

CHAPTER 1

INTRODUCTION

Section 1.1 Summary of the case

1. The present case arises out of a dispute relating to the delimitation of a single maritime boundary between the exclusive economic zones (*EEZ*) and the continental shelves (*CS*) of Barbados and the Republic of Trinidad and Tobago (*Trinidad and Tobago*) respectively (*the Parties*). A map of Barbados and its neighbours is found at Map 1, attached hereto.
2. As is described more fully in Section 4.1, below, the Parties have been discussing and subsequently negotiating the inter-related issues of delimitation and fisheries for the past 25 years. Most recently, intensive negotiations for the settlement of the two issues took place between the Parties in a total of nine sessions spread over the period 19 July 2000 - 21 November 2003. In the course of these meetings it became clear that no agreement could be reached and the dispute could not be resolved by further negotiation because there was a fundamental disagreement as to the applicable legal method of delimitation. An additional meeting between the Prime Ministers of the Parties took place on 16 February 2004 at which Prime Minister Manning of Trinidad and Tobago stated that the issue of maritime boundary delimitation was intractable. Barbados commenced the present proceedings following that additional meeting.
3. Both Barbados and Trinidad and Tobago are parties to the UN Convention on the Law of the Sea 1982 (*UNCLOS* or *the Convention*). Article 293 of the Convention provides that a tribunal such as the Tribunal in the present case shall apply the Convention

and other rules of international law not incompatible with the Convention. The dispute therefore falls to be determined by reference to the Convention and related rules of public international law.

4. The relevant provisions of the Convention are Articles 74(1) (relating to the EEZ) and Article 83(1) (relating to the CS). Both articles provide that delimitation shall be effected by agreement "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

5. The Convention also provides in both the above-cited articles that, if no agreement can be reached within a reasonable period, the States concerned shall resort to the procedures provided for in Part XV. Within this Part, Articles 286, 287 and 288, coupled with Annex VII, establish compulsory jurisdiction at the instance of any party. It is on this basis that the present proceedings have been commenced.

6. Barbados believes that the proper method that international law prescribes for determining the boundary in order to achieve the requisite equitable solution is by the application of the equidistance/special circumstances rule. First, a provisional median line must be drawn, every point of which is equidistant from the nearest points on the respective baselines of the Parties. The line so established must then be considered for adjustment if required by any relevant special circumstances. On Map 2, the Tribunal will find the median line between Barbados and Trinidad and Tobago, along with the median lines between the Parties and their other neighbouring States.

7. It is Barbados' submission that, in order to reach an equitable solution in the present case, the western part of the Barbados-Trinidad and Tobago median line must be adjusted

so as to take account of a special circumstance: the fact that Barbados fisherfolk have traditionally fished by artisanal methods in the waters off the northwest, north and northeast coasts of the island of Tobago. This Barbados fishery off Tobago is based principally on the flyingfish, a species of pelagic fish that moves seasonally to the waters off Tobago. The flyingfish is a staple component of the Barbados diet and an important element of the history, economy and culture of Barbados. Barbadians have continuously fished off Tobago during the fishing season to catch the flyingfish, as well as associated pelagic species that prey on the flyingfish. The adjusted median line which gives effect to this special circumstance is shown on Map 3.

8. This necessary adjustment, which moves the line southward for part of its course, is shown on Map 3 as embracing the area coloured green. It is bounded by a line connecting: Point A (which lies at the intersection of the meridian $61^{\circ} 15' W$ and the median line between Trinidad and Tobago and Grenada); Point B (which lies at the intersection of the meridian $61^{\circ} 15' W$ and the outer limit of the 12 nautical mile territorial sea of Trinidad and Tobago, constructed on the relevant segment of its archipelagic baseline); and Point C (which lies at the intersection of the parallel $11^{\circ} 08' N$ and the 12 nautical mile territorial sea limit of Trinidad and Tobago). From Point C the line follows an azimuth of 048° until it intersects with the calculated median line between Barbados and Trinidad and Tobago at Point D, and then follows the median line to Point E, (the tri-point between Barbados, Trinidad and Tobago and the Co-operative Republic of Guyana (*Guyana*)).

9. Throughout the recent negotiations, Trinidad and Tobago rejected the approach described above (namely, identifying a provisional median line and then determining if any special circumstances require its adjustment). The boundary line proposed by Trinidad and

Tobago in the recent negotiations lies to the north of the median line between the Parties. Trinidad and Tobago also insisted that Barbados recognise the effect of the 1990 delimitation agreement between Trinidad and Tobago and the Bolivarian Republic of Venezuela (*Venezuela*), discussed below, which in part reflects those two States' purported attempt, *inter alia*, to divide between themselves part of Barbados' maritime territory.

Section 1.2 Outline of the Memorial

10. This Memorial will be developed as follows:

- Chapter 2 will briefly set out the essential geographical elements of the case;
- Chapter 3 will summarise the relevant historical elements of the case;
- Chapter 4 will discuss the background to the dispute;
- Chapter 5 will describe the law relating to the delimitation;
- Chapter 6 will expound on the special circumstance requiring the adjustment of the provisional median line; and
- Chapter 7 will set out Barbados' conclusion and submission.

11. Barbados does not propose in this Memorial to deal in any detail with arguments that have been expressed by Trinidad and Tobago during the negotiations. It is for Trinidad and Tobago to put its case in this arbitration. Barbados reserves its position in relation to those arguments.

CHAPTER 2

THE GEOGRAPHICAL ELEMENTS OF THE CASE

Section 2.1 Geographical description of the Parties

12. Barbados consists of a single island. It is the most easterly State in the Caribbean region, with a population of approximately 272,200.¹

13. Trinidad and Tobago consists of a number of islands. The principal two are Trinidad (to the south) and Tobago (to the north).² It has declared itself an archipelagic State in accordance with Part IV of UNCLOS. The population of Trinidad and Tobago is approximately 1.3 million.³

Section 2.2 Geographical description of the disputed area

14. At their closest points, the islands of Barbados and Tobago are separated by approximately 116 nautical miles of maritime space.⁴ Part of that maritime space in an area to the northwest, north and northeast of the island of Tobago has long constituted an important fishing ground for the people of Barbados.⁵

15. Maps 1 and 4 show the geographical setting of Barbados and Trinidad and Tobago within the eastern Caribbean region. The waters of Grenada and St Vincent and the Grenadines border the maritime space between the islands of Barbados and Tobago to the

¹ Barbados Economic and Social Report 2003. (Appendix 57, Vol. 3 at p.650).

² Map 4.

³ Entry on Trinidad and Tobago in Encyclopaedia Britannica Online, www.britannica.com/ebc/article?tocId=9381163&query=trinidad&ct. (Appendix 89, Vol. 4 at p. 957).

⁴ Maps 1 and 4.

⁵ Section 3.4 below.

west. The waters of Guyana border the maritime space between the islands of Barbados and Tobago to the south and east.

16. In 1978, four years before UNCLOS was signed, Barbados extended its jurisdiction beyond its territorial sea by virtue of the Marine Boundaries and Jurisdiction Act. The Act expressed this extension of jurisdiction to be up to 200 nautical miles from Barbados' shore but where there was less than 400 nautical miles between Barbados and one of its neighbours, the Act extended the exercise of Barbados' authority up to the median line pending a delimitation.⁶ To date, maritime boundaries have not been delimited between Barbados and its neighbours, including Grenada, St Vincent and the Grenadines, and Guyana. There is, however, in force between Barbados and Guyana an Exclusive Economic Zone Co-operation Treaty of 2 December 2003 (*the EEZ Co-operation Treaty*).⁷ This Treaty, described more fully in Section 2.4 below, provides for the exercise of joint jurisdiction by those two States within their overlapping EEZs in an area that lies beyond the 200 nautical mile arc of any other State. Barbados and Guyana have agreed

⁶ The 1978 Act. (Appendix 26). Section 3 of the 1978 Act provides as follows:

"(1) There is established, contiguous to the territorial waters, a marine zone to be known as the Exclusive Economic Zone having as its inner limit the boundary line of the seaward limit of the territorial waters and as its outer limit a boundary line which, subject to subsection (3), at every point is a distance of 200 miles from the nearest point of the baselines of the territorial waters or such other distance from the nearest point of those baselines as the Minister responsible for External Affairs, by order, prescribes.

(2) An order made under subsection (1) is subject to affirmative resolution, and shall be judicially noticed.

(3) Notwithstanding subsection (1), where the median line as defined by subsection (4) between Barbados and any adjacent or opposite State is less than 200 miles from the baseline of the territorial waters, the outer boundary limit of the Zone shall be that fixed by agreement between Barbados and that other State, but where there is no such agreement, the outer boundary limit shall be the median line.

(4) The median line is a line every point of which is equidistant from the nearest point of the baselines of the territorial waters, on the one hand, and the corresponding baselines of the territorial waters of any adjacent or opposite State as recognised by the Minister, on the other hand.

(5) An agreement entered into pursuant to subsection (3) shall be laid before Parliament, and shall be judicially noticed."

⁷ The EEZ Co-operation Treaty, 2 December 2003. (Appendix 59, Vol. 3 at pp. 668-676).

that the EEZ Co-operation Treaty is without prejudice to the eventual delimitation of their overlapping EEZs.

17. Trinidad and Tobago has not delimited boundaries with any of its neighbours other than Venezuela. In 1990, Trinidad and Tobago entered into a delimitation agreement with Venezuela that purports to describe a boundary line between those two States (*the Trinidad-Venezuela Agreement*).⁸ Part of that line, including a part that lies beyond the 200 nautical mile arcs of both Venezuela and Trinidad and Tobago, lies within Barbados' maritime territory. Under customary international law, Article 34 of the Vienna Convention on the Law of Treaties 1969, and Article II.2 of the Trinidad-Venezuela Agreement itself, the Trinidad-Venezuela Agreement is not opposable to Barbados. By a diplomatic note dated 23 August 2001 addressed to Trinidad and Tobago, Barbados confirmed its understanding that the Trinidad-Venezuela Agreement could not affect the rights of Barbados.⁹ An illustration of the area showing the Barbados-Guyana EEZ Co-operation Zone, with the line described in the Trinidad-Venezuela Agreement superimposed, is found at Map 5.

18. If each of the boundaries in this maritime area were delimited using median lines, the maritime boundary between Barbados and Trinidad and Tobago would be constituted by a line connecting a tri-point with, to the west, the limit of the St Vincent and the Grenadines EEZ and, to the east, the limit of the Guyana EEZ. The course of that line, and

⁸ The Trinidad - Venezuela Agreement. (Appendix 36, Vol. 3 at pp. 377-388).

⁹ Diplomatic Note No. IR/2001/238 from the Ministry of Foreign Affairs and Foreign Trade of Barbados to the Ministry of Enterprise Development, Foreign Affairs and Tourism of Trinidad and Tobago, dated 23 August 2001. (Appendix 51, Vol. 3 at pp. 618-621).

its relation to the 200 nautical mile arc of Trinidad and Tobago and the Barbados-Guyana Co-operation Zone, is illustrated on Map 6.¹⁰

19. The median line between Barbados and Trinidad and Tobago passes, at its closest, 58 nautical miles from their coasts. A median line delimitation would give Barbados and Trinidad and Tobago a common EEZ boundary that extends, at its furthest, up to a little over 191 nautical miles from each of their respective coasts, just nine nautical miles short of their maximum EEZ entitlement.¹¹

Section 2.3 The base points for the median line and the relevant coasts of the Parties

20. A median line is one of which every point is equidistant from the nearest points on the baseline on either side, the baseline being that from which the breadth of the territorial sea is measured. The base points used for drawing a median line between Barbados and Trinidad and Tobago are shown on Maps 7 and 8. It can readily be seen that the base points of Barbados are spread out around the southern coast of Barbados. All of the Trinidad and Tobago base points are clustered around the extreme northeastern tip of Tobago.

21. Map 8 shows in more detail the location of the base points around the southern coastline of Barbados. They spread over a total coastal length of 10.202 nautical miles opposite Tobago. Map 8 also shows the location of the base points around the extreme northeastern tip of Tobago in more detail. All of those base points fall on a single short leg

¹⁰ In Barbados' submission, a median line would not constitute an equitable solution to the question of maritime delimitation between itself and Trinidad and Tobago. See further Chapter 6 below.

¹¹ It may be that Trinidad and Tobago has chosen to cut itself off from this full maritime entitlement by virtue of the Trinidad-Venezuela Agreement. That, of course, can have no effect on Barbados' rights.

of the Trinidad and Tobago archipelagic baseline opposite Barbados. The total length of that leg is 4.737 nautical miles.

Section 2.4 The area of exclusive joint jurisdiction of Barbados and Guyana

22. Map 6 shows the location of 200 nautical mile arcs drawn from the relevant base points on Barbados, Trinidad and Tobago and Guyana. At no point does Trinidad and Tobago's 200 nautical mile arc reach as far as the outer limit of the arcs of Barbados and Guyana. Geography constrains Trinidad and Tobago's potential EEZ entitlement to fall, even at its maximum possible extension, within Barbados' and Guyana's EEZs. As stated above, a maritime area that falls to the east of the 200 nautical mile arc of Trinidad and Tobago, but within the 200 nautical mile arcs of each of Barbados and Guyana, is the subject of the EEZ Co-operation Treaty. The EEZ Co-operation Treaty establishes and regulates a co-operation zone (*the Co-operation Zone*) in accordance with generally accepted principles of international law. The location of the Co-operation Zone beyond the 200 nautical mile arc of any third State, but within the 200 nautical mile arcs of Barbados and Guyana, means that no third party State's rights under UNCLOS have been affected by its creation. Map 9 illustrates the location of the Co-operation Zone.

23. The western boundary of the Co-operation Zone is the 200 nautical mile arc of Trinidad and Tobago, representing Barbados and Guyana's understanding that they each have yet to delimit their maritime boundaries to the west of that arc. The Co-operation Zone is described in broad terms at Article 2 of the EEZ Co-operation Treaty as follows:

"The Parties agree that the Co-operation Zone is the area of bilateral overlap between the exclusive economic zones encompassed within each of their outer limits measured to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and beyond the

outer limits of the exclusive economic zones of other States at a distance of 200 nautical miles measured from the baselines from which their territorial sea is measured."

This is not the full extent of the bilateral EEZ overlap in this area, but merely the extent of the agreed zone.

24. The precise geographical extent of the Co-operation Zone is defined at Annex 1 to the EEZ Co-operation Treaty. Map 10 provides a close-up illustration of the Co-operation Zone.

