ARBITRATION BETWEEN NEWFOUNDLAND AND LABRADOR

AND NOVA SCOTIA

held on the 28th day of November, A.D., 2001, at the Wu Conference Centre, Fredericton, New Brunswick, commencing at 9:30 a.m.

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Tribunal:

Hon. Gerard V. LaForest, Chairman

Mr. Leonard Legault, Q.C.

Professor James Richard Crawford

Appearances:

L. Yves Fortier, Q.C.

Professor Phillip M. Saunders

Jean G. Bertrand

. . . . . .

CHAIRMAN: Mr. Fortier?

MR. FORTIER: Thank you, Mr. Chairman, and good morning to you and to other members of the Tribunal. I was brought up in an age where we avocats, barristers, did not use slides, and as you will recall, I forewent the privilege of -- or the offer of using slides last Friday in my closing first round speech, and I have decided to do the

same this morning. I will not be using graphics.

I have a text which is being printed and will be handed to you at the conclusion of my remarks.

Now Mr. Chairman, Members of the Tribunal, Nova Scotia's rebuttal submissions in this second and last round of the hearing in phase two of the arbitration will, of necessity, cover a number of distinct, yet complementary topics arising from the speeches by counsel for Newfoundland and Labrador on Monday, as well as from the questions posed to Nova Scotia by the Tribunal during our submissions last week.

We, unlike Nova Scotia -- unlike Newfoundland, rather, intend to confine ourselves to a true rebuttal. We will not employ the Newfoundland tactic of using its last appearance before the Tribunal to unload arguments and material that have clearly been in its possession for some time, and more importantly, whose origin, accuracy and veracity is, in many instances, so dubious as to call into question its bona fides.

My colleagues and I who appear before you today on behalf of Nova Scotia, hope and trust the Tribunal will not consider our role to be simply to deliver uninterrupted monologues. We continue to invite and welcome challenging questions.

And unlike Newfoundland and Labrador, we will not have

recourse to arguments packaged in blandly pleasing terms, tempting rhetoric and the sort of false yet appealing syllogisms as might have been deployed by Milton's devil in Paradise Lost.

Newfoundland may cloak itself in the mantle of sober orthodoxy, yet its hands are far from clean and its dogma, its mantra, should be anathema to the members of the Tribunal.

No, Mr. Chairman, don't be a pioneer, just apply the law. Professor McRae pleaded soothingly on Monday of this week, "Don't be a pioneer, just apply the law." Professor McRae suggested that the law provides a simple and ready answer to the complex legal and factual issues that the Tribunal has been charged to resolve.

This, in my respectful submission, is nothing other than a plea for you to ignore what I called on Friday the most basic truths of this case, including the truth that you are confronted with facts that simply have never been considered before by an international tribunal, but which cannot for that reason be disregarded, as Newfoundland and Labrador proposes.

As well as the truth that the law does not contain ready-made solutions to maritime delimitation disputes, least of all a dispute of this nature. Of course it does not. To suggest that it does, no matter how very

reassuring the proposition, is to deny the very essence of the law that you are asked to apply. Newfoundland and Labrador's proposition is -- I say very respectfully, Mr. Chairman, Members of the Tribunal, Newfoundland and Labrador's proposition is but an invitation to abdicate your very duty as arbitrators and to forego your mandate.

This arbitration, you were told by my friend, Professor McRae, on Monday, in the opening minutes of his presentation, is but, and I quote, "the culmination of a process that began with the adoption of the Atlantic Accord in 1985 and the Nova Scotia Accord in 1986...for the determination of the boundary between the provinces in respect of their offshore areas."

This is far from the truth, as even a casual reference to the Accords and their implementing Acts makes abundantly clear.

As you well know, under the Canada-Newfoundland Act, the process for determining the limits -- the process for determining the limits of what, for the sake of convenience, we refer to as "Newfoundland's offshore areas", was to be, and I quote, "by regulations made by the Governor in Council."

As you know, in the Canada-Nova Scotia Act, the limits of the Nova Scotia offshore area are defined with deliberate precision in Schedule I, including the boundary

between the offshore areas of the two provinces.

PROFESSOR CRAWFORD: Mr. Fortier -- and that's the case, also, for the 1982 Accord?

MR. FORTIER: Yes, it is.

PROFESSOR CRAWFORD: Can you explain to me why the '82 Accord was replaced by the '86 Accord?

MR. FORTIER: Why the '82 Accord was replaced by the '86 Accord. I'm not sure the -- yes, the negotiations continued between the province and the federal government and a better deal was struck with the arrival of a new government in 1984. Mr. Mulroney became Prime Minister in 1984 and it was one of his -- one of his election promises to the Atlantic -- to the Atlantic provinces that he would be prepared to enter into negotiations with the provinces to better the 1982 Act.

PROFESSOR CRAWFORD: Because the '82 Accord has this most favoured province clause in there to which had earlier been suggested by Prime Minister Trudeau as a method of getting the individual provinces to come on board, as it were, individually.

MR. FORTIER: That is correct.

PROFESSOR CRAWFORD: Was the '86 Accord sort of -- was that relevant to the negotiation of the '86 Accord or was it simply a change of policy at a different level?

MR. FORTIER: I'm instructed that it was relevant. Yes. So

it's a change of government. It's a better deal, in fact, after the 1984 federal election.

CHAIRMAN: In fact, did not the Conservatives, at least under Joe Clark, agree to grant it -- and I don't know what Mulroney did; I think for awhile he may have followed that policy, but when he came to government, thought that was a little difficult to take.

MR. FORTIER: You are absolutely right. In the short-lived Clark government of 1979, there was -- the Accords were on the agenda, definitely. Definitely. But the fact of the matter is whether in 1982 the '82 or '86 legislation, the definition of the limits of the Nova Scotia offshore area are defined with precision.

PROFESSOR CRAWFORD: Do you see any differences that the mechanism for resolving boundary disputes is different as between '82 and '86?

MR. FORTIER: Yes, it is, but you have -- you have pronounced the key word -- for resolving a dispute if a dispute arises. But the boundary -- failing a dispute, the boundary is defined with precision and it delimits the offshore area of the two provinces. And as I said, it's only in the event that one of the two provinces raises a dispute regarding these limits, and only where as the provision, the clause in question Dr. Crawford has referred to -- only where other means have been tried and

failed -- in other words, negotiations -- that recourse to arbitration is to be had.

CHAIRMAN: But, in fact, it was known that there had been a dispute, at least since the Doody letter?

MR. FORTIER: We would take issue with that. I know that you allude in your Phase One Award to what appears to be the beginning of a dispute, but as I will try to demonstrate, if there was a dispute, there was -- there was an obligation which Newfoundland had to put in motion the process that was defined in the legislation, and they did not do it until -- in effect, until 1998. And that is one of the elements which I believe should weigh very heavily in your consideration of the facts.

PROFESSOR CRAWFORD: That's certainly true because my understanding of the chronology, and this is something Mr. McRae addressed the other day, obviously, you had the legislation in the mid-80s. The moratorium was still in force during that period and didn't expire until 1992.

MR. FORTIER: That is correct, between France and Canada. Yes.

PROFESSOR CRAWFORD: Yes. So that the Newfoundland explanation for the delay was that they were in discussions with the federal government. The moratorium was there. There was uncertainty about what the boundary would be until after the Anglo-French Court of -- sorry,

the French-Canadian Court of Arbitration made its decision, and accordingly, there was no call for a resolution of any intraprovincial dispute until after that.

MR. FORTIER: But the boundary between -- as between the two provinces lived on in legislation.

PROFESSOR CRAWFORD: In legislation with Nova Scotia.

MR. FORTIER: In provincial and federal legislation. Absolutely. So our point here is that Newfoundland and Labrador wishes to see yourselves as legislators -- in a sense, part of a process intended to enact a boundary as though for the first time, but I repeat this is simply not the case.

Newfoundland and Labrador hides behind this ruse so as to avoid the implications that flow from the fact that, Mr. Chairman, it waited nearly 40 years to raise a dispute clearly and formally. It wasn't until 1998 that Newfoundland and Labrador raised a dispute clearly and formally. It wasn't until 1998 that it stated a claim different -- a claim different than the line that it long considered to be a reasonable and equitable boundary between the offshore entitlements of the parties.

PROFESSOR CRAWFORD: And in the 1982 Accord even, there is provision for the resolution of disputes. Although my reading of the Accord, there is some discrepancy between

the Accord and the legislation.

MR. FORTIER: Some.

PROFESSOR CRAWFORD: I think that's probably irrelevant, because --

MR. FORTIER: In our view, it is irrelevant.

PROFESSOR CRAWFORD: Yes. But if you look at the Accord, it's clearly -- it says in the beginning of the boundary description, before the actual boundary description, in the annex, it says any boundary -- I can't remember what the word is...dispute, or whatever it is.

MR. FORTIER: The word "dispute" is used.

PROFESSOR CRAWFORD: Can be resolved by the federal minister, after consultation with Nova Scotia.

MR. FORTIER: That is correct. That is correct.

PROFESSOR CRAWFORD: So, wouldn't one infer from that that it was not the intention of the federal government to lay down a boundary that was beyond dispute? I mean, if you say any dispute about the following boundaries will be resolved in the following method, but these are the boundaries. You are, aren't you, implying that the boundaries are still, in some sense, capable of being disputed?

MR. FORTIER: But our point here is that the legislation uses the word "dispute" and the -- if there is a dispute about a line, that means that the party that disputes the

existing legislated line has another line to propose. And that is what was not done until 1998.

PROFESSOR CRAWFORD: For the record, the first appearance I have been able to find of the line is 1997. It was put in the -- and it was a formal letter.

MR. FORTIER: Yes, I will be coming to that.

PROFESSOR CRAWFORD: Not in '98, but there was an earlier version of the line which seems the same in 1997.

MR. FORTIER: In 1997, it was as between the Federal Government and Newfoundland, Nova Scotia not being a party to that correspondence.

And contrary to Professor McRae's suggestion on Monday, the 1984 legislation implementing the '82 Agreement did not contain any provision for modifying the line. For modifying the line. It referred to a dispute, but there was no provision for modifying the line. And I believe that this is something that you should -- it's also something that should be borne in mind.

So, the -- as I think, if I may just complete this first facet of my presentation this morning, you, Mr. Chairman, and Members of the Tribunal, know by now that it is Newfoundland and Labrador which petitioned the Federal Government for this arbitration. It is Newfoundland and Labrador which challenges, now challenges the line that has been law since 1984, and in use de facto for almost 40

years. And it is Newfoundland and Labrador that seeks to undo a deal, to revise history, and to rewrite legislation.

Now, following my initial comments this morning, Mr. Chairman, Professor Saunders will address the Tribunal. He will consider what I call the load dumped on all of us by Newfoundland and Labrador this week. Its sheaf of lines to use terminology employed in Tunisia-Libya.

He will also respond to Professor Crawford's query regarding the line that Nova Scotia might have claimed had it not claimed the existing line. As well as your hypothesis, Professor Crawford, concerning a delimitation between two independent states in the position of Nova Scotia and Newfoundland, but, quoting from the transcript of the 23rd of November, "with no prior agreement between them, taking into account the maritime boundary of St. Pierre and Miquelon."

Finally, Professor Saunders will address the Tribunal's wish to have depicted what Dr. Crawford has called "the coasts and areas that actually have an impact on the delimitation."

Following Professor Saunders, my partner and friend, Jean Bertrand, will re-visit, briefly, key facets of the conduct of the parties, in respect of which, in Nova Scotia's view, counsel for Newfoundland have attempted to

cloud the facts and confuse the Tribunal.

Finally, I will return to the podium to summarize the position of Nova Scotia and the nature of the relief which it seeks, and you will be happy to hear, to close Nova Scotia's case.

Before asking you to call on Professor Saunders, Mr. Chairman, there are two preliminary matters which remain to be addressed, unfortunately. They both stem from the statements of Newfoundland's counsel on Monday.

The first concerns the basis of title and the terrible, yet wholly imaginary, outcome forecast by Professor McRae and his colleagues, should your Tribunal accept to treat the dispute as it quite frankly is, as a dispute regarding negotiated and legislated offshore areas, rather than ab initio and ipso jure continental shelves.

Professor McRae, Mr. Willis' presentation on Monday, and the fact that I was left with the impression that their views were not being challenged by Members of the Tribunal makes it incumbent on me to return to the basics of the case for both parties, the basis of title.

My second preliminary matter concerns, we have alluded to it presently, concerns a recent history of the dispute. The recent history of the dispute, and the ostensibly comforting, yet equally illusory, description provided by

Newfoundland and Labrador's Agent regarding the manner in which the dispute in fact crystallised, and the steps which led to it being referred to binding arbitration by the Government of Canada.

Professor Crawford?

PROFESSOR CRAWFORD: I just want to make an observation. The fact that Members of the Tribunal don't ask questions about something that is profoundly equivocal, it may mean that we are satisfied by something, or it may mean we are so dissatisfied by it that we have nothing to say.

MR. FORTIER: There was a division of opinion between counsel for Nova Scotia on this point, Professor Crawford. But, of course, I recognize that it can be one or the other. Some arbitrators are more sphinx-like than others.

The basis of title. Last week in the course of my opening submissions, Mr. Legault stated that his understanding, that was earlier in the process, Mr. Legault stated that his understanding is that the basis of entitlement to all maritime zones over which a coastal state exercises jurisdiction is the state's sovereignty over its land territory. As well, we heard Mr. Willis earlier this week, affirm a similar proposition in response to a question from Mr. Legault.

It is of course true that the maritime entitlements traditionally recognized by international law derive from

sovereignty over the land, and that it is through the medium of a state's coastal geography that the maxim, "the land dominates the sea" is given practical application.

However, it would be incorrect to believe that, on its own, this constitutes a complete statement of the legal basis of maritime entitlement. The jurisprudence is abundantly clear on this point, as I will very briefly review.

The Chamber in a case which Mr. Legault knows well, the Chamber in the Gulf of Maine case, cautioned that although the concept of adjacency can be acknowledged to express the link between a state's sovereignty and its sovereign rights to adjacent submerged land, it should not be forgotten, I quote from paragraph 103, "It should not be forgotten, however, that legal title to certain maritime or submarine area is always and exclusively the effect of a legal operation. The same is true of the boundary of the extent of the title. That boundary results from a rule of law, and not from any intrinsic merit in the purely physical fact." Paragraph 103.

Now the legal basis and the extent of title to maritime areas is not the result of the purely physical fact of coastal geography, adjacency, or natural prolongation. Rather, title arises as a result of a legal operation that also encompasses other considerations as

well, such as the nature and the purpose of a state's right in relation to the zone.

For example, publicists have written extensively about the difference between the nature of a coastal state's title to the territorial sea and the nature of its rights in relation to the continental shelf.

With respect to the territorial sea, a coastal state exercises a three-dimensional sovereignty that extends not only to the waters, but also to the seabed and subsoil below and to the airspace above.

These rights extend over areas close to the coastal state's shores for purposes related to what? Related to the defence and security of the state, interests inherent in the old cannon shot rule. And lest the point be forgotten, Mr. Chairman, Members of the Tribunal, I would ask you to bear in mind that a cannon fires in all directions, not only straight offshore, perpendicular to the coast, as it were.

On the other hand, a coastal state's rights over the continental shelf involved not sovereignty, but rather sovereign rights for the purpose of exploring and exploiting the natural resources of the shelf.

Now the significance of this difference in the basis of title to the two zones, the territorial sea and the continental shelf, and its implications for the

delimitation process were clearly recognized by the Chamber in the Gulf of Maine case, when it declared, and I quote again, this time from paragraph 120: "The situation of the territorial sea and the contiguous zone, conceived as subject to the sovereignty of the coastal state, or subject to the exercise of customs controls and similar measures, intended to prevent violations of territorial sovereignty cannot be treated as an analogy to the continental shelf or fisheries zone."

And the Chamber went on to say in the same paragraph 120, "There is nothing here in the legal institution of a territorial sea and contiguous zone, there is nothing which is comparable with the reservation of the exclusive rights of exploitation of resources of a maritime area extending to 200 miles. There is, therefore, nothing which could justify the idea of an extension thereto of criteria and delimitation methods expressly contemplated for the narrow strip of sea defined for a quite different purpose."

In other words, this is back to basics, I appreciate, but it behooves me to go back to basics. In other words, notwithstanding that the legal institution of the territorial sea and of the continental shelf share a common origin in the coastal state sovereignty over the land, there exists significant differences even between

two such closely related juridical concepts as regards their respective bases of title. And these difference have very important implications for the delimitation process.

The differences between the legal basis of a coastal state's title to the continental shelf, and the basis of the parties' entitlement to the offshore areas to be delimitated in this case, it goes without saying, I submit, is far greater. Both juridical concepts are related, to some degree, to the coastal geography of the so-called state that enjoys the entitlement. The provinces, as we know, would have no offshore area entitlements if their lands did not abut the sea. But unlike the continental shelf, the legal basis of the offshore area, and of the parties' entitlement to it, are negotiated, are given effect by legislation, and are confined to purposes that are incompatible with any notion of sovereignty or sovereign rights.

MR. LEGAULT: Mr. Fortier --

MR. FORTIER: Yes, Mr. Legault.

MR. LEGAULT: -- if I may, just very briefly. The differences, which you have described very accurately, between the legal nature of the territorial sea and the legal nature of the continental shelf, and again, as you are absolutely right to point out, delimitation is a legal

operation. But in that legal operation, those differences, don't they come into play in the determination of the relevant circumstances? I thought that was indeed the essence of Nova Scotia's pleading.

MR. FORTIER: You are absolutely right. But there is a process that begins with the basis, the identification of the basis of title. The process must begin. That is the benchmark of the operation that you have to carry out. You first have to inquire into the basis of title. Once you have inquired and identified the basis of title, you are able to look at the nature of the entitlements. That is the point, which I believe is made abundantly clear in the Gulf of Maine case.

PROFESSOR CRAWFORD: There isn't really a dispute here about the nature of the entitlements. I think my understanding was that Mr. McRae agreed with your analysis of the nature of the entitlements. The question is the geographical extent of the entitlements.

MR. FORTIER: Well the fundamental difference here is that -- as for Newfoundland and Labrador, this delimitation should be -- should proceed as if you were delimitating a continental shelf. And we say no. You have to look at the purpose for which the entitlements have been legislated. And the purpose, as we know, is a share in the administration and the benefits of the offshore area,

which is altogether different from the rights which accrue to the coastal state, which is claiming rights over the continental shelf ipso jure -- de facto ipso jure.

PROFESSOR CRAWFORD: There is a problem with that argument in that both the legislation itself, and also the Terms of Reference, but let's stick with the legislation. As you say, that's the dominant instrument. The legislation not merely spells out the purposes in the way you have described in the entitlements in terms of their character, it also says that we are to apply international law with such modifications as the circumstances require. The international law, the principles of maritime delimitation.

MR. FORTIER: Correct.

PROFESSOR CRAWFORD: So that the legislature actually addressed its mind to this point in precisely in the context of these sorts of entitlement. It told us to apply --

MR. FORTIER: That is correct.

PROFESSOR CRAWFORD: -- a particular area of law. Now the question is whether your argument relates to the way in which the international law, principles of delimitation apply in this situation. That is to say, as Mr. Legault would put it, whether it's a relevant or special circumstance, as the case may be, or whether your argument

goes to the modifications to that part of the formula. Are you saying that the principles, themselves, operate differently in relation to these sorts of rights? Or are you saying because the provinces only have these sorts of rights, it's necessary to modify the international law principles?

MR. FORTIER: Definite -- not the latter, it's the former without any doubt at all. The whole process -- the whole operation begins with the legal basis of title. And to -- if one listens to, reads the Newfoundland argument, we see that there is a fundamental dispute, if I may use the word, between their definition of the legal basis of title and Nova Scotia's definition. And I have tried to demonstrate by reference to some passages in the Gulf of Maine case, that you have -- you, the adjudicator, have to look at the nature and the purpose of the title that the provinces have over the offshore area.

And here the purpose and the nature of the rights -- the nature of the rights of the provinces is a share in the, as I said, the administration and the benefits. It's not -- they are not rights which can in any be identified with those which a coastal right, a coastal state has over a continental shelf for purposes of a delimitation of a -- of a pure continental shelf. In the same way that the nature and purpose of the "territorial sea sovereignty" is

different from the nature and purpose of the continental shelf.

CHAIRMAN: Mr. Fortier --

MR. LEGAULT: Mr. Fortier -- oh, I am sorry, Mr. Chairman.

CHAIRMAN: -- you distinguished quite properly between the sovereign rights of the states, a complete right of sovereignty over the territorial waters and the contiguous zone, which is a system to protect the sovereignty of the state in its internal aspects. Now whereas both the continental shelf, using another perspective now, and the rights given to the provinces under these agreements are for the exploitation of resources of the sea, which is really not a complete analogy to me and leads to why the distinction is made there?

MR. FORTIER: There are no rights of exploitation to the resources of the sea which are granted to the provinces.

CHAIRMAN: Not as extensively, but --

MR. FORTIER: None whatsoever, I say respectfully.

CHAIRMAN: -- certainly in the end you share the administration of it.

MR. FORTIER: Yes.

CHAIRMAN: You share the profits of it.

