

ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR
AND NOVA SCOTIA

held on the 23rd day of November, A.D., 2001, at the Wu
Conference Centre, Fredericton, New Brunswick, commencing
at 9:30 a.m.

P. Lynch Enterprises
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G.V. La Forest

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Tribunal:

Hon. Gerard V. LaForest, Chairman

Mr. Leonard Legault, Q.C.

Professor James Richard Crawford

Appearances:

Jean G. Bertrand

Professor Philip M. Saunders

L. Yves Fortier, Q.C.

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CHAIRMAN: Mr. Bertrand?

MR. BERTRAND: Good morning, Mr. Chairman. Good morning,
panel members. When we broke off yesterday, a few matters
were left in abeyance. I have made a list of them. I

hope it's an exhaustive list. If it's not, I would ask you to be kind enough to remind me that it is not exhaustive.

First, Mr. Chairman, I want to thank you for having brought my attention to Minister Lang's letter, which is mentioned at paragraph 4 -- 5.14 of the phase one Award. Indeed, it does confirm what I attempted to summarize yesterday, and, in fact, the documents emanating from the provinces during the contemporaneous period confirm what Mr. Lang's perception was as indicated in this letter.

Indeed, you will recall that shortly after having approved the turning points, the first ministers -- the five first ministers of the eastern provinces met for the first time to discuss the mineral rights issue, and on this occasion they confirmed the boundary, rejected the federal government's proposal, and I will just briefly recall to your attention annex 54, which is the communiqué issued following that August 2nd meeting of the premiers. The item 2 says "The government of the five eastern provinces have agreed to the delineation and description of the offshore boundaries between each of these provinces."

PROFESSOR CRAWFORD: But, in effect, am I right in my recall that the 1972 map didn't show the line to the east of
2017?

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: And there was no map at the time which did that?

MR. BERTRAND: Yes, there's a '64 map.

PROFESSOR CRAWFORD: Yes, other than the '64 map?

MR. BERTRAND: Yes, but I mean I don't want to reargue phase one, but remember that the task --

PROFESSOR CRAWFORD: I'm relieved to hear it.

MR. BERTRAND: I thought I was able to accomplish that yesterday.

PROFESSOR CRAWFORD: Yes. So did I. It was perhaps a --

MR. BERTRAND: Despite your invitation.

PROFESSOR CRAWFORD: It was perhaps -- perhaps a near run thing, but --

MR. BERTRAND: I just want to remind you, Professor Crawford, that the task of the JMRC was limited to finding out the exact coordinates of the turning points of a boundary that had already been agreed upon. The Agent for Nova Scotia reminds me that there was the Crosby map, which I will address this morning, that existed.

PROFESSOR CRAWFORD: Did the Crosby map exist at the time of --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: I thought it was after.

MR. BERTRAND: It was -- it was used -- it was probably in

existence in 1971. It was presented to Nova Scotia then, but Newfoundland became aware of it in the spring of 1972 at that briefing first in anticipation of the First Ministers Conference on June, 1819. Then this map was used -- I'm getting ahead of myself, but this map was used at the August 2nd meeting and was also referred to at the August 23rd meeting of the -- for the five first ministers of the eastern provinces. That's the first item.

The second item is in response to Mr. Legault's question with respect to the -- Dr. Crosby's account of the meeting between a delegation headed by Premier Moores with the then Federal Minister of Energy and Mines, or Resources, it was called at the time, Donald MacDonald. Our reading of the document, which is Annex 47, leads us to believe that indeed the reference to the minister without any further description is to Minister MacDonald.

Unfortunately, on the second item, that is in reference to the sentence that reads "The Minister noted the problem of Sable Island in discussions with Nova Scotia and the boundary issue with France", we don't know -- so far, we've not been able to ascertain what this refers to. It could refer to the fact that the dispute with France was already in the making, the moratorium was in place since 1967, and the issue of Sable Island might have been -- might have been becoming hot at the time and

there were pressures from the industry to issue permits, probably around Sable Island, which potentially could conflict with the claim by France, but this is all speculation for the time being.

Professor Crawford, you did ask me a question with respect -- or you did ask Professor Saunders a question with respect to the Hoffman letter in the Gulf of Maine. And last night we re-read the decision, and especially I would draw your attention to paragraph 139 with which I'm sure you're quite familiar, and I think it puts the Hoffman letter in its proper context. There, the Chamber noted, "The Chamber considers that the terms of the Hoffman letter cannot be invoked against the United States government."

So that we're clear, Hoffman had acknowledged receipt of certain information regarding permit issuance in the offshore that had been requested maybe by him or someone else within the US government. Now those permits clearly encroached on what was the line advocated by the US or the position of the US at the time; however, the Court there notes that, first, the official was not empowered to really make that decision to bind the government; he was really a technical advisor, and secondly, he may not have been aware of the fact that the area in issue was in dispute and was disputed by the US.

PROFESSOR CRAWFORD: Yes. The reason I raised it was slightly different. It was argued, and I think you argued, as well, that the -- although this wasn't a legally binding agreement, it was -- it was a consensus. I mean it was a meeting of minds --

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: -- on a particular point.

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: Not legally binding, in certain respects subsequently repudiated by Newfoundland, but it was there, and that this amounted, if not to a de facto line, at least to conduct which should be taken into account in delimitation. That's your position?

MR. BERTRAND: That's correct. I would just add a small twist to that. It's not legally binding, but it is certainly indicative, assuming, as we should, that both parties and all the provinces were acting in good faith and were trying to reach a consensus.

PROFESSOR CRAWFORD: The point is to what weight is to be given to such a meeting of minds, not legally binding, subsequently varied in certain respects and eventually in all respects by one of the parties, as distinct from oil practice? I mean, obviously, Tunisia-Libya was about actual operations, and that's quite different. We'll come to that later on, no doubt.

MR. BERTRAND: Mm-hmm.

PROFESSOR CRAWFORD: But just taking that circumstance by itself, what weight is to be given to it?

MR. BERTRAND: By itself, without any reference to the subsequent conduct.

PROFESSOR CRAWFORD: Yes. The permit -- and there wasn't subsequent conduct by the United States underlying the Hoffman letter. The -- it's a possible inference from the Gulf of Maine and the way the Court treated the Hoffman issue that once conduct of a party not legally binding by virtue of agreement or estoppel -- sorry, once conduct of a party has been excluded as legally binding because it doesn't amount either to agreement or estoppel, it's not even relevant. The Gulf of Maine Chamber went on to decide the case by reference exclusively to -- well, essentially, to geographical circumstances. And I -- it just seemed to me that it's possible to infer from this, and possibly from the treatment of the issues in the Jan Mayen case, though perhaps less clearly, that mere agreement in negotiations involving a meeting of minds, not legally binding, not binding by virtue of estoppel, is not a relevant circumstance, at least not unless it's supported by subsequent actual conduct. That's the inference that I was seeking to draw from that passage. It may be pushing it too hard, but --

MR. BERTRAND: Well, I would certainly like to come back to it, but for the time being, I would note that in the Gulf of Maine -- let me make the first point that if it's not a relevant circumstance to dictate how delimitation should be effected, it is not because the Court may not have considered it subsequently to test the equity of the line it was about to impose that it's not relevant. It just mean that it has not given -- not been given any weight or not much weight. That's the first point.

The second point is that Gulf of Maine contains indications to the contrary. For example, resources, and I'll come back to that later this morning. They used resources to test the line and the outer segment, as we are asking this Court to do in the present case.

PROFESSOR CRAWFORD: But that's access to resources. It's not the agreement of -- it's not the connection -- you're trying to draw a connection between the 64/72 --

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: -- consensus, if we can call it that.

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: And the subsequent practice of the parties. Now, obviously, if you -- that's a question of fact, essentially.

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: If you could show, as in Tunisia-Libya,

that there was over a sufficient period of time --

MR. BERTRAND: Reference.

PROFESSOR CRAWFORD: -- relatively consistent practice of the parties referring to that line, that would plainly be important, and we'll come to the question of whether you can do it. Though I'm just talking about the circumstance itself of the consensus.

MR. BERTRAND: Well, I think it's still relevant. How much weight it should be given, it's obviously for the Tribunal to decide. It's in the background. How is it relevant? Because, I would submit, it's certainly relevant to the extent that now Newfoundland tells you that the line is nowhere near in this area, but somewhere totally far from there.

It would seem -- I would think the Tribunal would be somewhat surprised or puzzled to hear Newfoundland contend that, where, at one point in time, it did feel, in all likelihood, that the line that we advocate was equitable and they were willing to go ahead with it. Now are they precluded from arguing something else? No, but I would submit that they would need a very good reason to convince you today that it's no longer equitable.

The last matter left in ~~abeyance~~ was the reference by Professor Crawford to the Jan Mayen case. I gave a general answer. Went back last night and re-read the case

PROFESSOR CRAWFORD: And that's not to be re-argued. What -
- what we did say was that the permit practice is
relevant, and -- as showing conduct, and as a relevant
circumstance. On the other hand, we heard quite a lot
about the Katy Permit, and we're happy to delegate to Mr.
Legault a further sub-hearing on the Katy Permit in
detail.

MR. BERTRAND: I will try to -- I think my -- my
presentation on Katy, Miss Katy, she was called in phase
one, will take a different angle. And I would like to
approach it from a practical point of view. While
reminding the Tribunal of certain facts that, as -- as Mr.
Fortier said yesterday, the facts are the facts.

At the outset, I think it's worth stating that the
issue of whether Newfoundland permits, in fact, overlap
the agreed boundary, or exactly match the boundary, is far
less significant here than in phase one of the
arbitration. And the point being that if you want to, on
the basis of conduct, establish an agreement legally
binding, I think the requirement that the meeting of the
mind over a specific, for example, a specific direction of
the line, is far more important than when you come to a
phase like here, where what you're trying to ascertain is
whether indeed there was a view, a consensus, held by both
parties that a line in this direction, whether it's one

degree less, one degree more, was equitable at the time.

PROFESSOR CRAWFORD: Is the argument about practice in this period, in the seventies, really relevant at all in light of your basis of title argument?

If I can paraphrase what Mr. Fortier said yesterday, he said this was a completely new creation, creation of the Accords. It's not an entitlement. It's not territory. It's not an area, it's simply a right to -- to benefit from a Canadian resource.

MR. BERTRAND: Certainly.

PROFESSOR CRAWFORD: What the provinces -- why doesn't it follow from that that what the provinces sought to do in relation to earlier rejected claims has got nothing to do with it.

MR. BERTRAND: Well, it does. I mean, it's not an argument that is over fisheries that we now seek to apply to revenue sharing of mineral rights resources. I -- as I said yesterday, I think the first argument is that the more includes the less. So if you're ready to agree on boundaries in respect of ownership of these resources, give me a good reason why it should not be equally applicable to revenue sharing, providing -- coming from these resources?

PROFESSOR CRAWFORD: I put the argument yesterday to Mr. Fortier that the greater includes the less, and he seemed

extremely reluctant to accept that.

MR. BERTRAND: Exactly.

The second aspect is that, as we have seen yesterday, again is that the parties, although they did not take up the invitation of the federal to formally apply to the revenue sharing proposal of the federal, the boundaries agreed as between them, there were discussions to that effect, and some of them, including Nova Scotia and Newfoundland, were prepared to go on that basis. So, I think that makes the tie in the particular circumstances of the case, with the now new base of entitlement, which is revenue sharing in the offshore. And those boundaries, the relevance of that boundary agreed back then is apparent, because the subject matter is quite related.

The permit practice is relevant in phase two, as first as evidence of a consensus on the boundary, and also to confirm that the parties' permits were drawn generally, so as to conform to the boundary. And the word "general" is obviously important, otherwise I'll have to go back to the technical presentation.

On the whole, it is our submission that the evidence amply demonstrates the establishment of a boundary in practice, of which the parties, and third party companies, to which these permits were issued, were well aware.

Let us review first the permit practice of Nova Scotia

very briefly. From 1965 onwards, Nova Scotia issued offshore exploration permits that fully conformed with the location of its boundaries agreed with its neighbouring provinces, that is the 135 degree azimuth line, southeast of turning point 2017.

Those permits were drawn to a standard grid system, and secondly, that permit map, and we will see it on the next slide a little later, the permit map which was used on the grid system was clearly marked with the mineral rights boundary line, which is hard to see, but I'll draw your attention to it a little later. It's now in -- it's been highlighted in red, along the boundary line.

And third, the permit map, which is -- forms the basis of the grid system, was published.

Now there's been, in the exchange of Memorials between the parties, a lot said about whether or not the publication had occurred. If we rely on Newfoundland's view of this, they do admit that at least as of '74, that map was published.

Furthermore -- furthermore -- can you come back? No. Can you come back? Thank you.

Furthermore, we did file Annex 160, which is a Nova Scotia Department of Mines and Energy publication list of 1983, that does list this map as a publication available to the public upon payment of a fee.

But more important to really put the nail in the coffin of this issue, I would like to draw the Tribunal's attention to the fact that these permits were part of the land registry of Nova Scotia, and therefore, were available to the public upon request.

Secondly, the companies to which these permits were issued described these permits, or the permits that were issued by Nova Scotia, were described in -- by reference to the boundary line, and to this map.

Now, at the very least, it can be said that the companies, the industry, was very well aware of the existence of this map. And thus, the existence of the mineral boundary line.

The next slide shows very well the inscription on that map, "Mineral Rights Boundary Line". Unfortunately, the earliest version of the map that we were able to locate appears to date back to 1974 only, but that doesn't mean that the map was not either published before, or not publicly available, either through industry, or at the Land Registry, as I've just mentioned.

Now, that permit practice of Nova Scotia was consistent to the drawing of the boundary in the inner segment. And up until turning point 2017. This is where the line was used by Nova Scotia, and in the permit grid that were determined -- the turning points that were

determined back in 1968, and '69, by the JMRC, and then approved by the premiers.

Then from 2017, turning point 2017 to the southeast, the line on the permit map did use the 135 degree azimuth.

Now these permits were relied on by industry, and were the basis on which significant sums were expended for oil and gas exploration. Again, they were not just pieces of paper. And as a sequel to the phase one hearing, we did file some additional documents which are annexes 178 to 180, which contain reports by industry, accounting for sums of money expended in relation to activities conducted under these permits.

CHAIRMAN: Now what kind of activity was conducted, Mr. Bertrand?

MR. BERTRAND: Under these permits, under -- pursuant to these documents, there were drilling activities, but there were also seismic work done. And a lot was made by Newfoundland with respect to our referring now to seismic work, whereas in the first phase we had criticized their issuance of seismic permits, which contendedly encroached over the line.

Now, our reference to these permits is not to show that seismic work conveys rights in the offshore and therefore, are an expression of an assertion of jurisdiction in the offshore. It's just that these

documents, and given the permit system in Nova Scotia, these documents show that seismic work was done, monies were expended in connection with this, and this money could then be credited as preliminary work under permits, not seismic permit, because as you will remember, Nova Scotia did not issue any seismic permit, did not consider that seismic permits were necessary to conduct seismic activities, but rather they were credited towards work, monies to be expended pursuant to drilling permits.

PROFESSOR CRAWFORD: But in fact, well it's questionable. My understanding is that it can neither -- neither exploratory, nor any other sort of wells were actually drilled close to the line.

MR. BERTRAND: I guess it depends on the definition of close. Figure 33 would show you how close it is.

PROFESSOR CRAWFORD: What figure are you on?

MR. BERTRAND: Figure 33. The figure 33, which is a map which we've filed. Which is referenced here. But I don't have it in the -- in the overheads this morning. Would show exactly where the wells were drilled. Whether this is close to the line, I think again, is a question of along the line, probably not.

PROFESSOR CRAWFORD: Do any of those wells fall within areas which Newfoundland now claims?

MR. BERTRAND: Definitely. Definitely. Definitely. This

is something I can confirm. Let me take this under advisement. What we can do is plot the line claimed by Newfoundland over figure 33, and we will show you what it looks like. We will do that. Can someone take a note of that?

Newfoundland noted, as well, that by the concept of grouping, monies expended in virtue of one permit could be credited against other permits, or at least a group of permit, and therefore it was impossible to know against which permit the work had actually taken place.

What we know from these documents, however, is that there were requests by Mobil, for example, to do work, seismic work, in respect to permits 209, 210, 218, 222, and 224, which were very close to the boundary line.

Now the other aspect I would like to bring your attention to in this respect is the fact that Newfoundland contends that because Mobil held permits in this area along the boundary within -- that all of the Mobil permits were within the moratorium in force since 1967, and that seismic activities were prohibited under this moratorium, obviously, one can only assume reading these documents that none of the activity reported by Mobil took place along the boundary lines, because they would have violated the moratorium.

Now we have filed, yesterday, I believe, exhibit -- an

addition to Annex 201, which is an additional excerpt from the Canada Memorial in the Canada-France dispute in the St. Pierre and Miquelon Award. And this additional excerpt shows clearly that the seismic work was not prohibited under the moratorium. At paragraph 242 of Annex 201, it shows clearly that the object of a moratorium was limited to drilling activities.

Again, this is the best evidence we have. We don't dispute that grouping occurred. We don't dispute that some of the monies reported under these documents related to seismic work as opposed to drilling activities. We did not try to hide that. We just came forward with the information, the best information we had. And we find it regrettable that in the pleadings, to a certain extent Newfoundland tried to make a big deal out of that, because, for example, we came forward in our Counter-Memorial at page 28, there is a specific footnote describing what these documents contain. And so we didn't try to hide the fact that seismic work had been reported by Mobil, among others, under these documents.

Newfoundland also raises -- before I go there, I am reminded of Annex 150. Newfoundland raises several arguments in its Counter-Memorial from paragraphs 115 to 120, which respect to the fact that the provincial permits were all backed up or blanketed by federal permits.

We draw your attention to Annex 150, which is a report by Petro-Can. And I don't have the date handy -- '79? Which shows clearly, at least from industry point of view, that the area of federal permits held, as opposed to provincial permits, did not necessarily match. And in certain instances, permits held or territory under permit -- under provincial permit, exceeded in size that held under a federal permit.

So the fact that there was automatically a federal permit for every provincial permit issued is not -- does not appear to be true. And I would say in the end, so what. If industry felt that they needed both permits to be on the safe side, and if they felt that they needed to pay money under protest to see who would be the victor in the end of that dispute, it does not matter. What matters here in this phase two, is that you can look at this conduct and say as between the two provinces, they did issue permits and where did they issue permits to? Did they respect a certain line as between them. That's the relevance that we want to -- we would like to Tribunal to focus at this stage of the hearing.

PROFESSOR CRAWFORD: Of course, Mr. Bertrand, the oil companies are bureaucracies, and if it doesn't cost them much money in the global scheme of things for oil companies, then they will get permits. Is there any

evidence that there is any -- there was any oil activity required by a Nova Scotia permit -- or sorry, required by Nova Scotia law carried on in relation to a Nova Scotia permit area, which was not covered by a federal permit? In other words, I think what Newfoundland would say was even if there may have been areas of Nova Scotia permits uncovered by federal permits, all the activity that mattered was carried on in real life under a federal permit.

MR. BERTRAND: I think it's a safe statement for me to venture that all drilling was conducted by companies who held permits both from the provincial authority and from the federal authority.

With respect to other activities, I will take it under advisement. But I would -- I would say that the answer would be no, as far as we have been able to ascertain.

So in the end, we submit that these permits gave rise to a range of exploration activities, including the drilling of exploratory wells. And I see that we have figure 33, so I guess it depends how close to the boundary close is in your book. Certainly, it's a safe statement to make at this juncture that the line claimed by Newfoundland at this stage probably encroaches on some of these well locations. And the same could be said of the equidistance line shown by Newfoundland earlier this week.

Very briefly, the permit practice of Newfoundland, the famous Mobil permit, it was issued in 1967. The same year as that -- the one issued by Nova Scotia. Extended from latitude 46 north to latitude 45 north along the boundary, and it precisely abutted, at least in our view, permits issued by Nova Scotia on its side of the line.

Now we see here a graphic depiction of the Mobil permits issued on both sides of the line. And you will recall that the Mobil permit has been issued by Nova Scotia with a reference to the boundary line. And so that the two points, the eastern limit -- the southeastern limit of the Nova Scotia permit, and the northeastern limit of the Nova Scotia permit, were well known.

In fact, the permit on the Nova Scotia side was issued several months before the permit on the Newfoundland side was issued.

Now the way that the permit was drawn by Newfoundland, it was drawn with specific reference to a point on the boundary northwest of point 2017. And I will come back to it in a minute. Its western limit, that is the limit abutting Nova Scotia's territory in the offshore, was virtually identical to the 135 degree line, as we show it here.

The way that the permit was drawn is by reference to a point that is shown here as point A, which is the same

point as the point described in the Nova Scotia permit. But the Newfoundland permit did not actually refer to the permit of Nova Scotia. They just referred to the same coordinates of that point. The permit is then drawn by reference to point D here, which is located between this point E, which is actually turning point 2016, and point C, which is actually turning point 2017.

Now we have to remember that all of this was done before the JMRC had delineated the turning points. And so a certain degree -- a certain margin of error can be expected. The permit is then drawn by finding a point, a coordinate between 47 degrees latitude north, and 59 degrees five minutes longitude west, which is the terminus point D. And a straight line is then drawn from that point to point A.

Now this line happens to match very nearly a straight line extension of turning points, which we saw 2016 and 2017. I think it's like a 150 yards or something off the mark.

As I said, a certain degree of error in drawing the permit was to be expected given that the turning points were not yet published. And then the Mobil permit was renewed, as we mentioned in 1972 as a class A permit, and it was shown on a map published by Newfoundland in 1977. And that obviously goes to the issue of how long these

permits were publicized or in force.

Now turning to the Katy permit, it was issued in May 1971 -- May 19, 1971. It was issued for an area in the vicinity of the boundary. And that vicinity ran from north of latitude 46 degrees to latitude 43 degrees. So it spanned quite a long ways along or close to the boundary.

What is important to remember is that the permit specified no construction method. So hence the debate we had in phase one as to how the drawer of the Katy permit went about putting the permit on the map, and then Newfoundland agreeing to issue a permit according to the map submitted. But the attached plan showed a permit drawn on a conic projection chart, so as to exactly match a straight line extension between turning points 2016 and 2017.

I will not venture to try to explain to you the difference between a conic projection and a Mercator projection, and how trying to transpose a depiction from a conic projection to a Mercator can lead to a certain margin of error. Let alone, the margin of error created by drawing a line on a map without any methodology, and someone trying to read where the line actually is on this map.

The permit, the Katy, was renewed as a class B permit

in 1972, as well, when after the exercise of review by the Moores government, and it was also shown on that 1977 map published by Newfoundland.

Now initially Newfoundland's original response was that the Katy permit was drawn according to a supposed Newfoundland permit grid. We have the reference in our Counter-Memorial of phase one. Newfoundland also claimed that Nova Scotia had illustrated the Katy permit on maps without the Newfoundland and Labrador permit grids, so as to bolster its position that it did match the boundary. And in fact we found out, and we indicated, and it's not been rebutted since then, that at the time, Newfoundland did not have in force a permit grid on which the permit could have been drawn.

Now in this latest round, Newfoundland now contends that every point of intersection of the Katy line with the grid can be transposed on to a Mercator chart containing a geographically-referenced grid. That may be so. But it does not -- it is not necessarily true, because this -- for this statement to be true, it assumes that this was the method used by the drawer of the permit. As you see in this figure produced by Newfoundland, the Katy permit map did not originally contain any coordinates.

We know it's a conic projection, but it does not contain any coordinates. So for someone to decide that

this point here is actually this coordinates -- these coordinates, there is a certain exercise of guesstimate needed to be made or certain assumptions. First -- the first and the most important is that this was the method used by the drawer to draw the permit on the map.

Yes, Professor?

PROFESSOR CRAWFORD: But Mr. Bertrand, the numbers that appear on the left-hand map there, they were on the original?

MR. BERTRAND: The yellow numbers?

PROFESSOR CRAWFORD: No. The numbers that appear around the border of the map.

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: So that the interpolations in red squares that have been made by Newfoundland and Labrador are readings off that -- those numbers?

MR. BERTRAND: Their best.

PROFESSOR CRAWFORD: Their best readings.

MR. BERTRAND: Assuming good faith, as we always do, their best shot at guesstimating what the coordinates are. But again, I mean, on this scale of a map, just a pencil mark, the width of a pencil mark may mean, yes, quite a difference in terms of how many kilometres you can be off.