CHAPTER 3

THE HISTORICAL ELEMENTS OF THE CASE

Section 3.1 A brief history of the Parties

(a) Barbados

25. Archaeological evidence suggests that the first Barbadians settled the island between AD 235 and AD 615, although charcoal at a recently-excavated site has been dated between BC 1500 and AD 150.¹² Those first settlers were Amerindians, coming originally from the area that now forms parts of Guyana and Venezuela on the South American mainland. By 1605, when Barbados was first claimed for England by the crew of the ship *Olive Blossom*, there were no permanent Amerindian settlements left on the island.¹³ The arrival of a settlement party commanded by John Powell in 1625 marked the beginning of an uninterrupted 341-year period of British colonial rule over Barbados.¹⁴

26. The early establishment of sugar plantations as Barbados' principal economic activity, and of slavery as the principal method of production, were to be the defining features of Barbados' economy and society well into the 19th century. The decline in the sugar trade, beginning at the end of the 18th century, was largely responsible for the dismantlement of slavery in Barbados and throughout the British West Indian colonies by

¹² Henry Fraser, Sean Carrington, Addinton Forde and John Gilmore, Entry on "Amerindians", *A-Z of Barbadian Heritage*, Heinemann Publishers (Caribbean) Limited (1990). (Appendix 34, Vol. 3 at p. 374).

¹³ Robert H Schomburgk *The History of Barbados*, 1848, Frank Cass Publishers (1971). (Appendix 17, Vol. 2 at pp. 168-169).

¹⁴ *Ibid.*, (Appendix 17, Vol. 2 at pp. 169-170).

1838.¹⁵ Today, Barbados' population bears testimony to its past. An overwhelming majority of its population is of African descent, while a minority is of European and other descent.

27. Following emancipation in 1838, a post-slavery society developed in Barbados, characterised by the progressive rise of a black middle class, the development of a mass education system and a slow – century long – march towards universal suffrage, which was finally achieved in 1951. Although this period of more than a century was marked by a radical shift in the political configuration of Barbadian society, essentially from white minority rule to black majority rule, there has been no break in the Barbados parliamentary tradition from the time the Barbados parliament was established in 1639 to this day. Barbados proudly boasts the third oldest parliament in the Commonwealth.¹⁶

28. During the colonial era, the political stability of Barbados in a region whose territories repeatedly changed hands amongst a variety of imperial powers made Barbados the cornerstone of British rule in the eastern Caribbean. Reflecting this, Barbados, Grenada, St Vincent and Tobago were joined together, from 1833 to 1885 under the authority of a single Governor-in-chief, resident in Barbados.

29. Barbados achieved independence from the United Kingdom in November 1966 and became a member of the United Nations in December of the same year. Since then, Barbados has continued to be a stable parliamentary democracy, with a Barbadian Governor-General being the representative of the monarch as Head of State. Barbados

¹⁵ Eric Williams, "The Abolition of the Caribbean Slave System", *From Columbus to Castro: The History of the Caribbean 1492-1969*, Andre Deutsch (1983). (Appendix 27, Vol. 2 at p. 294).

¹⁶ <http://www.parliamentbarbados.gov.bb/>. (Appendix 80, Vol. 4 at pp. 812-813).

remains a leading advocate, internationally, of issues pertaining to the sustainable development of Small Island Developing States.¹⁷

30. Despite its continued decline in value as a commodity on world markets, sugar production remains a mainstay of the Barbadian agricultural sector. Even today it remains a significant source of employment and foreign exchange.¹⁸ The sector will, however, be placed under increasing pressure as the subsidised prices offered to Barbados by the European Union are reduced in the near future. Barbados' options for agricultural diversification are few, given its limited land area and relatively poor soil quality. The contribution of the fisheries sector is therefore likely to assume an even more prominent role. Even now, fishing represents a significant part of Barbados' economy. Together with sugar production, fishing enables Barbados to maintain a viable agricultural and rural social sector, a factor that is critical to maintaining a stable society and economy.

31. Since independence, Barbados' economy has expanded to include tourism and other international services.¹⁹ Despite this, Barbados' relatively small economy is a developing one. The World Trade Organisation recently noted that "specialization and the small size of the economy have resulted in a narrow production base that makes Barbados vulnerable to external shocks".²⁰ Partly in order to address this vulnerability, Barbados has

¹⁷ Barbados hosted the United Nations Global Conference on the Sustainable Development of Small Island Developing States in 1994. The programme of action that emerged from that conference is scheduled for review in 2005 at the United Nations International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States. <http://www.un.org/smallislands2005/>. (Appendix 79, Vol. 4 at pp. 809-810).

¹⁸ Economic and Financial Statistics, Central Bank of Barbados, July 2004, p.81. (Appendix 66, Vol. 4 at pp. 776).

¹⁹ <http://www.barbadosbusiness.gov.bb/miib/Barbados/economy.cfm>. (Appendix 83, Vol. 4 at p. 825).

²⁰ Trade Policy Review Barbados, World Trade Organization, Report by the Secretariat, 10 June 2002. (Appendix 55, Vol. 3 at pp. 644).

participated actively in the creation of the Caribbean Community (CARICOM)²¹ Single Market and Economy as well as other regional institutions, such as the Caribbean Court of Justice, which is to be inaugurated in early 2005. It has also been at the forefront of efforts to secure special and differential treatment for small economies in the context of the ongoing multilateral trade negotiations within the Free Trade Area of the Americas (FTAA) and within the WTO. The Prime Minister of Barbados has led a Commonwealth/World Bank Small States Initiative which seeks to have the peculiar vulnerabilities of small States recognised and effectively addressed through the policies and programmes of the international financial and development agencies.

(b) Trinidad and Tobago

32. In contrast to Barbados, the island of Trinidad had a significant Amerindian population when European explorers first arrived there in 1498.²² In 1532, Spain settled the island of Tobago. Tobago subsequently changed hands among Britain, the Netherlands and France an estimated 22 times before it was finally ceded to Great Britain in 1814. Barbados, Grenada, St Vincent and Tobago were joined together as one political unit under British rule from 1833 to 1885. The islands of Trinidad and Tobago became a single British colony in 1888 and remained under British colonial rule until gaining independence in 1962. Trinidad and Tobago became a Republic within the Commonwealth in 1976, with the President as its Head of State.

²¹ CARICOM's original signatories were Barbados, Jamaica, Guyana and Trinidad and Tobago. CARICOM came into being on 1 August 1973. Since 1973, CARICOM has grown and now has 15 member States: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname and Trinidad and Tobago.

²² Entry for Trinidad and Tobago in Encyclopaedia Britannica Online. (Appendix 89, Vol. 4 at pp. 957-958).

33. Trinidad and Tobago is the most industrialised country in the English-speaking Caribbean. Partly because of that, and partly because of the abundance of hydrocarbons there, Trinidad and Tobago enjoys a large balance of trade surplus, particularly amongst its CARICOM neighbours.²³ Its main industries are petroleum, chemicals, tourism, food processing, cement, beverages and cotton textiles. Its natural resources include petroleum, natural gas and asphalt.²⁴ Trinidad and Tobago is the leading supplier of liquefied natural gas to the United States, providing it with 77% of its requirements.²⁵

(c) **The Caribbean regional dimension**

34. It is impossible to discuss the history of Barbados – or the history of Trinidad and Tobago, for that matter – without referring to the theme of regional integration and interaction. The independent States of the Commonwealth Caribbean, now all members of CARICOM, possess a unique common history, initially by virtue of being British colonies and, since independence, by virtue of the continuity of political choices they have made in favour of regional integration.

35. As early as the 17th century, upon consolidation of its control in this part of the Caribbean, Britain began to rationalise its rule through cost-effective regional governance

²³ Within the CARICOM region, in 2002 Trinidad and Tobago exported EC\$1.81 billion and imported EC\$ 204 million. Source: CARICOM Statistics, available at: <http://www.caricomstats.org/Files/Databases/SELECTED%20INDICATORS%20OF%20CARICOM%20MEMBER%20STATES1.htm>. (Appendix 81, Vol. 4 at pp. 818-819).

In the same year, Trinidad and Tobago enjoyed a bilateral trade surplus with Barbados of over EC\$ 306 million. This rose in 2003 to over EC\$ 416 million. See: Barbados Statistical Service, 21 October 2004. (Appendix 56, Vol. 3 at p. 648).

²⁴ Entry on Trinidad and Tobago in Encyclopaedia Britannica Online. (Appendix 89, Vol. 4 at p. 957).

²⁵ Speech by Hon. Eric A. Williams, Minister of Energy and Energy Ministries of Trinidad and Tobago, 29 June 2004, available at: <http://www.energy.gov.tt/siteadmin/uploads/46/Min%20Pres%20CWC%20welcome%20addressJune04.pdf>. (Appendix 65, Vol. 4 at pp. 766).

arrangements. Thus, Barbados was part of a confederal structure with the Windward Islands (which included Tobago) during the 17th century, and again during the 19th century. In the decades following World War I, a series of commissions and conferences was held with the aim of achieving "the combination into one political entity of all British possessions in the area".²⁶ This resulted in the creation, in 1958, of the Federation of the West Indies, to which ten British possessions, including Barbados and Trinidad and Tobago, belonged. The Federation was headquartered in Trinidad and Tobago and led by a Barbadian, Sir Grantley Adams.²⁷ The failure of this attempt at collective self determination after only four years led the colonies to pursue independence on an individual basis, beginning in 1962. Several of their leaders, however, continued to champion the ideal of Caribbean integration through the formation in 1965, of the Caribbean Free Trade Association (CARIFTA).²⁸ CARIFTA was succeeded in 1973 by CARICOM through the Treaty of Chaguaramas, which was itself revised some three decades later to provide for the Caribbean Single Market and Economy (CSME).²⁹

Section 3.2 Barbados' general dependence on fishing

36. Barbados has a long history of dependence upon maritime fishing as a source of food and work for its population. This history stretches back to pre-colonial times, when Arawak Indians inhabited the island.³⁰

²⁶ Samuel J. Hurwitz, "The Federation of the West Indies: a Study in Nationalisms", *Journal of British Studies*, Vol. 6 No. 1 (Nov. 1966). (Appendix 23, Vol. 2 at p. 245).

²⁷ *Ibid.*, (Appendix 23, Vol. 2 at pp. 251-252).

²⁸ CARIFTA was established on 15 December 1965 by Barbados, Antigua and British Guiana. <http://www.caricom.org/archives/agreement-carifta.pdf>.

²⁹ Under CARICOM, Barbados has lead responsibility for the co-ordination of the establishment of the CSME.

³⁰ Richard Price, "*Caribbean Fishing and Fishermen: A Historical Sketch*", *American Anthropologist* Vol. 68 (1966). (Appendix 24, Vol. 2 at p. 264).

37. Soon after the arrival of the first European colonists in Barbados, fishing became a mainstay of Barbados' survival. During a visit to the island in 1632, only seven years after it was first settled by the British, Henry Colt was already able to observe that Barbados had "more fish and better fishing" than St. Kitts.³¹ During colonial times, the character of Barbados' fishing, and particularly its offshore fishing, was unique within the region. A leading Caribbean historian has written:

"Of all the English speaking West Indian islands during the colonial period, Barbados had the most developed fishing industry. Whereas the other islands concentrated their efforts on inshore or reef fishing, Barbados from as early as the 17th century, employed a fleet of ocean going vessels which engaged in fishing for pelagic or deep water species."³²

38. Fresh and salted fish – both local and imported – were the major source of protein for the island's slave population and Barbadian slaves who fished are recorded as having constituted a privileged sub-group of slaves within the plantation system.³³ The slave population participated actively in Barbados' fishery. Indeed, the appearance of African crews in Barbadian fishing boats within a few years of their arrival in Barbados illustrates the influence of African artisanal fishing methods upon the early development of the Barbados fishery.

39. It is known that slave fisherfolk during this period were accustomed to spending long periods at sea. For example, a book printed in 1789, entitled *Letters on Slavery*, described the history of a Barbadian slave who mastered a fishing vessel with five or six

³¹ "Colonising Expeditions to the West Indies and Guiana 1623-1667", The Hakluyt Society, London (1924). (Appendix 11, Vol. 2 at p. 83).

³² Robert Poole, "The Beneficent Bee: or Traveller's Companion-Part 2", (2001) Vol. XLVII *Journal of the Barbados Museum and Historical Society*. (Appendix 48, Vol. 3 at p. 592).

³³ For a general discussion of the importance of fishing to the social and economic history of Barbados, see Richard Price "Caribbean Fishing and Fishermen: A Historical Sketch" *American Anthropologist* Vol. 68 (1966). (Appendix 24, Vol. 2 at p. 264).

other slaves as his crew and who was given considerable autonomy in his fishing activities by his master. John, the Barbadian slave, apparently died of consumption as a result of "staying out whole nights at sea, in his fishing-boats".³⁴

40. Following emancipation in 1838, ex-slaves had few alternatives with regard to employment within the plantation system.³⁵ Fishing was one such alternative and thus an important source of employment for ex-slaves. It provided significantly greater levels of income than plantation work and so proved a popular livelihood for many emancipated former slaves in 19th century Barbados. John Bezsins Tyne, a white Barbadian who migrated to the United States in 1868, wrote of the Barbados fishing sector:

"A few of the poorest class of whites 'fish for a living' literally, and get tanned to the color, and it might be said: - almost to the consistency of Russia leather:- but the Negroes, - who are the chief fishermen -, don't care for exposure to sun and sea air as they don't tan readily, and they catch nearly all the fish, as well as turtles, lobster and other crustacean with which the market is supplied."³⁶

41. Fishing continued to provide the black population with a principal source of protein from the time of emancipation onward. Today, maritime fishing still constitutes one of the country's most important economic activities and provides a significant proportion of the nutritional needs of Barbadians.³⁷ The current day maritime fishery remains focused on local, small scale enterprises, with the Government encouraging co-management through

³⁴ William Dickson, *Letters on Slavery (1789)*, reprinted in Negro Universities Press Westport, Connecticut, (1970). (Appendix 14, Vol. 2 at p. 144).

³⁵ William Sewell, *The Ordeal of Free Labor in the British West Indies*, Sampson Low, Son & Co, (1862), reprinted by Frank Cass, (1968). (Appendix 18, Vol. 2 at p. 184).

³⁶ John Bezsins Tyne, *Tropical Reminiscences* (1909), unpublished manuscript, Barbados Museum and Historical Society. (Appendix 21, Vol. 2 at p. 196).

