At the time of St. Pierre and Miquelon, there were none to be taken into account. Now we have the delimitation with France. Delimitation -- we have the delimitation with the States in the Gulf of Maine. And the either present or future, depending on Newfoundland's approach to it, delimitations with the other provinces on the east coast.

The nature and the history of the parties' conduct is also totally different and a matter for consideration here.

Even as regards the geographic similarities between the two cases, Newfoundland overreaches straining credulity. And the following statement demonstrates the centrality of that decision to several of Newfoundland's principal contentions.

It says Canada and France provides a point of departure for the analysis of the geographical configuration of the area off Newfoundland and Nova Scotia outside the Gulf of St. Lawrence. The positions taken by the parties, and the findings of the Court of Arbitration are highly significant, because the general area of the delimitation is essentially the same.

This passage reveals several critical errors. First and most important, the statement ignored the true relevance of geographical configuration as a factor in delimitation. The key to the relevance lies not in the particular configuration of any one or more of the relevant coasts of the parties, even if you're dealing with zen coasts. But rather in a relationship between those coasts.

This is demonstrated in the terminology employed to assess and to describe the significant geographic features present in a given case.

For example, the relevance of coastal geography to the drawing of a particular line is directly related to the

degree of opposition or adjacency that is observed. For example, in Gulf of Maine, and in Libya-Malta.

Or even to the distance between the coasts, as in Libya-Malta, or Jan Mayen. All of which describe not coasts belonging to one party or another, but forms a coastal relationship between the parties to the delimitation.

The Court of Arbitration in the St. Pierre and Miquelon Award was never asked to consider or to describe the relationship between the coast of Nova Scotia and Newfoundland. Nor would such an exercise have been relevant to the Court's mandate.

So, the decision can hardly be considered as the basis of an analysis of a coastal relationship between Nova Scotia and Newfoundland, that the Court never actually addressed.

The St. Pierre and Miquelon Award lies at the heart of three of Newfoundland's main contentions. It's described as the point of departure for the analysis of the geographical configuration. It's thus used to justify a restricted, and erroneous definition of the relevant Nova Scotia coasts as well as the relevant area. And it's used as authority, which it is not, for Newfoundland's proposition regarding the supposed dominant position of Newfoundland's coasts in the outer area.

However, while the St. Pierre and Miquelon is certainly binding on Canada and France, the findings of the Court of Arbitration are in no way determinative of any of the issues due to be decided by the Tribunal in this arbitration. And Newfoundland's undue reliance on those findings to support, and in many instances to prejudge, its claims in this case effectively undermines its position.

In sum, the general errors in law made by Newfoundland all tend to be directed towards restricting, or pre-determining the range of considerations that the Tribunal will take into account in effecting this delimitation.

Newfoundland's treatment of its own chosen equitable criteria as though they were mandatory, and its boilerplate application of findings regarding the relevant circumstances in other cases, effectively divorce the critical determinations to be made in this arbitration, from the circumstances that truly obtain. In the same way, the erroneous assumption that this is a continental shelf delimitation, and that the offshore areas share the same juridical basis as the continental shelf, divorces Newfoundland's reasoning from one of the most distinctive and essential factual elements in the case, the basis of title to the offshore areas.

Newfoundland's narrow approach to the facts, and to

the law, is contrary to the essence of the fundamental norm, which recognizes that each delimitation is unique, and which is all about breadth, looking at all the circumstances of a particular case, and selecting equitable criteria and practical methods of delimitation appropriate to those circumstances.

Newfoundland ignores, and it would have you ignore, the juridical origin and nature, and the spatial extent of the offshore areas to be delimited. It precludes from consideration the extensive conduct of the parties with respect to the boundary, and it dismisses the relevance of the only resources, which are the object of the parties' interests.

Newfoundland limits its consideration, and the Tribunal's, to one set of circumstances, geographical. And as Professor Saunders will show, it distorts those.

In the end it produces a delimitation divorced from the factual and legal circumstances of this case, and inconsistent with what the fundamental norm requires, an equitable result.

Nova Scotia, on the other hand, whatever criticisms may be made of our case, has set forth a case grounded in the legal and factual context that we have here.

And we urge the Tribunal to consider all of the circumstances that are relevant to this unique dispute.

Thank you.

CHAIRMAN: We will take a break now for about 15 minutes.

(BRIEF RECESS)

PROFESSOR SAUNDERS: Thank you, Mr. Chairman.

Good afternoon, Mr. Chairman, Members of the Tribunal. It's an honour to appear before you again, along with my colleague, Mr. Fortier, earlier today, and my colleague from the other world, Dean Russell, who preceded me.

I would like to take just a few minutes this afternoon to introduce the next submissions, which deal with the relevant circumstances of this case. Really just introductory comments.

But in addition, I have some statements to make, or comments, about the proper role, proper approach to the use of conduct as a relevant circumstance.

Now, as Dean Russell has already shown, and contrary to the approach taken by Newfoundland, the identification of relevant circumstances is an exercise to be undertaken on the facts of each case. The very nature of relevant circumstances is that they are factual.

Furthermore, the nature and origin of the legal entitlement in issue must be a central element in the exercise, both as a circumstance in its own right, and as a factor in the selection of other circumstances, and particularly, in the weighting of those circumstances.

This is one of the reasons why the origin and nature of the zone matters in this case. You have also heard from Mr. Fortier on the nature of the entitlement in this case. The offshore area.

Just to summarize, and these are not all of the elements, but the central elements of the entitlement include the following: It was negotiated, and then implemented in Statute. A fact which is alternately ignored and denied in Newfoundland's written pleadings, but has more recently been admitted in the oral phase.

It cannot be described as an inherent or an ab initio entitlement.

It involves hydrocarbon resources only, and only limited rights to participate in management and benefits. There is no ownership, there are no sovereign rights that are conveyed, this is expressed in the Statutes.

And, critically for our presentation tomorrow, the seaward extent of the offshore areas is defined by Statute.

Now the facts of this case, including but not restricted to the nature of the entitlement, lead directly to Nova Scotia's identification of three additional categories of relevant circumstances. In addition, that is, to the nature of the zone.

The first of these, no big surprise I suppose, is

conduct. Of which we have heard so much, and of which we will hear more yet. But simply put, the extensive factual history of conduct related to the boundary means the conduct must be a relevant circumstance in this case. Especially given that the zone itself, as a negotiated regime, is essentially a product of the conduct of the parties. Conduct that Nova Scotia would submit was related to the boundary as well.

How significant a factor it is, how much weight is to be given to it, is another issue. An issue which is influenced, we would argue, by the origin of the zone, and on which you will hear more from Mr. Bertrand later.

Resource, location and access is also of interest here, certainly to Nova Scotia, and as Mr. Fortier has shown, to Newfoundland as well. There is only one type of resource involved here, hydrocarbons, and management sharing and access to the benefits from the development of this resource were the entire objective of the negotiations that created the zone.

As such, and because there are no other interests involved to be considered, the location of the resources at stake here is a matter that is clearly relevant to an understanding of an equitable result.

Again, Mr. Bertrand will cover this issue, as well.

Furthermore, it is worth noting that the offshore

entitlements, offshore area entitlements, are not based in any inherent claim to the maritime spaces within which the resources exists. There is no boundary simply waiting to be found, as in the older shelf cases.

And what of geography? While Newfoundland would have you believe otherwise, Nova Scotia accepts that the geographic circumstances must be relevant, but denies that geography has a guaranteed primacy in a pre-determined hierarchy, as is claimed by Newfoundland.

In fact, it's not even really an hierarchy for Newfoundland, it's a one unit hierarchy.