PROFESSOR CRAWFORD: It can't presumably mean an error at least at the southern end of that line, because if

Newfoundland and Labrador is right there is a very substantial discrepancy between the 135 degree line and the Katy line.

MR. BERTRAND: Well then I would submit to you that the difference can be explained by the transposition from a conic to a Mercator projection. Because as you know on a Mercator, I believe the azimuth is constant whereas on a conic it is not. And so as you go down the permit here, it would tend to shy away from the 135 degree constant azimuth on the Mercator.

Mr. Fortier is tempted to add a comment but --

MR. LEGAULT: Mr. Bertrand, are you saying, however, that on the conic projection the permit line does follow the 135 degree azimuth? Can you know that from the degree of precision you get in this map?

MR. BERTRAND: No. What we did in phase one I believe -- and I stand to be corrected, that what we did is attempt to show that by correctly transposing the conic projection on a Mercator we come very, very close to the 135 degree map.

MR. LEGAULT: But subject to the same inaccuracies that you suggest could be found in this transposition?

MR. BERTRAND: Which apply in both cases. What we -- obviously -- I mean, we are all working from the same map. I think the difference between the presentation we made or

we gave you in the first phase, is that trying to account for the difference between the conic and the Mercator projection.

The starting azimuth, I'm reminded of the Katy permit, is just about 135 degrees. Now on a conic projection if you transpose it on a Mercator it will slowly become 140 or something like that. As you go down remember that the Katy permit is quite long, extends from latitude 43, I believe -- not 43 but up there, 46, about 46 to about 43 degrees. So it's several hundred miles, I believe.

Now as I mentioned earlier, in phase two, the precision with which the permits conform to the boundary which Nova Scotia says existed or exists de facto is not as important. Even assuming Newfoundland is right in its interpretation of the Katy permit, which we believe it is not, this permit does not support the line proposed by Newfoundland, but rather a line in the vicinity of the 135 degree azimuth.

And leaving the technical aspect and looking at the context, what can we find? What can the Tribunal look at? The permit to Katy was issued in November 1971. These permits, in Newfoundland's own words at paragraph 211 of its phase one Counter-Memorial, were issued as -- I quote -- "part of the province's strategy to assert exclusive jurisdiction over all of the offshore resources

adjacent to its coasts."

It was a manifestation of exercise of jurisdiction in the context of these negotiations with the federal government to bolster their claim. To act as though they were the owners of these resources.

Now the previous year, you will remember in 1970, Premier Smallwood then in power, had written to Mr. Trudeau, the Prime Minister of Canada, and referred to the work of the JMRC, that is Newfoundland document 40, which we saw yesterday, referring to the fact that the JMRC was working on the boundary issue and trying to find ways to develop a -- some sort of management scheme of the offshore resources.

At the time of issuance of the Katy permit, Newfoundland was still part of the common front of the east coast provinces. That's also to be remembered.

During the following summer, that is summer of 1972, Minister Doodie will remind his premier, newly elected, that the boundaries have been agreed some years ago. Premier Moores, a little later during the same summer, will confirm -- at a premier's meeting will confirm the 1964 boundary and approve the turning points on June 18 and 19. He will then a little later in the summer stand proudly in the House of Assembly and announce that the provinces had agreed on the boundaries.

Premier Moores in August will then meet again with the five -- his four other colleagues from the east coast provinces and will again confirm on two occasions the 1964 boundaries.

Now I submit to you that knowing that, can anyone really believe that Newfoundland did not have the intent to comply with the agreed boundary when it issued the permit to Katy Industries in 1971? Otherwise, why would the western edge of the Katy permit be drawn diagonally and not look like a jagged edge like it does for its eastern edge?

It is not -- is it not more plausible to conclude that in fact the western edge of the Katy permit was meant to espouse the 135 degree line, being the boundary agreed between the provinces and to coincide with the eastern edge of the permits issued by Nova Scotia along the 135 degree azimuth.

Now otherwise, how one can explain the fact that the northern portion of the permit issued to Katy on the same day, May 19, 1971, conforms perfectly with the segment of the boundary provided for by the 1964 Agreement. A segment of the boundary that applied in the Gulf of St. Lawrence as between Newfoundland and Quebec, despite the fact that this -- in this area the boundary follows an irregular path.

Is that only coincidence? We submit that it is not. That obviously the province meant to exercise its jurisdiction to issue permits to the full extent of the offshore that it was being given or a portion pursuant to the agreement reached with the other provinces.

PROFESSOR CRAWFORD: Mr. Bertrand, of course all these permits were legally invalid.

MR. BERTRAND: They didn't know that at the time.

PROFESSOR CRAWFORD: They had had this -- the earlier decision of the Supreme Court. Of course Newfoundland had a --

MR. BERTRAND: Special case.

PROFESSOR CRAWFORD: -- view that it was a special case, subsequently refuted, but I mean, a decent argument that it had a special case. Nova Scotia didn't.

MR. BERTRAND: I wouldn't say that they were invalid.

PROFESSOR CRAWFORD: Why not?

MR. BERTRAND: I don't think that at the time -- first we are talking about intent.

PROFESSOR CRAWFORD: You know, I quite see that irrespective of their legal validity --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- one might say that they reflect a view --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- of the provinces to what is equitable and therefore relevant irrespective of their validity. But I was making a different point. Of course, it doesn't exactly arise in the international context because no one has ever suggested that any of the actions carried out, for example, in Tunisia-Libya raise any question of domestic legal validity, and even if it did, it would probably be irrelevant.

MR. BERTRAND: And -- correct. And also this is not phase one to the extent that we are not trying to take a domestic and apply it in an international context as such.

So I would submit to you that clearly the intent of Newfoundland is to show the federal government that it exercises jurisdiction in the full extent of its offshore area as delimited by the agreement with the other provinces, including Nova Scotia.

Now it may not follow the 135 degree perfectly. We could be here at Christmas trying to find out exactly why. I would submit to you that in this phase it doesn't really matter.

And we submit that in the end the only reasonable interpretation is it was meant to conform to 135 degrees.

Now other Newfoundland permits were issued in a subsequent period of time. Those were the seismic permits issued by Newfoundland from 1973 to 1975. I will not

spend a lot of time over these. I just note that in passing that they were issued after Minister Doody sent his letter questioning the appropriateness of the outer segment as depicted on the 1964 map. Our position, Nova Scotia, is that seismic activity does not convey any interest in the offshore. Nova Scotia did not even require a permit for companies to conduct seismic work in its part of the offshore. And our contention is that they do not demonstrate any nonrespect of the de facto line.

PROFESSOR CRAWFORD: Did Canada require permits for seismic work?

MR. BERTRAND: I don't know. But I will take it under advisement.

MR. LEGAULT: Mr. Bertrand --

MR. BERTRAND: Oui, Mr. Legault.

MR. LEGAULT: -- could you tell me what significance you attach to the fact that these seismic permits were issued after Mr. -- Minister Doody's October 6th letter? You mention this as something of significance, I suppose.

MR. BERTRAND: Yes. Well I think the mood changed in Newfoundland sometime after 1972. Were these issued without paying attention? Were these issued with something else in mind? Maybe with a potential defence or argument in the making eventually to be able to say that indeed as they attempt to say today that they did not

respect the 135 degree line. We do not know. However, I just note the fact that all of the permits issued before the Doody letter with the caveat and the explanations given for Katy did comply with the 135 degree.

MR. LEGAULT: Thank you.

MR. BERTRAND: And even in this case the -- any encroachment, if there is, would be in the outer limit. The permits that Texaco, number 6 you will recall being this permit here, was described -- and we will see it on the next slide -- was described as a square but under reserve of the fact that the actual territory cover by the permit was to exclude throughout those areas outside the jurisdiction of the legislature of the province of Newfoundland.

So it was drawn as a big square, with the caveat that only the part of the square within Newfoundland's jurisdiction was actually awarded under this permit.

In another case, we found that Newfoundland had issued a big square permit for work that was required to be conducted along a latitude, 45 degrees north latitude, between 54 degrees west of longitude, and 55 degrees west of longitude.

On that basis -- on that basis of that request, Newfoundland issued a permit that turned out to be a square, that had three -- that had a thickness, basically.

Was not confined to the latitude 45 degrees north.

Now, our submission is that the permit practice of both parties is concordant, and reveals that the party -- that the parties intended to conform to the 135 degree azimuth, southeast of point 2017, and to the turning points, the boundary delimited per the turning points, northwest or northeast, of turning point 2017.

There are four sectors that I would like to address briefly with respect to this contention of Nova Scotia.

The first sector is from the tri-junction to turning point 2017; the second is from turning point 2017 to parallel 46 degrees north; then from latitudes 46 north to 45 north; and finally from latitude 45 seawards to the southeast.

Now the first -- the first sector from the tri-junction point to point 2017 -- I should note first that I believe that the copies that you have in your books this morning do not show the same colours, unfortunately, and -- and apparently it was photocopied on not the right type of paper. So we will endeavour to provide you replacement copies.

But on the screen -- so the first sector, what we note is that Newfoundland issued no permits, and Newfoundland did contend, or did disagree with that contention of ours. Obviously what we meant was no permits along the --

anywhere near the boundary. The sector of the boundary from turning point 2015 to turning point 2017.

On -- for its part, Nova Scotia did issue permits in this area, and all of them conformed to the agreed line out to turning point 2017.

So, in this sector, the permits merely confirm the boundary, the location of which was clearly agreed by the parties back in 1964.

In the second segment -- in the second segment from turning points 2017 to the parallel of 46 degrees north, there Nova Scotia permits were also issued, and did conform with the 135 degree azimuth. We find there the permits issued to Mobil Oil.

To Nova Scotia's knowledge, none of these permits were ever the subject of objections by Newfoundland.

PROFESSOR CRAWFORD: Mr. Bertrand, sorry to --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- to interrupt. Can we -- going back to your first sector.

MR. BERTRAND: First sector.

PROFESSOR CRAWFORD: Which is the -- the turning points up to 2017. Looking at your figure 33, there doesn't seem to be -- have been any, or very much, oil activity at all in that sector?

MR. BERTRAND: Along the boundary, close to the shores, in

the Cabot Strait basically?

PROFESSOR CRAWFORD: Yes.

MR. BERTRAND: At the time, probably -- you're probably right. There have been activities more recently, I believe.

There is one which is spot number -- I would have -- this is not a good enough copy for me to venture. But I think it's a fair assessment, as depicted as of February, 1974.

Next sector, from latitudes 46 north to 45 north, then again, a series of Nova Scotia permits continued the pattern of conformity with the 135 degree line.

In addition, the Newfoundland permit issued to Mobil Oil in this area does conform with the 135 degree azimuth.

And finally, the last segment, which is from latitudes 46, actually it should read 45, to 43 north, on the -- on the Newfoundland side, the Katy Permit, and the explanations we just gave, and again, on the other side, additional permits placed along the same line as those to the north, extended as far as latitude 44 degrees, 30 minutes north, and continued the pattern of conformance in this area.

Now, our argument is clearly that those permits, the conduct of the parties was referable to an earlier agreement, and in Tunisia-Libya, the general concordance

between the oil concessions line used to establish the first segment of the boundary, and an earlier *modus vivendi* on sponge fishing jurisdiction in place between the Italian and the French Colonial powers, were given -- was given significant weight by the Court.

The fact that the concessions had some connection to the earlier practice or agreement, even though the concord -- I'm sorry -- even though the concordance was not precise, was regarded by the Court as reinforcing the relevance of the concession lines, and provided added justification for the Court to give it some weight.

Same for Guinea-Guinea Bissau, the connection between the contemporary practice of the parties with respect to the placement and maintenance of navigation aides, and an earlier treaty between them on the land boundary through a region of islands, enabled the Court to adopt the resulting *de facto* line for the delimitation of one segment of the disputed boundary.

In the Gulf of Maine, the reverse occurred. The evidence of the parties on their oil permit practice was found not to be referable to any previous practice or agreement, but to stand in isolation. And therefore, among other reasons, the Court -- the Chamber was not prepared to accept that the practice was sufficiently indicative of the parties' position regarding an equitable

delimitation.

It is our submission that this case is different, to the extent that clearly, both from the Nova Scotia side, and we submit from the Newfoundland side, the parties intended to exercise their jurisdiction, and to assert in the offshore a jurisdiction to the full extent of the territory, as given to them under the 64 delimitation.

Before I leave the issue of permits, I would like to note that with respect to the area covered -- with respect to the area covered, Nova Scotia's permits extended as far as 200 nautical miles from its coast. And Newfoundland's permits, I believe extended even further than that. Probably close to 300 miles. Actually, I'm given information here. It's 267 nautical miles from its coast. So one --

CHAIRMAN: Mr. Bertrand?

MR. BERTRAND: Yes.

CHAIRMAN: I'm wondering how long you're going to continue, or whether we should reach a convenient break at some point?

MR. BERTRAND: If Mr. Chairman, with your indulgence, if I could have 30 seconds more, I will conclude on this segment of the presentation, and I will move to the next one.

CHAIRMAN: Maybe even 35 seconds.

MR. BERTRAND: Thank you.

MR. LEGAULT: Thirty-five, perhaps.

MR. BERTRAND: Thirty-five perhaps. A lot was made by Nova -- by Newfoundland about the length of these permits, or the length of the conduct. And briefly, with respect to the permits, there is no evidence other than the fact that these permits were eventually subsumed by a new regime that came about in the late 1980s, the permits were actually -- actually ended, or -- or actually became -- became --

MR. DRYMER: Lapsed?

MR. BERTRAND: That they lapsed, thank you.

The only evidence, in fact, is that they were renewed from time to time, as pointed out earlier, and that in fact, they were subsumed by the implementation of the new regime's, as between each of the province with the federal government.

And on these words, I will conclude for the time being. Thank you very much, Mr. Chairman.

CHAIRMAN: We will adjourn for 15 minutes.

MR. BERTRAND: Thank you.

(Brief recess)

MR. BERTRAND: Thank you, Mr. Chairman. Before the break, I addressed the issue of the length of the permits, and I forgot to make a very important point. Over and above the

length of those permits, what really matters is the fact that they were issued in the first place. So the intent of the parties, the fact that they were issued, and the fact that in issuing them, the parties did comply with the line we say existed as between the parties at the time, and still exists de facto.

I would like to turn to acquiescence with a small "a". This, we submit, is relevant in this phase two, quite apart from our argument on acquiescence, and simply to illustrate to the Tribunal the degree to which Newfoundland was comfortable or approved the line -- the de facto line, because on several occasions it had opportunities to voice concerns or objections and failed to do so. So it does provide unequivocal support for the conclusions derived from an analysis of the positive conduct of the parties, and it constitutes further compelling evidence that the parties' conduct was, indeed, as we say, in compliance and supportive of a boundary de facto along the 135-degree azimuth. It also confirms the existence of a consensus regarding the location and application of the boundary.

Now in Tunisia-Libya, such acquiescence, even if insufficient to ground a claim of estoppel was said to be clearly relevant to confirm the views of the parties on a de facto line. The most salient examples of

Newfoundland's conduct demonstrating acquiescence are listed -- will be listed shortly. And the first, obviously, is the fact that the Nova Scotia permits were never protested by Newfoundland.

The second relates to the meeting of Premiers Moores and his delegation with Dr. Crosby in June -- I believe it was June 6th of 1972, and in the next few slides, I will go back to that Crosby map and the square mileage areas described there, just to show that, in fact, Premier Moores and the Newfoundland delegation was fully aware of the boundary as it was then depicted on the map of Mr. Crosby out to the edge of the continental margin.

So the first document I would like to go to is the notes of Dr. Crosby, which is Annex 52. In view of that meeting, Dr. Crosby prepared some notes. At the request of his minister, he was to brief Premier Moores and the delegation from Newfoundland.

The numbers I would like to draw your attention are those showing now on the screen -- Newfoundland, 13,500 square miles; Nova Scotia, 3,500 square miles, and that's part of the MRA's. In the Atlantic pool, there are two versions. Newfoundland has 244,500 square miles and Nova Scotia has 83,000 square miles.

Now if we go to the -- to the next document, we will see very clearly that these are the numbers that are shown

on the map, and the Newfoundland number of 13,500 square miles plus 244,500 square miles, as shown on the previous document, do add up to 258,000 square mile, appearing on this map. The reason why the numbers were split on the document of Mr. Crosby, if we can go back to slide 79, you see that these numbers are split, and Newfoundland is not 258, but rather two numbers that make up for 258. Let's go to the next one, before -- just before. Is because the map used by Dr. Crosby was not identical to this one because it had on it the MRA's -- the mineral rights administration lines -- which delimited the area around the provinces that were the exclusive jurisdiction or from which the provinces would derive exclusively from the resources explored in these areas, if we can go back to the previous one. Hence, the total square mile area for Newfoundland was split into two, a part found under the MRA's and the rest in the pool.

Now the only way we can arrive at these numbers -- if we can go to the map -- is if this line is exactly there, and for the whole length. The minute that this line moves, whether it's shorter or it moves a degree south or north, then the square mileage areas -- if you can blow it up, please -- will change automatically.

So it was not the map that was used for the briefing of Premiers Moores, and we can't find it, but it was a map

that had the same boundary. The only difference was that the map used by Dr. Crosby had those MRA's. And obviously, at that meeting, Premier Moores and his people were shown a map depicting a boundary all the way out to the edge of the continental slope.

Next slide, please. So when Dr. Crosby reported on his meeting to the minister -- on his meeting with Premier Moores, he said at Annex 51, and that memo, I believe, is dated June 14 -- he said, "Premier Moores began the opening session by asking my opinion..." -- that's Crosby speaking -- "...on how we should proceed, whereupon I assured him that we were completely at his disposal. The result was that I began with a review of the offshore situation from the beginning, utilizing an overall map of the east coast region that we had constructed for the occasion. I described Canada's submerged continental margin off the east coast, explaining what it consists of, its areal distribution, so the way the area is splitted, and so on."

Now I submit to you that the map referred to here can be none others -- none other than that which matches or is consistent with the numbers showing on the notes of Dr. Crosby prepared by him for that very meeting. If we can go back to the notes of that very meeting -- 79.

Now Newfoundland attempts or attempted to contend that

that page contained a lot of numbers, and it was not obvious that any of them or all of them appeared on the map. Well, I think that's trying to confuse the issue. These numbers do add up to depict the total square mileage area of both provinces on the map, whether it's the map showing the MRA lines or the map without the MRA lines, but in both cases it is a map that shows -- that depicts the boundary that you now see at slide number 80.

And that boundary, as we have shown during phase one, conforms with what Nova Scotia submits is the appropriate boundary. That is a boundary which, until turning point 2017, follows the boundary agreed upon in 1964 and thence follows the 135-degree azimuth to the edge of the continental margin.

Now I'm not going to go back very -- at length on this, but the same map was used at the August 2nd meeting of the premiers. Again, we have no evidence that the map was actually used or circulated at the meeting of the premiers in June -- June 18, June 19 -- but we do have evidence that this map was used at the August 2nd meeting.

The reason is that the agenda -- first, a cover letter in preparation for this meeting forwarding material in preparation for the meeting, did refer to a map showing boundaries between the provinces and the offshore areas. Secondly, the item in the middle is an excerpt from the

agenda that financial arrangements in French -- I won't dare to say it in French because it's -- it's ill translated -- was going to be -- bilingual -- bilingualism at work -- or not, yes -- this was one of the items scheduled to be discussed at the conference.

Now in support of this agenda item, the document on the right hand side was supplied, among others, and it did show the apportionment of the pool discussed, and these figures are again consistent with those shown on the map that we have just discussed.

PROFESSOR CRAWFORD: Of course, this was a discussion of an arrangement that never came into force?

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: And it referred back to boundaries which related to a provincial proposal that was rejected?

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: You still say that this amounts to Newfoundland acquiescence? In other words, Newfoundland's conduct vis-à-vis the federal government in respect of failed negotiations is evidence of acquiescence vis-à-vis Nova Scotia?

MR. BERTRAND: Well, acquiescence with a small "a". What I'm saying is that the premiers were very conscious of the fact that this 1964 agreement, which the Tribunal has found didn't -- was too imprecise in the southeast sector

past turning point 2017 actually meant an azimuth of 135 degrees, and was being used to discuss revenue sharing programs with the federal government.

There was no -- no objection, no interjection by anyone saying, well, these boundaries are, therefore, different than those that we have agreed upon in 1964 for claiming ownership rights. They are the same boundaries being applied for whatever arrangements the parties were discussing at the time.

There is no -- I mean there is no way around these numbers. As I said, the minute that you move the line, the numbers change obviously. A little more is granted to one province, as opposed to the other, to the detriment of the other. So these are the August meetings of the premiers.

The next item, and I don't intend to spend a lot of time is the 1977 MOU, as was pleaded at length in our Memorial and Counter-Memorial, depicted -- and depicted the boundary using the 135 degree azimuth in the area between Newfoundland and Nova Scotia was never protested.

Newfoundland did criticize the MOU, but not because of the boundary, but rather because of its nature. No, Newfoundland at the time was not in agreement with that type of approach, while it still wanted to press their own claim. And, therefore, really renewed or criticized this

approach.

Then we have the 1982 Canada-Nova-Scotia Agreement. Newfoundland pointed out that there was a caveat in the agreement, which apparently gave them some assurance that they didn't need to protest.

I would submit to you the 1984 implementation legislation did not contain that caveat, that proviso, for possible dispute resolution. And should have attracted Nova Scotia's -- Newfoundland's protest at the time, because the line was being implemented by the federal government, who following the Hibernia reference had been -- had been not selected, but had been decided to be the level of government responsible for the offshore.

And so Newfoundland should have been -- should have been on notice that something was being made to its offshore. Something was being done in the offshore that it would potentially claim as its own. And yet they remained silent.

Now in part one -- phase one of this arbitration, the Tribunal found that various statements later made by either Newfoundland representatives or federal representatives may have constituted objections to a conclusion that the parties had entered into a legally binding agreement.

What we are asking you is to have a second look at

this conduct, the subsequent conduct in the context of determining whether the parties viewed the boundary agreed upon as constituting an equitable solution for the boundary issue.

In Tunisia-Libya, the ICJ considered a relationship between conduct that appeared to establish a modus vivendi or a de facto line on the one hand, and conflicting legal claims and practice on the other. In that case, both parties formulated claims that conflicted with the line that divided de facto the areas within which each party granted oil concession. Moreover, Tunisia issued permits issued permits soon after the original concessions were granted that clearly crossed the de facto line. And the concessions that formed the basis of the de facto line, themselves, became the object of protest by both parties.

Now the Court's response to this tangle of practice and legal claims was straight forward. Neither the legal claims formulated contemporaneously with the emergence of a de facto line, nor the subsequent practice or protest of the parties was sufficient to displace the fact that a concordant situation had at one point existed in practice.

The significance of that circumstance, what the Court described as the actual situation, was described as follows, and we have the quotation from -- the cite form the judgment in Libya-Tunisia. "The result was the

appearance on the map of a de facto line dividing concession areas, which were the subject of active claims in the sense that exploration activities were authorized by one party without interference or until 1976 protests by the other. The Court does not, of course, overlook the fact that the areas to which a legal claim was asserted by both parties were more far reaching. The actual situation, however, was that which has just been described."

In the present case, we submit, unlike in Tunisia-Libya, only one party, that is, Newfoundland and Labrador has ever departed from, or otherwise contradicted the parties' agreement, or the general de facto line that has appeared in practice.

All of the conduct that Newfoundland claims is contrary to the existence of a de facto line dates from 1972 or later. After the period of time within which the de facto line came into being. And even during the subsequent period, never has Newfoundland protested any of the permits issued by Nova Scotia.

Now the first of these alleged objections that I would like to address is the Doody letter, Minister Doody's letter of 1972 -- October 1972. It is our submission that both -- and the exchange that followed -- both Mr. Kirby and Mr. Doody understood that there had been an agreement,

a consensus over the boundary issue.

Minister Doody said in his letter, the inter' -- referred to in his letter to the interprovincial boundary, the present demarcation, and the present version of the boundary. He was not questioning in his own words, the principles which form the basis of the present demarcation. And the prior agreement in his own words, giving the map that he submitted with his letter, extended far beyond turning point 2017. As we calculated it in the first phase, and we showed to the Tribunal, the 1964 line extended approximately 100 -- 87 nautical miles past turning point 2017. While the line that Minister Doody drew or had drawn for him on the map, which he submitted with his letter, extended some 135 miles, I believe, this was the figure, past turning point 2017. So clearly, he understood that there was some sort of agreement in the outer segment.