³⁷ The Food and Agriculture Organisation of the United Nations (FAO)'s fishery country profile, available at <http://www.fao.org/fi/fcp/en/BRB/profile.htm>. (Appendix 45, Vol. 3 at pp. 553-556).

the promotion and support of local fishing organisations.³⁸ Barbados' maritime fishing provides employment for up to 6,000 people on the island,³⁹ equal to approximately 4.2% of the working population. Approximately 2,200 of them are fisherfolk, fishing from over 1,000 boats. The remaining 3,800 people work in associated onshore employment. This associated employment includes fish boners, fish sellers, fish processors, fishing boat builders, fishing gear suppliers and boat mechanics.⁴⁰ Many thousands more are dependents of those who work in maritime fishing.

42. In contrast to its importance to Barbados, fishing is not a major revenue earner for Trinidad and Tobago.⁴¹

43. Fish still constitutes a significant part of Barbados' national diet. *Per capita* consumption of seafood in Barbados is about 30kg per year.⁴² Approximately 84% of Barbadians eat fresh fish at least once a week and 25% of Barbadians eat fresh fish at least three times a week.⁴³ Barbados is a net importer of fish.⁴⁴

³⁸ FAO Information on Fisheries Management in Barbados (October 1999), available at <http://www.fao.org/fi/fcp/en/BRB/body.htm>. (Appendix 46, Vol. 3 at pp. 558-568).

³⁹ Fisheries Management Plan 2004-2006, Fisheries Division, Ministry of Agriculture and Rural Development, Barbados, section 2.2. (Appendix 60, Vol. 3 at p. 681).

⁴⁰ *Ibid.*, section 5.1. (Appendix 60, Vol. 3 at pp. 709-710).

⁴¹ Lennox Ballah, "The Living Resources of the Exclusive Economic Zone of Trinidad and Tobago and their Potential Contribution to National Development", FAO Fisheries Report No. 483, 1992, Report and proceedings of the Meeting on Fisheries Exploitation within the Exclusive Economic Zones of English-Speaking Caribbean Countries, St. George's, Grenada, 12-14 February 1992. (Appendix 42, Vol. 3 at p. 505).

⁴² Fisheries Management Plan 2004-2006, Fisheries Division, Ministry of Agriculture and Rural Development, Barbados. (Appendix 60, Vol. 3 at p. 689).

⁴³ FAO Field Document, Robin Mahon and Stephen Willoughby, "Impacts of Low Catches on Fishermen, Vendors and Consumers in Barbados", FAO Barbados (1990). (Appendix 39, Vol. 3 at p. 436).

⁴⁴ Quick Facts: Barbados, Caribbean Regional Fisheries Mechanism, available at <http://www.caricom-fisheries.com/members/barbados.asp>, 29 July 2004. (Appendix 67, Vol. 4 at p. 777).

Section 3.3 Barbados' particular dependence on the flyingfish fishery

44. The flyingfish fishery has for centuries made up a significant component of Barbados' fishing sector. Barbadian society and culture is inextricably linked to the flyingfish. Archaeological evidence from Amerindian settlement sites in Barbados has revealed that pre-colonial Barbadians relied upon the flyingfish as a staple source of protein.⁴⁵ Indeed, Arawak Indians are known to have fished for pelagic species such as flyingfish at least three miles offshore using gill nets.⁴⁶

45. The colonial flyingfish fishery of Barbados started soon after the first British settlers landed in 1625. In 1722, a Royal Navy surgeon passing through Barbados noted that the diet of Barbados' population was constituted:

"principally by their fisheries and importations ... The sea gives them plenty of flying fish, dolphins, barracuda and king-fish, particularly the first; ... the fish fly in such numbers to the boats that they take them up with dip-nets and sometimes the dolphins with them; the season goes off at the autumnal equinox."⁴⁷

To this day, the autumnal equinox marks the beginning of the flyingfish season for Barbadian fisherfolk.

46. Flyingfish featured in a poem about Barbados written by James Grainger, following his visit to the island in 1764. In a footnote to his poem, Grainger commented that flyingfish "are well tasted, and commonly sold at Barbadoes [*sic*]."⁴⁸ Pickled and salted

⁴⁵ Peter Drewett, *Prehistoric Barbados*, University College, London (1991). (Appendix 40, Vol. 3 at pp. 451, 456-457 and 466).

⁴⁶ *Ibid.* (Appendix 40, Vol. 3 at pp. 451, 456-457 and 466).

⁴⁷ John Atkins, *A voyage to Guinea, Brazil & and the West Indies in His Majesty's Ships, the Swallow and Weymouth*, (1735), reprinted by Frank Cass (1970). (Appendix 4, Vol. 2 at p. 33).

⁴⁸ James Grainger, "The Sugar Cane" taken from *Caribbean: An Anthology of English Literature of the West Indies 1657-1777*, University of Chicago Press (1999), FNII. (Appendix 13, Vol. 2 at p. 124).

flyingfish were eaten throughout the year by Barbados' slave population. One visitor to Barbados in the late 18th century remarked that in Barbados "everything is dear but flying fish."⁴⁹ Another visitor around the same time wrote:

"we have no hesitation in saying that fishes ---- do fly! ... The fish is about the size now of a herring. They are caught, in great numbers, near Barbados, where they are pickled, and salted, and used as a very common food ... The day before we made the land we met with shoals of flying fish."⁵⁰

47. Fishing for flyingfish was recognised at that time to be unique to Barbados and its population. In 1789, William Dickson wrote that:

"the catching of flying fish is, I believe, peculiar to Barbados. They are caught chiefly during the crop, and add to the plenty of that season."⁵¹

48. By the end of the 18th century, the association between Barbados and flyingfish was such that the fish became known in Europe as "Barbadoe's Pigeons"⁵² or "Spike's Pigeons"⁵³ (after the island's Spike's Town, now Speightstown). In 1812, an American prisoner of war in Barbados wrote of the flyingfish that "one could hardly escape the sight of them anywhere." Once caught, he wrote, "they were carried about, ready fried, by the negroes in trays for sale."⁵⁴

⁴⁹ Edward Thompson, *Sailor's Letters Vol II*, Dublin, (1770). (Appendix 10, Vol. 2 at p. 58).

⁵⁰ George Pinckard, *Notes on the West Indies Vol I*, (1806). (Appendix 16, Vol. 2 at p. 160).

⁵¹ William Dickson, *Letters on Slavery* (1789). (Appendix 14, Vol. 2 at pp. 137-138).

⁵² Edward Thompson, *Sailor's Letters Vol II*, Dublin, (1770). (Appendix 10, Vol. 2 at p. 58).

⁵³ "Extract of a Letter from Barbadoes", *The European Magazine and London Review*, Vol. 26, (1794). (Appendix 15, Vol. 2 at p. 149).

⁵⁴ *The Yarn of a Yankee Privateer*, edited by Nathaniel Hawthorne, New York: Funk and Wagnells (1920). (Appendix 22, Vol. 2 at p. 227).

49. John Bezsins Tyne commented in 1868 on the relationship of Barbados with flyingfish and the nature of the day boats used in the fishery:

"The catch of this delicate flavored fish is an industry peculiar to Barbados, at least, I am not aware of flying fish being pursued for food elsewhere in the Caribbean sea or in other waters they frequent. The industry gives employment to hundreds of boats built and equipped for the purpose, each of which is manned with two, to five men, according to its size."⁵⁵

50. The abundance and affordable price of flyingfish ensured that it remained a staple of the former slaves' diet following emancipation. In his 1848 *History of Barbados*, Robert Schomburgk wrote:

"The common Flying Fish ... is so abundant in some seasons of the year about Barbados, that they constitute an important article of food, and during the season a large number of small boats are occupied in fishing."⁵⁶

51. The signal role of flyingfish as a dietary staple of black Barbadians – and consequently as a focus of the fishing sector – has continued in subsequent generations. In 1894, a United States newspaper article noted that the flyingfish fishery in Barbados:

"has been for many years the mainstay of a large part of the population and the source whence the most popular food known on the island is derived. There are about 200 boats engaged in the fishery."⁵⁷

52. In 1897, another article recorded that:

"In Barbadoes [*sic*] there is established the only regular flying-fishery in the world, and in just the manner I have described, except that the boats are

⁵⁵ John Bezsins Tyne, *Tropical Reminiscences* (1909), unpublished manuscript, Barbados Museum and Historical Society. (Appendix 21, Vol. 2 at p. 197).

⁵⁶ Robert H Schomburgk, *The History of Barbados*, 1848, Frank Cass Publishers (1971). (Appendix 17, Vol. 2 at p. 177K).

⁵⁷ The Daily Nevada State Journal, 19 April 1894. (Appendix 20, Vol. 2 at p. 191).

considerably larger, is the whole town supplied with delicious fish at so trifling a cost as to make it a staple food among all classes".⁵⁸

53. Today, flyingfish makes up almost two thirds of the annual Barbadian fish catch by weight.⁵⁹ Between 1990 and 2002, the average annual catch of flyingfish in Barbados has been steady at around 1,500 to 2,000 tonnes most years.⁶⁰ Over 90% of Barbados' 2,200 fisherfolk, and 500 Barbadian fish vendors, are directly reliant upon the flyingfish fishery for their livelihoods.⁶¹ In addition, many Barbadians are employed at fish markets specifically as scalers/boners of flyingfish. Barbadians consume more than 99% of their annual flyingfish catch.⁶² Demand for flyingfish is so high that Barbados actually imports flyingfish.⁶³

54. Flyingfish continues to enjoy a special place in the contemporary social and cultural fabric of Barbados. Barbados is widely referred to as the "land of the flyingfish", as it has been for centuries.⁶⁴ Flyingfish is the national dish of Barbados.⁶⁵ Flyingfish appear on a wide variety of Barbadian commercial motifs,⁶⁶ stamps,⁶⁷ bank notes⁶⁸ and coins⁶⁹ dating back over 50 years.

⁵⁸ Frank T. Bullen, *The Cruise of the "Cachalot" Round the World after Sperm Whales* (1897), available at www.munarchaeology.com/munarchaeology/stories/cachalot/ch07.htm. (Appendix 19, Vol. 2 at p. 190).

⁵⁹ Fisheries Management Plan 2004-2006, section 6.3.1.2. (Appendix 60, Vol. 3 at p. 729).

⁶⁰ FAO Fishstat statistics, Landed catches (Tonnes) by species for Barbados 1950-2002 (extracts), available at www.fao.org/fi/statist/FISOFT/FISHPLUS.asp (Appendix 52, Vol. 3 at p. 623).

⁶¹ Fisheries Management Plan 2004-2006, section 6.3.1.2. (Appendix 60, Vol. 3 at p. 729).

⁶² For example, in 2002, Barbados landed 1,590 tonnes of flyingfish: see FAO-Fishstat Plus figures for fish landed in Barbados. (Appendix 52). In the same year, Barbados exported approximately 6.5 tonnes of flyingfish: see flyingfish export figures for 2002. (Appendix 54, Vol. 3 at p. 623).

⁶³ Barbados Trade: imports and exports for January – December 2002 (all countries). (Appendix 54, Vol. 3 at p. 636).

⁶⁴ Barbados Government Information Service website (1994), available at www.barbados.gov.bb/localrecipies.htm. (Appendix 68, Vol. 4 at p. 779).

⁶⁵ *Ibid.*

⁶⁶ See, for example, the Barbados Tourism Authority website, www.barbados.org. (Appendix 82, Vol. 4 at pp. 821 and 823).

⁶⁷ See, for example, the 50 cent and 12 cent stamps. (Appendix 94, Vol. 4 at p. 982-983).

Section 3.4 Barbados' specific dependence on the fishery off the northwest, north and northeast of Tobago

The Barbadian fishery off Tobago

55. Throughout the flyingfish season, from November to February and from June to July, large numbers of Barbadian fisherfolk have traditionally followed the movement of flyingfish to an area off the northwest, north and northeast coasts of the island of Tobago. They follow the flyingfish there in order to catch them, as well as the other pelagic fish that follow the movements of the flyingfish as their predators.⁷⁰

56. The earliest records of Barbadian fishing off Tobago date to the first half of the 18th century.⁷¹ A series of reports from both the French and the English authorities in 1724 bear witness to the practice. For example, a report from a French naval captain in 1724⁷² describes an incident in which a private Barbados-based fishing sloop (a vessel about the size of a schooner), owned by a Barbadian named Stephen Charnock, raided a French party in Tobago and made off with their wares as well as their turtles. At the time, Charnock

⁶⁸ All of the bank notes of Barbados feature the flyingfish. (Appendix 95, Vol. 4 at pp. 984-985).

⁶⁹ The "silver" dollar coin, currently one of the most common coins in Barbados, features the flyingfish. (Appendix 96, Vol. 4 at p. 986).

⁷⁰ See further the DVD and video entitled "Barbados' Fishing off Tobago" (with transcript). (Appendix 93, Vol. 4 at pp. 968-981).

⁷¹ Barbadian activities in and around Tobago also included turtling and collecting wood. See, for example, Douglas Archibald, in his book entitled *Tobago: Melancholy Isle: 1498-1771* (Port of Spain, Westindiana 1987) writes:

"... there came into being what proved to be a long-enduring association between Barbados and Tobago, whereby the former came to depend, to a large extent, on the latter for a constant supply of timber. Such a trade between the two islands lasted well into the first half of the twentieth century." (Appendix 12, Vol. 2 at p. 95).

In 1750, a Proclamation to the Right Honourable Sir Thomas Robinson, Principal Secretary of State for Southern Provinces, referred to the fact that the inhabitants of Barbados had always been accustomed to cutting timber in the island of Tobago. (Appendix 9, Vol. 2 at pp. 53-56).