MR. FORTIER: Yes. But you don't have any other rights to those resources, such as a state, such as Germany and Denmark and the Netherlands had in the continental shelf

off their coasts in the North Sea cases. With respect, there can be no -- there is no identify -- the rights are altogether different. Altogether fundamentally different.

PROFESSOR CRAWFORD: Well they are not altogether different. But certainly they are different. I mean I think everyone would agree with that. But evidently Canada gets half the revenue.

MR. FORTIER: Well --

PROFESSOR CRAWFORD: So it's foregone half the revenue, but it would have got that half of the revenue by reason of its inherent rights if the Accords legislation had never existed. So to that extent, there is overlap, to put it at its lowest, between the provisions of the Accords and the situation that would existed apart from them.

But the question that concerns me, I asked you this in the first round, and you gave an answer at least in one respect, but you said it wasn't a complete answer. The question was well bearing in mind that this is a negotiated provincial entitlement, does that mean that conducts during the negotiations is more important to delimitation of the offshore area, than it would be to delimitation of the continental shelf? To which your answer is, yes, but that's not the only difference. Okay. So I mean I understand that you say you have to draw a connection between the character of the entitlement, as a

negotiated entitlement, and the character of what is relevant circumstances for purposes of delimitation. That's fine.

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: Looking at the other aspects of the differences between continental shelf and offshore area, the question is what other implications are we to draw from those differences? Now maybe you are coming to this. But my difficulty is in seeing other cases. I mean, for example, the resources of the continental shelf include sedentary species, but it's not really suggested that the boundary should be any different because you are not getting sedentary species.

MR. FORTIER: Of course not. Of course not.

PROFESSOR CRAWFORD: No.

MR. FORTIER: Of course not, Professor Crawford.

PROFESSOR CRAWFORD: The extent of the area is the outer edge of the continental margin, which is in fact co-extensive with the rights of Canada to continental shelf.

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: So there is an expressed link in the Oceans Act that way. So again, it doesn't seem that although I perfectly see that the extent of the margin raises implications for a delimitation process, I don't see that there is any difference between the implications

it would raise for this delimitation process, and the difference it will -- and the implications it would raise on a purely interstate basis.

MR. FORTIER: The way you phrase your question, I agree with you, as far as Article 76 of the Oceans Act is concerned, it only serves to determine the relevant area. It's not part of the law -- it's not a principle of law of maritime delimitation.

PROFESSOR CRAWFORD: So what we have established so far is that because this is a negotiated entitlement, unlike continental shelf, therefore, conduct during negotiations and conduct more generally --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: -- has a higher level of salience or relevance?

MR. FORTIER: Absolutely.

PROFESSOR CRAWFORD: Okay. Follow you there.

MR. FORTIER: It all goes to the weight of that's the relevant circumstance, which conduct is.

PROFESSOR CRAWFORD: Yes. Fine.

MR. LEGAULT: Mr. Fortier, if I may, I don't want to add my cannon shot to the barrage you are undergoing --

MR. FORTIER: As long as you don't fire in one direction only, Mr. Legault.

MR. LEGAULT: Are you arguing that the differences in the

nature and purpose of the rights enjoyed in these various maritime zones change the legal basis of title over those zones?

MR. FORTIER: I am saying that in order to identify the basis of title, you have to look at the nature and the purpose of the zone in question. You have to look at the nature and the purpose. And the nature and purpose is found in the legislation. You have to look at the nature and purpose of the territorial sea. You have to look at the nature and purpose of the continental shelf. You have to look at the nature and purpose of the offshore areas in this case. That's what the Chamber said in the Gulf of Maine.

Let me remind you again of what I consider to be one of the most important passages. Legal title to certain maritime or submarine area, the offshore area, is always, and exclusively the effect of a legal operation.

So where do you find it? You find it in the legislation here. You find it in your Terms of Reference.

MR. LEGAULT: That wasn't quite the question I put to you but I thank you for your answer.

MR. FORTIER: Now when you talk about, as Article 3 of the Terms of Reference does, the principles of the law of maritime delimitation, what does it refer to? Dr. Crawford, you referred to it. It boils down to what? To

the fundamental norm. And the fundamental norm we certainly have never advocated that would be heresy. The fundamental norm, you know, does not -- I forgot what I was going to say. But the fundamental norm begins with the basis of title. That is the all important submission that we are making. And the basis of title to an offshore area is different than the basis of title to a territorial sea, or to a continental shelf, or to an EEZ or to a fisheries zone.

PROFESSOR CRAWFORD: And the point I was trying to make, and I think we have probably reached at least a measure of agreement on this is, okay, we accept that the basis of title is different and it's then necessary to show how the particular difference relates to --

MR. FORTIER: Yes, sir.

PROFESSOR CRAWFORD: -- the application of the principles of international law. And we have seen one respect in which in your view it does relate and it would make -- at least arguably make a difference.

MR. FORTIER: Yes, sir. So the -- because you see, you must after you have identified the basis of title -- and as I say, the norm dictates to the adjudicator that the operation starts with a basis of title. After you have identified the title as a touch -- you know, you use it as -- I would say as the touch stone for every other aspect

of the delimitation operation. But you start with the basis of title. And in order to identify the basis of title, you must look to the nature and purpose of the area. What is the nature and purpose?

Now I have reached a point where I'm repeating myself, so I will move on.

Although it may be justifiable in a multi-purpose delimitation of a single maritime boundary encompassing the different zones -- encompassing different zones as in the Gulf of Maine case, although it may be justifiable to focus primarily on the common denominator of the different zones being delimited in conjunction, for example, on coastal geography and on considerations related to it, the situation is different, is entirely different where, as in the present case, the delimitation involves only one zone, the legal basis of which relates to particular and specific purposes.

This is implicit in the Chamber's comment on the natural criterion of delimitation related to the distribution of fisheries resources advocated by the United States.

In this regard the Chamber found -- and I quote -- "The fundamental fact remains that the criterion underlying the US line of 1976 was too much geared to one aspect of the present for problem for it to be capable of

being considered equitable in relation to the characteristics of the case. This criterion may have been justified for a delimitation concerning exclusive fishery zones alone, but less so for a single delimitation in whose purpose the continental shelf and especially the resources of its subsoil also play a most important part." So it's the identification of the circumstance. It's the weighing of the circumstance.

And I invite you to remember that, you know, Newfoundland both in its written pleadings, as well as in its oral submissions, actually denies that the basis of title affects in any way the weighing of relevant circumstances. And this is a fundamental difference between the positions of the two parties before your Tribunal.

The point is that in the present case, which concerns the delimitation of only one juridical zone, the offshore area as defined in the Acts, there is simply no need, and indeed it would be wholly inappropriate to restrict an analysis of the basis of title and the considerations which flow from it, to such a common denominator, as we hope we demonstrated in our written and oral submissions. And as I have just mentioned, the federal government would presumably not have conferred offshore area entitlements on the parties if they did not have any coastal geography,

of course. But geography is not the root of that entitlement. Geography is not the root of the entitlement.

There is nothing radical here, I submit. Nothing to conjure up the dragons produced by the imagination and the seductive rhetoric of Newfoundland and Labrador's Agent. You know, if we --

PROFESSOR CRAWFORD: If we look at the negotiations, of course, there was a serious proposal for pooling, which would have treated I think all of the east coast provinces on the same basis here irrespective of coastal geography.

MR. FORTIER: Yes. It came to that in the 70s, yes.

PROFESSOR CRAWFORD: And that was rejected.

MR. FORTIER: That's right.

PROFESSOR CRAWFORD: So one might say that that aspect of the negotiation supports the idea that the more coastline you have the more you may be liable to get.

MR. FORTIER: Well I suppose you could make the argument but I don't think that it would hold, respectfully.

CHAIRMAN: It certainly would be the case on the under the basis of the "agreement" which the provinces freely entered into.

MR. FORTIER: I'm sorry, Mr. --

CHAIRMAN: The "1964 Agreement".

MR. FORTIER: Yes.

CHAIRMAN: There was a division based on geographical considerations.

MR. FORTIER: I -- we have never, never stated that geography was not a relevant circumstance. Of course it is a relevant circumstance. It's the weighing and the priority, if you wish, that you accord to geography versus conduct, for example, in this particular case. But, yes, geography is a relevant circumstance.

CHAIRMAN: But completely divorced from the continental shelf. Why should it be? They are all part of Canada.

MR. FORTIER: And the question?

CHAIRMAN: Why should there be a difference? They are all part of Canada, every province is.

MR. FORTIER: Yes.

CHAIRMAN: So why should we make a difference between them on the basis on geography? We don't for other federal powers.

MR. FORTIER: Well if you mean, Mr. Chairman, whether or not you should consider the geography of the area, my answer is yes. We have -- Nova Scotia has never taken the position that geography was not a factor. But my point at the moment is that in order -- you know, before you come to identifying -- if I may work backwards -- identifying the method after you have identified the relevant circumstances and after you have given its proper weight

to each one of the relevant circumstance, you have to go back to the identification of the basis of title. What is the nature and purpose of the area in question? And the nature and purpose is not the exploitation of the natural resources, because that is not a right which is conferred to either Newfoundland and Labrador or to Nova Scotia. It's strictly a participation in, a sharing of the administration and the benefits.

And, you know, to come back to Dr. Crawford's reference to what was envisioned at one time, the pooling connotes the idea of a division based on some kind of a formula. But that is not the case that we are dealing with, because -- like this is another one of the conditions that did not materialize. This was another aspect of the negotiation in the 1970s between the Atlantic Provinces and the federal government that came to naught.

As I was saying before I addressed the most recent questions of Members of the Tribunal, by no stretch of the imagination, no matter how fertile it may be, can it be said that geography in this case it has been described even by my friend Professor McRae as unique -- geography is not the root of the provinces' entitlement. And that is not radical. I submit that it doesn't conjure up the dragons produced by the imagination and the rhetoric of

Professor McRae to say that the basis of title to the offshore area should affect the selection of and the weight attached to the circumstances to be considered by the Tribunal and the equitable criteria to be applied is to do no more than reaffirm -- as I stated a moment ago, no more than reaffirm the fundamental norm of maritime delimitation.

And to say, Mr. Chairman, that the offshore area is not a continental shelf, is not the shocking heresy that Newfoundland describes. It is one of the simple basic truths of this case. We are not -- I repeat, we are not saying that geography is not relevant to the delimitation, but we are saying that geography is not the only -- not the only relevant consideration. And this is the only conclusion that is supported by the applicable law and true to the indisputable facts of this case.

MR. CRAWFORD: Of course, it is also true under international law that geography is not the only basis.

MR. FORTIER: Yes, sir. Yes.

PROFESSOR CRAWFORD: So in this case there is actually concordance between the international law principles and the principles you would say flow from the character of the design. That is that geography is relevant but not the only relevant consideration.

MR. FORTIER: It's a question of weight. It's a question of

weight and I -- it affects the -- I have to go back to basics again. And if you go back to basics you have to go back to the basis of title. And the basis of title affects the weighing of the relevant circumstances. And this is denied by Newfoundland and Labrador, that the basis of title in this case in any way affects the weighing of the relevant circumstances. And that cannot be so.

So, yes, in the delimitation, as in this case, of a negotiated entitlement, conduct relating to the genesis of the entitlement and the determination of its limits or boundaries, will have more weight than it would in the delimitation of, for example, the continental shelf. And yes, in the delimitation of an entitlement that confers rights solely in relation to certain resources, circumstances relating to the location of those resources and the access to them, provided by various proposed lines, should have more weight than might otherwise by the case.

But no, the fact that the offshore area is not identifiable with a continental shelf does not mean that there is no law to apply. The frightful notion that there would be no law to apply if the offshore area is not treated as a continental shelf, and if the parties' entitlements are not treated as inherent continental shelf

rights, is entirely of Newfoundland's making.

The theme, Mr. Chairman, Members of the Tribunal, if you don't follow us or you will be devoured by dragons, is not Nova Scotia's argument, it's Newfoundland's argument. It's an argument in terrorem, a device not without effect, but without any merit. And the Tribunal ought not to buy into it.

PROFESSOR CRAWFORD: I take it these are marine dragons?

MR. FORTIER: They have to be.

PROFESSOR CRAWFORD: Yes.

MR. FORTIER: They are marine dragons found in the offshore areas of the parties.

PROFESSOR CRAWFORD: And they're not sedentary?

MR. FORTIER: That is correct.

PROFESSOR CRAWFORD: Therefore they are irrelevant.

MR. FORTIER: The offshore areas to be delimited, yes, they are unprecedented as far as maritime entitlements go. And the legal basis of those areas and of the parties' entitlements will affect, as I said, the weight attached to the circumstances and the criteria considered by the Tribunal.

And as you begin your deliberations, I invite you to recall that both provinces which appear before this Tribunal, Mr. Chairman, they received rights relating to the seabed abutting their coasts. Just as in a different

context, one could argue, continuing on your, you know, this is Canada type of question, Mr. Chairman, western provinces receive rights over northern lands abutting their provinces, as they were then defined.

Geography does matter. We are, as we -- these are both Canadian provinces, but if there were no coastal geography, there would be no offshore area. That's a truism, of course. You know, we have never argued that the offshore area, as I said earlier, is an issue in this case, because the two provinces have coasts which abut on those area.

PROFESSOR CRAWFORD: Could we argue that because this is a negotiated settlement within Canada which is a federation dedicated to principles of fiscal equalization, or at least a measure of fiscal equalization, therefore we should take into account relative resources of the provinces?

MR. FORTIER: I don't think I will enter that political --

PROFESSOR CRAWFORD: I'm just looking for ways in which it might be different if they are offshore areas, and that seemed to me an important way, because if you were simply doing it on a geographical basis, obviously you could accentuate the inequalities. But if we imply a measure of fiscal equalization, we would actually improve things. So we should look at the relative resources, which we can't

do under international law.

MR. FORTIER: That's an interesting argument. While you're doing that, you might also consider how important in the context of the Canadian Federation, is the word of a -- of a Provincial Premier, you know, given to one of his colleagues.

So, you know, lest you be -- would you like to continue the discussion?

PROFESSOR CRAWFORD: The Chairman was just saying to me that this is true in general of provincial premiers, but not universally.

MR. FORTIER: Again, this is not an area that I'm going to -- there I would fear running into dragons.

So, you know, I almost feel as if -- Members of the Tribunal are extremely eminent, and very experienced adjudicators, jurists. I'm sure you will not shy away from the unique circumstances that present themselves in this case. That you won't shy away from discharging your responsibilities, your mandate under the Terms of Reference.

Because, to guide you in your task, you have the law. You have the international law of maritime delimitation which, of course, encompasses the all important fundamental norm. And the fundamental norm remains the same. The tools, the criteria, the techniques, the

methods developed by the jurisprudence remain the same, and they are available to your Tribunal, and you, of course, will have recourse to them.

You know, it would be difficult to count the number of times during the hearing that counsel for Newfoundland and Labrador charged that the delimitation proposed by Nova Scotia rests on its conception of the basis of title to the parties' offshore areas. It does. Of course it does.

But so, too, does Newfoundland's delimitation depend on its own conception of the basis of title. The difference between our case and that of Newfoundland and Labrador, is not that only one rests on a particular conception of the legal basis of the parties' entitlements. The difference, I submit, is that Nova Scotia builds its case on the true basis of title that is at issue in this case, while Newfoundland asks the Tribunal to assume, or imagine, or fictionalize a basis of title that does not exist, that the parties do not possess, that the Government of Canada and the Supreme Court of Canada have in fact, both expressly denied to Newfoundland, and that the Tribunal is neither required nor permitted to impute to the parties under the terms of its mandate.

So the choice to be made between these two competing approaches, the one based on the facts, and the other

based on fantasy is easy, there is no choice at all.

Under the international law of maritime delimitation, and according to the provisions of the Terms of Reference, the one factor that you must constantly bear in mind as you fulfil your mandate, to quote yet again the Court in Libya-Malta, "is the legal basis of the offshore areas to be delimited and of the parties' entitlements to those areas."

And what of the requirements to apply the facts as if the parties were states? Well, in your first Award, the first phase of this arbitration, you dealt with that requirement. You found that the Terms of Reference provide the flexibility required to apply rules of international law to facts that arise within Canada, by reference to Canadian law and politics, and to modify the applicable principles of international law, Mr. Chairman, Members of the Tribunal, but not the facts of the dispute.

You have already ruled. You held that this rule applies equally to the second, and to the first phase of the arbitration. And the facts, yes, as Mr. Currie said last week, the facts are the facts.

I turn the page now, and I go from the basis of title to a brief review of the recent history of the dispute.

I have discussed up to now this morning the true nature of the exercise in which you are engaged, not the

neutral, quasi-legislative process of setting a boundary as though none existed, that Newfoundland describes. This is not what you are asked to do. But proceedings engaged as a direct result of a dispute raised by Newfoundland and Labrador concerning an existing de facto line.

In his comments this week, the Agent for Newfoundland and Labrador misstated the manner in which this dispute arose, and was referred to arbitration. And in so doing, since he may have misled the Members of the Tribunal, I believe that is incumbent on me to review, very briefly, the record. It is clear, it is before your Tribunal.

All of the material that was adduced by the parties in phase one of the arbitration is relevant to this continuing arbitration. Almost none of it was referred to by Mr. McRae this week.

Briefly, it was in March of 1992, just before the Award in St. Pierre et Miquelon was handed down, that representatives of the two provinces met with the Federal Government to discuss the resumption of oil and gas activity that would occur after the Award. And I refer here to Newfoundland, at document number 109. There's an internal memorandum, the Newfoundland representative at this meeting, reported that in response to a comment from a federal official, that it will be necessary for Newfoundland and Nova Scotia to confirm their boundary,

Nova Scotia's Assistant Deputy Minister, quote, this is in the Newfoundland memorandum, that the Nova Scotia Deputy Minister "stated that Nova Scotia feels that the offshore boundary with Newfoundland is properly set out in the Nova Scotia Accord Legislation." This was in 1992.

In August of 1992, after the decision of the Tribunal of the international arbitral tribunal in the Canada-France dispute, August, Mr. Epp, the Federal Minister of Energy, who was referred to earlier, wrote to his provincial counterparts in Newfoundland and Nova Scotia, and in his letter he proposed that representatives of the three governments immediately begin discussions regarding the determination of the offshore boundary. This was in August.

One month later, the Nova Scotia Minister replied by stating that Nova Scotia did not believe that a dispute existed, in virtue of which the dispute resolution provisions of the Accord Acts could be engaged. Nova Scotia said there is no dispute. But the offer of federal assistance was appreciated.

PROFESSOR CRAWFORD: Yes, I don't have the letter with me. What they said was, from recollection, they wouldn't describe it as a dispute. You might --

MR. FORTIER: It's Nova Scotia annex 3.

PROFESSOR CRAWFORD: Yes. So, it's not a letter which, as

it were, affirms that there is no disagreement whatever. What it says is that there may be something that requires discussion. It hasn't yet taken on the characteristics of a dispute, that's how I read that.

MR. FORTIER: Well we read that letter as a statement of position by Nova Scotia to the effect that there is no dispute. But if -- but the Nova Scotia Minister said, you know, we appreciate the offer of federal assistance. And two months later, in November of 1992, here this -- I'm referring to document number 112, Newfoundland document, phase one. The -- Nova Scotia's Assistant Deputy Minister of Natural Resources wrote to his vis-a-vis in Newfoundland, further to a meeting between them that had taken place a few weeks ago, to provide him with, and I quote document number 112, "background information relating to the 1964 boundary line that was agreed to by the two provinces."

So what did Newfoundland do? Nothing. Absolutely nothing occurred that we have been referred to. And the matter appears to have been dropped.

It was three years later in August of 1995, the Newfoundland Minister, three years later -- now I'm in Nova Scotia annex 5 -- annex 4, forgive me -- the Newfoundland Minister wrote to the Nova Scotia Minister to say that "The government of Newfoundland and Labrador

supports a process of negotiation to resolve the Newfoundland/Nova Scotia offshore boundary. Once our preparations are complete, I will be in contact with you." This was in, I repeat, August of 1995. Nothing further was heard from Newfoundland, at least not by Nova Scotia.

PROFESSOR CRAWFORD: Of course, I mean the first point to make and it has to be acknowledged, that Nova Scotia has been entirely consistent in its position throughout --

MR. FORTIER: Since 1964.

PROFESSOR CRAWFORD: Throughout that period. I've seen no evidence at all that indicates that there was any divergence of the Nova Scotian position. Those discussions in the 90s, there's a clear implication, even in 1992, that there is something to discuss. It's not very clear what it is, I admit that, that there's something to discuss and the process of --

MR. FORTIER: Well, this --

PROFESSOR CRAWFORD: -- negotiations that was referred to in 1995 was obviously a negotiation about something to do with the boundary. It wasn't simply the record of an agreement and a long lunch.

MR. FORTIER: Well, the -- but the Nova Scotia position as we see and as we will continue to see is that there is no -- there is an agreed boundary. The words are "The 1964 boundary line that was agreed by the two provinces."

That was the Nova Scotia position. And Newfoundland at that point did not engage. That is they did not raise the dispute to the level which the legislation had envisaged. They just said, well, you know, we are prepared to start a process of negotiation, and then silence, you know, for three years.