Geography is relevant here, yes, because the legal definition of the offshore areas, and in particular the outer limits of those offshore areas, depends in part upon the coastal configuration of the parties. It's just not relevant in the manner suggested by Newfoundland, nor to the overwhelmingly intrusive extent suggested by Newfoundland.

Now, in the selection, and in the application, as we will go through them, of all of these circumstances, Nova Scotia's entire approach is to be governed by the facts of the case, to begin with, it relies on all of the facts that are relevant, including the nature of the entitlement. And by contrast, and you've heard this from Dean Russell to some extent already, although they have

soft pedalled this in these hearings, Newfoundland in its Memorial, made it crystal clear that for its delimitation, only geography matters. And a particular type of geography.

As Newfoundland puts it in this passage, "The present dispute can and should be resolved exclusively on the basis of the coastal geography of the delimitation area." Exclusively. In contrast to the slightly more inclusive tone of the oral pleadings for Newfoundland.

Furthermore, Newfoundland makes this pre-determination based not on the consideration of these facts, or this zone, but on facts found in previous cases. And based on a mistaken view of what zone it is that stands to be delimited here. And we will hear more on this tomorrow with respect to the relevant area.

I would note, however, that on one of the pre-determination issues, St. Pierre, which Dean Russell has already addressed, we are not completely at odds. There are parts of the Court of Arbitration's decision that Nova Scotia has adopted, not necessarily because we are required to, but because we felt the reasoning was sound.

So for example, as you will see tomorrow, Nova Scotia has adopted a coastal length for Newfoundland which incorporates, as far as we know, all of the areas granted, or considered, by the Court of Arbitration. That's the

part of the coast that the Court was considering. In fact, we've added to it. Included areas that were excluded by the Court of Arbitration. But Newfoundland doesn't admit that.

What we don't do is include, or respect, I guess is not the word for it. We don't feel bound by the reasoning on coastlines that the Court of Arbitration never considered. And one of the reasons they never considered, of course, is that it wasn't put to them. Canada had no interests in arguing the coast beyond Canso, because Canada was arguing, as was suggested in the oral hearings the other day, that St. Pierre is nestled up in a concavity, and should be enclaved. Any argument on the coast beyond Canso would have been contrary to that.

So that part of the reasoning in St. Pierre does not bear here.

Now my colleagues have already noted the general problems with this error, this approach, but it shows most clearly -- yes, Professor Crawford?

PROFESSOR CRAWFORD: Just a point of information. We don't have, although it's quite obvious that both parties have had, access to the pleadings in the St. Pierre Miquelon case. Now that may be a blessing. My general experience of access to pleadings, even in the case itself, is that they are less help than you

think they ought to be, but it is a question whether we should have access to it. I think it's a matter of consideration, even perhaps between the Agents, but --

PROFESSOR SAUNDERS: Perhaps I could refer that to the Agent. I know -- I'm sure I have a copy of the Memorial lying around somewhere --

PROFESSOR CRAWFORD: Yes.

PROFESSOR SAUNDERS: -- for Canada. I don't know about the access to the -- all of the pleadings locally.

PROFESSOR CRAWFORD: It's simply a question -- because, obviously, the way -- the way that Court dealt with the Nova Scotia coasts might well have been affected by the way it was argued.

PROFESSOR SAUNDERS: Exactly.

PROFESSOR CRAWFORD: And it may be that the information you are giving us or that information that will be given to us by other party will be a sufficient basis for to take -- for us to take that factor into account.

PROFESSOR SAUNDERS: We can --

PROFESSOR CRAWFORD: But if not, there may be -- may be a question of providing to the Registrar, at least, one copy of the complete pleadings so we could have a look at them for ourselves.

PROFESSOR SAUNDERS: I think we can certainly organize -- find out whether there is enough in what we have. I would

point out that you have large parts of it in the Memorial from Newfoundland, including some of the maps, but that may not be the part you need, so we can have a look at it, and if we find a part that, perhaps in consultation with the Agents, that is sufficient, I will leave that to the Agents.

With respect to the selection and weighting of relevant circumstances directly, this application of their approach, Newfoundland states the issue quite clearly. First and most important, it says, "Equity in maritime boundary delimitation is based on relevant circumstances." We agree. Then they say, "Which must be linked to the legal institution of the continental shelf or the Exclusive Economic Zone, primarily in terms of the basis of legal title." And Newfoundland in that statement is right on the law, or would be, if this were a case about a continental shelf or an Exclusive Economic Zone, but, of course, as we have heard, it is not. The proper statement at this point for the present case would read as follows: "First and most important, it is based on relevant circumstances which must be linked to the legal institution of the offshore area, primarily in terms of the basis of legal title." It only involves a change of a few words, but nonetheless, significant.

Now beginning tomorrow morning, I will be dealing with

geography, but this afternoon, depending on timing, Mr. Bertrand will begin to deal with both the conduct of the parties and the question of resource location and access.

For the remainder of this session, however, I would like to address a preliminary matter dealing with the potential legal relevance of one of the critical factors, the one most disputed by Newfoundland, and that is conduct. To be clear, I will not be addressing the weight that ought to be assigned to conduct in this particular case, nor how these facts might compare to other cases. All of that will fall to Mr. Bertrand, who is now standing in for Ms. Hughes instead of me.

All I want to deal with today, if only briefly, is the rather more basic question raised by Newfoundland, as to whether or not conduct can even be on the list.

As Mr. Bertrand will show, and as days of argument in phase one already demonstrated, it seems undoubted that there was conduct of at least factual relevance to the boundary in this case. Indeed, there was rather a lot of it. Newfoundland, of course, denies even this. That, too, I will leave to Mr. Bertrand. But in addition to simple denial, Newfoundland has misstated both Nova Scotia's argument on conduct and the standards by which conduct is to be considered.

In its Memorial and Counter-Memorial, Newfoundland has

made three basic arguments with respect to conduct. First, that Nova Scotia is ignoring or attempting to reargue phase one. Second, that conduct is not relevant at all unless it meets certain stringent legal tests, as they call it. And third, where it has been used, conduct is only a corroborative or secondary factor, though still subject to the stringent test, apparently.

Now I should note that I specifically referred to these arguments as made in Newfoundland's written pleadings because in the course of oral arguments from Mr. Colson, we heard a very detailed account of the facts relating to conduct in Tunisia-Libya. I'm not sure how to describe this argument entirely because, in part, it offers a recapitulation of the position that Nova Scotia has already advanced on conduct. But I'll address that separately because it differs so markedly from the written pleadings of Newfoundland.

On the first of the written arguments, then, the question of our supposed inability to accept phase one. I can only state -- of course, the Tribunal governs this, in any event -- that Nova Scotia does not claim in this phase that the conduct gives rise to a legally binding agreement that resolves the boundary, and that is what was resolved by phase one. Nova Scotia is free, as noted by the Tribunal, to argue the facts of conduct on an entirely

different set of standards and criteria, those of a relevant circumstance.

And I would note in passing that Newfoundland seems to have dropped the words "legally binding" from its vocabulary, whereas in phase one, they were almost always attached to the word "agreement". It was a legally binding agreement that was the question at phase one. It's not the question here. The Tribunal did not and could not resolve the role of conduct in that context in phase one.

So let me turn instead to the question of the proper tests for the use of conduct as a relevant circumstance in this new and entirely different phase. The cases are, if not clear, at least relatively consistent on the relevance of conduct and the circumstances under which it can be taken into account.