And finally, it is apparent that Minister Doody only ever objected to a line, which Newfoundland believed to not reflect the 1964 Agreement in the outer segment.

However, even Minister Doody's letter and proposed map -- proposed line cannot serve as the basis of the line now sought by Newfoundland. What we have done on this slide 91 is to take figure 78 and depict on it the line now claimed by Newfoundland.

Now what is interesting -- we will come back to the --
what is interesting is the following --

CHAIRMAN: Let me just intersperse one remark here.

MR. BERTRAND: Yes, Mr. Chairman.

CHAIRMAN: One of the concerns I have is that while we are following international law, I am considering the position of the premiers at that time. Now if you -- if this was the head of a state in international law, he would know, or if he did not know, his legal advisors --

MR. BERTRAND: Should --

CHAIRMAN: -- could be able to advise him that protests were necessary. In the interprovincial here, the same situation would not prevail. In other words, we may not here, staying within the Terms of Reference, because we mentioned that before, we might say well, these were provincial premiers, that protests would not necessarily be expected.

MR. BERTRAND: As we understand them in international law.

CHAIRMAN: Yes.

MR. BERTRAND: And we would agree with that. However, let me take an extreme example. If Nova Scotia starts issuing drilling permits on land in Newfoundland, I am sure they will hear about it.

Now do you call that a formal protest under international law? What form will that protest take? I

don't know. But I think we can assume that to the extent that the parties were resolved to exercise a jurisdiction over an area, that a consistent pattern of behaviour from another province that would run counter to Newfoundland's stated claim or position would certainly be met eventually one way or the other by a clear expression of this agreement. And we submit that in this case, it was not.

PROFESSOR CRAWFORD: I wonder, maybe this will come up elsewhere, I am slightly unclear about the subsequent course of the disagreement about the southeasterly line.

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: You told me yesterday that it -- the actual -- the current Newfoundland claim line was shown informally on a map in -- was it 1998 or thereabouts. What happened between the Doody letter and then? Can you -- just give me a pen picture of events in that period?

MR. BERTRAND: Of what happened between 1972 --

PROFESSOR CRAWFORD: And 1999 -- well this was 1973.

MR. BERTRAND: '72.

PROFESSOR CRAWFORD: '72.

MR. BERTRAND: To October '7 --

PROFESSOR CRAWFORD: October '72.

MR. BERTRAND: At the time, you will recall that

Newfoundland was busy preparing its claim. And the

Hibernia reference was '84. So not much happened until then actually.

PROFESSOR CRAWFORD: That's explicable and relatively neutral I would say after '84.

MR. BERTRAND: Yes. After '84, obviously, Nova Scotia had struck an agreement on its own after the '77 MOU had struck an agreement in '82, and was in the process of getting legislation in place to implement that Accord.

PROFESSOR CRAWFORD: Sure. No, I am interested in what happened on the Newfoundland side. And perhaps I should have asked Newfoundland this question. No doubt they will provide information if they disagree with you.

MR. BERTRAND: I think that the record is sparse --

PROFESSOR CRAWFORD: What was the diplomatic history of the dispute from '72 to '98?

MR. BERTRAND: I think that the record is sparse in terms of the discussions between Newfoundland and the federal government with a view to striking their own bilateral Accord on the offshore regime.

PROFESSOR CRAWFORD: The Hibernia claim, itself, which went to the Supreme Court didn't involve any particular assertion of any line. It was simply a debate in principle.

MR. BERTRAND: Well one might say that the permits -- the seismic permits were certainly there to bolster their

case, among other things.

PROFESSOR CRAWFORD: But there was nothing -- there was nothing in the pleadings in that case, which indicated an assertion of that line?

MR. BERTRAND: Not that I am aware of. So the last point I wanted to make on this map is what is interesting to note is that this line here, which for the record, is below -- to the southeast of turning point 2017 on Mr. Doody's map, the line to the east, the far east, actually conforms with the eastern limit of the Katy permit.

And if you care to pull, for example, figure A8 and look at this picture, you will see, because it's -- I mean, the Katy permit has a signature of its own. You will see it -- a jagged edge here and then it's like a stair, really. And you will see that this conforms with the eastern limit of the Katy permit. However, the dotted line in the middle does not conform with the western limit of the Katy permit.

So was this because -- is it attributable to the transposition of the permit from a conic projection to a Mercator, which this map is, or was Minister Doody attempting to gain some wiggle room, we just don't know. But it is interesting to note that obviously Katy is here. But obviously the width between the eastern line and the western line is not consistent with the width of the

actual Katy permit.

PROFESSOR CRAWFORD: And he also pointed out in that letter that he wasn't trying to be accurate at all, he was simply indicating that there was a problem.

MR. BERTRAND: Correct. Correct. I'm sorry. Now I'm reminded that obviously to go back to the question by the Chairman that the formalities required to have a formal protest may not be those that you would find in the Canadian context or in any other context. However, to the extent that the Tribunal found that the Doody letter was the beginning of a sound of discordance from Newfoundland, I would submit to you that it would be very easy then to find in the record other examples to that effect, which we don't.

We don't want to be applying a double standard here, meaning Doody letter good enough for -- to form a protest so that there is no legally binding agreement. But on the other hand require higher standard to have a protest in the context of an argument of acquiescence with a small "a".

I would like to move very briefly to the seismic permit we have already dealt with. All of these permits, just to say, were issued after the concord and practice of the parties was established, as was the case actually in Tunisia-Libya. And this discordant practice ex post facto

cannot change the original practice which was in place earlier and that had crystallized a situation, which the Court called the actual situation.

MR. LEGAULT: Mr. Bertrand?

MR. BERTRAND: Yes, Mr. Legault.

MR. LEGAULT: Is there possibly a double standard emerging with respect to conduct? We have to begin with an "agreement", in quotation marks, which we have ruled to be at best a conditional agreement. Can that agreement be made unconditional by practice over a period of let's say eight years, '64 to '72? And to the point where no protest, no action by the other party can unseat the conditional agreement -- or conditional is by definition one you can repudiate?

MR. BERTRAND: Correct.

MR. LEGAULT: I would just like your thoughts on whether there is a double standard conduct is relevant in certain circumstances but not relevant in other circumstances?

MR. BERTRAND: I don't believe that there is a double standard or at least that we are asking you to apply a double standard here.

I would like to deal with the second aspect of your question first. We are not saying in this second phase that Newfoundland should have protested the 1964 Agreement. We are saying that Newfoundland should have --

or had several opportunities to express disagreement vis-a-vis a de facto line, yes, that was consistent with an earlier agreement, but that's a different point. But had ample opportunities to protest a situation of fact that was unfolding before its eyes. And with which it was, according to their saying today, clearly in disagreement.

That's the second aspect of the question. So we were not asking or we are not contending that ex post facto they should have five, 10 years after the fact protested the earlier agreement. But certainly a behavior of Nova Scotia, which was consistent with the existence of an agreement.

The first aspect of your question I would like to address by saying that we are not asking to apply a double standard. Obviously we are not saying here today that there is a binding agreement. We are not contending that the consensus reached earlier was meant to become final only if certain conditions were met. We are only saying that to the extent that the conditions could be capable of occurring, the parties were satisfied that their consensus or bargain was adequate to represent the best solution under the circumstances.

And we are saying that this has a certain relevance when the Tribunal is tasked with drawing a line that has to be the result of an equitable process.

Equity is best seen through the eyes of those who will have to live with this line. And if at a given point in time with respect to the agreement, whether it be '64 or '72, the parties viewed the line, which we now say persisted de facto as equitable. Again, I think the onus is on Newfoundland to demonstrate to the Tribunal why this line is no longer equitable.

MR. LEGAULT: Thank you, Mr. Bertrand.

MR. BERTRAND: Thank you, Mr. Legault. The -- we would contend as well that the rejection of these permits, of the seismic permit would be consistent with the Gulf of Maine decision, where the Chamber at paragraphs 306 and 307 indicated or cited United States' position, seeming to agree with that position. The text reads, "The United States replies that at the time in question it was confronted on Georges Bank with Canadian seismic exploration of minor importance, which involved neither drilling nor the extraction of petroleum. No special action was therefore necessary on its part." And the Court -- or the Chamber seems to cite this with some sort of approval.

The next opportunity to object relates to the 1977 Newfoundland White Paper and Petroleum Regulations. And I will go very quickly over that.

PROFESSOR CRAWFORD: I'm sorry, can I just go back to that

previous statement?

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: You are supporting this statement in your favor?

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: You are using -- can you explain to me why?

MR. BERTRAND: Yes. To discard seismic permit as an expression of assertion of jurisdiction over a territory. So those permits which Newfoundland contends were issued in violation or which encroached allegedly over the boundary with Nova Scotia, would be, in our view, treated consistently by this panel if they were discarded as conveying no interest in the offshore.

PROFESSOR CRAWFORD: Okay.

MR. BERTRAND: 1977 regs very quickly. Section 8, as we have seen in phase one, provided for quadrangles with in which Newfoundland could issue permits. These quadrangles did appear to encroach over the 135 degree line. But this map where the quadrangles were shown in virtue of section 8, were qualified by section 12, which read, "Notwithstanding section 8, the boundaries of all quadrangles shall conform with the province's onshore and offshore boundaries with the other provinces and the North West Territories and shall conform with those established

by any lawfully established international seabed boundary."

Moreover, even if we take it at face value, this unilateral conduct diverges from the previously existing consensus only for part of the path of the boundary shown in the regs.

There seems to be conformity until latitude 46 north with the existing boundary, so well past turning point 2017. Furthermore, as I alluded to yesterday, even this map with this proposed unilateral boundary by Newfoundland cannot be a support for the line Newfoundland now claims before this Tribunal.

There were other purported objections. I don't intend to go into them. They relate to the various communications, discussions between federal government and the provinces in the late 70s before the MOU was struck with a view to trying to arrive at an agreement.

They also involve discussions where Newfoundland was absent, having parted company with the rest of the provinces. Our view -- our submission globally is that these are not sufficiently indicative of a protest. They often are not emanations of Newfoundland. And they are all aimed at pointing out that the agreement between the provinces was not binding upon Newfoundland.

The cumulative effect of the conduct described in the

section I have covered since yesterday, is graphically represented on figure 40. First -- and I will go very quickly over that. We have the segment turing point 2015 to 2017. A line was agreed. The points were defined in 1969 and confirmed in '72 by the premiers.

The next segment goes from turing point 2017 to latitude 46 north. And this is based in part on the 1977 regs map of Newfoundland. It does comply with the sector from latitudes 46 north to latitude 45 north, the Newfoundland Mobil permit was shown to match with a very good degree of precision the line defined by the azimuth 135 degrees. And finally, the Katy permit from 46 degrees 15 minutes north to 43 degrees, we believe, and I hope I was able to convince you this morning, that the intent of this permit was to comply with the boundary. And if it does not perfectly match the boundary line, it's because of the imprecision probably resulting from poor draftsmanship. The fact that the turing points were not available then and the use of a conic projection map as opposed to a Mercator, and the difficulties associated with transposing one to the other.

On the Nova Scotia side we have the permits that go all the way down to latitude 44 degrees 30 minute north, and those permits were never protested.

And finally, we've just covered a series of events

that cover the entire -- that cover the entire length of the boundary, first the Crosby map, and secondly, the 1982 Canada-Nova Scotia Agreement, that was implemented without the reserve, or potential modification by the Federal Government in the 1984 legislation.

So it is certainly our submission that the conduct of the parties -- the conduct of the parties clearly show that a boundary was created through first their agreement, and then by their other conduct on their respective sides of the line throughout the entire course of the boundary.

Any Newfoundland proposals, or indications of another line were purely unilateral acts, and as in Tunisia-Libya, cannot displace the significance of the mutually defined de facto boundary line.

That line provides the clearest, best possible evidence of what the parties in this case considered to be an equitable division of their respective offshore entitlements.

Resource distribution I'll cover in two minutes.

PROFESSOR CRAWFORD: Before you do --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: Can I ask you a question about

turning -- turning point 2015, that is the tri-point?

MR. BERTRAND: Tri-junction, yes.

PROFESSOR CRAWFORD: Is there any subsequent evidence of

Quebec either continuing to accept, or repudiating that point?

MR. BERTRAND: Continuing. I can tell you that the map published today by Quebec still shows the 1964 boundary. And it shows -- it's in the record, I'll point you to the figure number, but actually the map that we showed, I think it's figure 13, that we showed as Quebec's map, is a map that we procured for this case very recently. And it still shows the 1964 boundaries. Not only that, but it shows the boundary as the parties understood it in 1964, and as depicted on figure 4.

It does show, from a Quebec perspective, that Quebec understood that as between Newfoundland and Nova Scotia, there -- the boundary have been resolved, because it does show the same line as you find on figure 4, 1964 map, which past turning point 2017, shows a course on a 125 degree azimuth, at least for 87 nautical miles.

PROFESSOR CRAWFORD: Has Quebec issued licenses in the Gulf?

MR. BERTRAND: It has. Recently, I don't know. But figure 13 will show that, if my recollection is right. Yes, they did issue permits.

Actually, I know from another light, but -- I mean part of the Sable activity, and permit issuance relating to Sable in the construction of a pipe line was of much interest to Quebec with a view to trying to drum up some

activity in the Gulf of St. Lawrence portion of their --
of their offshore. Or offshore internal waters.

I would like to go directly to slide 113. It's figure
15? Yes.

I'm showing figure 15, which depicts a map of the
Quebec issued permits, and they go directly up to the
boundary in the Gulf of St. Lawrence.

Annex 74 and 75 are the Quebec maps. Annex 74, I
recall was replicated as figure 13 in the record. And
it's showing.

Annex 74, which I'm now unfolding, is the map which we
procured for this case. And it's -- as you can see, it's
a very new map. I don't know whether it bears a
publication date. It must. It says that the informations
are up to date to September 1st 1998. Is that dispositive
of the boundary in the Cabot Strait? I don't know. I
wish it were.

So, can I move to relevant resources, very quickly?
That part has been dealt with very clearly in the
Memorial, so I don't intend to spend a lot of time. Just
to address a few points, if I may.

In the present case, access to the benefits of
hydrocarbon resources is the only objective of this
dispute, as seen by the parties. Given the nature of the
offshore areas, and of the parties' entitlements that are

at issue, the sole object of the delimitation is the division of a limited entitlement to hydrocarbon's resources.

Location of the mineral resources at issue was moreover a factor in the creation of the offshore areas themselves. And by that, we mean that when, in the eighties, Nova Scotia agreed to enter into a bargain with the Federal Government with respect to a revenue sharing scheme, according to a certain boundary, it, as you saw earlier, had the possibility of maybe negotiating something else. That is, access to a pool of the Atlantic Provinces.

Now, knowing whether the line is where it is now, or somewhere else, may impact the decision of a province to go along with the scheme that is being proposed and negotiated. And to that extent, we submit that the Tribunal should be at least conscious of that aspect. And to that extent, we submit that location of the natural resources is relevant.

CHAIRMAN: If I am understanding the import of your remarks, it seems to me that if you had a pool, I'm not sure how that would benefit either Nova Scotia or Newfoundland particularly, given that they are the two provinces that have, at first glance at least, a lot of room, and a lot of space for exploration and for development. Whereas

Nova -- in New Brunswick, PEI --

MR. BERTRAND: Do not have much. However, Newfoundland would probably share in the revenues from Sable Island, and Nova Scotia could share in the revenues from Hibernia. So that's the basic difference.

And if we talk about the Laurentian sub-basin, obviously, if it's to one party exclusively as opposed to being shared in a certain fashion, we're not saying equally, but certainly have access to that area which is thought to be very prospective.

CHAIRMAN: I'm not sure of the evidence of the -- of that Laurentian Channel and so on, and particularly as it was thought at that particular time.

MR. BERTRAND: At that particular time, I believe -- I'm not sure that the evidence was any different than what it is today. There is obviously some -- some seismic work that has been done. A well has been -- a well has been drilled in the baguette portion of that. But some of the work done is not yet public. It's still confidential. In terms of technology, may have evolved, obviously as we've seen Premier Hamm state in a speech that -- excerpts of which have been discussed in the pleadings, but I will concede that the evidence is sparse. To say the least.

However, there is -- there are too, a consensus that this is the sweet spot. In this area there is a sweet

spot, and it's -- it's called the Laurentian sub-basin.

Now, and it's without a question that there is a disparity between the so-called discovered resources within the parties' respective offshore areas. And as I just mentioned, the sub-basin is of particular significance in terms of being very prospective, or thought to be very prospective, and the likely true prize in the delimitation.

But it's true, as well, that it's not possible to locate within that area where the potential is, and it's not possible to assess with any precision what size is that potential.

Now, for Newfoundland to say that it is not relevant in this arbitration is, I think, overdoing it. The minister, quote from the minister, but before we get there, news report after the publication of your Award reported that the dispute involved a vast geological region known as the Laurentian sub-basin, 60,000 square kilometres of the Atlantic Ocean, between the south coast of Newfoundland, and the north coast shore of Cape Breton.

Companies have been clamouring to drill in the area for years, but the dispute has prevented either province from issuing exploration permits. The basin is thought to contain large pools of oil and natural gas, which means either province could earn billions of dollars from energy

royalties, depending on where the line is drawn.

Now, Minister of Mines for Newfoundland, Mr. Lloyd Matthews, is said to have been forthcoming, if not candid, by saying "If we told you we wanted it all, would you be surprised?" Now, they know that this is the true prize of the arbitration. If it were not for the sub-basin, I'm not sure that the dispute would be ripe for a decision just yet. We're not sure that Newfoundland would have brought this case forward, or pressed Nova Scotia for a resolution of the dispute.

Because apart from that, it's certainly not for the fish, and in Newfoundland's own admission in an annex that we filed yesterday as Annex 219, which is a press release quoted by Mr. Fortier in his opening remarks, Newfoundland says "The establishment of a boundary will open up highly prospective areas between the two provinces, in particular, the Laurentian sub-basin to exploration drilling. Newfoundland and Labrador and Nova Scotia will continue to work together in promoting the tremendous potential of our offshore areas." Now what we're asking the Tribunal to do with resources is to check the line against the equitable access, given the current state of knowledge as to where those resources are -- that is, the Laurentian sub-basin. And to a certain extent, given Newfoundland's position taken here, the issue is moot

because, according to their line, they would get it all.

MR. LEGAULT: Mr. Bertrand, how accurate is the -- I know you have already said that we don't really know --

MR. BERTRAND: Yes.

MR. LEGAULT: -- where the resources are and so on, but the depiction of the overall area of the Laurentian sub-basin, how accurate is that? Is that largely guesstimates? Could it be larger?

MR. BERTRAND: My understanding, and I stand to be corrected, and with your permission, I'll take it under advisement, but for the time being, my understanding is that the contour of the shaded area delimits an area where the thickness of the sediments is the greatest, and therefore, where the prospectivity is thought to be the highest. It's called a sweet spot.

And those conclude my remarks, Mr. Chairman, so I would ask you to call upon Professor Saunders.

PROFESSOR CRAWFORD: Mr. Bertrand, the issue is not moot. Moot is, perhaps, the wrong word. What you're saying is that if -- if the --

MR. BERTRAND: Newfoundland.

PROFESSOR CRAWFORD: -- Newfoundland claim line was accepted, there would be no question of Nova Scotia getting the --

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: That has nothing to do with --

MR. BERTRAND: With mootness. You're right -- I stand corrected. Actually, the text read "Maybe moot, if Newfoundland has its way."

Mr. Chairman, with your indulgence, we would ask for two minutes, just so that we can load the presentation on the computer. Thank you.

(Brief recess)

PROFESSOR SAUNDERS: Mr. Chairman, we seem to be technically prepared.

MR. DRYMER: Or challenged.

PROFESSOR SAUNDERS: Or challenged. Mr. Chairman, members of the Tribunal, let me begin.

What Mr. Bertrand has been covering, conduct, is something that we have submitted as strongly as we can, is very directly connected to the facts of this case and to keep the overall picture directly connected to the basis of title and entitlement in this case what's been called the primordial consideration maritime boundary law.

For my sins, I get to deal with one of the others, which I prefer to think of as the primordial ooze of maritime boundary law, which is the consideration of coastal geography, which has caused real problems in some of the cases and real difficulties, but which is emerging with some degree of precision over the years.

For Newfoundland, of course, geography is the only relevant circumstance of any importance. Now consideration of the geographic circumstances comes up at a number of points in the Nova Scotia submissions, but for the purposes of this presentation, I want to focus on the following matters.

First, a few words about the general geographic configuration of the region, including some areas of agreement and disagreement, and second, more important, I think, for the case and the outcome of the -- of both delimitations as the parties have presented them, the definition of the relevant maritime areas and the relevant coasts, and the conflicting approaches of the parties.

The general geographic configuration, if I can begin, here we have Newfoundland's most recent presentation of the geographic configuration -- the first slide from Professor McRae's presentation on Friday. Perhaps it was a slip; perhaps not, but both the map and the title are revealing, in our view.

Newfoundland's response to the Tribunal's questions about the "cut the coast at Canso" -- no problem, this map takes care of that. It moves it further to the east and gets rid of Canso, as well. Problems with the outer limit? This one does not even make it to Sable or to the 200-mile limit. But it's the title that is most striking.

This is the geographical setting of the south coast of Newfoundland, with an unidentified small island off to the west.

And ultimately, as I will show, this is really the geographic context of this delimitation, as far as Newfoundland is concerned. It is defined a priori that the south coast of Newfoundland, sometimes a single coast, sometimes one with marked changes in direction requiring new coastal fronts and bisectors -- is the dominant coast in this case, and this is nothing more -- I'll return to this later -- than the old and long discarded theory of primary and secondary coasts, and as I say, I'll return to that later on.

Now there are, fortunately, some areas of at least partial agreement on the geography of the region as it relates to the delimitation. We agree that there are three general sectors -- the Gulf, an inner area, and an outer area -- although we disagree on the precise location and on just what kind of concavity the inner area might be.

We are agreed that the Gulf is of no real significance to the delimitation, although it has to be delimited, given that the area involved is fairly small. From our point of view, we note that Nova Scotia's delimitation solves one very fundamental problem. It accords with the

practice of third party interest in the area.

And we are agreed that the inner -- we were agreed, I should say, before the oral hearings that the inner coasts are mainly opposite and the outer coasts of the provinces are mainly adjacent, although Nova Scotia would argue there's a partial opposition in the outer area because of Sable.

There is even, surprisingly, general agreement on the actual coastal length of Newfoundland from Cape Race to Cape Ray, although we defined them in this way for different reasons. And there is agreement on the length, roughly, of the Nova Scotia coast from Money Point to Scatarie and on to Canso.

Newfoundland does complain about how we defined their coast, despite the fact that we gave them a slightly longer one than they asked for themselves, and Nova Scotia, of course, disagrees with stopping at Canso.

Now if I can turn to the Newfoundland complaints for a moment. Newfoundland does raise some issues with our use of geography. For example, in the coastal definitions that I just mentioned, Newfoundland is upset that we used different points -- in some cases, my goodness, we used more points than the St. Pierre case. What they don't show is that it makes the slightest difference to anything, especially as we are not using a frontal

projection approach to define the zone; we use the actual coastlines. The general feeling, I guess, is that even if we give them their full coastal length and more, on principle, we must be up to something.

More specifically, Newfoundland complains that we use different coastlines and different points in different figures. Well, yes, we do, and we fully explained in the Memorial that one of these figures is to introduce the geography of the area and nothing more, and the other is to assign coastal lengths, which is to the benefit of Newfoundland because we used the indentations.

Now on this, Newfoundland mocks the Nova Scotia Memorial, asserting that the drafters of one part did not talk to the drafters of the other, and it may be true. But the same gremlin seems to have made it into the Newfoundland Memorial, for we can see, as here, that Newfoundland takes rather different coasts when it wants a coastal length and when it wants a coastal front. And, indeed, they get it backwards on their own method because the coastal front, as across Placentia Bay in this diagram, could, on the approach of the North Seas, which is what they purport to be operating on, be used for the measurement of the coast, which is the way it was used in that case. Instead, they go into the indentation, as we do.

But then Newfoundland even manages to complain about Nova Scotia taking what they call a "leap" across the geography of Placentia Bay, but that is exactly how they define their coastal direction on their coastal front, which is at the heart of their argument.