⁷² CO28/39, Colonial Office and Predecessors: Barbados, Original Correspondence 1689-1951, Witness Statement of Francois Chevalier, 14 September 1724 (with English translation). (Appendix 1, Vol. 2 at pp. 1-8).

asserted that he had "a right to fish in and about the said island of Tobago",⁷³ an assertion that was corroborated by the then Governor of Barbados.⁷⁴

57. In 1749, the French Governor of Martinique and the British Governor of Barbados concluded a treaty that provided for the evacuation of nationals of both countries from Tobago pending a final resolution over its sovereignty.⁷⁵ In the meantime, the treaty provided that "the Subjects of both Nations shall be permitted to frequent the island of Tobago, there to wood, water and fish ...".⁷⁶ Notice of their continued right to fish off Tobago was announced to Barbadians by way of a broadsheet posted at churches and other public places.⁷⁷ A subsequent visit to Tobago by a British colonial official in September 1750 confirmed that British subjects continued to fish off Tobago.⁷⁸

58. When Britain finally acquired Tobago definitively in 1814; the maritime area bounded by Grenada, St. Vincent and the Grenadines, St. Lucia, Barbados and Tobago became, in effect, a British lake. It was governed as a single colonial unit from Barbados for the greater part of the 19th century. The question of which British subject was fishing where in this British lake became of negligible importance to British colonial

⁷³ CO28/39, Colonial Office and Predecessors: Barbados, Original Correspondence 1689-1951, The Joint and Separate disposition of Mr Stephen Charnock dated 7 November 1724. (Appendix 2, Vol. 2 at p. 9).

⁷⁴ CO28/39, Colonial Office and Predecessors: Barbados, Original Correspondence 1689-1951, The Governor of Barbados to Lords, Commissioners for Trade and Plantations dated 16 November 1724. (Appendix 3, Vol. 2 at p. 16).

⁷⁵ CO 28/41, Colonial Office and Predecessors: Barbados, Original Correspondence 1689 - 1951, letter from Richard Husbands enclosing a public notice informing the subjects of Barbados of the treaty between the French Governor of Martinique and the British Governor of Barbados, dated 10 December 1749. (Appendix 7, Vol. 2 at p. 47).

⁷⁶ Transcription of 1749 treaty between the French Governor of Martinique and the British Governor of Barbados, from Lucas Manuscripts. (Appendix 5, Vol. 2 at p. 42).

⁷⁷ Broadsheet announcement by His Excellency's Command, Richard Husbands, 18 December 1749, Stowe-Grenville Papers, 18 December 1749, box 24, folder 29, the Huntington Library. (Appendix 6, Vol. 2 at p. 45).

⁷⁸ CO 28/41, Colonial Office and Predecessors: Barbados, Original Correspondence 1689-1951, letter dated 1 September 1750 to Francis Holbourne Esq. from W. Bladwell. (Appendix 8, Vol. 2 at p. 51).

administrators and written records appear not to have been kept of Barbadians fishing in and around Tobago. Although there can be no doubt that fishermen from Barbados have fished off Tobago for centuries, there is a dearth of direct evidence to this effect for the period from the early 19th century to the mid-20th century. One must therefore rely on other evidence and the oral tradition that has passed down through the generations.

59. The following elements support the conclusion that Barbadians continued to fish off Tobago during the 19th and the first part of the 20th centuries. First, the historical role of flyingfish as a staple of the Barbadian diet throughout this period is well-established. This must be coupled with the scientific evidence, discussed below, which confirms that flyingfish move in a seasonal pattern that takes them to waters off the coast of Tobago from November to February and from June to July every year. To supply the demand in Barbados for fish in general, and flyingfish in particular, Barbadian fisherfolk would throughout this period have had to follow them and their associated pelagic fish predators to Tobago during those seasons for the same reasons that Barbadian fisherfolk do today.

60. Second, the oral history traditions of the Barbadian fisherfolk cannot be disregarded. They confirm that the forbearers of today's fisherfolk habitually fished off Tobago, as is reflected in the statements of modern-day Barbadian fisherfolk. Barbadian fisherman Everton Brathwaite states:

"...as a young boy growing up I always used to hear fellows talk about the fish off Tobago; they would go down there and fish and see the fish down there".⁷⁹

⁷⁹ Affidavit of Everton Brathwaite dated 12 October 2004. (Appendix 73, Vol. 4 at p. 796).

Barbadian fisherman Joseph Knight states:

"At certain times of the year the fish near Tobago is very plentiful. I have been fishing there all of my life. As far as I know from stories I hear from fisherfolk, this has always been the way for Barbadian fisherfolk."⁸⁰

Barbadian fisherman Dennis Robinson states:

"People have fished off Tobago since before I was born and those born before me talk about it, so before they were born too."⁸¹

The President of the Barbados National Union of Fisherfolk Organisations, Angela Watson, states:

"Barbadians have fished off the northwest, north and northeast coasts of Tobago for many years and I understand that this has been going on for generations. This is certainly the history as you hear it in the fishing communities."⁸²

61. Third, when documentary records of fishing off Tobago started again from the early 1960s onwards, in the period just before independence, they confirm that Barbadians were fishing offshore there. Thus, for example, one Government of Trinidad and Tobago report describes how Barbadian fisherfolk introduced the technique for catching flyingfish to Tobago in 1962.⁸³ This reflected a continuity with the centuries old tradition of Barbadian fishing off Tobago.

⁸⁰ Affidavit of Joseph Knight dated 8 October 2004. (Appendix 70, Vol. 4 at p. 785).

⁸¹ Affidavit of Dennis Robinson dated 12 October 2004. (Appendix 75, Vol. 4 at p. 801).

⁸² Affidavit of Angela Watson, President of the Barbados National Union of Fisherfolk Organisations dated 28 October 2004. (Appendix 91, Vol. 4 at p. 963).

⁸³ Suzanne Samlalsingh, Elizabeth Pandohee and Erol Caesar, "The Flyingfish Fishery of Trinidad and Tobago", 1992. (Appendix 41, Vol. 3 at p. 468).

62. Fourth, the traditional character of Barbadian fishing activities in the waters off Tobago is of general knowledge and has been publicly recognised even by government ministers and officials from Trinidad and Tobago.⁸⁴

63. The pattern of following the movement of the flyingfish down to Tobago exists today as it has for centuries. The approximate location of the traditional Barbadian fishing area off Tobago is illustrated on Map 11.

64. Barbadian fisherfolk depend on the fishery off Tobago. Barbadian fisherman Everton Brathwaite states:

"Fishing off Tobago is important to me because, in the first three months of year, if you do not fish off Tobago it is very hard to make a living around Barbados. Fish usually migrate there at that time of the year. To go there and get those three months in, you can start to make a living and you can say that your season has begun."⁸⁵

Barbadian fisherman Donville Brathwaite states:

"Fishing off Tobago is very important to me because it gives you the start you need to start the year. If it wasn't for those first three months, it just gives me another three months of not working. You're going fishing and you're not catching anything."⁸⁶

65. The modern-day boats from Barbados that fish in the waters off Tobago are

⁸⁴ Paragraphs 122 and 123 below.

⁸⁵ Affidavit of Everton Brathwaite. (Appendix 73, Vol. 4 at p. 797).

⁸⁶ Affidavit of Donville Brathwaite dated 12 October 2004. (Appendix 71, Vol. 4 at p. 789).

referred to as "ice-boats".⁸⁷ There are approximately 190 such ice-boats in Barbados.⁸⁸ They are typically crewed by two or three fisherfolk, usually family members or neighbours.⁸⁹ Since the 1970s, Barbadian fisherfolk fishing off Tobago have usually transported their catch back to Barbados in ice. Before then, Barbadians fishing off Tobago used other preservation methods to transport their catches home, such as salting and pickling.⁹⁰

66. Barbadian fisherman Victor Drayton describes the consequences of loss of the traditional fishery off Tobago:

"There are times that you need to go to Tobago. When you know you depend upon something for your livelihood and to feed your family you know how important it is."⁹¹

Barbadian fisherman Donville Brathwaite expresses similar sentiments:

"If I was no longer allowed to fish [off Tobago] I would need another source of income, and I have no idea where this would come from. This would affect my family deeply. I depend on fishing to make a living. Those three months that I can't get anything out of the sea, they have to be fed. It will affect me and them tremendously.

...

I think that it will affect the community just the same. Those three months that fish is not coming from Tobago (the early three months) vendors and others have to work the same way I do; it depends on fish they bone and so

⁸⁷ Barbadian ice-boats are between 12 and 18 metres in length, with 5 to 12 tonne capacity ice-holds. Many of the boats are converted day-boats: 70% being wooden and 30% fibreglass. The majority are powered by single inboard diesel engines, and remain at sea from 4 to 14 days, storing the catch on ice. These ice-boats employ the same fishing techniques for catching large pelagics and flying fish as the day-boats.

⁸⁸ Fisheries Management Plan, section 4.2. (Appendix 60, Vol. 3 at pp. 699).

⁸⁹ Affidavit of Angela Watson. (Appendix 91, Vol. 4 at p. 963).

⁹⁰ George Pinckard, *Notes on the West Indies Vol 1*, (1806). (Appendix 16, Vol. 2 at p. 160).

⁹¹ Affidavit of Victor Drayton dated 22 October 2004. (Appendix 85, Vol. 4 at p. 829).

on. It will affect them the same way. They have to find employment for those three months as well."⁹²

Barbadian fisherman Emmerson Pinder states:

"It would be terrible if we were stopped from fishing off the coast of Tobago. I would not be able to catch enough fish during the early months of the fishing season.

...

The problem with stopping fisherfolk from fishing off the coast of Tobago is that many of us rely on fishing there to make enough money to survive. This is the case for me. Fishing is my only and permanent occupation and therefore all of my income comes from fishing. If I am stopped from fishing off the coast of Tobago, I would not be able to make enough money to support myself and my family, especially in the early months of the fishing season."⁹³

Angela Watson states:

"The fishery off Tobago is a vital source of income for many Barbadian fishermen. Many could not survive and provide for their families without access to it, particularly during the months of November to February and June to July. Most ice-boat fishermen from Barbados depend on the Tobago fishery to make ends meet during those months. Every captain of a Barbadian ice-boat who can do so takes his boat down to Tobago during that period."⁹⁴

Scientific evidence confirms the importance to Barbados of the fishery off Tobago

67. Flyingfish move seasonally to various locations in the eastern Caribbean.⁹⁵ A recent two-year tagging study confirmed what every Barbadian fisherman has known for centuries: that one of the defined routes of seasonal flyingfish movement is between

⁹² Affidavit of Donville Brathwaite. (Appendix 71, Vol. 4 at p. 789).

⁹³ Affidavit of Emmerson Pinder dated 23 October 2004. (Appendix 86, Vol. 4 at p. 834).

⁹⁴ Affidavit of Angela Watson. (Appendix 91, Vol. 4 at pp. 965-966).

⁹⁵ H.A. Oxenford, *Movements of Flyingfish (Hirundichthys Affinis) in the Eastern Caribbean*, 1994, reprinted from *Bulletin of Marine Science*, vol. 54, no. 1. (Appendix 43, Vol. 3 at pp. 535-550).

Barbados and Tobago,⁹⁶ in part because conditions off Tobago make the area an ideal flyingfish spawning ground.⁹⁷

68. Other associated larger pelagic species such as dolphinfish, wahoo and tuna prey on the flyingfish.⁹⁸ Their seasonal patterns of movement therefore largely mirror those of the flyingfish. With the flyingfish, these associated pelagics provide a rich fishing source off Tobago at certain times of the year.

The fisherfolk of Tobago generally fish close to shore and do not rely upon flyingfish

69. Such flyingfish as are caught by Tobagonians are largely fished close to shore. In 1980, a Tobagonian historian wrote that local fisherfolk only ventured "a short distance from the shore and use a line to catch quality fish, but they will not lose sight of land ... Tobagonians differ from their Barbadian and Grenadian neighbours in not being oriented to the sea."⁹⁹ A 2000 FAO report on the Tobago flyingfish industry stated that about 95% of the vessels in Tobago were still small boats powered by outboard motors and involved in day-fishing close to the shoreline.¹⁰⁰

⁹⁶ Oxenford, Hunte and Mahon Expert Report to the Tribunal on the Biological characteristics of the four wing flyingfish and associated species in the Eastern Caribbean, with special attention to movement patterns and sustainable use, dated 26 October 2004. (Appendix 88, Vol. 4 at p. 860).

⁹⁷ Scientific evidence supports the centuries of Barbadian fisherfolk experience to the effect that flyingfish congregate twice a year off the north of Tobago at the same time that they are generally absent from the waters off Barbados.

⁹⁸ Expert Report to the Tribunal. (Appendix 88, Vol. 4 at p. 842).

⁹⁹ David L. Niddrie, Tobago, Litho Press (1980). (Appendix 31, Vol. 3 at p. 363).

¹⁰⁰ FAO Fishery Country Profile: Trinidad and Tobago (2000), www.fao.org/fi/fcp/en/TTO/profile.htm. (Appendix 47, Vol. 3 at p. 570).

70. Barbadian fisherman Anthony Brathwaite states:

"... fishermen from Tobago do not go more than 5 to 6 miles out to sea. They do not need to go any further out because the fish in that area are very plentiful. Therefore, we do not get in the way of one another."¹⁰¹

71. Angela Watson states:

"[We] Barbadians cannot remember a time when we have not fished off Tobago. I have gone to Tobago on several occasions and have spoken to Tobagonian fishermen. I was there as recently as October 2003. They tell me that they do not object to Barbadians fishing off Tobago because we do it well offshore, whereas they fish mostly inshore (mostly three to six miles offshore). The truth is that Tobagonians do not eat flyingfish. They prefer to eat reef fish. That is why Tobagonians mostly fish close inshore: that is where the reef fish are."

72. According to a Government of Trinidad and Tobago report, until the early 1960s, the flyingfish fishery was "non-existent in Trinidad and Tobago".¹⁰² Indeed, as recently as 1992, a Government of Trinidad and Tobago report confirmed that the technique for catching flyingfish was introduced to Tobago by Barbadian fishermen in 1962.¹⁰³ The Tobagonians began fishing for flyingfish only after that but it does not appear to have become a significant fishery for them. A Government of Trinidad and Tobago report noted that flyingfish "holds little or no consumer acceptance in Tobago and does not even appear in the market. Small quantities were being sold in the supermarkets in Trinidad but even so, only persons of Barbadian heritage, who knew the fish, were prepared to purchase

¹⁰¹ Affidavit of Anthony Brathwaite. (Appendix 69, Vol. 4 at p. 782).

¹⁰² Hubert E. Wood, "Two Case Histories of Successful Fisheries Development in Trinidad and Tobago", Division of Fisheries, Ministry of Agriculture, Trinidad and Tobago, 1978. (Appendix 25, Vol. 2 at p. 277).