We have, for example, the following statement from the decision in Tunisia-Libya. In referring to the consideration of what method would ensure an equitable result, the Court found as follows: "It is evident that the Court must take into account whatever indicia are available of the line or lines which the parties themselves may have considered equitable or acted upon as such, if only as an interim solution effecting part only of the area to be delimited." The Court quoted and

confirmed this statement three years later in Libya-Malta, noting what it called its duty to take into account the indicia referred to in Tunisia-Libya.

Fairly clear language -- a duty to take into account whatever indicia are available. Lines the parties either considered equitable or acted upon -- it can be either of those.

Newfoundland, however, simply begs to differ with the International Court of Justice. First of all, Newfoundland in its Memorial spends most of the limited space it devotes to conduct on the tests for acquiescence and estoppel, rather than on conduct as a relevant circumstance or indicator of equity. That would merely be an omission, a concentration of one aspect of conduct while neglecting another, but Newfoundland goes further and assimilates the tests into one, making the following claim: "Except in cases that meet the strict conditions for the application of the doctrines of estoppel or acquiescence, state conduct is a secondary consideration and never the primary basis for establishing a line." And later, laying out -- after laying out its standards for consistency, sustained use and clear acceptance, Newfoundland claims that conduct that does not meet the standard is simply irrelevant.

PROFESSOR CRAWFORD: You may have been going on to deal with

this, but is there some inferential support for that proposition in the treatment by the -- in the Gulf of Maine of the Hoffman letter because clearly, the -- if you are going to deal with it, then I'll withdraw the question, but I mean, the Chamber basically said since the Hoffman letter is not binding on United States, it's irrelevant, which appears to -- or at least it implied, inferred that that was the case.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: It certainly didn't take it into account in any way in the determination of the line.

PROFESSOR SAUNDERS: It was -- the Gulf of Maine case on the actual application will be dealt with by Mr. Bertrand, but in brief, the use of conduct in the Gulf of Maine -- it's complicated by a couple of factors. One is the fact that United States denied any common line at all. The other was the relatively short space over which it occurred, which was going to affect not just the placement of a line, but the principle on which a line would be done, and conduct is always more difficult to have accepted if it's an acceptance that wherever we do anything we're going to use this method. The North Seas, for example.

But also, I think underlying a lot of that is what the Chamber stated fairly explicitly, was that they weren't prepared to be governed by a factor that affected only one

of the two elements of the zone in question, and I think that would have weakened the usefulness of permit conduct related only to oil and gas, in any event. And if there are further questions, perhaps Mr. Bertrand could take it up.

Now these standards, the standards put forward by Newfoundland, are obviously at variance with the mandate from the Court -- take account of whatever indicia are available. And, of course, Newfoundland offers no authority for these propositions, and no explanation for how conduct could be found to be highly relevant in Tunisia-Libya, for example, when the Court explicitly found that the test for acquiescence and estoppel had not been met. In its Counter-Memorial, Newfoundland becomes even more ambitious, addressing the question of the condition of a federal and provincial legislative implementation as it related to the 1972 confirmation of the boundaries, Newfoundland makes the following assertion: "It follows that in political as well as in legal terms, the failure of this essential condition provides a complete answer to the contention that the alleged agreement should now be considered a legally relevant circumstance, even landward of Point 2017."

Now remembering here that this essential condition was in the hands of a third party, not even the two parties

involved, a failure of an essential condition is a test for whether or not there was a legally binding agreement, and that is certainly how Newfoundland argued it in phase one.

In fact, in this passage, Newfoundland is suggesting, it seems, that conduct cannot become relevant unless and until an agreement has not only become binding, but has also been implemented, which is, of course, what the legislation would have accomplished. If anything is a rehash of phase one, this argument fits the bill.

If Newfoundland's approach were correct, conduct could never become a relevant circumstance in an equitable delimitation, and I'm sure that's the intention, because the only cases in which it could be used would be those where the boundary had already been agreed and implemented, and unless somebody had some strange desire to go before the International Court, there would be no case.

Now this would -- this standard would come as a real surprise to the ICJ. In Tunisia-Libya, for example, the Court was quite explicit in finding that the conduct of the parties in issuing oil permits, and the other conduct involved, as well, did not rise to the level of acquiescence and estoppel, nor did it amount to even a tacit agreement. The Court said the following: "It

should be made clear the Court is not here making a finding of tacit agreement between the parties, which, in view of their more extensive and firmly maintained claims, would not be possible." No agreement, tacit or otherwise. And it went on to say the same about estoppel.

In fact, there were in that case what the Court called "firmly maintained claims to the contrary". We heard how firmly maintained from Mr. Colson the other day, involving firearms, which at least have never been involved in this dispute. That's as firmly maintained as it gets, but it was still conduct that was relevant. And conduct, indeed, formed the basis for the precise definition of the first segment of the boundary, although we have a debate about that to which I'll return in a moment.

In sum, Newfoundland's version of the appropriate use of conduct in a particular stringent test for relevance is simply not found in the case law.

So what about the second argument -- conduct as corroboration? Newfoundland argues that even where conduct is used, presumably having passed the stringent test, it is only used to corroborate a line already chosen by different means. To quote from the Newfoundland Memorial, "In Tunisia and Libya, the conduct of the parties was taken into account merely as a corroborating indication of the equity of the chosen line."

Interestingly, Newfoundland offers no citation to the paragraph or page in the case where this interpretation was expressed because, of course, the case was not decided on that basis.

Nowhere in the decision does the Court say that its careful examination of the parties' conduct was only by way of corroboration. What the Court did say was that the parties' oil and gas permit practice was highly relevant to the determination of the method of delimitation.

But what of this perpendicular that the Court had adopted in Newfoundland's words, or at the chosen line, which was later compared to the permit line, in Newfoundland's view? Hereto, the Court and Newfoundland seemed to be at odds. Having stated that the oil concession line, the 26th degree line was highly relevant and the de facto line between the concessions was of great relevance, the Court went on to identify a further relevant circumstance. The existence of a line defined in the conduct of the colonial powers, which certainly was perpendicular to the coast at that point. Not a long coastal direction, but a short one. And which was -- that was a factor, as well.

What is clear from the passage just noted, and from the dispositif, and from further evidence, which I will come to in a moment, that the further relevant

circumstance of the earlier modus vivendi, was being used to corroborate the permit line and not the other way around. I will return to this issue in the consideration of Mr. Colson's remarks, if I may.

Finally, it's worth nothing that even the earlier perpendicular line was itself based on nothing but conduct. Conduct of the colonial parties' powers. This is a fact pointed out by Nova Scotia, and derided by Mr. Colson as word parsing, because a perpendicular is a perpendicular. Well, yes, it is. And if it is parsing to point out the difference between a perpendicular drawn by the Court and one justified by conduct, I guess we are parsing.

Now, I mentioned Mr. Colson's presentation. I would like to briefly address some of the issues he raised. He gave a very detailed review of the facts. And, of course, the present case does not match Tunisia-Libya in all respects. Some aspects of the conduct here may be stronger, some may be weaker. Mr. Bertrand will deal with that.

But it is a general approach to conduct set out in Tunisia-Libya, the approach that I have already discussed that really matters. And that Mr. Colson brushed over rather quickly. To the extent that Mr. Colson's point was that the permit conduct in the case, and it was just not

permit conduct, was taken into account along with a number of other factors, and that it contributed to the balancing up in determining the first segment of the boundary, fine. Because, of course, this is just what Nova Scotia suggested in its Memorial and Counter-Memorial. Although, Mr. Colson did not mention that, and may have left the impression that we thought conduct was the sole factor in that line.