But then, what else? They don't like us going down to 46 degrees north for an area of opposition based on the last inner equidistant points because they say it can go on forever, except, of course, that in this case 46 degrees north is what we identified as a point of transition between the inner and outer sectors -- this is in our Memorial -- where there are outer controlling points that begin to influence the line. That was the reason for choosing 46 degrees north. If there were no outer points, then yes, Newfoundland's criticism could apply. And, in any event, it's about 23 nautical miles south of the Scatarie Lamaline closing line that Newfoundland uses. Not a significant problem.

In the end, that defines much of Newfoundland's complaints over geography. It does not amount to much. The reason, simply put, is that we did not use their method for dealing with coastal geography. We used, wherever possible, because it's consistent with the zone we are delimiting, the actual coasts, measurements and projections from them. Not moveable fronts, not new

coasts across Cabot Strait, but the actual coastal geography. And where this coastal geography gets used by Newfoundland and by Nova Scotia, where it matters, is in the definition of "relevant coasts" and "relevant areas", to which I will now turn.

The relevant maritime areas and maritime coasts have been subject to competing definitions offered by the parties as to which are relevant to this delimitation, and they are absolutely essential to this delimitation. For Newfoundland, the relevant coasts, as they see them, are alleged to be the basis of their delimitation methods. And for both parties, the definition of the relevant coasts and the maritime areas provides the basis for testing the proportionality of the result. And proportionality is essential to the parties' consideration of the equitableness of the proposed lines, the final, fundamental step in the delimitation.

Indeed, for Newfoundland, proportionality is really the only basis on which it is prepared to test its line. Thus, we can say that Newfoundland's entire argument on the equity of the result, which it agrees must be the dominant concern, ultimately rests on its depiction of the relevant coasts and the relevant maritime areas. If that falls, so does everything else.

Now before considering the conflicting approaches of

Newfoundland and Nova Scotia to this issue, it's useful to note a few preliminary points. First, the parties begin their discussions of relevant coasts and relevant areas with at least partial agreement on one point.

Nova Scotia defines the relevant maritime area as the area of overlapping entitlements, consistent with the approach set out by the International Court of Justice in Denmark-Norway or Jan-Mayen. And Newfoundland, at one point in its Memorial, refers to what it terms "the delimitation area" as encompassing, and I quote, "a potential overlap and convergence of maritime entitlements", although this terminology no longer appears in its Counter-Memorial. Where Newfoundland and Nova Scotia disagree with respect -- is with respect to how the entitlements, the potential areas of overlap, are to be defined.

In brief, just to summarize what is coming, for Nova Scotia, the potential areas of -- areas of potential entitlement, and thus, of overlap, must be defined with reference to the legal definition of the zone in question. In this case, the offshore areas. And in particular the definition of their seaward extent. The relevant coasts are those that generate the areas of overlapping entitlement. Again, by reference to the legal definition which coasts generate which maritime areas.

For Newfoundland the relevant coasts must be determined first and are defined as those that face toward the delimitation area in a frontal projection. All other coasts, or at least all other Nova Scotian coasts, are to be excluded from consideration.

The maritime areas are then established by what Newfoundland calls the frontal projection of the already determined relevant coasts. This projection being defined by perpendiculars to the general coastal direction.

And the overlap and convergence of these projections delivers the relevant maritime areas. Those are the two approaches.

Let me begin with the legal and factual basis for Newfoundland's approach to the definition of relevant coasts and relevant areas, and then turn to what I would submit is the correct method for this case, that presented by Nova Scotia.

For Newfoundland, everything begins with the definition of the relevant coasts. The anointing of coast lines as relevant or irrelevant predetermines the relevant maritime areas, as I will show in a moment. And yet, as became increasingly apparent in the course of oral argument, Newfoundland offers no sustainable justification for its decision to exclude major parts of the coast of Nova Scotia as irrelevant, or at least no justification

that relates to the law or the geographic facts.

Newfoundland argues essentially that the relevant coasts of Nova Scotia is restricted to those portions running from Money Point to Scatarie Island and onto Cape Canso, as shown here.

Newfoundland's description of these coasts and the relationship to the maritime area, has an error of inevitability about it. Newfoundland says the south coast of Newfoundland remains a constant presence as the eye moves seaward and the coast of Nova Scotia recedes into the background. I don't know if this is cartography or a travel log but it is not really geography, because of course in this critical feature setting out the relevant coasts, Newfoundland has simply removed the rest of Nova Scotia from the map, making it impossible for the eye to discern any presence other than that of Newfoundland's south coast, as has already been noted by the Tribunal.

Furthermore, the relevant maritime area towards which these coasts supposedly face is arbitrarily stopped not far from 44 degrees north or thereabouts, despite the fact that the actual maritime areas in question extend approximately 200 nautical miles further seaward.

How are we to judge by eye whether a coast face a maritime area when neither the potential -- all of the potential coasts nor all of the potential maritime areas

are even on the map?

Now in this figure on the other hand, as the eye moves seaward, the coast of Nova Scotia remains a constant presence, while that of Newfoundland recedes into the background. It is of course absurd, but no more so than what Newfoundland has presented as the basis of its definition of relevant coasts.

PROFESSOR CRAWFORD: It makes Sable island very central.

PROFESSOR SAUNDERS: Well, yes, it does actually, doesn't it? But I have a feeling France will be after us again.

PROFESSOR CRAWFORD: We should delimit around Sable Island and give half effect to Nova Scotia.

PROFESSOR SAUNDERS: I believe that was one of the French arguments in St. Pierre actually.

If we could leave aside Newfoundland's definition of relevant coasts by the simple expedient of coastal amputation, what is left by way of actual argument? Newfoundland offers two justifications for its depiction of the relevant coasts. First, as we have heard before, Newfoundland argues these coastlines were selected as relevant in Canada-France. And in Newfoundland's view the delimitation area in the present case is, as they say, essentially the same as in that arbitration.

And second, in Newfoundland's conception, the mainland coasts of Nova Scotia face away from the delimitation area

and not towards Newfoundland. And that provides sufficient grounds for excluding them in their entirety.

Take each of these in turn. With respect to the simple adoption of findings from the St. Pierre case, Professor Russell has already addressed the general difficulties. And we can even leave aside for the moment, the fact that the coastlines adopted here by Newfoundland include segments all in Newfoundland that were excluded from consideration in Canada-France. Part of what Mr. Willis identified as Newfoundland's willingness to depart from that case where necessary.

But Newfoundland's coasts aren't really the issue here, because Nova Scotia is on this point generally consistent with Canada-France. We have given full credit to the Newfoundland coasts.

But with respect to Nova Scotia's coast, I would simply reiterate the Court of Arbitration was never asked to consider the relationship between the coasts of Newfoundland and Nova Scotia. And contrary to what Mr. Willis has said, the Court never -- and I quote from his oral presentation -- "decided there was no projection from Nova Scotia into the area south of the French Islands".

Professor Russell has addressed the fact that the St. Pierre case, for whatever odd reasons, stopped at 200 nautical miles. So the maritime area in question cannot

necessarily be the same because this delimitation involves a zone with a different seaward extent.

PROFESSOR CRAWFORD: Does that mean that you accept the -- well speculation is too low a phrase -- but the proposition from St. Pierre Miquelon that there would be no -- just applying purely geographical considerations, there would be no projection within 200 miles?

PROFESSOR SAUNDERS: I believe what they said -- and it is actually critical to the way we take this -- is that they hypothesize two independent states --

PROFESSOR CRAWFORD: Yes.

PROFESSOR SAUNDERS: -- provisioning this arbitration perhaps. But what they said was that in that case those two states would be opposite in their relationship and that therefore, equidistance would apply. And in a situation of equidistance, they did not anticipate that there would be some projection there. But that in itself in a way denies the frontal projection theory and denies the notion that the coastal relationships in this area are the same, because in fact they found that the relationship of St. Pierre was opposite to Nova Scotia, not adjacent.

And actually that brings up a way that Newfoundland has justified this and I think it illustrates the logic of the argument. And I quote from paragraph 211 of their Counter-Memorial.

CHAIRMAN: May I interrupt you for a moment?

PROFESSOR SAUNDERS: Yes, certainly.

CHAIRMAN: We are getting about five minutes from 12:30. I wonder if you can find --

PROFESSOR SAUNDERS: I can find a point within five minutes or so, yes. Thank you, Mr. Chairman. One way or the other. I will just cut it off arbitrarily.

Nova Scotia utterly ignores the relevant coasts identified in Canada-France. Not withstanding the fact that -- and I quote -- "Because the French islands are laterally aligned feature of the south coast of Newfoundland situated mid-way along that coast, the area concerned is substantially the same because" -- because the French Islands are a laterally aligned feature mid-way along the coast? Well I stand to be corrected, and anything is possible in the geography that we have seen this week, but Nova Scotia is not a laterally aligned feature mid-way along the coast of Newfoundland. That cannot be a justification for saying that the two are essentially the same.

What it says is that the two are different. So Newfoundland's logic is that because the two coastal relationships are entirely different the maritime areas involved must be entirely the same. Now this is counter, we would suggest, to common sense.

The last point which I will address briefly before we break, if it is acceptable, is the question of where coasts face. If we can dispense with Canada-France for the moment, the remainder of Newfoundland's argument on the relevant coasts is based on the notion that coasts face in one direction and one direction only. And that that is shown by the perpendicular to the general direction of the coastline. What Newfoundland calls frontal projection.

Once it has been determined that a coast faces in some direction it cannot be relevant outside that area in Newfoundland's view. Thus, in this figure from the Newfoundland Counter-Memorial, the coast of Nova Scotia, the mainland coast, projects in only one direction. A piece of coast one kilometre past the cut off at Canso cannot be counted as relevant to any area east of the perpendicular. It just obviously faces in the wrong direction.

However, if we consider Newfoundland's own theory of frontal projection, there seems to be at least some overlap, as the Tribunal pointed out, between Newfoundland and the coast well along the Nova Scotia side. But then we hear from Mr. Willis and Mr. McRae the first time that this is not absolute. There can be some radial projection, just not for Nova Scotia. And it is not just

overlap, that's not enough, it has to be a significant overlap but an undefined amount, which is a judgment call.

Pardon our confusion, but it seemed to us that the exclusion of the entire coast from Canso on with massive effects for this delimitation was absolute.

And if that is a convenient point, Mr. Chairman, I could stop there and begin again at 1:30?

CHAIRMAN: 1:30.

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

CHAIRMAN: Yes, Professor Saunders?

PROFESSOR SAUNDERS: Thank you, Mr. Chairman, members of the Tribunal. Before the break we were discussing the question of frontally projecting coasts, and the difficulty and subjectivity, in a sense, of determining the overlaps of this type of projection.

But let's accept for the moment, and this is obviously for the sake of argument only, that coasts project in this restricted way and not radially. The factual difficulty here as well is straightforward and is demonstrated in this next figure.

Even allowing, as in this figure, for the maximum interpretation of the supposed change in coastal direction at Canso, there does not seem to be a significant alteration, certainly nothing to justify the drastic consequences proposed by Newfoundland.

And nothing to match the change, for example, on the east side of the Burin Peninsula, in this area, which is also a change in the coastal direction that Newfoundland is using, although we may accept the fronts.

Now in the Canada-France decision on which Newfoundland places so much reliance regarding all matters coastal, the coastal direction at Canso was considered. And what the Court said was the following: "The east coast of mainland Nova Scotia continues in the same direction"

We are not suggesting that this Tribunal is bound by this conclusion, but we submit independently that there is no change in coastal direction of any significance at Canso, a point not apparent in Newfoundland's depiction of the relevant coasts which of course stops at Canso.

Now the relationship between the coasts of the parties, which is the important consideration, is the same after Canso as before. There is no change, no need to dismiss the remaining coasts as relevant.

But what of the law? Newfoundland claims at paragraph 39 of its Memorial, that examples of this general approach abound in the leading cases. But where? Newfoundland refers to the Gulf of Maine and indeed the Chamber did decline to use the outer coasts of Nova Scotia and Massachusetts, as shown here. But apart from the fact

that it was a far more significant change in direction in both instances in this case, the Chamber never actually addressed the issue of where coasts face, nor did it dismiss these coasts for the reasons suggested by Newfoundland.

Rather they were simply excluded as not being part of the delimitation area of the Gulf of Maine with no reference to excluding those that face away from the delimitation area.

PROFESSOR CRAWFORD: And of course the Chamber did that in the prior context of saying that the Gulf of Maine was an essentially rectangular --

PROFESSOR SAUNDERS: Exactly.

PROFESSOR CRAWFORD: -- insertion into a rather straight coastline.

PROFESSOR SAUNDERS: And which was critical to the use of the perpendicular, as well. And as a further factor as well, in that if they had wanted to, it would be very difficult, because these gray lines, which we have added, do not represent part of the judgment, represent the practical limits of any decision that the Court -- the Chamber could have for a line coming out of the Gulf.

I mean the Americans came close with their claim towards Canada, but effectively anything coming out of the Gulf that was going to end up in this triangle which the

parties had determined would be the terminal area of the boundary, had to come through that area. Which meant that neither of these coasts even abutted on maritime areas that were actually going to be part of the delimitation by what the parties had agreed. At the very least it offers no definite indication that this is an approved approach.

Further, we have Tunisia-Libya. In Tunisia-Libya, the exclusion of the coast beyond Ras Tajoura -- if I could have the next slide, please? Thanks. And Ras Kaboudin in Tunisia, it was very important to Newfoundland. And I think it's important particularly to Newfoundland, because this is one case in which for one of the coasts at least, Libya, the change in direction was, though significant, not as dramatic. It is more of a particular -- closer to the Canso situation, although it's still more of a change in direction.

But in the words of the decision, it was the relationship of the coasts to each other, not just to an undefined maritime area, as Newfoundland has it, that mattered. The Court said it was clear there came a point where the coasts did not have a relationship with each other that was relevant for delimitation. No mention of facing coasts or perpendicular projections. Just a change in coastal relationship. And as demonstrated a moment ago, there is no such change in the coastal relationship

at Canso that would justify this arbitrary cutting off of the coastline.

Now the Court had a further issue in mind, and this was raised in a question by Professor Crawford on Monday, respecting the possible impact of the presence of Italy and Malta in constraining the relevant area and affecting the points that were chosen on the coast.

This was a question that Mr. Willis did not really answer. He referred to the area in the east as perhaps being less constrained. Now this figure shows the area in question as depicted by Newfoundland, including Italy and Malta. And here we have the first map in the decision showing not only Italy, but the maritime boundary between them with Tunisia, clearly blocking any possible relevance after Ras Kaboudin.

And at paragraph 20, where the Court first considers the relevant area, there is specific mention of the presence of Malta in the east, which is no real surprise, given that Libya and Malta had in 1976 signed a special agreement to take their maritime boundary to court. But as if that were not enough to get the Court's attention, we had the further fact that the Court had in 1981 ruled on Malta's application to intervene in the Tunisia-Libya case. So I think we can safely assume that they had this in mind. And the Court's selection of Ras Tajoura turns

out to be almost prescient.

As we see here in a figure drawn from the Libya-Malta case in 1985, the relationship between Ras Tajoura on the coast and the actual boundary that was drawn with Malta, is fairly direct.

In sum then, Newfoundland's truncated definition of Nova Scotia's relevant coast has no apparent basis in fact or in law. It's nothing more than an arbitrary selective judgment rooted in the need to minimize Nova Scotia's coast. And yet this definition is absolutely essential to everything Newfoundland has to say about the equity of this case.

Furthermore, we have the interesting theory advanced by Professor McRae on Tuesday, as to why Newfoundland can project from east to west past St. Pierre, while Nova Scotia cannot come in the other direction. I can only think of this as the toe-hold theory. If any part of this south coast of Newfoundland can project anywhere, the rest of the coast comes with it. It's a unit.

Of course, this theory, too, works only one way. As can be seen in this diagram, at least some of the facing coast of Nova Scotia, even the part that is accorded, projects into the area below. Given that there is no real change after Canso, certainly not as much as at Burin, for example, why does not the Nova Scotia coast get dragged in

too? No answer. Apparently, another judgment call.

That, I would suggest, deals with Newfoundland's treatment of the relevant coasts or the critical parts of them. Do they fare any better on the maritime area, the companion piece?

Newfoundland's definition of the relevant maritime area, as shown here, has two parts, a seaward outer limit and lateral limits east and west. Deal first with the outer limit.

For the outer limit, Newfoundland stops at 200 nautical miles, as we have heard. As has already been addressed by my colleagues, this is not sustainable. The Tribunal's mandate is to delimit the offshore areas and that can only be done by a line running to the outer edge of the continental margin. And Newfoundland has asked for such a line as well.

But it also asks the Tribunal, apparently, not to look at the impact of the line that it must draw. And none of Newfoundland's justifications hold water.

There is no difficulty in the international delimitation issues that Newfoundland refers to in its Memorial. This Tribunal is not asked to determine the limits. Just consider where they might be.

Newfoundland refers again to Canada-France. But that case used the 200 mile limit, because the Court was

delimiting a 200 mile zone. The seaward extent of the relevant area matched the seaward extent of the juridical zone in issue. Exactly what needs to be done here, which means going to the outer edge of the margin. And as you see here, the Newfoundland line goes well beyond any possible conception of the 200 mile zone.

PROFESSOR CRAWFORD: It's still the case, Mr. Saunders, isn't it, that the relevant area for the purpose of delimitation has to be those coasts which are capable of having an effect. I mean accepting what you say about the outer edge of the continental margin for the moment, the relevant coasts still have to have an effect on the delimitation of that line in any -- on any reasonable hypothesis. And what I don't understand is how -- how some of your coasts have that.

Certainly, for example, the southeast -- the southwest coast of Nova Scotia --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- beyond Halifax, it is not at all clear what effect that could possibly have on the location of the line. So why is that a relevant coast?

PROFESSOR SAUNDERS: Well if I can come to the actual details of those particular coasts as they generate --

PROFESSOR CRAWFORD: Okay. Fine.

PROFESSOR SAUNDERS: -- but the general point, and we will

come back to this later, is that our view of the relevant area is that it should be based on the overlapping potential entitlements. That the delimitation is a separate exercise from the relevant area and not a pre-determination of the delimitation. But if I may return to that with the slides in the proper order.

What else does Newfoundland have on the 200? It asserts, without proof, that the extension to the outer limits changes nothing. There is no reason to believe they say there would be any significant effect. No reason except the facts, because this is a fairly straight forward claim easily tested.

This figure shows the impact of extending Newfoundland's suggested relevant area using its lateral limits to the outer edge of the margin, as we have estimated it. And, of course, this gives Newfoundland the benefit of those lateral limits. The effect further east is even more pronounced.

The figure also, and I will just in passing say, demonstrates the inappropriateness of using coastal perpendiculars for long maritime areas, because of the narrowing effect, which distorts how it really reflects what's going on further out the further seaward you go. It becomes a bit of a cone really.

But the result, the practical result, is this. Of the

area beyond the artificial 200 mile limit, Newfoundland gets within this area 54,000 square kilometres or so. 99.8 percent of what is contained within its own limits, lateral limits beyond 200. Nova Scotia, on the other hand, gets 130. Not 130,000, but 130 square kilometres or .2 percent.

The area Newfoundland obtains just within this restricted outer area is 70 percent of the total allocation to Nova Scotia within what Newfoundland views as the relevant area.

So in Newfoundland's view, the equitable result for Nova Scotia is an allocation so small that 70 percent of it has no significant impact on the delimitation.

Finally, we would note that this figure also shows the line proposed by Newfoundland crossing out of the relevant area into what would presumably be an area all Nova Scotia's to the west immediately beyond 200.

In the end, there is no basis in law for the use of this limit. And the claim of supposed factual insignificance cannot be sustained.

Yes, Mr. Legault?

MR. LEGAULT: Mr. Saunders, your last comment, I wonder if I could just get you to repeat it. You said that we say that the Newfoundland line --

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: -- once you get into the outer area, gives -- crosses into areas that would be -- and perhaps even before it gets into the outer area -- crosses into areas that would be Nova Scotia's alone?

PROFESSOR SAUNDERS: I shouldn't put it in terms of the determined -- the areas that are outside what it defines as the relevant area.

MR. LEGAULT: Yes.

PROFESSOR SAUNDERS: That's a better way to put it. You are quite right. So the boundary comes down here, crosses over the lateral limits of the relevant area, and off into an area that Newfoundland decides is not relevant to the delimitation. Is that clearer?

MR. LEGAULT: Yes.

PROFESSOR SAUNDERS: Thank you.

MR. LEGAULT: Thanks.

PROFESSOR CRAWFORD: Before you scrap that diagram, which I understand you may be about to do, could you show us which coasts on Nova Scotia would be relevant in terms of the bottom part of the Newfoundland claim line?

PROFESSOR SAUNDERS: Relevant here?

PROFESSOR CRAWFORD: Yes. Which coasts?

PROFESSOR SAUNDERS: On an Article 76 definition in terms of being able to project within those limits --

PROFESSOR CRAWFORD: Yes.

PROFESSOR SAUNDERS: -- it would be, I think, virtually this entire area could reach them from there, but I have to define the relevant coast in connection to the entire area. That is, we don't tie it, one piece of coast to one piece of area, is the problem.

PROFESSOR CRAWFORD: No, but there would be -- there are coasts which would be incapable in the context of generating the area in black?

PROFESSOR SAUNDERS: Yes. That would be this.

PROFESSOR CRAWFORD: Well, yes.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: And further -- and further southwest.

PROFESSOR SAUNDERS: On an Article 76 definition, not necessarily, because the 350 --

PROFESSOR CRAWFORD: Is the relevant area a matter of entitlement or is it a matter of potential overlap under any realistic scenario, having regard to the overall context.

PROFESSOR SAUNDERS: I would argue when you have precise definitions compared to the former fairly loose definitions of the limits, it can be an overlapping area of entitlement, as it is in Jan Mayen.

MR. LEGAULT: Professor Saunders --

PROFESSOR CRAWFORD: Yes, but in Jan Mayen, of course, the areas were constrained by other factors. So the Court

really wasn't confronted with a claim that things which are not in dispute, and which are way off to one side, as it were, are nonetheless relevant for the purposes of proportionality.

PROFESSOR SAUNDERS: Although, as I will show a little later, most relevant areas, as shown in the cases, include areas that are not seriously in dispute.

MR. LEGAULT: They are not areas in dispute?

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: Well it would obviously include areas that are not in dispute. I mean I think any calculation of any form of relevant area -- there are whole areas there that are not claimed by you?

PROFESSOR SAUNDERS: That's right.

PROFESSOR CRAWFORD: And clearly whole areas not claimed by them. That's not the point. The question is whether a particular area of coast could conceivably be regarded as generating an area which the Tribunal might award to one or other party?

PROFESSOR SAUNDERS: That's right. And the reason -- and we will be coming back to this on the Nova Scotia side, as opposed to the Newfoundland, is that we use the definition that we do, is that the overlapping entitlements are capable of definition and they don't constitute the kind of pre-definition that has gone into some of the cases

wherein -- and some jurists have complained of this -- the delimitation is effectively over the point you define as the relevant area, particularly the relevant coasts. And certainly that's the case with Newfoundland's definition.

Now finally, Newfoundland seems to feel that this is an area that raises doubt, it's a difficult thing, or it could raise distortion, leading to unjustified definitions in the outer margin. They can only note that in 1977 in its regulations, Newfoundland had no concerns about setting its outer limits with the data they had at the time. In fact, shown in comparison with the line we have here, very similar in some areas; beyond it in others. And in the White Paper that accompanied the introduction to the regulations, the government specifically referred to the ongoing negotiations, the Law of the Sea Convention -- Conference as the basis for entitlement.

PROFESSOR CRAWFORD: Sorry. The red line there is --

PROFESSOR SAUNDERS: Transferred from the other diagram.

PROFESSOR CRAWFORD: This is the Newfoundland view of the outer edge of the continental margin?

PROFESSOR SAUNDERS: No. Sorry. The red line is our view of the outer edge on today's date. The black line, the shaded area, is Newfoundland's view.

Now the second element -- put aside the outer limit -- the second element in Newfoundland's creation of a

relevant area is equally divorced from the legal definition of the offshore areas, and from the cases that Newfoundland offers in support.