¹⁰³ Suzanne Samlalsingh, Elizabeth Pandohee and Erol Caesar, "The Flyingfish Fishery of Trinidad and Tobago", 1992. (Appendix 41, Vol. 3 at p. 468); see also Hubert E. Wood, "Two Case Histories of Successful Fisheries Development in Trinidad and Tobago", Division of Fisheries, Ministry of Agriculture, Trinidad and Tobago, 1978. (Appendix 25, Vol. 2 at p. 277).

it".¹⁰⁴ As a result of the low consumer demand for flyingfish in Trinidad and Tobago, such flyingfish as is caught by Tobagonian fisherfolk is exported, mainly to Barbados.

73. Since the commencement of this arbitration, there have been reports that the Government of Trinidad and Tobago has made efforts to develop an export market for flyingfish in the United States.¹⁰⁵ This attempt by Trinidad and Tobago to develop new export markets for flyingfish emphasises the low demand for the fish in Trinidad and Tobago and the recent character of the fishery.

Section 3.5 Barbados has engaged in hydrocarbon activities in the maritime area between Barbados and Trinidad and Tobago since 1979, without protest from Trinidad and Tobago until 2001

74. Barbados began conducting exploratory hydrocarbon activities in the waters between Barbados and Tobago in 1979. In November of that year, Barbados granted a geological and geophysical seismic licence to Mobil Exploration Barbados Limited, a locally incorporated subsidiary of the Mobil Corporation. That licence covered all of the maritime space to the south of Barbados up to the median line with Trinidad and Tobago.¹⁰⁶

¹⁰⁴ Hubert E. Wood, "Two Case Histories of Successful Fisheries Development in Trinidad and Tobago", Division of Fisheries, Ministry of Agriculture, Trinidad and Tobago, 1978. (Appendix 25, Vol. 2 at p. 278); see also affidavit of Angela Watson. (Appendix 91, Vol. 4 at p. 964).

¹⁰⁵ Earl Manmohan, "Tobago team seeks flying-fish market in US", 25 May 2004, www.trinidadexpress.com/index.pl/article_business?id=23623982. (Appendix 64, Vol. 4 at pp. 762-763).

¹⁰⁶ Geological and geophysical (offshore) licence, (unsigned copy), 1979. (Appendix 28, Vol. 2 at p. 318). See further Section 4.1 below.

75. In meetings between the Prime Ministers of Barbados and Trinidad and Tobago between 29 April and 2 May 1979, it was agreed that the two countries would co-operate in respect of all aspects of the hydrocarbon industry. It was also agreed that they would co-operate in the off-shore development of their oil and gas industries.¹⁰⁷ Barbados thus informed Trinidad and Tobago of its grant of the 1979 licence.¹⁰⁸ Still in keeping with that agreement, Barbados also informed Trinidad and Tobago of its grant of a new licence and concession agreement (covering the same maritime space as the previous Mobil licence) to CONOCO Barbados Ltd, a Bermudan subsidiary of CONOCO Inc., on 30 March 1996.¹⁰⁹ Trinidad and Tobago did not make any contemporaneous protest to either the 1979 licence or the 1996 licence and concession. Only on 8 June 2001, nearly a year after the commencement of the boundary delimitation negotiations between the Parties, did Trinidad and Tobago first protest in relation to the activities that CONOCO and its partner, TotalFinaElf, engaged in pursuant to the 1996 licence and concession.¹¹⁰

¹⁰⁷ Agreements arrived at between the Prime Minister of Trinidad and Tobago and the Prime Minister of Barbados following the signing of the Memorandum of Understanding, 30 April 1979. (Appendix 30, Vol. 2 at pp. 346-349).

¹⁰⁸ Letter from the Permanent Secretary, Ministry of Trade and Industry, Barbados, to the Permanent Secretary, Ministry of Petroleum and Mines, Trinidad and Tobago, 19 May 1981. (Appendix 32, Vol. 3 at pp. 367-368).

¹⁰⁹ See, for example, letter from the Permanent Secretary, Finance, to the Permanent Secretary, Ministry of Energy and Energy Industries of Trinidad and Tobago, dated 28 May 1998. (Appendix 44A, Vol. 4, pp. 552A-552B).

¹¹⁰ Note No. 1048, Ministry of Enterprise Development, Foreign Affairs and Tourism of the Republic of Trinidad and Tobago, 8 June 2001. (Appendix 49, Vol. 3 at pp. 613-615).

CHAPTER 4

THE BACKGROUND TO THE DISPUTE

Section 4.1 The Parties have been negotiating the inter-related issues of delimitation and fisheries for more than twenty five years

The 1979 Memorandum of Understanding between the Parties

76. On 30 April 1979, Barbados and Trinidad and Tobago entered into a Memorandum of Understanding on Matters of Co-operation (*the MoU*).¹¹¹ The MoU followed a series of bilateral discussions between the Parties dating back to 1976. It recorded a broad series of statements, understandings and arrangements covering air services, defence and security, industry and commerce, hydrocarbon exploitation and fishing.

77. In the MoU, the Parties agreed that negotiations leading to a bilateral fishing agreement between them would be initiated "as an urgent matter".¹¹² A series of communications was exchanged between the Parties on the subject between the date of the MoU and the launch of the arbitration proceedings. These included discussions related to the 1990 fisheries *modus vivendi*, in relation to which see further Section 4.2 below.

78. Immediately following the signing of the MoU, the two Prime Ministers also agreed that the two countries would co-operate in respect of all aspects of the hydrocarbon industry.¹¹³

¹¹¹ Memorandum of Understanding on Matters of Co-operation, 30 April 1979. (Appendix 29, Vol. 2 at pp. 335-345).

¹¹² *Ibid.*, Article 6. (Appendix 29, Vol. 2 at p. 345).

¹¹³ See footnote 107 above.

79. In addition, the Prime Ministers of Barbados and Trinidad and Tobago agreed that definition of maritime boundaries was an issue "for closer collaboration".¹¹⁴ As noted above, between July 2000 and November 2003 the Parties also engaged in an intensive series of negotiations on the inter-related disputed issues of maritime delimitation and fisheries.

Section 4.2 Notwithstanding such negotiations, Trinidad and Tobago has recently engaged in behaviour designed to alter the *status quo*

(a) Trinidad and Tobago has disrupted Barbadian fishing activities off Tobago

1990 modus vivendi

80. In February 1989, 10 years after the MoU and one year prior to the Venezuela – Trinidad Agreement and in the middle of bilateral negotiations over fisheries, Trinidad and Tobago, for the first time, arrested and charged Barbadians fishing off Tobago. The Barbadian crews were detained and fined. These arrests shocked and concerned the Barbadian fisherfolk, who could not remember a time when they had not fished off Tobago.¹¹⁵

81. In the immediate aftermath of the arrests, Barbadian fisherfolk temporarily suspended their fishing activity off Tobago. Without access to their traditional fishing grounds off Tobago following those first arrests, the catches of Barbadian fisherfolk dropped and prices of flyingfish rose dramatically,¹¹⁶ with the result that many in Barbados were unable to afford fresh fish. The fisherfolk described this as a "noose around their

¹¹⁴ Footnote 113 above.

¹¹⁵ Affidavit of Angela Watson. (Appendix 91, Vol. 4 at p. 964).

¹¹⁶ Affidavit of Angela Watson, p.4, para 13. (Appendix 91, Vol. 4 at p. 965); see also FAO Field Document, Robin Mahon and Stephen Willoughby, "Impacts of Low Catches on Fishermen, Vendors and Consumers in Barbados", November 1990. (Appendix 39, Vol. 3 at pp. 415-438).

necks".¹¹⁷ One fisherman complained at the time, "we have to try and scramble just for a few dollars to feed our families, then the bank comes and reclaim[s] the boat when you can't repay the loans and you end up not being able to repay the bank nor feed your family."¹¹⁸

82. Following the 1989 arrests, Barbados immediately sought to negotiate with Trinidad and Tobago a temporary arrangement to enable Barbadian fisherfolk to resume their traditional fishing off Tobago without being arrested. These negotiations culminated on 23 November 1990 with the conclusion of a short-term *modus vivendi* on fishing (*the 1990 Fishing Agreement*).¹¹⁹

83. The 1990 Fishing Agreement was expressed diplomatically as being intended to promote bilateral co-operation in the fisheries sector.¹²⁰ In reality, it was a *modus vivendi* which Barbados was constrained to conclude in order to enable the urgent resumption of fishing activities by Barbadian fisherfolk off Tobago, given the crisis situation caused by the arrests. In the absence of the *modus vivendi* that year, many of the fishing communities of Barbados would have faced an imminent loss of livelihood and traditional way of life, with multiplying effects through the Barbadian economy.¹²¹

¹¹⁷ "Tobago pinch' hurts fishermen", *The Advocate*, 3 January 1990. (Appendix 35, Vol. 3 at p. 376).

¹¹⁸ *Ibid.*

¹¹⁹ The 1990 Fishing Agreement between the Government of Barbados and the Government of the Republic of Trinidad and Tobago. (Appendix 37, Vol. 3 at pp. 389-412).

¹²⁰ *Ibid.*

¹²¹ See, *inter alia*, paragraph 81 above.

84. The 1990 Fishing Agreement did not purport to indicate the course of a maritime boundary between Barbados and Trinidad and Tobago. Instead, the document records the agreement of Barbados and Trinidad and Tobago that certain areas close to Tobago would be treated as "closed areas" in which no fishing was to be allowed.¹²² These "closed areas" were illustrated on a map attached to the 1990 Fishing Agreement,¹²³ and were described in Article III.2.1 as "... the marine areas within twelve (12) nautical miles as measured from the straight archipelagic baselines from which the territorial sea of the Republic of Trinidad and Tobago is measured."

85. The 1990 Fishing Agreement was conceived by the Parties as a short-term *modus vivendi*. It was concluded for one year and never renewed. It was ignored by the fishing communities of Barbados, who kept fishing off Tobago as they always had. The 1990 *modus vivendi* on fishing did not change the traditional fishing patterns of Barbadians.

Trinidad and Tobago re-commenced arresting Barbadian fisherfolk in 1994

86. Trinidad and Tobago resumed arresting Barbadian fisherfolk fishing off Tobago in 1994. The illegal arrests have, fortunately, been sporadic. In all, between 1994 and 2004, the crews of eighteen Barbadian fishing boats were arrested.¹²⁴ The area within the traditional Barbadian fishing area where these arrests took place is illustrated approximately on Map 11. All of the arrests have taken place to the south of the median line between the Parties and all but one have taken place beyond the 12 nautical mile

¹²² The 1990 Fishing Agreement, Article III. 2. (Appendix 37, Vol. 3 at p.391).

¹²³ *Ibid.*, map attached to the 1990 Fishing Agreement. (Appendix 37, Vol. 3 at p. 402).

¹²⁴ Table entitled "Details of Arrests by the Trinidad and Tobago Coast Guard of Barbadian Boat Crews Fishing in Traditional Fishing Ground", Fishery Division of Barbados. (Appendix 92, Vol. 4 at p. 967).

territorial sea limit of Trinidad and Tobago.¹²⁵ The arrests have been the subject of protest by Barbados.¹²⁶

87. There is evidence that, on other occasions, the Trinidad and Tobago Coastguard has intercepted Barbadian fisherfolk fishing off Tobago but, instead of arresting them, escorted them back toward Barbados.¹²⁷ At other times, it appears that the Trinidad and Tobago Coastguard has taken fish from the fisherfolk for personal consumption but then left them to fish unmolested.¹²⁸ None of these activities has deterred the Barbadian fisherfolk from fishing off Tobago.¹²⁹

88. Since the commencement of the present arbitration proceedings, Trinidad and Tobago has not arrested any Barbadian fisherfolk fishing off Tobago. On isolated occasions since the commencement of the arbitration, Trinidad and Tobago appears to have intercepted Barbadian fisherfolk but only escorted them away from Tobago without detaining them. Because of Trinidad and Tobago's moderation of its practice, Barbados has so far refrained from seeking provisional measures to restrain Trinidad and Tobago from molesting Barbadian fisherfolk. However, Barbados reserves its rights in this respect and will approach the Tribunal if Trinidad and Tobago should seriously interfere with Barbadian fisherfolk conducting their traditional fishing.

¹²⁵ The one exception was when a boat drifted by accident into the territorial sea of Trinidad and Tobago.

¹²⁶ See, for example, Diplomatic Note No. 372, from the Ministry of Foreign Affairs of Barbados to the Ministry of Foreign Affairs of Trinidad and Tobago, 13 April 1994. (Appendix 44, Vol. 3 at p. 552).

¹²⁷ Affidavit of Edmund Brathwaite dated 12 October 2004. (Appendix 72, Vol. 4 at p. 791); see also affidavit of Angela Watson. (Appendix 91, Vol. 4 at p. 964).

¹²⁸ Affidavit of Elvis Clarke dated 22 October 2004. (Appendix 84, Vol. 4 at p. 826); see also affidavit of Angela Watson. (Appendix 91, Vol. 4 at p. 964).

¹²⁹ Affidavit of Angela Watson. (Appendix 91, Vol. 4 at p. 964).

(b) Trinidad and Tobago has recently engaged in hydrocarbon activities in the disputed area

In 1996, 2001 and 2003, Trinidad and Tobago offered for tender deep water hydrocarbon blocks off the coast of Tobago

89. Notwithstanding the 1979 agreement between the Prime Ministers to the effect, *inter alia*, that the governments would co-operate in respect of all aspects of the hydrocarbon industry,¹³⁰ in 1996 and again in 2001, after the commencement of the recent maritime delimitation negotiations between the Parties, Trinidad and Tobago offered for tender deep water hydrocarbon blocks off the coast of Tobago. Barbados protested on a number of occasions.¹³¹ The 1996 and 2001 offers were not taken up in relation to those blocks.

90. Also in 2001, Barbados learned that Trinidad and Tobago was considering conducting a seismic shoot in maritime space forming part of Barbados' territory. In light of its discovery, Barbados communicated its concerns to oil companies that might be interested in working in the area and informed them that it had decided to take whatever action it deemed necessary to protect its interests.¹³²

91. In July 2003, three years after the commencement of the latest series of maritime delimitation negotiations between the Parties and shortly before the fifth round of those negotiations, Trinidad and Tobago launched a new round of hydrocarbon tenders that again

¹³⁰ Paragraph 75 above.

¹³¹ Diplomatic Notes from the Ministry of Foreign Affairs and Foreign Trade of Barbados to the Ministry of Foreign Affairs of Trinidad and Tobago, Nos. IR/2002/335, IR/2001/238, IR/2001/124 and IR/2001/70. (Appendix 53, Vol. 3 at pp. 624-634).