What Nova Scotia said was clear, as in this passage from our Counter-Memorial. Past conduct, in that case, that is relevant to the issues to be decided is to be considered along with other relevant circumstances. All of these factors can then be taken into account, and the proper weight accorded to each factor as part of the ultimate balancing up exercise. And that approach was confirmed in the 1985 judgment on the request for revision.

So if we put aside the strawman of conduct as a sole factor, Mr. Colson also goes on to claim that Nova Scotia was wrong on the significance of conduct in relation to other factors. And particularly on the significance on the permits when compared to the earlier colonial modus vivendi on fishing.

He told has told us that conflicts existed at the time implying, I think, that this influenced the Court's

decision. Well, we can only go on what the Court said they used as the basis of their decision. And we have no access to any information to the contrary. We are also told that the fact the segment in question extended all of 15 miles beyond the last matching permits, is proof positive that the Court was using a perpendicular, and not the conduct of a concession line. Unless, of course, the Court simply extended the method already shown in the practice and the conduct onward to a convenient point.

Now turning to our treatment of the case, Mr. Colson makes reference to the fact that we quote paragraph 117. I hate to get detailed here, but I think it's necessary. Paragraph 117 --

PROFESSOR CRAWFORD: Feel free.

PROFESSOR SAUNDERS: I won't be as detailed as the presentation the other day. I have no maps. But the Court refers to conduct as a highly relevant circumstance, and says it's one already alluded to in paragraph 113.

Mr. Colson saw significance in that. He said that it was interesting, as he puts it, to go back and take note what paragraph 113 was talking about. And then he says that it was a paragraph where the Court was, and I quote, "knocking down the arguments on both sides." Yes, but we are not sure what the point is. What the Court said, they simply made it clear, was in paragraph 113, there was a

circumstance the parties had not mentioned, but that the Court was taking as highly relevant. And in paragraph 117, they confirm that it's the permit conduct.

But the Court did say something of interest in paragraph 113. And it confirms the relationship of the permit conduct to the other factors. What the Court said was this, the Court will, therefore, indicate what this circumstance is, turns out to be conduct, and how it serves with the support of other circumstances, which the parties themselves have taken into account to produce an equitable delimitation.

So the other factors the parties took into account, which included geography and the modus vivendi, on one side, would support the conduct in producing an equitable delimitation. Contrary to the impression given by Mr. Colson.

Mr. Colson, also deals with the comparative influence of the two types of conduct, the concessions and the modus vivendi. Being quite specific here, he asserts that the Court had made a rather important conclusion. And I quote, "without examining the oil concession practice." What's that conclusion? He refers to paragraph 95 of the Court's decision, and quotes it as follows, "the respect for the tacit modus vivendi never formally contested by either side throughout a long period..", this is the

important part, "..could warrant its acceptance as a historical justification for the choice of method for the delimitation of the continental shelf."

Now that is a quote from the Court and it could be quite important. But even more so is what comes before and after the quote, which Mr. Colson did not include in his otherwise thorough review. Before we have a discussion, not just of the historical respect for the modus vivendi, referred to by Mr. Colson, but also of the Tunisian claim to historic rights defined by the so-called ZV 45 degree line. After, we have the rest of the sentence quoted to the Tribunal by Mr. Colson.

To pick it up in the middle, "could warrant its acceptance as historical justification for the choice of method for delimitation of the continental shelf, to the extent that the historic rights claimed by Tunisia could not, in any event, be opposable to Libya east of the modus vivendi line." It's the rest of the sentence. It's a somewhat more limited statement than the broad one quoted by Mr. Colson.

In any event, we do not have to rely on our view of the comparative importance of the two examples of conduct, for we have the statement of someone who was actually there.

Judge Ago, who agreed on the results, issued a

separate opinion that dealt with this precise issue. He saw the earlier conduct as far more important than the majority. In fact, he thought it resulted in a boundary. And in the end, he had this to say about the permits and the modus vivendi, and his reason for the separate opinion.

He states that for the first segment, the judgment bases itself, in the first instance, on a finding of fact, namely, that up to 1974, out to 50 miles from shore, the two states parties to the dispute spontaneously adopted the 26 degree line in their permit practice. He goes on to say the following, it is only by way of supplementary justification, dare we say corroboration, that reference has been made to a historical juridical argument drawn from the modus vivendi. Later he says he was convinced that the order and hierarchy of the arguments put forward by the Court had in his words been reversed from what he would have preferred.

Now, Judge Ago, presumably would have had the advantage over Mr. Colson and us of discussing this with the rest of the Court. If they really were finding on the basis suggested by Mr. Colson, they could have easily have said so to avoid this confusion.

The real status of conduct in Tunisia-Libya was put quite nicely by Mr. Willis in his 1986 article. In the

Tunisia-Lybia case, the Court held that conduct not strictly amounting to acquiesence could nonetheless be relevant as one of the indicia of equity. And state conduct turned out to be decisive in that case. And he says more, as well, which I will return to. But state conduct was decisive. Not corroboration, not secondary, decisive.

He also went on to state the correct position regarding the interaction of conduct and other factors. He said conduct was not independent of geography in that case. He is quite right. But rather, and I quote, "an indication of how the negotiating parties saw the equities through their own eyes." That indication was enough to make the conduct decisive.

This is precisely the use that Nova Scotia asks the Tribunal to make of conduct in this case. Buttressed by the fact that in this zone, more than a continental shelf, conduct becomes a relevant factor.

It's conduct as a relevant circumstance, an indicator of equity. It's not simply to be accepted or rejected in its entirety based on technical, legal barriers. But that is what Newfoundland has suggested. If conduct does not meet a series of stringent tests, to use Newfoundland's term, it is to be excluded from any consideration.

It's Nova Scotia's submission that even if this were a

shelf delimitation, but even more so here, the proper approach is to consider all of the relevant conduct and make a determination based on its impact. It's overall impact. Not any one event.

Nor does conduct in one case have to match on all fours, that in another to be relevant. Which seems to be an implicit message in Mr. Colson's presentation. Questions of time frame or inconsistent conduct are not dealt with by dismissing the relevance of conduct out of hand. Otherwise, it never would have made it into Tunisia-Lybia. They are simply elements to be considered in assessing the proper weight to be given to particular conduct in the circumstances. All of it aimed at determining whether the conduct is, in Mr. Willis' words, an indication of how the negotiating parties saw the equities through their own eyes.

If there are no questions at this point, I will turn the podium over to Mr. Bertrand.

MR. BERTRAND: Thank you, Mr. Chairman. We are ready. I apologize for the interruption, panel members. I think I am going to be able to finish within the usual schedule -- the afternoon schedule, that is, before 4:30, since I have only a portion of my presentation to present to you this afternoon. And I will continue tomorrow morning.

As Professor Saunders indicated, I will address

various aspects of the conduct of the parties in the present case, and I will focus on the conduct, the historical record of phase one, without necessarily going back and going over every aspect -- detailed aspect of the conduct.

My remarks will focus on what we consider to be the highlights of that conduct. And obviously, this will provide an opportunity for the members of the Tribunal to ask questions, even if those relate to aspects of the historical record that are not the object of my remarks.

With respect to conduct, Nova Scotia's position in this phase two of the arbitration is that by their conduct the parties establish a de facto boundary as regards their respective offshore claims.

This boundary line is the line now sought by Nova Scotia in this arbitration, so in this sense there is continuity.

And third, the de facto boundary is the result of three different types of conduct which compliment one another, which all point to the boundary line advocated by Nova Scotia. And that conduct, obviously, has spread over a significant period of time.