And -- well, it's one of the points that we are making, that in the fullness of time -- we came to August of 2001 and the first formal claim with a defined line which was explained came to be presented to Nova Scotia in the Newfoundland Memorial. The -- yes, my colleagues remind me that, you know -- yes, I mean the correspondence is certainly not limpid, but, you know, one could argue that rather than there being any disagreement over a boundary as such, over the boundary, that since some of the federal permits crossed the line and needed to be split, that was what was envisaged -- what was envisaged as a subject for discussion.

So you -- we come to November of 1997, and we have a representative of the federal government who wrote to Mr. Ryan in Halifax, stating that -- and I quote, "In view of the correspondence and subsequent discussions between Ministers Goodale and Furey, who were the federal and the Newfoundland Ministers of Energy, the Natural Resources Canadian Minister has decided to exercise his authority

under the Accord legislation with respect to negotiations involving the boundary issue." This is Nova Scotia Annex 5.

And attached to that letter was a copy of some earlier correspondence from Newfoundland to the federal government and a Newfoundland map, none of which Nova Scotia had ever seen.

Six weeks later, January, 1998, the federal Minister formally notified the provinces of his intentions to convene negotiations with a view to resolving this issue. And the Minister's letter noted that no meeting regarding the issue had taken place since the autumn of 1992. We're in 1998, six years later -- no negotiations were ever formally convened. Rather, it was at a meeting of representatives of the two provinces held at the Halifax Airport Inn on April 9, 1998. There were no minutes that we're aware of that were taken and no paper exchanged, but the Nova Scotia officials present heard from Newfoundland's legal counsel, now its Agent. They heard Newfoundland's view regarding how the existing line should have been drawn. And three months later -- yes, Dr. Crawford?

PROFESSOR CRAWFORD: Yes, go ahead.

MR. FORTIER: This was in April. Three months later, in July, Nova Scotia received a letter from Newfoundland to

which was attached a map and a single page of explanatory note -- that's Nova Scotia Annex 7 -- regarding a proposed line. And the material provided in July of 1998 in no way explained the basis for Newfoundland's objection to the existing line. There was no mention of Newfoundland's basis for the objection to the existing line. And as you will recall, it was prefaced with the words that it was provided without prejudice to any position that Newfoundland and Labrador might take in the future on the location of the line.

So other than this information which I reviewed very briefly, from 1992 to 1998, no explanation of Newfoundland's reasons for disputing the existing boundary was ever presented to Nova Scotia before the arbitration commenced.

Now why do we -- why do I recall this evidence at this hour?

PROFESSOR CRAWFORD: Can I just come back --

MR. FORTIER: Yes.

PROFESSOR CRAWFORD: During the whole of this period, and, indeed -- well, I suppose if we take the moratorium, though it didn't cover the whole area as being significant, in the period from 1992 to 1997, the Accord structures on both sides would have been operating?

MR. FORTIER: Yes, sir.

PROFESSOR CRAWFORD: But we don't have any evidence that anything occurred in the context of those meetings -- Accord meetings -- which related in any way to the boundary or to resources along it.

MR. FORTIER: We do not -- we do not -- and I would venture the observation that if anything relevant to this adjudication, to this process, had surfaced during those discussions, that either one of the two provinces, of the parties, would have produced it.

PROFESSOR CRAWFORD: That seems a reasonable inference.

MR. FORTIER: Now why did I recall this evidence, albeit it briefly? Well, Mr. Chairman, Members of the Tribunal, it is to put the lie to Newfoundland's attempt to lull the members of the Tribunal into the false belief that this arbitration is anything other than the result of Newfoundland's conscious decision in 1998 to invoke for the first time ever the dispute resolution provision of the Accord legislation.

It also highlights the truth, as remarked by the Tribunal itself, during last week's hearings, that no formal claim of any sort to any line -- no formal claim of any sort to any line other than the existing line was ever made by Newfoundland prior to August, 2001 when it produced its Memorial in phase two of this arbitration.

Now --

PROFESSOR CRAWFORD: Well, I mean it's only a quibble, but it's quite clear that was what done in 1998 amounted to a claim, even though it was done without prejudice. In fact, precisely because it was done without prejudice. And as soon as you start saying "without prejudice", then you know, you're talking about --

MR. FORTIER: You know that it's -- you're not making a formal claim, and as the evidence discloses, I guess it took Newfoundland another three years to decide that it would push the line a little further west. You know, the formal claim which is before your Tribunal is the claim which rests on the line which we saw for the first time, which Nova Scotia saw in August of 2001.

Now I also referred briefly to this evidence to underscore, Mr. Chairman, Members of the Tribunal, the degree to which the two phases of this arbitration are intimately intertwined. Your Tribunal has been established. You have been appointed to resolve a single dispute and to preside over a single arbitration. For good reason, the process was bifurcated, with the question of whether the line dividing the parties' offshore areas had been resolved by binding agreement treated in the first phase.

But the Tribunal's determination of that issue, which Nova Scotia has never, of course, called into question,

did not, as Newfoundland pretends now, render moot the issue of the parties' conduct.

The arguments made by the parties, the conclusions sought by them in the first phase of the arbitration may have been fully addressed in the Tribunal's Phase One Award, but not the evidence of their extensive negotiations, agreements and other conduct concerning a boundary between their respective offshore entitlement -- the very issue to be determined by the Tribunal here.

Throughout phase two, Newfoundland has attempted to mock Nova Scotia's case and has invited the Tribunal to do the same. It has referred to this -- Newfoundland's -- Nova Scotia's case has been referred to as a "rehash of phase one". Well, for its part, Nova Scotia does not consider that the Tribunal made a "hash" of phase one.

PROFESSOR CRAWFORD: I hope we don't find either "hash" or "rehash" on our smorgasbord.

MR. FORTIER: Maybe on your curry.

MR. LEGAULT: French is your mother tongue.

MR. FORTIER: More significantly, Newfoundland and Labrador provides no response to the common sense proposition articulated by your Tribunal in your Award in the first phase that just because the parties' conduct does not reveal evidence of a binding agreement from the perspective of international law, their efforts to reach

agreement were necessarily without legal effect or consequence. In the words of your Tribunal, "The conduct of the parties may be relevant to delimitation in a variety of ways, while stopping short of a dispositive agreement. Such conduct thus remains relevant for the process of delimitation in the second phase of this arbitration."

Now we have never pretended that this passage from your first -- from your Award in phase one provides a complete answer to the analysis of the parties' conduct -- a complete answer to the analysis of the parties' conduct to be made in phase two, but it does provide, at the very least, a point of departure. It provides a benchmark.

And as Dean Russell pointed out last week, the test for the relevance of conduct in a delimitation is not the test for an estoppel, nor is it the test for whether the conduct resulted in the creation of a legally binding agreement. But this has not deterred Newfoundland and Labrador from accusing Nova Scotia of inviting the Tribunal "to undo its phase one decision" and righteously declaring that "it would be a mockery of this arbitration process", we heard on Monday, for the Tribunal to find that the existing line could be the basis of a delimitation "by virtue of the application of a standard less stringent than that of agreement."

Again, this language is deceptively simplistic. How would a non-binding agreement become a binding delimitation? Well in fact, Nova Scotia seeks no more, Mr. Chairman, Members of the Tribunal, than that which the Tribunal, itself, suggested would be appropriate. That the parties' conduct, as reflected in the consensus reached by the Premiers in '64, reaffirmed by them in '72, and given practical effect in the conduct of successive government from '64 onward be seen for what it is, highly relevant to the process of delimitation.

And the decision, which has been referred to earlier in the Guinea-Guinea Bissau case is instructive.

Very briefly, the Court of Arbitration in that case found that an 1886 Convention between France and Portugal did not delimit a maritime boundary between the parties, but that the description of the first inshore segment of the boundary set out in the instrument was nonetheless, "a factor", it -- the Court should take into account, with a view to a delimitation tending to achieve an equitable result.

And in the 1986 article, the noted publicist, Allan Willis, described the situation in the following words, he said, referring to this passage in the Guinea-Guinea Bissau case, the 1986 treaty, although not applicable de jure, was treated as a relevant circumstance of decisive

important.

PROFESSOR CRAWFORD: Another example I commend to you is the treatment of Eddystone Rock in the Anglo-French case.

MR. FORTIER: Yes, absolutely. Absolutely. So the possibility that this could be true also in our case is vigorously, indeed, emotionally, almost religiously denied by counsel for Newfoundland and Labrador, including my friend, Mr. Willis.

Small wonder then that Newfoundland and Labrador shun all together any reference to the Tribunal's injunction in the phase one Award regarding the relevance in phase two of the parties' conduct. In doing so, Newfoundland not only disavows the conduct of its political leaders and representatives of the past, it seems prepared to do so with respect to the declaration of its counsel in the first phase of the present proceeding. You remember the passages, which my friend, Mr. Bertrand referred to last week. Now when the Agent for Newfoundland and Labrador in March referred to the '64, '72 events, as a present indication of what their boundaries are going to be. The identification of the boundary lines, he said. The defined element of an agreement and so on. That the boundary lines that the provincial premiers themselves obviously considered equitable, could be dismissed out of hand by Newfoundland as being utterly irrelevant to the

present process, the goal of which is to ensure an equitable result, is truly astonishing.

More generally, that the conduct of the parties relating specifically to the creation, the definition and the division of their offshore areas should be, in its view, irrelevant to the delimitation of those same offshore areas is beyond belief. How is it possible that this could be so is a mystery that would baffle even the most experienced international lawyer. I fear that not even Frank and Joe Hardy of The Missing Compass Rose fame, could unravel this mystery.

However, Mr. Chairman, Members of the Tribunal, any lingering doubts will, I assure you, be solved today. Commencing with the submissions of my friend and colleague, Professor Saunders, who will review the geographic context within which the delimitation will be effected. And unless you have any more questions for me, I ask you to invite Professor Saunders to the podium.

CHAIRMAN: I wonder, Mr. Fortier, if this might not be a good time for a break?

MR. FORTIER: Considering that my colleague does use graphics, I think it would be a good time, Mr. Chairman.

CHAIRMAN: 15 minutes?

MR. FORTIER: That's fine. Thank you.

(Short Recess)

PROFESSOR SAUNDERS: Thank you, Mr. Chairman, Members of the Tribunal. Good morning. I will be addressing again issues of geography, relevant coasts and areas, and briefly, the conflicting proposals of the parties.

A preliminary point I should mention that some of the figures in my package would be out of sequence, if you read the numbers at the bottom. But they ought to match the presentation on the screen, I hope.

If I may begin, Mr. Chairman, before my own main presentation, I would like to respond very briefly to something that was mentioned in the last session, which I had an opportunity to look at. This is a question that because geography is important to some extent in this case -- to some extent, not as important as Newfoundland would make it, not as heavily weighted, but still a factor -- it was suggested that we might expect then that longer coasts would get larger areas. And in general that is exactly what happens in the delimitation, or the general definition of the offshore areas.

So just to set the context, and not to relate this to the precise delimitation line, I do think we want to remember the Newfoundland offshore areas, we calculated with the present line is 1.5 million plus square kilometres. Nova Scotia's is 648,000. The area that Newfoundland requests with its new line, departing from

the existing line, constitutes over 25 percent of Nova Scotia's zone, and just over 10 percent will be added to its own.

It does set some of the context. And in fact the longer coasts do get most of the maritime area, which is ultimately as it should be. The question is how we segment and define those coasts for the microscopic purposes of the delimitation.

Now the submissions of Newfoundland on Monday gave us a great deal to think about over the last day and a half, and a great deal to respond to. We have seen new lines, new calculations of the relevant coasts and the relevant areas, all of which we must address. And we learned a few things. We learned that Newfoundland does not care whether the Nova Scotia coast is much longer, despite their earlier protestations to the contrary. That is good news and we will return to it later.

We now know that it never really mattered at all whether the Gulf of Maine was actually identical to the geography of this case in the inner sector. It's just an incidental issue now. We got a much better idea of just how many different versions of the immutable objective coastal geography Newfoundland had to try on before they came up with what they viewed as a winner. And we learned that the Gulf of Maine boundary was in its effect,

something called a mainland equidistance boundary. A fact concealed by the Chamber in their decision.

And finally, one last go through this, we learned that shipwrecks were relevant to maritime boundary delimitation, but only because they provide a rough and ready indicator of how far an island is from the coast for purposes of deciding whether to give that island effect. And I will confess, I missed the subtlety of that the first time around.

But there are also, of course, inevitably, things that were not addressed by the speakers. Some of these, not all, will be raised in my presentation today. Examples include the following, we did not hear why, if the geographic configuration of the inner sector in the Gulf of Maine was both different and irrelevant, as we have now heard, Newfoundland found it necessary to represent it as being essentially the same, to the extent of creating a pink non-coast at the back of the Cabot Strait.

We do not know yet when Newfoundland first tested the equidistance line, either in its inner sector, out to 46 north and found it wanting. We know it wasn't in the Memorial. But apparently it has been done. Or in the words of Mr. Colson, just why and how it was demonstrated that the Newfoundland line in the inner sector, as he put it, could beat equidistance. What exactly was it about

the result with the median line that resulted in this conclusion?

We heard no more of Newfoundland's supposed authority for the proposition that coasts face only in one precise direction for the purposes of establishing their relevance. Newfoundland presented one authority that might have supported them. If I could have the next. Thank you. Supported them in the notion that a coast with the slight coastal direction change that might be identified at Canso could lead to this consequence. And that was Tunisia-Libya. But Newfoundland offered no explanation for the crucial factual omissions from their account of that case. The failure to mention both the Tunisia-Italy boundary and the Libya-Malta situation, both of which must have affected the choice of coasts.

We never heard an explanation from Newfoundland of just what it is that overlapping maritime projections are meant to reflect, if it's not some measure of the overlapping legal entitlements. If it is a subset of that area, which it appears to be, they do not explain exactly by what criteria it is limited.

And finally, if quantitative proportionality is not a mandatory test of equity, a point made by Mr. Colson on Monday, and one with which we agree, and in fact we have made it before, and that it is difficult to apply it in

open seaward areas, why has Newfoundland relied upon it as the sole test of the equity of the result? And why in their Memorial were they sure of the opposite position? Where they said in the following passages, it was pointed out that it was accepted in the cases that a substantial disproportion between lengths of coasts and areas allocated would be a circumstance calling for correction, it is modified by substantial, but the following, in making such a proportionality calculation, the area allocated as a result of a delimitation has to be defined. That is Newfoundland's case. It isn't necessarily or doesn't have to be ours.

In any event, with the time available, I propose to address the remaining issues under the following heads. First, I would like to carry out a brief analysis of the new lines and the new justifications presented as examples only by Newfoundland. And a review of what we feel is left of their original proposal.

Second, I would like to deal -- rephrase that -- I have to deal with the vexatious question of relevant coasts and areas and proportionality, as dealt with by Newfoundland in a new form, and by Nova Scotia. And in response to questions raised by the Tribunal, and by Newfoundland, perhaps to try to and find some unification or unity in President Guillaume words.

And third, I want to deal with the question of nonencroachment, as well as cut-off and the connection to the baguette and the coast of southwest Newfoundland. On this point, I will attempt to deal with Professor Crawford's hypothetical about the impact of the notional three independent states with no history of conduct. Which I will say for the first, and not the last time, that we do not accept the premise of the hypothetical.

If I may begin, in a series of scenarios presented on Monday, scenarios which were not intended as proposals, of course, Professor McRae showed us something of the reasoning that went into the Newfoundland claim and we think exposed some of the difficulties in that fundamental approach.

As Newfoundland has it on this figure, all roads lead to Rome. And, of course, we have resisted the temptation of placing Rome on the Laurentian Sub-basin. Now let's have a very quick look at these options presented by Newfoundland on Monday, all of which demonstrate, in their view, the irresistible geographic attraction of the line that they have proposed.

First, we have scenario one, which they label the macro-geographic approach. I should note the titles do get better as they go along. Here in the inner sector, Newfoundland has dropped its reliance on the Connaigre

Head line, and substituted a line which runs from Cape Ray to the Burin Peninsula directly.

In fact, this line was used in the original Newfoundland offer, without prejudice, in 1998, and before Newfoundland discovered that there was a coast at Connaigre Head and developed the second bisector approach for the inner portion. Our reaction to that line then was the same as it is now. St. Pierre is part of the coastal direction, if we can live with that as a general proposition. But apart from that, this line is about as close as you can get to being 100 percent water and still touch coastal points. It's clear the justification of a bay closing line is not going to work here. It runs for quite some distance well seaward of the islands of any general direction of the coastline and utilizes the peninsula. Fair enough.

In the outer sector, we have a new general direction closing line -- directional line in Newfoundland running from Cape Ray to Burin -- across Burin and hitting Cape Race. And also a long line on the Nova Scotia side. And this is compared -- these coastal directions are compared, this time for Nova Scotia a one directional line only, which seems to have been possible contrary to Newfoundland's other assertions.

But why change the coastal direction in Newfoundland?

And why compare the combined inner and outer Newfoundland coasts to Nova Scotia's outer coast only? If we turn this around -- and this is an alternative, we are not suggesting this, there are flaws in this model too -- we have this model combining the Newfoundland coast, but applying it to the inner coast in Nova Scotia.

Now there is a method employed here to average out the coastal directions. Quite simply, the areas of water inside the line are by mathematical operation equal to the areas of land that stick out beyond it. It averages out the coastal direction on both sides to the same principle.

So we establish those coastal directions, which runs on our side by chance, as it turns out, down to Sable, if you extend the line. The bisector, shown here in red, amazingly enough approximates the 135 line, which is shown in black. All done with a recognizable sort of method.

So let's move on to scenario two from Professor McRae, what he calls the outer rings. The inner sector in this case is done on the same basis as the last one, and we still have the Burin to Cape Ray line, which is problematic. The outer, here on the right, has a perpendicular to the closing line, but without the further shift to the west, although part of the same effect has been achieved by changing the inner coastal direction to land at Burin, but pushes the line to the west in a

different way but not in the same way as was done with the 1998 -- with the 2001 line.

Now essentially this is the '98 proposal as far as we can tell, showing that the outer perpendicular, however, is on a azimuth that is also enbuttressing this, the average of the two short outer coasts of Nova Scotia here, and Newfoundland here. This time they have changed the coasts, they are not using the longer coasts and they have changed the direction of it.

Given that this same justification is used for the current Newfoundland proposal, this outer coast average justification -- I will return to it later, if I may.

Scenario three. Scenario three, Newfoundland calls the broken wing. And this one is a little more confusing, but what they have done is compare the Nova Scotia outer coast from Canso to Scatarie with the coasts from Cape Ray to Burin here. I'm not sure -- we are not sure why, but to bisect that, and sure enough you once again end up with something like the same line.

Now for us, choosing the angles you need, you get the result that you want, but we can turn that on its head. If we can have the obvious next question that arises from this, why not try it the other way and use the inner Nova Scotia coast and the outer Newfoundland coast? And we get this red line running down beside the green line, which is

the 124.74 line. Perhaps we finally explained that 125 line on the 1964 map. No more meaningful, no more useful.

Here is scenario four, they call St. Paul's cake and ice-cream. And it shows the Nova Scotia coastal direction running to St. Paul, not something we rely on -- not something we need to rely on because we use what amounts to a median method in that area. This adds nothing of importance, but it makes the outer sector, in this scenario the bisector of the outer wings here and here. And of course to get the right angle this time, Newfoundland has tried out a third coastal direction for Nova Scotia, this time from Scatarie to Sambro.

And again, having chosen the angles they need, they get the result they expect.

But there is of course another option that never appears in Newfoundland's approaches, and we will call it scenario five. If, as Newfoundland has argued from time to time, this geography is similar to the Gulf of Maine, perhaps we should forget about both outer coasts for a moment, as they did in the Gulf of Maine, and use an option based on the inner coasts. This is an option, in fact, that I mentioned last week in argument.

Here we have a median line in the inner sector, justified of course on the basis of the opposite coast configuration. And here we have the bisector to the inner

coasts as currently defined by Newfoundland in their Maine proposal. Why? Because on the logic of the Gulf of Maine, the perpendicular was nothing more than the bisector of a straight coast at the back of the Gulf. Here the coasts are not straight, they are angular. And this is the bisector of the inner coasts.

There is the 64 line. This then on a Gulf of Maine reasoning, no stranger than that proposed by Newfoundland, is perhaps the claim we did not make but could have made, as referred to by Professor Crawford last week.

But in the end what do these scenarios and our critiques, as well, in our fairness, really demonstrate? What this shows first, I think, is the process of reasoning that went into the geographic construction of Newfoundland's real proposal. That is that supposedly objective immutable facts of geography are subject to a virtually unlimited range of changing definitions and characterizations as the argument might require.

This is an approach that is in fact at the heart of the subjective use of geography. And it's the kind of exercise that I think most people would admit we have seen before the International Court in many cases. It is this unpredictable, uncertain use of geography as a component of equitable principles that gives resonance to the desire of President Guillaume and others for some degree of

certainty in the manner in which geography is used.

And President Guillaume remember, was not complaining about the uncertainty of conduct, which can be referred to in historical record, nor of resource location in Jan Mayen.

If I can return to Professor McRae's opening analogy when he said that all roads lead to Rome. What he was forgetting is that the reason all roads led to Rome was simply because that was where they started. And if they didn't start there when they were built, that's where they were headed. The builders had an objective in mind and in every one of its scenarios, so did Newfoundland.

So where does that leave us with Newfoundland's actual proposed line, the final result of its process of trial and error. Our criticism of the Newfoundland approach, particularly as related to their reliance on the Gulf of Maine, were addressed on Friday, and these still stand. I propose to recap these only in brief and to move on to the responses that came from Newfoundland on Monday.