Newfoundland defines the breadth of the relevant area by perpendiculars to what it identifies as the general directions of the coast, and this is simply the operational expression of their concept of frontal projection. And, of course, Newfoundland uses as the starting points for these perpendiculars the points at Race in the east and Canso in the west, that it had already defined as the limits of the relevant coasts.

Now that is a simple method, as Newfoundland suggests, but simplicity alone is not enough. Newfoundland does claim that a similar method was adopted in Canada-France, but in fact that case did not use perpendiculars at either end, as can be seen here in the comparison of Newfoundland's methods with the Court of Arbitration.

In the east, it comes close. It was a line due south, although it would be the darker shaded area, but in the west it didn't even attempt a perpendicular. It joined Canso with a point at sea where the 200-mile arcs intersected, based on the limits of the zones.

PROFESSOR CRAWFORD: Sorry. What was the point -- could we come back to that diagram?

PROFESSOR SAUNDERS: Yes. Could I have that back, please?

The point was that in the -- in this area here, for certain, what they had done by their definition, was, in fact, go to the legal limits -- the intersection of the 200-mile arcs from Cape Breton and St. Pierre, which is not based on a perpendicular or frontal projection. And, of course, Newfoundland's definition of the frontal projection of Canso adds quite a bit more maritime area to Nova Scotia's area.

Now it was done, this method, in Eritrea and Yemen, but with very enclosed areas, as the situation of opposition where the choice really wasn't significant. All of this is addressed in detail in our Counter-Memorial, and I don't think we need to linger on it here because the more fundamental problem is that there is no authority offered for using the notion of unidirectional frontal projection as the basis for determining relevant areas.

And, of course, there could be no authority of relevance to an Article 76 determination as there has not yet been a determination or delimitation involving an Article 76 claim. But even if we look at the shelf and water column cases, there's no help. To the limited extent that the concept has been used at all, as in St. Pierre, for example, it has been at the stage of delimitation, not in determining the relevant area. As to

its use in the definition of relevant areas in the situation of seaward adjacency, really nothing.

St. Pierre, we've already addressed. The relevant area could not have been based on seaward projection of a perpendicular. St. Pierre would only have had a very small relevant area if that were the case. And the Gulf of Maine, no, the area was effectively defined by the establishment of the triangle. And in any event, the decision itself was contrary to the idea of unidirectional frontal projection.

As is shown here, the Nova Scotia coast from Whipple Point to Cape Sable -- the last part of the relevant coasts could not, in Newfoundland's version, project into the areas that the Chamber deemed relevant. The United States, of course, could, and this was the point the United States made, but this theory -- the primary coast theory -- was advanced by the US and rejected by the Chamber.

Tunisia-Libya, the Court does not apply a perpendicular coastal projection. Newfoundland infers it from nothing more than the choice of coast points made by the Court.

Denmark-Norway, a more recent application of the law, no, the Court in that case explicitly used the legal definition of the parties' potential entitlements as the

basis for the relevant area, and based it on a radial projection.

So where zones are based on radial projection from coast seaward, the frontal projection theory cannot define the relevant area, and the basic problem was noted in a different context by Professor Weil in his dissent on St. Pierre, and he was talking about delimitation at this point.

So shown in this example, and as was pointed out by Professor Weil, the coasts of Newfoundland here and here taken on this -- oh, sorry, I should do it this side first -- here and here on this strict unidirectional projection, cannot project into that area. There's a gap, an unclaimed area, in theory. In those areas here, they only project in radially, or at an angle, the same as this coast does. Neither coast has priority unless one is assuming proximity, and adjacency has even disappeared from the Article 76 definition of the shelf, if it was ever dominant, and Newfoundland rejects it, in any event, with its line. But Newfoundland is really asserting that one coast is simply defined as dominant, a term used repeatedly by Newfoundland.

But, of course, Canada projects its zones by arcs, which can only imply radial projection, and as is also required by the distance criteria in Article 76. But in

any event, Newfoundland now concedes that there can be radial, or, indeed, even over land projection. It is all, apparently, as they call it, judgment.

Now Mr. Colson, when he mentioned the St. Pierre case, said that the Court found the south coast of Newfoundland to be dominant, and, of course, it is exactly that approach that Newfoundland wants adopted here. He then quickly went on to say, and I quote, "And I don't want to get into a primary/secondary coast discussion", and I'm sure he does not, for good reason. For it is only by reference to notions of primary coasts which are, by definition, dominant over any other coasts in the area, that any of Newfoundland's contentions can be sustained.

PROFESSOR CRAWFORD: But it is a reasonable reading of St. Pierre Miquelon that the Court treated St. Pierre as, in effect, part of the Newfoundland --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- set up, if I can use --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- a deliberately vague word, and basically rejected the relevance to any significant degree of any part of the Nova Scotia coast.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: Is that a fair reading of --

PROFESSOR SAUNDERS: I think that's a fair reading, although

I think we have to read St. Pierre carefully in that respect. I mean the operative paragraph -- phrase, if I recall, along the lines of "This is how we solve the problem. This is how we deal with this particular..." -- I think Professor McRae called it "peculiar facts of this case." St. Pierre is, and I take the Canadian view on this, part of the coastal set up of Newfoundland. Nova Scotia isn't. That, in a sense, is the end of the comparison, for all practical purposes. Yes, Mr. Legault?

MR. LEGAULT: Professor Saunders, could you explain to me -- I think you've done so in part, but in my usual slow way, I had to catch up with you. What is the significance of the so-called unclaimed area?

PROFESSOR SAUNDERS: The significance --

MR. LEGAULT: It's very interesting. There's an area that Newfoundland doesn't claim, in fiction. In fact, of course, it does.

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: What does that have to do with the concept which it seems to me is the real concept behind the concept of the relevant area of the coasts that could influence the delimitation? There's no way that I know of, and please enlighten me if I'm wrong, that that eastward facing coast of Newfoundland can influence this delimitation.

PROFESSOR SAUNDERS: The eastward facing coast here is included -- this is purely to demonstrate the problems with radial -- or frontal projection. This is not to indicate that in this particular delimitation this is how it has to be done. No, that wasn't the point. But the point here is simply to illustrate that in theory, it doesn't work as a means of determining where coasts generate entitlement.

MR. LEGAULT: Being one of those who had something to do with the first introduction of the concept of radial projection, I must say this whole debate around frontal projection and radial projection has at least an element in the real world of schoolmen's debate, Duns Scotus or Thomas Aquinas, let's say, or Talmudic scholar's debate. They are fascinating stuff, but I don't really see its practical application here. What I think my colleagues and I are looking for is what coasts affect the delimitation; what coasts can be said to have some effect on the delimitation?

PROFESSOR SAUNDERS: That's a very fair way of putting it. I would answer the first part of that, if I can, separately. What is the effect of this in this delimitation? For Newfoundland, the use of this theory has the effect of excluding virtually the entire coast of Nova Scotia. That's the practical effect that we're

dealing with and why we have to address this. Now, if we're putting frontal projection aside and going to what the practical effect is on measurement, then I think the answer is quite straightforward. You should, where possible, measure the potential entitlements of a party based on the legal definition of the zone that is in question.

If I can use an example, if we had been delimiting the first of the 200 nautical mile zones -- that may be one of your first tasks, as well -- and the response of the Tribunal was, well, you can't do that. This thing isn't within 12 nautical miles. There's a disconnection between how you're supposed to measure, not just in seaward extent, but how you're supposed to measure the zone from one to the other. Our point here is that the way in which you measure the relevant area ought to be related to how you measure the zone itself. It can't be anything else in the end.

MR. LEGAULT: I think we have to make -- and I don't mean to be making pronouncements from my chair -- again, just trying to reach some understanding, because as you pointed out very rightly at the beginning, this is where boundary delimitation law enters the field of metaphysics.

PROFESSOR SAUNDERS: Absolutely.

MR. LEGAULT: Now the coasts that can affect the

delimitation --

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: -- that's one thing, and that's not too hard to understand. It's when you get into the other use -- sometimes other use of the relevant area for a test of proportionality --

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: -- that you get into real difficulties, and if I may say so, a lot of creativity on the part of learned counsel in every case that has ever been decided by any tribunal whatever. And it's the confusion, I think, between those two uses of relevant coasts that contributes to making this so difficult to see, so anything you can do to help this poor soul out of that difficulty would be immensely appreciated.

PROFESSOR CRAWFORD: There's a prior question. I don't want to -- these graphics are wonderful, but they may tie you down to a particular order of presentation in such a way that you have to postpone answering a question. Isn't there a serious question in this case whether all this business about relevant areas is terribly helpful? And it creates new debates, and it may be this -- metaphysics can be defined from a legal point of view as the creation of still further debates, which are, essentially, even less soluble. And I mean the Court in the last two maritime

boundary cases, and literally not in situations quite like this, didn't give any areal indication at all. It obviously took into account relative lengths of coasts as a factor, as well as some other factors, but -- and it referred in general terms in Qatar-Bahrain to the areas allocated --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- but it didn't actually give any proportion at all. Mr. Fortier might in his closing remark tell us from -- if he can, what the areas actually were because the Court studiously --

PROFESSOR SAUNDERS: It's not entirely clear.

PROFESSOR CRAWFORD: -- has failed to do so. But are we moving in international delimitation law away from this idea of strict arithmetical proportion, even for the purposes of testing? And if that's so, why does it really matter? Mr. Legault asks, and I endorse his question very strongly. Tell us the coasts that are capable of effecting the delimitation. You've shown us a graphic which indicates that coasts beyond Cape Canso are capable of effecting the delimitation out to the outer edge of the continental margin. Show us how much further we need to go to cover those coasts.

PROFESSOR SAUNDERS: Okay. This, perhaps, is where is, I think, some of the confusion. I agree the distinction

between using the relevant coasts to define a metaphysical geographical structure to the delimitation is where the greatest abuses take place, as it affects the delimitation, trying to effect the delimitation by coastal interpretation, which is essentially what Newfoundland's case is built upon. However, for the relevant area, it is possible to move towards a more quantitative approach of the definition, and let me come to a moment whether that's necessary, which is the part of your question. I think I've got three questions going here at the moment.

The definition of the relevant area need not necessarily be just those coasts that affect the delimitation at the end of the day.

It may, for example, as an inclusion of the inner coast of the Bay of Fundy, be an attempt to do what the -- both the Court of Arbitration of St. Pierre, and the Court in Tunisia-Libya said, which was to compare like to like. The difficulty -- and this in the proportionality phase, which is the only use that we're making of proportionality here. Newfoundland uses it both as a sword and a shield.

But if you're using proportionality just as a test of the equity of the result, and no it's not mandatory, but it is an option which counsel felt it might be wise to prepare for. If you are doing that, then the best reflection of the relevant area is that which gives a fair

comparison of how the two sets of coasts generate, and the more micro, the more microscopic you make your selection, the more likely it is you've predetermined the delimitation by the more subjective and metaphysical exercise of choosing the relevant coasts. And that's the essential problem.

MR. LEGAULT: Mr. Saunders, I'm not debating with you. In the Gulf of Maine case, the question of the coast of the Bay of Fundy arose once. Only once. And it wasn't so much in terms of defining a relevant area. In fact, the Chamber never used the term "relevant area" according to my recollection, even once.

PROFESSOR SAUNDERS: Delimitation area.

MR. LEGAULT: It did use -- it did use the term "area of delimitation".

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: And it didn't actually draw those lines down to the triangle, it suggested that that was the area of delimitation was in that area, but without drawing the lines. Now, that's a perfectly understandable thing to do. And it doesn't raise any problems in terms of relevant area. It -- what the Chamber said, essentially, was they -- you can't exclude the Bay of Fundy. Thank heavens the Chamber did say this. You can't exclude the Bay of Fundy from the Gulf of Maine.

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: It's part of the Gulf of Maine. Ergo, you count the coast, not only on one side of the bay, but hallelujah, even on the coast of Nova Scotia facing New Brunswick, that too, became a relevant coast, and evened the odds for Canada, of course, but I don't see the relevance of that in this context.

PROFESSOR SAUNDERS: Well I think it's relevant if you carry it through on the point that I just made, and we might not want to make this. Mr. Colson's not back yet, is he?

Might not be something he wants to be reminded of.

MR. LEGAULT: And I'm not going to interrupt you again.

PROFESSOR SAUNDERS: No, no. That's -- let's take it from that point. Why were those coasts even in issue? They didn't affect the delimitation in that sense. What they did, was they reflected a fair rational pro Canadian approach to what the coasts were that ought to be compared to each other. And when you compare like to like, on a broader basis often, you get a better assessment of really what the proportionality test, in its passive phase, not as an active use of choice of method, but as a test of equity, you get a better description the broader you go. Not necessarily narrower, because if you do it narrower, if you make the choices Newfoundland has suggested, to chop the coast first, then you undoubtedly end up making

delimitation decisions before you have considered the delimitation. And that's the essential problem.

But what we're trying to do, and maybe I should skip ahead to what is obviously the area that interest, if we've agreed that Newfoundland's method makes no sense, in terms of frontal projection as an excuse for how to exclude Nova Scotia's areas --

MR. LEGAULT: I said I wasn't going to -- I can't help myself.

The Nova Scotia -- the Newfoundland theory is one thing. Its application is another.

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: Thank you.

PROFESSOR SAUNDERS: And I think the answer, in a sense, from this description is neither the theory nor the application work well.

If I can turn to Nova Scotia's definition of the relevant coasts scenarios. What does Nova Scotia submit is the proper approach to the determination of the relevant coasts in the maritime areas in this case, if we need to do it? And if we don't need to do it, and there's actually agreement on that, I would be grateful. But there are two simple propositions at the heart of Nova Scotia's approach. Leaving aside what it looks like, which is the more difficult issue.

First, the maritime areas relevant to a delimitation are defined as areas in which potential legal entitlements of the parties overlap. This requires the determination of the maximum potential entitlement of each party, and the overlap between the two.

Second, the relevant coasts should be determined as those which can be seen as generating the area of entitlement.

Now, the first point is the fundamental one, because delimitation is at heart the division of those areas which may be claimed, or might fall to either party. And what can be claimed by other party can only be understood by the application of the legal principles that define the zone. So, if you're defining a 12 nautical mile zone, you have to use 12 nautical miles as the basis of that.

To do otherwise divorces the delimitation from the legal basis of entitlement, which we agree we shouldn't do.

Now this approach, in a particular context, form the basis of the delimitation -- of the definition of the relevant area in the Jan Mayen case. Said that in maritime boundary cases there are areas of overlapping entitlements, in the sense of overlap between the areas which each state would have been able to claim had it not been for the presence of the other state. It was this

area --

MR. LEGAULT: Professor Saunders --

PROFESSOR SAUNDERS: Yes, Mr. Legault.

MR. LEGAULT: -- I'm sorry. Is it correct that there were three areas identified in Jan Mayen, a relevant area, an area of potential overlapping entitlement, and an area of overlapping claims? Is it also correct that in the end, the decision of the Court took the overlapping entitlement area into account, for reasons of perspective, only because one party in that case had claimed the maximum entitlement of 200 miles? That was my reading of the case.

PROFESSOR SAUNDERS: Well, they stated it more broadly than that. They did say that, in fact, this concept of overlapping entitlements was, in their words, the basis of the principle of non-encroachment in the North Sea continental shelf cases, which is fairly broadly stated, not limited to those particular issues. And it was the area of overlapping entitlement that they adopted as the relevant area.

MR. LEGAULT: No, it was not. The relevant area, according to the definition of the Court, was the area that had been proposed by Denmark, in order to define the eastern and western limits of the delimitation.

PROFESSOR SAUNDERS: We will return to this, if we may.

We'll actually get the passage, if I may go on?

MR. LEGAULT: Yes, please.

PROFESSOR SAUNDERS: According to Newfoundland, Nova Scotia contrives an unprecedented notion of overlapping entitlements as the basis of its relevant area. Unprecedented, if you don't count the Court of Justice, because if we can assume for the moment that we go along with the ICJ, and not with Newfoundland, the real question is clear. What is the area within which the legal entitlements of these parties overlap?

And the question can only be answered by determining the maximum areas of potential entitlement of each party.

That determination must be made by reference to the legal definition of the zone in question. With some reference to it, at least. And the offshore area is the legal zone in question here, and in particular its seaward limits.

Now, I don't think I'm going to have time to go through an Article 76 definition at this point, if that's acceptable. This point has already been addressed by Mr. Fortier.

The parties are agreed that the limits of the offshore areas are set by legislation at the outer edge of the continental margin, and must be defined by the application of the principles and criteria in Article 76, the 1982

Convention. And this is precisely what Nova Scotia has done. It has applied the objective criteria found in Article 76, not the purely subjective, and they are purely subjective, notions of frontal projections, and where coasts face to determine the potential legal entitlements of the parties. And thus the overlap between them.

Now the application of Article 76 is set out in Appendix "B" of the Nova Scotia Memorial. I'm not going to go through it. I would also note Newfoundland has not challenged, or even really addressed Nova Scotia's application of the technical criteria in the case.

The definition in Article 76, and adopted in the Accords, incorporates no notions of unidirectional frontal projection. The use of 350 nautical mile limits, 100 nautical mile lines on the 2500 meter isobath, are all distance limits and can only be understood as projections in all directions from the coast.

And of course, that's the approach that's being taken by the Commission on the limits of the continental shelf.

And Mr. Willis on Monday referred to the 350 nautical mile outer limit as a maximum. He may not have meant it this way, in fact, but I want to be clear on one point, the 350 mile limit is one of the constraints that can be applied. The other is the line 100 miles beyond the 2500 meter isobath. Except on submarine ridges, states can use

either or both of these measures.

Now the results of the application of Article 76, they said, are shown in the combined entitlements of the parties. If I could move ahead to slide 36? One more.

PROFESSOR CRAWFORD: Thirty-six?

PROFESSOR SAUNDERS: In our own internal figures. Sorry.

But I would note that the limits, which we're going to come to, the limits of the potential claim here, the dark green, are those areas done on the measurements, the precise distance and geomorphological measurements that are set out in the convention, and in the guidelines that have followed, that can be projected from either or both coasts.

This area certainly looks large out here, and it certainly reflects the large continental shelf that Newfoundland gets. I would note that this area of overlap, which is delimited, and I'm coming to those coasts in the northeast, and in the southwest, was not done at random. But because Article 76 allows projection only through submarine areas, not through land. And that's the northern limit at which any point in Nova Scotia can project effectively on line of sight through the land mass, or past the land mass of Newfoundland.

The same exercise was conducted for -- yes, Professor Crawford?

PROFESSOR CRAWFORD: So you are including Sable Island?

PROFESSOR SAUNDERS: Yes. Although if you remove Sable Island, the projection goes from the main land, it removes about 59,000 square kilometres.

PROFESSOR CRAWFORD: Because you go from the southern -- southwest --

PROFESSOR SAUNDERS: Yes. Exactly. It doesn't affect the overall propositions.

I would also note -- now let's -- actually, if I could move to relevant coasts?

It's Nova Scotia's submission that the relevant coasts are those from which the overlapping maritime areas are measured according to the legal definition; that is the coasts that can be seen as generating those areas. And for most of this maritime area, on the precise distance criteria that we're operating on, the results are clear enough. All of the southern coast of Newfoundland is engaged, and the coast of Nova Scotia from Cabot Strait to Scatarie, and down to Cape Sable, as well as Sable Island, although we don't count the distance for Sable Island, in any event.

The two small sections that have raised comment, although it is mentioned in the Memorial here and here, are not significant. But I will address them.

These are the two sections, the only two sections of

this definition of relevant coasts that are not based on measurement, by defined criteria. We have to admit some subjectivity in choosing those coasts, as we do.

Ironically, Newfoundland's entire coastal selection is subjective. It's quite exercised about it. Says that it's inexplicable to include those, and there's no coherent basis to the entire approach. And in fact, the inclusion of those coasts was explained in the Memorial. In both cases, the coasts were included simply to reflect the fact that because the projection went past the land mass and above, some kind of credit had to be given. The end points of those coasts are the points closest on each side to the end point of the zone. But you could choose another one.

PROFESSOR CRAWFORD: I just wonder if the whole exercise isn't -- and I'm not expressing any concluded view -- but whether the whole exercise isn't, as it were, being completely loosed from its moorings. The point of determining relevant coasts and relevant areas is in order to be able to check that the eventual delimitation is, broadly speaking, equitable. And there is at least debate about calculations that come up with very precise measures of equity, because one has the distinct suspicion that they must have been fixed.

And I'm including in that the statements in the St.

Pierre and Miquelon case which were uncannily close. Except in very confined areas, as in Yemen Eritrea, you would expect that there will be some discrepancies. Unless they are gross you would think that what looks in general like a fair assessment shouldn't be disproportionate. And the more so if the assessment goes out to the outer edge of the continental margin where there are vast spaces concerned.

I mean, our concern is with two disputed claim lines which can be drawn and we can surely having regard to the nature of the entitlement you can work out which coasts are capable of affecting the choice between those claim lines.

PROFESSOR SAUNDERS: Well actually --

PROFESSOR CRAWFORD: Isn't that a much more confined area than the one you have shown?

PROFESSOR SAUNDERS: It certainly would be, Professor Crawford, and that's exactly the problem Nova Scotia is facing in this case. The line we have isn't a claim line. The line we have is a line that Nova Scotia has lived with for quite some time and wasn't in the position really of making the kind of exaggerated claim that Newfoundland has been able to prepare for litigation. So in fact, simply using the comparing claims, which is a traditional sort of approach in delimitation, doesn't suit the purpose, in our

view.

PROFESSOR CRAWFORD: But -- well, you could put yourself in the -- you may say in the position of Jan Mayen where the offshore state, Norway had perhaps been moderate in its presentation of the case although by implication at some level the Court obviously thought the two states' positions had been reasonable.

It is difficult to think of any claim line that you could have made that -- in the circumstances where you might have gone a bit further and there may be some room for movement, but I mean, you couldn't have swung that much more room than it has swung now.

PROFESSOR SAUNDERS: But again, having made a compromise to have an exaggerated claim on the other side defined as the basis for the delimitation area is essentially playing that game. And I think that's very dangerous. Do we need to define relevant areas in every case? No. But we certainly had to in this case if only in response to the kind of claim that Newfoundland is making, which is entirely based on the notion that a micro relevant area can be used as the basis of assessing the equities in its entirety. We are prepared to look at other bases of equity for determining the equitable result. Newfoundland is not.

PROFESSOR CRAWFORD: You are applying a definition here of

what areas could have been claimed if the other state wasn't there.

PROFESSOR SAUNDERS: That's right.

PROFESSOR CRAWFORD: But in fact the areas you are positing are not merely -- if the other state wasn't there but if the United States wasn't there and New Brunswick wasn't there and so on. I mean -- because if the United States wasn't there you could have gone further south. I mean, I just -- the whole thing.

PROFESSOR SAUNDERS: Yes. Newfoundland raises that, but two things. We have to use Article 76, because that is what the offshore areas mandate, so that is the basis of the entitlement. Now the fact that it looks too large is not really an answer. However, if the question of projecting to the south past the United States, that's already built into the Accord definition. Certainly on the Nova Scotia side it uses the US boundary as part of the definition. And in any event, the Accords operate entirely within Canadian jurisdiction. And that's all. They can't go any further.

If I can answer -- I have been passed the judgment in Jan Mayen. The passage on which we are relying refers to the area of overlapping claims, which is of obvious relevance. It adds that but maritime boundary claims have the particular feature that there is an area of

overlapping entitlements in the sense of overlap between the areas each state would have been able to claim had it not been for the presence of the other. It is clear that in this case a true perspective on the relationship of the opposing claims, and the opposing entitlements is to be gained by consideration of both the area of the overlapping claims and the area of the overlapping potential entitlement, which was larger.

In sum, Nova Scotia has defined both the relevant area and the relevant coast by the legal definition, which though it may look different, remember, has never been done before. This is the first time one of these has had to be done.

The definitions derived from the Accord Acts and Newfoundland's response is essentially nothing.

CHAIRMAN: We have asked you a lot of questions and if need be, we will cut down the period of time of our break. You are the only one to judge that but I wouldn't want you to rush your presentation too much.

PROFESSOR SAUNDERS: Thank you. Well I will move it along, if I can, Mr. Chairman.

Newfoundland's response, Mr. Chairman, is what you might expect in regard to a brand new claim. And I suspect it is much what people -- the way people responded to some of the earlier continental shelf claims as well.

First and foremost we get the mandatory shock and outrage, terms Newfoundland employs include bizarre and infinitely elastic, in the realm of science fiction. Extravagant to the point of fantasy. Grotesquely inflated. And my own favorite, bloated. It fits with the gastronomic theme of the week.