When we say compliment one another, what we mean and we will eventually tomorrow see it graphically, given the Award of phase one, which we accept, our submission is

that the boundary now proposed by Nova Scotia can be supported by a mix of conduct of the parties. A part of which may be agreeing, another part may stem from the actual issuance of permits, and another part or the entirety of which may be supported by acquiescence. A mission or silence on behalf on Newfoundland.

A mission that does not necessarily rise to the level of acquiescence as we understand the term in its legal sense, but certainly silence which can help the Tribunal ascertain that a particular conduct, a particular set of facts, in reality contained in the historical record, represented the parties' view of what was equitable in those days.

Certainly the most important aspect, the most significant feature of the conduct of the parties in the present case, is that at one point in time the parties actually agreed on the boundary, on the location of the boundary dividing their respective maritime claims. And they subsequently conducted themselves in such a way that they established a de facto line.

Now my goal this afternoon is to address the first aspect, which deals with the fact that they actually agreed on the boundary at one point in time.

And you will recall that in phase one we did see that the historical record disclosed that back in 1964, after

lengthy negotiations that spread over almost 15 years, the five east coast provinces agreed upon the location of mineral rights boundary lines for the division of their respective maritime claims, and they subsequently proposed these boundary lines to the federal government in the context of their joint submission, which was annex 31 in the first phase.

Subsequently, and as a continuation of that consensus over what their boundaries should be, in 1968 and '69, representatives of the east coast provinces prepared precise coordinates for the turning points identified in 1964, and they are shown on figure 7, which is depicted on the slide that is now showing.

Those turning points that are of particular relevance here are turning points 2015, 2016 and 2017.

Now further, in 1972, the five premiers agreed upon a technical delineation and description of the boundaries first described and delimited in 1964. This agreement was publicly confirmed by Premier Moores of Newfoundland in a statement to the House of Assembly, which I am sure you recall very well, since it was alluded to time and again in phase one.

PROFESSOR CRAWFORD: Mr. Bertrand, are you saying that that agreement was enough to establish a de facto boundary?

MR. BERTRAND: It was certainly -- the agreement -- the

non-legally binding agreement, combined with the subsequent behaviour of the parties that not only confirm their acceptance of these boundaries as being equitable, but also that showed that in effect, in fact they did issue permits that were -- that respected that boundary are certainly sufficient to -- for the Tribunal to come to the conclusion that this particular line was then seen by the parties, and has been seen as such by the parties over a number of years, as equitable. As what it should be in reality.

PROFESSOR CRAWFORD: So you rely on the agreements -- I will use that word in inverted commas -- but we know what --

MR. BERTRAND: Lowercase.

PROFESSOR CRAWFORD: The inverted commas, lower case A agreements, end of inverted commas. We rely on these to establish a view of the parties as to what would be equitable and they do that in and of themselves. But we further rely on them in conjunction -- you further rely on them in conjunction with other conducts to establish a de facto boundary?

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: And you all, either now or tomorrow, will analyze that conduct --

MR. BERTRAND: How does it refer to the agreement?

PROFESSOR CRAWFORD: -- how does it refer to the agreement?

Can I express the hope that if you do so that you will distinguish between conduct to the east and to the west of point 2017?

MR. BERTRAND: I shall. Certainly.

Now in phase one of this arbitration the Tribunal found that the Agreement on boundaries reached by the provinces was not legally binding on the parties, in part because of its -- and I'm quoting from the Award, it's paragraph 7.5 (1) -- "Because of its conditional character and its linkage to a provincial claim to existing legal rights to the offshore."

However, it is our reading, and we believe that this is exactly, hopefully, what the Tribunal meant. "A Tribunal did recognize that the parties had concluded some sort of agreement in respect of their boundaries."

The Tribunal expressed a view at paragraph 7.3 of its Award that -- and I quote -- "The terms of the Joint Statement are more consistent with a political provisional or tentative agreement which may lead to a formal agreement, but is not itself that agreement."

In our submission, hence the provinces back then, in 1964 and as reiterated in 1972, did agree on something, even if that agreement was not legally binding.

Now, initially Newfoundland did not dispute that the location of the boundary had been the subject in an

agreement -- of an agreement. Indeed, during the March, 2001 hearing, counsel for Newfoundland and Labrador characterized what the provinces had done in 1964 in a -- in various fashion.

Mr. McRae first indicated that the boundaries were a present indication of what those boundaries are going to be. He then said -- referred to them as an agreement on what they will conclude in their future agreement, also an agreement to agree in the future. He said that the premiers were setting out the terms on which, when they do enter into an agreement, they will use these terms. He said that that agreement was what the boundaries will be when an agreement is entered into. Called it also a description and definition of the boundaries, the defined element of an agreement.

The premiers did agree, according to him, on the lines that it was desirable to agree formally on as boundaries at some stage in the future, and finally that the agreement was the identification of the boundary lines.

Now, having no doubt realized by now the impact of the Tribunal's pronouncement in phase one, and the relevancy of this aspect of the party's conduct, Newfoundland has attempted, in its Counter-Memorial, to take back some of its earlier statements, and to now contend that in fact there has never been any agreement of any sort between

Nova Scotia and Newfoundland on the boundary issue. In this respect I refer to Newfoundland's Counter-Memorial at paragraphs 89 and 90.

Now the question is, what was agreed back then? Well, it is our submission that the agreement provided for the general methodology used to draw the boundaries. Indeed, the parties expressly agreed on the methods by which their boundaries were drawn, which methods were applied, and the boundaries described in 1964 and delineated in 1972.

And we find them in the notes re boundaries, which are an annex to the Joint Submission filed as annex 31. One of the methods agreed upon was that islands lying between provinces and belonging to one or another province are considered as if they were peninsulas. And another method was that mineral rights boundaries are so drawn as to join median points between prominent landmarks selected so far as possible along parallel shores.

PROFESSOR CRAWFORD: You would agree, Mr. Bertrand, that Sable Island is not an island lying between provinces?

MR. BERTRAND: I will leave that to Mr. Saunders, but I don't think it's all that clear.

PROFESSOR CRAWFORD: Thank you. Which is the other province? We will leave that to Mr. Saunders, as well?

MR. BERTRAND: Yes.

Now, to borrow the words that Mr. Colson used during

his presentation Tuesday at page 218 of the transcript, these agreed methods may very well constitute -- to quote him -- "a rudimentary method that some might call a 1960's version of simplified equidistance."

But be that as it may, this is what the provinces thought was acceptable and equitable as between themselves. It is what they wanted.

Moreover, to the extent that there was an attempt by Mr. Colson on Tuesday to distinguish the situation in Tunisia-Libya with the present case on the basis of the modus vivendi recognized there by the ICJ, was no more and no less than a recognition of a line which was in fact geography based, i.e., a line perpendicular to the general direction of the coastline. So, too, the boundary line drawn on the basis of the methodology agreed by the provinces in 1964 can be said to be derived from a geography based method.

Now what was agreed, as well, were the turning points defined as mid-points between coastal features, and I have mentioned already turning points 2015, turning points 2016 and '17.

The agreement also provided that the line thence ran SE or southeasterly, and in phase one the Tribunal found at paragraph 7.2(4) of its Award that "The boundaries were described and illustrated with a lack of precision and

attention to detail that were hardly consistent with an intent to enter into a final and binding agreement and that this was especially so in relation to the line southeast from Cabot Strait."

Now in the final paragraph of its Award, the Tribunal went on to say that "Even if the 1964 Joint Statement or the 1972 Communiqué had amounted to a binding agreement, this would not have resolved the question of that line because a direction of the line on the map did not coincide with a strict southeast line and there was nothing", the Tribunal noted, "in the documents or in the travaux which could resolve the uncertainty." If anything, the indications were that the line would not follow a strict southeast direction, and this leaves to one side the question what form the line would take -- a constant azimuth, a rum line or a geodesic. We accept that; however, there doesn't seem to be a dispute that the provinces meant to delimit the area southeast of turning point 2017.