By way of review then. We pointed out the following difficulties with the approach of Newfoundland to the use of methods from the Gulf of Maine. And it was the methods, remember, that they adopted, not the equitable criterion that was applied in that case. First, the basic geography of the inner sector is entirely different, and

it was that geography that made the method appropriate.

The rectilinear formation of the Gulf, which the Chamber called an essential requirement for the use of the perpendicular, the transition from adjacency to opposition that justified the second line, the presence of inner coasts that defined the delimitation area and no outer coasts that were relevant, especially given the triangle established by the parties as the terminal area, none of these are present here.

I will come back to the responses of Newfoundland in a moment.

Second, a related point. There is no backing coast that provides the parallel to the closing line. The closing line Newfoundland presents has no parallel at all.

Third, the perpendicular line drawn in the Gulf of Maine paralleled the parties' earlier claims, not here of course. Fourth, the length of the line, the presence of the triangle, prevented the kinds of distortions that result here with a line of almost 700 kilometres from the closing and no limit as to where it might land.

And finally, the Chamber in the Gulf of Maine kept an eye on what its line did with respect to ensuring reasonable resource access for the parties. And that included the speculative prospective oil and gas areas. And we know, of course, that was not a concern of

Newfoundland's in drawing this line.

And how was this responded to on Monday? Professor McRae minimized our concerns about the lack of similarities, geographic similarities with the Gulf of Maine. In particular, the geographic configuration of the area.

We find this to be at least puzzling in a case that depends entirely on geography, geographic differences from one case to another make no difference to the outcome? Professor McRae extended this view even to the question of the rectangular formation of the Gulf in these words, when one gets beyond the issue of rectangular configurations, the boundaries in the corner and the Bay of Fundy, there are several lessons from the Gulf of Maine. But with respect, you don't get beyond the rectangular formation that easily, not for methods, the use of the methods at least.

The Chamber saw it as an essential requirement for its choice of methods, particularly the perpendicular. And yes, there are other lessons to be drawn. But in the first round of orals, the lessons that Newfoundland drew from the Gulf of Maine were entirely based on the methods that could be applied, not on anything else. So having dropped the first line of lessons, what does Newfoundland now take from the Gulf of Maine?

Professor McRae noted that the Chamber recognized that when emerging from a closed into an open area, methods need to change. And they did say that effectively for the delimitation they were confronted with. They stated no general rule. More important, they never said that two methods could not result in a line that was effectively unidirectional as it emerged from the inner area because theirs was very close to that, as the line developed by the parties in this case was. And indeed, as is the line developed by Newfoundland. But more on that later.

Next we heard that coastal length is important and that's a lesson from the Gulf of Maine, and yes, from other cases as well. But not necessarily definitive. And it was used in the context of an inner sector division that assumed by its method an equal division of areas. So the maritime part of a comparison of coast to area was, in the Chamber's view, already taken care of by the method, not so in the way the method is applied here with the inter sector coasts, as we have shown.

What else? Professor McRae told us that the Chamber in the Gulf of Maine recognized that the boundary inside must be effected with a view to the outside. And of course they said this, as already noted. But they said it in a case where there were only inner coasts to consider and the outer area was severely constrained by the prior

agreement of the parties.

They said nothing about the kind of manipulation we find here affecting vast areas of seaward extension. And furthermore, one of the things they kept in mind as they projected into the outer area explicitly were the resources at stake, which Newfoundland says this Tribunal must deny.

Finally, Professor McRae suggested that the Gulf of Maine held, and I quote from page 751 of the orals, "The coastal geography of the exit point that must govern the line..." -- "That it is the coastal geography of the exit point that must govern the line as it leaves the inner area and as it moves to the transition to the outer area." But really, as we saw in Mr. Colson's very thorough presentation of last week, it was the geography of the area leading up to the exit point, that, in many ways, governed not the points themselves, or two points, as chosen by Newfoundland.

And, in fact, it was the geography of the area at large, the backing coast and parallel, the rectangular formation, that made possible the use of the closing line in the first place, all of which I have noted is not the case here.

These may be lessons from the Gulf of Maine that Professor McRae has cited, but they are not lessons to be

applied by rote. And in any event, they are not lessons, at least not the same lessons, that Newfoundland applied in the first round of orals where it focused almost entirely on a simple transference of the methods from Gulf of Maine, methods which we have shown were so dependent on the specific facts of the case, which, in the end, is the real lesson of the Gulf of Maine. The criteria and the methods which must be derived from those criteria have to be determined in the factual context that you are operating in.

There was one other issue emphasized by Newfoundland on Monday that I would like to address, and it did appear in the Memorial, as well. This is the fact that if you take Newfoundland's designated coastal wings, the outer coasts, and bisect the angles, as they call it, you end up with the same azimuth as their perpendicular. Now we have already had an inside view to the kinds of trial and error that are possible behind Newfoundland's various scenarios, and this may be another example, but there are bigger problems.

First, if Newfoundland is now relying on the bisector of an angle created by the coastal -- by the outer coasts to create the perpendicular and not just the -- not the closing line at all or not just the closing line, it's going in a direction that's contrary to that stated in the

Gulf of Maine and Tunisia-Libya and in Guinea-Guinea Bissau, all of which recognize the need for a fairly substantial stretch of straight coast to apply a perpendicular.

As to the use of a bisector -- not a perpendicular, but a bisector in a situation of adjacency for angular coasts separated across a body of water, that's essentially unsupported in the Newfoundland case. We're not aware of a case in which it's been done. The closest might be the inner portion of the Gulf of Maine, but the coasts actually became adjacent because of the land terminus, although the boundary didn't start there.

And in any event, it all leads to the same problems as those identified by Mr. Willis in 1986, where he points out the difficulty that leads to the need to take a macro-geographical perspective, and sometimes, he said, on a continental scale.

To give an example, a perpendicular out to 50 miles from the coast may look right if it is backed by a straight coastline of approximately the same length, but a perpendicular out to the 200-mile limit would normally require the establishment of a general coastal direction of a far greater length.

And here, of course, we are talking about a line that goes out 696 kilometres -- whatever that is in nautical

miles.

Furthermore, it must be noted that the use of two points, or even a short segment of outer coast on either side, effectively results in a line that is equidistant to those two points, as shown here, or the immediately surrounding coastal front, which is very short. And the Tribunal will recall that Newfoundland has identified in its Memorial the distorting effect of equidistance simply applied when there are long lines to run seaward, including, for example, the fact that incidental points can distort the line further out.

But the situation is not improved when one simply chooses the controlling points and then draws what is effectively an equidistance line between those two. It's no better than the general method -- just has the advantage of choice.

In the end, all of Professor McRae's scenarios, and, indeed, we think the entire construction of Newfoundland's line highlights nothing so much as the subjectivity, the uncertainty behind President Guillaume's concerns about the use of geography in equitable delimitation.

If I could turn briefly to the role of equidistance, its appropriateness or inappropriateness, its possible use in this delimitation, I would note that Newfoundland, after opening with Mr. Colson saying that we were making

innuendos beyond our knowledge, that we wanted an equidistance line, spent a good part of the past week telling the Tribunal in none too subtle fashion not to apply this, while showing you versions of equidistance with no effect for Sable Island. I'll have more to say on the practical impact of equidistance in a hypothetical situation later. But for Newfoundland, of course, the only issue with respect to equidistance is that of islands. For now, because it has not really been rebutted, I would reiterate what I said last week. Islands are not the only issue here. I did not, of course, say what Professor McRae suggested I did; that the Newfoundland peninsulas are, I quote, "a mere image of Sable". What I did say was that the impact of peninsulas cannot be ignored. When the outer basepoints of Newfoundland from Burin out are controlled, they are all controlled on a few peninsulas, and indeed, the St. Marys basepoint falls on St. Marys Caves to rocks offshore, but within the territorial sea.

Now this impact of the peninsulas is simply enhanced by the added effect, as I said last week, of the east-west orientation of Newfoundland compared to the southwest to northeast orientation of Nova Scotia. The tip of Nova Scotia essentially points at the middle of Newfoundland, leaving clearly the outer coast of Newfoundland in an

advantageous position with respect to equidistance. That's the general structure of the region, not just one island.

But what of President Guillaume's comments respecting a possible presumptive effect for an equidistance line in a delimitation such as this, subject to modification for special circumstances?

The history in the cases was thoroughly addressed by Mr. Colson on Monday, and I do not propose to repeat that ground. Mr. Fortier may return to some of it later, depending -- what I would add, and I have to say this, is really my humble opinion is that President Guillaume is both right and wrong. Yes, it does appear that in cases like Jan Mayen and Libya-Malta, and for all their protestations, the Court was close to granting some sort of presumptive effect to the median line, but those cases were explicit, still, in stating that the opposite relationship of the coasts was a factor in making the median line appropriate. I think that's an important limitation.

PROFESSOR CRAWFORD: That's certainly true for Jan Mayen, which was, of course, an opposite case. What he said was that -- and there are lots of other would say that in the opposite situation you would normally start from the equidistance line unless there are good reasons --

PROFESSOR SAUNDERS: Yes, that's right.

PROFESSOR CRAWFORD: -- very good reasons not to. I don't think anyone really has any doubt that it's a sort of a presumption in opposite coasts unless there are good -- unless there are very good reasons, but what he said was that the use in Qatar-Bahrain, in the outer area in Qatar-Bahrain --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- was really the extension of it. That's, perhaps, the most interesting thing that he did say.

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: I stress, of course, that -- I mean I drew your attention to it simply because I had read it and I didn't want you not to know that, as it were.

PROFESSOR SAUNDERS: Well, it's going to be important later. I'm assuming that this Tribunal you constructed has read it, as well.

PROFESSOR CRAWFORD: The point is this, that he's not speaking in judicial capacity and it's not --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- it's not holy writ. It's simply a view -- an informed view because he was in the cases, but nonetheless, a view of what's going on.

PROFESSOR SAUNDERS: Absolutely. I agree completely, and

perhaps I can take off from that point, that I think in their heart of hearts, the presumptive effect that an opposition situation, whether they say it or not, seems to be what is happening.

But with all respect to the President of the Court, and maybe I can turn to the Qatar-Bahrain situation -- I think that it is premature to expand his idea into situations of what I might call "broad adjacency". And in that situation, it was quite constrained. The outer portion was very short, and still, one would argue, almost within a zone of opposition. I think perhaps he is, if not on a frolic of his own, at least ahead of the race, to some extent, on the adjacency situation.

In other cases, however, and this is perhaps the other aspect of where this comes in -- it's noted by Mr. Colson, "It would appear that tribunals, even in adjacency situations, have been in some situations, not always, at least comparing the line they have developed to equidistance." That's a different issue, although, and again, he's quite correct -- as Mr. Colson pointed out, no real certainty is found as to how they have gone about dealing with it once they have made the comparison.

This was explicit in the Gulf of Maine, where there was comparison of the orientation of the chosen line to what had been the equidistance proposal. But we would

just say, and this is in passing, that this line that was presented by Newfoundland as the mainland equidistant line, presumably submitted as part of the fall back campaign for no-effect equidistance, was based on three basepoints on each side, one of them, ironically, in the middle of an island, seven miles offshore, as far as we can calculate it -- Grand Desert Island, and not even on the coast, and indeed, the first two appear to have been chosen because the midpoint between them falls on the line, which is not exactly how we would go about calculating an equidistance line, but this is a byplay.

The real issue is the application of the concept in Gulf of Maine, and yes, they did consider it. I don't think they applied it.

The real issue, the broader issue, and President Guillaume's concerns, can be brought in some ways to this case. In this respect, I note two things.

First, out to 46 north, we apply a line that is a simplified median line. Most of the area is, on the definition of either party, within the area of coastal opposition, and we feel it's sustainable to 46 north, in any event, if not a little further. So we fulfil Guillaume's dream out to this point. Newfoundland has offered nothing of consequence within this area to suggest a modification.

Second, in the Jan Mayen case to which President Guillaume referred approvingly, the line was adjusted to deal with resource location and access. We do not --

PROFESSOR CRAWFORD: And distance of coasts.

PROFESSOR SAUNDERS: And distance and coastal length. Absolutely. The point I'm making is that although there is some conflict within Guillaume's comments because he refers elsewhere to special circumstances as primarily geographical, at the same time he refers approvingly to Jan Mayen, and it used the fishery resource location as one of the special circumstances, and he certainly doesn't deny conduct, either. In our case, with respect to conduct, we apply it quite strongly. With respect to resource location, we don't apply it to ask for a shift in the line, but rather a check on the line to find that our lines comes out just fine.

But in any event, the point that I draw from this is that President Guillaume must not have seen his search for certainty and unification as excluding in any way consideration such as resource location as a reason for departing from equidistance, even if you take it to his lengths in the adjacent areas.

But as I said, I think that in situations of long seaward adjacency, he is perhaps ahead of the rest of the Court.

For these cases, these other long seaward cases, I think the best view was that essentially stated by Mr. Colson. The Courts will look at the equidistance line, if only as in the Gulf of Maine, to check the orientation. It's possible this was a factor in Tunisia-Libya, as well, in the outer sector, with the dog leg. But this would, of course, come together with consideration of other factors, such as conduct and resources.

So here we see the existing line and the equidistance line are essentially in parallel, quite closely so in parts. And we know that the strong history of conduct is important, and we would argue that resource location and proportionality both support a movement from equidistance to the line proposed by Nova Scotia. So, although we may not agree with the requirement to do it in the outer area, we are blessed in that we could if we had to.

Let me turn to relevant coasts and proportionality. To begin with, our fundamental position, and I don't need to argue it in detail, remains unchanged. The proper approach is to take account of the overlapping entitlements. And in the present case, because this is an offshore area, that means not the traditional approaches to continental shelf outer limits, but the criteria of Article 76 represented here, a technical representation that has never been rebutted by Newfoundland.

So I would emphasize first that our position remains unchanged. But I also note that the Tribunal had a number of remaining questions on this issue. And, I note further, that Professor McRae has now introduced a number of alternative visions of the relevant coasts, and the relevant areas, which I will address in a moment. These require a response.

Before considering those issues, I propose to deal very briefly with a couple of preliminary points. First, I would remind the Tribunal again that it was Newfoundland that relied entirely upon the quantitative proportionality test as its sole measure of the equity of the result. If the Tribunal believes that proportionality is difficult to quantify, or even to apply in a meaningful way in these circumstances, then Newfoundland is left with nothing to fall back on.

Newfoundland has never really defended their vision of how proportionality should be measured as a partial zone cropped by arbitrary limits. It has focused its attack on Nova Scotia's use of the legal definition of the seaward limits.

Second, and briefly, I submit to the Tribunal that whatever particular limits, especially lateral limits, it might place on the relevant area, they must nonetheless be linked, even if not perfectly, to the concept of

overlapping legal entitlements.

On Monday, both Mr. Willis and Mr. Colson referred to the Jan Mayen case. Mr. Willis referred to the fact that the Court had identified different areas as they did, and as was shown in our diagrams, including the overlapping 200 nautical mile entitlements. And then said the following.

"But when it came to the actual delimitation method..." at paragraph 89, and following, "...the focus was on the actual area of overlapping claims, which it divided into three sectors by joining up the turning points on the median line, and the 200 mile claim, the Danish 200 mile claim."

Quite true, except for one thing. Mr. Willis missed an intervening step. In paragraph 64, not paragraph 89, the Court began to first consider the prima facie value of the median line. And it described it as, and I quote, "equidistant also from the two 200 mile limits." And as a line which may, quote, "prima facie be regarded as effecting an equitable division of the overlapping area."

It went on in the subsequent paragraphs to modify the area, to account for the special circumstances of the case which have already been referred to. But the starting point of their inquiry was the division of the full overlapping entitlements by the median line, which was

prima facie an equitable division in the case.

And the practical application of the area referred to in paragraph 59 is, though briefly, found in paragraph 69.

But they didn't use it in the end. They did move to a different method. And I don't want to replay this debate. We have been fully heard on the issue. Newfoundland added nothing new, other than what I have just referred to on the subject.

What was new, however, was the introduction by Newfoundland of new conceptions of how it might constitute a relevant area, and relevant coasts. And we must respond to these, as well as to the Tribunal's remaining questions from last week.

You will recall Newfoundland's relevant area extended here to the continental margin, the inverted cone that it represents highlights the fundamental problem of Newfoundland's use of perpendiculars from localized coastal directions to determine relevant areas far out to sea. Because the narrowing of the zone, as you move seaward, cannot be taken even as a reasonable reflection of the original broader coastal front. Even on Newfoundland's own theory.

In fact, the continental margin, because of the geometry, is longer than the coasts. If anything, the relevant maritime area should be broader as we move

seaward, if all areas are to be counted, which is what Newfoundland wants to avoid.

Now, as I said, Newfoundland presented a number of new versions of the relevant area, some with 200 mile zones, some with the continental margin. These are found, figures 119 to 124, of Newfoundland's orals.

We briefly reviewed these, and are unsure of some of them. For example, in these two figures, 120 and 122, we find that Nova Scotia turns out to have the same calculated maritime area in both figures, despite the fact that the outer margin is included in one and not the other, which is an impossibility. And on our arithmetic, the total maritime area in percentages on figure 122, adds up to 102.6 percent of the relevant area.

Similarly, some figures are restricted to 200, some are shown in an outer edge version, and it seems to bounce back and forth.

But in the end there is one key point that emerges. Only one of these figures introduced by Newfoundland attributes any maritime area to the coasts of Newfoundland past the perpendicular drop from Cape Race in the east. And that is figure 126, shown here.

It uses what is stated to be the 350 nautical mile arcs, we think it's an approximation of those, not accurate. But this is the one figure that begins to show

some disproportion in favour of Newfoundland, even on Newfoundland's description of its own coasts as including all of the areas behind St. Pierre.

Now Professor McRae, page 861 of the transcripts, mentioned this test, but said it did not affect the proportionality results. It does affect the proportionality results, in fact.

And of course, the 350 nautical mile limit, contrary to what Mr. Willis may or may not have said, is not the outer limit, the outer edge of the continental margin. So this figure, by going to 350, begins to show the problem, the proportion starts to reverse, but it doesn't solve it, because it stops at 350. We're left with the same difficulty.

The problem is the one we identified in this figure, which we all enjoyed so much last time around, so I am going to use it again. But there is a point to it this time.

It points out the problem, even if we accept, for purposes of argument only, that the relevant coast is defined first in isolation, you are still left with the further question, how do you then attribute maritime area to that coast for the purposes of comparison or relevant area, if you wish to take that step? Especially where, as here, a key coastal point is on the end of a coast with

substantial maritime area adjacent to it, as here? How does that get allocated?

Simple radial projection? Frontal projection? A mixture? What is the option? Because it has to be decided.

How much of the area should be credited to the coasts, as it were, fairly reflects what maritime area is really being allocated to that coast, which is what proportionality is all about. Because the perpendicular is used on the end of a coast rather than in the middle, substantial maritime areas go unaccounted for, and no comparison of like to like is possible.

So, given Newfoundland's suggestions, new suggestions, as to possible relevant coasts for Nova Scotia, which it made in oral argument on Monday, and again, not in any means sacrificing our main argument, this is for the sake of argument only, how can these limited coasts and areas be defined while still respecting the extent of entitlement to the outer margin, which ties back to the definition of the offshore area?

Here we have 200 nautical mile arc from Newfoundland, one of the methods suggested on Monday for limiting the extent of these areas by Newfoundland. This arc, although it actually comes from up here, can be extended to define a point to the Newfoundland coast. Two hundred has no

magic, it's one option.

If that point, however, is related to Sable nearby, we see that there is a certain logic, that things may not go past Sable. We're playing, in a sense, Newfoundland's own game here. But a little more, we hope, logically.

This arc defines a point on the coast which gives us these results and coasts. Now on the Newfoundland side, we run from Cape Ray to Race. But consistent with the reasoning in Canada-France, and with Newfoundland's not being able to project through land, but allowing them to project through water, including other territorial waters, we limit the coast at Connaigre Head. The rest of the area behind is taken up by the boundary with St. Pierre.

So how do we define the direction seaward from Cape Race? Well, one option. This figure shows the total arc on a radial projection to stop at 200, but it would continue out in the same way. The total arc controlled by that one coastal point. That is, this is the arc beyond which other points start to control on either side of Cape Race.

But, to allow even more for the influence on that maritime area from the north, to be cautious, we bisect that area. Bisect the arc. Cut it in half. Creating this directional line from Cape Race to the outer edge of the margin.

Now, we do not agree with this limitation. We don't think it's necessary. We think our definition of Article 76 entitlements is sufficient. But it does restrict the area, while giving at least some weight to the notion of how the entitlement must be determined in this case.

On the Nova Scotia side, if we assume that Sable forms a natural blocking point, and that there's at least some reason to say that between Sable and its own coast, home coast, the areas are more directly within Nova Scotia's projection from both sides, as it were, then it's appropriate to join the mainland point to the island.

From Sable to the margin, and again, this is not the line we would choose, took Newfoundland's method. The line from Sable Island to the margin is drawn perpendicular to the general direction of the mainland coasts. Which in a mid-coastal point might reflect the method of arcs as well, because the next point immediately takes over. What are we left with? We have these coastal lengths on both sides. And finally, we have the existing line and their respective areas accorded to the parties set out in this figure.