Now while I enjoy a string of colorful pejoratives as much as the next person, they don't really substitute for an actual argument. And that's what Newfoundland doesn't actually provide. For when we consider Newfoundland's stated objections to Nova Scotia's determination of the relevant area, they don't amount to much. And they completely fail to address the fact that this entitlement has to be defined under Article 76, which is a whole new ballgame.

Newfoundland claims yet again that we have failed to apply the relevant area as determined in Canada-France, to which the reply is, of course we didn't. It doesn't apply.

Newfoundland asserts it cannot fathom what principles were applied in determining the relevant area. To quote, "would mystify any international lawyer attempting to apply the recognized principles". Or any international lawyer who had not read or who refused to apply Article 76. We provided appendix B, if there is information

missing it could have been sought in discovery.

We have the claim, it has already been addressed, that it would run through the United States. In fact Nova Scotia's claim would run up to the Arctic. Well of course it can't. Article 76 projects through the submarine prolongation of a state, not over land mass. Only Newfoundland coasts do that.

CHAIRMAN: You are not complaining that they are outdoing the dramatics on your side?

PROFESSOR SAUNDERS: Yes. As the soul of understated discretion I can't imagine what you mean, Mr. Chairman.

Now the overlapping entitlement approach in the Jan Mayen case doesn't assume -- require parties to assume that the other state isn't there. Just that it doesn't have a claim. We are told more generally -- and I think this is the important point and it may address some of the Tribunal's concerns -- remembering of course that our primary reliance is not on proportionality, Newfoundland's is. Only Newfoundland relies entirely on proportionality, which is an elastic concept, to define the equity of its result. We have other grounds.

We are told that Nova Scotia has contrived the definition of the area. That it operates from no objective basis for the determination of the relevant area. But we couldn't contrive it because we applied

criteria which Newfoundland can challenge, and they haven't done so.

The definition requires the application of objective criteria defined in the law to facts of geography, geology and geomorphology. We applied them.

The Jan Mayen case, according to Newfoundland, only applied in that case because of the precisely defined overlapping 200 mile arcs created by the presence of the opposite coasts. But again, the ICJ was quite explicit. They said that the overlapping entitlements notion was the basis of nonencroachment in the North Sea cases.

And the point the Court is making is clear and it perhaps relates back to what the President of the ICJ was saying recently, it was raised the other day. Earlier attempts at defining areas of overlap were necessarily vague, general and subjective. We are moving into an era particularly with the definition of the limits that is more precise.

We can do that because we have definitions. But the earlier definitions, as best as they could, were all aimed at trying to determine where areas of entitlement overlapped. In the Jan Mayen the same principle was applied, but now using a 200 mile zone. In the present case, the same principle applies, but now using the Article 76 definition.

But the final area of disagreement -- and this perhaps indicate the fundamental difference on the purpose of the relevant area concept. Newfoundland claims essentially that it's too big. Like a mathematician looking at the equation two plus two equals four and deciding that four is just too big, it ought to be three. They ignore the fact the area is a result of systematic application of criteria. It's an Article 76 definition.

But there is another side to the complaint. Newfoundland dismisses the depiction on the basis that it includes areas that could not in any realistic result fall to Nova Scotia in the east or Newfoundland in the west.

There is no possibility of entitlement to areas lying, in Newfoundland's words, directly in front of the territory of neighboring states. But it is clear even from a cursory consideration of the cases that where the relevant areas have actually been defined, and they are not always, that's not the case.

There was no serious chance that areas in the Bay of Fundy, particularly internal waters or down in the coast of New Hampshire were going to part of an award in any event. And in St. Pierre, again, there was no possibility areas immediately off Cape Race could be included as part of any award to St. Pierre.

Jan Mayen, the extent of the relevant area well beyond

any actual claim made by Norway for Jan Mayen and those areas closest to the coast of Greenland could never have been accorded to them. The list goes on, but the point is clear. The relevant area is not to be defined on the basis of a predetermination of the outcome of the delimitation. The delimitation is a distinct and separate operation.

The purpose of defining relevant coasts and areas, if it is done, is to permit an assessment of how the maritime areas accorded to each party compare to the coasts that can be legitimately associated with those areas.

Newfoundland assumes a relevant area is better if it is smaller. And indeed there must be some limits placed on the scope. But the limit should come from the law. And an excessive narrowing of the relevant area accomplishes only one thing, a distorted preselected view of what is actually being done in the delimitation. And that's what they said or they meant, I think, when they said to compare like with like. Get the area broad enough that you show what kinds of maritime areas are being allocated to the coasts of the parties on each side, Tunisia-Libya and Canada-France. Like to like.

PROFESSOR CRAWFORD: Mr. Saunders, the Court didn't, having defined the relevant area that way, the Court didn't actually make any use of it.

PROFESSOR SAUNDERS: Well in -- you could argue in St.

Pierre they came very close in the --

PROFESSOR CRAWFORD: No, no, I'm talking about Jan Mayen. I

mean, I think Jan Mayen is recent ICJ jurisprudence --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- on maritime delimitation and is

pretty important, if that's what we are doing. Can we

have Jan Mayen back?

PROFESSOR SAUNDERS: Perhaps. Yes.

PROFESSOR CRAWFORD: I was missing it. The Court, having

defined the relevant area that way didn't actually make

any use of it. All of the focus was on the area of

overlapping claims subsequent to that.

PROFESSOR SAUNDERS: Well subsequent. But they used it for

comparison purposes. Now here, again, I would argue that

overlapping claims is peculiarly inappropriate in this

case given the factual background. But the definition of

the relevant area is for a purpose to set the context.

For the same reason in fact that we do argue, although

Newfoundland denies this entirely, that the total offshore

areas are relevant in this case to some extent.

PROFESSOR CRAWFORD: What you are arguing now having -- in

the second round is that the -- is that your claim line

represents a reasonable perception of a -- of the

equities --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- actually taken by the parties? That being so, it may well be that your claim line might have been somewhat more extreme than that, but it wasn't going to be a lot more extreme than that?

PROFESSOR SAUNDERS: Oh, I had moments in my dreams.

PROFESSOR CRAWFORD: Well -- so, I mean, bearing in mind that we can apply the concept with a degree of flexibility on any view, why do you say the area of overlapping claims isn't a more helpful criterion? My problem -- and I don't know whether my colleagues share it -- is that if you come up with an area of potential entitlements as big as you have, it ceases to have any value whatever for any purpose.

PROFESSOR SAUNDERS: Yes. No, that's fair enough. The first question, if I can go back, or maybe it's the second -- the largest -- the larger part of the maritime area, whether in fact the overlapping claims are the relevant areas, generally, argue in the case, as we have shown, the overlapping claims don't become the relevant area. They didn't in Gulf of Maine and they didn't in St. Pierre. In St. Pierre, it went broader than the French claim to consider the relevant area.

Relevant area for the purposes of perhaps choosing a method might be narrower. But relevant area for the

purposes of assessing the outcome ought to take into account as much of the coast as possible, and the actual areas accorded. Because what you are really doing, and with that use, not the first use of relevant area is determining what the outcome has been in general. And if you have pre-selected the limits of the Maritime area, you have essentially pre-determined it. Choosing the relevant claims, I would argue, is even more dangerous, because you just guarantee what the parties are going to be coming to court with. And some could argue that is what has happened.

But in any event, the Terms of Reference do define the relevant area in a sense. They are the offshore areas. But it's the offshore areas that we have to operate from.

Mr. Chairman, I don't know if this is a good time to take a break? If there are any -- there may be further questions, in fact, which I would be happy to have on this part of the presentation. The next is a bit of a break, because it moves to how the parties have actually conducted delimitation, leaving aside the relevant area. I would reiterate before I leave that, Nova Scotia does not rely on the relevant area to assert the equitableness of the result. The primary basis of the equitableness of the result in this case is in the history and the conduct.

CHAIRMAN: What are you looking for, a five-minute break?

PROFESSOR SAUNDERS: Five minutes. Is that enough? Yes.

Thank you.

(Brief Recess)

CHAIRMAN: Yes, Mr. Saunders.

PROFESSOR SAUNDERS: Yes, Mr. Chairman. Thank you very much. My next -- next task -- I must have missed the committee meeting that did speeches, I guess, I think -- is to review the manner in which the two parties have actually effected their proposed delimitations, building upon the other presentations we have already had. And, of course, referring particularly here back to Newfoundland's submissions.

At the outset, I want to emphasize I am not going to be discussing or relitigating Gulf of Maine, nor the Canada-France boundary. Although at times, the Tribunal may be forgiven for thinking that we are engaged in that exercise.

Newfoundland has essentially in its case given us a hybrid of St. Pierre and Gulf of Maine. St. Pierre for the geography. Gulf of Maine for the methods. I can't ~~decide whether we should~~ call it the St. Pierre and Maine case, or perhaps the Gulf of Miquelon boundary. But it's one of the two. But we are not arguing that. Nor in fact are we here to litigate Tunisia-Libya. We see that cases authority. The proposition that conduct is an important

consideration in an equitable delimitation. And it can be a central proposition. But not for the simple adoption of concession lines wherever you happen to find one.

It's clear by now the two parties have adopted fairly fundamentally different approaches to the delimitation. Nova Scotia has proceeded from the facts of this case, including in particular the legal definition and origin of the zone in question.

A relevant area, arguable although it may be, is defined by reference to the definition of offshore areas found in the Accord Acts.

And the other relevant circumstances, which are particularly important to us are tied to the unique character of this dispute. Extensive history of conduct, and the origin of the zones as a negotiated entitlement.

Newfoundland, on the other hand, seeks the delimitation of a zone, which we say does not exist. And which is mentioned nowhere in the Terms of Reference or the legislation. It defines the relevant area by methods that bear no relation whatsoever to the legal definition of any zone in question here, or indeed, even to a continental shelf. And it argues, in our view, disconnected from both the history of this dispute, and the origin of the offshore areas and the Accords, that the only circumstance of any relevance here is coastal

geography. Why? Because they say the entitlement is an ab initio inherent right rooted in the seaward projection of the sovereign jurisdiction of the provinces. The clear words of the legislation and the Supreme Court of Canada notwithstanding.

Given this beginning, it would be too much to expect Newfoundland to change tack when it comes to the selection of equitable criteria and practical methods, or testing the result they propose. And indeed, they don't.

Newfoundland effects a delimitation, the same selective approach, in our view, divorced from the facts and the law, with which it determined its coasts and the maritime areas.

Applying the general norm to the facts of this case would involve the selection of criteria. Equitable criteria that reflect the relevant circumstances and methods designed to reflect those criteria.

Newfoundland, on the other hand, borrows bits and pieces of criteria and methods used in different factual situations to cobble together what we see as the result it wanted in this case.

I am going to turn now to a consideration of how Newfoundland has gone about this delimitation, followed by a quick examination of the competing approach suggested by Nova Scotia, really in summary.

In each case, this requires consideration of the selective -- selection of equitable criteria, the choice of practical methods, which are to give effect to those criteria, and the testing of the equitableness of the result, with a few other preliminary issues thrown in.

Now to begin with Newfoundland's proposed line, we heard something on Tuesday that had been obvious, but never stated so clearly, and that is the almost complete reliance of Newfoundland on the Gulf of Maine case for the practical methods used in its proposed boundary.

In fact, for Newfoundland, as I said, Canada-France defines the coasts. Gulf of Maine defines methods.

Left unanswered is why in a case so dominated by geography, the application of the objective law to what is supposedly the same geography as Canada-France, leads to the use of methods found appropriate in the Gulf of Maine. Is geography the same in both cases or does this mean in Newfoundland's reasoning that the Court in St. Pierre got in wrong and should have applied the bisector at a perpendicular? Or was the Chamber in the Gulf of Maine wrong, and one of the parties should have been given a baguette.

This conundrum points out one of the fundamental problems in the way Newfoundland has gone about the use of the law in this case, a problem that Nova Scotia has

addressed in its Counter-Memorial.

In the two presentations on Tuesday, Mr. Colson's exhaustive review of the methods used in the Gulf of Maine, and Professor McRae's discussion of the application of those methods to this case, something was missing.

There was no real attempt to address the primary equitable criterion that the Chamber in the Gulf of Maine found applicable, given the geographic and other circumstances of the case. And the criterion, of course, was used to select those methods. The criterion was the equal division of overlapping maritime projections, subject to special circumstances. And along with this, the Chamber considered as auxiliary criteria only, factors such as cut-off and proportionality.

Newfoundland simply takes all of the methods from Gulf of Maine, but does not actually adopt the same primary criterion. It appears, I guess by happy coincidence that the same methods give effect to both criteria, and in any geographic setting.

But at this point, I must turn to Newfoundland's version of the case. For in fact, Newfoundland now claims that the geographic setting of the Gulf of Maine and the inner sector of this case are, and I quote, "almost identical." Well if you only look at the pink, yes, to some extent. But there are some problems.

First, in the Gulf of Maine, both the entire back and one wing of the rectilinear formation that the Chamber found were American. A critical factor for the Chamber, especially, as one of the Canadian wings was a protrusion from the southern end of Nova Scotia towards Maine. And to top it off, a land boundary, which is not shown here up in this area was buried up in the top corner of the Gulf, emphasizing the American nature of the coast.

But second, and I think far more fundamental really, is the fact that this convenient straight line across the Cabot Strait here represents nothing at all. This is not coast. It is water. Whereas the equivalent part of the line in the Gulf of Maine is coast. And it is clear once you remove it that the parties are in a situation of coastal opposition in this area. And to the Gulf of Maine, the innermost portion of the Gulf was found by the Chamber to be a situation of adjacency.

Now neither Newfoundland or Nova Scotia can be said to have a coast line here. On Tuesday, we had an explanation of this from Professor McRae that would seem to require a coast line in that spot, perhaps of Canada's. Now that might be possible for Canada, as part of its closing lines. But it's not possible for either of these parties in this arbitration.

We have also heard an explanation based on the idea

that these were internal waters, and therefore, somehow different. But, of course, if we go back to the legislation, which Newfoundland is loathe to do, the offshore areas include internal waters. It's part of what has to be delimited. It can't be separated out that way.

This eliminates -- the simple removal of one line eliminates the illusion of rectilinear formation, and any similarity with the inner portion of the Gulf of Maine.

What else? The geography of these cases is not just defined by the inner portions. In both situations, there were outer coasts -- there are outer coasts. In Gulf of Maine, the Chamber found, assisted by the fact that the parties had constrained the area of delimitation by agreement, that the outer coast played no part. Here both parties agree that there relevant outer coasts.

So we are left with the geographic facts of this case, facts that make it clear that the coasts are opposite in this area, and that there are relevant coasts outside. And that's what we have to work with.

On this first crucial point of comparison between this case and the Gulf of Maine, the all critical geography, the similarities are slight or simply invented. The coasts in this case are opposite in the intersector, not adjacent switching to opposite part way through, which was the Gulf of Maine. It is an angular, not a rectilinear

relationship between the coasts. And there are two backing coasts and an open waterway, not one.

It does not take long to remove Newfoundland's illusion of a virtually identical geography.

So let's leave the geography problem aside for the moment. What about the equitable criteria? In the Gulf of Maine, the Chamber considering the nature of the zone to be delimited and the geographic circumstances settled on the primary criterion of equal division of overlapping maritime projections, with the auxiliary criteria I mentioned, including no cut-off. And that was certainly relevant, especially in the constricted situation of the inner Gulf, and proportionality.

Now, Newfoundland, by contrast identifies two equitable criteria, mainly as being of relevance in this case. Proportionality and nonencroachment.

So according to Newfoundland, we are operating here on different equitable criteria, as well as different geography. Although that's supposed to be a critical step in the process, we still end up with the same methods. There is no method at all here.

Proportionality is used by Newfoundland, both as a post facto test of the equity, the more traditional use, and in the more active sense, to define the selection of methods. That is, it uses an alleged disproportion in

coastal length as well as the avoidance of potential disproportionate effects for some geographic features to justify the use of particular methods. Particularly, the dismissal of equidistance in the inner sector.

In the outer sector, it's nonencroachment that plays the primary, though not the exclusive role.

And for Newfoundland, nonencroachment is built on natural prolongation. Expressed as the unidirectional seaward projection of coastal fronts.

The problems with proportionality are mainly areas of application, to which I'll turn in a moment. With nonencroachment, I think the problems are of a more fundamental nature. It's clear that Newfoundland justifies its outer sector line -- if I could have the next slide -- mainly by reference to non-encroachment, as is confirmed in this passage. Nova Scotia simply cannot encroach past St. Pierre, that's a large part of the delimitation.

It was confirmed in orals, even apart from the role of the baguette. It's enough to bar Nova Scotia from any projection east of St. Pierre.

But to the west of St. Pierre, once we're restricted to the west, although Newfoundland's coast can still project across it, it's still unclear exactly how Newfoundland makes the leap from this very general

principle, which is what it is, to the line that it actually espouses. Far to the west of the St. Pierre corridor.

This is because this criterion is of limited usefulness as an operational principle. As a means of actually choosing a practical method. In cases with the factual characteristics that we're dealing with here.

Why? Well, the first difficulty is a practical one. The principle of non-encroachment was developed and applied primarily, though not exclusively, in cases where the encroachment takes place relatively close to shore.

The North Sea cases, the Court was referring to circumstances where the boundary might swing out laterally across another state's coastal front, cutting it off from areas situated directly before that front. And they were in fairly constricted areas there.

Judge de Arechaga, in a separate opinion in Tunisia-Libya returned to this issue, and explained it fairly clearly. The correct interpretation, he said, was nonencroachment in front of, and close to, the coast of the state. Furthermore, he noted that there was what he called a correct development, which is the factor of distance from the coast.

But in this case, of course, the area to be delimited runs about as far from the coast as is possible, several

hundred miles, contrary to Newfoundland's view of the relevant area.

And from the south coast of Newfoundland, to where the current boundary intersects the baguette, the distance is about 270 kilometres. Even on the other side as it exits, allowing for the promontory of Burin, still about 215 kilometres.

Now those are just facts. But for Newfoundland, non-encroachment is a matter of pure logic, not facts.

But on these facts, any conceivable encroachment of what Newfoundland sees as its own natural prolongation takes place so far from shore as to be irrelevant. Or at least subject to this corrective element, as Judge de Arechaga called it.

Yes, Mr. Legault?

MR. LEGAULT: Professor Saunders, do you see nonencroachment and avoidance of cut-off as being exactly the same?

PROFESSOR SAUNDERS: Not entirely, although they do seem to be tied together fairly closely, and I think if we use the word cut-off as complete cut-off, then I would say no. But if cut-off is understood to mean something less than a complete enclavement, then I think they're associated concepts.

MR. LEGAULT: And would you say, perhaps along the lines of what Mr. Willis said about convergence, that cut-off gets

less important as you get further from the coast? Is that what you were suggesting --

PROFESSOR SAUNDERS: Yes.

MR. LEGAULT: -- in quoting --

PROFESSOR SAUNDERS: And I think we're far from the coast fairly quickly here. Or at least in the relevant areas. And there's no real issue of encroachment in the inner sector, as there might have been in the Gulf of Maine.

PROFESSOR CRAWFORD: Why?

MR. LEGAULT: Thank you.

PROFESSOR SAUNDERS: Why is there here? Or why is there not here?

PROFESSOR CRAWFORD: Why is there not here?

PROFESSOR SAUNDERS: In the inner sectors, I would argue that by the time you get that far seaward, it started to even out, and the unobstructed seaward projections to the east are a dominant feature of the broader geography of the region.

PROFESSOR CRAWFORD: But if you look at this case from the perspective of the absence of a boundary of any sort, to the east of point 2017, leaving aside arguments about oil practice, and de facto lines and so on, if one was to assume for the sake of argument that the only agreement had gone up to 2017, and there was then a question of what -- what would be equitable, surely there is a Newfoundland

coast, the southwest coast of Newfoundland, which has some entitlements to a continental shelf in a -- which would be broadly in a south facing direction? You don't have to adopt full frontal projection?

PROFESSOR SAUNDERS: No.

PROFESSOR CRAWFORD: And doesn't your line, I see that if you can establish that this is a Tunisia-Libya line, it's irrelevant.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: I accept that. But let's assume it's not.

PROFESSOR SAUNDERS: Then I would suggest, number one, we have to deal with St. Pierre, and that comes into what parts of the south coasts of Newfoundland can legitimately ignore the real effects of geography. But I also suggest that we are dealing particularly the broader you go, and again, this is as broad as it gets with the shelf, you have to consider the overall situation in the region. And as Professor McRae has insisted repeatedly, the south coast of Newfoundland is essentially a unit.

Well, the coast from Burin to Cape Race does very, very well. So there are compensating factors that make it less than -- if you look just to one side of the line or the other, and unfortunately the baguette forces a visual perception into that area, but if you take that out of the

picture, it's not that immediately apparent that that functions as a cut-off.

Particularly since the other interests which were part of nonencroachment, in de Arechaga's views, security, concern for ports, and the rest of it, none of that enters into it for these parties.

PROFESSOR CRAWFORD: I can see that you might argue if St. Pierre and Miquelon was not there at all, and that -- then the baguette would have been, the whole mushroom, had disappeared off the map, you would say, well, there is a slightly south -- what is it -- southeast facing projection of the coast of Newfoundland, so that there is no coast of Newfoundland which is actually cut off, or if there is, it's only right at the end, and of course, it's the coast of Nova Scotia which is cut off opposite it.

PROFESSOR SAUNDERS: Mmm-hm.

PROFESSOR CRAWFORD: That's not the case.

In the hypothesis that I have given to you, that is to say no boundary of any kind, de facto, or other to the east of point 2017, consider -- what effect would it have on the method that there is -- there is St. Pierre and Miquelon, and there is the mushroom? How should that affect the method?

PROFESSOR SAUNDERS: It might affect two states who really are delimited in the continental shelf zone in one way,

because there are security and other interests engaged. How should it affect the two provinces in the absence of St. Pierre, which is a difficult thing to do? I would suggest that the resources would probably be in a negotiation, certainly, which is what we have to hypothesize in some ways here, a very serious part of it.

Remember the order of nonencroachment --

PROFESSOR CRAWFORD: Now my question is, if you're a Tribunal --

PROFESSOR SAUNDERS: Oh, the Tribunal, sorry.

PROFESSOR CRAWFORD: -- a Tribunal having to delimit with no boundary in place at all, and St. Pierre and Miquelon, which is allocated to a third state by delimitation binding on both the parties, what effect does that delimitation have on the -- on the choice of the method of delimitation? I mean, your answer might be none. I put this question to Mr. -- to Mr. McRae very early on. The sort of cut-out method, rather than cut-off method.

PROFESSOR SAUNDERS: I'm sorry, I reversed the question. I thought you were asking without St. Pierre.

PROFESSOR CRAWFORD: No.

PROFESSOR SAUNDERS: With St. Pierre, sorry.

PROFESSOR CRAWFORD: I started that by saying that if it hadn't been there, I could see that you would say that there was at least -- at least you could argue there was

no cut-off.

PROFESSOR SAUNDERS: Okay. I'm sorry.

PROFESSOR CRAWFORD: With it there, there's a very pronounced cut-off.

PROFESSOR SAUNDERS: Okay. With it there, then I think the hypothesis has to be that we are operating from an offshore area, the offshore area is purely a resource entitlement, and the seaward notion of territorial sovereignty, which was really creeping into the North Seas judgement in the sense that, well the state has to be able to get to the sea, much like territorial sea reasoning. And de Arechaga comes back to that notion, just doesn't apply. Shouldn't have applied in the continental shelf. It applies even less to an offshore area which is purely concerned with the total areas of resource access involved. I think that would be the answer.

Now, the second problem with the use of nonencroachment in the -- in the rigid way that Newfoundland uses it here, relates to an understanding of how the principle has developed over time.

As Professor McRae reminded us the other day, this delimitation is not being conducted in 1964, nor we would note, in 1969.

After nonencroachment was mentioned in the North Seas, it didn't take long for Tribunals to realize that the

principle, and its underlying justification of natural prolongation were of limited, if any usefulness, once it was determined that parties were on a shared continental shelf.

The precise issue arose in the Anglo-French arbitration, referring back to the conclusion on nonencroachment, and made the following observations. That as far as delimitation is concerned, this conclusion states the problem rather than solves it.