The 1964 map, which is now shown on your screen, to which we have added the distance in nautical miles from southeast of the last turning point 2017, shows indeed that the parties intended to delimit something beyond turning point 2017, and the text of the notes re boundaries corroborate that.

Now we may not know what direction, or at least the Tribunal found that we do not know exactly what the direction that line should take, and the documents contained in the historical record may not be sufficient to help the Tribunal arrive at the conclusion that the precise direction had been agreed; however, we submit that to a certain degree -- no pun intended -- we know what direction and form it was not meant to take.

Newfoundland's proposed line, which is now showing on the same map, is so off the mark that it could not have been in the minds of the provinces at the time. In fact, it is so off the mark that it took more than three decades to germinate in the mind of Newfoundland and Labrador and to be put forward as its claim. This --

PROFESSOR CRAWFORD: Can you tell me when was the first time -- I mean as we said in the first award, from 1973 there was clearly a disagreement about the way in which that line would be drawn.

MR. BERTRAND: We'll come back to that. Yes.

PROFESSOR CRAWFORD: Okay. But there was uncertainty as from 1973. When -- when was the precise Newfoundland claim line first broached in discussions between the provinces?

MR. BERTRAND: I would say officially --

PROFESSOR CRAWFORD: Yes.

MR. BERTRAND: -- in the present arbitration.

PROFESSOR CRAWFORD: And not before?

MR. BERTRAND: Unofficially, and I'm not sure it's in the record, back in 1998 -- summer of '98, I believe.

MR. DRYMER: I think it's in the record, on the first page of the arbitration, Mr. Crawford.

MR. BERTRAND: Summer of 1998.

PROFESSOR CRAWFORD: I'm sorry. I have a very short memory.

MR. DRYMER: I'll give you the annex reference --

PROFESSOR CRAWFORD: Thank you very much.

MR. DRYMER: -- at the end of the day.

MR. BERTRAND: Yes. And at the time, I believe it was submitted on a fully without prejudice basis. I believe it's a line that is either the line currently sought or a line very similar to it, and I'm sure that if I'm wrong, I'll be corrected by Mr. McRae or his colleagues.

Now this line, in our submission, is so ambitious that even Newfoundland and Labrador previously suggested lines are pale in comparison. As I will illustrate tomorrow, it can only -- it cannot even be compared with Mr. Doody's open bid, if I may say so, to engage in discussions with Nova Scotia on the issue of the outer segment, or even with Newfoundland's unilateral depiction of a boundary in its 1977 petroleum regulations map. I will come back to that tomorrow.

Now our submission is that the consensus or agreement with a small "a" is extremely relevant in the present circumstances because of various factors. First, because of the high degree of mutuality involved in the conduct. Secondly, because of the nature of the agreement and the reason for its eventual non-implementation. Third, because of its intended finality. Fourth, because of its object and purpose, and finally, because of the parties' conduct subsequent to that agreement.

With respect to the high degree of mutuality, I think it goes without saying that this is an agreement, so it's very mutual. And to that extent, this situation is quite different from that reviewed by the ICJ in the Tunisia-Libya and the Guinea-Guinea/Bissau cases. Indeed, this is not a situation of matching yet independent conduct resulting in a de facto concordance and practice, as was the case, for example, with the oil concessions in the Tunisia-Libya case. It is neither a case involving various administrative measures taken by the parties, as was the case in Guinea-Guinea/Bissau. And finally, nor is it a situation where the conduct under review involves a unilateral act of one party combined with a claim of acquiescence. And when I say this, I say this with respect to the consensus only, obviously, because on top of the consensus, there are features which are similar to

the facts studied in Guinea-Guinea/Bissau and in Tunisia-Libya. Yes, Professor Crawford?

PROFESSOR CRAWFORD: You haven't mentioned Jan Mayen. Obviously, there was initial question in Jan Mayen about the interpretation of the general bilateral agreement, which the Court said was simply irrelevant as relating to mainland Norway. But there was also some discussion in Jan Mayen of conduct which the Court eventually dismissed. Is it a fair reading of that treatment that the Court is going to be reluctant to give effect to agree to unimplemented or unperfected agreements, especially in the context where one party may be showing forbearance or restraint in making a claim, but not actually espousing a definitive position? Does that -- that seem a tenable interpretation of what the Court did in Jan Mayen? You can come back to that tomorrow, if you would prefer.

MR. BERTRAND: I will, but I would like to address it, in part, today. I wish I would come here today with a recipe book for you to apply to this case. I would say -- and I don't mean this in a jest, but it's for you to write the recipe in this case. What we want to underscore here is the fact that there are no preset way of going about this case -- only to look at the relevant circumstances of this particular case and then find what the best criteria is, suited to these circumstances. And then from there, find

the proper method to draw the line. So we can find similarities with a lot of other cases, and my friends on the other side of the room will stand up and find -- try to distinguish those cases from the present situation.

In the end, it is up to the Tribunal to decide what are the circumstances that will carry the day, and indeed, assess whether the conduct, for example, was a proper indication of what the parties believed to be equitable. And whether, for example, one party should be today allowed to uphold a different view of the situation and whether this change of mind is warranted or whether the Tribunal should just give effect to what the parties were, for a long period of time, happy to live with.

So as I was saying, the consensus represents the highest degree of mutuality because the parties acted in concert, they negotiated and they created a boundary which, at the time, they felt was reasonable and equitable. That approach of the parties at the time was certainly consistent with their most fundamental obligation as states to seek a resolution effected by means of an agreement following negotiations conducted in good faith and with a genuine intention of achieving positive results.

PROFESSOR CRAWFORD: You mean as provinces?

MR. BERTRAND: As provinces. Exactly. But when provinces

do negotiate in areas where they believe that they have jurisdiction, they certainly behave as states. And I would say that today when you look at conduct and you want to know whether this is fair, is this equitable for the Tribunal to rely on this conduct? Certainly, the duty of good faith is not any different whether you consider them as provinces or as states.

Now the second reason why this conduct is of particular relevance is the fact that it was not in the end implemented for reasons that have nothing to do with where the boundary was located. In phase one, the Tribunal found that the parties had not entered into a legally binding agreement, principally because the agreement of the parties was conditional primarily upon the acceptance of the provinces' ownership claims by the federal government. It did lack precision; we acknowledge that, but primarily, it was a consensus reached in the context of a claim to ownership of the mineral rights in the offshore. But the federal refusal, no matter how fatal it may have been to the consensus, does not detract from the fact that the parties, after many years of consideration, did reach a consensus on the boundary that they regarded as appropriate in terms of their division to their respective offshore claims.

And as the Tribunal noted at paragraph 7.5(2),

actually that is -- it was seen later, the federal government even suggested that these boundaries formed the basis of a revenue distribution formula between it and the provinces. But the provinces never formally said yes to that at the time.

However, it just shows that the federal refusal, and hence the reason for the non-implementation of the consensus, was not linked to the ill-appropriate nature of the boundary, or its location, or its method of drawing.

And as such, there exists no valid reason why the compromise reached by the parties then should not be considered as equitable and appropriate today as it was at the time.

However, Newfoundland's position, as expressed by its Minister of Mines and Energy, in the aftermath of the phase one Award, is crystal clear, and provides ample explanation for Newfoundland's now held view of the -- of the historical record.

Newfoundland wants to get it all, and now contends that there has never been an agreement whatsoever.