The result of this approach, building on Newfoundland's suggestion of a 200-mile arc, and its new willingness to accept an area to the outer edge of the margin, is a result that is roughly proportional,

certainly to the degree that would be acceptable when measuring such a large area.

PROFESSOR CRAWFORD: Mr. Saunders, I'm sure you don't know this figure but just on the hypothesis, if you do, what would you do if you joined Lamaline Shag Rock and Connaigre Head?

PROFESSOR SAUNDERS: You would add 77 nautical miles and whatever that is in kilometres. It affects the proportion slightly but on the scale of operation with the offshore areas there would be a disproportion in favor of Nova Scotia, but in that we are looking for a significant disproportion, we don't feel that it affects it significantly. We could provide those numbers though, if you wish.

PROFESSOR CRAWFORD: Surely the disproportion would be in favor of Newfoundland, if you are --

PROFESSOR SAUNDERS: That's what I meant, yes. Yes.

PROFESSOR CRAWFORD: But it wouldn't -- what you are saying --

PROFESSOR SAUNDERS: I meant in favor of Nova Scotia in the sense of allocation.

PROFESSOR CRAWFORD: Yes. Okay, fine. It wouldn't be -- it still wouldn't be significant looking at in some global sense?

PROFESSOR SAUNDERS: Not in the kind of macro sense that has

been talked about here.

Now in the end, even on this approach, merged as it is with one of the options presented by Newfoundland for the selection of Nova Scotia's areas, and with even a partial inclusion of the large areas generated by the south coast of Newfoundland off to the east, the result with the existing line is equitable to the extent the proportionality is even required as a test in these circumstances. Recalling, of course, that Nova Scotia relies as well on the relationship of good faith conduct to the line and the factor of access to resources in determining the equitableness of the result.

If I may turn now to nonencroachment and cut-off. Last week I suggested that while it should be considered particularly as a factor in assessing the equitableness of a result, the general principle of nonencroachment was generally of limited utility in an operational sense in choosing a line. Its companion piece cut-off can have a more direct application, I would submit. And I would like to turn to that in a moment.

And I noted that where parties are in a situation of adjacency and they share the same shelf, as here by agreement of the parties, equitable principles derived from non prolongation, which includes nonencroachment as a category, would not be of direct application in the

selection of the line. A position supported, we would argue, by Tunisia-Libya and to some extent Guinea-Guinea Bissau.

Now Professor McRae and Professor -- and Mr. Willis -- I am starting to call him Professor Willis, since -- I don't know if that's a compliment or not. But the writing is professorial.

PROFESSOR CRAWFORD: Yes. It seems the more he gets cited as an authority the more difficult it is.

PROFESSOR SAUNDERS: My mother always said no one is perfect, but that worried me. She was usually referring to me, but that's -- Professor McRae and Mr. Willis both returned to this point and they argued for a continued usefulness for both nonencroachment and cut-off in a practical, not the general sense, that is as a choice of method.

And Mr. Willis noted that the method was alive and kicking, and that its use to, as he put it, to control the method of delimitation had been -- and I quote -- "decisive in a number of significant cases". Furthermore, that it had not been restricted to areas relatively close to the coast.

In support, he raised the North Seas, St. Pierre, Guineau-Guinea Bissau. But of course the North Seas is where we started, that was the point. We indicated that

later developments changed the situation. In St. Pierre, as Professor McRae pointed out last week, was decided on its peculiar facts and has not been taken, as far as we know, to stand for much of anything as a general proposition about nonencroachment far from a coast. It's a very odd case.

And Guinea-Guinea Bissau on the other hand, was a case of true potential cut-off, enclavement, to which I will return in a moment, because I think it's a related but a different issue. It says nothing in what Mr. Willis said to reverse the general position that we stated about the limited usefulness of moving directly from a statement of nonencroachment, in general, to the choice of a line in particular. And that's what they do in the west especially, by excluding any Nova Scotia presence at all west of the -- sorry, east of the baguette on the basis of this principle alone. Our view, based on the cases after North Seas, is the principle -- we didn't say it was dead, but if the horse they are flogging isn't dead, it's at least not feeling well at this point. And I think that we can say it hasn't been used in the context that's suggested, direct choice of a line from such a generalized principle, except in very special circumstances.

PROFESSOR CRAWFORD: And it would be very rare that a principle such as cut-off would dictate a line. The

question is whether its use as a basis of criticising a line?

PROFESSOR SAUNDERS: Yes, I agree. And that's how Nova Scotia suggests it be used. Newfoundland on the other hand does actually use it at least in excluding Nova Scotia from the east as a direct method, in a sense, and proposes it to some extent as a very direct basis for choice of method, if not the precise direction of the line to the west as well.

But what was notable on Monday, and I think perhaps in response to questions including -- I think twice Mr. Legault raised the question of the difference between nonencroachment and cut-off -- was the degree to which Newfoundland switched emphasis from simple nonencroachment east of the baguette well out to sea, to the issue of what it calls the cut-off in the west. And I think we need to address this squarely.

There are some fundamental difficulties with the way Newfoundland perceives the cut-off in this area, in our view, partly connected to the fact that these are provinces and they have an entire zone and Newfoundland has access to the rest of it, but more specifically. In the North Seas the impact of the equidistance line on Germany was that it would have no further seaward projection in the region. On the other side of the other

zones that were involved, there was no further German continental shelf, that was it. Similarly, the potential enclavement -- and this is where we come to real cut-off in Guinea-Guineau Bissau, meant to further projection seaward could be a fundamentally inequitable result requiring drastic responses.

Here in this case, there are two important differences. First of all, Newfoundland has other coasts in the immediate vicinity that do project seaward in an unobstructed manner with no impinging third party presence and in fact a huge entitlement. Indeed, on Newfoundland's theory, remember, the entire south coast is one unit. The unit represented by the south coast in Newfoundland's view, certainly seems to have plenty of room to project seaward. There is no cut-off if you take it as a unit, on Newfoundland's argument.

What Newfoundland is really arguing is this, every segment of a coast must be free from cut-off regardless of its location, although of course, that does not seem to apply to Cape Breton here, the inner coast of Cape Breton. And also we would note that Nova Scotia's protection from cut-off, 277 kilometres on this arrow and 398 kilometres on this arrow, is substantially less if we allow any weight for proximity in any way at all.

More fundamental though is this notion that every

piece of a coast is entitled to a full projection seaward. And Newfoundland has not really supported that segmentation idea by reference to any cases at all.

PROFESSOR CRAWFORD: I mean, I think that's a slight over statement of Newfoundland's position. Their position is that you have got to consider every segment of a coast and minimize the cut-off to the extent possible.

PROFESSOR SAUNDERS: At times they say that in the statement but in the effect what they insist upon is the ability to project seaward down this line. So the method in fact reflects I think -- I would argue a more absolute approach to it.

Now if I can return to this question actually. This assumption -- we will change the assumption here -- relates to the fact that Newfoundland's argument on cut-off depends entirely on the presence of the baguette. Without it it would be apparent that Newfoundland -- the south west coast of Newfoundland does project seaward, albeit at an angle, well to the south east. Indeed, using this assumption, this figure shows an angular seaward projection maintaining the breadth of the coasts without cut-off to the edge of the continental margin using the existing boundary.

It assumes projection through the water of the baguette, not through the land mass of St. Pierre, to be

consistent. And both parties have agreed that projection through another territory's water for these purposes is possible. We heard this again from Mr. Colson on Monday with reference to the Channel Island situation. But of course, Newfoundland's entire assumption about the role of its eastern coast to the west is based on this as well.

So what it comes down to is this, unless we can accept that projection, coastal projection can only be in one absolute direction, and you must ignore everything to the side, a position which I think Newfoundland I think has abandoned, then there is no reason to restrict our consideration of the seaward entitlements of Newfoundland's south coast to one direction and one direction only, that simply predetermines the answer to the question. If you only run their coast down to the south, yes, it looks like there is a cut-off, if you assume the baguette is impermeable.

In fact, in our argument, the St. Pierre zone is a Godsend for Newfoundland in this arbitration. Without it, they would have no visual possibility of arguing the cut-off as they have. With it, and for the sacrifice of less than 10,000 square kilometres of the EEZ portion of the St, Pierre boundary, Newfoundland can create the illusion of a cut-off to the detriment of Nova Scotia. A cut-off that just doesn't exist.

The delimitation of this area has to be considered as a whole, as here. When that is done it's clear that the kinds of inequitable effects of a real cut-off, a North Seas cut-off, a Guinea cut-off with no further projection seaward for the state involved, simply do not occur with respect to Newfoundland, both because they can project from the west and because there is in effect a projection down the line.

Mr. Chairman, the question of nonencroachment and the impact of the baguette gives rise to one further issue. On Friday Professor Crawford asked me a hypothetical question involving a situation, which if I got it right, St. Pierre, Newfoundland and Nova Scotia were all states bound by the Canada-France Court of Arbitration in which there was no boundary established by the conduct of the parties, if that's a fair statement of the hypothetical.

The question, as I understood it, was how a boundary might be drawn under international law in such circumstances. I, naturally, equivocated to some degree and denied the basis of the hypothetical. And, of course, we still do. We cannot tell how the Court would have drawn that boundary had Nova Scotia been a separate state, because they didn't have to consider it. And in any event, I did not provide the actual boundary, which I could not have done without technical help.

But on Monday, Professor McRae returned to this issue of a boundary drawn tabula rasa, or almost rasa, because we still have St. Pierre. He indicated that we had avoided, as he put it, any invitation by the Tribunal to indicate how it would delimit this area. In his words, if it had to apply principles of international law.

Well, of course, we have said how it should be drawn according to international law, in our view, but his point was more specific. The invitation to draw a new boundary on those terms was that proposed by Professor Crawford in his hypothetical. So to provide Professor McRae with the answer he felt was lacking, but still fully denying yet again the premises of the hypothetical, I will suggest how that imaginary boundary might have been drawn.

Here is the area in question. The green line is no longer the existing boundary. But I have assumed that Nova Scotia would at least have a claim line, if this is within the terms of the hypothetical, and oddly enough, it turned out to be the same.

I also show the equidistance boundary. But from the tri-junction point down to around 46 north, as we have shown, the line so modestly claimed by Nova Scotia in this hypothetical Tribunal, is effectively a simplified median line. So it deserves some priority. And this new Court of Arbitration, having attended President Guillaume's

speech, will give it just that. And it gives us a first segment as shown here.

How do you move into the next sector, is hypothetical states? The baguette does seem to provide a natural transition point, and a short straight extension of the inner line provides a boundary as far as that point. Similar to the extension in Tunisia-Libya, up to the point of transition.

PROFESSOR CRAWFORD: I am sorry --

PROFESSOR SAUNDERS: They are calculated equidistance points, the yellow ones. And the first ones are the points on the current boundary.

PROFESSOR CRAWFORD: Yes. Okay. Thank you.

PROFESSOR SAUNDERS: From the tri-junction, as I said, we move on --

PROFESSOR CRAWFORD: You are not drawing any equidistance points from St. Pierre and Miquelon?

PROFESSOR SAUNDERS: No.

PROFESSOR CRAWFORD: Or in --

PROFESSOR SAUNDERS: These would be from Burin Peninsula, yes. Now --

PROFESSOR CRAWFORD: Part of the problem here, and this is why it's such an unusual situation, in all the third party cases that have occurred so far, you haven't -- well, with the exception, I suppose, Iceland and Jan Mayen, because

that was a conceded, but it was off to one side --

PROFESSOR SAUNDERS: Yes.

PROFESSOR CRAWFORD: -- and didn't really present the problem. Here we have the point of an intervening third state, with a boundary binding on both existing states, and therefore --

PROFESSOR SAUNDERS: That's right.

PROFESSOR CRAWFORD: -- no third state problem. Just the problem how to draw the line. And that's never happened before.

PROFESSOR SAUNDERS: No. But I would suggest though, Professor Crawford, that it will. I can think of circumstances in the Caribbean, with some of the sequential island states, and the leeward and windward islands where precisely that problem may emerge. Particularly, where France has been a little more ambitious in some of their boundary negotiations, where there is going to be some kind of crossing over. So it isn't purely hypothetical.

In any event, if we can move to the next sector. Here we are. If the baguette provides a natural transition point, because of the binding boundary, the short straight extension of the inner line provides a boundary as far as that point on the eastern edge of the baguette. Similar to the extension in Tunisia-Libya up to a convenient point

of transition. And obviously this is short hand. And a point on another country's boundary, which is not a problem, as we heard from Mr. Colson on Monday. What next? Well, we are supposedly bound by Canada-France, which did refer to the projection of the south coast of Newfoundland.

On the other hand, even if these were states, it was equivocal on the relationship of Nova Scotia to St. Pierre, and silent on the relationship of Nova Scotia to Newfoundland. And the permit and political practice of these parties has, of course, been assumed away. Just as Newfoundland has done in this arbitration.

Now balancing all these considerations, as the Courts always do, it seems appropriate to reflect a chain situation by an angular alteration, as was done in the outer segment of Tunisia-Libya. But where? In the spirit of practicality that infuses boundary law, this can be readily accomplished by joining the last point at the edge of the baguette to the next segment of the equidistance line to the south, as shown here in red. This gives some scope for Nova Scotia's relationship to the outer maritime area, even on this hypothetical. And yet, and this was an area not addressed by the Court of Arbitration, particularly beyond 200, but it preserves Newfoundland's interest closer to shore and reflects the changed coastal

direction affected by what we assume is a binding boundary. And that, given this hypothesis, is how it might be done according to international law. But without any account being taken of the conduct of the parties, or resource location, or any of the nongeographic factors.

But, of course, this is not the reality that we are faced with. This is close to our boundary, but it isn't our boundary. Mr. Colson referred to the unique political geography of the region. And that means that we are dealing with these provinces, this federation and this history. And it means that the St. Pierre boundary was decided on a different plane. One where the rights and interests of Nova Scotia were simply not in issue. And in this real world, the extensive conduct of the parties represented here on this diagram, fully addressed by Mr. Bertrand last week, and again in a moment, or perhaps this afternoon, this conduct must be a highly relevant circumstance in the drawing of an equitable boundary. And so it is for Nova Scotia. But recall it is just that point that Newfoundland vehemently denies. And that is why we are having the argument we are over such an arcane issue as the basis of offshore title. It's really about the relevant circumstances.

But I am not going to review the Newfoundland claim again. I have shown on Friday and today, I believe, that

it is one artifice built upon another. It's disconnected from the law, from the historical facts, and even from the geography upon which Newfoundland places such reliance.

But there is one last overriding point on both boundaries that I wish to mention before I turn over the podium, and that relates to one fundamental critique of the line that Newfoundland offers. The line that the parties developed, that is.

Newfoundland claims that in a two-zone configuration -- this is drawn from the Gulf of Maine, of course -- a single straight line is, "almost certain to deliver an unacceptable result." Elsewhere, however, it describes its own line in the following terms, the bearings of the second and third segments are so similar it says that, "there could be no objection to a simplified delimitation consisting of a single straight line extending seaward from the intersection of the first and second segments." And their line in fact runs that way, effectively from very close to Point 2017.

And Newfoundland justifies this apparent contradiction by saying that its outer line is defined on a different principle from the inner line. So it doesn't matter that it is in fact the same line, a straight line running to the margin just like the one proposed by Nova Scotia.

With respect, this is a degree of abstract formalism

that is divorced from the real world character of boundaries. Both parties in this case have suggested azimuth lines to deal with a long outer segment. And both are chosen lines. The only difference is that Newfoundland's was chosen by one party from among the creative options it had before it in preparation for this litigation. A sampling of which we saw on Monday.

The Nova Scotia proposal was chosen by both parties in the course of their political and administrative dealings and that existed in practice long before Newfoundland ever contemplated the initiation of this dispute.

And if there are no further questions on that, I thank you for your patience, and would seek guidance on whether we break at this point or call on Mr. Bertrand? Perhaps it might be most convenient, since I don't think Mr. Bertrand is going to take the whole afternoon, if we broke for lunch now, if that's acceptable, Mr. Chairman?

CHAIRMAN: Break for lunch then. What time?

MR. FORTIER: If it was convenient, could we adjourn until 1:15, Mr. Chairman. We will finish comfortably before 4:00 o'clock.

PROFESSOR CRAWFORD: You can get out to the airport in that time.

MR. FORTIER: Yes.

CHAIRMAN: 1:15 then.

MR. FORTIER: Thank you.

(Recess - 12:00 p.m. to 1:15 p.m.)

MR. BERTRAND: Thank you Mr. Chairman, Members of the Tribunal. This afternoon, as you may suspect, I would like to deal with conduct generally. And more particularly with the permit practice of the parties.

However, before I do so, I would like to come back briefly on the issue of resources, only to respond to a characterization made by Mr. McRae, with respect to what Nova Scotia wants the Tribunal to do with the resources.

At page 880 of the transcript, Mr. McRae said, "Now, Mr. Chairman, the law of maritime boundary delimitation has recognized that the location of resources is a factor that can be taken into account in determining a line, or checking the equity result." And so he does admit, or concede the point, that the equity of the resulting line can be checked having regard to the access to the resources at stake, and the location of these resources.

However, a little further down the same page he says, "To determine the location of a boundary on the basis of where one side says resources may possibly be located in the future would be to be guided by speculation and not by law." And then he refers to the fact that maybe in two or five years from now, we may find that the sub-basin is actually dry, and it would be a shame to have delimited

the boundary on the basis of resources that prove not to be there.

I would just like to draw your attention to what the Chamber did in the Gulf of Maine, and how it took into account resources, even though these were only identified as potential resources. And that no actual exploration or exploitation had occurred.

And this is a reference I gave earlier last Friday, it is the Gulf of Maine decision, at paragraph -- at page 340, paragraph 232. And there is also, I believe, an earlier reference where the word "potential" is actually used. I believe it's at paragraph 217, but I'll check within the next couple of minutes and confirm it to you.

The -- before I delve into the permit issue, I would also like to say that I made good on my promise to provide you with a revised figure 33. You will remember that this is the figure that shows all of the wells with the boundary proposed by Newfoundland. And I must point out that Mr. Colson was quicker than I was on this issue. He had already provided his figure 108, and I understand that the line and the information we are showing do not diverge from that shown on his depiction at figure 108.

Now, turning finally to the permit issuance, the permit practice of the parties. A lot was said about permits by counsel for Newfoundland, and we believe that

it is important to correct false impressions that may have been conveyed by certain comments made, or inaccuracies of other comments. And also to give some context to other arguments presented to you by counsel for Newfoundland.

I propose to deal with six separate items under the permit practice, and the first is the number of permits that were issued.

Newfoundland has invited the Tribunal to disregard conduct relating to permit issuance, and in particular its own conduct, in part on the limited number of permits issued.

On the Nova Scotia side, several permits were issued along the existing boundaries. And we have to refer only to permits issued to Mobil, to Texaco, a little further up the Cabot Strait, to Amoco along the boundary with Quebec, and there are others even with PEI, Hudson's Bay, Shaw, I believe. Chevron, Murphy Oil, and so on. And that is figure 17 from our collection of figures.

On the Newfoundland side, the attention has been focused primarily on two permits: the Mobil and the Katy permits.

However, this conveys a wrong impression that the permit issuance behaviour of the parties comprised only a few episodes, insufficient in numbers to support a true practice.

In fact, Newfoundland has issued several exploration permits apart from the Katy or Mobil permits. And you have there showing on the slide Newfoundland's Counter-Memorial figure number 10, which accounts for at least nine permits. Or nine permitees, rather. There may be subject to more than one permit in each instance.

The Newfoundland permits to Katy and Mobil, in addition, were themselves renewed in 1972, you'll remember. Katy was renewed as a Class "B" permit with no drilling rights, whereas Mobil was renewed as a Class "A" permit with full drilling rights.

Turning now to figure 18, the reason why the attention was focused on the Newfoundland side of the boundary exclusively on the Mobil and the Katy permits is obviously that those permits are the ones issued by Newfoundland along the existing boundaries, including the de facto boundary between Newfoundland and Nova Scotia.

The reason why no more than two permits have been issued by Newfoundland alongside the line is simply that these two permits, Mobil and Katy, occupy all of the Laurentian Sub-basin area situated on the Newfoundland side along the 135 degree boundary line. There is hardly any room left to issue other permits.

And we invite the Tribunal to bear in mind, as well, that these permits issued by Newfoundland were issued in

response to industry requests, and not the reverse. The fact that Newfoundland has not issued more permits is not indicative of an intent by Newfoundland to limit the number of permits issued, or to curtail its permit practice in any fashion.

I said that Class "A" permits meant with full drilling rights, what I meant to say was full drilling rights and production rights. That is the ability to extract petroleum as a result of the drilling activities.

PROFESSOR CRAWFORD: Mr. Bertrand?

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: How many permits were in force on your side of the line when the 1982 Accord came into force?

MR. BERTRAND: When the 1982 Accord, I don't have the information with me. I don't know that we have it. It is true, and we do not dispute Mr. Colson's -- or rather Mr. Willis', I believe, analysis of the situation. But a lot of the permits were surrendered by the companies. But that a number of them remained in force until 1982, when the Accord -- rather 1984, when the legislation implementing the Accord was enacted. How many exactly were still in force at the time, had not been surrendered, I don't have the information with me. But we have to remember that Nova Scotia issued, over that period, and I will come back to it, between '65 and '72, more than 400

different permits. So we are not talking about a few permits.