Why? Because the problem of delimitation arises precisely because situations where the territories of two or more states abut on a single continuous area of continental shelf, it may be said geographically to constitute a natural prolongation of the territory of each.

On the facts of this case, the parties are at least agreed that there is one continuous physical shelf off the east coast. This means either that in Newfoundland's view there's one natural prolongation, or in Nova Scotia's view, there's an overlap of offshore areas defined by article 76 under the Accord Acts. One of the two.

It doesn't matter which, the problem raised in the Anglo-French arbitration still arises. Non-encroachment doesn't tell us how to divide areas which are within the potential entitlement of either party, and that's the

situation in this case.

It's been confirmed over the years, in Tunisia-Libya, and arose again in Guinea-Guinea Bissau.

So the assurance with which Newfoundland asserts non-encroachment as a sole basis for excluding any possible Nova Scotia claim to large areas which are clearly of interest, is simply at odds with the modern law.

So what is the proper place for non-encroachment? Because I don't think it's dead. But in 2001, not 1969, and involving the single shelf in offshore areas within which each party might claim. It's best used, as it has been by Nova Scotia, as part of the test of equity. That is, the concept can be of assistance in checking what has been done, and ensuring that severe encroachment doesn't result. It tells us very little about how to actually choose a line.

But of course, there's no real evidence in the delimitation proposed by Newfoundland that they did use it to choose the line. In pursuit of this, I'll turn now to the manner in which Newfoundland has gone about the application of practical methods from the Gulf of Maine in this case.

Actually, I should deal with one contention first. Because how could I avoid this? Particularly in the outer area, inequity resulting from disproportion in coastal

length, and the presence of Sable Island. St. Paul I'll deal with separately.

Coastal lengths, I don't propose to spend more time on this here than to say that I think it's been fully dealt with already. The alleged disproportion of coastal lengths is a fiction, largely. Certainly a large disproportion, or a huge disproportion as alleged by Newfoundland. It's a creation of selected use of geography. It's shown no disproportion that would even remotely justify the extreme approach to the boundary in the outer sector.

Second, regarding islands. I do have some points to make, but unless the Tribunal wishes to pursue the matter further, I do not propose to deal with the status of Sable Island in Canadian law. Anymore than we propose to selectively remove any peninsula in Newfoundland that happens to have a lighthouse on it, because it comes under the same section of the constitution. They are, after all, this island is part of Nova Scotia.

I would also note the Jan Mayen, a small isolated island, difficult -- different circumstance in that sense, with about 25 government personnel as the only permanent residents, was given a zone. A fairly substantial weight in a situation of immense disproportion of coast lines.

But in general, Newfoundland has tried to exaggerate

our reliance on Sable Island, claiming that it's a pivotal point for our delimitation. Paradoxically, Mr. Colson seemed to feel that because we argued Sable had no impact on our line, we were conceding the point that there was a problem with it -- something we would hardly do if it was a pivotal point. And we will make our own concessions if needed, but it's not needed here. Even if Sable is considered, as in the supporting line based on Cape St. Marys, and it is a supporting argument only, there are a few things to remember.

First, Newfoundland claims that no effect for islands is a common solution or often the appropriate solution. It is not. Other than small rocks or islands very close to a median line in a situation of opposition, Newfoundland simply has nothing to offer in support. That's fully covered in our Counter-Memorial, Part 3. I don't have the impression that even Newfoundland takes no effect seriously in this context.

Second, Newfoundland and equidistance. The impact of Sable in this case is highlighted -- and I think we started to see the Newfoundland real case come out of the woods with this diagram. Newfoundland sets up the argument in a sense by showing this line and showing a half effect for one feature and a no effect for the same feature, because when Newfoundland thinks of distorting

effects, it thinks of islands -- some islands, and nothing else. So in this slide, the Court is directed to partial effect for Sable with no other considerations, but if we consider the geography of the region, as shown in this slide, also showing the equidistance line, it's clear that there are other factors that arguably compensate, and it is on a very broad scale here for Sable. In Newfoundland, the latter part of the south coast is essentially a series of long peninsular projections, defining the eastern part of the south coast. Newfoundland's coastal fronts in its Memorials are defined by two or three points on the tips, and peninsulas are also considered as potentially distorting features along with islands, as in the Anglo-French arbitration where the island was at the end of the peninsula, to make it even worse. There's no mention of these by Newfoundland.

Furthermore, it could be argued that in the macro-geographical context which Newfoundland speaks, it's the entire configuration of the area that makes equidistance inappropriate in the outer sector, because that configuration gives Newfoundland a boost from equidistance, as they would call it. Remember that in the inner sector, Newfoundland complained that its receding coast leads to inequities if a median line is employed. Nova Scotia demonstrated this was not so in a situation of

opposition because the maritime area simply increases, according to the receding coast. But in situations of adjacency, because the coastal points that define an equidistance line may be quite limited by the coastal orientation of the parties, it's very different, as here.

The general east-west configuration of Newfoundland, coupled with the projection southward of the two major peninsulas, really means, as a structural effect, that Nova Scotia has a receding coast from the primary point of contact between the two. Coupled with the peninsulas, this overall effect -- it's not a localized effect, as is Sable; it's an overall effect -- means that Nova Scotia, despite its long coasts, is going to generate on an equidistance line -- rather, on an equidistance line will be restricted to a relatively few mainland base points in the northeast near Scatarie, well up to the north, because Newfoundland's coast effectively projects out, as did Tunisia's in Tunisia-Libya, where the ultimate result came nowhere the equidistance line. Well, not nowhere near, but paralleled it. As a result, Newfoundland obtains an overall advantage from equidistance.

One final point on islands. Jan Mayen did accord -- was accorded a substantial maritime zone -- not huge, but substantial, but it had the further effect of blocking Greenland's projection beyond the island, an effect that

does not occur here, one that could be particularly inequitable with islands, because Sable is in front of a continuing Nova Scotia coast, a coast that has to be given its own effect. It's not analogous to an island on the wrong side of or very close to a median line. It's backed by a substantial Nova Scotia coast.

I guess the point we generally want to make, and we don't argue equidistance as an appropriate approach in the outer sector -- perhaps we can come back to Mr. Guillaume's comments, if you wish. Yes. The notion that islands equal inequity in any situation just doesn't suffice, but the more important point -- Newfoundland's practical methods.

PROFESSOR CRAWFORD: Sorry.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: Back to the last graphic, please. No, the last one.

PROFESSOR SAUNDERS: Sorry.

PROFESSOR CRAWFORD: You answered this question already, but I'm going to ask it to you again on another hypothesis.

You said that --

PROFESSOR SAUNDERS: That's a bad side.

PROFESSOR CRAWFORD: No, we're -- we're simply talking about the process.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: You said that the effect of St. Pierre Miquelon in relation to this situation should be ignored because this was an intra-Canadian delimitation of offshore area and nothing to do with international continental shelf. But let's hypothesize. Let's assume that Nova Scotia and Newfoundland are independent states.

PROFESSOR SAUNDERS: Mm-hmm.

PROFESSOR CRAWFORD: And an international Tribunal is having to delimit -- let's assume that they're successors to Canada, they're successors to Canadian boundaries, including maritime boundaries, and therefore, they're both bound by the St. Pierre and Miquelon delimitation. What -- what account -- how should an international tribunal delimiting the maritime boundaries of Nova Scotia and Newfoundland with no prior agreement between them take into account the maritime boundary of St. Pierre Miquelon?

PROFESSOR SAUNDERS: Okay.

PROFESSOR CRAWFORD: You thought I was going to ask that, didn't you?

PROFESSOR SAUNDERS: It's a multi-layered hypothetical, so at least allow me the defence of stating how much of it we accept, which is almost none.

PROFESSOR CRAWFORD: Yes. I think I get that.

PROFESSOR SAUNDERS: Yes. But the point is that we do operate on a different plane, and I think that theory is a

far sounder one in this case. It's really the only way to handle it. If I were arguing on an international level, two independent states, I would argue it on the basis that you cannot understand the coastal relationship of one party to another, unless you have evidence led on that relationship, and you can't define the relationship of one large coast to another large coast by looking at a small island nestled into the large coast. I think it would be as simple as that. And then I suspect there would be questions.

PROFESSOR CRAWFORD: Well, the effect of that answer, which is a perfectly reasonable answer, would be to say it's not the function of international tribunals to reconfigure geography. St. Pierre Miquelon is there. It can't be -- can't pretend it is not there. It has the effect it has. That's it.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: Your concern -- obviously, small islands generate relatively to coastline more maritime zones than big features. That's just a fact of life. And it's up to the Tribunal to delimit Newfoundland and Nova Scotia and --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- have no regard to St. Pierre Miquelon?

PROFESSOR SAUNDERS: Yes. And particularly, since it's here -- again, back to reality -- that we are dealing with the provinces, but also that the effect on the two zones is, in our view, minimal. It would be different if it -- in taking out the territorial sea, which I think is a slightly different issue, the zone coming down through this is really split between the parties, practically. Does that answer the question, the hypothetical case?

A consideration of Newfoundland's methods has to begin with what they've done in the inner sector followed by an assessment of why they have done it. Newfoundland begins with a line that is a bisector of the coastal directions shown on the map, beginning in the Cabot Strait, running to the southeast. And we know this one from the Gulf of Maine -- everyone's familiar with it, and it's useful to note at the outset, again, why it was used there. In the innermost portion of the Gulf, as I said, the Chamber was quite explicit. "This was the most effective way of effecting an equal division with no special circumstances of what were adjacent coasts."

As here, and here is already discussed, we have opposite coasts, so the reasoning of Gulf of Maine simply cannot be the sole reason for the bisector.

I'll return to the motivation in a moment, but far more important to the Newfoundland case is this second

sector -- the purported bisector of a new pair of coastal fronts, the same one on the Nova Scotia side, a new one in Newfoundland. Again, Newfoundland points us to the Gulf of Maine, but what was the purpose of the second bisector in that case? And I'm sure the Newfoundland team remembers from both sides of the isle -- the Chamber made it clear that a new line was needed to reflect a new coastal relationship, one of oppositeness between those portions of the coast. So the method adopted, the median line between the two coastal lines, not a true median line, reflected this change. Here, the coast continued to be in a relation of oppositeness throughout. There's no change. Leading to at least a provisional notion that the median line in this sector or something awfully close to it -- say the existing line -- might have been useful from the start. That is the whole reason for there being lines defined by two methods in the intersector in the Gulf of Maine, was the change in coastal relationship partway through, and that is absent here.

Whatever else this is, it isn't the Gulf of Maine. So why did they do it? Newfoundland, using the framework of coastal fronts it says was used in St. Pierre, although including coasts which were excluded in that case, finds that a whole new coast becomes dominant over the southern sector. And where is it? Well, they never show it close

up, but it begins, apparently, when Newfoundland's south coast turns sharply to the south at Connaigre Head, and I hope I'm pronouncing that correctly -- I have no idea if I am. Can we have the next slide, please? Connaigre Head is there in the middle.

Now we heard from Professor McRae that this was a change in the general direction, but I don't think it is. I think it's simply a convenient point for Newfoundland. The explanation is that the line meets the technical requirements for closing off a bay when Brunette Island is used, and it does. Well, heaven forbid that an incidental feature like an island should have a major effect on a delimitation, but the problem is more fundamental. The mere fact that a short segment of coast or of a bay meets the requirements for a closing line doesn't mean that it's a coastal front in this scheme of dominant coastal fronts. This is micro-geography used in a method that relies on a broad perspective. And, of course, there's no explanation for how this marked change can still be part of a southern coast that goes everywhere as a single unit.

PROFESSOR CRAWFORD: Okay. That's a criticism of the use of Connaigre Head. It's not a criticism of the point that at some -- again, can we go back to the previous --

PROFESSOR SAUNDERS: The one before that?

PROFESSOR CRAWFORD: No, that's -- well, that will do. That

may be a criticism of the use of Connaigre Head, but it's not necessarily a criticism of the proposition that at some point there is a shift, and Burin Peninsula is a shift.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: And so you might say, "Well, it happens a bit further along, but it happens eventually."

PROFESSOR SAUNDERS: Yes. There's a change in the coastal direction, and I'm going to come to this in terms of the effect of Burin, and I think part of this comes back to the notion of using a provisional median line and what its effects are, and part of what Newfoundland doesn't represent or misunderstands in this, is that coastal points that are well to the front of Fortune Bay, as Fortune Bay isn't wide enough to have an effect as a concavity, coastal points outside control the median line, so there is no impact in that sense on a median line, which, as Newfoundland said, they intended to test provisionally, but didn't. So if I can come back to that, in that context. It's what Newfoundland does with this coast that matters. This is where we've argued that Newfoundland does have somewhat more talented and versatile coasts than Nova Scotia. Not only do they project radially, no doubt one of those non-absolute judgment calls -- they apparently can project either

around or through land masses in this theory.

Now this may explain Newfoundland's fears about Nova Scotia's claims off Labrador, but on Newfoundland's apparent theory, Nova Scotia could project right through the island at Newfoundland and out the other side.

Now this was justified in orals, partly on the basis of the treatment of the Channel Islands in the Anglo-French arbitration, but that case involved equidistance construction lines, not a frontal projection. And on our analysis -- and I don't know if this has been provided to the Tribunal and the other side -- perhaps we should provide it to both at the same time. We will provide an illustration showing the construction of the relevant points in the Anglo-French and how they went around the Channel Islands. It didn't depend on going through them, and it was based, in any event, on enclaving the islands. So the coastal points that defined it, as you'll see in Anglo-French, were possible without going through the islands.

Now this is in our view an odd coast, but a very useful one. It provides the entire basis for this new bisector in the second segment of the boundary. And in our view explains why they needed to have a bisector on the first segment. Because the median line actually wasn't that much worse, it might have been better, for

Newfoundland in the earlier portion of the boundary. But if they had started out with the median line, there would have been no basis for changing part way through, so a bisector had to be the basis.

Now this new bisector was not enough. Newfoundland finds a need to shift the starting point in the south 34.6 nautical miles or about 64 kilometres or so towards Nova Scotia, with the result shown here. Why? The first reason given was that this corrected for a disproportion in coasts in the inner sector, as in the Gulf of Maine.

And indeed, the line is moved in proportion to the measurements that Newfoundland assigns to those coasts. Measurements, which are at odds with its own theory of frontal projection, as they include coasts that can't project anywhere. But, Newfoundland never bothers to check the division of maritime areas in the inner sector. If it's close to the ratio of coastal lengths, the disproportion can't be evidenced by a simple disproportion in the coastal length. That is -- sorry, if the maritime area is similar. The point being that proportionality -- disproportion is evidenced by a comparison of the coastal length to the maritime area that it generates, not just by the coastal length by itself, although it's sometimes used that way. It's used that way in particular circumstances.

In the Gulf of Maine they didn't check the maritime

area, but then they were using a method and in a context where they assumed, and stated so, that they were affecting an equal division of areas already, so they could just assume that the coastal fronts had to be proportional.

Newfoundland is not here in this context. We are also not in the sort of open sea context where it becomes difficult in a shelf delimitation to determine where the area is, as we have already seen.

So why has Newfoundland gone through these steps, these manipulations? What was it about the geography that led inevitably to this combination of methods.

And Newfoundland suggested in their Memorials that was done as part of a test of a provisional equidistant line in the middle sector. If I could have the next text line. Sorry, I am skipping ahead a bit there.

And in describing the line that they intended to draw or promised to draw, they said the provisional line considered below has been constructed on the basis of this definition, that is a standard equidistance definition. But the line never appears in the Memorial. So having said they would do this for the inner sector, they didn't, until this hearing.

Now Mr. Colson took us to task for demanding this of Newfoundland and not doing it ourselves, which is not

quite true. Nova Scotia in its Counter-Memorial -- and this is where we come to the point, I guess -- made it clear that the provisional median line was what we were talking about in the inner sector, where both parties seem to be agreed that it was a relevant provisional step in a situation of oppositeness. Both parties agreed that was the situation then.

And that status, provisional status, even if not presumptive, is reserved for opposite coasts as confirmed in Libya-Malta, Jan Mayen, although it sounds like somebody in the International Court may be thinking of going further than that with it, but the courts haven't yet.

And the question is particularly important in this case, as Nova Scotia's line, as discussed in the Memorial is essentially a simplified median line, which Mr. Colson at least came close to conceding on Tuesday.

But whatever the basis, Newfoundland asserts that its test of the median line in the inner sector showed serious problems arising from at least two major features, the inequity resulting from St. Paul, and the impact of an alleged situation of concavity. So I want to test those hypotheses, for that's what they are, against the real line.

Now to begin with St. Paul, I'm not quite sure how to

deal with Professor McRae's approach to St. Paul. If I heard him correctly on Monday, it is somehow relevant to the status of St. Paul Island that its lakes are badly located. It has less than robust trees and its governance in the colonial period was subject to change, as was Newfoundland's, of course, and much later in the day. But most significant of all it seems is that St. Paul by virtue of its position caused a lot of shipwrecks. And this somehow affects the weight it should be given. It is, he said, essentially a hazard to navigation.

We have to admit the shipwrecks and ask for others to be taken into account, I suspect. But they did not call it the graveyard of the Gulf for nothing. But it's irrelevant. There is no good island, bad island theory of delimitation. And as there has not been any wrecks lately, perhaps we can just claim the island as rehabilitated.

So let's return instead to the facts, inconvenient though they may be. In their Memorial, and again in orals, we hear that St. Paul gives an unwarranted boost to St. Paul -- to Nova Scotia at the start of the line. And the implication of a boost is that its effect continues to effect the line. Now it could on Newfoundland's method, but not on ours.

This slide shows the actual impact of St. Paul in the

inner sector, and indeed Newfoundland came forward with a version of this in their slides. St. Paul affects the line for 74 kilometres. The total area generated is about 186 square nautical miles or 637 square kilometres in the inner sector only, as defined by Newfoundland. Not a huge impact. Even if you allowed four or five kilometres for the coast of St. Paul, it generates maritime area at a rate below the average for the coasts of Nova Scotia and Newfoundland.

Now Mr. Colson's response was that the size of the impact doesn't matter. We disagree. We think it does. It's an equity in fact, not an equity in theory that matters.

In some, unless we believe islands are not entitled to zones at all, the impact of St. Paul is entirely proportionate. The Newfoundland solution would place their line about 13 nautical miles from St. Paul, close enough that you could stand on the hill and watch the drilling.

And as explained in Nova Scotia's Counter-Memorial, Newfoundland has offered no evidence that islands of this importance and size and in this relation to the coast have ever been given no effect.

And finally with the conduct of the parties with respect to St. Paul is rather convincing.

What about the concavity then, the alleged concavity and its impact? Here we have Newfoundland's explanation for why it is in its own words "squeezed between the jurisdictions of France and Nova Scotia, just as Germany was squeezed between Denmark and the Netherlands". Yes.

Mr. Colson says we are quibbling with the graphics and declines to go down that road. It's the same road where the primary and secondary coasts were. We still feel this diagram represents nothing to do with reality. What Newfoundland has done is draw a blue polygon here that relates to absolutely nothing. No bordering coasts, no boundaries, and shown that it is the same shape as the polygon in the North Sea cases.

Well, of course, it is. That's how they drew it. But as shown below here, where we have put two color blue in, Newfoundland has an actual situation, it's a bit different. It uses for the jurisdiction of St. Pierre, the French claim in that case. Even what appears as the median line in the south seems to be the line drawn between France and Cape Breton.

But, of course, France lost. And indeed, Newfoundland admits that later, but they don't explain in the light of that how this is relevant. Because it is not just the decision that they omitted, along the coast they have added these lines, which are highlighted in yellow here

and here. You notice them in this upper diagram.

Why? The Newfoundland zone doesn't stop there. The water doesn't turn white. It continues on, as shown in the larger diagram. But, of course, if that were shown the polygon would be the wrong shape, so it has to be cut off.

So let's return to reality. The drastic effects of the median line in the inner sector, which Newfoundland says it will test, but never really does, do not appear. The line does not swing directly across the coastal front causing a cut-off, nor is the Newfoundland coast concave in any event. The coast is relatively straight with a protrusion, Burin at one end. And the indentation of Fortune Bay has no effect. The controlling base points are out in front of it.

In the end, we do not really need to debate what each side divines from reading the end trails of the maps. It's proof of equity or inequity on the facts.

This slide shows the result with the three lines, Newfoundland's proposal, the median line and the existing line.

The median line allocates Newfoundland only 544 square kilometres, 59 square nautical miles, less than what it gets with its proposed line. Where is the significant difference to justify these contortions?

The difference between the Newfoundland proposal and the existing line is not more important, 327 square nautical miles.

PROFESSOR CRAWFORD: I notice you have drawn that line straight across -- I'm sorry. No, no.

PROFESSOR SAUNDERS: Sorry. That actually just uses Newfoundland's closing lines. It becomes even clearer when we consider the ratios comparing Newfoundland's maritime area to Nova Scotia's in the sector for all three lines. Their line results in a ratio approximately 1.8 to 1. The median line is 1.7 to 1. This is Newfoundland area to Nova Scotia area. The smaller. And the existing line 1.6 to 1.

So what is the purpose of all of this? Why not adopt the median line, or Nova Scotia's proposal what is the simplified median line? And the answer is readily apparent, if we consider the impact. Just the shift to the west of 64 kilometres based on the alleged disproportion in the inner sector, which we know does not exist, is transferred to the perpendicular and adds to Newfoundland's area along the length of the perpendicular approximately 696 kilometres along the way. Gets an additional 44,500 plus square kilometres just from that one manoeuvre, all made possible by the little coast at Connaigre Head. And the 64 kilometre shift down the line.

That area is larger than the entire area in the inner sector on both sides of the line. And yet it is put in place partly, allegedly to correct a marginal disproportion between the two areas in that zone. It's bigger than the whole zone.

PROFESSOR CRAWFORD: This is, of course, a general problem with perpendiculars.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: And it was able to be avoided in Gulf of Maine simply because you had a straight coast and the box like structure behind the coast. And an agreement as to where the line would end. And it was all of those factors taken together, which meant that it simply didn't create problems.

PROFESSOR SAUNDERS: Perhaps I will remove that page from my argument but, yes, exactly. Those -- it's not --

PROFESSOR CRAWFORD: I'm sorry, that's my reading.

PROFESSOR SAUNDERS: I'm agreeing completely that the length of the line was important. It wasn't that far from the outer sector in Gulf of Maine to the triangle. The triangle constrained the lateral movement, which was important. You couldn't have a big shift one way or the other. And as you say, it was largely one backing rectilinear formation, which is not the case here. None of the reasons for doing it in the Gulf of Maine are

present.

But in the end, Professor McRae, has told us -- and this was mentioned in the Memorials, the shift has little to do with the inner sector at all. Newfoundland simply needs to be well along to the west on the closing line for the perpendicular to have the desired effect in the outer sector.

Newfoundland referring to the Chamber in the Gulf of Maine and their concern to set up the outer sector, says that this is not a problem, because that's what they did in the Gulf of Maine. But in the Gulf of Maine, apart from what Professor Crawford has just said, only the inner coasts were considered to be relevant. So, of course, using those proportions made some sense, I still would question how much. But here, there are outer coasts that are relevant. It's a much, much longer line and a huge area with no constraining factor of the triangle. Newfoundland makes this change without any demonstration of a degree of disproportion in the inner sector clearly, and assumes that there is a disproportion in the outer sector without bothering to show it. So it can't be related to the inner sector, we know what the result was there. It isn't related in any rational way to the outer sector, it's just done.

Now in sum, this situation, this case, not the Gulf of

Maine, is better dealt with as suggested in the Anglo-French case -- arbitration where the Court said it wasn't obvious -- in response to an argument -- why the inner coasts should have absolute relevance in the outer sector. Furthermore, this inconsistency was not removed, as the Court said, by invoking proportionality. For that did not explain why the inner coast should be used at all.

In the end, there is no reason, no principle behind the inner line and the westward manipulation of it.

Newfoundland simply applies methods that were found useful in an entirely different geography, using a different equitable criterion, and has not demonstrated any need to depart from the median line or its equivalent, the existing line confirmed by the conduct of the parties.

Now in the outer sector, Newfoundland makes the transition to the outer sector via its line from Lamaline and to Scatarie. The small problem with this line, although by this point it's hardly relevant, it's a line joining the outer coast point to an inner coast point, which causes some conceptual difficulties compared to the Gulf of Maine, where they were the last two opposite points. Lamaline is intersected only laterally. It comes in obliquely, as it were.