¹³² Letters from the Permanent Secretary, Ministry of Foreign Affairs and Foreign Trade of Barbados, 12 June 2001. (Appendix 50, Vol. 3 at pp.616-617).

included Blocks 22, 23(a), 23(b) and 24. To the best of Barbados' knowledge, that process is still ongoing. Barbados has protested against Trinidad and Tobago's 2003 bidding round.¹³³ Barbados also informed oil companies apparently interested in working in the area of the fact that Blocks 22, 23(a), 23(b) and 24 are located in maritime space over which sovereignty is in dispute between Trinidad and Tobago and Barbados.¹³⁴

In 2003, Trinidad and Tobago agreed unitisation procedures with Venezuela in relation to the Trinidad – Venezuela Agreement.

92. On 12 August 2003, Trinidad and Tobago and Venezuela signed a Letter of Intent and Memorandum of Understanding which established a procedure for unitising hydrocarbon reservoirs crossing the delimitation line purported to be established by the Trinidad-Venezuela Agreement. The eastern part of that line lies within Barbados' maritime territory close to the Barbados-Guyana EEZ Cooperation Zone and a part of it lies beyond the 200 nautical mile arcs of both Venezuela and Trinidad and Tobago.¹³⁵ Accordingly, Barbados protested to Trinidad and Tobago and requested information from it relating to the Letter of Intent and Memorandum of Understanding.¹³⁶ Trinidad and Tobago has not yet provided any of the information requested by Barbados.

¹³³ See, for example, Diplomatic Note No. IR/2004/43, 1 March 2004. (Appendix 62, Vol. 4 at pp. 747-749).

¹³⁴ Letters from the Permanent Secretary, Ministry of Foreign Affairs and Foreign Trade of Barbados, to PDVSA and BP America Inc. dated 5 March 2004 and February 2004 respectively, with list of oil companies to whom equivalent letters were also sent by Barbados. (Appendix 63, Vol. 4 at pp. 750-761).

¹³⁵ See further, paragraphs 17, 18 and 19 above in relation to the Trinidad-Venezuela Agreement.

¹³⁶ For example, Diplomatic Note from the Ministry of Foreign Affairs and Foreign Trade of Barbados to the Ministry of Foreign Affairs of Trinidad and Tobago, No: 18/1-1 Vol: II, 19 February 2004. (Appendix 61, Vol. 4 at pp. 745-746).

93. In the circumstances, and having regard to the present arbitration, Barbados reserves its rights to seek provisional measures in relation to Trinidad and Tobago's recent hydrocarbon activities in the disputed area.

Section 4.3 The arbitration commenced on 16 February 2004

94. On 6 February 2004, despite the fact that a sixth round of maritime delimitation and fishery negotiations was scheduled for later that month, Trinidad and Tobago arrested two Barbadian fishing boats fishing in the Barbadian fishing grounds off Tobago. This time, the fisherfolk detained were held in custody for several days, before being released without charge.

95. Prompted by the latest round of arrests and a period of heightened diplomatic activity, Prime Minister Arthur of Barbados met on the morning of 16 February 2004 with Prime Minister Manning of Trinidad and Tobago at the latter's request. At that meeting, Prime Minister Manning made it clear that the Trinidad-Venezuela Treaty made the boundary problem of Barbados and Trinidad and Tobago intractable. Prime Minister Manning further stated that Trinidad and Tobago would henceforth only discuss the issue of Barbados' fishing rights in isolation from the boundary issue, leaving the negotiations on the issue of maritime boundaries in abeyance since, in his view, no progress was possible.

96. Barbados had made clear during the first five rounds of maritime delimitation and fishery negotiations, and, indeed, Trinidad and Tobago had agreed, that the issues of fisheries and maritime delimitation were linked and must be negotiated together. Further, Barbados had repeatedly objected to the Trinidad-Venezuela Agreement both during bilateral negotiations and publicly.

97. On the afternoon of 16 February 2004, after the meeting with Prime Minister Manning and his delegation from Trinidad and Tobago, Prime Minister Arthur of Barbados met with his Cabinet to discuss the day's developments. After careful review of the options which were left, Barbados submitted the dispute between itself and Trinidad and Tobago to the present arbitral process.

CHAPTER 5

THE LAW RELATING TO THE DELIMITATION OF OPPOSITE AND ADJACENT EEZS AND CONTINENTAL SHELVES

Section 5.1 Applicable law

98. Barbados and Trinidad and Tobago are parties to UNCLOS, Part XV of which makes provision for the settlement of disputes concerning its interpretation or application. In particular, section 2 of Part XV makes provision for the submission of such disputes to compulsory procedures entailing binding decisions, where no settlement has been reached by recourse to section 1 of Part XV. Neither Barbados nor Trinidad and Tobago has made any declaration under Article 298 of UNCLOS setting out optional exceptions to the applicability of section 2, nor have either made any written declaration pursuant to Article 287 of UNCLOS. Accordingly, a tribunal constituted in accordance with UNCLOS Annex VII has jurisdiction over the dispute between the Parties. The dispute relates to the delimitation of the EEZ and CS boundaries between Barbados and Trinidad and Tobago.

99. As already stated, the boundary between the maritime areas appertaining to Barbados and Trinidad and Tobago is to be determined by the use of the so-called "equidistance/special circumstances" rule. A long line of consistent holdings by the International Court of Justice (*the ICJ or the Court*) and other international tribunals has established that this is the mode for implementing the mandate of Articles 74 and 83 of UNCLOS, in order to achieve the "equitable solution" which they require.¹³⁷ The

¹³⁷ This is also supported by State practice and the writings of the most highly qualified publicists.

relevance of all of these authorities has been authoritatively expressed in Oppenheim's *International Law*¹³⁸ at p.776:

"The law concerning these questions has evolved from the provisions of the 1958 Convention, the provisions of the 1982 Convention, from the practice of states demonstrated in very many boundary agreements, and also a considerable jurisprudence from arbitral awards, and especially from judgments of the International Court of Justice."

Section 5.2 Decisions of the International Court of Justice

100. The priority to be accorded to the determination of a provisional median line, to be followed only subsequently by a consideration of the circumstances that might require an adjustment of that line, was clearly acknowledged in the decision of the ICJ in the *Libya/Malta* case (1985)¹³⁹ and was quoted with approval by the Court in the *Jan Mayen* case (Denmark v. Norway) (1993)¹⁴⁰ :

"Judicial decisions on the basis of the customary law governing continental shelf delimitation between opposite coasts have likewise regarded the median line as a provisional line that may then be adjusted or shifted in order to ensure an equitable result. The Court, in the Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* already referred to (paragraph 46 above), in which it took particular account of the Judgment in the *North Sea Continental Shelf* cases, said:

'The Court has itself noted that the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts.'
(*ICJ Reports 1985*, p.47, para. 62.)

¹³⁸ Ninth edition, Sir Robert Jennings and Sir Arthur Watts.

¹³⁹ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *ICJ Reports 1985*, p. 13 at p. 57, paras. 63, 65 and 79.

¹⁴⁰ *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, *ICJ Reports 1993*, p. 38 at p. 60, para. 58.

It then went on to cite the passage in the Judgment in the *North Sea Continental Shelf* cases, where the Court stated that the continental shelf off, and dividing, opposite States 'can . . . only be delimited by means of a median line' (*ICJ Reports 1969*, p. 36, para. 57; see also p. 37, para. 58). The Judgment in the *Libya/Malta* case then continues:

'But it is in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between those coasts, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result.' " (*ICJ Reports 1985*, p. 47, para. 62.)

101. The same approach has been followed in the two most recent decisions of the ICJ involving delimitation issues.¹⁴¹

102. In *Qatar v. Bahrain*, the Court first dealt with the delimitation of the territorial sea between the Parties. In this connection, it had to apply Article 15 of UNCLOS, which provides that in the absence of agreement the boundary is to be a median line save where it is necessary by reason of historic title or other special circumstances to delimit in a way that is at variance with the median line. Referring to this as "the equidistance/special circumstances" rule, the ICJ said:

"The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances. Once it has delimited the territorial seas belonging to the Parties, the Court will determine the rules and principles of customary law to be applied to the delimitation of the Parties' continental shelves and their exclusive economic zones or fishery zones. The Court will further decide whether the method to be chosen for this delimitation differs from or is similar to the approach just outlined."¹⁴²

¹⁴¹ *Qatar v. Bahrain, Merits, ICJ Reports 1991-2001, and Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), ICJ Reports 1994-2002.*

¹⁴² *Qatar v. Bahrain*, para.176.

103. When the Court moved on to delimit the EEZ and CS boundaries, it followed the same approach as was employed in the *Jan Mayen* case. The Court quoted from the Judgment in that case as follows:

"227. With regard to the delimitation of the continental shelf the Court stated that

'even if it were appropriate to apply . . . customary law concerning the continental shelf as developed in the decided cases [the Court had referred to the *Gulf of Maine* and the *Libya/Malta* cases], it is in accord with precedents to begin with the median line as a provisional line and then to ask whether 'special circumstances' [the term used in Art. 6 of the 1958 Convention on the Continental Shelf, which was the applicable law in the case] require any adjustment or shifting of that line.' (*ICJ Reports 1993*, p. 61, para. 51.)

228. After having come to a similar conclusion with regard to the fishery zones, the Court stated:

'It thus appears that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn.' (*Ibid.* p. 62, para. 53.)

229. The Court went on to say that it was further called upon to examine those factors which might suggest an adjustment or shifting of the median line in order to achieve an "equitable result". The Court concluded:

'It is thus apparent that special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle. General international law, as it has developed through the case-law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of "relevant circumstances". This concept can be described as a fact necessary to be taken into account in the delimitation process.' (*Ibid.*, p. 62, para. 55.)

230. The Court will follow the same approach in the present case. For the delimitation of the maritime zone beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.

231. The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea,

and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated."¹⁴³

104. The ICJ adhered to this position in its most recent decision on the subject, *Cameroon v. Nigeria*, saying:

"The Court has on various occasions made it clear what the applicable criteria, principles and rules of determination are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves *first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'*."¹⁴⁴ (Emphasis added)

105. In view of so clear a series of recent statements by the ICJ, it hardly seems necessary to refer to additional authority. But one may note the consistency between the approach of the ICJ and that of arbitral tribunals dealing with the same subject.

Section 5.3 Decisions of arbitral tribunals

106. In the *Anglo-French Continental Shelf* case,¹⁴⁵ the Court of Arbitration acknowledged that the determination of the median or equidistance line would be the starting point of the process:

¹⁴³ *Qatar/Bahrain*, paras. 227-231. The ICJ thus applied the equidistance/special circumstances rule to delimit both the territorial sea and the unified EEZ and CS boundaries of Qatar and Bahrain. The ICJ's finding that the southern coasts of Qatar and Bahrain were opposite, while the northern coasts were comparable to adjacent coasts, was not considered by the ICJ to be a reason to stop applying this rule. Nor was it a special circumstance requiring the adjustment of the provisional equidistance line. The ICJ's decision in *Qatar/Bahrain* can thus be seen as an acknowledgement that the equidistance/special circumstances rule is the correct methodology under UNCLOS for the delimitation of a single maritime boundary between opposite and adjacent coasts.

¹⁴⁴ *Cameroon v. Nigeria*, p. 135, para. 288.

¹⁴⁵ *Delimitation of the Continental Shelf (United Kingdom and the French Republic)*, 30 June 1997, 54 ILR 6.

" . . . it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation."¹⁴⁶

107. Comparable views have been authoritatively expressed in the *Eritrea/Yemen Arbitration (Second Stage: Maritime delimitation)* (1999).¹⁴⁷ The Tribunal took "as its starting point, as its fundamental point of departure, that, as between opposite coasts, a median line obtains".¹⁴⁸ It noted that:

"It is a generally accepted view, as is evidenced in both the writings of commentators and in the jurisprudence, that between coasts that are opposite to each other the median or equidistance line normally provides an equitable boundary in accordance with the requirements of the Convention, and in particular those of its Articles 74 and 83 which respectively provide for the equitable delimitation of the EEZ and of the continental shelf between States with opposite or adjacent coasts."¹⁴⁹

108. The Tribunal also found, in accordance with Article 15 of UNCLOS, that "the normal methods for drawing an equidistant median line could be varied if reason of historic title or other special circumstance were to indicate otherwise."¹⁵⁰ However, after considering the special circumstances advanced by each State in that case, the Tribunal decided that "no variance [was] necessary"¹⁵¹ as it concluded that the special circumstance could be protected by the award of non-exclusive rights for traditional artisanal fishing.

¹⁴⁶ *Ibid.*, p. 123, para. 249.

¹⁴⁷ *The Government of the State of Eritrea and the Government of the Republic of Yemen (Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)*, 3 October 1996, 119 ILR 418.

¹⁴⁸ *Ibid.*, p. 445, para. 83.

¹⁴⁹ *Ibid.*, p. 457, para. 131.

¹⁵⁰ *Ibid.*, p. 464, para. 158.

¹⁵¹ *Ibid.*, p. 464, para. 158.

109. Lastly, reference may be made to the Award in the second phase of the *Newfoundland/Labrador/Nova Scotia* arbitration (2002),¹⁵² where the Tribunal said:

"2.28 In the context of opposite coasts and latterly adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstances justify it. The Tribunal will further consider the question of choice of methods in due course. For present purposes it is sufficient to note that the applicability of the 1958 Geneva Convention in the present proceedings reinforces the case for commencing with an equidistance line, but in any event that is now the starting point in most cases, whether the governing law is the 1958 Geneva Convention, the Law of the Sea Convention or customary international law."

110. In the light of the authorities cited above, the approach identified is as applicable to the determination of a single maritime boundary as it is to the delimitation of the EEZ and CS separately.

111. On the basis of the clear line of authority set out above, Barbados submits that, particularly having regard to the opposite character of the coasts of Barbados and Trinidad and Tobago, the Tribunal should take as the starting point of its determination of the boundary a provisional median line drawn as described in paragraph 20 above and illustrated on Map 2.

¹⁵² *Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002.*

CHAPTER 6

A SPECIAL CIRCUMSTANCE REQUIRES THE ADJUSTMENT OF THE PROVISIONAL MEDIAN LINE TO THE SOUTH

Section 6.1 Barbadians are dependent on fishing off Tobago where they have fished for over 250 years.

112. Proceeding from the provisional median line, Barbados submits that the boundary must be adjusted so as to lie, in the manner illustrated on Map 3, to the south of the median line. This adjustment is required by a "special circumstance", namely, the fact that, as described above, Barbadians, using traditional artisanal methods, have fished in areas lying off the northwest, north and northeast coasts of Tobago and have come to rely extensively on that fishery. The approximate location of the traditional fishing area is illustrated on Map 11.