The third aspect of the agreement which is of particular relevance, is the fact that --

CHAIRMAN: I would like to bring you back to one point. You say the federal refusal had nothing to do with the boundary. It seems to me that the material shows that the

federal, whether right or wrong, thought the parties couldn't agree to a boundary. I'm thinking now, one thing that comes to mind is Mr. Lang's statements, you know, that they can't agree. So I think the -- this was part of the -- the reason, I suspect.

MR. BERTRAND: Well I will try to -- I hear what you are saying, Mr. Chairman. And I think I agree with what you are saying in the sense that the federal could not tolerate that provinces could have boundaries, since this was the whole of the Canadian territory.

But our point is somewhat different. Our point is that the refusal of the federal government is not linked in any way whatsoever to the actual location of the boundary. And not the fact that the provinces wanted to apportion the offshore as between themselves.

And so I -- that's where I would draw the distinction. The point we are trying to make is that the parties then, the provinces, did think, for example, it's our submission, that the boundary as delineated until turning point 2017, and thence southeasterly east in the Cabot Strait, was appropriate, was equitable.

The reason the federal government said no, is not because the boundary should have been located a little to the south of that, it's because the federal government was not prepared to recognize the -- any ownership of the

provinces in the offshore, and therefore, there was no need for a boundary to start with.

And -- and as proof of that, what we submit is that later, when the parties discussed alternative arrangements, revenue sharing schemes, federal government had no problem accepting whatever division as between the provinces that they had agreed between themselves.

So --

PROFESSOR CRAWFORD: That wasn't because the federal government, itself, took any view on the equity of the situation?

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: So -- so you are simply making, in effect, a rather neutral point. There was no disapproval of -- of the boundaries from a federal point of view, having regard to their merits. That's as far as you are taking it?

MR. BERTRAND: Well, it's -- I'm sorry to hear you think it's neutral. Well, I think -- I think what it makes, as a point, is that the consensus of the province as to where the -- the boundary should lie was not altered by the federal government's refusal to give effect to this boundary. That's what I'm saying, basically.

So that extent, yes, the federal rejection of the proposal was neutral on the parties' view as to the equity

of the location of the boundary.

So the third aspect, which we find of particular relevance, is the intended finality of the agreed boundary. In Tunisia-Libya, the ICJ found as we saw earlier, and as Mr. Colson explained in great detail, that a modus vivendi, even if applied as an interim solution pending resolution of the overall dispute, could be considered relevant as an indicator of what the parties themselves considered to be an equitable solution.

We say that this case is somewhat different to the extent that it is clearer, because the parties, when they did sit down back in 1964 and 1972, and reached a consensus on their boundary, envisioned that boundary as applying on a definite basis, and not simply as an interim solution.

We believe that this intended finality increases the relevance of the agreed line in the present delimitation.

The fourth aspect, which is of particular relevance, is the actual object and the purpose of the 1964 Agreement.

Now, the Agreement -- dealing with the object first, the Agreement concluded in 1964, and reaffirmed in 1972, related specifically to the provinces' entitlements with respect to submarine minerals.

In Tunisia-Libya, the oil concession practice of the

parties was found to be highly relevant, in large part because of the central role of such resources in the parties' dispute. As the court noted, at paragraph -- at page 84, the line in Tunisia-Libya was not intended as a delimitation of a fisheries zone, or of a zone of surveillance. It was drawn by each of the two states separately. Tunisia being the first to do so, for purposes of delimiting the eastward and westward boundaries of petroleum concessions, a fact which, in view of the issues at the heart of the dispute between Tunisia and Libya has great relevance.

In the present case, we submit, issues related to benefits from oil and gas resources are not just at the heart of the parties' dispute, as they were in Tunisia-Libya, but they comprise the entire dispute between the parties.

That's it, and that's all.

As such, it is an especially significant circumstance in the context of the present delimitation.

Now turning to the purpose of the Agreement, it is true that the Tribunal found in the first phase, that the Federal Government was prepared to accept the agreed lines for the purpose of revenue distribution, but that the provinces never collectively accepted such proposals.

The factual record provides several indications, which

should be looked at in this second phase of the arbitration, that the parties either viewed, or were prepared to use the agreement as applicable in the context of a shared management and royalty regime, such as those -- such as those they eventually agreed to under the Accords.

PROFESSOR CRAWFORD: Are you saying, and of course, and rather in a curious way, rather like St. Pierre and Miquelon, if there is a wrong statement of fact in the first phase award, then obviously you are welcome to try to correct it. Are you disagreeing with the statement in paragraph 7.5? You said the provinces never collectively accepted any such proposal?

MR. BERTRAND: I don't think I'm at liberty to disagree.

PROFESSOR CRAWFORD: Well I was just telling you, you are. Anyway, I can't speak on behalf of my colleagues, but all you said was that the provinces might have been willing to accept a proposal of which that was part, which is not quite the same thing as to say that they collectively accepted a proposal.

MR. BERTRAND: That's quite true.

And -- and the purpose of my expose here is not to contend to submit to you that they did accept, and that you were wrong, but rather that this was an issue that was discussed. That some of the provinces were willing to

accept it at the time, that certainly it was a topic that was discussed. And as such, it forms part of the conduct of the parties.

It's not something that if the Tribunal decides to take into account that comes from left field. It was something that was discussed by the parties at the time. At the time it may not have been right for a decision by the provinces, because obviously they had their eyes on something else.

And so very quickly, I want to bring you through some facts, some documents contained in the historical record, that do refer to that potential possible use by the provinces, of the boundaries for other purposes than simply claiming ownership over the mineral resources.

CHAIRMAN: Before you get to that, Mr. Bertrand, I located the statement that, it's in 5.14 --

PROFESSOR CRAWFORD: It's in the Lang Statement.

CHAIRMAN: Pardon me? Yes, the Lang Statement.

And it may be of some comfort to you that it was -- that they weren't -- one of the problems that the federal government was that the -- it was the boundary, but because it was provinces other than Newfoundland or Nova Scotia that are mentioned as being -- dragging their feet.

MR. BERTRAND: Well, with your permission I will -- I will have a look at that closely tonight, and maybe have a

comment tomorrow morning.

CHAIRMAN: Yes. As I say, the -- the statement doesn't refer to Nova Scotia --

MR. BERTRAND: Or Newfoundland.

CHAIRMAN: -- but to other provinces.

MR. BERTRAND: Well, as we will see I think, it will show that indeed Newfoundland and Nova Scotia were not necessarily against using these boundaries for other purposes.

Now the first example is the May 12th 1969 letter from Minister Allard, Vice-Chairman then of the JMRC, to his colleagues, asking them to seek instructions and confirm of their principal's view with respect to a few issues, including an item appearing at page 4, under number 3.

Minister Allard wrote, "I would, therefore, request that you bring this matter to the attention of your government at the earliest possible moment, and report back to me. Three, that the boundaries are effected for all purposes, and in particular, mineral rights in the submarine areas are the property of the province within those -- within whose boundaries the area is."

Obviously, the Tribunal noted that -- that letter, and did comment in its award on the letter. It's quite unfortunate that all of the provinces did not say yes, we agree. It might have changed the course of history.

Nevertheless, the issue was discussed, and I must say just in passing, it's interesting to note some of the provinces' reaction. For example, PEI didn't want the boundaries to apply for all purposes, because they just didn't want the jurisdiction. They wanted to leave it to the federal government at the time which is obviously for someone coming from Quebec, a reaction hard to understand.

CHAIRMAN: What is easier to understand is you don't have as much coastline bordering the sea.