It's not parallel to any backing coast that can be identified, this line, as it was in the Gulf of Maine,

critically in the Gulf of Maine. So we lose that justification altogether. So from this line what we --

PROFESSOR CRAWFORD: Sorry, what would that criticism mean on my elaborate hypothesis as to where a -- are you saying that the closing line ought not to be drawn there, because I think everyone had been proceeding on the basis of a general acceptance of that as a reasonable closing line?

PROFESSOR SAUNDERS: I suggested that it is not a major problem at this point, because the serious problems are inside. If you are comparing to the Gulf of Maine, it becomes difficult, because they aren't in fact the last opposite points, which was how the Gulf of Maine was drawn. But as I said, not a major problem. The bigger problems are inside and outside.

The biggest problem with the line, however, is that it is not parallel to anything. It's a line. Two points. In the Gulf of Maine, the Chamber was quite explicit, the line was useful, partly because the parties seemed to agree where it was. But, largely, because it paralleled the back of the rectilinear formation. It's simply not the case here.

In fact the only way to follow -- sorry --

PROFESSOR CRAWFORD: Sorry. I'm sorry.

PROFESSOR SAUNDERS: -- yes, the only way to follow the Gulf of Maine in this case, would be to continue the coastal

bisector from the inner portion, because that's the bisector of the inner coastal angles. And all the perpendicular was in the Gulf of Maine, or in any other case, is a bisector of a straight line. It just happens to be 180 degrees. The bisector here, there is nothing to bisect with a perpendicular. So the bisector is this line A to B. It would have to be projected to the edge of the margin on Newfoundland's reasoning, if we are trying to reflect the inner coasts, as they did in the Gulf of Maine.

So really we have a perpendicular headed out to the margin. Newfoundland has obviously exaggerated the significance of this method that has been used in only one decision, a perpendicular to a closing line, which they refer to as -- the Gulf of Maine as the classic example. Which we refer to as the only example. But the justification is that it was done in the identical geography of the Gulf of Maine. It's not identical. No backing coast. No rectilinear formation, the essential requirement. But, of course, the bisector would not be favourable to Newfoundland. And the potential impact here, as we stated is much larger, both in the length of the line and the possible lateral movement, because of no closing point. And it lacks the final justification that they had in the Gulf of Maine, which was that the line was

at least parallel, roughly, to other claims the orientation was similar to the equidistance line, and to former claims of the parties.

Here Newfoundland has never proposed anything that looked like this before. And if anything roughly parallels equidistance at least until that jog to the south -- apart from the jog caused by Burin here, and another down here caused by these capes, it's the 1964 line, the existing line that roughly parallels equidistance, and indeed obviously has a history with the parties, not the perpendicular.

Finally, I would note that the Chamber considered the effect that the perpendicular would have as it came out of the Gulf on seabed resource division in the outer area, and assured itself that the result was equitable, that both parties would continue to have access to areas for prospecting.

It appears that Newfoundland has entered into the same inquiry with respect to the perpendicular, but with different results. In sum, this line has none of the advantages of a perpendicular in the Gulf of Maine, and all of the disadvantages of a method chosen on two isolated coastal points extended over long seaward expanses.

So in the end, what is Newfoundland's line based on?

There are too many differences from the Gulf of Maine to sustain that fiction. But the methods accomplish what Newfoundland wants. Only by forcing the methods onto a completely different geographical situation. Different in terms of the geography, different in terms of the parties' conduct and prior claims. And the other geographical rationales are either nonexistent, as in the inner sector, or irrelevant as in the outer. It's artifice upon artifice using the coastal descriptions.

Now Newfoundland's test of the equity of the result, as I have said, is based entirely upon proportionality. And its test of proportionality, we argue, is too flawed to be of any real assistance. They use the wrong coasts tied to the maritime area to arrive at a result that bears no relationship to anything that's involved in this case.

Indeed, if Newfoundland were serious about its own theory of coastal fronts, and leaving aside the projection across the baguette, its coastal lengths would be reflected more by this diagram than by its own, because that's how Newfoundland would project southward a frontal projection.

But what's left of Newfoundland's neutral --

PROFESSOR CRAWFORD: Sorry. Sorry --

PROFESSOR SAUNDERS: Yes, Professor Crawford.

PROFESSOR CRAWFORD: -- and on --

PROFESSOR SAUNDERS: We are not adopting this.

PROFESSOR CRAWFORD: -- no, I was -- I was I suppose going to ask you to apply the reasoning implicit in that -- in that to your coastline, but I think that's probably an unfair question, so --

PROFESSOR SAUNDERS: No, we are simply comparing it to what they have argued. We are not arguing for the method to be adopted, no.

So what do we have left of Newfoundland's supposedly neutral objective application of the immutable law of geography to this situation? The line is not based on the transference of the rationale in the Gulf of Maine. We know that. The rationale at every stage cannot be applied to this case. It's not based on the correction of supposed disproportions that it identifies. Some don't exist at all. And the others are not shown to be a serious factor or not even connected to the line as it's drawn, as with nonencroachment.

Nonencroachment is nonabsolute as its application seems to be for Newfoundland's coasts, is simply not of assistance for most of the boundary. And, of course, the line -- yes, Professor -- I am arguing that the nonencroachment is not of assistance for most of the boundary. But that in any event, the way nonencroachment has been applied, via frontal projections, has been quite

differential for different coasts.

Now Newfoundland's argument is that this line, and its testing for equitableness has nothing whatever to do with resource location. This result of this line that is not connected to anything in the law, it's just another one of those remarkable coincidences.

So what of Nova Scotia's line? And obviously this is a bit simpler. For Newfoundland our line is nothing more than a rehash of phase one. And we disagree. Before I run through the rationale offered for our line, let me just clear up a couple of preliminary matters, if I may.

First of all, this line is shown by Nova Scotia in its Counter-Memorial and critiqued by Newfoundland on Tuesday -- I don't want to linger on this, because I don't think it's too important, but we do have to confess something. A couple of things should be noted. This line was not, as suggested by Mr. Colson, introduced as part of a search for an alternative geographic method, nor was it proposed as a delimitation.

It was explicitly put forward in the Counter-Memorial as a rebuttal to a very sweeping Newfoundland statement to the effect that the Nova Scotia line could not relate to any conceivable method. That's all -- that's what it was used for. The method employed took the last two equidistant points on the inner sector and continued a

line based upon them, as was done with the last two points in the Anglo-French. And obviously, we were being a little excessive where we found the inner sector. It was also part of the point.

The Anglo-French, as was pointed out to us, involved a half effect, but it explicitly said in the Counter-Memorial that didn't apply here. The rest of the Anglo-French is applied in this way. But in any event, Newfoundland overstates the importance.

But we also have an error that was revealed by Newfoundland, our divergence from the real course of the line determined by the two points. I am afraid this is our fault, not Newfoundland's. But not in the way alleged by Newfoundland, and not involving any subterfuge. Here is the explanation.

As was stated in our Counter-Memorial, the line in the figure shown by Newfoundland stopped at 46 degrees north, because that is where the controlling points from the outer sector began to come in. That was the reasoning. The equidistance line that Newfoundland compares to our extension, the one that was left over in the diagram, was based on the line with the outer points, as shown here. Explicitly, they weren't used in the extended figure. But the base point wasn't shown. That created the small divergence pointed out by Newfoundland.

The second point I want to address is the question of the line between Sable Island and Cape St. Mary's. As noted earlier, we feel Newfoundland exaggerates the use of this line to justify their focus on Sable. It was, however, pointed out in support of our main rationale, and in any event, it is at least interesting that this effect occurs, a mid-point within 200 metres on a line of this length. The mid-point between Sable Island and Cape St. Mary's, within 200 metres of the 135 line, which is no difference at all at this scale.

PROFESSOR CRAWFORD: I take it that's just a coincidence?

PROFESSOR SAUNDERS: Another one, yes. As far as we know, we have no evidence. We are just pointing out --

PROFESSOR CRAWFORD: There is no evidence that in 1964 anyone --

PROFESSOR SAUNDERS: No.

PROFESSOR CRAWFORD: -- anyone knew that?

PROFESSOR SAUNDERS: No, there isn't. And all we are suggesting is if you wish to apply the method defined in the documents, it would be possible to apply this method.

PROFESSOR CRAWFORD: And neither in 1964, nor in 1972 was Sable Island considered at all in terms of the construction of any turning point?

PROFESSOR SAUNDERS: Not that we are aware of.

PROFESSOR CRAWFORD: No.

PROFESSOR SAUNDERS: The other point that we would make though, as to his reference that us finding this by trial and error, and sort of running down the coastline, I think trying to figure out where it was, but our technical expert assures me there was no trial, there was no error. There was one shot. The base points are simply those which are legislated by Canada. So that the line is actually drawn from the legislated base points, not from chosen points. But then you could say that they aren't actually the only opposite points, but out of this entire case, perhaps we are entitled to one judgment call.

PROFESSOR CRAWFORD: Can we go back to your previous graphic, which is the one that shows your big area? That's it. If we took the view that the relevant area was not the whole relevant -- the whole area of relevant potential entitlements as defined in a different context, was it in Jan Mayen, but that it was the area generated by coasts, which could potentially have an effect or bear upon the area to be delimited having regard to the opposing claims, something along those lines, and obviously, I haven't written this down. What difference would that make to the area that we can now see?

PROFESSOR SAUNDERS: That is the conundrum. And that's why we drew this the way we did. If you choose the coasts in advance by any method, we did it backwards. There is a

certainly circularity here, if you do it the way that's being suggested. And it's the circularity that's clear in Newfoundland's argument. What Newfoundland says is this - and I will come back to the answer, but if I could explain this first. Newfoundland says we choose the relevant coasts based on which ones face towards the relevant maritime area. Fine. How do you choose where they face? They face perpendicularly towards a relevant area. Okay. Having defined the coast, how do you choose -- know where the relevant maritime area is? Well you define it as being the maritime area within the projection of the coast that you just chose. How did you choose the coast? By the ones that face towards the maritime area. It becomes circular very quickly and subjective. If we assume we have to choose coasts that affect the delimitation, it means we have to assume a delimitation method in advance, as well. If the method were equidistance, for example, the only points in Newfoundland and the outer sector would be a few points on Burin, and a few on the Avalon. How do you judge the length of that coast? The 10 or 20 miles at the end of those peninsulas or some other form?

The other alternative is not to focus on proportionality as a test of the equity, but rather the equities of recognizing the history of conduct.

PROFESSOR CRAWFORD: Yes, but let's assume we are delimiting

coasts of this configuration, and there has been no prior conduct, as would be the case in many parts of the world.

And what do you do then?

PROFESSOR SAUNDERS: The first thing I would do, I would suggest, is this, the size and the breadth is purely a visual feature of a brand new zone that has never been delimited before. The fact that it's large, if that's what the coasts generate, that's what you're trying to find out about. So you're trying to determine how the allocation actually -- if it's a proportionality test. If it's not a rigid proportionality test, then it becomes less important. But as soon as you go in to define a relevant maritime area without making arbitrary decisions on where to stop, not connected to the seaward extent of the zone, it's hard to see how it's done properly. And Newfoundland's method to us makes no sense, because it doesn't connect to the nature of the zone.

Yes, Mr. Legault?

MR. LEGAULT: Professor Saunders, just very briefly. Do you know off-hand of any case in the jurisprudence where the relevant area has been designated first, and from that, the relevant coasts have been deduced? Or has it generally been, first select your relevant coasts, then determine your relevant area?

PROFESSOR SAUNDERS: Newfoundland asserts that it's always

choosed the coasts first, but in fact, if you look at some of the cases, that's not entirely clear. In St. Pierre, for example, the Court said first that the general maritime area it was agreed by the parties, and they worked from that in choosing the coasts.

Gulf of Maine, likewise. The area was practically defined for the Chamber, who then chose the coast. Tunisia-Libya, the precise definition with the Meridians was done after the coasts were chosen, but the general maritime area was defined first. So, in fact, it's not a consistent practice to choose the coast first.

Now we have argued -- if I could go ahead a bit. Yes. And another one. Yes. That's it.

We'll start with the total offshore areas of the parties, divided by the once and future line. We argue that this area has some relevance by way of general context, because of the history, because of the nature of these zones.

But that the delimitation can be practically effected by use of the relevant area defined here if proportionality requirements or calculations are required. If they are not, our approach does not require precise definitions of the relevant maritime area.

But what of criteria and methods? Our line can fortunately be explained in fewer steps than that of

Newfoundland, but it's not entirely a one trick pony, as Newfoundland would allege.

We begin with two primary equitable criteria we believe are founded in the facts of this case, and supported in the jurisprudence.

They are to give effect to the conduct of the parties, as much as it can be determined. And the equal division of overlapping areas of entitlement, although where we actually apply this as a direct criterion, you could call it maritime projection, and it wouldn't matter, because we don't apply it in the outer area as a method, only as a test. Auxiliary criteria to test the equity included proportionality, the possibility of cut-off, and the question of resource location and access.

In the inner sector, however, where the coasts are opposite, other considerations did apply, and I mentioned this, including the criterion of equal division, equal in principle at least.

I missed one for you there. Okay. Could we have that one again?

The primary criterion, as we did -- or the first of the primary equitable criteria involves the overwhelming evidence of the conduct of the parties as evidenced by everything that's been listed by Mr. Bertrand this morning. The Agreements, the permit conduct, and the

political conduct, as well.

The existing boundary is -- the existing boundary is an application of the methods employed by the parties in the inner sector, and a reflection of their conduct in the outer sector, and it generates, in our view, a proportional result.

Now we have -- if I can just move ahead a bit. We have, as far south as 46 degrees north, a line justified both by a median line, and by the very strong evidence of mutual conduct, including the 1964 Agreement out to 2017. And the Nova Scotia permits, coupled with the Mobil permits, as far as 45 degrees, as well as, all the other evidence.

That is the line proposed by Nova Scotia. The line in use, in practice and legislation for many years. But in phase one that's all we had to say. The equity of the line was irrelevant to the question of the binding agreement. Here however, we do go further. We test the line for proportionality, even using the full coast of Newfoundland appropriate to our method, if not to theirs. We feel the existing line delivers a fully proportional result, and all of that is fully addressed in our Memorial, in our Counter-Memorial.

And we consider, yes, we admit it, the impact of the major known perspective structure in the immediate

vicinity of the line. Laurentian Sub-basin. Compatible with the standards expressed in the Gulf of Maine, we see that the line leaves to both parties, and to France, areas within which they can carry out prospecting activities.

In sum, this line is the line created by the parties in their conduct. It is a line justified by the general geography of the area, and it's one that avoids, in the outer sector, the possible distorting effects of equidistance. And it's a line that equitably divides the potential resources of the sub-basin, the identification of which is what most likely prompted Newfoundland to initiate the dispute.

It is, as my colleague Mr. Fortier will tell you, both the equitable line, and the right line.

If there are no further questions? Thank you.

MR. FORTIER: Mr. Chairman, I have been drinking a lot of water, could I have a two minute break, please, which might serve another purpose for Mr. Legault?

(Brief recess)

MR. FORTIER: Mr. Chairman, members of the Tribunal, I -- I have been thinking in the last few minutes -- why don't we turn off the -- let's turn off the screen. Let's turn off the -- I -- I'm not -- I don't need any graphics to convey Nova Scotia's last message to the Tribunal, although we have prepared some, I'm going to do away with them.

Before I start my péroraison, so to speak, I would like to address a couple of comments to Mr. Legault. And I do this very respectfully.

The line of questions which -- which were asked, which was asked of Mr. -- of Professor Saunders earlier this afternoon, was based on your reading of the Jan Mayen decision by the International Court of Justice. And I -- in the last hour, with the assistance of my colleagues, I have reread the relevant passages of Jan Mayen, and -- and very respectfully, since you and the other members of the Tribunal will have the weekend to, I'm sure, reflect on what you have heard in the course of the last five days, I -- I invite you to look in particular at paragraphs 18 to 20, of the ICJ decision, as well as paragraph 59. So that's paragraphs 18 to 20, and paragraph 59. And I believe, I say this very respectfully, that you will see that the premise of your question is not borne out by what the Court said.

MR. LEGAULT: I accept your invitation gratefully. Thank you.

MR. FORTIER: Thank you.

Mr. Chairman, members of the Tribunal, it's -- it has been a very long week. Since Monday morning, you have listened very patiently to counsel for Newfoundland and Labrador, and Nova Scotia, expound about -- upon their

respective theories of this very important case.

And as far as -- as far as I'm concerned, as agent for Nova Scotia, I cannot add or indeed, subtract anything from what my friends, Dean Russell, Maître Bertrand, and Professor Saunders have said on law, conduct, and geography.

Soon the advocates will be silent, and you will retire to deliberate with transcripts, and Memorials, and figures, and exhibits, expert evidence, and not least, your own vast experience and wisdom. All week you've heard claims, and counter-claims, accusations, rebuttals, denials, admissions, pleas. Is the law a rubber band, or a bar of soap? Are we talking about a -- a buffet, or a smorgasbord? Un potte au feu, or an ice cream, curry? Is that for here, or to go? Domestic or international? Rules, principles, or criteria? Primary or secondary? Bisector or perpendicular? Mercator or conic? Perversion, subversion, or inversion?

Offshore area, continental shelf, fishery zone, territorial sea, or EEZ, LOS, or GCCS? The litany of code words and concepts in this area of maritime delimitation is very lengthy indeed.

I think though, that even my friends who represent -- my learned friends who represent the Province of Newfoundland and Labrador would agree with me on one

thing, TGIF. Thank God it's Friday.

In the course of this, my very brief conclusion to the first round of presentation -- first round presentation of Nova Scotia, I am mindful of the fact that after the weekend pause, and after Monday when we hear Newfoundland round two, I will have the privilege of returning to this podium.

At this point in time, I only wish to recall a few very simple and very basic truths concerning the case that you have been asked to decide, and that you will decide in due course. And as we prepare to part company for the weekend, I ask no more than that over the next two days, as you ponder the arguments that you have heard, and as you begin to think about next week and beyond, you bear these in mind.

First, your mandate, Mr. Chairman, members of the Tribunal, is intimately tied to the political and legislative process by which the rights that are at issue between the parties came into existence in the first place. The purpose of this arbitration is to complete, to finalize the regulatory scheme which is defined in the legislation. The practical application of the delimitation that you will carry out will determine which province gets to share certain responsibilities and certain benefits with the Government of Canada --

entitlements that the Supreme Court of Canada has twice ruled are enjoyed exclusively by the federal government.

Professor Crawford wondered aloud yesterday whether, when one enters into the field of Canadian politics, everything becomes soft and mushy. I say to Professor Crawford on behalf of all of us, I'm sure, welcome to Canada. It may be confusing, but to us, it is home.

Second, your mandate, Mr. Chairman, members of the Tribunal, requires you to apply international legal concepts to domestic subjects, and to a domestic subject matter that, not surprisingly, are unknown to a law that governs relations between sovereign states. But this obstacle has already been negotiated; it's already been dealt with in your award in the first phase of the arbitration when you found that the Terms of Reference provide the flexibility required to apply rules of international law to transactions which took place within Canada by reference to Canadian law and politics. You did it -- you did it in your Phase One Award, and you then ruled clearly that you would have no difficulty doing it in the second phase of the arbitration.

Third, the most elemental consideration in the international law of maritime delimitation is the legal basis of entitlement regarding the area to be delimited. The basis of entitlement is both the point of departure

and the benchmark of relevance for all other considerations in the delimitation process. It is, indeed, primordial and it then dictates to the adjudicators the weight to be accorded to all relevant circumstances in the delimitation.

Fourth, the question of entitlement and of definition of that which is to be delimited on the one hand and the question of delimitation on the other hand are distinct. They are found in different sources. The two questions are, nonetheless, complementary since the legal basis of that which is to be delimited and of entitlement to it cannot be other than pertinent to the delimitation. These are all words which members of the Tribunal will recall are to be found in the Libya-Malta decision of the International Court.

Fifth, in this case, the legal basis of that which is to be delimited and of entitlement to it, that is the legal basis of the offshore areas and of the parties' entitlement regarding those areas arises exclusively by virtue of a negotiating process, the results of which have been enshrined in legislation. That is a fact which cannot be modified, nor need it be modified for the Tribunal to fulfil its mandate.

Yes, the application of international law to such an entitlement is unprecedented, but it is just as surely

what the Terms of Reference, your Terms of Reference require.

Sixth. Sixth, basic truth. The applicable principles of international law, Mr. Chairman, members of the Tribunal, comprising the fundamental norm, of course, of maritime delimitation, are, in fact, fully capable of application in this case. The norm has proven itself sufficiently robust and flexible to apply as we saw in the course of the last two days to novel subject matters, from the North Sea cases to the Gulf of Maine to the Jan Mayen decisions. The same norm, the same tools, the same techniques that have been tried and tested in other maritime delimitation cases can be applied to divide the areas at issue here. The only fiction or modification that is required is to treat those international principles as applicable to the parties in this case as if they were states, and this is already achieved in the Terms of Reference.

Seventh. Seventh basic truth that I pray you take with you over the weekend. You are not confronted here with a tabula rasa. Rather, a line dividing the parties' offshore area currently exists. Call it what you wish. Call it what you wish. The fact remains that a line exists, both in fact and in federal and provincial law.

Eighth. That same line has existed in some form, de

facto or de jure, for almost 40 years, and please remember that this line was a product not of a hurried, eleventh hour deal, but of many years of reflection and negotiation as the evidence discloses.

Ninth. Ninth basic truth. Since 1964, Nova Scotia has faithfully, consistently and openly respected and applied the existing line in its laws, in its regulatory and permitting practice, and in its relations and agreements with other governments in the region. For at least some, likely much, and arguably, nearly all of that period, Newfoundland and Labrador has also respected and applied that line. It "agreed" to that line in many ways in 1964, and again, in 1972. It describes that line in the context of these very proceedings as -- and I quote, "the defined element of a boundary agreement" and as "the identification of the boundary lines." It issued permits that conformed to that line, extending from Cabot Strait to, we're now told, precisely 267 nautical miles to sea. It continues to respect a boundary between it and Quebec that was defined during the same process that produced the existing line. This line between Nova Scotia, Newfoundland and Labrador never became legally binding. That has been decided. That is settled. But the consensus line of the premiers in 1964 has survived for many years and has been used by both provinces, as Mr.

Bertrand demonstrated this morning. To paraphrase the International Court of Justice in the Tunisia-Libya case, "The conduct..." -- "This conduct is one of the indicia which your Tribunal must take into account since it demonstrates that both parties themselves considered the line to be equitable." The line is not dispositive. If it had been dispositive, there would not have been a second phase. But it could only -- it can only avail as a relevant circumstance.

Tenth and final truth, which I invite members of the Tribunal to reflect on during the weekend. No other line was ever formally claimed by Newfoundland until August of this year when it produced its Memorial in this second phase of the arbitration. This, Mr. Chairman, members of the Tribunal, is fully 13 years after the Canada Nova Scotia Accord Act became law with its Schedule 1 in 1988. That is 14 years after the Canada Newfoundland Act became law in 1987. That is 17 years after the original 1982 agreement between Canada and Nova Scotia setting out the boundary by longitude and latitude was implemented in legislation in 1984.

That is 17 years, as well, after the Hibernia reference determined once and for all in 1984, that Canada, not Newfoundland and Labrador, enjoyed exclusive ownership and jurisdiction over the resources of the

continental shelf offshore of Newfoundland.

And that is 29 years after, as your Tribunal has found, Newfoundland first suggested that there may be some controversy regarding part of the line dividing the two provinces' offshore claims in 1972.

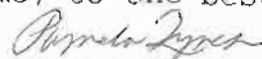
So these, Mr. Chairman, members of the Tribunal, are the basic truths which I wanted to identify, and which I pray you carry with you to your home, your hotel room this weekend, as you begin to -- or continue to reflect on the evidence which has been put before you. And I am confident, as agent for Nova Scotia, that as you continue your reflection, as you continue your -- your discussion, and as you come to apply the principles of international law, the fundamental norm, you will determine that the line proposed by Nova Scotia, to divide the respective offshore areas of the parties, is an equitable line.

It's been a long week, TGIF, and on behalf of Nova Scotia, I thank you, Mr. Chairman, members of the Tribunal, for your attention to Nova Scotia's presentation. And I wish you a good weekend.

CHAIRMAN: MDCV, Merci Dieu c'est Vendredi.

(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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