113. As described at Chapter 3 above, Barbados has a long history of dependence upon maritime fishing, including in particular flyingfish, as a source of food for its people. During five months of the fishing season, abundant stocks of flyingfish and associated pelagic species are found off the northwest, north and northeast of Tobago. Barbadians have fished there using artisanal methods for over 250 years. The traditional Barbados fisheries in the waters off Tobago, recognised by Trinidad and Tobago,¹⁵³ are established features of Barbados' history, economy and culture and must be taken into account as a "special circumstance" in the determination of the maritime boundary with Trinidad and Tobago.

¹⁵³ Paragraphs 122 and 123 below.

114. If Barbadian fishing were disrupted by the loss of the traditional fishery off Tobago, the repercussions for the Barbadian fisherfolk, others in associated employment in Barbados, and their families and dependants would be so far-reaching as to be catastrophic.

Section 6.2 Legal considerations

(a) The relevance of the special circumstance

115. The traditional Barbadian fishing activity off Tobago is critical to the delimitation for two reasons:

- (i) the first is that it constitutes a special circumstance requiring the adjustment of the provisional median line southwards towards Tobago in order to achieve an equitable solution as required by Articles 74 and 83 of UNCLOS; and
- (ii) the second is that, while the existence of this traditional fishing activity would make the adjustment of the median line southwards productive of an equitable solution, a comparably equitable solution could not be achieved if the boundary were left at the median line and the rights of the Barbadian fisherfolk were left unprotected.

116. The special circumstance which Barbados invokes arises from the traditional artisanal fishing which Barbadians have long conducted in the waters heretofore the high seas, but now claimed by Trinidad and Tobago. By virtue of this fishing activity, Barbados and Barbadians have acquired rights which can only be preserved by an adjustment of the median line, as indicated on Map 3. The rights derive from two independent grounds: (i) the long usage of the waters in question for traditional artisanal fishing; and (ii) the

catastrophic consequences to the concerned population of Barbados if they are excluded from their traditional fishing grounds. Four rules of law are relevant:

- (i) the exercise of traditional artisanal fishing rights for an extended period has been recognised as generating a vested interest or acquired right; this is especially the case when the right was exercised in areas theretofore *res communis*;
- (ii) such traditional artisanal fishing rights vest not only in the State of the individuals that traditionally exercised them, but also in the individuals themselves and cannot be taken away or waived by their State;
- (iii) such rights are not extinguished by UNCLOS or by general international law; and
- (iv) such rights have been held to constitute a special circumstance requiring an appropriate adjustment to a provisional median line.

(b) The identification and effect of the special circumstance

The exercise of traditional artisanal fishing rights for an extended period can generate a vested interest or acquired right

117. In his article on "The Law and Procedure of the International Court of Justice: General Principles and Sources of Law, 1951-1954",¹⁵⁴ Sir Gerald Fitzmaurice said:

"if the fishing vessels of a given country have been accustomed from time immemorial, or over a long period, to fish in a certain area, on the basis of the area being high seas and common to all, it may be said that their country has through them ... acquired a vested interest that the fisheries of that area

¹⁵⁴ Reprinted in the two volume collection of his articles under the title of *The Law and Procedure of the International Court of Justice*, Cambridge University Press, (1986).

should remain available to its fishing vessels (of course on a non-exclusive basis) - so that if another country asserts a claim to that area as territorial waters, which is found to be valid or comes to be recognized, this can only be subject to the acquired rights of fishery in question, which must continue to be respected."¹⁵⁵

He continued:

"Some such conception would seem to have underlain certain observations made by Judge Alvarez in the *Fisheries* case, when he included amongst the conditions upon which a State might determine the extent of its territorial waters, one to the following effect (*I.C.J.*, 1951, p. 150):

'... that it does not infringe the rights acquired by other States ...'

Again in finding for Norway, he gave as one reason (*ibid.*, p. 153) that:

'... the delimitation ... does not infringe rights acquired by other States, ...'

There would seem to be justice in this idea - for if a State can by a long-continued usage and practice build up a prescriptive or historical right to the waters of an area originally and in its essence *res communis*, so equally should a State which has specifically exercised its communal rights in respect of that area as such, over a long period of time, be entitled to continue to do so, notwithstanding the change in the status of the area. Indeed, it could be said that the latter claim is the stronger - since it only involves the retention and continued exercise of an existing right, not the acquisition of a new one."¹⁵⁶

118. The same idea appears, albeit expressed in different terminology, in the judgment of the ICJ itself in the *Fisheries* case when, speaking of the "realities which must be borne in mind in appraising" the United Kingdom's contentions regarding the Norwegian claims to a broad territorial sea which encroached on recognised and internationally used areas of the high seas, it referred to two facts: (1) that the fishing grounds off the Norwegian coast

¹⁵⁵ *Ibid.*, p. 181.

¹⁵⁶ *Ibid.*, p. 181.

"were known to Norwegian fishermen and exploited by them from time immemorial" and
(2) "in these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing".¹⁵⁷

119. Later in the same judgment the Court said:

"Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."¹⁵⁸

120. The *Behring Sea Arbitration* award of 1893 had also recognised traditional artisanal fishing rights. That arbitration involved, *inter alia*, the "jurisdictional rights of the United States in the waters of [the] Behring Sea".¹⁵⁹ The Tribunal recognised the traditional artisanal fishing rights of native Americans in the area by exempting from the proposed regulatory regime:

"... Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur-seal fishing in canoes or undecked boats not transported by or used in connection with other vessels, and propelled wholly by paddles, oars, or sails, and manned by not more than five persons each in the way hitherto practised by the Indians."¹⁶⁰

¹⁵⁷ *Fisheries Case (United Kingdom v. Norway) ICJ Reports 1951*, p. 116 at pp. 127-128.

¹⁵⁸ *Ibid.*, p. 133.

¹⁵⁹ *Behring Sea, Arbitration Award Between Great Britain and the United States*, 15 August 1893, Consolidated Treaty Series, Vol. 179, p. 97, No. 8, at 98.

¹⁶⁰ *Ibid.*, at p. 103, para. 8.

121. State practice in the form of treaties has long recognised the existence and the need for the preservation of traditional fishing rights when new boundaries that might interfere with those rights are established.¹⁶¹

¹⁶¹ As early as 1856 a treaty between Sweden and England provided that

"It shall be free for the subjects of the most Serene King of Sweden, to fish and catch herrings and other fish in the seas and on the coasts which are in the dominion of this republic, provided the ships employed in the fishery do not exceed a thousand in number; nor while they are fishing shall they be any ways hindered or molested; nor shall any charges be demanded on the account of the fishing by the men of war of this republic, nor by those who are commissioned privately to trade at their own expense, nor by the fishing vessels on the northern coasts of Britain, but all persons shall be treated courteously and amicably, and shall be allowed even to dry their nets on the shore, and to purchase all necessary provisions from the inhabitants of those places at a fair price."

(Treaty Between Sweden and England, 17 July 1656, Consolidated Treaty Series, Vol. 4, p. 127, at p. 149; see also, for example, Treaty of Peace and Friendship Between France and Great Britain, 11 April 1713, Consolidated Treaty Series, Vol. 27, p. 475, at p. 486).

Article II of a Convention between France and Great Britain of 1904 respecting Newfoundland and West and Central Africa, provided:

"Article II. France retains for her citizens, on a footing of equality with British subjects, the right of fishing in the territorial waters on that portion of the coast of Newfoundland comprised between Cape St. John and Cape Ray, passing by the north; this right shall be exercised during the usual fishing season closing for all persons on the 20th October of each year." (Convention between France and Great Britain respecting Newfoundland and West and Central Africa, 8 April 1904, Consolidated Treaty Series, Vol. 195, 205, Article II, at p. 206.)

The Convention between Great Britain, Japan, Russia and the United States respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean of 1911 provided, in Article IV:

"It is further agreed that the provisions of this Convention shall not apply to Indians, Ainos, Aleuts, or other aborigines dwelling on the coast of the waters mentioned in Article I, who carry on pelagic sealing in canoes not transported by or used in connection with other vessels, and propelled entirely by oars, paddles, or sails, and manned by not more than five persons each, in the way hitherto practised and without the use of firearms; provided that such aborigines are not in the employment of other persons, or under contract to deliver the skins to any person." (Convention between Great Britain, Japan, Russia and the United States respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean, 7 July 1911, Consolidated Treaty Series, Vol. 214, p. 80, Article IV, at p. 82.)

In the 1972 Boundary Agreement between Canada and France (*St. Pierre & Miquelon*), the delimitation followed equidistance, but the preamble explicitly acknowledges the need to delimit Canada's territorial sea and fishing zones "with a view to the protection of Canadian fisheries". The boundary ultimately agreed upon reflects a compromise between, on the one hand, Canada's efforts to establish control of its fisheries off its Atlantic coasts, and on the other, French attempts to maintain traditional fishing activities in the area. (*Ibid.*, at 82 n.2.)

Article 2(1) of the Agreement Between France and Italy on the Delimitation of the Maritime Boundaries in the Area of the Strait of Bonifacio provides:

"For the purpose of ensuring that this agreement shall not interfere with the established fishing practices of professional fishermen of the two countries, the Parties hereby agree, by way of neighbourly arrangement, to allow French and Italian coastal fishing vessels to continue their activities in traditional fishing areas located within a zone defined [by certain agreed coordinates]." (Agreement Between the Government of the French Republic and the Government of the Italian Republic on the Delimitation of the Maritime Boundaries in the Area of the Strait of Bonifacio, 28 November 1986).

122. Trinidad and Tobago has long been aware of the existence of Barbadian fishing activity in the waters off Tobago.¹⁶² Indeed that activity could properly be described as being "notorious". Moreover, the traditional fishing activities of Barbadian fisherfolk in the waters off Tobago have been officially recognised by Trinidad and Tobago. For example, they were specifically referred to and recognised by the Minister of External Affairs and International Trade for Trinidad and Tobago during his speech given at the signing of the 1990 Fishing Agreement.¹⁶³ He said:

"The United Nations Convention on the Law of the Sea, which the Government of the Republic of Trinidad and Tobago has signed and ratified, was partly incorporated in the legislation of Trinidad and Tobago through the Archipelagic Waters and Exclusive Economic Zone Act 1986. As a result, the maritime jurisdiction of Trinidad and Tobago was extended from the 12-mile territorial sea to embrace its own Exclusive Economic Zone. This new scenario meant that those fishermen of Barbados who used to fish in waters adjacent to the territorial sea of Trinidad and Tobago found that they were no longer fishing in the high seas but in the Exclusive Economic Zone of Trinidad and Tobago. Thus, their formerly legitimate fishing activities suddenly became a matter of concern for the Law".

The maritime boundary delimitation treaty between France and Monaco of 1984 contains substantially the same provision, allowing "Monegasque and French coastal fishing vessels to continue fishing the traditional fishing areas situated within Monegasque territorial waters and the neighbouring French territorial waters". (Article 4).

The Treaty between the UK and Honduras of 4 December 2001 concerning the delimitation of the maritime areas between the Caymans and Honduras grants a limited number of Cayman Island vessels the right to continue traditional fishing for red snapper and grouper "in the area of Misteriosa and Rosario Banks located in the exclusive economic zone of the Republic of Honduras... in accordance with existing patterns and levels".

¹⁶² Indeed, a Government of Trinidad and Tobago report confirmed in 1992 that the technique for catching flyingfish was introduced to Tobago by Barbadian fishermen in 1962: Suzanne Samlalsingh, Elizabeth Pandohee and Erol Caesar, "The Flyingfish Fishery of Trinidad and Tobago", 1992, p. 46. (Appendix 41); see also Hubert E. Wood, "Two Case Histories of Successful Fisheries Development in Trinidad and Tobago", Division of Fisheries, Ministry of Agriculture, Trinidad and Tobago, 1978. (Appendix 25, Vol. 2 at p. 277).

¹⁶³ Statement of Dr The Honourable Sahadeo Basdeo, Minister of External Affairs and International Trade at the signing of the 1990 Fishing Agreement, 'Knowsley', 23 November 1990. (Appendix 38, Vol. 3 at pp. 413-414). The 1990 Fishing Agreement is discussed further at Section 4.2 above.

123. As recently as 2003, a report of the Fisheries Division, Ministry of Agriculture, Land and Marine Resources of Trinidad and Tobago stated, in the section dealing with fishing off Tobago:

"Traditionally, boats from Barbados have fished in the EEZ of Trinidad and Tobago primarily for flyingfish and associated large pelagics. Their catches are not captured in the data collection system in Tobago."¹⁶⁴

124. Barbados does not, of course, agree that the relevant maritime area is correctly described as being within Trinidad and Tobago's EEZ. Nor does Barbados agree with the map included by the Government of Trinidad and Tobago in the 2003 report, which shows Trinidad and Tobago's maritime boundary with Barbados as being a median line unadjusted for the special circumstance. The point is that both Parties have recognised that Barbadians have traditionally fished off Tobago using artisanal methods.

125. As Barbadian fishing off Tobago took place prior to the 1986 declaration by Trinidad and Tobago of its EEZ, in international waters in which Barbadian fisherfolk had a perfect right to fish, it called for no adverse reaction from Trinidad and Tobago. Nonetheless, that established and continuous fishing activity, as amply evidenced by the affidavits of the Barbadian fisherfolk annexed to this Memorial, remains a fact that necessarily establishes a limit upon some of the rights that Trinidad and Tobago may subsequently assert in the waters of what it claims as its EEZ.

¹⁶⁴ Elizabeth Mohammed and Christine Chan A Shing, "Trinidad and Tobago: Preliminary Reconstruction of Fisheries Catches and Fishing Effort, 1908-2002". (Appendix 58, Vol. 3 at p. 659).

Such traditional artisanal fishing rights vest not only in the State of the individuals that traditionally exercised them, but also in the individuals themselves and cannot be taken away or waived by their State

126. The entitlement to pursue traditional livelihoods is recognised by international law as a matter of individual human rights and is confirmed in human rights treaties.¹⁶⁵ Fishing rights are a form of property.¹⁶⁶ International human rights law has come to recognise the right of peoples to engage in the traditional uses of property, individual or communal, by which they subsist and earn their livelihood. As human rights, such rights vest in the members of the population concerned as well as in their States. Their rights are therefore not susceptible to being decreed, waived or negotiated out of existence by State action. Thus, Barbadian traditional fisherfolk cannot now be excluded from maritime zones that they have traditionally fished, destroying their principal means of subsistence during substantial periods of the fishing season.