Obviously a lot of them had nothing to do with the area adjoining the boundary. But nevertheless, the point is that the permit practice is not based on sparse evidence.

PROFESSOR CRAWFORD: Everyone has been talking about the period in the sixties and early seventies, why -- is it the case that the issuing of new permits as distinct from possibly the renewal, or continuation of permits, ceased in the early seventies, and if so, why?

MR. BERTRAND: That's what we can gather from the evidence. On the Nova Scotia side, if we can go back to figure R-3, we can see then the -- there is hardly any room left to issue permits. That may be one reason why.

The other reason is also, I believe, simply a business reason. At the time, the attraction was more towards Sable, and more towards the area where Hibernia is located, which is to the southeast of Newfoundland. However, as well, there was a moratorium that kicked in in 1967. But we'll see later that the moratorium did not prevent parties from issuing permits, and did not prevent certain activities from taking place.

So I think a combination of these factors may explain why these permits were mostly issued before, or around

1970. A bit before, as of 1965, and then in the first few years in the seventies.

If we could go now to my second point, which is the Katy permit, at R-7, that's correct. Our contention, as you may recall, is that the Katy permit is consistent with the de facto boundary using the 135 degree azimuth.

Now Mr. Willis submitted at page 785 of Monday's transcript, November 26, that, and I quote, "the western edge of the Katy permit was not in the vicinity of the 135 degree line." He indicated that according to their measurement, he said "ours", "ours" meaning Newfoundland, the distance between the western edge of the Katy permit, and the 135 degree line at the northern limit here, was 10.1 nautical miles, and that the distance between the western edge of the Katy permit and the 135 degree azimuth at the southern limit, was 39 nautical miles.

This again, assumes that the permit was drawn on a conic map, and that its western limit was drawn without reference to the existing boundary, the 135 degree azimuth, and not as an extension of the line formed by turning points 2016 and 2017, as I have explained to you last Friday.

In other words, what it assumes is that the drafter of the Katy permit intended to show, if we could go back to the previous slide, to show the western edge of the permit

here on the map, as a curved line and not as a straight line, on a normal map, being a Mercator map.

So he intended to show a permit that, if you were to look at it on a normal map, a Mercator map, you would see in effect, a long curved line, because he drew a straight line on a conic projection. And as Professor Saunders explained with a lot of ability in the first round, and several slides, on a conic projection, an azimuth of 135 degree line will, when transposed on a Mercator, actually gradually shift azimuth and be perceived as a curved line.

Again, let us remember, if we can go to the previous one -- oh, that's fine, yes -- let us remember that the Katy map does not provide any coordinates. Does not provide any methodology. It just provides a line on a map.

PROFESSOR CRAWFORD: Who did the colouring in?

MR. BERTRAND: If we could go back to 7, it leads into my next -- this is an excerpt from the Katy map. So this obviously is not shown on the Katy map. We will see it a little later. So there is no point. So it's just a line drawn on a grid, which is a conic projection, and whether it's Newfoundland's technical person, Mr. Gray, or us, we have to figure out what is there simply by trying to measure where the line is, as opposed to following a methodology, which is purported to be replicated or

depicted on a map.

Going back to R-9, please. We invite the Tribunal not to lose sight of the demonstration given by Professor Saunders during the first phase of this hearing. And as he indicated then, this figure, which is figure A-7, on which from the Katy map, we have added point A, B, C, D and E. Point E being turning point 2016. Point C being turning point 2017. And point D being the point used by the drafter of the Mobil permit to draw a line between the southern edge of the Mobil permit to this point. And it matches the 135 degree line.

The purpose of this drawing is to show that the western edge of the Katy permit matches an extension of the line joining turning point 2016 with turning point 2017. Very close to the point D identified in the Mobil permit. And that azimuth is 136 degrees and some dust. So very close to the 135 degree that we say is the de facto boundary.

Now actually the azimuth of the extension line at turning point 2016 is 136 degrees, 13 minutes, 1 second and 45th hundreds. While the azimuth of the northeast extension of the western edge of the Katy permit is 136 degrees, 25 minutes. So a difference -- I will repeat. If you extend a straight line from turning points 2016 to 2017, you continue that, the azimuth is 136, 13 degrees.

If you extend the western edge of the Katy permit on the same path, the azimuth is 136 degrees, 25 minutes. So a difference of 12 minutes basically. And different of let's say 13 minutes, means that a depiction on this type of map, using this scale, would be hardly noticeable. It would be less than one-tenth of one millimetre. So the room for error is great. And we talk about one degree, we talk about several kilometres.

Again, the difference between the western edge, which is 136 degrees, 25 minutes, and the actual 135 degree boundary still means a difference of approximately one millimetre on this map. Again, something like a pencil mark. And so when you are looking at this map without any clue as to how it was drafted, it's very easy, even for the original drafter, to have misplaced the permit from the place he really wanted to show it on the map.

R-10, please. Now this is not a mere coincidence, especially in view of the fact that in the northern section of the Katy permit, which we talked about last Friday, the depiction conforms with the Quebec-Newfoundland boundary segment of the line in the Gulf of St. Lawrence, despite the very irregular path followed by the boundary on this location. So I invited you to draw the conclusion that manifestly the drawer meant to comply with the boundary. Not only there, but also there.

However, obviously a difference of a pencil line at the beginning of the course of a line that will extend over 300 miles, and which creates a gap hardly noticeable at the northern end, will eventually create a gap that will go increasing as you go down the length of the permit. And this is the reason why, according to Newfoundland's measurements, the gap between the western edge of the Katy permit and the 135 degree azimuth is 1.7 nautical miles as opposed to 10 nautical miles, according to Newfoundland at the northern edge, and 12 nautical miles as opposed to 39 nautical miles calculated by Newfoundland.

This length here, the whole length of the western edge of the Katy permit, is 263 nautical miles long. So the minute you are off just a bit, albeit by a pencil mark, you project that over such a long distance that you create an area of divergence that makes or attempts to make it appear as though the permit does not match the azimuth of 135 degrees.

I would like to turn now to my third subject, which is the Mobil permit. At page 845 of the November 26th transcript of Mr. Colson's argument, he indicated that Mobil, of course, received a federal permit that extended beyond the degree -- 135 degree line on both sides of that line. He then said Mobil took out provincial permits from

both Newfoundland and Nova Scotia to cover the federal permit. This conveys, again, the impression that the provincial permit regime was a duplicate of the federal permit issuance. And we contend that this is inaccurate.

First, as we have indicated last Friday, annex 150 clearly demonstrates -- can we go back to 150 -- clearly demonstrates that there existed more acreage under provincial permits than there existed under federal permits. And this has not been disputed, obviously, from what we heard last Monday.

Secondly --

PROFESSOR CRAWFORD: Excuse me, Mr. Bertrand. The Mobil permit in the precise vicinity of the line was not also a federal permit.

MR. BERTRAND: I will come to that.

PROFESSOR CRAWFORD: Okay.

MR. BERTRAND: I will show you that the shape of the federal permit does not match the joined shapes of the provincial permits. And I mean -- may I say that it proves little. But it proves a point that this is not simply a carbon copy of what the federal was doing. And I have yet more examples of that. I think that all of that to say that the permit practice of the provinces stood on its own.

So a comparison of figure 17, which is the issuance of permits by Nova Scotia, and figure 108, referred to by Mr.

Colson, shows clearly that there is no duplication between the practice of Nova Scotia and the permits issued by the federal government. And we just have to see for example on the Nova Scotia front, the Mobil permit versus the Gulf permit, or the Amoco permit here versus nothing, or the Hudson's Bay permit -- Hudson's Bay Oil versus nothing. And others that I could go into in this area not along the boundaries.

On the federal front, as you noticed, Professor Crawford, we have the Texaco permit. There is no Nova Scotia equivalent to the Texaco permit.

Turning now to the similar comparison with Newfoundland, by comparing figure 10 filed with their first phase Counter-Memorial, with the same figure 108 used by Mr. Colson, we see that the Katy permit, which is number 8 here, does not have any correspondence at the federal level. We see also that Katy does not have any correspondence with the Gulf permit. Is in conflict actually with the Gulf permit issued by the federal government.

CHAIRMAN: So what you are saying is that there were areas where company A had a federal permit, and unrelated company B had a provincial permit?

MR. BERTRAND: I am saying that among other things, yes.

PROFESSOR CRAWFORD: And how could that operate? I am sorry

I am used to the arcane Australian constitution. In the Australian constitution, the state permit in that case would be invalid. Even if the state had the jurisdiction.

MR. BERTRAND: I don't think that the solution is that easy in the Canadian context. However, I will concede, as I said earlier, that it is our understanding that all of the drilling that occurred in this area occurred under the auspices of permits that were held from the provincial authorities as well as a permit from the federal authorities. Whether these permits were actually the same is not necessarily true; however, for that particular area where the well was drilled, it was a permit held by -- from the federal government and from the provincial government concerned.

PROFESSOR CRAWFORD: Did these permits purport to be exclusive?

MR. BERTRAND: Some of them, yes. Others, no. For example, in Newfoundland the Class A permits were -- turned out to be -- the interim Class A permits turned out to be exclusive; the Class B were non-exclusive with no drilling rights. The seismic permits issued by Newfoundland were non-exclusive and that's a point I'll get to, that there was a lot of overlap, and we see from this map that there's a lot of overlap.

PROFESSOR CRAWFORD: And you didn't have seismic permits at

all? You just waived --

MR. BERTRAND: Correct. In the harbour at Halifax. Harbour. Correct.

We now have slide 16 to make the point that, furthermore, the statement of Mr. Colson is plainly wrong. The Nova Scotia and Newfoundland permits issued to Mobil in 1967 are not a duplicate of the federal permit issued to Mobil. This is apparent from a comparison of these two maps. For example, if we look at the map on the left, which is -- which was used in Mr. Saunders' phase one presentation, the yellow permit or the permit depicted in yellow is the Nova Scotia portion of the Mobil permit which abuts the line and which has an equivalent of -- on the Newfoundland side, the permit on the Newfoundland side is depicted in orange. Obviously, if you take this joint shape or the shape formed jointly by these two permits, you cannot replicate the shape on the federal permit depiction as seen in Figure 108. The Newfoundland portion --

PROFESSOR CRAWFORD: I mean there is no doubt that there was a federal permit granted to Mobil that, as it were, transcended the line, if I can use --

MR. BERTRAND: Definitely. And not only to Mobil; to Texaco, as well. Obviously, when the government -- the federal government issued permits back in 1968 or '67, it

did not bother with the line. It just issued permits along the grids provided for by its permit grids. There was no diagonal division of the permits.

But the point is that, obviously, there's no -- it's not a replicate of the federal permit. Provincial permits are distinct from the federal permit, albeit there may be some overlap and the holders may be the same in several instances. It is not an automatic recipe.

Also, Mr. Colson's statement there on Monday serves to implicitly buttress Newfoundland's claim that its Mobil permit was issued to match the Nova Scotia permit issued to Mobil and that not much should be read into that, meaning that Newfoundland simply copied blindly what Nova Scotia had done.

As I explained to the Tribunal last Friday -- if I can have the next slide, please? The permit of Newfoundland issued to Mobil was described by using a point which is Point A on this figure, which has the same coordinates as the southeastern corner of the equivalent permit issued on the Nova Scotia side, but does not refer to the Nova Scotia permit. And so they drew a line between this Point A and a point which they described by coordinates shown here as Point D, a point which happens to be on a straight line between turnings points 2016 and turning points 2017.

If it had been drawn to match the Nova Scotia permit,

why did the draftsmen of the Newfoundland permit not use the coordinates of the Point B here? It would have been so easy. It was known then. Nova Scotia permit to Mobil had been issued a few months earlier and the permit grid was known, the coordinates was known. Why did they not use the second point to draw the line and say that this is the northern edge of the -- northern corner of the Newfoundland Mobil permit?

If that what -- if that's what they had in mind, then it would have been very easy to do, and since they didn't do that, but rather referred to a point which is somewhere between -- along the line between turning points 2016 and 2017, we submit to you that it's more likely that the permit of Newfoundland was drawn by reference to a line dividing the two provinces' offshore areas.

PROFESSOR CRAWFORD: Drawn by whom? I mean presumably, Mobil came along and said, we want a permit from A to B, or --

MR. BERTRAND: Remember, Newfoundland said that the issuance of permits is a conscious exercise of assertion of jurisdiction. They said that time and again.

Obviously, the request for permit is submitted by the company with a drawing. The province doesn't have to say yes, and presumably, they know what they're doing when they issue the permits. I don't think it changes much,

the situation. The industry obviously knew that there was a boundary; they referred to it. Newfoundland saw the drawing, said, okay, we'll do it in this fashion. So it just goes to show that the argument to say that we didn't pay much attention -- Newfoundland didn't pay much attention because we just duplicated the matching Mobil permit on the Nova Scotia side doesn't hold water.

This insinuation relating to the blanketing of provincial permits by federal permits is a close cousin to the statements made by Newfoundland at paragraph 118 of its phase two Counter-Memorial.

In the first sentence of this paragraph, Newfoundland contended that it was federal permits that counted for private companies, as is illustrated by what industry itself was saying and seeing in leading journals at the time. And for this, they refer us to supplementary authorities number 3. Well, if we look at supplementary authorities number 3, we see that it is, in fact, a speech delivered by one D.G. Crosby. I'm sure you'll remember Mr. Crosby of the federal government, from the Department of Natural Resources. It was a speech delivered on behalf of Minister Donald Macdonald because he couldn't make it to the meeting where the speech was to be delivered. It was delivered on April 24th, 1973 at an East Coast Symposium of an American Association of Petroleum

Geologists held in Atlantic City.

So the first thing we have to say in respect of that -- this is not what industry is saying. It is what the federal government was saying. Second, it is not surprising having said that, to see that an official of the federal government speaking on behalf of his Minister is referring only to federal permits, especially at a time where there is still a provincial-federal dispute over the ownership of mineral rights in the offshore, and especially after the outcome of the BC reference.

In the second and third sentences of the same paragraph 118, Newfoundland states, "Figure 7 shows maps of the Canada east coast offshore published in the annual bulletins of the American Association of Petroleum Geologists in 1970 and 1971. They show the area blanketed with federal permits. There is no reference to provincial claims or to provincial permits." And then, again, the reader is referred to a footnote where he is then sent back to supplementary authorities number 4 and 5.

Now figure 7 is a reproduction of a map found in each of the articles referred to in that footnote, being supplementary authorities number 4 and 5. Those are not articles of the American Association of Petroleum Geologists, as figure 7 would have you or the reader believe. The depiction here indicates "Eastern Canada

offshore holdings 1969, as depicted by the American Association of Petroleum Geologists." This is simply an article -- and we will get to -- in a moment to who is the author of that article -- an article published in a journal of the American Association of Petroleum Geologists.

Now they are articles co-authored by one R.D. Howie, a geologist of the Geological Survey of Canada. So again, it is not surprising to find, we submit, in these articles references to Canadian permits only.

I would like to turn to my fourth -- yes?

PROFESSOR CRAWFORD: Did the provincial officials write about the area in terms of provincial permits in the Association of --

MR. BERTRAND: I don't know that they did.

PROFESSOR CRAWFORD: We haven't been referred to any articles where they did.

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: Perhaps they have better things to do than write articles.

MR. BERTRAND: I will not go there.

PROFESSOR CRAWFORD: Well, if somebody wrote an article today, had it forced back on them three times. It's a good rule not to write articles if you want to be an authority.

MR. BERTRAND: I would like to move to my fourth topic under "Permit Issuance", which is the permit practice of the parties and the moratorium. Now Mr. Colson, on Monday, again, made two separate comments regarding the moratorium which resulted from the Canada-France dispute.

First, at page 845 of last Monday's transcript, he indicated that because of the existence of the moratorium, "it seems that no seismic activities were conducted in the moratorium block." Now I understand that Mr. Colson was not there when I made my presentation last Friday, and I notice that he is not here today, so he won't hear the explanation -- my repetition of the explanation I gave last Friday. But we can see from a blow-up of figure 16, which is the Nova Scotia grid map for permits, first the Tribunal will recall that I referred to paragraph 242 of Canada's Memorial in the Canada-France dispute, which shows clearly -- it's annex 201 -- which shows clearly that seismic work as opposed to drilling was not prohibited in the moratorium area.

And I would like to draw Mr. Colson's attention, who I'm sure will read the transcript, to information contained in annexes 178 to 180, especially in 178, which shows that Mobil disclosed its intention to do seismic work in respect of permits 209. 209 being -- abutting the boundary. 210, I thought I had seen it. Skip 210. 218,

along the boundary. 222, also along the boundary, and 224. All of which are close to the boundary line.

PROFESSOR CRAWFORD: What was that document?

MR. BERTRAND: Annex 178. A report filed by Mobil informing the government of its intention in terms of work.

PROFESSOR CRAWFORD: The government of?

MR. BERTRAND: Nova Scotia. In terms of work to be conducted. Second --

PROFESSOR CRAWFORD: And this was seismic work?

MR. BERTRAND: Correct.

PROFESSOR CRAWFORD: I thought you said they didn't need permission for seismic work?

MR. BERTRAND: Correct. However, under the Nova Scotia permit system, a company could, because it was under the permit system, oblige to expend certain sums of money. Once it had the permit it could qualify certain of the expenses incurred to do seismic work as a valid expense towards expenses under the permit, the exploration permit.

PROFESSOR CRAWFORD: And your response to the grouping point is that this seismic work was precisely located in these?

MR. BERTRAND: It was a number of permits, including these along the boundaries, our specific reference to these permits.

PROFESSOR CRAWFORD: As well as a number of others?

MR. BERTRAND: In other letters, yes. But there is a

specific reference to these permits.

PROFESSOR CRAWFORD: My understanding is that the moratorium was on drilling?

MR. BERTRAND: Correct. I will get to that in a minute actually. Now the second point I wanted to make in respect of Mr. Colson's argument on Monday is that at page 847, of the same day's transcript, in answer to a question of Professor Crawford, he admitted not knowing why the Texaco permit had been issued by the federal government in 1972 in the moratorium area after it had come into being in 1967. He as well speculated as to the reasons why the federal government had decided to issue one nevertheless. Maybe by way of retaliation to what France may have done.

I don't know the answer to that question, Professor Crawford, but what I know is that the reality of the moratorium is that it did not prevent Newfoundland from issuing permits in this area. Permits were indeed issued in the moratorium area by Newfoundland, including the Katy permit and subsequently the renewal of the Mobil and the Katy permits in 1972. All three permits were issued while the moratorium was in force. And were issued for areas covered by the moratorium, as can be clearly seen from a comparison of figure 108 with our figure 18.

Also seismic permits were issued in the moratorium area by Newfoundland to Texaco and Pacific Petroleum. We

see them as Texaco being number 6 and number -- I believe it's number 7 here, Pacific Petroleum. Apparently at the time, Newfoundland did not believe that seismic activities were prohibited in the moratorium area.

Now coming back to your comment or a question earlier, Professor Crawford, this morning on the reasons invoked by Mr. McRae in his argument Monday to explain the inaction of Newfoundland in the late 80s and early 90s, I would like to point out that certainly Newfoundland was not prevented from issuing permits along the boundary outside the moratorium. Although the moratorium may have hampered its willingness or eagerness to resolve the issue of the boundary, it was not prevented from issuing permits in this area or further down.

Drilling was not prevented outside this area, as we know. I think a more plausible explanation for Newfoundland's inaction was that first Newfoundland was preparing its case for the reference. Secondly, when it lost, it then sought to negotiate a better deal. Thirdly, industry -- as I explained or alluded to earlier, industry at the time was not showing any interest for the area because the sweet spot of the Laurentian Sub basin is right in the middle of the moratorium. The focus at the time was then Sable Island, here, and Hibernia.

Fourth, Newfoundland was waiting to play his hand at

the most opportune time. That explains why Newfoundland didn't do -- didn't protest, didn't do much in those years.

While I'm on the issue of lack of protest or acquiescence, with a small "a", by Newfoundland, I would like to respond to the description of events relating to the 1982 Accord and 1984 implementing legislation made by Mr. Willis at page 789 of the transcript on Monday.

Actually, I believe I can show that it is more an overview from a satellite in orbit around the earth than it is a description of events, as several important details were omitted.

At page 789, Mr. Willis said -- and I quote -- "now a final point about the political relations between the parties is that Mr. Bertrand in Nova Scotia's written pleadings refer to the failure of Newfoundland and Labrador to protest the 1982 Canada-Nova Scotia Agreement and the 1984 Canada-Nova Scotia legislation."

He then continued. "But, Mr. Chairman, the Agreement itself provided all the assurance Newfoundland and Labrador could have sought. The boundary schedule included the caveat -- quote -- provided that if there is a dispute as to these boundaries with any neighboring jurisdiction, the federal government may redraw the boundaries after consultation with all the parties

concerned".

This he said was the conduct -- this was the context in which the 1984 legislation was enacted and perceived. And of course very shortly thereafter it was overtaken by events. The Atlantic Accord with Newfoundland and Labrador was concluded, as was the second Nova Scotia Accord, both anticipating this dispute and this arbitration as though they were waiting for the proper moment to launch this dispute.