MR. BERTRAND: Correct. The second example of that is found in Premier Smallwood's January 29, 1970 letter to Prime Minister Trudeau. It's the Newfoundland document number 40. And it's a letter that we have not spent a great deal of time in phase one, but it is worth recalling.

In this letter Premier Smallwood replies to Mr. Trudeau's letter of December 2nd 1969 asking him to hurry up because industry wants to start exploration. He wants the provinces to agree. He wants the provinces to agree to the federal proposal with respect to resource sharing, which at the time calls for Atlantic pool. And Premier Smallwood writes back that the establishment of administrative arrangements, i.e. arrangements between Canada and Newfoundland that would provide the provinces with administrative responsibility over part of the offshore was precisely the motivation underlying the

provinces' decision and efforts in the creation of the Joint Mineral Resources Committee.

And we will recall that the Joint Mineral Resources Committee is the sub-committee that was created by the provinces to further delineate the turning points. And one if its tasks was to delineate the turning points but the JMRC had a lot of other fish to fry, including looking at any federal proposal and any potential solution other than straight out ownership claim to the mineral rights in the offshore, vis-a-vis the federal government.

The other document that is worth recalling is the May 9, 1972 report on a meeting between Premier Moores and other members of his government with the -- including Mr. Doody, famous Mr. Doody, and Minister Donald MacDonald, the Federal Minister of Energy and Mines at the time.

And that meeting took place shortly after Premier Moores came into power, and presumably as a briefing on the issue of offshore mineral rights.

Now in the course of a discussion on offshore issues, the matter of the provincial portion of offshore revenues was addressed, as was the question of boundaries during the meeting. And at point number 7 we read from Mr. Crosby's notes, that Premier Moores raised the question of the distribution of the provincial portion of offshore revenues amongst the provinces, and was reminded by Mr.

Doody, his own minister, that the five Atlantic provinces had some years ago agreed on boundary lines and spheres of interest.

Now this is the same Mr. Doody as minister -- I'm sorry, Mr. Legault, yes?

MR. LEGAULT: Thank you very much, Mr. Bertrand. The next line --

MR. BERTRAND: Yes.

MR. LEGAULT: -- beginning "the minister". I assume that is still Minister Doody? Premier Moores wouldn't be referred to as the Minister?

MR. BERTRAND: No. But Minster MacDonald was --

MR. LEGAULT: Is it Minister MacDonald who notes this?

MR. BERTRAND: Can I take this under advisement? And I believe it is but I would like to see the document --

MR. LEGAULT: It's ambiguous.

MR. BERTRAND: -- in its entirety, and I don't see it on the screen now, and I don't have it handy.

MR. LEGAULT: Thank you.

MR. BERTRAND: But I will make a note of that. This is Mr. Doody, the same -- I said the famous Mr. Doody. The same Minister Doody who will be writing to Nova Scotia, calling for an adjustment of the outer segment of the boundary, only five months later. And I must also underscore the fact that he is speaking on behalf of the same province

that less than a year earlier, issued permits to Katy Industries. Now Mr. Doody was under the impression that there had been an agreement on the boundaries, whether it was legally binding or not. But that's what he told his premier.

Presumably, the government acted consistently with these obligations in this agreement. Now when we are going to have a look at the Katy Industries' permit, I submit to you that this is an indication that the permit that Newfoundland intended to issue intended to conform with the boundary agreed upon between the provinces.

PROFESSOR CRAWFORD: Premier Moores had to be reminded of this. At least in my experience when you have to remind a minister, you have to tell him something for the first time.

MR. BERTRAND: I guess Mr. Crosby took great fun at writing this. He is a new premier. Mr. Drymer points out he is a new premier. He just came into power, I guess, in March of 1972. And this is during -- the time during which the -- all of the permits of Newfoundland are being analyzed. There is not really a system in place. Nobody knows what has been done. And they are having a broad look at the situation.

Yes, Mr. Legault.

MR. LEGAULT: Mr. Bertrand, if you could just when you are

inquiring into this question of who the minister was --

MR. BERTRAND: Yes.

MR. LEGAULT: -- and I'm beginning to suspect it was Minister MacDonald. But could you give us any information on just what was --

MR. BERTRAND: The problem with Sable?

MR. LEGAULT: -- the problem with -- of Sable Island with Nova Scotia?

MR. BERTRAND: With pleasure. Also, leaving the issue of Katy Industries on the side for a minute, given what Minister Doody says here, or is reported to have said, can it also be said that when he wrote only a few months after -- can it be said that he was seeking more than a minor adjustment to the boundary shown on figure 4, which is the 1964 map? I don't think so, in my humble submission.

The next item that is worth reviewing is Premier Moores' June, 1972 statement to the House in Newfoundland, where he reported on the seven-point agreement, which we focused at length during the first phase. But I would like to focus on a different aspect of his statement.

He made sure to underscore the fact that although the provinces had determined that it was desirable that there be some sort of agreement, they had not reached an agreement. And furthermore, that it was desirable that there be some form of joint provincial federal body to

administer the offshore area.

At page 2 of the Communique, he publicly declared the five eastern provinces are prepared to discuss with the federal government the delegation of certain aspects of the administration of the mineral resources and the seabed of the Atlantic coast and the Gulfs of St. Lawrence.

Premiers agreed -- at item 6 -- of the concept of a regional administrative authority was worthy of a further study by the provinces concerned.

And the last item is taken from the August 23rd 1972 meeting of the premier -- the Prime Minister of Canada with the premiers of the east coast to discuss new proposals, because you will remember that at the August 2nd meeting, that we just quoted from, the provinces decided to reject the federal proposal.

Now as recorded in the notes of the meetings made by some federal officials at the time, the first minister's discussion concerned joint administration and not ownership. Premier Regan was -- is said to have opened the meeting by setting out a couple of basic points, the first being that the resolution of the ownership of offshore resources question, should be set aside for the moment as not being essential to arriving at a general solution.

The Prime Minister agreed with the suggestion and the

Honourable Mr. Levesque on behalf of the province of Quebec -- that one being Gérard, and not Rene -- said that that was Quebec's position as well.

Premier Regan also suggested that there should be a created -- there should be created a joint federal provincial body for the administration of the resources of the region.

In the end we fail to see why to the extent that deriving revenues from the exploration of mineral resources is an integral component of proprietary rights over the same resources. Why a consensus reached on the boundaries for the latter should not a fortiori be as equitable and applied to the former.

The parties' boundary agreement and the work of the JMRC was concerned precisely with the resources that are the object of the accords, and implementing legislation that are today the sole object of the parties' entitlement within the offshore area to be delimited in this arbitration.

Now this conduct -- this first part of the conduct pertaining to the parties reaching a consensus was followed by additional conduct. It did not stop there. Obviously first -- after 1964 the provinces sought fit to delineate and reconfirm their earlier agreement. But moreover, as we will see tomorrow, the record discloses a

pattern of conduct by the parties consistent with the boundaries agreed by them in 1964. In practice these boundaries have been respected and applied by the parties ever since. And discontinuity alone is sufficient to enhance the relevance of that agreement.

And on these words, I would like to bid you a good night until tomorrow morning.

CHAIRMAN: Thank you, Mr. Bertrand.

MR. BERTRAND: Thank you, Mr. Chairman.

CHAIRMAN: Good night until tomorrow.

MR. BERTRAND: Thank you.

MR. DRYMER: In the Labrador proposal, it's referred to at paragraph 18 of Nova Scotia's Memorial in the first phase of this arbitration. Paragraph 18 of section 1, part 1 of Nova Scotia's Memorial in the first phase and it's found at annex seven of the materials filed by Nova Scotia.

(Adjourned)

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

Reporter

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