¹⁶⁵ Universal Declaration of Human Rights, Article 17 provides:

"(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property."

American Convention on Human Rights, Article 21 (ratified by Barbados and Trinidad and Tobago, but later denounced by Trinidad and Tobago on 26 May 1998) provides:

"1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. ..."

¹⁶⁶ The European Commission of Human Rights has confirmed that fishing rights constitute a proprietary interest entitled to protection under Article 1 of Protocol No. 1 to the European Convention on Human Rights: application no. 11763/85, *Banér v. Sweden* (1989). Article 1 of Protocol No. 1 provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Such traditional artisanal fishing rights survive the declaration by Trinidad and Tobago of an EEZ in 1986 and the entry into force of UNCLOS in 1994

127. It follows from the authorities cited that the established traditional rights to fish in the waters outside the territorial sea of Tobago survived the declaration by Trinidad and Tobago of an EEZ in 1986 and the entry into force of UNCLOS in 1994. Indeed, the official statements of Trinidad and Tobago cited at paragraphs 122 and 123 above dated from 1990 and 2003 respectively.

128. At the time that Trinidad and Tobago made its declaration in 1986, UNCLOS had already been signed and Trinidad and Tobago had ratified it. So any reference by Trinidad and Tobago to an EEZ must be read by reference to the UNCLOS provisions.

129. Article 47(6), one of the provisions establishing the new archipelagic regime, provides that:

"[i]f a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters... shall continue and be respected".

130. Article 51(1) requires archipelagic States to "respect existing arrangements with other States" and requires the recognition of "traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters."

131. Part V of UNCLOS dealing with the EEZ makes no express reference to the preservation of fishing rights in waters previously forming part of the high seas but now included in the EEZ. However, the fact that specific protection for traditional fishing rights was provided for in archipelagic waters, but not in Part V, does not mean that the

new EEZ overrides specific pre-existing traditional artisanal fishing rights. For one thing, there is no indication that such a radical step was intended. Studies of the *travaux préparatoires* of Part V reveal no intention on the part of negotiating States to extinguish such pre-existing traditional rights.

132. Moreover, it would be contrary to established methods of the interpretation of treaties to read into a treaty an intention to extinguish pre-existing rights in the absence of express words to that effect. Thus, in the *ELSI* case the Chamber of the ICJ stated that it "finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".¹⁶⁷ This was more recently followed by the arbitral tribunal in the *Loewen* case. The tribunal said:

"An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so (*Elettronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at 42). Such an intention may be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law."¹⁶⁸

133. Directly to the point, the *Eritrea-Yemen* arbitration tribunal observed that the traditional fishing regime which it recognised in that case:

"is not limited to the territorial waters of specified islands.... *By its very nature it is not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea.* The traditional fishing regime

¹⁶⁷ *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ Reports 1989, p.15 at p.42, para.50.

¹⁶⁸ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (Case No. ARB(AF)/98/3), ICSID Award of 26 June 2003, p. 46, para. 160.

operates throughout those waters beyond the territorial waters of each of the Parties".¹⁶⁹ (Emphasis added).

The italicised words clearly mean that that the EEZ, as a maritime zone specified under UNCLOS, does not displace or override the pre-existing traditional artisanal fishing regime.

Such rights have been held to constitute a special circumstance requiring an appropriate adjustment of a provisional median line.

134. Access to fishery resources and fishing activities can constitute a "special circumstance" when applying the equidistance/special circumstances rule to maritime delimitations.¹⁷⁰ This has been confirmed by the ICJ and arbitral tribunals in their assessments of relevant, special or equitable circumstances in several delimitation cases, namely, by the ICJ in *Gulf of Maine*¹⁷¹ and *Jan Mayen*,¹⁷² and by arbitral tribunals in *Eritrea/Yemen (Phase 2)*¹⁷³ and *St Pierre & Miquelon*.¹⁷⁴ It is confirmed by highly qualified publicists in major treatises, who generally include fishing as a special/relevant/equitable circumstances in delimitation.¹⁷⁵ Likewise, the *Handbook on the Delimitation of Maritime Boundaries*, prepared by the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations in 2000,¹⁷⁶ in

¹⁶⁹ *Eritrea/Yemen (Phase 2)*, p. 452, para. 109.

¹⁷⁰ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, ICJ Reports 1969, p. 50, para. 93, quoted in *Jan Mayen*, p. 63 para. 57 and p.70, para.71.

¹⁷¹ *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, ICJ Reports 1984, pp. 340-344, paras. 232-241, especially para. 233.

¹⁷² *Jan Mayen*, pp. 70-71, paras. 72-5 and 90, ("equitable access to the resources of the Southern part of the area of overlapping claims has to be assured"). To this list might be added the ICJ's consideration of pearling banks in *Qatar v Bahrain*, paras. 235-6.

¹⁷³ *Eritrea/Yemen (Phase 2)*, pp. 436-443, paras. 47-74, pp. 447-452, paras 87-110.

¹⁷⁴ *Case Concerning Delimitation of Maritime Areas Between Canada and the French Republic (St. Pierre & Miquelon)*, Court of Arbitration, 10 June 1992, 95 ILR 645, p. 675 paras. 84-5.

¹⁷⁵ O'Connell (Shearer ed), *The International Law of the Sea* (1982), vol. 2, pp. 712-714; Brownlie, *Principles of Public International Law* (6th ed, 2003), pp. 217-218; Lowe & Churchill, *The Law of the Sea* (3rd ed, 1999), pp. 187-8.

¹⁷⁶ UN Publication, Sales No. E.01.V2.

chapter 3 entitled "Factors exerting an influence on Maritime Boundary Delimitation", includes within the subsection on "Economic factors" an item on "Fisheries":

"The practice of States shows the importance of fisheries resources in a number of delimitation agreements. In particular, the accommodation of fisheries interests has played a role either as an element agreed to simultaneously before or after the boundary delimitation settlement or as a measure undertaken pending the outcome.

...

The preservation of traditional (historic) fisheries is on many occasions one of the main concerns of States in the negotiation of a maritime boundary delimitation ...".¹⁷⁷

135. State practice also confirms the importance of taking fisheries into account in determining maritime boundaries.¹⁷⁸

136. While it is only in the *Jan Mayen* decision that the delimitation line was adjusted by reference to fisheries resources and activities to ensure that both parties had access to a particular fishing ground, fishing activities were clearly an important special consideration in the other decisions referred to. The tribunals in those cases explained that the fishing interests of the parties could not be compromised by the delimitation line set: in *Gulf of Maine*, the ICJ recorded that the line it set actually achieved an equitable division of

¹⁷⁷ *Ibid.*, paras. 176 and 178.

¹⁷⁸ One example is the Agreement of 28 May 1980 between Norway and Iceland on Fishery and Continental Shelf Questions. There, the preamble states:

"Recognizing the special circumstances of importance for the drawing up of a dividing line between the two countries in the sea areas concerned for fishery and continental shelf purposes..."

The effect of this Agreement in leading to the displacement of the median line is recognized in the preamble to the agreement that the parties concluded in the following year:

"Having agreed, by entering into the Agreement of 28 May 1980, on Fishery and Continental Shelf Questions, to the extension of the economic zone of Iceland to 200 nautical miles also in those areas between Iceland and Jan Mayen where the distance between the baselines is less than 400 nautical miles."

In other words, by allowing Iceland the full extension of its EEZ towards Jan Mayen, Norway was accepting the displacement of the median line boundary in Iceland's favour.

fisheries resources; and in both *Eritrea/Yemen (Phase 2)* and *St Pierre & Miquelon*, the tribunals noted that the fishing interests of the parties were protected by previous awards or other arrangements, thereby reducing the weight of fishing activities as one of the several special considerations put forward by the parties.¹⁷⁹ In *Eritrea/Yemen*, the special circumstance was given effect by granting non-exclusive traditional artisanal fishing rights. So, in the only case - *Jan Mayen* - where one party's access to important fishing resources would have been denied by an otherwise equitable delimitation, the Court moved the line.¹⁸⁰

137. The threshold at which fishing activities would necessitate an adjustment of a single maritime boundary line was expressed in the *Gulf of Maine* case as being at the level where the delimitation would be "likely to entail catastrophic repercussions for the livelihood and economic well being of the population of the countries concerned".¹⁸¹ In the later *Jan Mayen* decision, the Court made the test for the adjustment of the boundary less demanding: the change was "required to ensure equitable access to the capelin fishing resources for the vulnerable fishing communities concerned".¹⁸²

138. As noted above, the special circumstance in respect of fishing activities in this case is that Barbadian fisherfolk have traditionally fished in, and are heavily dependent upon, the area lying off the northwest, north, and northeast coasts of Tobago. Any failure to adjust the provisional median line to the south to account for traditional artisanal fishing rights would deny Barbadians essential and equitable access to the fishery off Tobago and

¹⁷⁹ *Eritrea/Yemen (Phase 2)*, pp. 440-441, paras. 63-64, p. 452, para 110; *St. Pierre & Miquelon*, p.675, para. 85.

¹⁸⁰ *Jan Mayen*, p.71, para. 75.

¹⁸¹ *Gulf of Maine*, p. 342, para. 237.

¹⁸² *Jan Mayen*, p. 71, para. 75.

would entail catastrophic repercussions for the concerned segment of Barbados' population. The acquired rights flowing from the Barbadian fishing off Tobago are recognised by international law for the reasons explained earlier, and survived the entry into force of UNCLOS on 16 November 1994.¹⁸³ This special consideration is particularly important in this case for three reasons: (1) these acquired fishing rights existed prior to the entry into force of UNCLOS; (2) they fall within the area of overlapping EEZ between Tobago and Barbados; and (3) they are not protected by any other arrangement, in contrast with the fishing rights and interests in the *Gulf of Maine*, *Eritrea/Yemen*, and *St Pierre & Miquelon*.

139. Sections 3.2, 3.3 and 3.4 above have described the dependency of Barbados fisherfolk and fishing communities on fishing in general, flyingfish in particular and the fishery off Tobago. Any denial or significant limitation of Barbadian access to the traditional fishery off Tobago would severely damage the vulnerable fishing communities (which make up nearly five per cent of the Barbadian work force) and would be a matter of the utmost gravity.¹⁸⁴ Hence, adjustment of the provisional median line is required in order to ensure equitable access to that fishery and thus achieve an equitable solution. This is the more compelling in the present case as, historically, the fisherfolk of Tobago have not fished in the area concerned and do not do so in significant numbers today. Accordingly, the established traditional fishing rights of the fisherfolk of Barbados must be acknowledged by the Tribunal in its determination of the maritime boundary.

¹⁸³ Paragraphs 117-133 above.

¹⁸⁴ See further Section 3.4 above.

CHAPTER 7

BARBADOS' CONCLUSION AND SUBMISSION

140. Barbados contends that international authority clearly prescribes that the Tribunal should start the process of delimitation by drawing a provisional median line between the coasts of Barbados and Trinidad and Tobago. This line should then be adjusted so as to give effect to a special circumstance and thus lead to an equitable solution. The special circumstance is the established traditional artisanal fishing activity of Barbadian fisherfolk south of the median line. The equitable solution to be reached is one that would recognise and protect Barbadian fishing activities by delimiting the Barbados EEZ in the manner illustrated on Map 3.

141. In view of the facts and arguments set forth in this Memorial, Barbados therefore requests the Tribunal to determine a single maritime boundary between the EEZs and CSs of the Parties that follows the line described below and is illustrated on Map 3.

142. The proposed delimitation line is a median line modified in the northwest to encompass the area of traditional fisheries enjoyed by Barbados. The line is defined in three parts from points A to B, B to C and the third part from points C to E.

143. The first part of the line from A to B is defined by the meridian $61^{\circ} 15' W$. This line runs south from point A, the point of intersection of this meridian with a line of delimitation between Trinidad and Tobago and Grenada, to point B, the intersection of this meridian with the 12 nautical mile territorial sea limit of Trinidad and Tobago.

144. The second part of the proposed delimitation line is the 12 nautical mile territorial sea limit of Trinidad and Tobago, running from point B around the northern shores of Tobago to point C, the intersection of the parallel $11^{\circ} 08' N$ and the 12 nautical mile territorial sea limit of Trinidad and Tobago lying southeast of the island of Tobago.

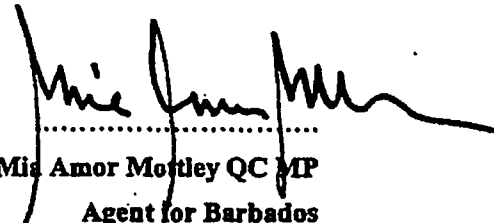
145. The third part of the proposed delimitation line is defined by a geodesic line from point C, following an azimuth of 048° until it intersects with the calculated median line between Barbados and Trinidad and Tobago at point D; then the line follows the median line south eastwards running through intermediate points on the median line numbered 1 to 8.

146. From point 8, the proposed delimitation line follows an azimuth of approximately 120° for approximately five nautical miles towards the point of intersection with the boundary of a third State at point E.

Coordinates listed are related to WGS 84 and quoted to 0.01 of a minute.

Point	Latitude			Longitude		
<i>A</i>	<i>11</i>	<i>37.87</i>	<i>N</i>	<i>61</i>	<i>15.00</i>	<i>W</i>
<i>B</i>	11	13.30	N	61	15.00	W
<i>C</i>	11	08.00	N	60	20.47	W
<i>D</i>	11	53.72	N	59	28.83	W
1	11	48.25	N	59	19.23	W
2	11	45.80	N	59	14.94	W
3	11	43.61	N	59	11.08	W
4	11	32.88	N	58	51.40	W
5	11	10.76	N	58	11.42	W
6	10	59.71	N	57	51.54	W
7	10	49.21	N	57	33.15	W
8	10	43.54	N	57	23.23	W
<i>E</i>	<i>10</i>	<i>41.03</i>	<i>N</i>	<i>57</i>	<i>18.83</i>	<i>W</i>

Signed:



The Honorable Mia Amor Motley QC MP
Agent for Barbados

30 October 2004

Positions listed in italics are only indicative of the positions described in the text which will require separate bi-lateral or tri-lateral agreements to define coordinates.

The latitude of point B and the Longitude of point C will change with the variation of the territorial sea limit of Trinidad and Tobago over time.