I submit that a few comments are in order. First, the most important one, is that the 1984 implementing legislation did not contain any reference to a possible dispute, to a possible dispute resolution mechanism or to even the possibility of the minister having the ability to redraw the boundaries in the event of a dispute.

PROFESSOR CRAWFORD: I notice that it does refer back of course to the Accord?

MR. BERTRAND: It does refer back to the Accord.

PROFESSOR CRAWFORD: And the Accord contains --

MR. BERTRAND: Correct. It implements the Accord but it does not reproduce that portion of the Accord contained in the Annex which contains the out that Newfoundland is telling us today it found so reassuring at the time.

And that's very clear. So this is in stark contrast with the 1982 Accord. And we can say, I submit, that the

context in which the 1984 implementing legislation was adopted cannot be said to have referred to a dispute resolution mechanism.

PROFESSOR CRAWFORD: I put that discrepancy rather elliptically to your leader this morning and he said he didn't think it was significant, but --

MR. FORTIER: I defer to my colleague.

PROFESSOR CRAWFORD: Well I'm not trying to drive any further wedges between you, but --

MR. BERTRAND: Also the --

PROFESSOR CRAWFORD: But seriously, do we have any -- it is a curious discrepancy and certainly when you compare it with the situation later on where there is clear concordance. Is there any reason?

MR. BERTRAND: We don't know. We just take notice of the fact that it's there. Why did they not protest then? Obviously a new government had come into power, the Mulroney government. There were talks of a secret deal having been done with Newfoundland assuring them that they would get a fair shake, if I may say so. That may explain why they didn't feel the urge to come forward and protest. But the facts are the facts, as Mr. Mr. Fortier said.

So the conclusion of the Canada -- the last aspect of that is that the conclusion of the Canada-Newfoundland Accord only came in 1985. And the conclusion that a

subsequent Canada-Nova Scotia Accord containing the dispute resolution provision now enforce only occurred in 1986. This is a span of two years. I guess this casts new light on Mr. Willis' broad brush depiction of events summarized by him as follows -- and I quote -- "And of course very shortly thereafter, it" -- referring to the 1984 legislation -- "was overtaken by events". Well events that took two years really to materialize. And yet Newfoundland remained silent. And we are submitting that nothing can excuse Newfoundland's inaction.

PROFESSOR CRAWFORD: Nova Scotia was arguably in a better legal position vis-a-vis the boundary under the first legislation than it is under the second legislation. There doesn't seem to have been any --

MR. BERTRAND: Do I need to comment on that?

PROFESSOR CRAWFORD: Well, no.

MR. BERTRAND: I'm sorry.

PROFESSOR CRAWFORD: I mean --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- just looking at it from the outside --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- I'm not a Canadian lawyer, but I would have thought that they had a better argument under the --

MR. BERTRAND: Without a dispute resolution provision.

PROFESSOR CRAWFORD: Yes. They don't seem to have minded, as it were, about the change. Perhaps provincial silence is a more general phenomenon.

MR. BERTRAND: Correct. We don't know -- seriously, I don't know and I don't think that we know what the answer is to that.

The fifth topic is seismic permits. In the comments made -- or the comment made, rather, earlier in respect of the Mobil permit that Newfoundland contends that permit issuance is a conscious exercise of assertion of jurisdiction, leads me also to respond to Mr. Willis' statement found at page 786 of Monday's transcript. And it reads, I quote, "And Mr. Chairman in this light, there is only one important fact about the 1973 to 1976 Newfoundland and Labrador permits. They were issued under provincial legislation that only authorized the issuance of permits of whatever sort for areas in the province. They disclose a conviction by the province that the areas they cover are in the province and not in another province."

Now I promise I will spare you with the recount of Newfoundland's oversight as illustrated by the -- as we have seen last Friday, granting of a permit encompassing a large square area, but specifying that the area

effectively covered by the permit is limited to that found within Newfoundland's territory. And as we have seen, that's document number 50 of Newfoundland's supplemental document. Or the granting of a permit encompassing a large square area when the permit requested was for a linear area along a parallel. But I will remind you of Texaco's permits, as issued by Newfoundland in the Cabot Strait area, and that's permit number 6 here, which by encompassing an area comprising St. Paul Island can hardly be said to be a conscious assertion of jurisdiction over the area covered by the permit.

More importantly, the seismic permits conveyed no interest in the offshore, as mentioned to you last Friday during my presentation, and as Newfoundland itself pointed out in its White Paper of 1977, at pages 38 and 39. In most countries -- we can read there -- companies carry on the seismic surveys prior to even making an application for the right to drill and produce. A number of companies may conduct separate seismic surveys over the same area. And of course, only one company is awarded the right to drill and produce.

Thus in most countries, the carrying out of seismic surveys is considered to be a normal part of the process of determining whether a company is interested in an area and is not considered to entitle the company to any

special rights in the area in question. This will also be the position of this government. That's in the White Paper. Continuing on 39, this amendment of 1974, the amendment to the legislation, which made it a requirement to obtain a permit before conducting seismic, was aimed at regulating pre-drilling seismic surveys and obtaining the information generated therefrom. Pursuant to the amended Act, any company wishing to conduct seismic operations on Newfoundland's continental margin, must first present a general program description to the Department of Mines and Energy.

After review, an interim permit is issued subject to the usual conditions. So I think that puts the last nail in the coffin of the seismic permits on the side of Newfoundland. Especially they are used to assert an encroachment over the de facto line that existed between the parties.

The sixth topic, Mr. Chairman, is the termination of permits. Mr. Willis, affirmed on Monday, November 26th, at page 785, again, of the transcript that -- and I quote -- "It is on record in this case that any surviving Nova Scotia permits were terminated by 1984 legislation implementing the 1982 Canada-Nova Scotia Agreement. With respect to the Newfoundland and Labrador permits, the Katy and Mobil permits, these were terminated at the latest by

coming into force of the 1977 regulations."

Well we disagree with Mr. Willis' assertion regarding the treatment reserved to Newfoundland permits. First, Mr. Willis' confidence regarding the Newfoundland permits is somewhat surprising given the content of annex 213, which are letters from Newfoundland's Deputy Agent, Debbie Paquette, responding to queries first from the Tribunal back in March of this year, and subsequently from Nova Scotia later this September, regarding the date of termination or surrender of the Katy and Mobil permits. On both occasions, Newfoundland indicated that it was not able to determine a date of expiry, termination or surrender for these permits.

Second, both the Katy and Mobil original permits found under annex 80, provided that the holder shall be entitled to have a permit issued under regulations to be adopted. So let me be clear. The older of the interim Katy and Mobil permits, as it was issued back in 1967 and '71, was entitled on the face of the permit to obtain a new permit on the same terms under the new permit regime, when the regulations would be adopted and would come into force.

PROFESSOR CRAWFORD: Which was when?

MR. BERTRAND: Eventually. It took awhile. It was only 1977. The 1977 Newfoundland --

PROFESSOR CRAWFORD: But we don't have any evidence --

MR. BERTRAND: -- petroleum regulations --

PROFESSOR CRAWFORD: We don't have any evidence that new permits were in fact issued then?

MR. BERTRAND: We do not. But that's where I'm going, obviously. Both permits -- we know that both permits were renewed in 1972. Except that in the case of Katy, it was renewed as a class "B" permit, that is with no drilling rights. Both permits were in force at the time of the coming into force of the 1977 petroleum regulations. And there are indications that at the very least -- I'm sorry, the Mobil permit could have survived the coming into force of these regulations. The coming into being of the new regime.

Now it is interesting to note that the Petro-Canada report released at the end of 1979, which is found at annex 150, contains a map where the Mobil permit still appears. Newfoundland has not supplied any evidence to the contrary, and it is difficult for Nova Scotia -- it is difficult for Nova Scotia to adduce evidence in this regard, because the permits of Newfoundland are still kept today confidential. They can only be accessed through proper requests to access to information under the relevant access to information legislation.

So to say the least, Mr. Colson's statement -- rather Mr. Willis' statement is over-reaching, to state firmly

and unequivocally that all permits of Newfoundland were terminated, with the coming into force of the 1977 regulations is a statement that we say is unsupported by the evidence and is inconsistent with certain indications in the record.

Further, Mr. Willis' invitation to the Tribunal, found at page 786 of Monday's transcript, to conclude that the permits issued by the provinces have no relevance because they were ultra vires of the provinces from the outset is really grasping at straws. Whether or not the permits turned out to be ultra vires in the end is irrelevant. What matters is that the province believed that they were valid at the time of issuance. That the province acted in a consistent manner with that belief, and that the provincial permits respected a de facto boundary delimiting the provinces' respective offshore areas.

Finally, the permit episode of this case is certainly comparable in length with the period of time over which the old concessions were granted before a protest was raised in the Tunisia-Libya case. Over 400 permits were issued by Nova Scotia between 1965 and 1972. Newfoundland began issuing permits in 1963, with the gist of them being issued in 1965. As we saw, the Mobil and Katy permits were renewed by Newfoundland as late as in 1972.

PROFESSOR CRAWFORD: I'm sorry to come back to this, but

what I want to know is why -- well you say you don't know what Newfoundland and Labrador was doing, that may be a fair comment. But let's just talk about Nova Scotia. Why did Nova Scotia issue no new permits after 1972, if that's the case?

MR. BERTRAND: As I said, I believe that the area was pretty much permitted out. Fully permitted.

PROFESSOR CRAWFORD: It was permitted -- I mean, one can look at these permits in prospective areas, as I have been doing in the Gulf of Guinea. And you see changes in the permits over time, when they become more and more ragged as different bits are relinquished and so on. In many cases, the permits have a requirement for relinquishment after a certain period for some --

MR. BERTRAND: If no activity is conducted.

PROFESSOR CRAWFORD: -- or even if there is activity, there can be systems of division of the permits. After a period of time, you have to relinquish half of it anyway. So which explains why these things come to assume very bizarre shapes. So in the ordinary situation of a prospective field with a permitting practice going over a period of, you know, a considerable number of years, you do expect changes. You don't expect to sort of stop.

MR. BERTRAND: Correct. Well, I am instructed that Nova Scotia did issue permits after 1972, albeit, not along the

boundary line that we are concerned with. How long after 1972 did it continue to issue permits? I don't have the information as of now. But before Mr. Fortier concludes the case today, if I have additional information, I will pass it along to him in this regard. I can only surmise that the area was pretty much permitted out, the effect of the moratorium -- there is an impact, there is no doubt, because, obviously permit issuance is a reaction to industry request. And industry was not interested in spending a lot of money since the sweet spot in this area, the primary objective is in the middle of the moratorium. And thirdly, as a bi-product, the interest of industry was more focused around Sable Island and Hibernia. When I say Hibernia, I mean in this area.

So over 400 permits were issued by Nova Scotia, yes.

PROFESSOR CRAWFORD: One final question on this. The reason is not the perceived industry -- an industry perception that the provincial campaign for offshore mineral rights in their own right had failed by the early 70s? I mean if one wanted to put a date on it, it would be '72, '73, when Mr. Trudeau said, you have got to be joking. I mean he didn't actually say that in those words, but he was pretty clear. I mean did that have any effect on whether companies applied for permits any longer?

MR. BERTRAND: I do not know. What I think we can assume is

that as a reasonable business person, if there are regulations that are in place, even though you may believe that they are invalid, until they are declared so by the Courts, you will comply with them and you won't take any chance.

So 400 permits were issued by Nova Scotia between '65 and '72. Newfoundland began issuing permits in 1963, with the gist of them being issued in '65. As we saw, Mobil and Katy were renewed in '72.

Now Mr. Colson tried at pages 836 and 837, and subsequently at pages 840 to 841 to distinguish -- of the transcript of Monday -- to distinguish the case at hand with the factual situation reviewed in Tunisia-Libya, drawing the Tribunal's attention to the fact that there were protests in this case only with respect to areas concerned with overlapping concessions.

He underscored that no protests were raised in Tunisia-Libya about the concession limits, and the activities therein, south of 33 degrees 55 minutes latitude north and 12 degrees east, until 1976.

With respect, what Nova Scotia sees there is a distinction without a difference.

In Tunisia-Libya, the first protest for the area south of latitude 33 degrees 55 minutes north first occurred in 1976. That is eight years after the oil concessions were

granted. In our case, the Tribunal ruled in phase one that the first hint or sign of a disagreement came in October, 1972, with Minister Doody's letter, that is more than seven years after the first permits were issued.

Mr. Willis conceded that the common front collapsed probably in 1973, and that would put the period of the first protest, or real sign of disagreement eight years after the permits were issued.

But by then, a de facto line had already taken form, and been accepted by both parties in the present case over the entire length and course of the line now sought by Nova Scotia. That is to the edge of the continental margin.

Furthermore, even accepting Mr. Doody's letter at face value, only the portion seaward of point 2017 was questioned. In fact, we believe that the context and content of the letter of Minister Doody indicate that he raised only an objection to the 125 degree depiction of the boundary seaward of turning point 2017, and that he was in fact, seeking a little wiggle room, so that the boundary in the outer segment would accommodate the Katy permit which his province had issued less than a year earlier.

We have demonstrated, I hope, that the Katy permit is consistent with the de facto boundary, and as such, we

look at the Doody letter as an attempt by Newfoundland to make sure that the boundary in the outer segment would espouse the 135 degree azimuth in the end.

PROFESSOR CRAWFORD: The handwriting on the graphic you were just showing --

MR. BERTRAND: Yes.

PROFESSOR CRAWFORD: -- it was figure 78. That's Mr. Doody's, is it?

MR. BERTRAND: I believe it is, yes.

PROFESSOR CRAWFORD: It says "Get lats and longs of..." what points?

MR. BERTRAND: Of turning points, I think. I'm not sure.

PROFESSOR CRAWFORD: It doesn't look like turning --

MR. BERTRAND: I have known that answer once, a long time ago, in this file.

PROFESSOR CRAWFORD: I'm glad that your memory is not all that much better than mine.

MR. BERTRAND: Maybe we can find it out before we are over. I have known this at one point.

Now, turning to the next figure, which is the depiction of the combined permit practice of Nova Scotia and Newfoundland, and this is based on figure 28.

Mr. Drymer, Deputy Agent for Nova Scotia, informs me that it's "junction points", and with your permission, I will lend you his magnifying glass.

PROFESSOR CRAWFORD: No, no, it's okay.

MR. BERTRAND: And this figure, slide 29, is based on figure 28, which has already been used in our material. And we say, "In the end, the permit practice of the parties amply demonstrate the existence of a de facto line over the most part of the length of the boundary now sought by Nova Scotia." And moreover, the de facto boundary line, which has stemmed from the parties' permit issuance, bears no relationship whatsoever with the boundary now being proposed by Newfoundland, and which is now showing in red on the same figure.

Now, having said that, I would like to change topics, and deal with conduct in a more general sense. And it will lead me to make a few comments in response to arguments made by Mr. Willis last Monday.

First, at pages 776 and 777, Mr. Willis said "So the context in the quid pro quo, the objective in those years was, as I said, the big prize of ownership and jurisdiction and nothing less. And alluding to a point we have just been discussing, Nova Scotia has returned to its theme, and the 1964 proposed lines were to be the lines for all purposes. Nova Scotia cobbles together a pastiche of references to administrative arrangements to shore up this all purpose argument. There is..." he says, "...however, no evidence that Newfoundland and Labrador

ever bought into this."

This last statement of Mr. Willis, as I was reminded by a reference made by the Chairman last Thursday to Minister Otto Lang's letter, which letter is also discussed at paragraph 5.14 of the phase one Award, appears to be incorrect.

Second and more importantly, the conduct of the parties should not be found relevant -- irrelevant here, according to Mr. Willis, because the conduct does not relate to the basis of title. That's at page 770 and 771. To use his words, there is a "missing link" between the conduct on the one hand, and the Accords and the implementing legislation which forms the basis of title on the other hand. We disagree, obviously.

We would submit, with all due respect, that Mr. Willis attempted to rely on his credibility with this Tribunal, and to take some liberties with the state of international law, for there is no requirement in the law to have such a link present.

The conduct of the parties is either relevant or it is not. In this case, for the reasons I alluded to in my presentations last Thursday and Friday, all aspects of the conduct of the parties, consensus or agreement, if you will, with a small "a", permit practice or other subsequent conduct of the parties, as well as acquiescence

with a small "a", or tacit confirmation by Newfoundland, are all highly relevant to the Tribunal's mandate in this second phase.

PROFESSOR CRAWFORD: Now Mr. Bertrand, I would agree with you, but as a -- I think I pointed out to Mr. Fortier, and again, I'm not trying to do this again, but if you say that what was created by the Accords, which is of course, well after the practice on which you essentially rely, if you say that what was created by the Accords was something entirely new and different, then surely there is a problem of connecting them. It's the same problem that the Court infer impliedly had in Qatar-Bahrain, when they were referred back to the pearling practice of Qatar-Bahrain in the twenties. And they said, well this stopped a long time ago, and it has got nothing to do with, in effect, it's got nothing to do with the continental shelf.

Now what Mr. Willis may have been trying to say, and I don't recall exactly what he was trying to say, but he may have been trying to say, is you can't connect up practice relating to a provincial claim to offshore areas of pertinent provinces with the subsequent grant of what, in your leader's submission, is quite different entity, a quite distinct entity.

MR. BERTRAND: Well, obviously our submission to that is that the basis of title is to be found in the Accords, and

the implementing legislation. However, the subject matter of these Accords and implementing legislation is closely related to the subject matter of the conduct that we have been describing to you in these proceedings. And hence, its relevance.

Now in fact, because of their particular characteristics, which I described at great length both Thursday and Friday last, talked about high degree of mutuality, we talked about referring to an earlier agreement, we talked about the concordant practice, and so on and so forth. These aspects of the conduct of the parties should play a decisive role in the Tribunal's choice of equitable criteria, and method of delimitation.

There exists no rule preventing the Tribunal from looking at, and considering the whole of the conduct of the parties, as Mr. Willis seems to have hinted. The Tribunal must have regard to all relevant circumstances.

In the present case, the conduct of the parties spans over a period of over 30 years from the late 1950s, when discussions between the provinces on the question of offshore entitlements began, to the mid 1980s, when each of Nova Scotia's and Newfoundland's Accords with the federal government was implemented in federal and provincial legislation.

The de facto line can be in law, and is in fact, the

result of a combination of various types of conduct, and the Tribunal must have regard to all of them. In the end, the Tribunal may rely on all of them to effect a delimitation along the line Nova Scotia is now seeking.

And these conclude my remarks this afternoon. Unless you have additional questions.

Thank you, Mr. Chairman, Members of the Tribunal.

CHAIRMAN: Yes, I wonder --

MR. BERTRAND: Was wondering -- you were wondering?

CHAIRMAN: Have you concluded your --

MR. BERTRAND: Yes, I have, Mr. Chairman.

CHAIRMAN: I was just wondering if we might take a short break now? Would you -- because your time is important, you might give me a notion how long we should break?

MR. FORTIER: I -- thank you, Mr. Chairman. I will not be more than -- absent questions, I will not be more than half an hour in closing. So this would be an appropriate time to call a break.

CHAIRMAN: Yes. Fifteen minutes.

(Short recess)

CHAIRMAN: Mr. Fortier?

MR. FORTIER: Merci, Monsieur President. Mr. Chairman, Members of the Tribunal, before I start my final and concluding remarks, if I may address three or four matters of housekeeping or follow up questions, which don't really

fit into my péroraison.

One, last week the Tribunal expressed an interest in seeing the written pleadings of the parties in the Canada-France arbitration, and my friends and I have agreed that we would make available to the Registrar the Canadian pleadings. As far as the French pleadings are concerned, I'm informed that they are locked up in a vault somewhere in the Quai D'Orsal in Paris and not available, regrettably.

PROFESSOR CRAWFORD: Mr. Fortier, in fact, it turns out the technical expert has a copy of the Canadian pleadings.

MR. FORTIER: Oh, really?

PROFESSOR CRAWFORD: Yes.

MR. FORTIER: It is available?

PROFESSOR CRAWFORD: So I think -- I think we are all right from that point of view. I was hoping I might get a copy of the French pleadings, but --

MR. FORTIER: Well, there is one member of the Nova Scotia team who has a copy of the pleadings, of course -- Monsieur François Mathys, but he is under a professional obligation not to -- and I haven't seen them. No, no, I'm sorry. That is not true. What am I saying? Of course, Mr. McRae and I have seen them. I don't remember them, is what I mean.

PROFESSOR CRAWFORD: I can -- I can relate to that. I think

we're okay.

MR. FORTIER: Okay. Now there was -- at the start of his address to the Tribunal this afternoon, Mr. Bertrand was searching for a reference in the Gulf of Maine Award, the Gulf of Maine decision to potential resources of the subsoil which the Chamber said was one of the principal stake in the proceedings, and that is to be found at paragraph 232. "This bank", that's referring to Georges Bank, "is a real subject of the dispute between the United States and Canada in the present case, the principal stake in the proceedings, from the viewpoint of the potential resources of the subsoil."

Another question that was put to Mr. Bertrand with respect to the date when the Nova Scotia Mobil permits may have ceased being the -- being used, in effect annex 178 in the Nova Scotia pleadings, written pleadings, demonstrate that the Nova Scotia Mobil permits were still being worked in 1974, including drilling. And I would point out that Mr. Colson himself on Monday, referring to page 850 of the transcript, mentioned that "Certain wells in Mobil's permit areas were only spudded, opened in 1975 and 1976." That's at page 850 of the transcript.

And finally, a question put to Mr. Bertrand when Professor Crawford was trying to drive a wedge between him and your humble servant -- I would point out that in

consultation with Mr. Bertrand, that it is -- reference being to the missing link, the alleged missing link, that the Accords did not represent a clean break with the past; that legal title originates in the Accords, but the Accords were the culmination, of course, of a long period of negotiations and other conduct which can trace its origin back to 1958.

So with these matters out of the way, I now begin my last intervention on behalf of the Province of Nova Scotia in this important arbitration. And I don't think it would be inappropriate for me to say a few words -- very few words about the -- what Mr. -- Professor McRae earlier this week referred to as the development and the evolution of the law of maritime boundary delimitation. I've entitled my remarks "the long march of the law of maritime delimitation".

Yes, Newfoundland's entire case is premised on its view of this evolution. It is based on the theory that the history of maritime delimitation decisions since the North Sea Cases may be viewed as a straight line progression of attempts to restrict the factors that may be taken into consideration by the adjudicator, and that this historical development has culminated in the reduction of relevant factors to one set, geographical.

But if -- as Members of the Tribunal know, if there is

one subject in respect of which the International Court has plainly acknowledged an about face, or I would say a volte-face, it is on this question of natural prolongation, and despite this volte-face, Newfoundland and Labrador continues to cling to this hour -- continues to cling to and to rely on as the foundation of its case the principle of natural prolongation, as it was enunciated in the North Sea Cases.

On Monday, for example, counsel for Newfoundland and Labrador reproduced for us paragraph 43 of the Court's decision in the North Sea Cases. And in quoting from Article 76 of the 1982 Law of the Sea, he selectively referred only to those portions which, read out of context and in isolation from the rest, could be construed as representing complete continuity with the North Sea cases.

Now as it has done since the beginning of this arbitration, Newfoundland and Labrador has studiously ignored the significance and the terms of Article 76 in its entirety, which clearly reflect those developments at UNCLOS III that marked a departure from the historical concept of natural prolongation as traditionally understood.

The recognized difficulty with the older concept, the depasser concept of natural prolongation, was that while it provided an apt description of the link between the

sovereignty of a coastal state over its land territory and its sovereign rights of the continental shelf, it provided no practical basis on which to define the shelf between neighbouring states or to determine the seaward limit of the shelf.

So if Newfoundland wished to build its case on natural prolongation and on criteria drawn from it, then at the very least it should have taken due account of the evolution of the concept, as reflected both in the jurisprudence and in Article 76 of the 1982 Convention.

The need to have proper regard to these developments in the process of delimitation -- this will be the only reference that I will submit to the Court at this point -- it was recognized by the Court in Libya-Malta when it said, "It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone. The concepts of natural prolongation and distance are therefore not opposed, but complementary, and both remain essential elements in the juridical concept of the continental shelf."

Now in this case, Libya-Malta, the Court was not concerned with delimitation of the broad shelf, as we remember, given the location of and relatively short distance between the two states concerned. But in this

case, however, the implications of the statement by the Court are clear. Article 76 must be looked at as a whole as a basis for the definition of the seaward limits of the parties' offshore areas as defined in the Acts.

Now as both Professor Saunders and I pointed out last week and as I explained in some -- and as is explained in some detail in Appendix B, much referred to Appendix B of our Phase Two Memorial, the criteria and methods defined in Article 76 depend not only on geography, but also on geology, geomorphology and distance. And although those criteria are complex, the present delimitation clearly requires your Tribunal to look beyond 200 nautical miles to the outer edge of the margin.

The key to the delimitation cannot be found in an outmoded conception of natural prolongation, nor on criteria drawn from it, such as no cut-off or nonencroachment, as I believe Professor Saunders has demonstrated. Nor is the answer to be found in geography alone. Ultimately, Mr. Chairman, members of the Tribunal, the jurisprudence does not support Newfoundland and Labrador's theory of the evolution of the law, nor does it support the practical implications sought by Newfoundland, principally, the exclusion or at least the significant demotion, of non-geographic factors in what it has called the proper hierarchy of relevant circumstances. Relevant

circumstances of a non-geographic nature can and should be considered in any maritime delimitation. And in the present case, such circumstances may assume the pride and place -- the pride of place typically reserved for coastal geography and the delimitation of geographically generated zones.

The law of maritime delimitation has developed and changed slowly over time; however, just as the light from a fading star reaches the earth only long after the star has been extinguished, it may be another millennium before the light of this evolution dawns on Newfoundland, whose case is founded on a prehistoric version of the law of maritime delimitation that continues to radiate although its source is long dead.

The reason for what can be described as the incremental evolution of this branch of the law, and indeed the explanation for the many inconsistencies in the case, is fundamental. At the heart of the law of maritime delimitation, Mr. Chairman, is the need to strike a balance between the requirement to define rules, which are capable of being applied to all situations of like character, and so provide a legal basis to the delimitation exercise, but which are at the same time able to take cognisance of the unique circumstances of each individual case, so as to ensure that the results are

equitable.

As Professor Prosper Weil writes, "Here more than elsewhere, it is hard to keep one's balance between the Scylla of the blind automatism of the general and the Charybdis of the irreducibly unique, and the risk of falling to one or other of them is considerable."

The law dictates that the equitableness of the result is the predominant concern. The consequence is that, as in modern resource management, fisheries is a prime example, a precautionary approach is mandated in maritime delimitation. And if the adjudicator, Mr. Chairman, Members of the Tribunal, is to err as he or she strives to carry out his or her responsibilities, he or she must make every effort to do so on the side of equity.

Last Thursday, in the course of Nova Scotia's first round submissions, Professor Crawford drew the parties' attention to a speech recently delivered to the Sixth Committee of the U.N. General Assembly by His Excellency Judge Gilbert Guillaume, President of the ICJ. We have heard from Professor Saunders this morning, the Nova Scotia reaction to that speech.

Perhaps the most useful light in which to view President Guillaume's comments are as an expression of his personal aspirations for the law of maritime delimitation, rather than as proof positive of any consensus amongst the

members of the Court, as reflected in the cases. As Professor Crawford suggested this morning, those comments do not necessarily constitute holy writ. And I doubt that even my distinguished friend, President Guillaume, would disagree with that statement.

As regard his conclusion that, "by means of developments in the Court's case law, the law of maritime delimitation has reached a new level of unity and certainty, while conserving the necessary flexibility, one can only wait and see whether his views are borne out in subsequent developments." And I'm certain I'm not alone in sharing his hope for certainty in the law, but not at the expense of equity.

In the present case, I doubt strongly that even President Guillaume would consider that the cause of certainty would be advanced by disregarding 40 years of history during which Newfoundland and Labrador adhered to the existing line and never formally articulated any other offshore claim.

In any event, the development of the law continues. Evolution is then an inexorable process. Your decision in this arbitration will doubtless, not only reflect, but also help to shape that process.

As George Bernard Shaw remarked, with his usual insight, "all great truths begin as blasphemies." The

wisdom of this observation resonates here, a case in which three very eminent arbitrators are asked to do their duty, fulfil their mandate, and apply the law, to facts in a context that has been called unprecedented. And where doing so has all but been condemned by Newfoundland and Labrador with the feigned piety that it can muster as heresy.

In his closing arguments this week, my friend, the Agent for Newfoundland and Labrador, Professor McRae, sought to cast himself as a modern-day Odysseus, to use his own metaphor, lashing himself to the mast, as it were, so as to resist the siren call that would lure less heroic mortals to their doom. But whereas a classical hero looked to his own destiny, Newfoundland's Agent is more concerned about the fate of the Members of the Tribunal. For it is to you that he has issued the invitation to chain yourselves to his ship. Resist the siren call to be a pioneer, he intoned. Resist the siren call to embrace new concepts. The sub-text is not subtle. You are invited to stick your heads in the sand.

In particular, you are invited to ignore the specific facts of this case, for the reason that they are unprecedented. And, yes, almost certainly unique in the annals of internal relations and jurisprudence. You are invited to eschew rules of law which, though they are

manifestly applicable, may never yet have been applied in any decision in any reported case. And lest such coaxing proves insufficient on its own, a little negative reinforcement is called in aid.

Newfoundland and Labrador invites you, "to resist the siren call to invert the law of relevant circumstances, or to apportion instead of delimit. Resist the invitation to reverse the result of your decision in phase one, or to undermine those decisions on maritime boundary delimitation affecting Canada."

Indeed, you were told, "if you draw a line that is contrary to what was done in these cases, or a line whose placement indicates that the approach or reasoning of these cases was wrong," -- well, let's be frank, Professor McRae meant a line that does not both mirror the geographic considerations of the Court in Canada-France, and mimic the methods used by the Chamber in the Canada-U.S. case. That is if you dare to be bold, as to differ from those decisions in any way, then your determination will have, "drastic implications of casting doubt on the very delimitations that those case effected." Those are his words. They are not mine. This is heavy stuff indeed. And we thought that Professor Saunders was the emotional one.

As you ponder the invitations and the calls to

resistance issued by Newfoundland and Labrador, I ask you, Mr. Chairman, distinguished Members of the Tribunal, to bear in mind, cooly and reasonably, the nature and the true bearing of the vessel to which it asks you to tie yourselves. Ask yourselves whether a proverbial doom actually awaits you if you do not adhere to the confined, blinkered approach to the delimitation that Newfoundland and Labrador has charted. And consider the real impact of your decision in this matter, and the harm that would be done if, with the sweep of a pen, the Tribunal were to decree that 40 years of history meant nothing.

This is a watershed moment in the history of Atlantic Canada. Your decision in this case will define both the past and the future of the region. And indeed will resonate far beyond. It will determine whether 40 years of good faith dealings have any meaning or whether they can be written off as though nothing of any significance took place throughout the period 1958 to the present.

And it will determine whether the next stage of the history of this region is to have any link to the past, determine how and where offshore development will proceed in the future, and determine how two Canadian provinces, doing business together, as they do every day, should henceforth conduct themselves.

Of course, as we have written, as we have said,

Newfoundland and Labrador has absolutely nothing to lose in this Arbitration. It never has. If the current, legislated line is maintained, Newfoundland and Labrador will find itself with the same equitable boundary it agreed to and applied long ago. It will find itself with the same equitable boundary that has allowed it, and will continue to allow it to develop to great profit and without any obstruction or competing claims thrown out by Nova Scotia, or any hesitation on the part of the federal government, the resources located in its offshore area.

This is the worst that Newfoundland can expect from your decision.

But if only a fraction of the areas on Nova Scotia's side of the line that Newfoundland now claims are awarded to it, it will have gained significantly. As an oil and gas man might say, the prospectivity is enormous. Over the years, Newfoundland's claims, I use the word loosely, since no formal claim was made between 1964 and August 2001, over the years, Newfoundland's claim have only become more ambitious.

The illustration on the screen depicts the existing boundary as compared with the line shown on Mr. Doody's 1972 map, the line published in Newfoundland's 1977 Petroleum Regulations, the without prejudice line shown to Nova Scotia in 1998. And finally, the line currently

claimed to be equitable by Newfoundland.

It's a good thing that Nova Scotia pressed for a speedy resolution of the dispute. The record suggests that had it not done so, Newfoundland's claim would have been even more excessive than it is.

PROFESSOR CRAWFORD: Perhaps a claim to Sable Island as well as St. Paul Island.

MR. FORTIER: At least. Why not throw in Cape Breton too. Nova Scotia's situation, Mr. Chairman, Members of the Tribunal, is vastly different. We are aware that no party to an adjudicated delimitation has ever, to our knowledge, been awarded the line that it claimed.

In all respects Newfoundland and Labrador certainly appears to have anticipated that this Tribunal will not award it the line that it has claimed, it has thrown out an excessive claim. An obviously excessive claim. A demonstratively excessive claim. With the apparent aim solely of convincing the Tribunal to award it something. Anything more favourable than the existing boundary.

As I have said, Nova Scotia is in a vastly different situation than Newfoundland. The boundary that it proposes, and that it asks the Tribunal to find constitutes an equitable delimitation, is itself the product of a compromise. Accepted many years ago as a fair and honourable solution after several years of

negotiations. The record is replete with these negotiations.

Nova Scotia could have claimed a line that did not reflect the compromise that it agreed to in 1964, and has lived with ever since. But it did not. It would have been dishonourable, at the very least, for it to disavow the compromise reached with all of its provincial neighbours. At most, it would have been highly disruptive for it to do so.

And ask yourselves, Mr. Chairman, distinguished Members of the Tribunal, how would Newfoundland, and how would you, have reacted had Nova Scotia come before this Tribunal to ask for a boundary other than the one which it has consistently, openly and reasonably held to be an expression of what both parties considered equitable for almost 40 years. A boundary other than the one implemented in all of its pertinent laws and regulations. A boundary other than the one shown on its maps. A boundary other than the one which it pleaded was resolved by agreement in the first phase of this arbitration.

There can be no surprise that Nova Scotia has no other line to propose to the Tribunal. There can be no surprise that in this, the delimitation phase of the arbitration, initiated by Newfoundland and Labrador, it proposes the line.

The fact that the boundary proposed by Nova Scotia is itself a compromise, Mr. Chairman, Members of the Tribunal, cannot be ignored. The boundary already takes into account the competing claims of the parties, as these reviewed by them prior to Newfoundland's initiation of the dispute. What Newfoundland and Labrador seeks is in fact a second kick at the can.

Taking the line not as the compromise that it truly reflects, but as what Newfoundland and Labrador might call a point of departure, Newfoundland asks the Tribunal to fix a line that will represent yet a further and with respect, a wholly unwarranted compromise.

As I've mentioned in my introductory remarks last week, Newfoundland and Labrador's obvious course in this arbitration is to claim a boundary so extreme, that no matter how the difference between that line and the existing boundary is divided, most or all of the area of primary interest, the Laurentian Sub-basin, falls to Newfoundland.

I've called Newfoundland's game "split the difference". Another expression also comes to mind, Mr. Chairman, "Heads, Newfoundland wins; tails, Nova Scotia loses".

The point is that this situation arises precisely because of the unique circumstances of this case.

Circumstances which, although Newfoundland and Labrador ignores them, Nova Scotia will not, lest its good faith be called into question by every other government with which it enjoys relations.

In its written and oral submissions in phase two of the arbitration, Nova Scotia has set out a reasoned coherent case, demonstrating that for a variety of reasons, taking into account a variety of considerations and criteria, the appropriate delimitation to be effected in this instance is for the Tribunal to apply the boundary that the parties themselves developed by agreement and other conduct.

That boundary is the clearest expression of what the parties sheltered from the stormy emotional atmosphere of the hearing room, considered to be equitable. It faithfully reflects the geographic and other circumstances relevant to this case. And it represents a demonstrably equitable result.

Nova Scotia's efforts have been directed to advancing not an excessive claim, concocted for the purpose of litigation, but a balanced, sound and equitable result, one that is grounded in the legal and factual context in which this case occurs, and that encourages the Tribunal to consider all of the circumstances of this unique dispute, and give each of them the weight to which they

are entitled.

On Friday last week, the Tribunal will recall that I spoke of ten basic truths of this case. I'm not going to repeat them at this late hour, but I invite you, very respectfully, to keep them in mind as you deliberate.

We have to return -- you have to return to the basics. You have to separate fact from fiction. You have to focus on the facts of this case, and on all of the undeniably relevant circumstances, including geography, including the true legal basis of that which is to be delimited; namely the offshore areas as defined in the Acts.

Since it is by this standard that every other consideration must be measured and weighed, including the location of the only resources that give any meaning whatsoever to the highly restricted rights comprising the parties' offshore entitlements, including the public declarations by both governments that the location of those resources, in the immediate vicinity of the existing boundary, constitutes the true reason for this dispute.

And including the line that the parties themselves once accepted as equitable. The line that can be clearly seen on your screen at the moment, by reference to the parties permit conduct alone. A line that two governments have enshrined in legislation, and a line that by any measure effects an equitable delimitation of the parties'

offshore area entitlements under the principles of international law governing maritime delimitation.

Mr. Chairman, Members of the Tribunal, I remind you of the statement of Premier Moore's in June of 1972. The Premier of Newfoundland at the time. When he rose, not just anywhere, he rose in the famed Newfoundland House of Assembly, to proclaim, and you will recall, that the governments of the five eastern provinces have agreed to the delineation and description of the offshore boundaries between each of these five provinces.

Almost 30 years later, in the first phase of the present arbitration, Newfoundland and Labrador convinced the Tribunal that no binding agreement arose with respect to this boundary.

It won. And we respect that decision.

Nova Scotia is confident that Newfoundland and Labrador will not win again. We're confident that the Tribunal will attribute to the words and deeds of Newfoundland's leaders, including the unambiguous statement of Premier Moore's, to which I have referred, quote, "The legal effect, or consequence, that they are due in the context of the second phase of the present delimitation."

Nova Scotia's aim throughout this case, Mr. Chairman, has been to furnish the Tribunal with all of the evidence

that it requires. Evidence regarding all of the relevant circumstances, as well as in this phase of the arbitration, all of the appropriate criteria and methods of delimitation. Evidence regarding the equities at issue. The correctness of our proposed line. And the fallaciousness of Newfoundland's skewed delimitation. In short, all of the evidence that the Tribunal will require when it commences the task of drawing the boundary that it has been asked to determine in all of its wisdom.

In closing, Mr. Chairman, Members of the Tribunal, because the time has come to close, I would like to quote Nova Scotia's Premier Stanfield, from his address to the conference of Atlantic Premiers held in Fredericton, New Brunswick, on September 22nd, 1959. Premier Stanfield, in Fredericton, 41 years ago, said "I wish to thank the Chairman for the warm welcome that he has extended to us. I can say with all sincerity that it is a real pleasure for us to have this opportunity to meet in this old city of Fredericton. It is a delightful city to visit, and the pleasure of such a visit is enhanced by the welcome that has been extended by all the people of this city. The circle has been completed..." he said, in 1959, "...and we're now back at the place where the first conference of the Atlantic Premiers was held on July 9, 1956."

It is most appropriate, Mr. Chairman, Members of the

Tribunal, that we've returned to Fredericton for this hearing. That we've returned to the place where the first conference of Atlantic Premiers was held, at which the issue of provincial entitlements to the offshore and the boundaries between those entitlements, was first discussed amongst the premiers.

That extract from Premier Stanfield's speech can be found in Nova Scotia's Annex 9, at page one.

It is appropriate that it should be here in Fredericton. That Nova Scotia asked the Tribunal to delimit the line dividing the offshore areas of Nova Scotia and Newfoundland and Labrador in a manner that is consistent with what the parties themselves determined at a conference of Atlantic premiers held in 1964, and as reflected in their subsequent conduct was an equitable division of their respective claims.

Mr. Chairman, it remains only for me to reaffirm all of the arguments made in Nova Scotia's written and oral submissions in this arbitration. And to reiterate our submission, that applying the principles of law governing maritime boundary delimitation and consistent with the Terms of Reference, the line dividing the respective offshore areas of Nova Scotia and Newfoundland and Labrador is the line defined by the co-ordinates set out in part 7, paragraph 16 of the phase two Memorial of Nova

Scotia.

It has been for me and my colleagues an honour and a privilege to represent the Province of Nova Scotia in this arbitration. I on behalf of -- on my own behalf and on behalf of all of my colleagues, I would like to thank the members of the Tribunal for their challenging attention to the presentations which my colleagues and I have made in both phases of this arbitration. I would like to thank the Tribunal's expert, whose task now begins, I guess. I would like to thank the Registrar. I would like to thank the reporter and all members of her team. And I would like to thank, on our side of the room, all of those people, many anonymous, who have contributed to the presentation by advocates, by counsel in the course of the last two weeks. I refer to the men and women of Cabana-Seguin. I refer to my friend, Mr. Galo Carrera, technical advisor. I refer to Mr. David Raymond, technical advisor. I refer to Professor Prosper Weil, and François Mathys who have been special advisors to the team. I refer to Brian Cuthbertson who has been the historic researcher. And I refer, of course, to Madame Helene Gladue, who is refereed to amongst our team as "the boss" of the Nova Scotia team.

But last and not least, I would like to thank the deputy agent and counsel, Mr. Drymer, Stephen Drymer, the author of many of my own remarks in the course of the last

two phases, and without whose contribution, the advocates on behalf of Nova Scotia could not even have begun to do justice to Nova Scotia's case. Thank you, Mr. Chairman, members of the Tribunal.

CHAIRMAN: Thank you, Mr. Fortier. I would like to thank all of you for the assistance and congratulate you on the conviction, the clarity and the eloquence with which you presented your case. The Tribunal now has the difficult task of taking this into account. We have in mind the prescient of the last time, when we produced it about the time the Terms of Reference told us to. This is a far more difficult case, but we will attempt to do the same this time to stay very close to the time limits.

And I would like to thank all of you for the assistance you have given us, and wish you a good rest of the day and happy flight for those of you who are taking it. Thank you.

MR. MCRAE: Mr. Chairman, really on behalf of Newfoundland and Labrador, I would like to echo Mr. Fortier's words in thanking both you, the Tribunal, Mr. Gray, the technical expert, the Registrar, and the court reporter and the people who have provided the sound throughout this hearing. Thank you very much.

CHAIRMAN: Thank you, Mr. McRae. Now to the work.

(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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